#52 9/13/68

First Supplement to Memorandum 68-86

Subject: Study 52 - Sovereign Immunity (Statute of Limitations)

The tentative recommendation relating to the Statute of Limitations in Actions Against Public Entities and Public Employees is attached to Memorandum 68-86. In this supplement we consider the comments we received on the tentative recommendation.

General reaction

Generally speaking, the tentative recommendation was not favorably received by either attorneys representing public agencies or attorneys representing injured plaintiffs. For example, Harry Gonick (Exhibit I) states:

> Although I have not read the tentative recommendation, my first impression is that it is a step backward. I feel sure that if you were to take a poll of all the lawyers in California who are concerned with such litigation, including defense lawyers, at least 90 per cent would favor the repeal of all special statutes pertaining to actions against public entities and public employees. (Emphasis in original.)

Daniel N. Fox, who also apparently did not read the tentative recommendation (his letter appears to be based on our newspaper release), states (Exhibit VI):

> Please be advised that I strongly feel that Section 352 of the Code of Civil Procedure should apply to actions against public entities and public employees. The rule of Williams vs. Los Angeles Metropolitan Transit Authority should not be changed.

The County Counsel of Los Angeles (Exhibit IV) supports the basic policy of the bill but suggests that the notice and warning provisions be made applicable only to the claimants who are entitled to special protections due to their disabilities. The County of San Diego

(Exhibit III) apparently supports the basic policy of the bill and suggests several revisions (discussed later) which the staff believes would improve the recommended legislation.

The City Attorney of Long Beach (Exhibit V), on the other hand, objects to the recommendation, stating: "We sincerely hope that the Law Revision Commission will be dissuaded from recommending the amendments pertaining to rejection notices and those extending the period of limitations." While the position of the Long Beach City Attorney is, I believe, based on a misunderstanding of the existing law, he states:

> In our opinion, the claims statutes as they currently exist already present a complex and sometimes confusing area for the average laymen, and even for attorneys who do not devote much of their practice to claims against public entities, and we feel that the proposed recommendations further complicate and place additional burdens upon the entities and claimants, or their attorneys.

This is basically the position of many lawyers who are confused and sometimes trapped by the complex claims statutes. The Long Beach City Attorney suggests the following to eliminate the existing complexity:

> To simplify and coordinate claims procedure against public entities with other periods of limitations with which both laymen and practicing attorneys are generally familiar and work with more consistently and, because claims involving personal injury against public entities appear to presently constitute the claims of greatest pecuniary concern on the part of both public entities and claimants, it is our suggestion that the Law Revision Commission consider recommending that in claims encompassed within 911.2, Government Code, the statute of limitations should be a straight one year period commencing on the date the claim accrued (in most cases this would be the date of the wrongful act or omission), as is now the period provided in cases of personal injury against defendants who are not public entities. The condition precedent to a valid cause of action that the claim was presented to the entity within 100 days from the date it occurred should of course be retained. The entity

should not be saddled with the additional requirement to notify the claimant of its obvious inaction and denial of the claim by operation of law within 45 days after date of presentation.

The staff had given this matter considerable thought prior to the time we received the above suggestion. For some time, we have been concerned that the claims statute is so complex that it is resulting in substantial injustice (we hear from time to time from lawyers who have been trapped by the statute) and has generated a substantial amount of paper work for claimants and public entities, including judicial proceedings involving the issue of late claims. We doubt that the "prompt notice" (100 days in case of an adult and, for all practical purposes, one year in the case of a minor) is really as essential as the public agencies claim. We feel fairly sure that the "opportunity to consider the claim before suit is filed" is of no great value to public entities. We have no doubt that the claimant will present a claim before he commences suit merely because he will wish to avoid suit if possible and to settle the claim without suit. Accordingly, the staff suggests that the Commission not submit the tentative recommendation to the 1969 Legislature but instead undertake to draft a tentative recommendation along the following lines:

(1) Eliminate any requirement that a claim be presented to a public entity as a condition for bringing an action against a public entity or public employee.

(2) Provide that a tort or inverse condemnation action must be commenced against a public entity or public employee within one year from the time the cause of action accrues. The provisions for tolling the statute in the case of a minor or incompetent would not apply to

actions against public entities or public employees, but the other provisions tolling the statute would apply.

