

Admin.

December 2, 2014

First Supplement to Memorandum 2014-41

New Topics and Priorities

The Commission¹ has received a letter, from attorneys Reuben A. Ginsburg and William R. Seligmann, suggesting a new topic for Commission study. The letter, which includes specific suggestions for statutory revisions, is attached as an exhibit.

DESCRIPTION OF PROPOSED STUDY

The proposed study involves the procedure for presentation of claims to a public entity under the Government Claims Act. Under that statute, there are time limits for the presentation of some claims.²

If such a claim is presented late, the public entity may return the claim within 45 days, along with statutory form notice indicating that the claimant's "only recourse" is to apply for leave to present a late claim.³

In applying for leave to present a late claim, the applicant must state the reason for delay in presenting the claim.⁴ The public entity must then either grant or deny leave to present a late claim. That decision must be based on specific criteria set out in the statute, involving circumstances that would excuse the lateness.⁵

If the public entity denies the application (either expressly or by the passage of 45 days without a response from the public entity), the claimant may petition the court to be excused from the claims presentation requirement. The court shall

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Gov't Code § 911.2.

3. Gov't Code § 911.3.

4. Gov't Code § 911.4.

5. Gov't Code § 911.6.

grant the petition if it finds specified grounds for excusing late presentation of the claim.⁶

While there is a well-developed procedure for addressing justifiable lateness in presenting a claim, there does not appear to be any statutory procedure for disputing that a claim was, in fact, presented late. That is the main issue addressed in the attached letter.⁷

Courts presented with that problem have held that the procedure for applying to present a late claim cannot be used to dispute that a claim was presented late.⁸ Instead, the claimant must file a complaint for damages and raise the lateness issue as part of that action:

Normally a complaint for damages against a public entity may not be filed until the public entity acts on a timely claim or, where the claim was not timely and an application for leave to present a late claim is denied, until a court grants the claimant relief from the requirements of the [Government] Claims Act. (§§ 945.4, 946.6.) Where, however, the claimant disputes the public entity's determination of untimeliness, the claimant must file a complaint for damages in order to raise this issue.⁹

Mr. Ginsburg and Mr. Seligmann propose that certain statutory notices be revised to acknowledge that possibility.¹⁰ They also propose some changes to the limitation periods relating to the late claim presentation process.¹¹

DISCUSSION

Mr. Ginsburg and Mr. Seligmann correctly note that the Government Claims Act is a topic on which the Commission has considerable institutional experience. That statute was enacted on Commission recommendation.

Despite that background, the Commission is not currently authorized to study the Government Claims Act. Before undertaking such a study, the Commission would need to request authority from the Legislature (by including the topic in its "calendar of topics" in its annual report) and the Legislature would need to grant that authority, by concurrent resolution or statute.¹²

6. Gov't Code § 946.6.

7. See Exhibit p. 2.

8. See, e.g., *Rason v. Santa Barbara City Hous. Auth.*, 201 Cal. App. 3d 817 (1988).

9. *Id.* at 827 (citations omitted).

10. See Exhibit pp. 4, 7.

11. See Exhibit pp. 3, 10-11.

12. Gov't Code § 8293.

The proposed study probably would not require much in the way of Commission resources. Any proposal to change the government claims procedure could be controversial, but the issue is fairly technical and narrow in scope. Mr. Ginsburg and Mr. Seligmann have identified the governing case law and have proposed specific revisions to address the matter.

In fact, given the degree of development of the proposal, it is not clear that Commission study would provide much additional benefit. The proposal seems ripe enough that it could be presented to a member of the Legislature for introduction as is. Alternatively, it could be submitted to another entity that regularly recommends legislation on such issues (e.g., the Litigation Section of the State Bar). Either approach would be much quicker than waiting for the Commission to obtain legislative authorization and complete a study of the matter, especially if other existing work priorities¹³ delay commencement of the new study.

If the Commission decides to study the proposed topic, the staff will draft appropriate language for inclusion in the next Annual Report and will look for an author to carry a resolution of authority. Work could not begin unless and until the Legislature approves the resolution, and would have to be coordinated with the Commission's other priorities.

How would the Commission like to proceed?

