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August 31, 2009

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COMMISSION ON
STATE MANDATES

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

RE: Incorrect Reduction Claim 05-4241-I-06
Emergency Procedures, Earthquake Procedures, and Disasters
Poway Unified School District
Fiscal Years: 2000-01, 2001-02, and 2002-03

Dear Ms. Higashi:

This letter is in rebuttal to the State Controller's Office response dated March 10, 2008, to the Incorrect Reduction Claim of Poway Unified School District (District) submitted on November 7, 2005.

Part I. Mr. Silva's Transmittal Letter

Mr. Silva's transmittal letter, dated March 10, 2008, contains factual and legal allegations regarding the District's Incorrect Reduction Claim. 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. Contrary to the conclusions in Mr. Silva's letter, the Controller's reductions were not appropriate, nor were they in accordance with law.

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 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, that is 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 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) expressly states 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 onto the District.

The Statement of Decision in the Incorrect Reduction Claim of San Diego Unified School District, that is cited in Mr. Silva's letter, relied on *Honeywell, Inc. v. State Bd of Equalization*[1] 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 the evidence regarding the auditing methods and procedures used, as well as which specific facts were relied upon for the audit findings. Thus, by Mr. Silva's own reasoning, the burden is upon the Controller to demonstrate that its 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

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[1] *Honeywell, Inc. v. State Bd of Equalization* (1982)128 Cal.App.3d 739, 744-745.

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 the audit findings because he bears the burden of going forward and because he is the party with the power to create, maintain, and provide this evidence.

C. STATUTE OF LIMITATIONS

Mr. Silva's letter asserts that "the audit of the fiscal years [*sic*] 2000-01 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, the assumption is not supported by the plain language of Government Code Section 17558.5.

The letter then asserts that the applicable statute of limitations was that imposed by the amendment to Section 17558.5, which was effective January 1, 2003. However, the court case cited by 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 Poway Unified School District (Spano Response)

A. CLAIMING INSTRUCTIONS

Mr. Spano's response (Tab 2; p. 4) asserts the August 2003 version of the Controller's claiming instructions, in its "clarification" of applicable law and standards, as being applicable. However, this version of the claiming instructions was issued *after* all of the fiscal years that are the subject of this Incorrect Reduction Claim. In fact, the annual reimbursement claims for FY 2000-01 and FY 2001-02 were already due and filed before these claiming instructions were issued.

Even though they purported to be retroactively applicable, the claiming instructions did not contain a requirement that already filed claims be amended if the amount claimed did not change. In fact, the Commission has previously found that it does not have the authority to require the filing of amended claims, since the filing of reimbursement claims is a "right" of school districts and local agencies[2]. Therefore, there is no requirement that the District retroactively comply with claiming instructions that purport

[2] *Graduation Requirements* 08-RCI-01, Final Staff Analysis of the Request for Review of the State Controller's Claiming Instructions, at page 11.

to be effective prior to their issuance. However, 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.

B. DOCUMENTATION STANDARD

The Controller asserts that the documentation provided by the District was insufficient to support the costs claimed, and rejects noncontemporaneous declarations. However, the requirement that source documents be contemporaneous was not added to the Parameters and Guidelines until the amendment was adopted on May 29, 2003.

Applicable Parameters and Guidelines

Mr. Spano's response (Tab 2; p. 5) claims that the District incorrectly identified the applicable Parameters and Guidelines. In fact, in the District's Incorrect Reduction Claim at pages 13-14, the District identified all of the Parameters and Guidelines adopted for this mandate program and then discussed why the amendments to the source documentation requirements cannot be applicable prior to their adoption on May 29, 2003. Despite the statement in the amended Parameters and Guidelines that the changes were to be applied retroactively to FY 2000-01 through FY 2002-03, it is impossible for the District to go back in time and comply with a documentation requirement that did not exist when the costs were incurred. Furthermore, the District had no notice that these new requirements were to be followed at the time that it was performing and documenting the mandate activities.

The Controller's contention that the additional requirements for source documentation merely clarified existing standards is unsupported by the staff analysis. The Revised Final Staff Analysis for the Parameters and Guidelines Amendment listed two reasons for the amendments requested by the Controller: "the current language is ambiguous and inconsistent with the statement of decision." The statement of decision makes no mention of documentation standards. Therefore, the requirement that source documents be contemporaneous was added in response to a request by the Controller to resolve ambiguous language in the existing Parameters and Guidelines.

There were several reasonable interpretations of the source document requirement in the February 28, 1991, version of the Parameters and Guidelines, and the Controller proposed an amendment to create a single standard. The original Parameters and Guidelines required that source documents be maintained, but provided no guidance or definition to state what constituted a source document. The evidentiary standard before the Commission allows, pursuant to Title 2, California Code of Regulations, Section 1187.5, "[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." Therefore, one reasonable interpretation of the original source document requirement is that any document meeting this standard is sufficient. Thus, the amendment did

increase the documentation requirements because, under the previous Parameters and Guidelines, a reasonable interpretation could support a less rigorous standard.

Finally, Mr. Spano's response (Tab 2; p. 10) notes that the District did not file a request to amend the Parameters and Guidelines in response to the retroactively increased documentation standard. However, the District is not required to request such an amendment. Government Code Section17557(d) states only that a claimant "may" request an amendment of the Parameters and Guidelines. The Controller then concludes that since such a request can no longer be filed for the fiscal years that are the subject of this audit, the District has somehow waived the right to protest this retroactive application. However, Mr. Spano's response references no statute, regulation, or applicable case law for this conclusion.

The documentation standard was not the only change made to the Parameters and Guidelines in the May 29, 2003, Amendment, but it was unique in that it required additional actions that could only have been completed in the past. The District had no way of knowing that the Controller would ignore the physical impossibility of traveling back in time to create contemporaneous documentation for reimbursement claims that had already been filed. Therefore, it had no notice that the amendment request suggested by the Controller was required at the time the May 29, 2003, Parameters and Guidelines were issued. Since the Controller can point to no law or regulation that restricts the right of a claimant to protest the impossibility of complying with a retroactive documentation standard, the lack of a request to amend the May 29, 2003, Amendment to the Parameters and Guidelines is irrelevant.

Contemporaneous Source Document Requirement

Mr. Spano's response (Tab 2; pp. 8-9) rejects declarations used to support the District's training costs because they were not prepared contemporaneously[3]. However, as discussed above, this is not a requirement of the Parameters and Guidelines that were in effect at the time the mandated activities were performed.

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[3] Mr. Spano's response (Tab 2; p. 9) also asserts:

> The district is correct in stating that other documentation "prepared in the normal course of implementing the state mandate" (e.g., emergency drill reports and meeting agendas) was insufficient for mandate cost accounting purposes.

However, this misconstrues the District's statements in its Incorrect Reduction Claim. The District never asserted that its own documentation was insufficient. Rather, it stated that the Controller asserted that the documentation provided was insufficient.

In addition, Mr. Spano's conclusion (Tab 2; p. 5) that source documents must be contemporaneous has been ruled to be underground rulemaking in regards to other mandate programs when there was no specific language requiring contemporaneous documents in the parameters and guidelines. In *Clovis v. Westly*[4], the court invalidated audit findings in the Collective Bargaining and Intradistrict Attendance mandates that were based on the Controller's requirement for contemporaneous documents. The parameters and guidelines for those programs required only "source documents" without elaboration or definition of the term, as do the February 28, 1997, Parameters and Guidelines for this mandate. Although that case is currently being appealed before the California Court of Appeals, Third Appellate District (Case # C061696), it is persuasive evidence that the Controller's position that source documents must be contemporaneous under the original Parameters and Guidelines is incorrect and unsupported.

Further, the Controller's reliance on *Maynard v. Commissioner of Internal Revenue* for the proposition that records must be "adequately supported with contemporaneous source documents" is misplaced. First, the Controller is citing an unpublished opinion from the United States Court of Appeals for the Ninth Circuit on a tax matter, not mandate reimbursement. According to that court's own Circuit Rule 36-3, the opinion is not precedent and can only be relied on for purposes of claim preclusion, issue preclusion, for factual purposes, or to demonstrate the existence of a conflict of opinions. None of those exceptions apply in this situation, and therefore the opinion is not controlling law.

Second, the level of review differs from that of the Commission in deciding incorrect reduction claims. The court in *Maynard* decided only that "the tax court did not commit clear error in denying Maynard's deductions for lack of substantiation." This level of review is inapplicable to incorrect reduction claims because the Controller does not act as a tribunal during its audit. The Commission's authority is not limited to review of Controller decisions for abuse of discretion or clear error.

Finally, The determination of the court in *Maynard* was based in large part on "Petitioners' general pattern of income concealment" because the tax court made a determination of fact "established by the taxpayer's evidence, and the credibility of the taxpayer and supporting witnesses. The credibility of the taxpayer is a crucial factor." It is the District's hope that the Controller is implying an opinion with no binding authority should be applied in this case where the facts are not analogous.

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[4] *Clovis v. Westly*, (2009) Superior Court of California, County of Sacramento, No. 06CS00748 / 07CS00263.

Time Studies

Mr. Spano's response (Tab 2; p. 11) also rejects the use of time studies for this mandate because "*Parameters and Guidelines* (May 29, 2003) does not identify time studies as an allowable methodology to support salary and benefit costs claimed." (Emphasis in original.)This reasoning flawed because the May 29, 2003, version of the Parameters and Guidelines also do not prohibit the use of time studies. In fact, the training costs that are a part of this mandate are particularly amenable to a time study because every employee must undergo the same training. Therefore, there is no reason for the Controller to unilaterally declare that time studies are not an allowable methodology for documenting actual costs for this mandate.

In conclusion, the May 29, 2003, amendment to the Parameters and Guidelines created an increased documentation standard by specifying that source documents must be contemporaneously created. This standard cannot be made applicable to the fiscal year 2000-01 through 2002-03 claims, despite the amendment's purported retroactivity, because the costs had already been incurred and the District cannot retroactively create contemporaneous source documents.

C. AUDIT STANDARD

Mr. Spano's response (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 is found in Government Code Section 17561(d)(2), which specifically pertains to the audit standards for mandate reimbursement claims. It is a well-settled maxim of statutory interpretation that "'[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.'"[5] The audit authority in Section 17561(d)(2) is more specific than the Controller's general audit authority contained in Government Code Section 12410. Therefore, the Controller

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[5] *San Francisco Taxpayers Assn. V. Board of Supervisors* (1992) 2 Cal.4th 571, 577.

only has the audit authority granted by Government Code Section 17561(d)(2) when auditing mandate reimbursement claims.

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.

Additionally, 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 or necessary" 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 actually excessive.

D. STATUTE OF LIMITATIONS

The District asserts that the FY 2000-01 claim was beyond the time limitation for audit when the Controller completed its audit on August 31, 2005.

Applicable Statute of Limitations

The Controller does not have a consistent position on which version of Government Code Section 17558.5 is applicable. Mr. Silva's letter claims that the FY 2000-01 reimbursement claim was subject to the amended version of Section 17558.5 that went into effect on January 1, 2003, because the claim was still subject to audit on that date under the previous version of this section. However, Mr. Spano's response (Tab 2; p. 16) agrees with the District's position and properly applies the version of Section 17558.5, effective July 1, 1996, which was in effect at the time the claim was filed.

"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 govern any court action. Rather, it specifies the time in which the Controller may exercise the authority and discretion to 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 pursuant to Section 12410.

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 Mr. Spano's response (Tab 2; p. 16) correctly points out, the phrase "subject to" places a claimant "under the power or authority of" the Controller in respect to audits. Therefore, once the FY 2000-01 claim was no longer subject to audit on December 31, 2004, 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 it does not get to extend the time limitation simply because it had begun the audit process.

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 can pass between the exit conference, issuance of the draft audit report, and issuance of the final audit report. The Controller is free 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.

Finally, Mr. Spano's response (Tab 2; p. 16) concludes that "clearly" the Legislature amended Government Code Section 17558.5 with Chapter 890, Statutes of 2004 to state that a reimbursement claim was "subject to the initiation of an audit" as a clarification of its intent for the previous language that stated only "subject to audit." However, the Controller provides absolutely no evidence that this is true.

"Courts are not to infer that legislation merely clarifies existing law unless (1) the nature of the amendment clearly demonstrates such an intent or (2) the legislature has itself stated that the particular amendment is merely declaratory of existing law." *(Goldman v. Standard Ins. Co.* (2003) 341 F.3d 1023, 1029). There is no evidence that either of these conditions exist for the 2004 amendment of Section 17558.5. Therefore, the Controller's claim that the amendment merely clarified existing law is incorrect.

In conclusion, the reasonable interpretation is that a reimbursement claim is only subject to any adjustments as a result of an audit if the audit is *completed* before the statute of limitations has run out. In this case, that would mean that the FY 2000-01 claim was beyond the statute of limitations when the Controller completed the audit by issuing the final audit report on August 31, 2005, and any resulting adjustments are void.

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 August 31, 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" *Clovis v. Westly* (2009) Superior Court of California, County of Sacramento, No. 06CS00748 / 07CS00263

Exhibit "C" *San Francisco Taxpayers Assn. V. Board of Supervisors* (1992) 2 Cal.4th 571

Exhibit "D" *Evelyn, Inc. v. California Emp. Stab. Com.* (1957) 48 Cal. 2d 588

Exhibit "E" *Life Savings Bank v. Wilhelm* (2000) 84 Cal.App.4th 174

Exhibit "F" *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942

Exhibit "G" *Bush v. Bright* (1968) 264 Cal.App.2d 788

Exhibit "H" *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861

Exhibit "I" *Goldman v. Standard Ins. Co.* (2003) 341 F.3d 1023

C: Jim Spano, Division of Audits, State Controller's Office
John Collins, Deputy Superintendent Business Support Services,
Poway Unified School District

DECLARATION OF SERVICE

Re: Incorrect Reduction Claim 05-4241-I-06
Poway Unified School District
Emergency Procedures, Earthquake Procedures, and Disasters

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant. I am 18 years of age or older and not a party to the entitled matter. My business address is 3270 Arena Blvd., Suite 400-363, Sacramento, CA 95834.

On the date indicated below, I served the attached letter dated August 31, 2009, to Paula Higashi, Executive Director, Commission on State Mandates, to:

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

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

John Collins, Deputy Superintendent, Business Support Services
Poway Unified School District
13626 Twin Peaks Road
Poway, CA 92064-3098

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

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally 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.

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

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 31, 2009, at Sacramento, California.

Kristin M. Smith

Exhibit A

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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

BROUSSARD, 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 trail 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 therefore 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).

