S202037

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE IN SUPPORT OF THE CITY OF LONG BEACH'S OPENING BRIEF ON THE MERITS

After Decision of the Second Appellate District of the
Court of Appeal
Case No. B200831

Appeal from the Superior Court of
the State of California for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

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To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Please take notice that, pursuant to California Rule of Court 8.252 and Evidence Code section 452, subds. (b), (c) and (h), Petitioner City of Long Beach hereby submits this Notice of Motion and Motion for Judicial Notice In Support of its Opening Brief on the Merits, and moves this Court to take judicial notice for the purposes of the Opening Brief on the Merits filed concurrently herewith of the following true and correct documents, Exhibits A through L to the Declaration of Tiana J. Murillo attached hereto:

A. Internal Revenue Service Revenue Ruling 1979-404, 1979-2 C.B. 382

B. Internal Revenue Service Notice 2006-50

C. Internal Revenue Service Notice 2007-11

D. Long Beach Municipal Code § 1.08.010

E. Long Beach Municipal Code § 1.08.130

F. Long Beach Municipal Code §§ 3.48.060 & 3.48.070

G. Long Beach Municipal Code § 3.68.160

H. Chapter 1724 of the Statutes of California, Volume 2, 1958 and 1959

I. Excerpts from Chapter 1681 of the Statutes of California, Volume 2, 1962 and 1963 (pp. 3266–3267)

J. Office of the Legislative Counsel's Report on Assembly Bill No. 405, dated June 29, 1959

K. Excerpts from the California Law Revision Commission Recommendation relating to Sovereign Immunity, Number 1, dated January 1963 (pp. 803–805, 807–809). The full text of this document can be found at http://clrc.ca.gov/pub/PrintedReports/*Non%20Searchable/Pub043.pdf.

L. Excerpts from the California Law Revision Commission Recommendation Relating to Sovereign Immunity, Number 2, dated January 1963 (pp. 1003, 1005, 1024–1041). The full text of this document can be found at http://clrc.ca.gov/pub/Printed-Reports/*Non%20Searchable/Pub044.pdf.

This motion is based on the attached Memorandum of Points and Authorities, which contains the information as stated in Rule of Court 8.252(a), true and correct copies of the above documents, which are attached as Exhibits A through L to the Declaration of Tiana J. Murillo, and the proposed order granting this motion.

DATED: September 10, 2012

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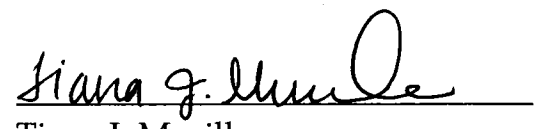

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

With the few exceptions noted in the discussion below, the documents attached to this Motion for Judicial Notice are included in the record on appeal in this matter. Respondent the City of Long Beach (the "City") collects them here, in one volume, for the convenience of the Court and the parties. The new materials constitute relevant provisions of the Long Beach Municipal Code, federal materials to illuminate the underlying dispute and portions of the legislative history of the Government Claims Act provisions in issue in this matter.

II. THE REQUESTED JUDICIAL NOTICE IS APPROPRIATE

A. General Principles of Judicial Notice

Courts may judicially notice duly enacted municipal resolutions and ordinances. (Cal. Evid. Code § 452, subds. (b) and (h); see also, *Jordan v. Los Angeles County* (1968) 267 Cal.App.2d 794, 798 [Evidence Code § 452(b) "permits judicial notice of legislative enactments of 'any public entity in the United States.'"]); *Shapiro v. Board of Directors of Centre City* (2005) 134 Cal.App.4th 170, 174, fn. 2 [judicial notice of municipal resolution].) A reviewing court may take judicial notice of any matter specified in Evidence Code § 452. (Cal. Evid. Code § 459.)

"Judicial notice is the recognition and acceptance by the court, for use by ... the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the

matter." (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882 [citations and quotations omitted]; Cal. Evid. Code § 454). The underlying theory of judicial notice is that a matter judicially noticed is a law or fact that is not reasonably subject to dispute. (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th at 882; Cal. Evid. Code § 452(h).)

B. The Court Should Notice the Internal Revenue Service Ruling and Notices

The Court should take notice of the documents in Exhibits A through C. These documents constitute evidence of regulations or legislative enactments issued under the authority of the Internal Revenue Service, a public entity of the United States. Further, such documents are not reasonably subject to dispute, and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. As such, these documents may be judicially noticed pursuant to Evidence Code sections 452(b) and (h). (*Ste. Marie v. Riverside County Regional Park & Open Space District* (2009) 46 Cal.4th 282, 293, fn. 7 [judicial notice permissible for regulations and legislative enactments issued by or under the authority of any public entity in the United States].)

The Internal Revenue Service Revenue Ruling and Internal Revenue Service Notices presented as Exhibits A through C were not provided to the trial court. However, on April 30, 2008, the City requested that the Court of Appeal take judicial notice of the Internal Revenue Service Ruling and Notice contained in Exhibits A and B. On May 27, 2008, the Court of

Appeal granted the City's request for judicial notice. Prior to the instant motion, the City has not sought judicial notice of Exhibit C.

Exhibits A through C are relevant to this appeal which, among other issues, concerns the interpretation of the City's ordinances affecting the telephone users tax in issue here. These documents will therefore illuminate the underlying dispute, as more fully explained in the City's Opening Brief on the Merits.

C. The Court Should Notice Relevant Municipal Ordinances

The Court should take notice of the documents attached as Exhibits D through G. These are duly acted municipal ordinances and are subject to notice pursuant to Evidence Code section 452 (b) and (h). Pursuant to Evidence Code section 459, this Court may notice these matters on appeal.

Long Beach Municipal Code ("LBMC") sections 3.48.060, 3.48.070 and 3.68.160 (Exhibits F and G, respectively) were provided to the trial court and the court took notice of those ordinances.[1] On April 30, 2008, the City requested that the Court of Appeal take judicial notice of LBMC sections 3.48.060 and 3.68.160, and on May 27, 2008 the Court of Appeal

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[1] The City cited and requested notice of LBMC sections 3.68.160, 3.48.060 and 3.48.070 along with its Demurrer to McWilliams' Complaint. The trial court granted the City's Demurrer due to Respondent's failure to comply with those ordinances. Accordingly, although this record is silent as to the trial court's action on the request for notice, it appears the trial court took notice of these ordinances. Whether or not it did so, it is proper for this Court to do so under the authorities noted above.

granted that request. However, prior to the instant motion, the City has not sought notice of LBMC sections 1.08.010 or 1.08.130 (Exhibits D and E, respectively).

Each of the documents proposed for notice in Exhibits D through G is relevant to this appeal, as each will aid the Court's understanding of the City's municipal ordinances disputed in this appeal; specifically, exhibits D through G are relevant to the Court's determination whether the City's ordinances allow class claims, as more fully explained in the City's Opening Brief on the Merits.

D. The Court Should Take Notice of Relevant Legislative History of the Government Claims Act

The Court should judicially notice the documents in Exhibits H through L, which constitute relevant portions of the legislative history of the provisions of the Government Claims Act contested in this appeal.

Exhibits K and L are reports of the Law Revision Commission that the Courts of Appeal have found to be the legislative history of the provisions of the Government Claims Act in issue here. (*Pasadena Hotel Dev. Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, 415 fn. 3.) These may be noticed pursuant to Evidence Code section 452(c). Further, the Court should take notice of Exhibits H, I and J, which evidence legislation, and may be noticed pursuant to Evidence Code sections 452(c) and (h). (See also *Elsner v. Uveges* (2004) 34 Cal.4th 915, 929 [legislative history appropriate for judicial notice].)

Exhibits H through L reflect facts not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (*Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 886, fn. 1 [Court judicially noticed water district notice to landowners].)

The documents marked as Exhibits H through L were not presented to the trial court. However, on April 11, 2012, the City requested that the Court of Appeal take judicial notice of Exhibits J, K and L. On April 12, 2012 the Court of Appeal granted Respondent's request for judicial notice. Prior to the instant motion, the City has not sought notice of the documents marked as Exhibits H and I (1959 and 1963 California statutes).

Each of the documents proposed for notice in Exhibits H through L are relevant here. They will assist the Court in understanding the Government Claims Act, the history and meaning of which is relevant to this appeal. Further, these materials demonstrate that the word "statute" as used in Government Code section 905, subd. (a) includes local ordinances like the City's, notwithstanding the contrary definition of the term included in Government Code section 811.8.

E. The City's Motion for Judicial Notice Complies with Rule of Court 8.252

The Court should likewise take judicial notice of the documents in Exhibits A through L because the City's Motion complies with California Rule of Court 8.252.

First, as discussed in Sections II B. through D., *supra*, this motion is relevant to the City's Opening Brief on the Merits because Exhibits A through C evidence regulations or legislative enactments issued under the authority of a Federal agency. These documents illuminate the nature of the instant action. Second, Exhibits D through G are municipal ordinances underlying the case; notice of Exhibits D through G will help the Court interpret the City's ordinances. Third, Exhibits H through L evidence the legislative history of the Government Claims Act, the interpretation of which is contested here.

Finally, as discussed above, the documents provided as Exhibits F and G were presented to the trial court, but the documents in Exhibits A through E and H through L were not. Documents A through C were not presented to the trial court because, at the demurrer stage, it was not necessary for the City to address the IRS ruling that formed one of the bases of McWilliams' complaint. Exhibits D and E were not presented to the trial court because at that time a further exploration of the construction of the City's ordinances was not required. Likewise, the documents in Exhibits H through L were not presented to the trial court because, at the trial level, the question of whether "statute" in Government Code section 905, subd. (a) includes municipal ordinances was not in issue, and therefore the legislative history of the Government Claims Act was not in issue.

Accordingly, this motion complies with California Rule of Court 8.252.

III. CONCLUSION

Therefore, the City respectfully submits that this Court should, after expiration of opposing counsel's opportunity to respond under rule 8.54, subd. (a)(3) of the California Rules of Court, grant the City of Long Beach's motion to take judicial notice of the materials attached as Exhibits A through L to the City of Long Beach's Motion For Judicial Notice In Support of its Opening Brief on the Merits.

DATED: September 10, 2012

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DECLARATION OF COUNSEL

[CRC 8.54, subd. (a)(2)]

1. I am an attorney in good standing licensed to practice before the Courts of this state and counsel of record for Respondent City of Long Beach.

2. Attached hereto as Exhibit A is a true and correct copy of Internal Revenue Service Revenue Ruling 1979-404, 1979-2 C.B. 382.

3. Attached hereto as Exhibit B is a true and correct copy of Internal Revenue Service Notice 2006-50.

4. Attached hereto as Exhibit C is a true and correct copy of Internal Revenue Service Notice 2007-11.

5. Attached hereto as Exhibit D is a true and correct copy of Long Beach Municipal Code § 1.08.010.

6. Attached hereto as Exhibit E is a true and correct copy of Long Beach Municipal Code § 1.08.130.

7. Attached hereto as Exhibit F is a true and correct copy of Long Beach Municipal Code §§ 3.48.060 & 3.48.070.

8. Attached hereto as Exhibit G is a true and correct copy of Long Beach Municipal Code § 3.68.160.

9. Attached hereto as Exhibit H is a true and correct copy of Chapter 1724 of the Statutes of California, Volume 2, 1958 and 1959.

10. Attached hereto as Exhibit I is a true and correct copy of excerpts from Chapter 1681 of the Statutes of California, Volume 2, 1962 and 1963 (pp. 3266–3267).