Respectfully submitted,

Brian Hebert
Executive Director

13. See Memorandum 2014-53 and its First Supplement.

GOVERNMENT CLAIMS ACT PROPOSED REVISIONS*

1. *Requested Action*

The legislature first enacted the Government Claims Act in 1959 based on a recommendation by the California Law Revision Commission (*Recommendation and Study Relating to the Presentation of Claims Against Public Entities*, 2 Cal. Law Revision Com. Rep. (1959) p. A-1). The CLRC later recommended revisions to the act on several occasions, including an extensive revision in 1963. The expertise and institutional knowledge of the CLRC make it the ideal body to study and recommend to the legislature proposed revisions to the act.

We request that the CLRC consider suggesting that the legislature refer to the CLRC as a topic for study and recommendation proposed revisions to the notice of untimely claim (Gov. Code, § 911.3) and other provisions discussed in this legislative proposal.

2. *Summary and Purposes*

This legislative proposal amends provisions in the Government Claims Act relating to a notice of untimely claim (Gov. Code, § 911.3), a notice of decision on an application to present a late claim (§ 911.8), the manner of giving notice (§ 915.4), the time to file suit on a claim (§ 945.6), and a petition for relief from the claim presentation requirement (§ 946.6). The purposes of this proposal are to

- conform the language of the notice of untimely claim with case law stating that a claimant can challenge the agency's decision that a claim was untimely in an action on the claim;
- clarify the notice provisions and include in the notice of untimely claim and notice of decision on an application to present a late claim a warning of the limitations period for an action on the claim;
- allow the agency to trigger the six-month limitations period for an action on a claim by including a warning in a notice of untimely claim and notice of decision on an application to present a late claim; and
- make the time to petition the court for relief from the claim presentation requirement run from the date of notice rather than the date of the agency's decision.

* The authors of this proposal, dated November 17, 2014, are Ben Ginsburg and Bill Seligmann. The authors may be contacted at reuben.ginsburg@jud.ca.gov, (213) 830-7273 and bill@southbaylaw.com, (831) 423-8383.

3. *Substantive Revisions*

Government Code section 911.3 states that in order to preserve the defense that a claim that was required to be presented within six months under Government Code section 911.2 was untimely, the public entity must within 45 days after the claim was presented give written notice that (1) the claim was untimely and (2) the claimant may apply for leave to present a late claim. Section 911.3, subdivision (a) sets forth language the substance of which must be included in the notice, including, “Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim.”¹

Courts have stated that the statutory language is inaccurate because an application for leave to present a late claim is not always the claimant’s “only recourse.” Instead, the claimant may challenge the agency’s decision that the claim was untimely in an action on the claim. (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 207, fn. 11; *Rason v. Santa Barbara City Housing Authority* (1988) 201 Cal.App.3d 817, 828.) This proposal corrects the inaccurate notice so as to inform the claimant of his or her right to challenge the timeliness decision in an action on the claim. (§ 911.3, subd. (a).)

This proposal also adds language to the notice of untimely claim and notice of decision on an application to present a late claim warning of the six-month limitations period for an action on a claim, and allows the agency to trigger this six-month period (in lieu of the two-year period under § 945.6, subd. (a)) by providing such notice. (§§ 911.3, subd. (a), 911.8, subd. (b).) The proposal also requires an agency to give notice in the event that its inaction on an application for leave to present a late claim is deemed a denial (§ 911.8, subd. (a)), consistent with a parallel provision in section 913, subdivision (a).

This proposal also adds provisions extending the time to file an action on a claim if the claimant timely applies for leave to present a late claim. This is intended to avoid a time trap for claimants applying for leave to present a late claim and to encourage claimants to seek such relief from the agency before filing an action on a claim. The time to file an action on a claim under the proposal is either (1) six months from the date a notice of decision on an application to present a late claim is given, or (2) if no such notice is given, two years from the accrual of the cause of action. (§ 945.6, subd. (a).)

¹ Government Code section 911.3 was first enacted in 1983 (Stats. 1983, ch. 107, § 1, p. 277) following a recommendation by the CLRC (*Recommendation Relating to Notice of Rejection of Late Claim Against Public Entity*, 16 Cal. Law Revision Com. Rep. (1982) p. 2255). The statute as enacted differed somewhat from the CLRC’s recommended legislation.

Finally, this proposal changes the limitations period for filing a petition for relief from the claims presentation requirement from six months after the date the application is denied or deemed denied to either (1) six months after the date a notice of decision on an application to present a late claim is given, or (2) if no such notice is given, 245 days after the date the notice is presented to the public entity. (§ 946.6, subd. (c)(3).) This revision avoids the inequity of the limitations period beginning to run before the claimant is given notice. (See *Rason v. Santa Barbara City Housing Authority*, *supra*, 201 Cal.App.3d at pp. 824-827, noting this concern and urging statutory revision.) The 245-day period includes 180 days (approximately six months) plus the maximum time allowed for the agency to act on the application (45 days plus 20 days if the application was mailed from outside the United States pursuant to §§ 911.6, subd. (a), 915.2, subd. (b)).