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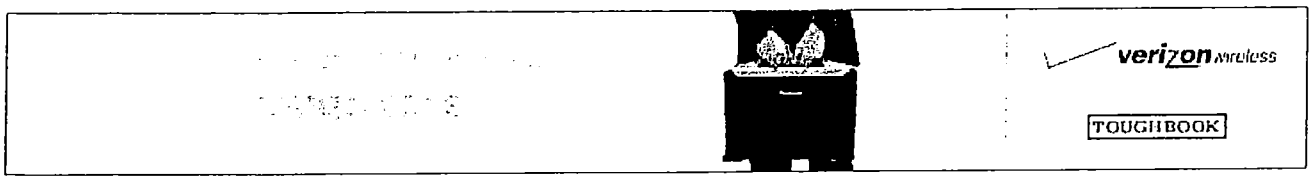

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Exhibit B

FILED / ENDORSED
FEB 19 2009
By Christa Beebout, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CLOVIS UNIFIED SCHOOL DISTRICT, EL CAMINO COMMUNITY COLLEGE DISTRICT, FREMONT UNIFIED SCHOOL DISTRICT, NEWPORT-MESA UNIFIED SCHOOL DISTRICT, NORWALK-LA MIRADA UNIFIED SCHOOL DISTRICT, RIVERSIDE UNIFIED SCHOOL DISTRICT, SAN MATEO COMMUNITY COLLEGE DISTRICT, SANTA MONICA COMMUNITY COLLEGE DISTRICT, STATE CENTER COMMUNITY COLLEGE DISTRICT, and SWEETWATER UNION HIGH SCHOOL DISTRICT,

Petitioners,

v.

STEVE WESTLY IN HIS OFFICIAL CAPACITY AS STATE CONTROLLER, and DOES 1-50, inclusive,

Respondents.

/

SAN JUAN UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

JOHN CHIANG IN HIS OFFICIAL CAPACITY AS STATE CONTROLLER, and DOES 1-50, inclusive,

Respondents.

/

Dept. 33

No. 06CS00748
Consolidated with
No. 07CS00263

JUDGMENT

The Petitions for Writ of Mandate and Complaints for Declaratory Relief filed in this proceeding came on regularly for hearing before this Court on April 25, 2008, the Honorable Lloyd G. Connelly presiding. Gregory A. Wedner and Sloan R. Simmons of Lozano Smith appeared as counsel for Petitioners. Kathleen A. Lynch, Deputy Attorney General, appeared as counsel for Respondents former California State Controller Steve Westly and current California State Controller John Chiang ("California State Controller's Office" or "SCO"). After the court took the matter under submission and issued its Ruling on Submitted Matter on August 14, 2008, Petitioners filed a Motion for Clarification and/or Reconsideration. The court heard Petitioners' motion on October 3, 2008, and issued a clarification of its ruling on January 2, 2009.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that:

1. The SCO's contemporaneous source document rule operates as an underground regulation in the SCO's audits of state-mandated reimbursement claims under the Collective Bargaining Program and the Intradistrict Attendance Program, in violation of the Administrative Procedure Act (Gov. Code § 11340 et seq.). Audit reductions resulting from the SCO's application of the contemporary source document rule in audits of state-mandated reimbursement claims under the Collective Bargaining Program and the Intradistrict Attendance Program are invalid, void and unenforceable.

2. A peremptory writ of mandate shall issue from this court requiring the SCO to:

a. Refrain from using the contemporaneous source document rule in any audit of state-mandated reimbursement claims under the Collective Bargaining Program and the Intradistrict Attendance Program unless and until the rule is adopted as a regulation in compliance with the rule-making procedures of the Administrative Procedure Act, as an amendment of the parameters and guidelines applicable to those two programs, or as an amendment to the statutes governing the SCO's responsibilities for auditing state-mandated reimbursement claims.

b. Within 90 days of receiving personal service of the writ, reverse those audit reductions in state-mandated reimbursement claims by Petitioners under the Collective Bargaining Program and the Intradistrict Attendance Program that are based on the invalid, void

and unenforceable contemporary source rule and that did not become final audit determinations prior to the three-year limitations period preceding the filing of Petitioners' respective lawsuits on May 23, 2006 (Case No. 06CS00748) and March 2, 2007 (Case No. 07CS00263).

c. File a return within 100 days of receiving personal service of the writ, setting forth what has been done to comply with the writ.

3. Except as set forth above in paragraphs 1 and 2 of this judgment, the petitions are denied in all respects.

4. Petitioners shall recover, pursuant to subdivision (a)(4) of Code of Civil Procedure section 1032 and rule 3.1700 of the California Rules of Court, their costs of suit related to their procurement of declaratory and mandate relief under paragraphs 1 and 2 of this judgment .

6. The court reserves jurisdiction to hear and determine a motion for attorney fees pursuant to rule 3.1702 of the California Rules of Court.

Dated: February 19, 2009

LLOYD G. CONNELLY
JUDGE OF THE SUPERIOR COURT

FILED / ENDORSED
AUG 14 2008
By Christa Beebout, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CLOVIS UNIFIED SCHOOL DISTRICT, et al.,

Petitioners,

v.

STEVE WESTLY IN HIS OFFICIAL CAPACITY AS STATE CONTROLLER, and DOES 1-50, inclusive,

Respondents.

/

Dept. 33

No. 06CS00748
Consolidated with
No. 07CS00263

RULING ON SUBMITTED MATTER

Petitioners, seven school districts and four community college districts, challenge specified standards and rules used by respondent State Controller in auditing claims for reimbursement of costs incurred by school districts and community colleges in carrying out state-mandated activities. Petitioners contend that the rules are used by the Controller to arbitrarily and capriciously reduce claims for reimbursement of state-mandated costs which are reasonable and not excessive. Petitioners further contend that the specified auditing standards and rules are underground regulations, i.e., rules of general application that implement statutory provisions and have not been adopted in compliance with the rule-making requirements of the Administrative Procedure Act (APA). Petitioners seek declaratory and traditional mandate relief directing the Controller to (a) refrain from using arbitrary and capricious auditing standards and rules to reduce state-mandated-reimbursement claims and (b) comply with the APA with respect to auditing rules of general application.

Petitioners do not and cannot seek relief from any particular audit finding or decision of the Controller in this proceeding. Relief from any particular decision reducing a state-mandated reimbursement claim is available only in an administrative mandate proceeding brought by a claimant after exhausting any applicable administrative remedy such as an improper reduction claim filed with the Commission on State Mandates. Rather petitioners refer to numerous auditing decisions of the Controller to illustrate the Controller's alleged overarching policy and practice of using arbitrary standards and rules and underground regulations to improperly reduce the claims. Petitioners may thus seek to prevent the Controller from continuing to use the policy and practice in auditing reimbursement claims in the future. (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1566; *Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1428-1429.)

Reimbursement Claims Process

The Commission on State Mandates is responsible for hearing and deciding each claim by a local agency and school district that the agency or district is entitled to be reimbursed by the state pursuant to section 6 of article XIII B of the California Constitution for costs mandated by the state. (Gov. Code § 17551.) When the Commission determines that a state-mandated program exists, the Commission must adopt parameters and guidelines for reimbursement of claims for costs mandated by the program. (Gov. Code § 17557.) A local agency, school district or the state may request the Commission to amend, modify or supplement the parameters and guidelines. (*Ibid.*)

Upon adopting parameters and guidelines for a reimbursable state mandate, the Commission must submit the parameters and guidelines to the Controller. (Gov. Code § 17558.) Within 60 days of receiving the parameters and guidelines, the Controller must issue claiming instructions to assist local agencies and school districts in claiming costs to be reimbursed. (*Ibid.* See Gov. Code § 175561, subd. (d) (timelines for submission of claims following Controller's issuance of claiming instructions).) The claiming instructions must be derived from the Commission's decision and the adopted parameters and guidelines for the mandate, reasonable reimbursement methodology, or statute declaring a legislatively determined mandate. (*Ibid.*)

Within 60 days of receiving amended parameters and guidelines or other information requiring a revision of the claiming instructions, the Controller must amend the claiming instructions. (*Ibid.*) The Commission, upon request of a local agency or school district, must review the claiming instructions issued by the Controller for reimbursement of state-mandated costs. (Gov. Code § 17571.) The Controller must modify the claiming instructions upon a determination by the that the instructions do not conform to the parameters and guidelines. (*Ibid.*)

A reimbursement claim for actual state-mandated costs filed by a local agency or school district is subject to the initiation of an audit by the Controller not later than three years after the claim is filed and completed two years after the date that the audit is commenced. (Gov. Code § 17558.5.) The Controller audits the claim to verify the actual amount of mandated costs and may reduce any claim that the Controller determines is excessive or unreasonable. (Gov. Code § 17561, subd. (d)(2).) The Controller must notify the claimant in writing of any adjustment to the claim that results from an audit (*Ibid.*), and the claimant may file an incorrect reduction claim with the commission for review of the reduction. (*Ibid.*; Gov. Code §§ 17551, 17558.7.)

Arbitrary and Capricious Rule?

--*"Contemporaneous source document rule"*

The Controller has a policy of requiring school districts' claims for reimbursement of employees' salaries in state mandated programs to be supported by source documents validating the employees' actual hours spent performing state-mandated functions and the employees' hourly rate. During audits of reimbursement claims, the Controller rejects as source documents employees' declarations and certifications of the hours they have spent in performing state-mandated functions when the employees prepare the declarations and certifications months after performing the hours or at the end of the fiscal year for which reimbursement is claimed. The Controller rejects such declarations and certifications as source documents adequate to validate the employees' actual hours on the ground that the declarations are only estimates after the fact of the time spent performing mandated functions. Based on this rejection, the Controller reduces

and disallows reimbursement for the employees' hours reported in the declarations and certifications.

Since 2003, paragraph 13 of the general claiming instructions in the Controller's Mandated Cost Manual for School Districts has described the Controller's source document requirements as follows: ""To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts. Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating: "I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct based upon personal knowledge." Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents. For costs incurred on or after January 1, 2005, a reasonable reimbursement methodology can be used as a "formula for reimbursing school district costs mandated by the State" that meets certain conditions specified in 17518.5(a). For costs incurred prior to January 1, 2005, a time study can substitute for continuous records of actual time spent for a specific fiscal year only if the program's P's & G's allow for the use of time studies."

Petitioners contend that the Controller's rejection of employees' declarations and certifications and the resulting reduction and disallowance of reimbursement claims during audits is arbitrary and lacking in any rational basis. Petitioners indicate that the Controller reduces reimbursement claims for lack of contemporaneous source documents without making any finding that the claimed reimbursement is excessive or unreasonable, the criterion for reducing

claims pursuant to Government Code section 17561, subdivision (d)(2). Petitioners note that sworn declarations and certifications have recognized evidentiary value in judicial proceedings and many other situations where the law requires a written statement under oath. And petitioners point out that the Controller has required contemporaneous source documents in four state-mandated programs -- Collective Bargaining; Emergency Procedures, Earthquake Procedures, and Disasters; Intradistrict Attendance; and School District of Choice -- when the parameters and guidelines and claiming instructions for those programs did not require contemporaneous source documents.

Contrary to petitioners' contention, the Controller's source document requirement is a reasonable means of carrying out his responsibility under subdivision (d)(2) of Government Code section 17561 to audit school district records to verify the actual amount of their claimed mandated costs. Time records created at or near the time that employees actually y perform mandated functions and their salary costs are actually incurred are likely to accurately and reliably report the time actually spent by the employees in performing the mandated functions; time records created months after the employees performed the mandated functions, even when sworn or certified, are likely to be considerably less accurate and reliable in reporting actual time spent and more likely to be reconstructed estimates of time spent.[1] For similar accuracy and reliability reasons, business records or official records may not be admitted as evidence of an act or event under an exception to the hearsay rule unless the records have been made at or near the time of the act or event. (Evid. Code § 1270, 1280.)

--*"Notification of Truancy Program"*

Petitioners challenge the Controller's continued application of parameters and guidelines and claiming instructions which reflected a statutory definition of truancy that had been substantively amended by the Legislature. This challenge is now moot: in response to Chapter 69 of the Statutes of 2007, the legislatively amended definition of truancy has been

---

[1] In some cases, the Controller's claiming instructions permit time studies as an alternative to time records made at or near the time an employee is performing mandated functions that are repetitive in nature. These time studies, like source documents documenting employee time, must be supported by time records that are completed contemporaneously. (Mandated Cost Manual for School Districts, Filing a Claim, § 9, p. 12.)

incorporated into amended parameters and guidelines by the Commission on January 31, 2008, and into revised claiming instructions by the Controller on April 4, 2008; the amendments are effective July 1, 2006 pursuant to Chapter 69. Any improper policy or practice by the Controller has been corrected, making declaratory and mandamus relief unnecessary and unavailable.

--"*Health Fee Elimination Program, Federal Approval Rule*"

Petitioners contend that the Controller arbitrarily reduces the indirect costs incurred by a community college in providing mandated student health services if the community college does not obtain federal approval for its indirect cost rates calculated under the federal Office of Management and Budget (OMB) Circular A-21. When the federal approval requirement is read in the context of the Controller's claiming instructions, the requirement is reasonable rather than arbitrary.

Section VI.B.3 of the Commission's parameters and guidelines for the Health Fee Elimination Program pertains to "Allowable Overhead Cost": "Indirect costs may be claimed in the manner described by the State Controller in his claiming instructions." The Controller's claiming instructions specific to the Health Fee Elimination Program do not mention indirect costs, but the general claiming instructions in the Controller's Mandated Cost Manual for Community Colleges provides: "A CCD may claim indirect costs using the Controller's methodology (FAM-29C) outlined in the following paragraphs. If specifically allowed by a mandated program's P's & G's, a district may alternately choose to claim indirect costs using either (1) a federally approved rate prepared in accordance with Office of Management and Budget (OMB) Circular A-21, *Cost Principles for Educational Institutions*; or (2) a flat 7% rate. [¶] The SCO developed FAM-29C to be consistent with OMB Circular A-21, cost accounting principles as they apply to mandated cost programs. The objective is to determine an equitable rate to allocate administrative support to personnel who performed the mandated cost activities. The FAM-29C methodology uses a direct cost base comprised of salary and benefit costs and operating expenses. Form FAM-29C provides a consistent indirect cost rate methodology for all CCD's mandated cost programs. . . . "

Under these claiming instructions, a community college is given a choice of claiming its indirect costs of providing student health services in one of three ways: using the Controller's methodology which is designed to be consistent with the OMB Circular A-21 and determine an equitable rate, using a federally approved rate prepared in accordance with OMB Circular A-21, or using a flat 7% rate. If the community college is not required to obtain federal approval of a rate prepared under OMB Circular A-21; it may instead use one of the other methods of claiming its indirect costs.

Notably, petitioners do not object to the option of a rate prepared under OMB Circular A-21 as a means of claiming indirect costs. They object only to the requirement of federal approval of the rate. This requirement, however, appears to provide independent verification that the rate has been properly prepared under OMB Circular A-21, is reasonable and not excessive.

