

5/7/69

First Supplement to Memorandum 69-59

Subject: Study 52 - Sovereign Immunity (Claims Statute) (SB 100)

Senate Bill 100 was heard by the Assembly Committee on Judiciary on May 5. It was obvious that representatives of public entities had devoted a great effort to lobbying the members of the Committee for an amendment which is attached to the letter set out as Exhibit I.

You will recall that the Commission determined that the public entity should be required to grant an application to file a late claim where the claimant had no knowledge of the claims presentation requirement and the public entity would not be prejudiced by the late filing. On the other hand, the revision sponsored by the public entities would permit a late filing where the public entity had actual notice of the incident giving rise to the claim and of the injury sustained, the claimant files an affidavit under penalty of perjury that he did not have personal knowledge of the requirements of this chapter and did not consult an attorney during the period required for presenting a claim, and the public entity is not prejudiced by the failure to present the claim within the 100-day period.

The Chairman was very insistent that the bill be amended to include the amendment suggested by the public entities. I resisted the amendment at the expense of some good will and finally requested an informal poll of the Committee members to determine how the Committee divided. Three members were in favor of the Commission bill as presented to the Committee, three were in favor of the public entity amendment, and the two others were absent. I suspect that the two absent members would vote in favor of the Commission proposal as submitted, but it is possible that, after the Committee has been further lobbied, we would lose one of the five votes I believe

we have for the bill as we recommend it. However, it should be recognized that the bill will have to go to the Ways and Means Committee, and it is much more difficult to get a decision from that Committee that does not reflect the effect of the cost of the proposal or the extensive lobbying that would take place if the bill were approved by the Assembly Judiciary Committee in the form we recommend it. Further, it is obvious that the State Attorney General's Office and the Department of Public Works sincerely believe that our proposal would substantially eliminate the protection afforded by the claims statute. The League of California Cities also is strongly of the same view. It is most likely that these groups would be able to persuade the Governor to veto our bill if it were enacted in its present form.

At the hearing in the Assembly, the Chairman suggested that the bill might be amended to provide that a late claim might be filed where the claimant did not know of the claims statute, had not consulted an attorney during the 100-day period, and the entity was not prejudiced. This is a very poor solution and I originally declined to accept the suggestion. However, during a brief intermission during which I discussed it with the State Bar representative, I decided to accept the suggestion as the best that could be obtained and the Committee reported out the bill as so amended. However, thereafter, the representative of the Department of Justice discussed the matter with the Chairman of the Committee, who then directed one of his attorneys on the committee staff to include the requirement of actual notice in the bill as reported out of committee. When I discovered this, I suggested to him that the bill be put over two weeks and that the Commission be provided with an opportunity to give further consideration to the bill.

The staff believes that the Commission submitted a recommendation that can be fully justified on the merits. However, it is obvious that the chance of that recommendation ever becoming law is exceedingly slim. Accordingly, we suggest that this is a time to consider the matter from a practical viewpoint and to determine the best course of action in light of the circumstances. The following are some of the possible actions that could be taken.

(1) Give the matter further study and submit a new recommendation to the 1970 Legislature. Perhaps the Commission was hasty in rejecting the six-month claims filing provision suggested by the State Bar. I have received a copy of the Minutes of the Northern Section of the State Bar Committee on Governmental Liability that supports the six-month claims filing period. However, the staff is of the view that this would be an undesirable solution; it is apparent that it would never meet the approval of public entities and extremely doubtful that it would ever become law. This alternative should be considered only if it becomes impossible to work out any satisfactory solution to the problem at the current session.

(2) Go with the bill as presently drafted. It is doubtful that the bill will ever become law in its present form. Hence, we do not consider this as a real alternative.

(3) Attempt to work out a compromise with the public entity representatives. This is the alternative suggested by the staff. We believe that something in the way of improvement is better than nothing. The bill would give public entities some benefit in the revision of the statute of limitations. In addition, it seems to us that it would be in the interest of the public entities to eliminate the trap created by the claims presentation requirement in cases where the claimant had no knowledge of the

claims presentation requirement and the entity had actual notice of the accident and resulting injury. Accordingly, we suggest that the bill be amended as set out in Exhibit II attached.