11. Attached hereto as Exhibit J is a true and correct copy of the Office of the Legislative Counsel's Report on Assembly Bill No. 405, dated June 29, 1959.

12. Attached hereto as Exhibit K is a true and correct copy of excerpts from the California Law Revision Commission Recommendation relating to Sovereign Immunity, Number 1, dated January 1963 (pp. 803–805, 807–809).

13. Attached hereto as Exhibit L is a true and correct copy of excerpts from the California Law Revision Commission Recommendation relating to Sovereign Immunity, Number 2, dated January 1963 (pp. 1003, 1005, 1024–1041).

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on this 10th day of September 2012.

By: Tiana J. Murillo

Tiana J. Murillo

[Proposed]

ORDER TAKING JUDICIAL NOTICE OF INTERNAL REVENUE SERVICE RULING AND NOTICES, MUNICIPAL ORDINANCES AND LEGISLATIVE HISTORY

Good cause appearing, IT IS HEREBY ORDERED that the Motion For Judicial Notice In Support of the City of Long Beach's Opening Brief on the Merits is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

1. Internal Revenue Service Revenue Ruling 1979-404, 1979-2 C.B. 382.

2. Internal Revenue Service Notice 2006-50.

3. Internal Revenue Service Notice 2007-11.

4. Long Beach Municipal Code § 1.08.010.

5. Long Beach Municipal Code § 1.08.130.

6. Long Beach Municipal Code §§ 3.48.060 & 3.48.070.

7. Long Beach Municipal Code § 3.68.160.

8. Chapter 1724 of the Statutes of California, Volume 2, 1958 and 1959.

9. Excerpts from Chapter 1681 of the Statutes of California, Volume 2, 1962 and 1963 (pp. 3266–3267).

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12. Excerpts from the California Law Revision Commission Recommendation relating to Sovereign Immunity, Number 2, dated January 1963 (pp. 1003, 1005, 1024–1041).

Dated: _____

_____
Chief Justice Tani Cantil-Sakauye

Rev. Rul. 79-404

1979-2 C.B. 382

ISSUE

Whether the federal excise tax on communication services applies to amounts paid in the United States for certain communications services between telephones in the United States and offshore facilities.

FACTS

X Company offers a service that enables communication between ships at sea or other offshore facilities (such as drilling platforms) and telephone subscribers in the United States. A message or call from a ship's radio station is relayed through an earth satellite, in orbit over the equator, to a landline station of X in the United States that is connected into the regular long distance telephone system for completion of the call. The procedure is reversed for calls from the United States. Thus, the service provided by X offers offshore stations access by radio into the United States land telephone network.

The charge for this service is 3x dollars for the first three minutes or fraction thereof, and 1x dollars for each additional minute or fraction thereof, regardless of the location of either the land telephone or maritime radio stations.

LAW AND ANALYSIS

Section 4251 of the Internal Revenue Code imposes a tax on the amounts paid for local telephone service and toll telephone service.

Section 4252(a)(1) of the Code defines "local telephone service" to include the access to a local telephone system and the privilege of telephonic quality communication with substantially all persons having telephone or radio stations constituting a part of such system, and any facility or service provided in connection with such service. The term "local telephone service" does not include any service that is a "toll telephone service" or a "private communication service."

Section 4252(b)(1) of the Code defines the term toll telephone service to include a telephonic quality communication for which there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and the charge is paid within the United States.

Rev. Rul. 77-49, 1977-1 C.B. 341, holds taxable amounts paid for radio telephone facilities and services that make regular telephone service accessible to offshore subscribers. The ruling points out that such radio service is an adjunct to the landline service by performing that function.

The mere fact that access into the telephone network is by radio is not a basis for exclusion from the tax. This is shown by the specific reference in section 4252(a) of the Code to radio stations,

EXHIBIT A

and the position of the Service set forth in Rev. Rul. 77-49. The service in this case is similar to that in Rev. Rul. 77-49 in that it serves as an adjunct to the American continental telephone network by making telephones in that network accessible to the maritime telephone stations.

Literally, the service provided in this case does not come within the definition of "local telephone service" or "toll telephone service" as those terms are currently defined in section 4252 of the Code. It is not local telephone service because it provides access to the long distance telephone system in the United States. It is not toll telephone service because the charge for such service does not vary with distance and therefore does not meet the requirement of section 4252(b)(1).

It is well established, however, that a statute may be given an interpretation other than that which follows from its literal language where such interpretation is required in order to comport with the legislative intent.

The Supreme Court has stated:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940).

See also Corn Products Refining Company v. Commissioner, 350 U.S. 46 (1955), 1955-2 C.B. 511, a tax case in which the Supreme Court departed from the literal wording of a statute. The Court did so because to hold otherwise would have been "to defeat rather than further the purpose of Congress." 350 U.S. at 51, 52.

The legislative history of section 4252 of the Code indicates that the type of service at issue here is within the intended scope of taxable "toll telephone service."

Prior to the amendment of section 4252 of the Code by section 302 of the Excise Tax Reduction Act of 1965, 1965-2 C.B. 568, 577-578, one of the services taxed was "toll telephone service", which was defined, in part, as a telephone or radio telephone message or conversation for which (1) there is a toll charge, and (2) the charge is paid within the United States.

Prior to the 1965 amendment the communication service considered here would have been within the definition of toll telephone service. The legislative history pertaining to the Excise Tax Reduction Act of 1965, 1965-2 C.B. 643 and 676, indicates that Congress intended to exempt certain private communication services from the tax and repeal the tax on telegraph

service and wire and equipment service. There is no indication that Congress otherwise intended to make changes in the types of service subject to tax.

The service in this case is essentially "toll telephone service" as described in section 4252(b)(1) of the Code, even though the charge for calls between remote maritime stations and stations in the United States vary with elapsed transmission time only. The toll charges described in section 4252(b)(1), that vary in amount with both distance and elapsed transmission time of the individual communication, reflect Congress' understanding of how the charges for long distance calls were computed at the time the section was enacted. The intent of the statute would be frustrated if a new type of service otherwise within such intent were held to be nontaxable merely because charges for it are determined in a manner which is not within the literal language of the statute.

HOLDING

The communication service in this case is toll telephone service within the meaning of section 4252(b)(1) of the Code, and amounts paid in the United States for this toll telephone service are subject to the tax imposed by section 4251(a).

Notice 2006-50

Communications Excise Tax; Toll Telephone Service

Table of Contents

SECTION 1. PURPOSE

(a) *In general.* As further described in this notice, the Internal Revenue Service will follow the holdings of *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005) (*ABIG*); *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005) (*Amtrak*); *Fortis v. United States*, 2006 U.S. App. LEXIS 10749 (2d Cir. Apr. 27, 2006); and *Reese Bros. v. United States*, 2006 U.S. App. LEXIS 11468 (3d Cir. May 9, 2006). These cases hold that a telephonic communication for which there is a toll charge that varies with elapsed transmission time and not distance (time-only service) is not taxable toll telephone service as defined in § 4252(b)(1) of the Internal Revenue Code. As a result, amounts paid for time-only service are not subject to the tax imposed by § 4251. Accordingly, the government will no longer litigate this issue and Notice 2005-79, 2005-46 I.R.B. 952, which states otherwise, is revoked.

(b) *Credits and refunds.* Taxpayers may be entitled to request credit or refund of the excise taxes paid for the services covered by this notice. This notice provides guidance regarding these requests. In addition, the Commissioner will authorize the scheduling of an overassessment under § 6407 to keep the period of limitations open for these requests. This overassessment will apply to all taxpayers and to all taxes paid for the services covered by this notice beginning with the tax paid on services that were billed to customers after February 28, 2003.

SECTION 2. BACKGROUND

(a) *In general*—(1) *Tax imposed.* Section 4251(a)(1) imposes a tax on amounts paid for communications services.

(2) *Payment of tax.* Section 4251(a)(2) provides that the tax imposed shall be paid by the person paying for the service (taxpayer). Section 4251(b)(2) provides that the applicable percentage is 3 percent of amounts paid for communications services.

(3) *Collection of tax.* Section 4291 provides that the tax is collected by the person receiving the payment (collector). In most cases, the collector, which is also responsible for paying over the tax to the government, is the telecommunications company that provides the communications services to the taxpayer.

(b) *Definitions*—(1) *Communications services.* Section 4251(b)(1) provides that the term communications services means (A) local telephone service; (B) toll telephone service; and (C) teletypewriter exchange service. This notice does not address teletypewriter exchange service.

(2) *Local telephone service.* Section 4252(a) provides that local telephone service means (1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system; and (2) any facility or service provided in connection with such a service. Local telephone service does not include any service that is a toll telephone service as defined in § 4252(b) or a private communications service as defined in § 4252(d). This notice does not address private communications service.

(3) *Toll telephone service*—(i) *Time and distance.* Section 4252(b)(1) provides that toll telephone service includes a telephonic quality communication for which there is a toll charge that varies in amount with the distance and elapsed transmission time of each individual communication and for which the charge is paid within the United States.

(ii) *Periodic charge for a specified area.* Section 4252(b)(2) provides that toll telephone service also includes a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission

EXHIBIT B

time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

(c) *Rev. Rul. 79-404.* Rev. Rul. 79-404, 1979-2 C.B. 382, concludes that a long distance telephone call for which the charge varies with elapsed transmission time but not with distance is toll telephone service described in § 4252(b)(1).

(d) *Notice of proposed rulemaking.* In a notice of proposed rulemaking (REG-141097-02, 2003-1 C.B. 807 [68 FR 15690]; April 1, 2003), the Service proposed an amendment to the Facilities and Services Excise Taxes Regulations to provide that toll telephone service described in section 4252(b)(1) may include a communication service for which the charge does not vary with the distance of each individual communication.

(e) *Recent litigation. ABIG*, *OfficeMax*, *Amtrak*, and *Reese Bros.* hold time-only service is not toll telephone service as defined in § 4252(b)(1). Further, *ABIG*, *OfficeMax*, and *Reese Bros.* hold that the communications service provided was not a service described in § 4252(b)(2) because the end result was not a "periodic charge" based on total elapsed time but rather a monthly bill based on a summation of toll charges for individual communications. (In *Amtrak*, toll telephone service described in § 4252(b)(2) would have been exempt from tax under the common carrier exception in § 4253(f).) *ABIG*, *OfficeMax*, *Amtrak*, and *Reese Bros.* also hold that the communications services provided were not local service, notwithstanding the access the services provided to the local telephone system. (*Fortis* affirms, in a *per curiam* opinion, a district court decision reaching the same results.)

(f) *Notice 2005-79.* Notice 2005-79, 2005-46 I.R.B. 952, states that the Service will continue to assess and collect the tax imposed by § 4251 on all taxable communications services, including those similar to the services in *ABIG*.

SECTION 3. TERMS DEFINED

The following terms are defined solely for purposes of this notice:

(a) *Bundled service.* Bundled service is local and long distance service provided under a plan that does not separately state the charge for the local telephone service. Bundled service includes, for example, Voice over Internet Protocol service, prepaid telephone cards, and plans that provide both local and long distance service for either a flat monthly fee or a charge that varies with the elapsed transmission time for which the service is used. Telecommunications companies provide bundled service for both landline and wireless (cellular) service.

(b) *Local-only service.* Local-only service is local telephone service, as defined in § 4252(a), provided under a plan that does not include long distance telephone service or that separately states the charge for local service on its bill to customers. The term also includes services and facilities provided in connection with service described in the preceding sentence even though these services and facilities may also be used with long distance service. See, for example, Rev. Rul. 72-537, 1972-2 C.B. 574 (telephone amplifier); Rev. Rul. 73-171, 1973-1 C.B. 445 (automatic call distributing equipment); and Rev. Rul. 73-269, 1973-1 C.B. 444 (special telephone).