4. *Text of Proposal*

The text of the proposal follows. Proposed additions are underscored, and proposed deletions are shown by strikethrough. The parenthetical description of each section is provided for reference only and is not part of the proposal. Those sections with no changes marked are not affected by the proposal and are provided for reference only.

Section 911.3 (notice of untimely claim):

(a) When a claim that is required by Section 911.2 to be presented not later than six months after accrual of the cause of action is presented after such time without the application provided in Section 911.4, the board or other person designated by it may, at any time within 45 days after the claim is presented, give written notice to the person presenting the claim that the claim was not ~~filed~~ presented timely and that it is being returned without further action. The notice shall be given in the manner prescribed by Section 915.4 and shall be in substantially the following form:

“The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim.

~~“Your only recourse at this time is to~~ You may apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code. Failure to apply for leave to present a late claim could prevent you from pursuing your claim.

“If you contend your claim was presented within the time required by law, you may challenge the decision that your claim was presented late by filing an action on this claim. Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. The time for you to file a court action on this claim will be extended, however, if you apply to (name of public entity) for leave to present a late claim. See Government Code Section 945.6.

“You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.”

(b) Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

Section 911.4 (late claim application):

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

(b) The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) 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) In computing the one-year period under subdivision (b), the following shall apply:

(1) The time during which the person who sustained the alleged injury, damage, or loss as a minor shall be counted, but the time during which he or she is mentally incapacitated and does not have a guardian or conservator of his or her person shall not be counted.

(2) The time shall not be counted during which the person is detained or adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law (Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code), if both of the following conditions exist:

(A) The person is in the custody and control of an agency of the public entity to which a claim is to be presented.

(B) The public entity or its agency having custody and control of the minor is required by statute or other law to make a report of injury, abuse, or neglect to either the juvenile court or the minor's attorney, and that entity or its agency fails to make this report within the time required by the statute or other enactment, with this time period to commence on the date on which the public entity or its agency becomes aware of the injury, neglect, or abuse. In circumstances where the public entity or its agency makes a late report, the claim period shall be tolled for the period of the delay caused by the failure to make a timely report.

(3) The time shall not be counted during which a minor is adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law (Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code), if the minor is without a guardian ad litem or conservator for purposes of filing civil actions.

Section 911.6 (decision on late claim application):

(a) The board shall grant or deny the application within 45 days after it is presented to the board. The claimant and the board may extend the period within which the board is required to act on the application by written agreement made before the expiration of the period.

(b) The board shall grant the application where one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2.

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(c) If the board fails or refuses to act on an application within the time prescribed by this section, the application shall be deemed to have been denied on the 45th day or, if the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period specified in the agreement.

Section 911.8 (notice of decision on late claim application):

(a) Written notice of the board's action upon the application or the inaction that is deemed denial under Section 911.6 shall be given in the manner prescribed by Section 915.4.

(b) If the application is denied, the notice shall include a warning in substantially the following form:

“WARNING

“If you wish to ~~file a court action on this matter~~ challenge the denial of your application for leave to present a late claim, you must first petition the appropriate court for an order relieving you from the provisions of Government Code Section 945.4 (claims presentation requirement). See Government Code Section 946.6. Such petition must be filed with the court within six (6) months from the date ~~your application for leave to present a late claim was denied~~ this notice was personally delivered or deposited in the mail.

“If you contend your claim was presented within the time required by law, you may challenge the decision that your claim was presented late by filing an action on this claim. Such a court action must be filed with the court within six (6) months from the date this notice was personally delivered or deposited in the mail. See Government Code Section 945.6.

“You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.”

Section 913 (notice of decision on claim):

(a) Written notice of the action taken under Section 912.5, 912.6, 912.7, or 912.8 or the inaction that is deemed rejection under Section 912.4 shall be given in the manner prescribed by Section 915.4. The notice may be in substantially the following form:

“Notice is hereby given that the claim that 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, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law).”

(b) If the claim is rejected, in whole or in part, the notice required by subdivision (a) shall include a warning in substantially the following form:

“WARNING

“Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6.

“You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.”