(3) Provide that an action on contract is governed by the same periods of limitation that apply to contracts generally.

The effect of this recommendation is to require the plaintiff's attorney to remember only one thing--an action against a public entity on tort or inverse condemnation must be commenced within one year, even though the claimant is a minor or incompetent. It is possible that some attorneys might get trapped in the case of a minor or incompetent, but this is not likely. The existing statutory scheme is so complex that even able, informed lawyers are trapped. The recommendation would eliminate the opportunity public agencies now have to defeat meritorious actions by the technical defense that the plaintiff failed in some respect to comply with the claims statute. On the other hand, the recommendation would not seriously handicap public agencies as far as notice is considered. One year is not that much more than 100 days and in the case of a minor it makes no change since the minor has a year to present the claim. The one-year statute of limitations would benefit public agencies because minors and others who are under a disability now have the benefit of Code of Civil Procedure Section 352 which tolls the statute of limitations and would not apply under the staff recommendation. Not the least of the benefits that would result from the recommendation would be the reduction in cost of paperwork in processing claims under the claims statute, both for claimants and public entities. The staff believes that the Senate and Assembly Judiciary Committees would give serious consideration to a bill drafted along the lines indicated; whether the bill could be

enacted would depend to some extent on the position of the Department of Public Works, the Attorney General, and the League of California Cities. But the staff believes that there would be a good chance to obtain the enactment of such a bill even over substantial objections from public entities.

Suggested revisions of tentative recommendation

As previously noted, the County Counsel of Los Angeles suggests that the notice and warning provision be made applicable only to claimants who are entitled to special protections due to their disabilities. The staff does not believe that this would be a desirable limitation; no doubt claimants who are adults are being trapped by the six-month limitation period and the proposed statute would minimize this.

Sections 352, 910.8 (pages 8-10)

No comments.

Section 911.8 (page 11)

The County of San Diego (Exhibit III) suggests that this section be revised. We think that the revision is desirable but should be made in Section 913. (Section 913 deals with actions on claims; Section 911.8 deals with applications to file a late claim.)

Section 913 (page 12)

To accomplish the purpose of the suggestion made by San Diego County, we suggest that subdivision (a) be revised to read:

> (a) Written notice of the action taken under Section 912.6 or 912.8 or of nonaction deemed denial of the claim shall be given in the manner prescribed by Section 915.4.

The County of San Diego suggests that permissive language for the notice be included in the statute as well as mandatory language for the warning. The staff believes that this is a good suggestion. We suggest that the following be added to subdivision (a):

> The written notice may be in substantially the following form:
>
> > "Notice is hereby given you that the claim which you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of $____ and rejected as to the balance, rejected by operation of law, whichever is applicable)."

Section 950.4 (page 18)

Both Commissioner Sato and Commissioner Stanton, in forwarding their editorial revisions of the tentative recommendation, raised a question as to actions against public employees. It is necessary to include these provisions because Government Code Section 950.2 provides:

> 950.2. Except as provided in Section 950.4, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liability for the injury.

Note that Section 950.2 applies even though the public entity is immune from liability for the injury. In some cases, whether such immunity existed could not be determined until the case had been decided by the trier of fact (i.e., where the plaintiff recovers punitive or exemplary damages--entity but not employee immune). In addition, there may be a serious issue whether the employee

was in the scope of his employment. When the plaintiff's only real remedy is against the employee rather than the public entity, it seems that he should have the benefit of the statute of limitations provisions that he would have available if the employee were not employed by the public entity. Thus, if the employee is out of the state, the statute of limitations should be tolled as is the case of any other defendant. In cases where the public entity is not immune from liability and the statute is tolled because the defendant employee is out of state, the entity will be required to pay the judgment under the general provisions of the governmental liability statute.

Sanction

The staff is concerned that the proposed legislation provides no real motivation to the public entity to give notice to the claimant where the claimant is a minor. A minor has one year to present his claim, the entity gets 45 days to act on the claim, the claimant has six months to bring his action--a total period almost equal to the proposed two-year limitation period.