(c) *Long distance service.* Long distance service is telephonic quality communication with persons whose telephones are outside the local telephone system of the caller.

(d) *Nontaxable service.* Nontaxable service means bundled service and long distance service.

SECTION 4. EFFECT OF *ABIG*, *OFFICEMAX*, *AMTRAK*, *FORTIS*, AND *REESE BROS.*

(a) *Tax treatment of communications service after ABIG, OfficeMax, Amtrak, Fortis, and Reese Bros.* The Service will follow *ABIG*, *OfficeMax*, *Amtrak*, *Fortis*, and *Reese Bros.* Accordingly, taxpayers are no longer required to pay tax under § 4251 for nontaxable service. In addition, collectors or taxpayers may request a refund of tax paid under § 4251 on nontaxable service that was billed to the taxpayers during the period after February 28, 2003, and before August 1, 2006 (the relevant period).

(b) *Tax on local-only service.* Collectors should continue to collect and pay over the § 4251 tax on amounts paid for local-only service. As noted in section 3(b) of this notice, local-only service includes amounts paid for facilities or services provided in connection with local telephone service. Thus, for example, tax will continue to be imposed on amounts paid by a taxpayer for renting an amplifier phone provided in connection with local telephone service that is subject to tax.

(c) *Effect on collectors.* Collectors are directed to cease collecting and paying over tax under § 4251 on nontaxable service that is billed after July 31, 2006, and are not required to report to the IRS any refusal by their customers to pay any tax on nontaxable service that is billed after May 25, 2006. Collectors should not pay over to the IRS any tax on nontaxable service that is billed after July 31, 2006. The form will require collectors to certify that for the third quarter of 2006 the § 4251 tax reported on the Form 720 does not include any tax on nontaxable service that was billed after July 31, 2006. Consequently, the IRS will deny all taxpayer

requests for refund of tax on nontaxable service that was billed after July 31, 2006. All such requests should be directed to the collector. In addition, collectors may repay to taxpayers the tax on nontaxable service that was billed before August 1, 2006, but are not required to repay such tax. Collectors may also request a refund or make an adjustment to their separate accounts, as appropriate, subject to the provisions of § 6415 and section 5(d)(4) of this notice. Collectors must continue to collect and pay over tax under § 4251 on amounts paid for local only service.

SECTION 5. REQUESTS FOR CREDIT OR REFUND

(a) *In general*—(1) *Request must follow this notice.* The Commissioner agrees to credit or refund the amounts paid for nontaxable service if the taxpayer requests the credit or refund in the manner prescribed in this notice.

(2) *Form of request.* Taxpayers may request a credit or refund of tax on nontaxable service that was billed after February 28, 2003, and before August 1, 2006, only on their 2006 Federal income tax returns. For this purpose, the 2006 income tax return is the income tax return for calendar year 2006 or for the first taxable year including December 31, 2006. Forms 1040 (series), 1041, 1065, 1120 (series), and 990-T will include a line for requesting the overpayment amount. Persons that are not otherwise required to file a federal income tax return must nevertheless file a return to obtain the credit or refund. Except as provided in section 5(d)(4) of this notice, a request for this credit or refund on any other form (such as a Form 720, 843, or 8849) will not be processed by the Service. Taxpayers will be permitted to request the safe harbor amount under paragraph (c) of this section only if they have paid all taxes billed by their service provider after February 28, 2003, and before August 1, 2006.

(3) *Guidance on the form.* The instructions to the respective federal income tax return forms will provide additional guidance. The forms and instructions will require taxpayers to certify that (1) the taxpayer has not received from the collector a credit or refund of the tax paid on nontaxable service billed during the relevant period and (2) the taxpayer will not ask the collector for a credit or refund of that tax and has withdrawn any such request that was previously submitted. The instructions will also require that taxpayers, except for those individuals using the safe harbor amount, retain records that substantiate the request. These records should include bills from the collector that show the amount of tax charged for nontaxable service for each month during the relevant period and receipts, canceled checks, or other evidence that the amount requested was actually paid.

(b) *Period of request.* The Commissioner will authorize the scheduling of an overassessment under § 6407 to preserve the period of limitations during which taxpayers may request refunds of the tax on nontaxable service that was billed to customers after February 28, 2003, and before August 1, 2006. Therefore, requests may be made for credits or refunds of tax paid for nontaxable service billed after February 28, 2003, and before August 1, 2006.

(c) *Amount of the request*—(1) *Requests by individual taxpayers*—(i) *Safe harbor amount.* Individual taxpayers may request a safe harbor amount. No documentation will be required to be submitted or kept to support the safe harbor request. However, taxpayers will be permitted to request the safe harbor amount only if they have paid all taxes billed by their service provider after February 28, 2003, and before August 1, 2006; have not received a credit or refund of these taxes from the service provider, and either have not requested such a credit or refund from the service provider or have withdrawn any such request. The amount of this safe harbor is still under consideration and will be announced in later guidance.

(ii) *Actual amount.* Taxpayers that do not request the safe harbor amount may request a credit or refund of the actual amount of tax they paid.

(d) *How to file*—(1) *Requests by individual taxpayers.* Individual taxpayers may request a credit or refund of federal excise taxes paid on nontaxable service only on their 2006 Form 1040, 1040A, or 1040-EZ, *U.S. Individual Income Tax Return.* Individuals who are not otherwise required to file a federal income tax return must nevertheless file Form 1040EZ-T to request the credit or refund. Individual taxpayers, including Schedule C filers, may request either the safe harbor amount or the actual amount of tax paid for nontaxable service.

(2) *Requests by taxpayers other than individual taxpayers.* Taxpayers other than individual taxpayers (entities) may request only the actual amount of tax paid on nontaxable service billed during the relevant period. No safe harbor amount is allowed for entities.

(3) *Requests by entities*—(i) *In general.* Entities may request a credit or refund of federal excise taxes paid on nontaxable service only on their 2006 income tax returns. Any part of the credit or refund attributable to tax payments that were deducted as an ordinary and necessary business expense (including in the determination of unrelated business taxable income) must be included in income for the taxable year in which the refund is received or accrued to the extent that the tax payments reduced the amount of federal income tax (or unrelated business income tax) imposed.

(ii) *Partnerships.* A partnership, as defined in § 7701(a)(2), may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1065, *U.S. Return of Partnership Income.* Any amount of the credit or refund included in partnership income and any interest on the credit or refund must be reported on the partnership's return for the taxable year in which received or accrued and must be allocated to its partners on the Schedule K-1, *Partner's Share of Income, Deductions, Credits, etc.*, for that taxable year.

(iii) *S Corporations.* An S Corporation, as defined in § 1361, may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1120S, *U.S. Income Tax Return for an S Corporation.* Any amount of the credit or refund included in S Corporation income and any interest on the credit or refund must be reported on the S Corporation's return for the taxable year in which received or accrued and must be allocated to its shareholders on the Schedule K-1, *Shareholder's Share of Income, Deductions, Credits, etc.*, for that taxable year.

(iv) *Estates and trusts.* An estate or a trust, as defined in § 301.7701-4(a) of the Procedure and Administration Regulations, may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1041, *U.S. Income Tax Return for Estates and Trusts.* Any amount of the credit or refund included in the estate's or trust's income and any interest on the credit or refund must be reported on the estate's or trust's Form 1041, *U.S. Income Tax Return for Estates and Trusts*, for the taxable year in which received or accrued. However, for a trust that is treated as owned by the grantor or other person under subpart E (§ 671 and following), part I, subchapter J, chapter 1 of the Internal Revenue Code (grantor trust), the owner of the trust may request a credit or refund of federal excise taxes treated as paid by the owner for nontaxable service only on its applicable 2006 federal tax return.

(v) *Tax exempt organizations.* An organization that is described in § 501(a) may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 990-T, *Exempt Organization Business Income Tax Return.* Tax exempt organizations that are not otherwise required to file a federal income tax return must nevertheless file Form 990-T to request the credit or refund. Any amount of the credit or refund included in the organization's unrelated business taxable income must be reported on the organization's Form 990-T, *Exempt Organization Business Income Tax Return*, for the taxable year in which received or accrued. An organization that is subject to tax on its interest income must also report any interest on the credit or refund on its Form 990-T, *Exempt Organization Business Income Tax Return*, for the taxable year in which received or accrued.

(vi) *Corporations.* A corporation, as defined in § 7701(a)(3), that is not described in section 5(d)(3)(iii) of this notice may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1120 (series) income tax return (generally, Form 1120, *U.S. Corporation Income Tax Return*). Any amount of the credit or refund included in the corporation's income and any interest on the credit or refund must be reported on the corporation's income tax return for the taxable year in which received or accrued. Corporations that are not otherwise required to file a federal income tax return must nevertheless file Form 1120 (series) to request the credit or refund.

(vii) *Other nonfiling entities.* Entities that are not otherwise required to file a federal income tax return must file Form 990-T to request the credit or refund.

(4) *Requests and adjustments by collectors*—(i) *Section 6415 conditions to allowance.* The conditions to allowance described in § 6415 apply to all requests and adjustments by collectors, as defined by section 2(a)(3) of this notice. Thus, a request by a collector is allowed only if the person that paid over the tax establishes that it has repaid the amount of the tax to the person from whom the tax was collected, or obtains the written consent of such person to the allowance of the credit or refund.

(ii) *Requests for regular method collectors*—(A) *In general.* A person that collected the tax imposed by § 4251 on nontaxable service and paid it over to the government based on amounts actually collected under § 40.6302(c)-1(a)(2)(i) of the Excise Tax Procedural Regulations (regular method collectors) may request a credit or refund.

(B) *Form of the request.* Regular method collectors may use Form 720X, *Amended Quarterly Federal Excise Tax Return*, line 1, IRS No. 22, for credit or refund of amounts collected and repaid to taxpayers.

(iii) *Account adjustments for alternative method collectors.* A person that collected the tax imposed by § 4251 on nontaxable service and paid it over to the government based on amounts considered as collected under § 40.6302(c)-1(a)(2)(ii) (alternative method collectors) may adjust the separate account for the amount of an overpayment. The required adjustment to the separate account is described in § 40.6302(c)-3(b)(2)(ii)(C). The adjustment is reflected on Form 720, Schedule A, line 2, but may not reduce tax liability on Form 720 below zero.

(e) *Interest on the credit or refund included in income.* If a taxpayer requests a credit or refund of the actual amount of tax paid, interest on the credit or refund of the tax paid for nontaxable service must be included as income on the taxpayer's income tax return for the taxable year in which the interest is received or accrued. Thus, individuals are generally required to report the interest on their 2007 income tax returns.

(f) *Estimated tax effects.* Although the credit or refund allowed to a taxpayer under this notice will be requested on the taxpayer's income tax return, it is not a credit against tax for purposes of §§ 6654 and 6655. Accordingly, the taxpayer may not take the credit or refund into account in determining the amount of the required installments of estimated tax for 2006. In determining the amount of the required installments of estimated tax for 2007, the income attributable to the credit or refund is taken into account on the date the income is paid or credited in the case of a cash method taxpayer and on the date the return making the request is filed in the case of an accrual method taxpayer.

(g) *Requests that do not follow the provisions of this notice.* Requests that do not follow the provisions of this notice (whether filed before or after its publication)—

(1) Will not be processed to the extent they relate to the tax paid on nontaxable service that was billed after February 28, 2003; and

(2) Will be processed normally to the extent they relate to the tax paid on nontaxable service that was billed before March 1, 2003.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Notice 2005-79, 2005-46 I.R.B. 952, is revoked. Rev. Rul. 79-404, 1979-2 C.B. 382, will be revoked in a later revenue ruling.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Taylor Cortright of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact (202) 622-3130 (not a toll-free call).