--"*Health Fee Elimination Program, Health Fee Rule*"

Petitioners challenge the Controller's policy of reducing community college districts' claims for reimbursement of their student health service costs by the amount of fees the districts are statutorily authorized to require students to pay. Petitioners contend that the policy misapplies the parameters and guidelines adopted by the Commission for the program by treating the fees as cost savings even when a community college does not require student to pay the fees. Petitioners are incorrect.

Section VIII of the parameters and guidelines for the Health Fees Elimination Program provide: "Any offsetting savings 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 $7.50 per full-time student per semester, $5.00 per full-time student for summer school, or $5.00 per full-time student per quarter, as authorized by Education Code section 72246(a). This shall also include payments (fees) received from individuals other than students who are not covered by Education Code Section 72246 for health services."

Consistent with Section VIII of the parameters and guidelines, paragraph 6 of the Controller's claiming instructions for the Health Fees Elimination Program provides: "Eligible claimants will be reimbursed for health service costs at the level of service provided in the 1986/87 fiscal year. The reimbursement will be reduced by the amount of student health fees authorized per Education Code § 76355."

Thus, the Controller's claiming instructions properly reflect the treatment of student health fees in the parameters and guidelines as reimbursement that offsets the costs incurred by the community colleges in providing student health services. Further, both the parameters and guidelines and the claiming instructions reflect the principle of state mandated costs, that costs are not mandated by the state to the extent that a local agency or school district has the authority to levy fees sufficient to pay for the mandated program. (Gov. Code § 17556, subd. (d).)

--Delayed initiation and completion of audits

Petitioners contend that the Controller has a policy of initiating an audit of a state-mandated reimbursement claim on the last day of the three-year limitations period set forth in Government Code section 17558.5 by notifying a claimant by phone of the Controller's intent to initiate an audit. Further delays ensue, according to petitioners, when the Controller fails to move forward on an audit, once initiated, for extended periods of time. Petitioners characterize these delays as arbitrary and violative of applicable auditing standards. However, the Controller has denied having a policy of initiating audits by phone on the last day of the limitations period or delaying an audit thereafter, and petitioners have not provided evidence to establish any abusive delays by the Controller.

The court concludes that the Controller's policies and practices challenged by petitioners are not arbitrary and capricious.

Underground regulation?

Under the APA, a regulation is defined as a rule adopted by a state agency to implement, interpret and make specific the law which the agency enforces or administers. (Gov. Code § 11342.600.) Such a rule has two principal identifying characteristics: First, the agency must intend its rule to apply generally to a certain class of cases rather than to a specific case.

Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency or govern the agency's procedure. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333-334, citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) If a rule meets both of these characteristics, it must be adopted in accordance with specified procedures, including public notice, public comment and review by the Office of Administrative Law for consistency with the law, clarity and necessity. (See Gov. Code § 11346, subd. (a).)

The contemporaneous source document rule appears to be, as petitioners contend, a regulation within the meaning of the APA with respect to two of the state-mandated programs identified by petitioners in this litigation. The rule set forth in the Controller's claiming instructions -- requiring that reimbursement claims for the salaries of employees performing mandated activities be supported by source documents which record the employees' hours spent in the activities at or near the time of the activities -- applies generally to the auditing of reimbursement claims under the Collective Bargaining and Intradistrict Attendance Programs; the Controller's auditors have no discretion to judge on a case by case basis whether to apply the rule. Further, the rule implements, interprets and makes specific the Controller's responsibility under subdivision (d)(2) of Government Code section 17561, to audit reimbursement claims to verify the actual amount of mandated costs. The rule also implements and makes specific the Controller's implied constitutional authority to audit all claims against the state.[2] And because the rule has not been adopted as a regulation in compliance with the APA rule-making procedures, the rule is an underground and unenforceable regulation.

Anomalously, the contemporaneous source document rule does not appear to be, as petitioners contend, a regulation within the meaning of the APA with respect to two of the other state-mandated programs identified by petitioners in this litigation, the School District of Choice

[2] The Controller is an elected constitutional state officer. (Cal. Const., art. V, § 11) Because money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant under article XVI, section 7 of the California Constitution, the Controller must concur in all expenditures from the State Treasury and has implied constitutional authority to audit all claims against the state. (71 Ops.Cal.Atty.Gen. 275, 282, discussing Cal Const. art. XVI, § 7.) This implied authority is expressly set forth in Government Code section 12410. ". . . 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. . . ."

Program and the Emergency Procedures, Earthquake Procedures and Disasters Program. In these two programs, the applicable parameters and guidelines adopted by the Commission and currently in effect, expressly set forth the source document rule, and the Controller, in deriving claiming instructions from the parameters and guidelines pursuant to Government Code section 17558, simply restates the rule and is not implementing, interpreting, or making specific either subdivision (d)(2) of Government Code section 17561 or his constitutional auditing authority. (See *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at p. 571 (policy manual that is no more that a restatement or summary, without commentary, of an agency's prior decisions in specific cases is not regulation).) In this circumstance, the source document rule is not an unenforceable underground regulation, and the Controller may use it in auditing school districts' reimbursement claims.

Similarly, the Health Fee Rule, reducing community colleges districts' reimbursement claims by the amount of the fees the districts have authority to charge students for health services, is not a regulation within the meaning of the APA. The Health Fee Rule instead restates the applicable parameters and guidelines without interpretation or implementation of the law administered or enforced by the Controller. Thus, the Controller is not required to adopt the rule as a regulation under the APA in order to use it in auditing state-mandated reimbursement claims.

The Federal Approval Rule, requiring federal approval of an indirect cost rate prepared under OMB Circular A-21, does not appear to apply generally to claims for reimbursement under the Health Fee Elimination Program. Rather, the rule appears to provide a means of verifying the accuracy of an indirect cost rate prepared under OMB Circular A-21, which constitutes but one of three ways provided in the Controller's claiming instructions for a community college district to claim indirect costs of providing health services to students. The federal approval requirement is no more a rule of general application than the OMB Circular A-21 methodology, the Controller's methodology, or the flat 7% approach that a community college can choose or not choose to use in claiming indirect costs. Thus, the requirement of

federal approval does not impose any general standard upon the reimbursement claims of community colleges and does not constitute a regulation within the meaning of the APA.

Finally, the Controller's Reimbursable Cost Index is not a regulation. The document contains an assortment of background information about statutory mandates and their amendment; updates on parameters and guidelines; items to verify during particular audits of reimbursement claims; recommended approaches and data relevant to auditing particular reimbursement issues; and resolutions of particular issues. Further, it is unclear whether and the extent to which any such resolutions bind the discretion of the Controller's auditors in their prospective auditing of reimbursement claims. (Cf. *Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th at p. 571 (interpretations arising in course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar cases).)

Controller's Conflicting Capacity As Commission Member?

Petitioners contend that the Controller, in his capacity as a governmental auditor, is bound by standards of independence and impartiality for governmental auditors (i.e., Generally Accepted Government Auditing Standards promulgated by the United States General Accounting Office, American Institute of Certified Accountants Code of Professional Standards, and California Board of Accountancy Regulations). In petitioners' view, these professional standards of independence for auditors disqualify him from properly sitting as a member of the Commission on State Mandates when it hears and decides appeals challenging the findings of his auditors reducing state-mandated reimbursement claims: in this dual capacity of auditor and commission member, petitioners claim the Controller is biased or appears to be biased in favor of his auditors' findings and violates professional standards of independence. Petitioners seek declaratory and mandate relief requiring the Controller to comply with the professional standards of independence and cease participation in incorrect reduction claims pending before the Commission.

The professional standards cited by petitioners have no apparent basis in statutory or constitutional law giving rise to an official duty of the Controller which is enforceable by the court in this proceeding. The case might be different if petitioners were to contend that the

Controller's participation in proceedings before the Commission violated constitutional due process claims. However, petitioners have expressly disclaimed any such contention.

For the foregoing reasons, the court will grant judgment (1) declaring that the contemporaneous source document rule operates as an underground regulation in audits of state-mandated reimbursement claims under the Collective Bargaining Program and the Intradistrict Attendance Program and (2) granting a writ of mandate requiring the Controller to refrain from using the contemporaneous source document rule in any audit of state-mandated reimbursement claims under the Collective Bargaining Program and the Intradistrict Attendance Program unless and until the rule is adopted as a regulation in compliance with the rule-making procedures of the APA, as an amendment of the parameters and guidelines applicable to those two programs, or as an amendment to the statutes governing the Controller's responsibilities for auditing state-mandated reimbursement claims. In all other respects, petitioners' claims for relief are denied.

Counsel for petitioners is directed to prepare a proposed judgment and a proposed writ of mandate, present the judgment and the writ to counsel for the Controller for approval as to form, and submit the judgment and writ to the court for signature and entry.

Dated: August 14, 2008

LLOYD G. CONNELLY
JUDGE OF THE SUPERIOR COURT

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled notice in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
County of Sacramento

Dated: August 15, 2008

By: C. BEEBOUT,
Deputy Clerk

Exhibit C

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San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal.4th 571 , 7 Cal.Rptr.2d 245; 828 P.2d 147

[No. S018200. May 4, 1992.]

SAN FRANCISCO TAXPAYERS ASSOCIATION, Plaintiff and Respondent, v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendant and Appellant.

(Superior Court of the City and County of San Francisco, No. 901018, Raymond J. Arata, Jr., Judge.)

(Opinion by Panelli, J., with Lucas, C. J., Arabian, Baxter and George, JJ., concurring. Separate dissenting opinions by Mosk and Kennard, JJ.)

COUNSEL

Louise H. Renne, City Attorney, Burke E. DeLeventhal and Thomas J. Owen, Deputy City Attorneys, for Defendant and Appellant.

Ronald A. Zumbrun, Anthony T. Caso and Jonathan M. Coupal for Plaintiff and Respondent.

OPINION

PANELLI, J.

California's voters, by adopting Proposition 4, placed a constitutional spending limit on appropriations by the state and local governments. (See Cal. Const., art. XIII B, § 1, added by initiative measure in **[2 Cal.4th 574]** Special Statewide Elec. (Nov. 6, 1979).) The measure sets out, for the purpose of calculating each governmental entity's spending limit, those categories of appropriations that are and are not subject to limitation. We granted review to decide which of the measure's provisions determines the treatment of a city's contributions to employee retirement funds that were established before Proposition 4 took effect. Section 5 fn. 1 provides that appropriations to "retirement" funds are "subject to limitation." Section 9 provides that appropriations for "debt service" are not. In accordance with the plain language of section 5, the more specific provision, we hold that retirement contributions are subject to limitation.

Background

The electorate approved Proposition 4 in 1979, thus adding article XIII B to the state Constitution. While the earlier Proposition 13 limited the state and local governments' power to increase taxes (see Cal. Const., art. XIII A, added by initiative measure in Primary Elec. (June 6, 1978)), Proposition 4, the so-called "Spirit of 13," imposed a complementary limit on the rate of growth in governmental spending. Article XIII B operates by subjecting each state and local governmental entity's appropriations to a limit equal to the entity's appropriations in the prior year, adjusted for changes in population and the cost of living. (§§ 1, 8, subds. (e), (f).)

Not all appropriations are subject to the constitutional spending limit. In general, " '[a]ppropriations subject to limitation' " include "any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity ...." (§ 8, subd. (b) [applicable to local governments].) However, the voters specifically excluded some categories of appropriations from the spending limit. Section 9, for example, permits appropriations beyond the limit for "[d]ebt service" and to "comply[ ] with mandates of the courts or the federal government ...." (§ 9, subds. (a), (b).) Conversely, the voters specifically determined that the spending limit would apply to other types of appropriations. The provision at issue in this case, section 5, declares that contributions to a "retirement" fund are "subject to limitation."

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Article XIII B took effect during the 1980-1981 fiscal year. Pursuant to its provisions, defendant and appellant Board of Supervisors (Board) of the City **[2 Cal.4th 575]** and County of San Francisco (City) established an appropriations limit that included the City's contributions to retirement funds. The Board continued to treat such contributions as subject to the spending limit for six consecutive fiscal years.

The Board changed its historical position in 1986. That year, the City Attorney advised the Board that appropriations for certain "mandatory employee benefits," including retirement contributions, were exempt from the spending limit as "debt service" under section 9. fn. 2 Adopting that position, the Board revised the City's base-year spending limit by subtracting $59,388,698, which represented the amount of the City's appropriations for such benefits in the year the voters approved Proposition 4. The Board derived the 1986-1987 spending limit by adjusting the revised base-year limit to reflect intervening increases in population and the cost of living. (See § 1.) Each subsequent fiscal year's spending limit has excluded retirement contributions.

In September 1987, a decision of the Court of Appeal cast doubt on the City Attorney's interpretation of article XIII B. The County of Santa Barbara, like the City of San Francisco, had decided several years after Proposition 4 to exclude retirement contributions from its spending limit as "debt service." The Second District Court of Appeal rejected the county's position, holding that "the plain language of section 5 requires the inclusion of such contributions as appropriations subject to the appropriations limit" and that the more specific language of section 5 takes precedence over section 9, the more general provision governing debt service. (Santa Barbara County Taxpayers Assn. v. County of Santa Barbara (1987) 194 Cal.App.3d 674, 678 [239 Cal.Rptr. 769] [hereafter Santa Barbara Taxpayers].) We denied a petition for review in that case on November 18, 1987.

In calculating the City's spending limit for the 1988-1989 fiscal year, the Board recognized that its exclusion of retirement contributions was inconsistent with the Santa Barbara Taxpayers decision. Even without the benefit of the exclusion, the City's projected "appropriations subject to limitation" did not exceed its annual spending limit. However, based on the City Attorney's advice that the Court of Appeal's opinion was "wrongly decided" the Board determined to continue to exclude retirement contributions. **[2 Cal.4th 576]**

The consequence of the Board's decision was to increase by $40,336,171 the total amount ($97,640,070) by which the City's spending limit exceeded its appropriations subject to limitation in the 1988- 1989 fiscal year. fn. 3 However, based on the City Attorney's opinion that the decision would "entail time consuming and difficult litigation," the City Controller recommended that the Board not "collect or appropriate revenues based upon [the $40 million] spread until the impact of the Santa Barbara [Taxpayers] decision on the City of San Francisco has been clarified."

In December 1988, plaintiff and respondent San Francisco Taxpayers Association (hereafter Taxpayers) initiated this action to challenge the Board's exclusion of retirement contributions from the City's spending limit. Taxpayers alleged that the Board's action violated section 5, which provides that "contributions" to "retirement" funds are "subject to limitation." Following the Second District's decision in Santa Barbara Taxpayers (supra, 194 Cal.App.3d 674), the superior court granted Taxpayers' motion for summary judgment and entered judgment against the Board. In its judgment, the court declared the Board's action invalid and ordered the Board, by injunction and writ of mandate, to revise the City's appropriations limit to include retirement contributions. On appeal, the First District declined to follow Santa Barbara Taxpayers and reversed the judgment. We granted review to resolve the conflict.