The attached draft would adopt the substance of the public entity proposal except that it would eliminate the requirement that the claimant did not consult an attorney during the period required for presenting the claim. The Chairman of the Committee is strongly of the view that this is a desirable requirement; he believes that there is no need to protect an incompetent attorney. However, unless we do provide some protection to attorneys in this area, we will continue to have a demand to repeal the claims statute and a general dissatisfaction with the existing situation. Moreover, this provision creates a problem. What if the claimant consults an attorney on the 89th day. Is he trapped because he then has no time to get his claim filed. We do not believe that the comment or statute should contain any reference to this situation. It should be noted, further, that the client is not necessarily protected if he is left merely with a cause of action for malpractice against his attorney because of the practical problems of proof and also because of the difficulty of obtaining representation on such a claim in some areas of the state.

The staff believes that the attached draft represents the maximum that can reasonably be offered to public entities by way of compromise. It should be noted that it is not unlikely that the California Supreme Court would rule that lack of knowledge of the claims statute constitutes "excusable neglect" as a matter of law if a case comes before the court. The only decisions to the contrary are court of appeal decisions. Hence,

if no compromise can be worked out, we believe that the matter should be given further study and that the bill be dropped for the current session. It is further noted that we have never made a general distribution to our list of commentators on governmental liability of the portion of the bill that makes a revision in the claims presentation requirement. In addition, it is always possible that the State Bar can obtain some support for its position. Nevertheless, taking into account all factors, the staff believes the best solution to the entire problem would be to work out a compromise along the lines suggested by the staff.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

1st supp Memo 68-59

EXHIBIT I

LEAGUE OF CALIFORNIA CITIES

MEMBER NATIONAL LEAGUE OF CITIES

(Formerly--American Municipal Association)

"WESTERN CITY" OFFICIAL PUBLICATION

Berkeley 94705 . . Hotel Claremont . . 843-3083 . . Area Code 415

Los Angeles 90017 . . 702 Statler Center . . 624-4934 . . Area Code 213

1108 "O" Street
Sacramento, California 95814
April 30, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94205

Dear John:

Thank you for providing me with an advance copy of the amendments to Senate Bill 100 together with your report and suggested draft of new Comments.

We are unable to support the amendment of Section 911.6(b)(1) of the Government Code. There would be no defense in most cases to an assertion of lack of knowledge. The requirement for presenting a claim within a statutory period of time is certainly not unique, and every person is charged with knowledge of numerous other analogous laws. The last sentence of your suggested comment to Section 911.6 is particularly objectionable. This would, in effect, condone malpractice on the part of an attorney. It is my understanding that representatives of the other public entities, both state and local, are opposed to this latest amendment and suggested draft of the committee report and Comment.

As you know, we did not oppose Senate Bill 100 as introduced. We agree with you that the bill is a better approach than the State Bar bill, Senate Bill 464. We shall continue to oppose the latter.

I have enclosed a draft of alternative language for an amendment of Section 911.6 which I have discussed with a number of the other public entity representatives, and which they have indicated would be acceptable to them. I have also furnished Harold Bradford with a copy of the draft. It appears to me that this language should be

Mr. John H. DeMouilly
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acceptable to the Commission and to the State Bar, and that it would provide a reasonable solution to the problem sought to be resolved. The proposed Comment should be revised accordingly.

As you know, we do not believe that the sanction contained in Section 945.6(a)(2), as amended by the bill, is either desirable or necessary. Are similar sanctions to be imposed wherever a governmental body is charged with an affirmative duty? I understand that you would consider reducing the time within which suit may be brought, where the required written notice has not been given, from two years to one year. Certainly the statute of limitations should not be longer than the general statute applicable to actions against private persons.

We will support Senate Bill 100 if amended as provided herein. We will oppose the State Bar proposal, Senate Bill 464.

Very truly yours,

Bill

William G. Holliman, Jr.
Assistant Legal Counsel

WGH:pc

cc: Senator Alfred H. Song
Assemblyman James A. Hayes

PROPOSED AMENDMENT OF SENATE BILL 100 AS AMENDED
IN THE ASSEMBLY ON APRIL 21

911.6. (a) The board shall grant or deny the application within 45 days after it is presented to the board. If the board does not act upon the application within 45 days after the application is presented, the application shall be deemed to have been denied on the 45th day.