Internal Revenue Bulletin: 2007-5
January 29, 2007

Notice 2007-11

Communications Excise Tax; Toll Telephone Service

Table of Contents

SECTION 1. PURPOSE

This notice amplifies, clarifies, and modifies Notice 2006-50, 2006-25 I.R.B. 1141. That notice provides that the tax imposed by § 4251 of the Internal Revenue Code (relating to communications excise tax) does not apply to amounts paid for long distance service and bundled service (collectively, nontaxable service) and also provides that taxpayers may request a credit or refund of tax on nontaxable service that was billed to the taxpayer after February 28, 2003, and before August 1, 2006, only on their 2006 federal income tax returns. This notice—

(a) Provides the conditions under which individual taxpayers may use the standard amounts announced in IR-2006-137 (August 31, 2006) on their 2006 federal income tax returns to request a credit or refund of the excise tax paid on nontaxable service;

(b) Provides guidance regarding the Business and Nonprofit Estimation Method, announced in IR-2006-179 (November 16, 2006);

(c) Answers questions that have been raised since the issuance of Notice 2006-50; and

(d) Modifies the requirement for claims filed on or before May 25, 2006.

SECTION 2. BACKGROUND

For the statutory background of the tax imposed by § 4251, see section 2 of Notice 2006-50. When used in this notice, *local-only service*, *long distance service*, and *nontaxable service* have the meaning given to the terms in section 3 of Notice 2006-50. *Bundled service* has the meaning given to the term by section 5 of this notice.

SECTION 3. STANDARD AMOUNT

EXHIBIT C

(a) *Conditions to allowance of standard amount.* A request for credit or refund of the standard amount, instead of the actual amount of federal communications excise tax paid for nontaxable service, may be made on a 2006 Form 1040 Series, *U.S. Individual Income Tax Return*, if any person filing the return, or any dependent listed on the return—

(1) Paid for any nontaxable service (other than for a prepaid telephone card or prepaid cellular telephone) that was billed to the taxpayer after February 28, 2003, and before August 1, 2006;

(2) Paid all federal communications excise taxes billed by their telecommunications provider after February 28, 2003, and before August 1, 2006;

(3) Has not received a credit or refund of these taxes from the telecommunications provider;

(4) Has not requested a credit or refund from the telecommunications provider or, if so requested, has withdrawn any such request; and

(5) Did not file any other claim or request for credit or refund with the IRS for the federal communications excise tax for a period after February 28, 2003.

(b) *Calculating standard amounts*—(1) *In general*—(i) *2006 Form 1040 Series (other than EZ).* To determine the standard amount, taxpayers must first determine the number of exemptions for which they are entitled on their 2006 Form 1040 Series federal income tax return (other than the 2006 Form 1040 EZ). The Instructions to the 2006 Form 1040 Series federal income tax return and Publication 501, *Exemptions, Standard Deduction, and Filing Information*, provide guidance on determining the correct number of exemptions. Once the individual determines the number of exemptions, the individual can select the appropriate standard amount based upon the number of those exemptions. Individuals should refer to the 2006 federal income tax return instructions to ensure that the standard amount is entered on the appropriate part of the return.

(ii) *2006 Form 1040 EZ.* On line 5, a taxpayer that checks the box for "you" is treated as having one exemption. A taxpayer that checks the boxes for "you" and "spouse" is treated as having two exemptions.

(2) *Amounts*—(i) For each 2006 Form 1040 Series federal income tax return filed showing one exemption for purposes of determining the standard amount, the standard amount allowed on that return is $30.

(ii) For each 2006 Form 1040 Series federal income tax return filed showing two exemptions for purposes of determining the standard amount, the standard amount allowed on that return is $40.

(iii) For each 2006 Form 1040 Series federal income tax return filed showing three exemptions for purposes of determining the standard amount, the standard amount allowed on that return is $50.

(iv) For each 2006 Form 1040 Series federal income tax return filed showing four or more exemptions for purposes of determining the standard amount, the standard amount allowed on that return is $60.

(c) *Interest.* The standard amount represents both the overpayment of the federal communications excise tax paid on nontaxable service and the interest on that overpayment.

(d) *Actual Amounts.* To request a credit or refund for the actual amount of federal communications excise tax paid, taxpayers must complete Form 8913, *Credit for Federal Telephone Excise Tax Paid*, and attach that form to their 2006 Form 1040 Series federal income tax return.

(e) *Examples.* The following examples illustrate the application of this section.

Example 1. A, an individual, files a joint return with Z, A's spouse. A meets the conditions to allowance described in paragraph (a) of this section. A used the 2006 federal income tax return instructions to determine that their correct number of exemptions is two. A may request the credit or refund of the federal communications excise tax under § 4251 for $40.

Example 2. B, an individual, used the 2006 federal income tax return instructions to determine that she had one exemption. B further used her telephone bills for the period March 1, 2003, through July 31, 2006, to determine that the total amount paid for federal communications excise tax under § 4251 for nontaxable service to all telecommunications providers was $45. Completing Form 8913 and attaching it to her 2006 Form 1040 Series federal income tax return, B may request a credit or refund of $45, the actual amount she paid in federal communications excise tax on nontaxable service under § 4251. As an alternative, B may request a credit or refund of the standard amount of $30 without having to complete Form 8913.

SECTION 4. DISTINCTION BETWEEN LOCAL-ONLY SERVICE AND BUNDLED SERVICE

(a) *Technology for transmitting telephone call.* The method for sending or receiving a call, such as on a landline telephone, wireless (cellular) telephone or some other method, does not affect whether a service is local-only or bundled.

(b) *Combined local exchanges.* If two or more telecommunications providers combine their resources to expand the geographic area that each treats as "local" service and each bills its customers for that service as local-only service, then that service is local-only service.

(c) *Billing method.* Section 3(a) of Notice 2006-50 and section 5 of this notice provide that bundled service is local and long distance service provided under a plan that does not separately state the charge for the local telephone service. Thus, if local and long distance service is billed to a customer on a single bill but the telecommunications company separately states the amount paid for local-only service and the amount paid for long distance service, the amount paid for local-only service is subject to federal communications excise tax.

(d) *Examples.* The following examples illustrate the application of this section.

Example 1. Customer A purchases telecommunications service from B, a telecommunications provider. Such service includes both local-only service and long distance service. B's bill to A states $X for telecommunications service. The bill does not separately state a charge for either local-only service or long distance service. Since the bill does not separately state the charge for local-only service, the service is a bundled service. Thus, the entire amount of A's telecommunications service is bundled service and thus nontaxable service.

Example 2. Customer C purchases telecommunications service from D, a telecommunications provider. Such service includes both local-only service and long distance service. D's bill to C states $X amount for telecommunications service. The bill further states $Y amount for local-only service and $Z amount for long distance service. Since the charges for local-only service and long distance service are separately stated, the service is not bundled service. Accordingly, only the amounts charged for long distance service are for nontaxable service; tax is imposed on the amounts paid for the local-only service.

SECTION 5. CLARIFICATION OF DEFINITION OF BUNDLED SERVICE

(a) *Present definition.* Section 3(a) of Notice 2006-50 defines bundled service as local and long distance service provided under a plan that does not separately state the charge for the local telephone service. Bundled service includes, for example, Voice over Internet Protocol service, prepaid telephone cards, and plans that provide both local and long distance service for either a flat monthly fee or a charge that varies with the elapsed transmission time for which the service is used. Telecommunications companies provide bundled service for both landline and wireless (cellular) service.

(b) *Reason for clarification.* The example in the second sentence of the definition of bundled service incorrectly assumes that all Voice over Internet Protocol (VoIP) service would provide both local and long distance service and that the charges for the two services would not be separately stated. As noted in section 4(a) of this notice, the method of transmitting a call is not a factor in determining whether a service is local-only or bundled. Accordingly, a VoIP service that provides local-only service is treated as local-only service.

(c) *Revised definition.* Accordingly, the definition of bundled service is clarified to read as follows:

Bundled service is local and long distance service provided under a plan that does not separately state the charge for the local telephone service. Bundled service includes plans that provide both local and long distance service for either a flat monthly fee or a charge that varies with the elapsed transmission time for which the service is used. Telecommunications companies provide bundled service for both landline and wireless (cellular) service. If Voice over Internet Protocol service provides both local and long distance service and the charges are not separately stated, such service is bundled service.

SECTION 6. PREPAID TELEPHONE CARDS (PTC)

(a) *In general*—(1) *Prepaid telephone cards.* Section 4251(d) and § 49.4251-4 of the Facilities and Services Excise Taxes Regulations provide rules for prepaid telephone cards (PTC). Section 49.4251-4(b) defines PTC as a card or similar arrangement that permits its holder to obtain a fixed amount of communications services by means of a code (such as a personal identification number (PIN)) or other access device provided by the carrier and to pay for those services in advance. The amount paid for PTCs is determined under the rules of §§ 4251(d)(1) and (2) and § 49.4251-4(c). Under this notice, the PTC will be treated as nontaxable service unless a PTC expressly states it is for local-only service.

(2) *Other cards.* This section does not address cards that permit the holder to purchase various services in addition to telecommunications services. Such services include, but are not limited to, ring tone downloads, music downloads, text messaging, picture messaging, web browsing, game downloads, or screen saver downloads.

(b) *Application of the tax*—(1) *Definitions.* Section 49.4251-4(b) provides that—

(i) *Carrier* means a telecommunications carrier as defined in 47 U.S.C. 153.

(ii) *Holder* means a person that purchases other than for resale.

(iii) *Transferee* means the first person that is not a carrier to whom a PTC is transferred by a carrier.

(2) *Imposition, liability, and collection.* Section 4251(d) provides that the § 4251 tax is imposed on the transfer of a PTC to a transferee; § 49.4251-4(d)(1) provides that the person liable for the tax is the transferee and that the person responsible for collecting the tax generally is the carrier transferring the PTC to the transferee. Section 49.4251-4(d)(1) further provides that if a holder purchases a PTC from a transferee reseller, the amount the holder pays for the PTC is not treated as an amount paid for communications services and thus tax is not imposed on that payment.

(c) *Person eligible to request credit or refund.* The transferee is the person liable for the tax paid on a PTC and thus generally is the person eligible to request a credit or refund of the tax it paid. The carrier is eligible to request a credit or refund only if it meets the conditions of section 5(d)(4) of Notice 2006-50. The holder is not liable for the tax and thus cannot request a credit or refund.

SECTION 7. PREPAID CELLULAR TELEPHONES

(a) *In general*—(1) *Prepaid cellular telephones.* Certain telecommunications providers offer wireless (cellular) telecommunications service on a prepaid service basis (prepaid telephones) whereby a customer purchases the cellular telephone with a set number of minutes available for telecommunications. When the customer exhausts the number of minutes on the prepaid telephone, the customer may purchase additional minutes. The customer does not enter into a contract with the telecommunications provider; there are no service charges after the additional purchase and no monthly bills. Under this notice, the prepaid telephone will be treated as nontaxable service unless the terms of the prepaid telephone service expressly state it is for local-only service.

(2) *Other prepaid cellular telephones.* This section does not address arrangements that permit the holder to purchase various services in addition to telecommunications services. Such services include, but are not limited to, ring tone downloads, music downloads, text messaging, picture messaging, web browsing, game downloads, or screen saver downloads.