Discussion

[1a] The question before us is whether section 5 or section 9 governs the treatment of retirement contributions for the purpose of calculating the City's spending limit. Section 5 expressly provides that a governmental entity's contributions to "retirement" funds are "subject to limitation." fn. 4 **[2 Cal.4th 577]** Section 9, which does not mention retirement contributions, provides that appropriations for "debt service" are not subject to limitation. fn. 5

Ordinary principles of interpretation point to the conclusion that section 5, the more specific provision, governs. [2] "It is well settled ... that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (Rose v. State of California (1942) 19 Cal.2d 713, 723-724 [123 P.2d 505].) [1b] Thus, even if we were to assume for argument's sake that the term "debt service" (§§ 8(g), 9(a)) might be broad enough to include retirement contributions, the treatment of such contributions is nevertheless governed by the voters' specific declaration that they are "subject to limitation." (§ 5.) This was the correct conclusion of the Court of Appeal in Santa Barbara Taxpayers (supra, 194 Cal.App.3d at pp. 681-682). fn. 6

The Board does not view this case as an example of a specific provision taking precedence over a general provision. Instead, the Board argues that sections 5 and 9(a) conflict and that we should "harmonize" them by giving effect to both so far as possible. (Cf. Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299]; Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323].) The Board would achieve harmony by distinguishing between payments required

by pension contracts, on one hand, and discretionary payments to reserve funds, on the other. As the Board would interpret the law, required payments constitute debt service while discretionary payments do not.

Two flaws render the Board's argument untenable. First, there is no conflict between sections 5 and 9(a) unless one assumes that the voters did not mean what they said in section 5-that "retirement" contributions are "subject to limitation." Read according to its plain meaning, section 5 creates an exception to section 9(a) rather than a conflict. **[2 Cal.4th 578]**

Second, the Board's argument would permit the City to evade section 5 completely, simply by satisfying its contractual obligations. According to the Board, so long as the City does not employ reserve funds for its own convenience its retirement contributions will never become subject to limitation. The voters could not reasonably have intended such a result, which would in effect nullify their express declaration that retirement contributions are subject to limitation. Such an interpretation is obviously to be avoided. (See, e.g., Lungren v. Deukmejian, supra, 45 Cal.3d at p. 735; People v. Craft (1986) 41 Cal.3d 554, 561 [224 Cal.Rptr. 626, 715 P.2d 585].) In contrast, to give full effect to section 5 does not nullify section 9(a), which continues to apply to a wide variety of other obligations.

The Board offers several additional arguments against this conclusion. None is persuasive.

First, the Board argues that retirement contributions must be treated as debt service in order to achieve consistency with article XIII A. Article XIII A limits the maximum rate of ad valorem taxes on real property but permits taxes in excess of that rate to repay certain voter-approved indebtedness. fn. 7 In Carman v. Alvord (1982) 31 Cal.3d 318, 324-333 [182 Cal.Rptr. 506, 644 P.2d 192] (Carman), we held that article XIII A's exemption for "indebtedness" was broad enough to include a city's retirement obligations. Thus, a city may levy taxes in excess of the maximum rate to satisfy such obligations. (Ibid.)

Because articles XIII A and XIII B address the treatment of indebtedness in similar language, the Board argues that retirement contributions cannot be debt service under the former (see Carman, supra, 31 Cal.3d 318) but not under the latter. The argument, however, ignores both the reasoning of Carman and the language of article XIII B. Our conclusion in Carman that retirement obligations constituted "indebtedness" was expressly based on article XIII A's failure to articulate a distinction for retirement contributions. (Carman, supra, 31 Cal.3d at p. 330.) In contrast, article XIII B does articulate a distinction between retirement contributions and other obligations. (§ 5.) Article XIII B also provides that its definition of "debt service" applies only in the context of that article and is subject to exceptions as "expressly provided" therein. (§ 8.) As already discussed, the specific provision governing retirement contributions (§ 5) must be viewed as an **[2 Cal.4th 579]** exception to the more general provisions governing debt service (§§ 8(g), 9(a)).

The Board's argument for "consistent" interpretations of articles XIII A and XIII B is not based solely on similarities in language. It would also be "meaningless," according to the Board, to permit the City to raise taxes to satisfy retirement obligations while denying it the power to spend the resulting revenues. However, the argument misconceives the purpose of subjecting retirement contributions to the overall spending limit. The purpose is not to prevent the City from satisfying its contractual obligations but simply to control the overall rate of growth in appropriations, if necessary by reducing other spending. Indeed, each year's spending limit reflects the fact that the City made retirement contributions in the prior year and the assumption that it will continue to do so. (See §§ 1, 5.) In contrast, to exclude a category of appropriations from the spending limit would in effect remove that category from the budget, permitting both it and overall spending to increase faster than the rate that the voters adopted as the measure of acceptable growth. (§ 1.)

The relationship between the Carman rule and the treatment of retirement contributions under article XIII B must be understood in this light. Carman permits the City to pass through directly to the voters the cost of any retirement contributions, regardless of the maximum tax rate set out in article XIII A. Unless such contributions are subject to the spending limit set out in article XIII B, as the voters expressly provided (§ 5), one of the largest categories of local governmental spending fn. 8 would be completely insulated from fiscal control. The result would be a material impairment of article XIII B's effectiveness in limiting the overall growth of appropriations.

The Board finds support for its contrary interpretation of article XIII B in a remark by the Legislative Analyst. In his report on the proposed measure, the Legislative Analyst concluded that "a local government with an unfunded liability in its retirement system could appropriate its excess revenues to reduce the liability, as such an appropriation would be considered a payment toward a legal 'indebtedness' under this ballot measure." (Ballot Pamp., Special Statewide Elec. (Nov. 6, 1979) p. 20.) [3a] In this case, as always, we consider the Legislative Analyst's views because we assume the voters considered them along with the other materials in the ballot pamphlet. (See, e.g., Raven v. Deukmejian (1990) 52 Cal.3d 336, 349 [276 Cal.Rptr. 326, 801 P.2d 1077].) **[2 Cal.4th 580]**

Nevertheless, a nonjudicial interpretation of the Constitution is entitled only to as much deference as its logic and persuasiveness demand. [1c] In this case, the Legislative Analyst's views are not persuasive because there is no indication that they take into account the most directly relevant provision, section 5.

[3b] The Legislative Analyst's comment regarding the treatment of retirement contributions is based on a memorandum to him from the Legislative Counsel dated June 15, 1979. In the memorandum, the Legislative Counsel concludes that "any legally binding obligation existing or legally authorized as of January 1, 1979, would be considered as 'indebtedness' for purposes of subdivision (g) of Section 8" and that "such a legally binding obligation would include the unfunded liability of a public employee retirement system." However, the memorandum does not mention or consider the effect of section 5, which expressly contradicts the memorandum's conclusion. In the Ballot Pamphlet, the Legislative Analyst merely repeated the Legislative Counsel's conclusion, again without any consideration of section 5.

The Legislative Analyst's comments, like other materials presented to the voters, "may be helpful but are not conclusive in determining the probable meaning of initiative language." (Carman, supra, 31 Cal.3d at p. 330.) Thus, when other statements in the election materials contradict the Legislative Analyst's comments we do not automatically assume that the latter accurately reflects the voters' understanding. (Id., at pp. 330- 331.) In Carman, for example, the official title and summary of Proposition 13 led us to reject the Legislative Analyst's conclusion that the measure's exemption from the maximum tax rate for voter-approved indebtedness applied only to bonded debt. (Ibid.) [1d] The case for rejecting the Legislative Analyst's views is even more compelling here, where the contradiction is in the language of the initiative. (§ 5.) Under circumstances such as these, to prefer an "extrinsic source" over "a clear statement in the Constitution itself" would be "a strained approach to constitutional analysis." (Cf. Delaney v. Superior Court (1990) 50 Cal.3d 785, 802-803 [268 Cal.Rptr. 753, 789 P.2d 934] [rejecting, as contrary to the language of the proposed measure, the Legislative Analyst's inference that the newsperson's shield law would apply only to confidential information].)

[4a] The Board's final argument for interpreting article XIII B to exclude retirement contributions is that such an interpretation will "eliminate doubts" as to the measure's constitutionality. According to the Board, to restrict the City's spending power impairs the security of its pension obligations and, thus, constitutes a "potential" violation of the contract clause of **[2 Cal.4th 581]** the federal Constitution. fn. 9 The Board expressly disclaims any intent to assert a cause of action or to raise an affirmative defense under the clause. "Rather," to quote the Board's brief, "the City has raised the potential impairment of contracts to explain and support its choice among competing interpretations of Article XIII B."

Taxpayers contend that the Board lacks standing to make the constitutional argument for two reasons. First, as a creation of the state, the City may not invoke the contract clause "in opposition to the will of [its] creator." (Coleman v. Miller (1939) 307 U.S. 433, 441 [83 L.Ed. 1385, 1390, 59 S.Ct. 972, 122 A.L.R. 695]; see also Williams v. Mayor (1933) 289 U.S. 36, 40 [77 L.Ed. 1015, 1020, 53 S.Ct. 431]; State of California v. Marin Mun. W. Dist. (1941) 17 Cal.2d 699, 705 [111 P.2d 651]; Cox Cable San Diego, Inc. v. City of San Diego (1987) 188 Cal.App.3d 952, 967 [233 Cal.Rptr. 735].) Second, any impairment of the City's retirement obligations would cause actual harm only to those persons entitled to receive retirement benefits. (See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 242 [149 Cal.Rptr. 239, 583 P.2d 1281] [in dictum].)

These arguments about the Board's standing are irrelevant because the Board is not challenging article XIII B's validity under the contract clause. Instead, we are called upon to decide what the article means. [5] In doing so, we assume that the voters intended the measure to be valid and construe it to avoid "serious" doubts as to its constitutionality if that can be done "without doing violence to the reasonable meaning of the language." (Miller v. Municipal Court (1943) 22 Cal.2d 818, 828 [142 P.2d 297]; see also Gollust v. Mendell (1991) ___ U.S. ___ [115 L.Ed.2d 109, 111 S.Ct. 2173, 2181]; Crowell v. Benson (1932) 285 U.S. 22, 62 [76 L.Ed. 598, 619, 52 S.Ct. 285].) [4b] These well established rules provide us with ample warrant to consider the Board's argument about how the contract clause should affect our interpretation of article XIII B.

We turn, then, to the argument's merits. In essence, the Board contends that the City's power to spend is the security for its pension obligations and that any restriction of the power ipso facto reduces the value of its employees' pension rights. This reduction in value, according to the Board, constitutes a "potential" impairment of the City's contractual obligations.

To establish this point on summary judgment, the Board submitted declarations in which experts applied techniques of financial analysis to predict **[2 Cal.4th 582]** the effect of a spending limit on the hypothetical market value of an employee's interest in retirement benefits. The trial court sustained objections to these declarations on relevance grounds. Even without such declarations, however, we may assume for argument's sake, as do the parties, that a spending limit has at least a theoretical effect on the security of the City's retirement obligations. In the Board's view, "an impairment occurs when the State changes the law so as to erode the ability of the City to perform, whether a breach necessarily follows or not." fn. 10

The Board relies, by analogy, on cases in which the high court refused to enforce state laws that purported to disable cities from levying taxes to repay municipal bonds. (See, e.g., Wolff v. New Orleans (1881) 103 U.S. 358, 365-369 [26 L.Ed. 395, 398-399]; Von Hoffman v. City of Quincy (1867) 71 U.S. 535, 554-555 [18 L.Ed. 403, 410].) These cases stand for the proposition that a state may not authorize a city to contract and then restrict its taxing power so that it cannot fulfill its obligations. fn. 11 (Wolff v. New Orleans, supra, 103 U.S. at pp. 367-369 [26 L.Ed. at pp. 399-400]; Von Hoffman v. City of Quincy, supra, 71 U.S. at pp. 554-555 [18 L.Ed. at p.

410]; cf. United States Trust Co. v. New Jersey (1977) 431 U.S. 1, 24, fn. 22 [52 L.Ed.2d 92, 111, 97 S.Ct. 1505].) Underlying such decisions, at least implicitly, is the idea that "[t]he principal asset of a municipality is its taxing power" and that "[a]n unsecured municipal security is therefore merely a draft on the good faith of a municipality in exercising its taxing power." (Faitoute Co. v. Asbury Park (1942) 316 U.S. 502, 509 [86 L.Ed. 1629, 1635, 62 S.Ct. 1129]; cf. Von Hoffman v. City of Quincy, supra, 71 U.S. at p. 555 [18 L.Ed. at p. 410].)

By analogy to these cases, the Board argues that the contract clause would also invalidate a state law purporting to disable a municipality from spending money to satisfy its contractual obligations. While there is support for the proposition, the relevant cases involve statutes specifically enacted for the purpose of repudiating particular contractual duties rather than laws imposing budgetary restrictions. In United States Trust Co. v. New Jersey (supra, 431 U.S. 1, 17-28 [52 L.Ed.2d 92, 106-113]) the high court declared unenforceable a statute intended to abrogate a port authority's express covenant to its bondholders not to make unauthorized expenditures out of revenues designated for repayment of the bonds. Similarly, in Valdes v. Cory ((1983) 139 Cal.App.3d 773, 789-791 [189 Cal.Rptr. 212]), the Court of Appeal ordered the state Controller and other public employers to make **[2 Cal.4th 583]** periodic payments to the Public Employees' Retirement Fund despite legislation intended to abrogate the underlying contractual and statutory duties.

Unlike the laws at issue in the cited cases, article XIII B does not repudiate, or even modify, any contractual right or obligation. fn. 12 Article XIII B can more accurately be said to bring retirement obligations under the umbrella of an overall spending limit, but even this limited statement is an oversimplification. In fact, other provisions of the law provide substantial protection for retirement obligations, even in the face of budgetary competition. Specifically, the City has mandatory duties to make periodic payments to its retirement funds in amounts sufficient to keep the funds actuarially sound (Gov. Code, §§ 20741 et seq. [contributions to Public Employees' Retirement Fund], 45341 et seq. [contributions to single-employer plans]; see generally Valdes v. Cory, supra, 139 Cal.App.3d 773); and article XIII A permits the City to recover the cost of such contributions without regard to the constitutional maximum tax rate. (See Carman, supra, 31 Cal.3d 318.)