Respectfully submitted,

John H. DeMoully
Executive Secretary

1st Supp. Memo 68-86 EXHIBIT I

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August 21, 1968

California Law Revision Commission
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Re: Actions Against Public Entities and Employees

Gentlemen:

I have recently learned that you are distributing for comment a tentative recommendation relating to the statute of limitations in actions against public entities and public employees, for submission to the 1969 legislature. According to my information, the Commission has tentatively concluded that Section 352 of the Code of Civil Procedure (which tolls the statute of limitations when the plaintiff is a minor, prisoner, or incompetent) should not apply to actions against public entities and public employees.

Although I have not read the tentative recommendation, my first impression is that it is a step backward. I feel sure that if you were to take a poll of all the lawyers in California who are concerned with such litigation, including defense lawyers, at least 90 per cent would favor the repeal of all special statutes pertaining to actions against public entities and public employees

I would appreciate your furnishing me with a copy of the tentative recommendation, as I may wish to comment thereon more particularly

Very truly yours,

Harry Gonick

Harry Gonick
HG:jg

1ST SUPP. Memo 68-86

EXHIBIT II

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August 23, 1968

John H. DeMoully, Executive Secretary
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Stanford University
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RE: Statute of Limitations in Actions Against Public Entities and Public Employees

Dear Mr. DeMoully:

In my practice I have encountered a situation which may have a bearing on your proposal. Although it is tangental, it appears to be within the general scope of your review.

The situation is substantially as follows:

> I represent a State employee injured on the job. There is little question as to the usual workmen's compensation issues. There appears to be a "serious and willful" issue as well and I have filed such an application. It was filed within the time period provided by the Labor Code. SCIF, which represents the State, has raised the statute of limitations issue claiming that such an action is in the nature of a tort claim and that the time has run because of Section 945.6 and related sections. The matter has not gone to trial and may not because of settlement attempts.

It is my impression that SCIF plans to pursue the question in my case or some other similar one. They believe the law is unclear and wish to be certain of its application. You may wish to consider action which will straighten out that aspect of the law.

Very truly yours,

Robert H. Sharpe

ROBERT H. SHARPE

RHS/ms

1st Supp. Memo 68-86 EXHIBIT III

County of San Diego

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August 29, 1968

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention John H. DeMoully, Executive Secretary

Gentlemen:

Re: Statute of Limitations in Actions Against Public Entities and Public Employees

You have asked for my comments on your tentative recommendation relative to the above subject. A brief reference to the practice in San Diego County may be helpful.

Complaints received from claimants regarding the procedure employed by San Diego County in the handling of claims, particularly from those claimants whose claims were so small as not to justify the employment of the services of an attorney, have caused the Board of Supervisors of San Diego County to adopt a procedure of notifying each claimant at the time his claim is received not only of the receipt of the claim but also that the claim will be deemed denied if not acted on within 45 days and of the time limits for bringing court action following denial. Since claimants of so small an amount normally are unfamiliar with statutory or legal language the phrasing of such a notice involves considerable difficulty. Particularly is that true with respect to the alternative provisions of Chapter 134 of Statutes of 1968. I am delighted with the proposal to include in the statute a specific form in which that notice can in part be given. I would suggest the expansion of this proposal to include permissive language for the entire notice as well as mandatory language for the warning.

The situation with which the small amount claimant has the greatest difficulty is that in which the Board of Supervisors takes no action and the claim is deemed denied 45 days after it is received. For that reason I would suggest the amplification of your proposal to include specific reference to the nonaction

situation and specific requirement that notice must be given where nonaction constitutes rejection. For the purpose of accomplishing the foregoing objectives I would suggest an amendment to your proposed amendments in the following language:

(1) The revision of Section 911.8 as follows:

911.8. Written notice of the board's action upon the application or of nonaction deemed denial shall be given in the manner prescribed by Section 915.4.

(2) A revision of Section 913 by inserting a new subparagraph and relettering the present subparagraph (b) to (c)

913 (a).

(b). The written notice may be in substantially the following form:

"Please take notice that the claim which you presented to the (title of board or officer) on (date) was (rejected, allowed, allowed in the amount of $ and rejected as to the balance, rejected by operation of law, whichever is applicable)."

The commission's staff is to be commended for its efforts to protect the interests of both claimants and public entities.

Yours very truly,

Bertram McLees, Jr.