(b) *Application of the tax.* Rules similar to the rules for PTCs, as described in section 6 of this notice, apply to prepaid telephones. Thus, the person liable for tax is the person (transferee) that buys the prepaid telephone from the telecommunications provider (carrier) and the carrier is responsible for collecting the tax. Any holder of a prepaid telephone (that is, a person that buys the prepaid telephone other than for resale) is not liable for tax.

(c) *Person eligible to request credit or refund.* The transferee is the person liable for the tax paid on a prepaid telephone and thus generally is the person eligible to request a credit or refund of the tax it paid. The carrier is eligible to request a credit or refund only if it meets the conditions of section 5(d)(4) of Notice 2006-50. The holder is not liable for the tax and thus cannot request a credit or refund.

SECTION 8. CHARGES IN CONNECTION WITH LOCAL-ONLY SERVICE

(a) *Background.* Section 3(b) of Notice 2006-50 defines local-only service as including certain services and facilities provided in connection with local telephone service, even though these services may also be used in connection with long distance service. As examples, the notice cites to Rev. Rul. 72-537, 1972-2 C.B. 574 (telephone amplifier), Rev. Rul. 73-171, 1973-1 C.B. 445 (automatic call distributing equipment), and Rev. Rul. 73-269, 1973-1 C.B. 444 (special telephone).

(b) *Subscriber line charges.* In addition to the examples in paragraph (a) of this section, amounts paid for subscriber line charges, which are described in Rev. Rul. 87-108, 1987-2 C.B. 260, are also amounts paid for local telephone service. This charge may appear on a bill as "Federal Access Charge," "Customer or Subscriber Line Charge," or "Interstate Access Charge."

(c) *Universal service fees*—(1) *Background.* All telecommunications companies that provide interstate and international telecommunications service contribute to the federal Universal Service Fund (USF). Their contributions support four Universal Service programs established and overseen by the Federal Communications Commission (FCC). Some telecommunications companies recover their contribution to the USF directly from their customers by billing them for this charge. The FCC does not require companies to pass on these costs to their customers. Each company makes a business decision about whether and how to

recover USF costs. A company that separately states this charge on a bill may call it a "Federal Universal Service Fee" or "Universal Connectivity Fee."

(2) *Application.* Because telecommunications providers charge the USF to their customers in connection with their customers' long distance service, amounts paid for separately stated USF amounts are not amounts paid for local-only service.

SECTION 9. PERSON TO MAKE REQUEST IF TAXPAYER IS NO LONGER IN BUSINESS OR DECEASED

Neither Notice 2006-50 nor this notice create any special rules regarding the person to request a credit or refund of tax for a taxpayer that no longer exists or is deceased. The same rules that apply to requests for credits or refunds of other federal taxes also apply to similar requests of the tax imposed under § 4251. These rules depend upon the facts and circumstances relating to the reasons that the taxpayer no longer exists. The Form 8913 Instructions and Publication 559, *Survivors, Executors, and Administrators*, provide general guidance for taxpayers regarding deceased taxpayers.

SECTION 10. EFFECT OF NOTICE 2006-50 ON STATE AND LOCAL TELECOMMUNICATIONS TAXES

Neither Notice 2006-50 nor this notice affect the ability of state or local governments to impose or collect telecommunication taxes under the respective statutes of those governments.

SECTION 11. NO OBLIGATION OF TELECOMMUNICATIONS PROVIDERS TO SUPPLY RECORDS TO CUSTOMERS

The IRS has been asked to require telecommunications providers to supply their customers with those customers' telecommunications bills for periods after February 28, 2003, and before August 1, 2006. Neither Notice 2006-50 nor this notice requires telecommunications providers to supply billing records to their customers.

SECTION 12. BUSINESS AND NONPROFIT ESTIMATION METHOD

(a) *In general.* This section provides rules for the Business and Nonprofit Estimation Method (EM) that eligible entities may use to determine the amount of their credit or refund for nontaxable service. Eligible entities may, but are not required to, use the EM instead of the actual amount of federal communications excise tax they paid on nontaxable service to calculate the amount of their credit or refund.

(b) *Definitions.* The following definitions apply to this section.

(1) *Eligible entity* means—

(i) Any—

(A) Business entity (including a corporation or partnership);

(B) Trust or estate;

(C) Tax-exempt organization; and

(D) Individual owner of rental property and any self-employed individual (including an independent contractor, sole proprietor, or farmer) but only if the individual (including a married couple filing a joint return) reports gross rental and business income totaling more than $25,000 on his or her 2006 federal income tax return;

(ii) That was in operation during any time from March 1, 2003 through July 31, 2006; and

(iii) That received and paid for telecommunications service that was reflected on bills dated in April 2006 and September 2006.

(2) *Total telephone expenses* means all amounts paid to every telecommunications provider used by the eligible entity for telephone service that were billed after February 28, 2003, and before August 1, 2006. These amounts include, but are not limited to, amounts paid for long distance service, local-only service, bundled service, 900 number service, universal service fees, federal, state, and local taxes. If an eligible entity is billed for telephone and non-telephone services on one bill each month and does not separately track non-telephone services in its books and records, the entire amount of that bill is included in total telephone expenses. An eligible entity may determine the amount of its total telephone expenses by examining its books and records, including, for example, its general ledger, check register, and canceled checks.

(3) *Employee* means any person working for the taxpayer full or part time as reported on the eligible entity's Form 941, *Employer's Quarterly Federal Tax Return*, for the 2nd quarter of 2006, other than any person employed as a household employee, in a non-pay status, on a pension, or an active member of the Armed Forces.

(c) *Using the EM to determine the amount of the credit or refund*—(1) *Determining the federal excise tax as a percentage of the telephone bill*—(i) First, determine the amount of federal communications excise tax on all telephone bills dated in April 2006 and all telephone bills dated in September 2006. The amount is generally separately stated on the bill as "FET" or "federal tax".

(ii) Next, for all the April telephone bills and all the September telephone bills, divide the amount of federal communications excise tax included on the bills by the total telephone expenses on the bills. The resulting amounts are the April and September percentages, respectively.

(iii) Next, subtract the September percentage from the April percentage. For purposes of this notice, this amount is the federal excise tax percentage (FETP).

(2) *Capping the FETP*—(i) Determine the number of employees.

(ii) For taxpayers with 250 or fewer employees, the FETP is capped at 2 percent.

(iii) For taxpayers with more than 250 employees, the FETP is capped at 1 percent.

(d) *Calculating the amount of the credit or refund*—(1) *Records kept on a monthly basis.* If the entity has maintained its telephone expense records on a monthly basis, multiply the FETP amount by the taxpayer's monthly total telephone expenses for each month of the 41 month period from March 2003 through July 2006. The product of this calculation is the taxpayer's credit or refund amount.

(2) *Records kept on an annual basis.* If the entity has maintained its telephone expense records on an annual basis rather than a monthly basis, prorate its annual amount equally to each month of that year. Thus, for example, a taxpayer maintaining annual telephone expense records for 2003 would divide its total telephone expenses by 12. Next, the taxpayer would use that monthly amount to complete the calculations for the credit or refund amount for 2003.

(e) *Actual Amounts.* Use of the EM is optional. Taxpayers may use the actual amounts paid for federal communications excise tax for nontaxable service to determine the amount of their credit or refund.

(f) *Examples.* The following examples illustrate the application of this section.

Example 1—(i) *Facts.* Business A has 250 employees. A's April 2006 telephone bill is $1,700, including federal communications excise tax of $47.60. A's September 2006 telephone bill is $1,600, including federal communications excise tax of $24.00. A's total telephone expenses, for which it does not have monthly records, are as follows:

2003 — $10,800.00

2004 — $16,000.00

2005 — $20,000.00

2006 — $20,571.37.

(ii) *Determining the April and September percentages.* A's April percentage is 2.8 percent (47.60 ÷ 1,700). A's September percentage is 1.5 percent (24 ÷ 1,600).

(iii) *Determining the FETP.* The difference between A's April percentage and September percentage is 1.3 percent (2.8 - 1.5). Thus, the FETP is 1.3 percent.

(iv) *Capping the FETP.* Because A's number of employees does not exceed 250, A's FETP is not capped at 1 percent.

(v) *Prorating.* Because A did not maintain its total telephone expense records by month, it prorates those amounts equally to each month within the March 2003 — July 2006 period for each particular year. For 2003, A divides its total telephone expense of $10,800 by 12 and multiplies that result by 10 (the number of months between March and December). ([10,800 ÷ 12] x 10 = 9,000.) For 2006, A divides its total telephone expense of $20,571.37 by 12 and multiplies that result by 7 (the number of months between January and July). ([20,571.37 ÷ 12] x 7 = 12,000.)

(vi) *Calculating the amount of the credit or refund.* Using the EM, the amount of A's credit or refund is calculated as follows:

2003: $9,000 x .013 = $117 (117÷10 = 11.7) Monthly amount $11.70

2004: $16,000 x .013 = $208 (208÷12 = 17.33) Monthly amount $17.33

2005: $20,000 x .013 = $260 (260÷12 = 21.67) Monthly amount $21.67

2006: $12,000 x .013 = $156 (156÷7 = 22.29) Monthly amount $22.29

(vii) *Reporting the credit or refund amounts on Form 8913*—(A) Because the credit or refund period does not align with the calendar quarters, Form 8913 requires taxpayers to report the credit or refund amounts in 13 three-month intervals and one two-month interval. Thus, A would report credit or refund amounts on Form 8913 as follows:

March, April, May 2003 — $35.10 (11.70 x 3 = 35.10)

June, July, August 2003 — $35.10 (11.70 x 3 = 35.10)

September, October, November 2003 — $35.10 (11.70 x 3 = 35.10)

December 2003, January, February 2004 — $46.36 (11.70 + [17.33 x 2] = 46.36)

March, April, May 2004 — $51.99 (17.33 x 3 = 51.99)

June, July, August 2004 — $51.99 (17.33 x 3 = 51.99)

September, October, November 2004 — $51.99 (17.33 x 3 = 51.99)

December 2004, January, February 2005 — $60.67 (17.33 + [21.67 x 2] = 60.67)

March, April, May 2005 — $65.01 (21.67 x 3 = 65.01)

June, July, August 2005 — $65.01 (21.67 x 3 = 65.01)

September, October, November 2005 — $65.01 (21.67 x 3 = 65.01)

December 2005, January, February 2006 — $66.25 (21.67 + [22.29 x 2] = 66.25)

March, April, May 2006 — $66.87 (22.29 x 3 = 66.87)

June, July 2006 — $44.58 (22.29 x 2 = 44.58)

(B) After determining the amount of credit or refund using the EM, A reports the amounts on Form 8913, and attaches the Form 8913 to A's 2006 federal income tax return.

Example 2. The same facts as *Example 1* except that A has 500 employees. A's FETP is capped at 1 percent. Thus, A must make the same calculation as in *Example 1* to determine the proper amount of A's credit or refund of federal communications excise tax using the FETP of 1 percent, rather than 1.3 percent.

SECTION 13. FORM 1040EZ-T, REQUEST FOR REFUND OF FEDERAL TELEPHONE EXCISE TAX

Individuals who do not have to file a federal income tax return and who meet the conditions for requesting a refund of the federal communications excise tax may file Form 1040EZ-T to request the refund. Individuals requesting a refund of actual amounts of federal communications excise tax paid must complete Form 8913 and attach that form to the Form 1040EZ-T.