Nor does article XIII B provide a strong incentive for a governmental entity to attempt to avoid its retirement obligations. This is because each year's spending limit reflects the prior year's retirement contributions and other appropriations, adjusted to account for the change in population and the cost of living. fn. 13 (§§ 1, 5.) Thus, the City's high retirement costs in the base year have been reflected in subsequent years by higher and higher adjusted spending limits. Under section 11, this court's determination that retirement contributions are subject to limitation will entail a corresponding increase in the City's base-year and current spending limits. Moreover, if the voters wish to increase discretionary spending in other areas they may do so by the vote of a simple majority. (§ 4.) We note that as of March 1990, voters in 117 jurisdictions had considered proposals to increase spending limits to permit the appropriation of revenues already collected. Of these proposals, 106 were approved. (Cal. Leg., 1990 Revenue and Taxation Reference Book, at p. 196 (1990).)

While it can be argued that any budget entails a theoretical reduction in the security of the budgeted obligations, more is required to establish a serious doubt as to a law's validity under the contract clause. Particularly in **[2 Cal.4th 584]** this area, " '[t]he Constitution is "intended to preserve practical and substantial rights, not to maintain theories" [citation].' " (City of El Paso v. Simmon (1965) 379 U.S. 497, 515 [13 L.Ed.2d 446, 458, 85 S.Ct. 577], quoting Faitoute Co. v. City of Asbury Park, supra, 316 U.S. at p. 514 [86 L.Ed. at p. 1637].) While the contract clause "appears literally to proscribe 'any' impairment ... 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' " (United States Trust Co. v. New Jersey, supra, 431 U.S. at p. 21 [52 L.Ed. 2d at p. 109], quoting Home Building & Loan Assn. v. Blaisdell (1934) 290 U.S. 398, 428 [78 L.Ed. 413, 423, 54 S.Ct. 231, 88 A.L.R. 1481].)

The threshold inquiry under the contract clause is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." (Allied Structural Steel Co. v. Spannaus (1978) 438 U.S. 234, 2441 [57 L.Ed.2d 727, 736, 98 S.Ct. 2716].) Viewing article XIII B with reference to the whole system of law of which it is a part (cf. Bowland v. Municipal Court (1976) 18 Cal.3d 479, 489 [134 Cal.Rptr. 630, 556 P.2d 1081]), it cannot fairly be said that article XIII B has operated as a substantial impairment. Its effect, rather, has been to require governmental entities to reduce the overall growth in appropriations by reducing expenditures not required by law, except where the voters have chosen to increase the spending limit. A governmental entity that decided to make discretionary appropriations in other areas rather than legally required contributions to retirement funds might well thereby violate the contract clause (Valdes v. Cory, supra, 139 Cal.App.3d 773), but it would not be acting under the aegis or compulsion of article XIII B.

While we must construe a provision to avoid serious doubts as to its constitutionality, the "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." (Moore Ice Cream Co. v. Rose (1933) 289 U.S. 373, 379 [77 L.Ed. 1265, 1270, 53 S.Ct. 620].) The manifest purpose of Proposition 4 was to limit the overall growth of governmental appropriations. To remove from the spending limit such a large category of appropriations as retirement contributions would do violence to that goal. Under these circumstances, the Board's constitutional arguments do not justify a departure from the plain statement that contributions to retirement funds are subject to limitation.

Disposition

The decision of the Court of Appeal is reversed.

Lucas, C. J., Arabian, J., Baxter, J., and George, J., concurred. **[2 Cal.4th 585]**

MOSK, J.

I dissent. The majority's holding that retirement contributions are subject to the limitation of section 1 of article XIII B of the California Constitution is based entirely on a literal reading of the language of section 5 of article XIII B (hereafter section 5) and the rule of statutory construction that a specific provision relating to a particular subject will govern over a more general provision relating to the same subject. That is, even though retirement contributions may be classified as an indebtedness under subdivision (a) of section 9 of article XIII B (hereafter section 9(a)), the majority conclude that section 5 must prevail because it refers specifically to contributions to retirement funds. In the view of the majority, the section 5 inclusion of retirement fund contributions is an exception to the general provision of section 9(a).

This holding is not only in violation of well-established rules of statutory construction, but is contrary to the intent of the voters in adopting article XIII B of the state Constitution (hereafter article XIII B). It is clear from the legislative history of that provision that the voters intended to exclude retirement contributions as an indebtedness under section 9(a). They were specifically told in the ballot pamphlet analysis by the Legislative Analyst that the government's liability to make payments into a retirement fund was an "indebtedness" under article XIII B. This statement is a persuasive indication of the intent of the voters since, as the majority recognize, it must be assumed that they considered it in voting on the measure.

The majority reject the conclusion that logically follows from the Legislative Analyst's statement. They cast doubt on its correctness because it is a "nonjudicial interpretation" of the language of article XIII B. But this may be said of any statement in the ballot pamphlet. In attempting to discern the intent of the voters, the legal persuasiveness of the analysis is not the standard; the purpose of consulting the ballot pamphlet is to determine what the voters intended, assuming, as we must, that they considered the statements made therein. The majority find the Legislative Analyst's conclusion to be unpersuasive because "there is no indication" that he considered the language of section 5 in making his analysis. But there is no reason to suppose that he informed the voters that pension contributions are an indebtedness under article XIII B without considering the other provisions of the article, including section 5. The issue is not whether he was correct in his analysis of the measure in the hindsight of a court considering the issue more than a decade after it was adopted, but the understanding of the voters as to the meaning of these provisions.

Another reason given by the majority for rejecting the Legislative Analyst's conclusion is that it contradicts section 5. But this is circular reasoning, for it assumes the answer to the question at issue. The problem posed by **[2 Cal.4th 586]** this case is whether pension contributions are excluded from the spending limitation as an indebtedness under section 9(a), or whether they are included in view of the language of section 5. To conclude, as do the majority, that contributions are not an indebtedness because such a determination would be contrary to the meaning of section 5, presupposes that section 5 prevails over section 9(a). That, of course, is the very issue under consideration.

In sum, there is no escaping the fact that the voters were expressly told by the Legislative Analyst that pension contributions were exempt from the spending limitation under article XIII B. The majority, instead of accepting the fact that this was the voters' understanding and attempting to harmonize sections 5 and 9(a) in accordance with that understanding, hold that section 5 dominates, thereby disregarding the intent of the electorate.

The result reached by the majority is particularly inappropriate in the present case because sections 5 and 9(a) may be harmonized so as to give effect to both provisions. The majority disregard a rule of construction critical in the present context, i.e., that a court must attempt to reconcile provisions relating to the same subject matter to the extent possible, so as to avoid substantially nullifying the effect of any part of an enactment. (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299]; County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 58 [233 Cal.Rptr. 38, 729 P.2d 202]; People v. Craft (1986) 41 Cal.3d 554, 560 [224 Cal.Rptr. 626, 715 P.2d 585].) The holding that section 5 is an exception to section 9(a) results in practically nullifying the effect of the latter provision. According to the majority's own analysis, retirement contributions constitute "one of the largest categories of local governmental spending." Such contributions are undoubtedly indebtedness of the city, a proposition the majority accept, at least for the sake of argument. To assume that the electorate chose in section 9(a) to except all indebtedness existing on January 1, 1979, from the spending limitation, fn. 1 but not to include within such indebtedness "one of the largest categories of governmental spending," results in a significant abrogation of section 9(a).

This consequence is particularly unwarranted in the present case because sections 5 and 9(a) may be reconciled so as to give effect to both provisions. That is, section 5 may be construed as referring to pension funds established **[2 Cal.4th 587]** after January 1, 1979. Section 9(a), on the other hand, applies to funds established prior to that date to fulfill the city's obligations to meet an "indebtedness." This construction is consistent with both the language of section 5-it provides that a government entity "may establish" such funds

as it "shall deem reasonable and proper," implying establishment of funds at a future time-and the general rule that constitutional provisions are applied prospectively. (In re Marriage of Bouquet (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371]; Mannheim v. Superior Court (1970) 3 Cal.3d 678, 686 [91 Cal.Rptr. 585, 478 P.2d 17].)

The majority reject an alternate means offered by the Board of Supervisors for the City and County of San Francisco (board) to harmonize the two sections. The board asserts that if the government is required by contract to satisfy its obligation to pay pensions by making appropriations to a fund for that purpose, this constitutes a debt, not subject to the spending limitation under section 9(a). But if no such contractual requirement exists, and the government chooses as a matter of discretion to establish a pension fund as a means of accruing a reserve for the payment of pensions, then this is not an indebtedness, and the contributions to such a fund would be subject to the limitation.

The majority respond to this suggested means of harmonizing the two sections by asserting that section 5 creates an exception to section 9(a), and therefore there is no reason to attempt to harmonize the two sections. As discussed above, however, the view that section 5 is an exception to section 9(a) is untenable because it results in practically negating the effect of the latter provision.

The second answer to the board's theory offered by the majority is that the city could evade section 5 by "satisfying its contractual obligations." But this is exactly what section 9(a) requires, if such obligations are indebtedness incurred before January 1, 1979. Contrary to the majority, the board's suggestion would not nullify the express declaration in section 5 that retirement contributions are subject to limitation, for contributions to a pension fund not required to be established by contract would be included in the limitation.

Finally, in my view Carman v. Alvord (1982) 31 Cal.3d 318 [182 Cal.Rptr. 506, 644 P.2d 192] (Carman), supports the conclusion that retirement contributions are an indebtedness under section 9(a). Carman involved the construction of article XIII A of the California Constitution (hereafter article XIII A). Subdivision (b) of section 1 of article XIII A (hereafter subdivision **[2 Cal.4th 588]** (b)) exempts from the 1 percent limit on ad valorem taxes on real property imposed by section 1, subdivision (a) of the article "taxes to pay the interest and redemption charges on ... any indebtedness approved by the voters prior to January 1, 1978 ...." The voters of the City of San Gabriel had, many years prior to 1978, approved a measure authorizing the city to levy a tax to fund the city's employee retirement system. After article XIII A became effective, the city levied a special tax for that purpose. The plaintiff filed an action alleging that the tax was unconstitutional because it exceeded the 1 percent limit on ad valorem real property taxes.

We held that an employer's duty to pay pensions promised and earned on terms substantially equivalent to those offered when the employee entered public service was a vested contractual right. Our opinion reasoned that the term "any indebtedness," as used in subdivision (b), includes obligations arising out of a city's pension plan, and the term "interest and redemption charges" refers to "the sums ... necessary to avoid default on obligations to pay money, including those for pensions." (Carman, supra, 31 Cal.3d at p. 328; accord, City of Fresno v. Superior Court (1984) 156 Cal.App.3d 1137, 1145-1146 [202 Cal.Rptr. 313]; City of Watsonville v. Merrill (1982) 137 Cal.App.3d 185, 193 [186 Cal.Rptr. 857].)

The language of subdivision (b) is similar to that of sections 9(a) and 8(g) of article XIII B. Unless there is some persuasive reason to interpret the provisions in the two articles differently, they should be construed as having the same meaning. Nevertheless the majority assert that the term "indebtedness" has a different meaning in the two provisions because article XIII A does not have a provision similar to section 5, making contributions to retirement funds subject to the spending limitation.

But the majority fail to point to any substantive difference in a city's obligations under article XIII A and article XIII B which would justify the conclusion that the duty to pay pensions or to fund a pension system for that purpose constitutes an "indebtedness" under one but not the other. Even if the meaning of the term "indebtedness" may vary, depending on the context in which it is used, the meaning attributed to it must relate to the nature of the obligation involved. Carman points out that the term "indebtedness" encompasses " 'obligations which are yet to become due as [well as] those which are already matured' " (31 Cal.3d at p. 327), and in support of its conclusion it relies on a case holding that the term "indebtedness" means "a complete and absolute liability to the extent that payment must ultimately be made ...." (County of Shasta v. County of Trinity (1980) 106 Cal.App.3d 30, 38 [165 Cal.Rptr. 18].) There can be no question that the obligation to **[2 Cal.4th 589]** pay pensions comes within these definitions. It is, therefore, an indebtedness, and is exempt from the spending limitation.

Moreover, as the Court of Appeal noted, articles XIII A and XIII B "are complementary fiscal measures designed to limit the government's ability to raise and spend tax revenues." This view is subscribed to by this court. (City of Sacramento v. State of California (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522].) Since, as we held in Carman, a government entity may impose a tax to fund pension payments without regard to the tax limitation of article XIII A, it is anomalous to hold, as do the majority, that the voters intended to prohibit the use of the funds generated for this purpose without a compensating reduction in other government expenditures.

I would affirm the judgment of the Court of Appeal.

KENNARD, J.

I dissent. Article XIII B of the California Constitution (hereafter article XIII B) limits state and local governments' ability to spend tax revenues. In general, a public entity can spend no more than it spent the year before, adjusted for changes in population and the cost of living. This limitation does not apply to all government spending, but only to spending falling within the constitutional definition of "appropriations subject to limitation." (Art. XIII B, § 1.) The majority holds that all contributions that a public entity makes to a retirement fund for its employees are "appropriations subject to limitation" and therefore subject to the article XIII B limit. This holding is based on a superficial analysis of the relevant constitutional provisions. A more complete analysis reveals that contributions to employee retirement funds are exempt from the article XIII B limit when the public entity makes them under an obligation that existed on January 1, 1979.

A provision of article XIII B exempts all "debt service" appropriations from the spending limit. (Art. XIII B, § 9, subd. (a).) In this context, "debt service" is defined as "appropriations required to pay the cost of interest and redemption charges, including the funding of any reserve or sinking fund required in connection therewith, on indebtedness existing or legally authorized as of January 1, 1979, or on bonded indebtedness thereafter approved according to law by a vote of the electors of the issuing entity voting in an election for that purpose." (Id., § 8, subd. (g).)

A public entity's mandatory contributions to an employee retirement fund constitute debt service. This court so held in Carman v. Alvord (1982) 31 Cal.3d 318, 327-328 [182 Cal.Rptr. 506, 644 P.2d 192]. Although in that case we construed a provision of article XIII A of the California Constitution, rather than the "debt service" provisions of article XIII B, these two articles **[2 Cal.4th 590]** are closely related and the language of the relevant provisions is virtually identical. fn. 1 There is no sound reason to conclude that the electorate intended to give the same words different meanings in these related and complementary parts of the state Constitution. Accordingly, mandatory contributions to an employee retirement fund are exempt from the article XIII B spending limit as "debt service" if the contributions are made under an obligation existing on January 1, 1979.