BERTRAM McLEES, JR.
County Counsel

BMc/cac

1st Supp. Memo 68-86 EXHIBIT IV

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September 5, 1968

AIR MAIL SPECIAL DELIVERY

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Statute of Limitations in Actions Against Public Entities and Public Employees - Tentative Recommendation

Dear Mr. DeMoully:

Regarding the tentative recommendation of the Law Revision Commission concerning the statute of limitations in actions against public entities and public employees, it appears that the basic purpose of the commission is to uniformly apply the six-month statute of limitations for filing actions against a public entity to all claimants regardless of any disabilities which they may be under.

In order to accomplish this, and yet preserve the rights of claimants who have disabilities, such as minors, insane people, and prisoners, the commission proposes to require notice to be given to the claimant of the action taken on his claim by the public entity, as well as a warning informing the claimant that he has six months to file an action from the date of the notice.

This office is in sympathy with the basic purpose of the commission in attempting to uniformly apply the six-month statute of limitations to all claimants. It is also our opinion that it would be a proper and fair procedure to give notice to claimants who are minors, prisoners, or insane,

informing them of the action taken on their claim and the fact that they have six months within which to file an action. However, there would appear to be no purpose in requiring that such notice and warning be sent to all claimants, and it would impose an unnecessary burden on the public entity to require it.

We would suggest that the notice and warning provisions be made applicable only to the claimants who are entitled to special protections due to their disabilities.

Very truly yours,

JOHN D. MAHARG
County Counsel

By Peter R. Krichman
PETER R. KRICHMAN
Deputy County Counsel

PRK:af

cc: Mr. John H. Larson
Mr. Norman J. Gilbert
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1st Supp. Memo 68-86 EXHIBIT V

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September 5, 1968

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Attention: John H. DeMoully
Executive Secretary

Gentlemen:

The City of Long Beach is self-insured, and all of the actions and claims against the City have been handled by the City Attorney's Office for a good many years. We are consequently acquainted with the state of affairs before the Muskopf decision and with the claims activities following the 1963 Tort Claims Act. At the time the California Tort Claims Act was first considered by the Legislature, Professor Arvo Alstyne then indicated the desirability of modifying the Government Code claims requirements for the reason that they constituted a "trap for the unwary".

Our review of the tentative recommendations of the California Law Revision Commission relating to the statute of limitations in actions against public entities and public employees, prompts us to offer the following observations:

1. The recommended statutory changes would further complicate an already confusing set of periods concerning claims and actions against public entities and employees.

2. Although it may be inferred from the editorial comment accompanying the recommended amendments, it is not absolutely clear that the proposed statutory changes would require an entity to send out the notice of rejection where the claim is deemed rejected by no action on the part of the entity.

3. If the proposed amendment does require that a notice be sent where the claim is deemed rejected by

failure of the entity to act within 45 days, this duty would place an additional task on the entities of determining, if possible, the date the claim was deposited in the mail in order to determine the correct date upon which the claim is deemed denied, as well as the obvious additional burdens of calendaring and the necessary paper work to accomplish the notice requirement.

4. There would be a burden placed upon the claimant to determine with certainty that the entity had not sent a rejection notice in order to enable him to rely upon the longer period of limitation by reason of there being no notice sent.

5. The period of limitations would in many cases be extended for a much longer period than the present statute of limitations that apply in cases of causes of action against defendants which are not public entities.

6. The proposed amendments would not only continue but would expand the number of different time periods involved in governmental claims procedure. Attorneys and laymen would be obligated to know and remember an additional and different "set of rules", which would be applicable in only a number of governmental claims cases.

7. The present method of determining the periods of limitation by using the time of placing the notice into a mail depository as the "triggering date" would be continued and the chances for error in such computations would be expanded.

It is interesting to note that when the California Tort Claims Act was enacted in 1963, the Legislature deemed it necessary to enact Section 342, California Code of Civil Procedure entitled "Actions Against Public Entities", which in effect refers the reader to Section 945.6 of the Government Code. The Law Revision Commission's comment to this section indicated that it was necessarily added to the limitations of actions provisions of the Code of Civil Procedure so that the statute of limitations applicable to actions upon claims by public entities may be discovered by looking at either 342 C.C.P. or the appropriate section of the Government Code. Therefore it has been acknowledged

that there should be coordination between the general statutes of law with those pertaining to claims against public entities.