Section 915.4 (manner of giving notice):

(a) The notices provided for in Sections 910.8, 911.3, 911.8, and 913 shall be given by either of the following methods:

(1) Personally delivering the notice to the person presenting the claim or making the application.

(2) Mailing the notice to the address, if any, stated in the claim or application as the address to which the person presenting the claim or making the application desires notices to be sent or, if no such address is stated in the claim or application, by mailing the notice to the address, if any, of the claimant as stated in the claim or application.

(b) No notice need be given where the claim or application fails to state either an address to which the person presenting the claim or making the application desires notices to be sent or an address of the claimant.

Section 945.6 (time to file suit):

(a) Except as provided in Sections 946.4 and 946.6 and subject to subdivision (b), any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced:

(1) If written notice is given in accordance with Section 911.3 or 913, not later than six months after the date that the first such notice is personally delivered or deposited in the mail, unless paragraph (3) or (4) applies.

(2) If written notice is not given in accordance with Section 911.3 or 913, within two years from the accrual of the cause of action. If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of such extension is not part of the time limited for the commencement of the action under this paragraph.

(3) If an application for leave to present a late claim is timely presented to the public entity and the application is not granted, and written notice is given in accordance with section 911.8, within six months after the date that such notice is personally delivered or deposited in the mail.

(4) If an application for leave to present a late claim is timely presented to the public entity, the application is not granted, and no written notice is given in accordance with Section 911.8, within two years from the accrual of the cause of action. If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of such extension is not part of the time limited for the commencement of the action under this paragraph.

(b) When a person is unable to commence a suit on a cause of action described in subdivision (a) within the time prescribed in that subdivision because he has been sentenced to imprisonment in a state prison, the time limit for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public entity establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (a).

(c) A person sentenced to imprisonment in a state prison may not commence a suit on a cause of action described in subdivision (a) unless he presented a claim in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division.

Section 946.6 (petition to court for late claim relief):

(a) If an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. The proper court for filing the petition is a superior court that would be a proper court for the trial of an action on the cause of action to which the claim relates. If the petition is filed in a court which is not a proper court for the determination of the matter, the court, on motion of any party, shall transfer the proceeding to a proper court. If an action on the cause of action to which the claim relates would be a limited civil case, a proceeding pursuant to this section is a limited civil case.

(b) The petition shall show each of the following:

(1) That application was made to the board under Section 911.4 and was denied or deemed denied.

(2) The reason for failure to present the claim within the time limit specified in Section 911.2.

(3) The information required by Section 910.

~~The petition shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6.~~

(c) The petition shall be filed by the earlier of six months after the date that notice in accordance with Section 911.8 is personally delivered or deposited in the mail or 245 days after the date that the application under section 911.4 is presented to the public entity.

(~~ed~~) The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4.

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(de) A copy of the petition and a written notice of the time and place of hearing shall be served before the hearing as prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure on (1) the clerk or secretary or board of the local public entity, if the respondent is a local public entity, or (2) the Attorney General, if the respondent is the state. If the petition involves a claim arising out of alleged actions or inactions of the Department of Transportation, service of the petition and notice of the hearing shall be made on the Attorney General or the Director of Transportation. Service on the Attorney General may be accomplished at any of the Attorney General's offices in Los Angeles, Sacramento, San Diego, or San Francisco. Service on the Director of Transportation may be accomplished only at the Department of Transportation's headquarters office in Sacramento. If the petition involves a claim arising out of alleged actions or inactions of a judicial branch entity, service of the petition and notice of the hearing shall be made in accordance with the following:

(1) If the petition involves a claim arising out of alleged actions or inactions of a superior court or a judge, court executive officer, or trial court employee, as defined in Section 811.9, of the court, service shall be made on the court executive officer.

(2) If the petition involves a claim arising out of alleged actions or inactions of a court of appeals or a judge thereof, service shall be made on the Clerk/Administrator of the court of appeals.

(3) If the petition involves a claim arising out of alleged actions or inactions of the Supreme Court or a judge thereof, service shall be made on the Clerk of the Supreme Court.

(4) If the petition involves a claim arising out of alleged actions or inactions of the Judicial Council or the Administrative Office of the Courts, service shall be made on the secretariat of the Judicial Council.

(ef) The court shall make an independent determination upon the petition. The determination shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition.

(fg) If the court makes an order relieving the petitioner from Section 945.4, suit on the cause of action to which the claim relates shall be filed with the court within 30 days thereafter.