The conclusion that mandatory payments to pre-1979 retirement funds are exempt as debt service is fortified by the analysis of the Legislative Analyst included in the voter pamphlet for the election at which article XIII B was enacted. In relevant part, it read: "[A] local government with an unfunded liability in its retirement system could appropriate its excess revenues to reduce the liability, as such an appropriation would be considered a payment toward a legal 'indebtedness' under this ballot measure." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979) p. 20, italics added.) Stated more simply, payments to existing employee retirement funds will be exempt from the article XIII B spending limit as debt service. The majority concedes this is what the Legislative Analyst's words mean, but it asserts that the Legislative Analyst was mistaken. On the contrary, the Legislative Analyst's conclusion is the most reasonable interpretation of article XIII B's language. Moreover, the Legislative Analyst's words are persuasive evidence of the voters' intent in enacting article XIII B because the voters had those words before them, as part of the voters' pamphlet, when they were deciding how to vote, and none of the other statements in the pamphlet disputed this interpretation.

The majority relies on a provision of article XIII B that expressly refers to employee retirement contributions. It states: "Each entity of government may establish such contingency, emergency, unemployment, reserve, retirement, sinking fund, trust, or similar funds as it shall deem reasonable and proper. Contributions to any such fund, to the extent that such contributions are derived from the proceeds of taxes, shall for purposes of this Article constitute appropriations subject to limitation in the year of contribution. Neither withdrawals from any such fund, nor expenditures of ... such withdrawals, nor transfers between or among such funds, shall for purposes of this Article constitute appropriations subject to limitation." (Art. XIII B, § 5, italics added.)

To be sure, this provision (hereafter section 5) necessarily contemplates that some contributions to employee retirement funds are subject to the **[2 Cal.4th 591]** article XIII B spending limit. But the majority reads it more expansively. The majority concludes that under section 5 all contributions to employee retirement funds are subject to the article XIII B spending limit, and that the debt service provisions, to the extent they provide a basis for exempting such retirement contributions from the article XIII B spending limit, must be disregarded because they fail to mention retirement fund contributions by name. This reasoning does not withstand scrutiny.

Putting aside retirement contributions, there is a need to reconcile section 5 with article XIII B's "debt service" provisions because both refer expressly to reserve and sinking funds. Section 5 includes payments to reserve and sinking funds with retirement contributions as appropriations subject to the article XIII B spending limit, whereas the "debt service" provisions state that payments to reserve and sinking funds may qualify as debt service that is exempt from the article XIII B limit. The only way to give effect to both provisions, as required by accepted rules of statutory and constitutional construction (see, e.g., County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 58 [233 Cal.Rptr. 38, 729 P.2d 202]), is to divide reserve and sinking funds into

two categories, so that some of the funds are subject to limitation under section 5 while others are exempt from limitation under the "debt service" provisions. This is easily done.

Section 5 speaks prospectively ("Each entity ... may establish such [reserve and sinking] ... funds ....") and therefore it is reasonably interpreted to apply only to reserve or sinking funds established after article XIII B appeared on the legal horizon. The "debt service" provisions, by contrast, look generally to the past. They provide an exemption for "indebtedness existing or legally authorized as of January 1, 1979." All payments made to reserve or sinking funds in existence on that date, and which otherwise meet the constitutional definition of "debt service," are exempt.

Thus, a fair reading of article XIII B compels the conclusion that payments to reserve and sinking funds can and must be divided between those made to funds established on or before January 1, 1979 (and therefore exempt) and those made to funds established afterward (and so not exempt). If payments to reserve and sinking funds can and must be so divided, then should not contributions to retirement funds (which are a kind of reserve fund) be divided in the same manner? The majority gives no satisfactory answer to this question.

Had section 5 been intended to establish an exception to the "debt service" exemption, as the majority concludes, it would have been logical to place **[2 Cal.4th 592]** section 5 with the "debt service" provisions, or at least to include within section 5 a reference to those provisions. Section 5's location distinctly apart from the "debt service" provisions, and the absence of any cross-reference to those provisions, suggests that section 5 was intended to serve a different purpose. That purpose is not difficult to discern. Rather than specifying whether particular funds are or are not exempt from the article XIII B limit, the primary purpose of section 5 is to explain how the article XIII B limit works when applied to those funds that are not exempt. The main point of section 5 is that in the case of various kinds of nonexempt reserve funds maintained by public entities, the article XIII B limit applies when the government makes payments into the fund, and not when payments are made out of the fund. This overriding purpose is in no way frustrated by a conclusion that certain fund payments (that is, those to service preexisting debt) are not subject to the article XIII B limit at all.

The majority relies on the rule of statutory and constitutional construction that a specific provision prevails over a general provision. But this rule applies only when the provisions at issue are inconsistent. (See Code Civ. Proc., § 1859 ["[W]hen a general and particular provision are inconsistent, the latter is paramount to the former."]; International Assn. of Fire Fighters Union v. City of Pleasanton (1976) 56 Cal.App.3d 959, 976 [129 Cal.Rptr. 68].) "Two statutes dealing with the same subject are given concurrent effect if they can be harmonized, even though one, is specific and the other general." (People v. Price (1991) 1 Cal.4th 324, 385 [3 Cal.Rptr. 106, 821 P.2d 610].) Properly read, section 5 is not inconsistent with the "debt service" provisions of article XIII B; these provisions can and should be harmonized. Under the "debt service" provisions, a public entity's contributions to an employee retirement fund are exempt from the article XIII B limit if they are made to discharge an obligation that existed on January 1, 1979; all other contributions to employee retirement funds are subject to that limit. I would so hold.

FN 1. All further references to section numbers, unless otherwise noted, are to sections of article XIII B of the California Constitution.

FN 2. The Board also excluded appropriations for certain other employee benefits, including contributions to the health service and social security systems. Only the treatment of retirement contributions is at issue in this case.

FN 3. The $40,336,171 amount represents the effect of excluding "mandatory employee benefits" (see fn. 2, ante), which include retirement contributions, from both the base-year limit and the 1988-1989 limit. In other words, $40,336,171 is the amount by which the City's appropriations for "mandatory employee benefits" grew, between the base year and 1988-1989, in excess of the permissible rate of growth set out article XIII B.

FN 4. Section 5 provides: "Each entity of government may establish such contingency, emergency, unemployment, reserve, retirement, sinking fund, trust, or similar funds as it shall deem reasonable and proper. Contributions to any such fund, to the extent that such contributions are derived from the proceeds of taxes, shall for purposes of this Article constitute appropriations subject to limitation in the year of contribution. Neither withdrawals from any such fund, nor expenditures of (or authorizations to expend) such withdrawals, nor transfers between or among such funds, shall for purposes of this Article constitute appropriations subject to limitation." (Italics added.)

FN 5. Section 9, subdivision (a) (hereafter section 9(a)), provides: " 'Appropriations subject to limitation' ... do not include ... Appropriations for debt service." (Italics added.)

Section 8, subdivision (g) (hereafter section 8(g)), provides: " 'Debt service' means appropriations required to pay the cost of interest and redemption charges, including the funding of any reserve or sinking fund required in connection therewith, on indebtedness existing or legally authorized as of January 1, 1979, or on bonded indebtedness thereafter approved according to law by a vote of the electors of the issuing entity voting in an election for that purpose." (Italics added.)

FN 6. The Legislature has similarly concluded that the state's retirement contributions are subject to limitation. (See 1991-1992 Budget, Stats. 1991, ch. 118, § 3.60, subd. (c).)

FN 7. Specifically, the maximum tax rate does not apply "to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) any indebtedness approved by the voters prior to July 1, 1978, or (2) any bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition." (Cal. Const., art. XIII A, § 1, subd. (b).)

FN 8. The City, in its Comprehensive Annual Financial Report for the year ended June 30, 1988, reported retirement contributions of approximately $240 million. The City's appropriations limit for that year, which excluded retirement contributions, was approximately $700 million.

FN 9. "No state shall ... pass any ... law impairing the obligation of contracts ...." (U.S. Const., art. I, § 10, cl. 1.)

FN 10. Because the Board's argument is so broad, and because the Board expressly disclaims any intent to assert a cause of action or defense under the contract clause, there is no need to remand for additional evidentiary proceedings.

FN 11. We rejected a similar challenge to article XIII A as premature in Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra, 22 Cal.3d at pages 238-242.

FN 12. For this reason, the rule that " 'alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation' " (Miller v. State of California (1977) 18 Cal.3d 808, 816 [135 Cal.Rptr. 386, 557 P.2d 970], quoting Allen v. City of Long Beach (1955) 45 Cal.2d 128, 131 [287 P.2d 765]), has no bearing on this case.

FN 13. Proposition 111 liberalized the definition of "cost of living," thus permitting greater annual increases to the spending limit. (See § 8, subd. (e)(2), added by initiative measure in Primary Elec. (June 5, 1990).)

FN 1. Under subdivision (g) of section 8 of article XIII B (hereafter section 8(g)), "debt service" is defined as "appropriations required to pay the cost of interest and redemption charges, including the funding of any reserve or sinking fund required in connection therewith, on indebtedness existing or legally authorized as of January 1, 1979."

FN 1. Article XIII A limits real property taxes, but it exempts from this limit real property taxes imposed "to pay the interest and redemption charges on ... any indebtedness approved by the voters" before article XIII A was enacted. (Cal. Const., art. XIII A, § 1, subd. (b).)

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Exhibit D

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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 calender 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 obligors 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

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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* **[84 Cal.App.4th 178]** 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).)

COUNSEL

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Robert E. Shannon, City Attorney, Daniel S. Murphy, Principal Deputy City Attorney, and Michelle Gardner, Deputy City Attorney, for Plaintiff and Respondent.

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Stanton, Kay & Watson and James P. Watson for Foundation for Fair Contracting as Amicus Curiae.

Davis, Cowell & Bowe, John J. Davis, Jr., and Andrew J. Kahn for Northern California Mechanical Contractors Association, Los Angeles Chapter National Electrical Contractors Association, Air Conditioning, Refrigeration and Mechanical Contractors Association of Southern California, California Plumbing and Mechanical Contractors Association, California Sheet Metal Contractors National Association and Associated Plumbing and Mechanical Contractors Association as Amici Curiae. **[34 Cal.4th 946]**

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 Freedenfeld & 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

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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 miscontrues 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

Steefel, 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.)" (*Yoffie 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[i]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. *Schaef*[]*er 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] ["[o]rdinarily 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 ejectment. 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 ActionIs 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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Exhibit I

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICE L. GOLDMAN, individually and on behalf of others similarly situated,

Plaintiff-Appellant,

v.

STANDARD INSURANCE COMPANY,

Defendant-Appellee.

No. 00-16691

D.C. No. CV-98-01013-VRW

OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted September 12, 2001
Submission Withdrawn November 21, 2001
Resubmitted March 17, 2003
San Francisco, California

Filed August 29, 2003

Before: William A. Fletcher, Raymond C. Fisher and Richard C. Tallman,* Circuit Judges.

Opinion by Judge Fisher

*Judge Tallman was drawn to replace Judge Henry Politz. Judge Tallman has read the briefs, reviewed the record, and listened to the tape of oral argument held on September 12, 2001.

COUNSEL

Claudia Center and William C. McNeill, III, The Employment Law Center, a Project of The Legal Aid Society of San Francisco, San Francisco, California, for the plaintiff-appellant.

Shawn Hanson and Katherine S. Ritchey, Pillsbury Winthrop LLP, San Francisco, California, for the defendant-appellee.

OPINION

FISHER, Circuit Judge:

In 1996, appellant Patrice Goldman, an attorney, applied for a disability income insurance policy with appellee Standard Insurance Company ("Standard") through a program approved by the State Bar of California and available only to its members. Standard declined to issue Goldman a policy, because she had been diagnosed as having an "Adjustment Disorder with mixed anxiety and depressed mood, DSM IV (Diagnostic and Statistical Manual of Mental Disorders) 309.28," and was participating in weekly therapy sessions with a licensed clinical social worker.[1] Standard's underwrit-

[1]Adjustment disorder is a short-term condition that occurs when a person is unable to cope with a particular source of stress. American Psychi-

ing policy is to deny coverage for applicants with adjustment disorder until at least one year after the cessation of treatment.

Goldman initially filed suit in federal district court seeking damages and declaratory and injunctive relief for violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; California's Unruh Civil Rights Act, California Civil Code section 51 ("Unruh Act"); and California Business and Professions Code section 17200 *et seq.*, but shortly thereafter she dismissed her federal complaint and filed the same claims in California state court. Standard, however, removed the case to federal court on March 13, 1998. The district court exercised its jurisdiction under 28 U.S.C. § 1331 based on the ADA claim, and its supplemental jurisdiction over the state law claims.

In December 1999, the district court granted summary judgment against Goldman. The court found that Goldman could not qualify as a disabled person under the ADA, because Standard did not regard her as *presently* substantially limited by her adjustment disorder but only as a person who *may* be substantially limited in the future. In so holding, the court relied upon the United States Supreme Court's interpretation of the ADA in *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999), requiring a plaintiff to show she is "presently — not potentially or hypothetically — substantially limited." *Id.* The district court concluded that the Unruh Act incorporated the ADA definition of disability and thus Goldman also was not covered by the Unruh Act. Finally, the court rejected Goldman's claim under section 17200. Goldman appeals the entry of summary judgment on her claims under the Unruh

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atric Association, Diagnostic and Statistical Manual of Mental Disorders 679-80 (4th ed. 2000). The distress is in excess of that which would be expected to result from the stressor and causes a significant impairment in social or occupational functioning. *Id.* The type of adjustment disorder from which Goldman suffers manifests itself in a combination of depressed and anxious feelings.

Act and section 17200, but does not pursue her ADA claim.[2] We conclude that unlike the ADA as interpreted by *Sutton*, the definition of disability under the Unruh Act does not require a plaintiff to show that she is regarded as having a *present* limitation of a major life activity.[3] As the California Legislature recently clarified, this was the state of California law in 1997, when Standard refused to issue Goldman a policy, and it remains the law today. We thus reverse the summary judgment on Goldman's claim under the Unruh Act and under section 17200.

Discussion

I.

Standard of Review

We "review de novo a grant of summary judgment and must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Roach v. Mail Handlers Benefits Plan*, 298 F.3d 847, 849 (9th Cir. 2002) (internal quotations and citation omitted). A district court's interpretation of state law is reviewed de novo. *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc). We must determine what meaning the state's highest court would give the statute in question. *Id.*

[2]Because Goldman does not appeal her ADA claim, we do not address the propriety of the district court's ruling that Goldman failed to satisfy the definition of disability under the ADA's "regarded as" prong, 42 U.S.C. § 12102(2)(C).

[3]We are not concerned with whether or not the Unruh Act requires the limitation to be substantial. Standard regards Goldman as having a condition that may completely prohibit her from performing her job and thus as having a condition that may substantially limit her ability to work, which we assume, absent argument to the contrary, is a major life activity under pre-2000 California law.

II.