SECTION 14. MODIFICATION OF PROVISION REGARDING REQUESTS FOR CREDIT OR REFUND

(a) *Present requirement.* Section 5(g) of Notice 2006-50 provides as follows:

Requests that do not follow the provisions of this notice. Requests that do not follow the provisions of this notice (whether filed before or after its publication)—

(1) Will not be processed to the extent they relate to the tax paid on nontaxable service that was billed after February 28, 2003; and

(2) Will be processed normally to the extent they relate to the tax paid on nontaxable service that was billed before March 1, 2003.

(b) *Reason for modification.* Many of the pending refund claims that were filed on or before May 25, 2006, include refund claims for nontaxable service that was billed before March 1, 2003, and after February 28, 2003. In the interest of sound tax administration and efficiency, the IRS will process all claims for credit or refund that were filed on or before May 25, 2006.

(c) *Revised requirement.* Accordingly, section 5(g) of Notice 2006-50 is modified to read as follows:

(1) Requests that do not follow the provisions of Notice 2006-50 and that were filed on or before May 25, 2006, will be processed normally.

(2) Requests that were filed on or after May 26, 2006, and do not follow the provisions of Notice 2006-50, will not be processed to the extent they relate to the tax paid on nontaxable service that was billed after February 28, 2003.

SECTION 15. EFFECT ON OTHER DOCUMENTS

Notice 2006-50 is amplified, clarified, and modified.

SECTION 16. DRAFTING INFORMATION

The principal author of this notice is Barbara B. Franklin of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact 202-622-3130 (not a toll-free number).

1.08.010 - Construction.

Unless the provisions of the context otherwise require, these general provisions, rules of construction and definitions shall govern the construction of this code. The provisions of this code and all proceedings under it are to be construed with a view to effect its objects and to promote justice.

(Prior code § 1300).

EXHIBIT D

1.08.130 - Definitions.

The following words and phrases, whenever used in this Code, shall be construed as defined in this Section unless from the context a different meaning is specifically defined and more particularly directed to the use of such words or phrases:

A. "Business" includes businesses, professions, trades and occupations, and all and every kind of calling.

B. "City" means the City of Long Beach or the area within the territorial City limits of the City of Long Beach and such territory outside of this City over which the City has jurisdiction or control by virtue of any constitutional or charter provision, or any law.

C. "City Attorney" or "Attorney" means the City Attorney of this City or such other official as hereafter may, by law, be designated as the official legal adviser of this City.

D. "City Auditor" or "Auditor" means the City Auditor of this City or such person as hereafter may, by law, be authorized to perform for the City the duties ordinarily incident to the office of an official auditor.

E. "City Clerk" or "Clerk" means the City Clerk of this City or such person as hereinafter may, by law, be authorized to perform the duties now being performed by that official.

F. "City Manager" or "Manager" means the City Manager of this City or his successor as chief executive officer of the City.

G. "Council" means the City Council of this City.

H. "County" is the County of Los Angeles.

I. "Engage in" includes commence, engage in, carry on, conduct, maintain, manage and operate.

J. "Fiscal year" means the year commencing with July 1st and ending the following June 30th.

K. "Goods" includes wares or merchandise.

L. "License fee" includes any charge imposed for a license, whether the object be regulation or revenue, or both regulation and revenue.

M. "May" is permissive.

N. "Oath" includes affirmation.

O. "Office." The use of the title of any officer, employee or office means such officer, employee or office of the City of Long Beach unless otherwise specifically designated.

P. "Operate" includes carry on, keep, conduct or maintain.

Q. "Owner" applied to a building or land, includes any part owner, joint owner, tenant, tenant in common, or joint tenant, of the whole or a part of such building or land.

R. "Person" means any natural person, firm, association, joint venture, joint stock company, partnership, organization, club, company, corporation, business trust or the manager, lessee, agent, servant, officer or employee or any of them, except as otherwise provided in this Code, or where the context clearly requires a different meaning.

S. "Sale" includes any sale, exchange, barter or offer for sale.

T. "Shall" and "must". Each is mandatory.

U. "State" is the State of California.

V. "Street" includes all streets, highways, avenues, lanes, alleys, courts, places, squares,

EXHIBIT E

sidewalks, parkways, curbs, or other public ways in this City which have been or may hereafter be dedicated and open to public use, or such other public property so designated in any law of this State.

W. "Tenant" or "occupant" applied to a building or land includes any person who occupies the whole or part of such building or land, whether alone or with others.

X. "Vote, approval or consent." Except as may be otherwise provided in connection therewith, the phrase "vote, approval or consent of the Council or other body" means the affirmative vote of a majority of those members present at a meeting having a quorum in attendance. Whenever said phrase refers to the members of the Council or other body rather than to the Council or body as such, the vote required shall be in relation to the total membership rather than to those members present at the meeting.

(Prior code § 1400).

3.48.060 - Refund—Time limitation of payment.

Any refund made pursuant to this chapter must be authorized by the department head with the approval of the city attorney or the city attorney and the city council, provided the refund is made within one (1) year after payment of the money to the city, or if an application for a refund is filed by the person entitled to the money, the application therefor must be filed within such one-year period.

(Ord. C-5377 § 1 (part), 1977: prior code § 2715.3).

3.48.070 - Refund—Conflicting provisions.

If any ordinance of the city or any law applicable thereto expressly authorizes, in certain contingencies, the making of a refund of money paid to the city or prescribes the procedure therefor, such ordinance shall control in making the refund. The council declares that its intent, in adopting this chapter, is to provide for the making of refunds of money paid to the city, under the conditions set forth in this chapter, not otherwise expressly prohibited by any ordinance or law applicable to the city or not otherwise expressly authorized by such ordinance or law.

(Prior code § 2715.4).

EXHIBIT F

3.68.160 - Refunds.

A. Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the city clerk or city treasurer-city tax collector under this chapter, it may be refunded as provided in this section.

B. A service supplier may claim a refund or take as credit against taxes collected and remitted the amount overpaid, paid more than once, or erroneously or illegally collected or received, when it is established in a manner prescribed by the city treasurer-city tax collector that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the service user or credited to charges subsequently payable by the service user to the person required to collect and remit.

C. No refund shall be paid under the provisions of this section unless the claimant established his or her right thereto by written records showing entitlement thereto.

D. No refund shall be paid under the provisions of this section unless the claimant has submitted a claim pursuant to this section.

(ORD-06-0035 § 2, 2006: ORD-06-0011 § 5, 2006: prior code § 2480.14).

EXHIBIT G

Volume 2

STATUTES OF CALIFORNIA

1958 AND 1959

CONSTITUTION OF 1879 AS AMENDED
MEASURES SUBMITTED TO VOTE OF ELECTORS,
1958 GENERAL ELECTION

GENERAL LAWS, AMENDMENTS TO CODES,
RESOLUTIONS, AND CONSTITUTIONAL
AMENDMENTS

PASSED AT

THE 1958 REGULAR SESSION OF
THE LEGISLATURE

THE 1958 FIRST AND SECOND EXTRAORDINARY
SESSIONS OF THE LEGISLATURE

AND

THE 1959 REGULAR SESSION OF THE LEGISLATURE

Compiled by
RALPH N. KLEPS
Legislative Counsel

102—L-2627

EXHIBIT H

other agencies and officials as are named in the order. Thereafter the proceedings in such case shall be deemed never to have occurred. The court shall send a copy of the order to each agency and official named therein, and each such agency and official shall expunge records in its custody as directed by the order.

CHAPTER 1724

An act to add Division 3.5 (commencing with Section 700) to Title 1 of the Government Code, to repeal Section 342 of the Code of Civil Procedure and to add Sections 313 and 342 to said code, relating to claims against the State, local public entities and public officers and employees.

[Approved by Governor July 9, 1959. Filed with Secretary of State July 10, 1959.]

In effect September 18, 1959

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

SECTION 1. Division 3.5 (commencing with Section 700) is added to Title 1 of the Government Code, to read:

DIVISION 3.5. CLAIMS AGAINST THE STATE, LOCAL PUBLIC ENTITIES AND OFFICERS AND EMPLOYEES

CHAPTER 2. CLAIMS AGAINST LOCAL PUBLIC ENTITIES

Article 1. General

"Local public entity"

700. As used in this chapter, "local public entity" includes any county or city and any district, local authority or other political subdivision of the State but does not include the State or any office, officer, department, division, bureau, board, commission or agency thereof claims against which are paid by warrants drawn by the Controller.

Adoption of constitutional amendment

701. Until the adoption by the people of an amendment to the Constitution of the State of California confirming the authority of the Legislature to prescribe procedures governing the presentation, consideration and enforcement of claims against chartered counties, chartered cities and counties and chartered cities and against officers, agents and employees thereof, this chapter shall not apply to causes of action founded on contract against a chartered city and county or chartered city while it has an applicable claims procedure prescribed by charter or pursuant thereto.

Causes of action affected

702. This chapter applies only to claims relating to causes of action which accrue subsequent to its effective date.

Exemptions

703. Articles 1 and 2 of this chapter apply to all claims for money or damages against local public entities except:

(a) Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification or adjustment of

any tax, assessment, fee or charge or any portion thereof, or of any penalties, costs or charges related thereto.

(b) Claims in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any provision of law relating to mechanics', laborers' or materialmen's liens.

(c) Claims by public officers and employees for fees, salaries, wages, mileage or other expenses and allowances.

(d) Claims for which the workmen's compensation authorized by Division 4 (commencing with Section 3201) of the Labor Code is the exclusive remedy.

(e) Applications or claims for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs, and claims for goods, services, provisions or other assistance rendered for or on behalf of any recipient of any form of public assistance.

(f) Applications or claims for money or benefits under any public retirement or pension system.

(g) Claims for principal or interest upon any bonds, notes, warrants, or other evidences of indebtedness.

(h) Claims which relate to a special assessment constituting a specific lien against the property assessed and which are payable from the proceeds of such an assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it.

(i) Claims by the State or a department or agency thereof or by another local public entity.

(j) Claims arising under any provision of the Unemployment Insurance Code, including but not limited to claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed.

(k) Claims for the recovery of penalties or forfeitures made pursuant to Article 1 of Chapter 1 of Part 7 of Division 2 of the Labor Code (commencing at Section 1720).

Claim made under prior law

704. A claim against a local public entity presented in substantial compliance with any other applicable claims procedure established by or pursuant to a statute, charter or ordinance in effect immediately prior to the effective date of this chapter shall satisfy the requirements of Articles 1 and 2 of this chapter, if such compliance takes place before the repeal of such statute, charter or ordinance or before July 1, 1964, whichever occurs first. Section 716 is applicable to claims governed by this section.

Claim procedure as established by agreement

705. The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any board or officer thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising

out of or related to the agreement and the consideration and payment of such claims. The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body. A claims procedure established by an agreement made pursuant to this section exclusively governs the claims to which it relates, except that the agreement may not require a shorter time for presentation of claims than the time provided in Section 715, and that Section 716 is applicable to all such claims.

Article 2. Presentation, Consideration and Enforcement of Claims

Necessity of written claim

710. No suit for money or damages may be brought against a local public entity on a cause of action for which this chapter requires a claim to be presented until a written claim therefor has been presented to the entity in conformity with the provisions of this article.

Contents

711. A claim shall be presented by the claimant or by a person acting on his behalf and shall show:

(a) The name and post office address of the claimant;

(b) The post office address to which the person presenting the claim desires notices to be sent;

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;

(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; and

(e) The amount claimed as of the date of presentation of the claim, together with the basis of computation thereof.

The claim shall be signed by the claimant or by some person on his behalf.

A claim may be amended at any time, and the amendment shall be considered a part of the original claim for all purposes.