(b) The board shall grant the application where:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect ~~or because of lack of knowledge of the requirement that a claim be presented,~~ or where the public entity had actual notice of the incident giving rise to the claim and of the injury sustained, and the claimant files an affidavit under penalty of perjury that he did not have personal knowledge of the requirements of this chapter and did not consult an attorney during the period required for presenting a claim, and the public entity was not prejudiced by the failure to present the claim within the time specified in Section 911.2; or

(2)

(3)

(4)

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EXHIBIT II

AMENDMENTS TO SENATE BILL 100

AMENDMENT 1

In the second line of the title of the printed bill as amended in Assembly April 22, 1969, after "910.8" insert:

911.4,

AMENDMENT 2

On page 2, after line 27, insert:

Sec. 2.5. Section 911.4 of the Government Code is amended to read:

911.4. (a) When a claim that is required by Section 911.2 to be presented not later than the 100th day after the accrual of the cause of action is not presented within such time, a written application may be made to the public entity for leave to present such claim.

(b) The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) of this chapter within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application.

(c) The application shall be accompanied by one or more affidavits or declarations under penalty of perjury stating in detail those facts upon which the application is based of which the affiant or declarant has personal knowledge.

AMENDMENT 3

On page 2, lines 38 and 39, strike out "or because of lack of knowledge of the requirement that a claim be presented".

AMENDMENT 4

On page 2, after line 41, insert:

(2) The person who sustained the alleged injury, damage or loss did not have personal knowledge of the requirements of this chapter within the time specified in Section 911.2 for the presentation of the claim and by reason of such lack of knowledge failed to present the claim within such time, the public entity had actual notice within such time of the incident giving rise to the alleged injury, damage or loss and that such incident caused such person injury, damage or loss and the public entity was not prejudiced by the failure to present the claim within such time; or

AMENDMENT 5

On page 3, line 1, strike out "(2)" and insert:

(3)

AMENDMENT 6

On page 3, line 4, strike out "(3)" and insert:

(4)

AMENDMENT 7

On page 3, line 9, strike out "(4)" and insert:

(5)

AMENDMENT 8

On page 5, lines 21 and 22, strike out "or because of lack of knowledge of the requirement that a claim be presented".

AMENDMENT 9

On page 5, after line 25, insert:

(2) The person who sustained the alleged injury, damage or loss did not have personal knowledge of the requirements of Chapter 2 (commencing with Section 910) of Part 3 of this division within the time specified in Section 911.2 for the presentation of the claim and by reason of such lack of knowledge failed to present the claim within such time and the public entity had actual notice within such time of the incident giving rise to the alleged injury, damage or loss and that such incident caused such person injury, damage or loss unless the public entity establishes that it would be prejudiced if the court relieves the petitioner from the provisions of Section 945.4; or

AMENDMENT 10

On page 5, line 26, strike out "(2)" and insert:

(3)

AMENDMENT 11

On page 5, line 29, strike out "(3)" and insert:

(4)

AMENDMENT 12

On page 5, line 34, strike out "(4)" and insert:

(5)

5/8/69

EXHIBIT III

SUGGESTED DRAFT

of

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON SENATE BILL 100

In order to indicate more fully its intent with respect to Senate Bill 100, the Assembly Committee on Judiciary makes the following report.

The Comments contained under the various sections of Senate Bill 100 as set out in the Recommendation of the California Law Revision Commission Relating to Sovereign Immunity: Number 9--Statute of Limitations in Actions Against Public Entities and Public Employees (September 1968), printed in the Annual Report of the Law Revision Commission (December 1968) at page 49 reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Senate Bill 100.

The following new Comments to sections contained in Senate Bill 100 also reflect the intent of the Assembly Committee on Judiciary in approving Senate Bill 100.

Government Code Section 911.6 (amended)

Comment. Paragraph (2) has been added to subdivision (b) of Section 911.6 and paragraph (2) has been added to subdivision (c) of Section 946.6 to require the board to accept a late claim under the circumstances therein specified. The application for leave to present a late claim must be made "within a reasonable time not to exceed one year after the accrual of the cause of action." See Section 911.4. See also Martin v. City of Madera, supra (application to present late claim not made within "reasonable time").

Whether a public entity has "actual notice" of the accident and injury is determined under the ordinary agency rules of imputed knowledge that would be applicable to a private person. This is the same test as is used in Section 835.2 ("actual notice" of dangerous condition of property).

Government Code Section 946.6 (amended)

Comment. See the Comment to Section 911.6.