Goldman's Unruh Civil Rights Act claim

[1] The Unruh Act provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, *disability*, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code § 51(b) (West 2003) (emphasis added). "The Unruh Civil Rights Act works to ensure that all persons receive the full accommodations of any business within California, regardless of the person's disabilities." *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1050 (9th Cir. 2000) (holding that the Unruh Act prohibits an insurance company from imposing unreasonable pricing differentials based on an applicant's disability).

[2] Goldman alleges that Standard refused to issue her insurance coverage solely on the basis of her diagnosis of adjustment disorder. The Unruh Act applies to insurance companies, *see* Cal. Ins. Code § 1861.03(a) (West 2003), and an insurance company's refusal to provide coverage on the basis of disability may constitute a denial of "full and equal . . . services" if the discrimination is not reasonable. *See Chabner*, 225 F.3d at 1050 ("disparities in treatment and pricing that are reasonable do not violate the Unruh Act") (citing *Koire v. Metro Car Wash*, 40 Cal. 3d 24 (1985)). Thus, if Goldman's adjustment disorder constitutes a disability within the meaning of the Unruh Act, then the Act may provide relief against Standard's refusal to issue a policy.

A. Goldman is disabled for the purposes of the Unruh Act.

[3] To survive summary judgment, Goldman must first demonstrate a triable issue of fact as to whether she has a "disability" within the meaning of the Unruh Act. Thus we must determine what constitutes a disability for purposes of that Act. In 1997, when Standard refused to issue a policy to Goldman, the Act did not define the term "disability."[4] In 2000, however, the California Legislature enacted the Poppink Act, which amended the Unruh Act to define the term as any mental or physical disability covered by the Fair Employment and Housing Act ("FEHA"), California Government Code section 12920 *et seq.*. Cal. Civ. Code § 51(e)(1) (West 2003); *see* 2000 Cal. Stat. Ch. 1049 (Assembly Bill 2222,

[4]We are aware that the pre-2000 version of California Civil Code § 54 contained a definition of "disability," which incorporated the language used in the ADA definition of the term, and that courts and commentators have sometimes referred to § 54 of the Civil Code as part of the Unruh Act. *See, e.g., Molski v. Gleich*, 318 F.3d 937, 944-45 (9th Cir. 2003); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 n.3 (9th Cir. 2000); *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019, 1025-26, 1027-28 (2003); *Donald v. Sacramento Valley Bank*, 209 Cal. App. 3d 1183, 1185-86 (1989). However, the California Court of Appeal has explained that only § 51 truly comprises the Unruh Act and that courts should not permit the inclusion of other Civil Code sections as nominally part of the Unruh Act to obscure legally significant differences between the statutes. *Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 757-58 (2002) (discussing different statutes of limitations applicable to various Civil Code sections sometimes termed as part of the Unruh Act); *cf. Hankins v. El Torito Rests., Inc.*, 63 Cal. App. 4th 510, 517, 520 n.4 (1988) (noting that unlike a § 51 claim, § 54 does not require intent); *see also* Cal. Dep't of Fair Employment & Hous., General Information about the Unruh Civil Rights Act, *at* http://www.dfeh.ca.gov/Publications/DFEH%20250.pdf (last visited July 29, 2003) (explaining the Unruh Act is codified at Civil Code §§ 51 through 51.3). This comports with the fact that the definition of "disability" in § 54 is applicable to statutes in Part 2.5 of the Civil Code, Cal. Civ. Code § 54(b) (West 1997), whereas § 51 is in Part 2. To avoid any confusion, all references to the Unruh Act in this opinion mean California Civil Code § 51.

Sec. 2). FEHA includes within the definition of "mental disability" two subsections that are relevant here:

> (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.
>
> . . .
>
> (5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that *has no present disabling effect, but that may become a mental disability* as described in paragraph (1) or (2).

Cal. Gov't Code § 12926(i)(1), (5) (West 2003) (emphasis added).

Through the help of therapy, Goldman functions effectively in her daily life and occupation as an attorney. She is not presently limited in any major life activity and — given subsection (5) of California Government Code § 12926(i), which directly addresses a future disability — does not appear to be covered by subsection (1). Standard, however, believes that Goldman may someday be entirely prohibited from working given her diagnosis of adjustment disorder. This belief was the basis of Standard's refusal to issue Goldman a disability insurance policy. Thus, assuming the definition of disability in the 2000 amendment is applicable to Goldman, either because the amendments were intended to apply retroactively or because they merely clarified existing law, Goldman would be regarded as disabled under subsection (5) of the definition. *Id.* § 12926(i)(5).[5]

[5]Goldman alternatively argues that the pre-2000 Unruh Act shares the definition of "mental disability" in the pre-2000 version of FEHA, which,

Standard contends that the 2000 amendments were not intended to apply retrospectively and that the amendments constituted a change rather than a clarification of existing law under the Unruh Act. According to Standard, the 1997 version of the Unruh Act incorporated the ADA definition of "disability," and thus the Supreme Court's interpretation of the ADA as requiring a person to be presently limited in a major life function must apply to the Unruh Act as well. *See Sutton*, 527 U.S. at 482. Because it considered Goldman to be potentially but not presently limited by her condition, Standard argues that in 1997, Goldman did not come within the disability antidiscrimination protections of the Unruh Act.

[4] The parties have argued extensively as to the retroactive application of the 2000 amendments. In the absence of an express retroactivity provision, California legislation is presumed to operate prospectively "unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." *In re Eastport Assocs.*,

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unlike FEHA's definition of "physical disability," did not require that a mental disability have *any* limiting effect, present or future. *See Jensen v. Wells Fargo Bank,* 85 Cal. App. 4th 245, 257 (2000); *Pensinger v. Bowsmith, Inc.*, 60 Cal. App. 4th 709, 721-22 (1998). *But see Muller v. Auto. Club*, 61 Cal. App. 4th 431, 441-43 (1998) (mental disability requires substantial limitation of major life activity). Standard not only disagrees that this FEHA definition applies, but argues the question is foreclosed by the California Supreme Court's recent decision in *Colmenares*, where the court noted that certain non-FEHA statutes, including "the Unruh Act," had incorporated the ADA's definition of "disability." 29 Cal.4th at 1025-27 (citing § 54 as the "Unruh Act"). Thus, argues Standard, the pre-2000 FEHA definition cannot be the same as that under the Unruh Act.

It is neither prudent nor necessary for us to decide whether *Colmenares*' reference to the Unruh Act embraced § 51, the section under which Goldman's claim arises, or whether it meant only to refer to § 54 *et seq.* As discussed at note 4 *supra*, the term Unruh Act has commonly been used in referring to § 54. Instead, we assume *arguendo* the pre-2000 version of the Unruh Act's definition of "mental disability" required a limitation of a major life function.

935 F.2d 1071, 1079 (9th Cir. 1991) (quoting *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1209 (1988)). While Goldman's appeal was pending before us, the California Supreme Court took for review a case that raised the issue of whether the 2000 amendments were intended to apply retroactively. *Colmenares v. Braemar Country Club, Inc.*, 29 Cal.4th 1019, 1024 n.2 (2003).[6] Accordingly, we withdrew submission of Goldman's case pending a decision in *Colmenares*. Rather than reaching the retroactivity question, however, the California Supreme Court concluded that the 2000 amendments merely clarified, rather than changed, the existing law that was relevant to the specific claims involved in that case. *Id.* at 1024 n.2, 1030-31 (noting, in construing whether FEHA required a limitation be substantial, that a legislative act that merely clarifies the law has no retrospective effect because the true meaning of the statute remains the same).

[5] For similar reasons, and guided by *Colmenares*, we likewise do not need to resolve the retroactive application of the Poppink Act generally, because we are persuaded that California's disability antidiscrimination law has never required that a plaintiff be regarded as *presently* limited by her disability. The 2000 amendments, although making other changes to the existing definition of disability under California law, merely clarified that the definition does not include such a limitation nor has it ever done so.

Courts are not to infer that legislation merely clarifies existing law unless (1) the nature of the amendment clearly demonstrates such an intent or (2) the legislature has itself stated that the particular amendment is merely declaratory of exist-

[6]In addition to granting review of *Colmenares*, previously published at 89 Cal. App. 4th 778 (2001), which had held that the Poppink Act modified existing law to a standard that is broader than the ADA, the California Supreme Court granted review of *Wittkopf v. County of Los Angeles*, previously published at 90 Cal. App. 4th 1205 (2001), which had come to the opposite conclusion.

ing law. *Victoria Groves Five v. Chaffey Joint Union High Sch. Dist.*, 225 Cal. App. 3d 1548, 1555 (1990). Both indicia are present here.

1. Nature of the Amendment — The Unruh Act Before 2000

In ascertaining the intent of the California Legislature, it is instructive to look to the pre-2000 understanding of disability in the context of the Unruh Act as section 51 has evolved. The Unruh Act was enacted in 1959 to broaden the prior version of California Civil Code section 51 to provide full and equal public accommodations regardless of race, color, religion, ancestry or national origin. *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1151-52 (1991). In 1987, the Legislature added "blindness or other physical disability" to the list of protected classifications. *Id.* at 1153. This amendment brought the Unruh Act into accord with California Civil Code section 54 *et seq.*, which entitled "[b]lind persons, visually handicapped persons, deaf persons, and other physically disabled persons" to full and equal access to common carriers, places of public accommodation, telephone facilities and other enumerated services, *see* Cal. Civ. Code § 54.1 (West 1987), and with FEHA, which prohibited employment discrimination based on "physical handicap." *Colmenares*, 29 Cal.4th at 1024-25. In the version of FEHA in effect from 1980 through 1992, "physical handicap" was defined to include "impairment of sight, hearing, or speech, or impairment of physical ability." *Id.* (internal quotations omitted). Rather than defining the term "impairment" as used in FEHA, the Fair Employment and Housing Commission adopted a regulation, drawn from the federal Rehabilitation Act of 1973, which defined "physical handicap" as a condition that "substantially limits one or more major life activities." *Id.* at 1025 (quoting former Cal. Admin. Code tit. 2, § 7293.6, subd. (j)(1)).

In 1990, Congress enacted the ADA, which defined the term "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Two years later, the California Legislature amended the Unruh Act, Civil Code section 54 and FEHA to expand coverage in light of the ADA. The Unruh Act's terminology, "blindness and physical disability," was changed to simply "disability," which was not defined. The Unruh Act was, however, amended so that "[a] violation of the right of any individual under the Americans with Disabilities Act (Public Law 101-336) shall also constitute a violation of this section." Cal. Civ. Code § 51 (West 1993). The Legislature added this reference to the ADA in order "to strengthen California law in this area [i.e., disability rights] where it is weaker than the Americans with Disabilities Act of 1990 . . . and to retain California law when it provides more protection for individuals with disabilities than the [ADA]." *Gatto*, 98 Cal. App. 4th at 758-59 (quoting Assemb. Bill No. 1077, ch. 913, § 1, 1992 Cal. Stat. 4282). Section 54's definition of "physical and mental disability" and FEHA's definition of "physical disability," on the other hand, were given statutory definitions generally modeled on the language of the ADA definition. *Colmenares*, 29 Cal.4th at 1025-26. Of particular importance here, both section 54 and FEHA required that the impairment "*limits*" participation in major life activities, the same language used in the ADA and in the California regulations implementing the prior version of FEHA.[7]

[7]Although both were modeled on the ADA's definition, § 54 differed from FEHA in that the former, like the ADA itself, required the limitation to be substantial. Section 54 defined "disability" as an "impairment that *substantially limits* one or more of the major life activities of the individual." *Compare* Cal. Civ. Code § 54(b)(1) (West 1997) (defining "disability" as an "impairment that *substantially limits* one or more of the major life activities of the individual"), *with* Cal. Gov't Code § 12926(k)(1)(B) (West 1997) (defining "physical disability" as a condition that "*limits* an individual's ability to participate in major life activities").

In 1999, the United States Supreme Court held that "a person [must] be *presently* — not potentially or hypothetically — substantially limited in order to demonstrate a disability" within the meaning of the ADA. *Sutton*, 527 U.S. at 482 (emphasis added). This conclusion turned largely on the fact that "the phrase 'substantially *limits*' appears in the Act in the present indicative verb form." *Id.* (emphasis added). The definition of "physical disability" employed in FEHA and of "mental and physical disability" in California Civil Code section 54 also use the present indicative verb form, "limits." We assume *arguendo* that the definition of mental disability for purposes of the Unruh Act pre-2000 would also have been expressed using "limits" in the present indicative. We cannot, however, take the next step Standard urges: that the verb form compels reading the Unruh Act in the restrictive manner *Sutton* read the ADA. To do so would fly in the face of the California Legislature's clearly expressed intent that the Unruh Act's antidiscrimination provisions be read broadly, and that it looked to the ADA as a model for putting a floor on coverage for the disabled, not a cap on liability.

First, when it adopted the "limits" terminology of the ADA, the Legislature also specified that, for purposes of FEHA:

> It is the intent of the Legislature that the definition of "physical disability" in this subdivision shall have the *same meaning as* the term "physical handicap" formerly defined by this subsection and construed in *American National Ins. Co. v. Fair Employment & Housing Com.*, 32 Cal.3d 603.

Cal. Gov't Code § 12926(k)(4) (West 1997) (emphasis added); *see also Cassista v. Cmty. Foods, Inc.*, 5 Cal.4th 1050, 1059 (1993) (discussing the legislative intent to maintain continuity of the definition). In *American National*, the California Supreme Court interpreted the term "physical handicap" as used in the pre-1992 version of FEHA broadly and, among other things, held that the term included physical

conditions "that *may handicap in the future but have no presently disabling effect.*" *Am. Nat'l Ins. Co. v. Fair Employment and Hous. Comm'n*, 32 Cal.3d 603, 610 (1982) (emphasis added).[8]

By adopting *American National*'s interpretation, the California Legislature made clear that it did not understand the term "limits" in the 1992 version of FEHA to imply a requirement of present disability, contrary to the Supreme Court's later interpretation of the same term in the ADA in *Sutton*. The same 1992 act that incorporated the limits language into FEHA also did so for section 54, albeit further requiring that the limitation be substantial. Given the clear legislative understanding of the term "limits" in FEHA as being consistent with *American National*'s holding that a presently disabling condition was not necessary, we must assume — absent compelling evidence otherwise — that the California Legislature did not intend a different understanding of that term in other sections that were amended by the same legislation.[9] Thus,

[8]The version of FEHA in effect at the time *American National Insurance Co.* was decided in 1982 did not use the "limits" terminology. Rather, it defined "physical handicap" to include an "(1) impairment of sight, hearing or speech, or (2) impairment of physical ability because of amputation or loss of function or coordination." *Am. Nat'l Ins. Co.*, 32 Cal.3d at 608.