Insufficiency of claim. Notice

712. If in the opinion of the governing body of the local public entity a claim as presented fails to comply substantially with the requirements of Section 711 the governing body may, at any time within fifty (50) days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein.

Such notice may be given by mailing it to the address, if any, stated in the claim as the address to which the person presenting the claim desires notices to be sent. If no such address is stated in the claim, the notice may be mailed to the address, if any, of the claimant as stated in the claim.

The governing body may not take action on the claim for a period of twenty (20) days after such notice is given. A failure or refusal to amend the claim shall not constitute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented complied substantially with Section 711.

Waiver of defense

713. Any defense based upon a defect or omission in a claim as presented is waived by failure of the governing body to mail notice of insufficiency with respect to such defect or omission as provided in Section 712, except that no notice need be mailed 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.

Presentment of claim

714. A claim may be presented to a local public entity (1) by delivering the claim to the clerk, secretary or auditor thereof within the period of time prescribed by Section 715 or (2) by mailing the claim to such clerk, secretary or auditor or to the governing body at its principal office not later than the last day of such period. A claim shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided herein if it is actually received by the clerk, secretary, auditor or governing body within the time prescribed.

Time of presentment

715. A claim relating to a cause of action for death or for physical injury to the person or to personal property or growing crops shall be presented as provided in Section 714 not later than the one hundredth day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Section 714 not later than one year after the accrual of the cause of action.

For the purpose of computing the time limit prescribed by this section, the date of accrual of a cause of action to which a claim relates is the date upon which the cause of action accrued within the meaning of the applicable statute of limitations.

Persons under disability

716. The superior court of the county in which the local public entity has its principal office shall grant leave to present a claim after the expiration of the time specified in Section 715 if the entity against which the claim is made will not be unduly prejudiced thereby, where no claim was presented during such time and where:

(a) Claimant was a minor during all of such time; or

(b) Claimant was physically or mentally incapacitated during all of such time and by reason of such disability failed to present a claim during such time; or

(c) Claimant died before the expiration of such time.

Application for such leave must be made by verified petition showing the reason for the delay. A copy of the proposed claim shall be attached to the petition. The petition shall be filed within a reasonable time, not to exceed one year, after the time specified in Section 715 has expired. A copy of the petition and the proposed claim and a written notice of the time and place of hearing thereof shall be served on the clerk or secretary or governing body of the local public entity not less than 10 days before such hearing. The application shall be determined upon the basis of the verified petition, any affidavits in support of or in opposition thereto, and any additional evidence received at such hearing.

717. The governing body shall act on a claim in one of the following ways: Action on claim

(a) If the governing body finds the claim is not a proper charge against the local public entity, it shall reject the claim.

(b) If the governing body finds the claim is a proper charge against the local public entity and is for an amount justly due, it shall allow the claim.

(c) If the governing body finds the claim is a proper charge against the local public entity but is for an amount greater than is justly due, it shall either reject the claim or allow it in the amount justly due and reject it as to the balance. If the governing body allows the claim in part and rejects it in part it may require the claimant, if he accepts the amount allowed, to accept it in settlement of the entire claim.

Notice of any action taken under this section rejecting a claim in whole or in part shall be given in writing by the clerk, secretary or auditor of the local public entity to the person who presented the claim.

718. Where this chapter requires that a claim be presented to the local public entity and a claim is presented and action thereon is taken by the governing body: Allowance of claim

(a) If the claim is allowed in full and the claimant accepts the amount allowed no suit may be maintained on any part of the cause of action to which the claim relates.

(b) If the claim is allowed in part and the claimant accepts the amount allowed, no suit may be maintained on that part of the cause of action which is represented by the allowed portion of the claim.

(c) If the claim is allowed in part no suit may be maintained against such entity on any portion of the cause of action where, pursuant to a requirement of the governing body to such effect, the claimant has accepted the amount allowed in settlement of the entire claim.

Nothing in this article shall be construed to deprive a claimant of the right to resort to writ of mandamus or other proceeding against the local public entity or the governing body or any officer thereof to compel it or him to pay the claim when and to the extent that it has been allowed.

719. Except where a different statute of limitations is specifically applicable to a local public entity, any suit brought against a local public entity on a cause of action for which this chapter requires a claim to be presented must be commenced within the period of time prescribed by the statute of limitations which would be applicable thereto if the suit were being brought against a private party. Statute of limitations

720. Nothing in this chapter shall prohibit the governing body of a local public entity from compromising any suit based on a cause of action for which this chapter requires a claim to be presented. Compromising claim

Article 3. Claims Procedures Established by Local Public Entities

Claims procedures established by local public entities

730. Claims against a local public entity for money or damages which are excepted by Section 703 from Articles 1 and 2 of this chapter, and which are not governed by any other statutes or regulations expressly relating thereto, shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity. The procedure so prescribed may include a requirement that a claim be presented as a prerequisite to suit thereon, but may not require a shorter time for presentation of any claim than the time provided in Section 715 of this code, and Section 716 of this code shall be applicable to all claims governed thereby.

Repeal

SEC. 2. Section 342 of the Code of Civil Procedure is hereby repealed.

SEC. 3. Section 313 is added to the Code of Civil Procedure, to read:

General procedure

313. The general procedure for the presentation of claims as a prerequisite to commencement of actions for money or damages against the State of California, counties, cities, cities and counties, districts, local authorities, and other political subdivisions of the State, and against the officers and employees thereof, is prescribed by Division 3.5 (commencing with Section 600) of Title 1 of the Government Code.

Prior claims

SEC. 4. Nothing in this act shall be deemed to allow suit or reinstate claims which have been denied or barred prior to the effective date of this act, including but not limited to claims under the Revenue and Taxation Code which have been denied or barred by the provisions of the Government Code.

CHAPTER 1725

An act to repeal Sections 29700, 29700.1, 29701, 29702, 29703, 29704, 29705, 29707, 29711, 29713, 29714, 29714.1, 29715, 29716, 29720, to add Sections 29700 and 29706, to renumber Section 29719, to renumber and amend Sections 29706, 29708, 29709, 29710, 29712, 29717, 29718, 29721 and to amend Sections 29741, 29744 and 29748 of the Government Code, and to amend Section 439.56 of the Agricultural Code and Section 945 of the Military and Veterans Code, all relating to claims against counties.

In effect September 18, 1959

[Approved by Governor July 9, 1959. Filed with Secretary of State July 10, 1959.]

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

Repeal

SECTION 1. Sections 29700, 29700.1, 29701, 29702, 29703, 29704, 29705, 29707, 29711, 29713, 29714, 29714.1, 29715, 29716, and 29720 of the Government Code are hereby repealed.

Volume 2

STATUTES OF CALIFORNIA

1962 AND 1963

CONSTITUTION OF 1879 AS AMENDED
MEASURES SUBMITTED TO VOTE OF ELECTORS,
SPECIAL ELECTION, JUNE 5, 1962
GENERAL ELECTION, NOVEMBER 6, 1962

GENERAL LAWS, AMENDMENTS TO CODES, RESOLUTIONS,
AND CONSTITUTIONAL AMENDMENTS

PASSED AT
THE 1962 REGULAR SESSION OF
THE LEGISLATURE

THE 1962 FIRST, SECOND, AND THIRD EXTRAORDINARY
SESSIONS OF THE LEGISLATURE

THE 1963 REGULAR SESSION OF THE LEGISLATURE

AND

THE 1963 FIRST EXTRAORDINARY SESSION
OF THE LEGISLATURE

Compiled by
A. C. MORRISON
Legislative Counsel

85—L-4573

EXHIBIT 1

a school district for the formation of a new district, the county committee shall determine if as to that district the election shall be held only in such territory. For plans and recommendations formed pursuant to Sections 3001 to 3009 for the formation of a new district the county committee shall determine the territory in which the election shall be held. The election shall be held in the district or portion thereof in accordance with such determination.

SEC. 2. Section 1 of this act becomes operative only if Division 5 of the Education Code as proposed to be added by Senate Bill No. 718 of the 1963 Regular Session is enacted by the Legislature at such session, and in such case at the same time as said Division 5 takes effect.

CHAPTER 1681

An act to add Division 3.6 (commencing with Section 810) to Title 1 of the Government Code, and to amend Sections 340, 1095 and 1242 of the Code of Civil Procedure, and to repeal Sections 903, 1041, 1042, 13551, 15512, 15513, 15514, 15515 and 15516 of the Education Code, and to repeal Section 1012 of, and Article 6 (commencing with Section 1181) of Chapter 4 of, Division 4 of the Education Code as proposed to be added by Senate Bill No. 718 of the 1963 Regular Session, and to repeal Article 1 (commencing with Section 1950) of Chapter 6 of Division 4 of Title 1 of, Article 6 (commencing with Section 50140) of Chapter 1 of Part 1 of Division 1 of Title 5 of, Article 3 (commencing with Section 53050) of Chapter 1 of Part 1 of Division 2 of Title 5 of, and Sections 2002.5, 39586, 54002, 61627 and 61633 of, the Government Code, and to amend Sections 943 and 954 of, and to repeal Chapter 23 (commencing with Section 5640) of Part 3 of Division 7 of, the Streets and Highways Code, and to repeal Article 10 (consisting of Section 51480) of Chapter 2 of Part 7 of Division 15 of, Chapter 5 (commencing with Section 60200) of Part 3 of Division 18 of, and Sections 22725, 22726, 22730, 22731, 31083, 31089, 31090, 35750, 35751, 35755, 35756, 50150 and 50152 of, the Water Code, and to amend Sections 6005, 6610.3 and 6610.9 of the Welfare and Institutions Code, and to repeal Sections 71754, 71755 and 71756 of the Water Code as added by Chapter 156, Statutes of 1963, and to repeal Section 10 of Chapter 641 of the Statutes of 1931 (Flood Control and Flood Water Conservation District Act), relating to liability of public entities and public officers, servants and employees.

[Approved by Governor July 15, 1963. Filed with Secretary of State July 17, 1963.]

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

SECTION 1. Division 3.6 (commencing with Section 810) is added to Title 1 of the Government Code, to read:

DIVISION 3.6. CLAIMS AND ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

PART 1. DEFINITIONS

810. Unless the provision or context otherwise requires, the definitions contained in this part govern the construction of this division.

810.2. "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.

810.4. "Employment" includes office or employment.

810.6. "Enactment" means a constitutional provision, statute, charter provision, ordinance or regulation.

810.8. "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.

811. "Law" includes not only enactments but also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

811.2. "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

811.4. "Public employee" means an employee of a public entity.

811.6. "Regulation" means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency.

811.8. "Statute" means an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act.

PART 2. LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES

CHAPTER 1. GENERAL PROVISIONS RELATING TO LIABILITY

Article 1. Scope of Part

814. Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee.

814.2. Nothing in this part shall be construed to impliedly repeal any provision of Division 4 (commencing with Section

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REPORT ON ASSEMBLY BILL NO. 405. BRADLEY

SUMMARY: Adds Ch. 2 of a new Div. 3.5, Title 1, Gov. C., repeals and adds Sec. 342, C.C.P., adds Sec. 313, C.C.P., re claims against local public entities.

Prescribes a general procedure for the presentation of claims for money or damages against local public entities which are defined to exclude the State of California and those of its agencies whose claims are paid by Controller's warrants on the State Treasury. Exempts certain claims for money, including claims relating to taxes, salaries and wages, workmen's compensation, unemployment insurance, public assistance, bonds and other such matters. Permits special claim procedures in contractual matters and, until July 1, 1964, permits continued use of unrepealed local procedures.