On page 3 of the Commission's comment referring to the present proposed amendments, it is stated that there is justification for a short statute of limitations against public entities and employees. This does not appear to us to be the result which would be effected if the statute of limitations was extended to 2 years.

The Commission also comments that in its review of recent decisions there are a number of apparent meritorious actions which have been barred by the six-month statute of limitations that applies to actions against public entities. It would appear that occurrences of this nature would no longer be likely to happen, due to the 1968 amendment to 945.6, Government Code, which provides for the commencement of a cause of action within six months after the claim is rejected, or within one year from the accrual of the cause of action, whichever period expires later.

In our opinion, the claims statutes as they currently exist already present a complex and sometimes confusing area for the average laymen, and even for attorneys who do not devote much of their practice to claims against public entities, and we feel that the proposed recommendations further complicate and place additional burdens upon the entities and claimants, or their attorneys.

We are acquainted with no valid reason that the claims requirement and the statute of limitations should be interwoven. The purpose of a claim is to put the governmental entity on notice of a defect which it then can repair. Its only other function is to allow a speedy settlement of valid claims and a convenient inquiry into the circumstances of the event. If the 100 days claim requirement is treated separately, the governmental entity is not jeopardized by otherwise following the basic statute of limitations which in itself is already confusing enough.

It is regrettable that the Commission's present position avoids the rationale of both the claims requirements and the statute of limitations and is leading unnecessarily

into further confusion.

To simplify and coordinate claims procedure against public entities with other periods of limitations with which both laymen and practicing attorneys are generally familiar and work with more consistently and, because claims involving personal injury against public entities appear to presently constitute the claims of greatest pecuniary concern on the part of both public entities and claimants, it is our suggestion that the Law Revision Commission consider recommending that in claims encompassed within 911.2, Government Code, the statute of limitations should be a straight one year period commencing on the date the claim accrued (in most cases this would be the date of the wrongful act or omission), as is now the period provided in cases of personal injury against defendants who are not public entities. The condition precedent to a valid cause of action that the claim was presented to the entity within 100 days from the date it occurred should of course be retained. The entity should not be saddled with the additional requirement to notify the claimant of its obvious inaction and denial of the claim by operation of law within 45 days after date of presentation.

If our above-stated recommendations were enacted into law, the statute of limitations would then be the same period as that with which most attorneys and laymen are familiar and accustomed to watching for and working with. There would also be no additional burden on the part of the entity of notifying claimants of its obvious inaction and the sometimes almost impossible task of determining exactly what date or time a notice was placed in a mail depository would be eliminated. Claimants, or their attorneys, would not be obligated to determine whether the entity actually sent a notice of rejection. Additionally, the now confusing various periods for commencing actions would no longer exist and yet the statute of limitations would be short enough to accomplish the desired result of preventing stale actions from being brought against public entities.

We sincerely hope that the Law Revision Commission will be dissuaded from recommending the amendments pertaining to rejection notices and those extending the period of limitations.

Thank you for your consideration of our observations and suggestions.

Yours very truly,

LEONARD PUTNAM, City Attorney

By John R. Calhoun
Deputy

JRC:HV

Memo 68-87

EXHIBIT III

Chapter 491, Statutes of 1968

CHAPTER 491

SENATE BILL NO. 988

An act to add Section 53069 to the Government Code, relating to government contracts.

The people of the State of California do enact as follows:

SECTION 1. Section 53069 is added to the Government Code, to read:

53069.

In any agreement entered into whereby any city, county, city and county, or local agency obtains a grant of easement, lease, license, right-of-way or right-of-entry, the city, county, city and county or agency entering into the agreement may agree to indemnify and hold harmless the grantor, lessor, or licensor and may agree to repair or pay for any damage proximately caused by reason of the uses authorized by such easement, lease, license, right-of-way, or right-of-entry agreement. "Local agency" shall include any public district, public corporation, or other political subdivision of the state.

SEC. 2. The addition made by Section 1 of this act does not constitute a change in, but is declaratory of, the preexisting law.

Approved and filed July 9, 1968.