[9]Relying on *Harris*, 52 Cal.3d at 1173-1174, Standard contends that the California Supreme Court has expressly disapproved an analogy between FEHA and the Unruh Act. In that case, the court refused to apply FEHA's disparate impact test to the Unruh Act. In doing so, it stated that "the *general* antidiscriminatory objectives of the Unruh Act are much broader than the *specific* antidiscrimination principles underlying titles VII and VIII . . . [and] their state FEHA counterparts." *Id.* at 1174 (internal quotation marks omitted). This language does not foreclose our analysis that the two statutes use the same definition of the term "limits." While application of the disparate impact model — a new *type* of liability — to the Unruh Act would expose all businesses to "new liability and potential court regulation of their day-to-day practices," *id.*, no such consequence flows from application of FEHA's definition of the term "limits" across the California statutes amended by the same 1992 Act.

whether construing FEHA's or Civil Code section 54's use of the word "limits" or the Unruh Act's implied incorporation of that terminology as of 1997, we should assume that a plaintiff would have been considered disabled if she was regarded as having a disability that might limit a major life activity in the future.

[6] The 2000 amendments therefore did not alter, but merely clarified, that California's disability antidiscrimination statutes — although historically modeled on the ADA — are broader than federal law, as it came to be interpreted by the Supreme Court in *Sutton* in 1999. This conclusion is reinforced by the California Legislature's own declaration enacted in 2000 as part of the Poppink Act and by that Act's legislative history.

2. Legislative Statement that the 2000 Amendment was Merely Declaratory of Existing Law

In the Poppink Act the Legislature declared that:

> The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, *this state's law has always, even prior to passage of the federal act, afforded additional protections.*

Cal. Gov't Code § 12926.1(a) (emphasis added). This statement appears to be at least in part a reference to the California Supreme Court's decision in *American National*, which preceded the enactment of the ADA by eight years. For instance, the Report of the Assembly Committee on the Judiciary specifically noted that the incorporation by the Poppink Act of *American National*'s interpretation of FEHA into California Government Code section 12926(k)(4) reflected that California law has always been different from the ADA as inter-

preted in *Sutton*.[10] *See* Assembly Comm. on Judiciary, Bill Analysis of Assembly Bill No. 2222, 1999-2000 Reg. Sess., at 4-5 (Apr. 11, 2000) (noting that *American National* is contrary to *Sutton* and that "the more restrictive ADA definition, as recently construed by the U.S. Supreme Court, should not . . . be allowed to preclude a finding that a person is disabled under FEHA). Moreover, this declaration echoes the intent of the California Legislature in 1992 "to strengthen California law in this area . . . where it is weaker than the Americans with Disabilities Act of 1990 . . . and *to retain California law when it provides more protection for individuals with disabilities than the [ADA].*" *Gatto*, 98 Cal. App. 4th at 759 (quoting Assemb. Bill No. 1077, ch. 913, § 1, 1992 Cal. Stat. 4282) (emphasis added).[11] "[A]lthough construction of a statute is a

[10]Standard notes that a prior version of the Poppink Act contained legislative findings that specifically stated:

> The Legislature declares that the amendments made by this act to subdivisions (h), (i), and (k) of Section 12926 of the Government Code and Sections 51, 51.5, and 54 of the Civil Code are declaratory of existing state law.

See Assembly Bill No. 2222 § 1.5, 1999-2000 Reg. Sess., at 2 (as amended on May 26, 2000). On July 6, 2000, the bill was amended to delete these findings and to replace them with those now codified at California Government Code § 12926.1. *See* Assembly Bill No. 2222, 1999-2000 Reg. Sess., at 3 (as amended on July 6, 2000). This substitution does not help Standard, however. The declaration that was enacted continues to note the historical distinction between the ADA and California law. Moreover, unlike the original draft, the enacted declaration recognizes that the amendments clarified some aspects of the law while changing others. Thus, § 12926.1 appears to be a more narrowly tailored declaration of the clarification of existing law.

[11]Our understanding of § 12926.1 as declaratory of existing law is supported by the California Supreme Court's decision in *Colmenares*. The lower court's decisions in *Colmenares*, previously published at 89 Cal. App. 4th 778, 781-84 (2001), read § 12926.1 as indicating a modification. In coming to this conclusion, it emphasized a few select words in the declaration that it believed demonstrated the statute "tells us not what the law already says but that, in a time yet to come, the statute is intended *to result in* broader coverage." *Id.* at 781-83 (relying on the words "to result in" in

judicial function, where a statute is unclear, a subsequent expression of the Legislature bearing upon the intent of the prior statute may be properly considered in determining the effect and meaning of the prior statute." *Tyler v. State*, 134 Cal. App. 3d 973, 977 (1982).

Nonetheless, Standard contends the legislative history of the Poppink Act shows that it modified existing law and was not intended merely as a clarification. It notes two press releases from the bill's author, then Assembly Member Sheila James Kuehl, which state that the Poppink Act was "designed to strengthen the rights of workers with disabilities." Standard also relies on the report of the Assembly Committee on Appropriations, which stated that the bill:

> *Modifies* and standardizes the definitions of "mental disability," "physical disability" and "medical condition" for purposes of California's Unruh Civil Rights Act and Fair Employment and Housing Act (FEHA) and *to clarify* that California's disability protections are broader than federal protections under the Americans with Disabilities Act (ADA).

Assembly Comm. on Appropriations, Bill Analysis of Assembly Bill No. 2222, 1999-2000 Reg. Sess., at 1-2 (May 17, 2000) (emphasis added). These statements do not alter our conclusion; they simply show that the legislation modified the law in part and clarified it in part.

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subsection (c) and "to require" and "to provide" in subsection (d)). On the other hand, in *Wittkopf v. County of Los Angeles*, previously published at 90 Cal. App. 4th 1205, 1215-17 (2001), Justice Boland interpreted § 12926.1 as a declaration of existing law, noting as we do that the section begins by stating that California disability antidiscrimination law has always been broader than the ADA. In reversing *Colmenares* and upholding *Wittkopf*, the California Supreme Court clearly expressed its preference for Justice Boland's analysis.

First, Standard's argument ignores statements of the intent to clarify contained in these same sources. Second, the California Supreme Court, in *Colmenares*, specifically held that parts of the Poppink Act were intended to clarify rather than to modify existing law. *Colmenares*, 29 Cal.4th at 1030-31. Finally, we find no anomaly in legislative statements that the Poppink Act was designed both to modify *and* to clarify. Clearly, the amendments did both. For instance, the Poppink Act modified the definition of "disability" in section 54 to delete the requirement that a limitation be substantial. *Compare* Cal. Civ. Code § 54(b) (West 1997), *with* Cal. Civ. Code § 54(b) (West 2003) (incorporating the definition enacted by the Poppink Act and found in Cal. Gov't Code § 12926). The Poppink Act both modified and clarified FEHA, first by adding the "limits" language to the definition of "mental disability," then by clarifying that FEHA — past or present — did not require that a limitation be substantial. *Compare* Cal. Gov't Code § 12926(i) (West 1997) (no limits language for mental disability), *with* Cal. Gov't Code § 12926(i)(1) (West 2003) (adding limits language). Thus, it is not surprising that the Legislature would have referred to both modification and clarification.

Moreover, the intent to clarify that California disability antidiscrimination law is broader than that of the ADA is evident throughout the legislative history of the Poppink Act. The Assembly Committee on the Judiciary framed the "key issue" as whether "the definition of mental and physical disability and medical condition [should] be clarified in California's civil rights laws," Assembly Comm. on Judiciary, Bill Analysis of Assembly Bill No. 2222, 1999-2000 Reg. Sess., at 1 (Apr. 11, 2000), and specifically stated that the bill would "*clarify* the definition" of disability in the Unruh Act, which had previously "had no definition at all." *Id.* at 5 (emphasis added). Additionally, the California Supreme Court in *Colmenares* emphasized that certain changes to the Unruh Act were made to "*clarify*[ ] that California's disability protections are

broader than federal protections." 29 Cal.4th at 1027 (emphasis in original).

Only one piece of legislative history counsels against our interpretation. The Report of the Senate Judiciary Committee cast the bill as one which "make[s] various definitional changes to the existing civil rights laws" and that "[t]he greatest change" is the definition of "limitation," which is to be determined without regard to mitigating measures. Senate Comm. on Judiciary, Bill Analysis of Assembly Bill No. 2222, 1999-2000 Reg. Sess., at 1 (Aug. 8, 2000).

[7] Despite this one statement, we are persuaded that existing law as relevant here was merely clarified and that California law has not required that a plaintiff be regarded as having a presently limiting condition. This intent is evident in the wealth of legislative statements, the declaration contained in California Government Code section 12926.1, the California Supreme Court's decision in *Colmenares* and our own review of California law as it existed before the 2000 amendments. Because Goldman established that Standard refused to insure her based on a mental condition that has no present disabling effect, but that may become a mental disability that will substantially limit Goldman's ability to engage in a major life function, she has established that she was "disabled" in 1997 within the meaning of the Unruh Act.

B. Goldman presents a genuine issue of material fact as to the reasonableness of Standard's decision to deny her coverage.

[8] Standard might still be entitled to summary judgment if its decision to deny Goldman insurance coverage because of her assumed disability was reasonable as a matter of law. We have held that California Insurance Code section 10144 establishes the standard for assessing the reasonableness of a nonstandard insurance premium, prohibiting any insurer from refusing insurance "solely because of a physical or mental

impairment," except where the refusal "is based on sound actuarial principles or is related to actual and reasonably anticipated experience." *Chabner*, 225 F.3d at 1050 (quoting Cal. Ins. Code § 10144).

[9] Viewing the facts most favorably to Goldman as the nonmoving party, we conclude that Standard has not established as a matter of law that its decision to refuse coverage to Goldman was "based on sound actuarial principles" or "related to actual and reasonably anticipated experience." Goldman has presented sufficient evidence to create triable issues of fact regarding both prongs of the section 10144 standard. In assessing Goldman's proffered evidence, our role is not to "weigh the evidence [or] determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1140 (9th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

First, Goldman's actuarial expert, Charles C. DeWeese, examined Standard's underwriting policy regarding adjustment disorder and concluded in his expert witness report that Standard's policy as well as its application to Goldman was inconsistent with principles of risk classification embodied in Actuarial Standard of Practice No. 12. DeWeese's expert opinion thus creates a triable issue whether Standard's refusal of coverage was "based on sound actuarial principles," section 10144's first prong.

Second, Goldman presented evidence to refute Standard's fundamental thesis relating to section 10144's second prong — that a diagnosis of adjustment disorder may predict future disability. Goldman's experts challenged this proposition on the basis of medical data, actuarial principles and actual experience.

According to Goldman's expert, Gary S. Sachs, M.D., nothing in his clinical experience, research or the professional literature suggests that employed individuals with a current diagnosis of adjustment disorder are more likely than other

individuals to become subsequently disabled from working for any non-psychiatric or psychiatric reason. Dr. Sachs specifically contradicted the declarations of Standard's own actuarial and underwriting experts. Similarly, Goldman's actuarial expert, DeWeese, stated that no "credible publicly available actuarial data, studies, or other objective evidence," including Standard's own studies, "support the proposition that working individuals with adjustment disorder and/or receiving mental health counseling are at a higher risk than other individuals to subsequently become disabled from working."

Both of these experts' opinions directly challenged the validity of Standard's studies. They criticized Standard for grouping together all individuals with psychiatric conditions or receiving medical health services as posing a similar risk of subsequent disability from working. The experts explained that such a grouping was not supported by medical data, reported claims experience or sound actuarial principles of risk classification. Dr. Sachs claimed that "better predictors of whether an individual will or will not subsequently become disabled from working are their personal work history, response to treatment, compliance with treatment, persistence of severe symptoms, prolonged periods of remission during treatment, and an absence of alcohol and substance abuse." DeWeese echoed the sentiment, stating that actuarial literature also recognized "an individual's work history and their motivation to work" as a "critical factor."

In addition to presenting evidence contradicting Standard's claim that individuals diagnosed with adjustment disorders are more likely to become disabled, Goldman also raised questions of fact as to whether Standard could profitably offer disability income insurance to Goldman. Dr. Sachs stated that Goldman did not present greater-than-average risk of becoming disabled. DeWeese disputed the more general proposition that "an insurance company jeopardizes the financial viability of the insurance by underwriting this risk [of mental disorder claims]." DeWeese pointed out that Standard's conclusion was based on the duration of psychiatric claims, a factor

which is relevant only when considered in conjunction with the number of claims. Moreover, DeWeese posited that Standard would not have to "increase prices dramatically" if it investigated and considered applicants with current or past treatment for a nondisabling psychiatric condition.

Who is correct in this battle of experts is not for us to decide. We do conclude, however, that Goldman's expert evidence is sufficient to deny Standard summary judgment on its section 10144 defense.

III.

Goldman's Section 17200 claim

[10] California's unfair competition law, Business & Professions Code section 17200 *et seq.*, prohibits "any unlawful, unfair or fraudulent business act or practice. . . . By proscribing any unlawful business practice, § 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999) (quotations and citations omitted). Because summary judgment is not warranted on Goldman's Unruh Act claim, her claim under section 17200 also survives.

Goldman urges that we hold Standard liable under section 17200 even if we conclude Standard has not violated the Unruh Act. Goldman relies on the principle that "a practice may be deemed unfair even if not specifically proscribed by some other law . . . . In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Id.* at 180. But there is a "safe harbor" exception to this principle that precludes Goldman's attempt to isolate her section 17200 claim. *Id.* at 165-66.

Under California law, if the Legislature has provided a safe harbor for certain conduct, that conduct will not create liabil-

ity under section 17200. But "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct." *Id.* at 183. We view California Insurance Code section 10144 as meeting this standard. As we have seen, it specifically permits an insurance company to refuse coverage on the basis of a mental impairment, as long as that denial was "based on sound actuarial principles or [was] related to actual and reasonably anticipated experience." Section 10144 provides a safe harbor for such denials of insurance coverage, thereby defeating a section 17200 claim based upon "unfair business practices." Thus, Goldman's section 17200 claim is dependant upon her prevailing on her Unruh Act claim and overcoming Standard's reasonableness defense under section 10144.

Conclusion

We hold that, unlike the ADA as interpreted by the United States Supreme Court in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), the 1997 version of the Unruh Act did not require a presently limiting disability. The 2000 Poppink Act merely clarified that this was the existing state of California law. Goldman satisfies the Unruh Act definition of disability that was effective in 1997, because Standard regarded her as having a mental disorder that has no presently disabling effect but may have that effect in the future. Further, Goldman has sufficiently disputed Standard's claim that its decision was based on sound actuarial principles or related to actual and reasonably anticipated experience. Cal. Ins. Code § 10144. Therefore, the district court's grant of summary judgment on Goldman's Unruh Act claim is reversed as is the court's grant of summary judgment on Goldman's unfair competition claim.

REVERSED AND REMANDED.