

## First Supplement to Memorandum 74-42

Subject: Study 65.90 - Inverse Condemnation (Payment of Judgments Against Local Public Entities)

Attached is a letter from Gideon Kanner who objects to the tentative recommendation that would require public entities to levy property taxes to pay inverse condemnation judgments and that would permit payment of such judgments in installments.

Mr. Kanner **argues** that there should be no installment payment of inverse condemnation judgments despite the fact that installment payment of tort judgments already is authorized. It is, however, sometimes difficult to determine the theory upon which recovery is had where both tort liability and inverse condemnation liability are pleaded. Hence, the existing distinction between a tort judgment and an inverse condemnation judgment has the potential for creating problems as to what theory the jury used in reaching its judgment. The problem is a real one because, as you know, inverse condemnation liability was a means of permitting recovery prior to the abolition of sovereign immunity, and the older cases permit recovery on a theory of inverse condemnation for what is actually liability for a tort. Hence, it often will be possible in a tort case where damage to property is involved to plead the case on an inverse condemnation theory as well as on a tort theory.

If installment payment is not permitted, just what is the public entity to do when a catastrophe judgment is obtained? What can the plaintiff do if the local public entity does not have funds available to pay a large inverse condemnation judgment? Note also that, in the case of a catastrophe judgment, it is always possible for the public entity to file a petition in bankruptcy and complete proceedings under the Federal Bankruptcy Act. See Govt. Code § 53760. Accordingly, to permit payment in installments may benefit not only

the public entity but also the judgment creditor. In this connection, it should be noted that there is no evidence of any abuse by public entities of the authority to pay tort judgments in installments.

The Commission may wish to consider a related matter as a possible subject for an additional tentative recommendation. The staff recommends that Government Code Sections 53740-53747 (attached as Exhibit II) be amended to make those sections applicable to all public entities and to extend the scope of the sections to include inverse condemnation judgments. This would permit a local public entity to build up a fund for the purpose of paying inverse condemnation judgments and tort judgments. We propose that a tentative recommendation be prepared to effectuate this staff recommendation and that it be distributed for comment after it has been reviewed by the Commission.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

First Supp. 74-42

EXHIBIT I

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Dear John:

I am sorry that I could not comment earlier on the proposed legislation concerning payment of inverse condemnation judgments. However, comment is called for as the Commission seems to have overlooked a constitutional restriction on the payment of "just compensation".

Cal. Const., Art. I, Sec. 14, requires that just compensation for taking or damaging of private property for public use, be "first" paid to the owner or deposited into court for him. That constitutional guarantee (Art. I, Sec. 14) is self-enforcing (Rose v. State, 19 Cal 2d 713), and as such is neither dependent on legislative implementation, nor subject to legislative impairment.

In other words, California has constitutionally rejected the federal rule whereby just compensation is deemed provided as long as payment is actually made within a reasonable time of the taking. Instead, California requires by express constitutional provision, that just compensation "first" be paid or deposited into court for the owner ( numerous cases have held that the money is not deemed so deposited until the owner is able to withdraw it from court ).

In sum, in view of the fact that the constitution requires that payment "first" be made, it is difficult to see how the Commission can recommend a statute whose effect would be to ignore that constitutional limitation, in favor of some sort of a fly-now-pay-later statutory scheme purporting to give up to ten years to pay what the constitution requires to be paid "first".

Sincerely yours,

  
GIDEON KANNER

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EXHIBIT II

SECTION 1. Article 4.5 (commencing with Section 53740) is added to Chapter 4, Division 3, Title 5 of the Government Code, to read:

Article 4.5. Tort Liability Fund

53740. As used in this article, "local agency" means city, county, or district empowered to levy or assess taxes.

53741. By ordinance, the legislative body of a local agency may provide for the levy and collection of assessments or taxes for the creation and accumulation of a fund to provide for payments of claims arising under Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, and all legal and investigative costs arising from said claims.

53742. In making a levy, the legislative body shall not exceed any limitation upon its right to impose taxes prescribed by law except as authorized by law.

53743. If the local agency is a city or county operating under a charter, any limitations upon the levying of taxes imposed by the charter apply.

53744. In a local agency required to adopt a budget, all or part of the fund may be shown in the budget as reserves for future expenditures in subsequent years and when so shown shall be identified as to purpose, but need not be itemized.

53745. At any time after the creation of the fund the legislative body may transfer to the fund any unencumbered surplus funds remaining on hand at the end of the fiscal year.

53746. The fund shall be used exclusively for the payments of claims, judgments, and legal and investigative costs that may arise under Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

53747. This article is applicable only in counties with a population of 4,000,000 or more, as determined by the 1960 federal census