Requires presentation of a written claim containing specified information as a prerequisite to suit against a local public entity, but provides that defects in claim are waived unless notice is given to claimant. Claims for personal injuries or injuries to personal property or growing crops must be presented within 100 days after accrual of cause of action and other claims within one year of accrual of cause of action. Provides for partial rejection of claim and prohibits suit on allowed portion. Permits amendment of claim. Unless law otherwise requires as to the particular local public entity, requires that an action be brought against such entity within the time allowed by the statute of limitations if the action were against a private person.

Establishes special procedure for extending time to file claim in cases of minority, disability

EXHIBIT J

or death.

Permits local public entities to establish claims procedure consistent with general statute for matters excluded from it and not covered by other provisions of law.

FORM: Approved. TITLE: Approved.

CONSTITUTIONALITY: Approved.

COMMENT: This bill is one of six (A.B. 405 - A.B. 410) sponsored by the Law Revision Commission relating to claims against public entities and having as a principal purpose the creation of a greater degree of uniformity in the law in this field. This program is discussed in a report of the Commission titled "The Presentation of Claims Against Public Entities," dated January, 1959.

Ralph N. Kleps
Legislative Counsel

By
Terry L. Baum
Deputy Legislative Counsel

TLB:fo

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Sovereign Immunity

Number 1—Tort Liability of Public Entities and Public Employees

January 1963

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

EXHIBIT K

NOTE

This pamphlet begins on page 801. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

STATE OF CALIFORNIA
CALIFORNIA LAW REVISION COMMISSION

January 2, 1963

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

On January 27, 1961, the California Supreme Court, in *Muskopf* v. *Corning Hospital District*, 55 Cal.2d 211, decided that the doctrine of sovereign immunity would no longer protect the State and other public entities in California from civil liability for their torts. At the same time, the Court decided *Lipman* v. *Brisbane Elementary School District*, 55 Cal.2d 224, in which it stated that the doctrine of discretionary immunity, which protects public officers and employees from liability for their discretionary acts, might not protect public entities from liability in all situations where the officers and employees are immune.

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation suspends the effect of the *Muskopf* and *Lipman* decisions until the ninety-first day after the adjournment of the 1963 Regular Session of the Legislature. At that time, unless further legislative action is taken, the State and other public entities in California will be liable for their torts under the conditions set forth in the *Muskopf* and *Lipman* cases.

Since the decision in the *Muskopf* case, the Commission has devoted substantially all of its time to the study of sovereign immunity. The Commission herewith submits its recommendation on one portion of this subject—tort liability of public entities and public employees. This is one of a series of reports prepared for the 1963 legislative session containing the recommendations of the Commission relating to various aspects of the subject of sovereign immunity. The Commission also has published a research study relating to sovereign immunity prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

In formulating its recommendations concerning sovereign immunity, the Commission first prepared a series of tentative recommendations, each of which related to a different aspect of the subject. These tentative recommendations were widely distributed, and comments and suggestions were solicited from all persons and organizations who expressed an interest in this subject. The State Bar appointed a special committee to consider the recommendations of the Commission relating to sovereign immunity, and this Committee has provided the Commission with helpful comments and suggestions. In addition, representatives of various public entities and other interested persons have attended the meetings of the Commission as observers. All comments and suggestions received were considered by the Commission in preparing its final recommendations.

Although the Commission has devoted the major portion of its time during the past two years to the study of sovereign immunity, the subject is so vast that a complete study of all its aspects could not be completed prior to the 1963 legislative session. The recommendations prepared for the 1963 legislative session are designed to meet the most pressing problems in regard to governmental tort liability. Other problems remain to be solved in the areas of activity already studied; and there are other areas of activity, where claims of liability arise less frequently, that require attention. Accordingly, the Commission proposes to continue its study of this subject and to make recommendations to subsequent legislative sessions dealing with the remaining problems. Among the topics that may be the subject of future study and recommendation by the Commission are liability without fault (including liability for ultrahazardous activities), specific or preventive relief against public entities and public employees, and liability for injuries to reputational interests (including defamation and invasion of privacy).

Respectfully submitted,

HERMAN F. SELVIN, *Chairman*

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 1—Tort Liability of Public Entities and Public Employees

BACKGROUND

On January 27, 1961, the California Supreme Court, in *Muskopf* v. *Corning Hospital District*,[1] decided that the doctrine of sovereign immunity would no longer protect public entities [2] in California from civil liability for their torts. At the same time, the Supreme Court decided *Lipman* v. *Brisbane Elementary School District*,[3] in which it stated that the doctrine of discretionary immunity, which protects public employees [4] from liability for their discretionary acts, might not protect public entities from liability in all situations where the employees are immune.

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation suspends the effect of the *Muskopf* and *Lipman* decisions until the ninety-first day after the final adjournment of the 1963 Regular Session of the Legislature. At that time, unless further legislative action is taken, the public entities of California will be liable for their torts under the conditions set forth in the *Muskopf* and *Lipman* decisions.

The Need for Legislation

Prior to the *Muskopf* and *Lipman* decisions, extensive legislation relating to the subject of governmental liability or immunity had been enacted. This legislation expresses a variety of conflicting policies. Some statutes create broad immunities for certain entities and others create wide areas of liability. Some apply to many public entities and others apply to but one. In some cases, statutes expressing conflicting policies overlap.[5] Even where statutes impose liability on public entities, they do so in a variety of inconsistent ways. Some entities are

[1] 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

[2] As used in this recommendation "public entities" includes the State and all other public entities.

[3] 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

[4] As used in this recommendation: "employee" includes an officer, agent or employee, but not an independent contractor; and "employment" includes office, agency or employment.

[5] For example, Streets and Highways Code Sections 5640 and 5641 (part of the Improvement Act of 1911) provide that cities, counties, resort districts and all corporations organized for municipal purposes are immune from liability for injuries caused by street and sidewalk defects. It is likely that these immunity provisions apply to several other kinds of districts, for the Improvement Act of 1911 has been incorporated by reference in many other statutes. But Government Code Section 53051 provides that cities, counties and school districts are liable for such dangerous conditions. As the Government Code section was last enacted, it has impliedly repealed the Streets and Highways Code sections insofar as cities and counties are concerned, but not insofar as resort districts and corporations organized for municipal purposes are concerned.

liable directly for the negligence of their employees. Others are not liable directly, but are required to pay judgments recovered against their employees even where the judgments result from malicious acts.

Where statutes are not applicable, the courts have determined liability on the basis of whether the injury was caused in the course of a governmental or proprietary activity. Thus, if the injury occurred in a swimming pool (a "governmental" activity), the public entity was not liable; but if the injury occurred on a golf course (a "proprietary" activity), the public entity was liable.

Even where a public entity is immune from liability for a negligent or wrongful act or omission, the public employee who acted or failed to act is often personally liable; and many public entities have assumed the cost of insurance protection for their employees against this liability.

Thus, even before the *Muskopf* and *Lipman* cases were decided, there was a pressing need for comprehensive legislation to deal with the problems of governmental liability and immunity.

The effect of the *Muskopf* and *Lipman* decisions on the existing statutes is not clear. Statutes that impose liability upon public entities in particular areas of activity may be construed either as limitations on the liability that would exist under these decisions or, in cases where a rule is declared that is broader than the common law rule that would be applicable under these decisions, as extensions of governmental liability.

The problem of reconciling the *Muskopf* and *Lipman* decisions with the existing statutory law could be met by repealing the existing statutes. Then the courts could decide all cases under the general principle that a public entity is liable for its torts. The federal government and some of the states have taken this approach. Thus, in some jurisdictions, a statute merely declares that the government is not immune from liability for its torts,[6] while in others, the courts have declared a similar rule.[7]

This solution to the problem, though, is fraught with difficulties. No precise standards for the determination of the liability of government have as yet been defined by the California courts. Hence, it is impossible to ascertain how large the potential liability would be if the *Muskopf* and *Lipman* cases were permitted to determine all governmental liability. The suggestion in the *Lipman* case that public entities may be liable for discretionary actions of public employees has given rise to fears that governmental liability may be expanded to the extent that essential governmental functions will be impaired. Experience in states which have left the limits of liability to be determined by the courts has shown that liability insurance to protect the financial integrity

[6] United States (28 U.S.C. §§ 1346, 2671-2680); New York (N.Y. CT. CL. ACT § 8—State only); Illinois (37 ILL. ANN. STAT. §§ 439.1-439.25 (Smith-Hurd Supp. 1961)—State only); Washington (Wash. Stats. 1961, Ch. 186—State only); Kentucky (KY. REV. STAT. § 44.070—State, negligence only); North Carolina (N.C. GEN. STAT. § 143-291—State, negligence only); Alaska (ALASKA COMP. LAWS ANN. § 56-2-2—local entities only, as construed in City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); ALASKA COMP. LAWS ANN. § 56-7-1 *et seq.*—State only); Hawaii (HAWAII REV. LAWS § 245A-1 *et seq.*—State only).

[7] New York (Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945)—local entities only); Florida (Hargrove v. Town of Cocoa Beach, 96 So.2d 130, 60 A.L.R.2d 1193 (Fla. 1957)—local entities only); Illinois (Molitor v. Kaneland Community Unit Dist., 18 Ill.2d 11, 163 N.E.2d 89 (1959)—local entities only); Michigan (Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961)); Wisconsin (Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962)).

of small public entities is at times prohibitively expensive or impossible to obtain when there is no defined limit to the potential extent of liability. As a result, some of these states have enacted legislation that substantially curtails governmental liability.

The courts, of course, have recognized that the liability of government cannot be unlimited. In the *Muskopf* case, the Supreme Court stated that it is not a tort for government to govern. In other jurisdictions where there has been a general waiver of sovereign immunity, the courts have worked out the limits of liability on a case by case basis over a period of years. Thus, in New York, the courts have declared that public entities are not liable for failing to enforce the law, for negligently inspecting buildings or for improperly issuing building permits. If the limits of governmental liability are not specified by statute in California, our courts will have to define the limits of such liability much as the courts in New York have been required to do. Under this process, though, many years will pass before the extent of governmental liability can be determined with certainty. Many cases must be tried and processed through the appellate courts. Large amounts of both private and public money must be fruitlessly expended in prosecuting and defending actions where the governmental defendant cannot be held liable. And in the meantime, while the potential liability is yet unknown, the financial stability of many public entities may be unprotected because of the unavailability of insurance at rates that they can afford to pay.

There is an immediate need, therefore, for the enactment of comprehensive legislation stating in considerable detail the extent to which public entities will be liable when the legislation suspending the effect of the *Muskopf* and *Lipman* decisions expires. In preparing this legislation, California may profit from the experience of New York and the federal government in administering their governmental tort laws. The difficulties the New York and federal courts have experienced in defining the limits of liability may be avoided here to a considerable extent by the statement of these limits in statutory form. Where the New York and federal courts have reached sound conclusions, the rules declared may be enacted here so that no time or money need be lost in test cases to determine whether the California courts will reach the same conclusions. Where the courts of these jurisdictions have reached unsound conclusions and have either restricted liability unduly or placed burdens on government that impair its ability to perform its vital functions, California can meet the problem by declaring a different rule by statute.

The resulting certainty will be of benefit both to public entities and to persons injured by governmental activities. If the limits of potential liability are known, public entities may plan accordingly, may budget for their potential liabilities, and may obtain realistically priced insurance. Meritorious claims will not be resisted in the hope that the appellate courts will create an additional immunity; and unmeritorious claims will not be pressed in the hope that an existing immunity will be curtailed or that liability will be extended beyond previously established limits.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Sovereign Immunity

Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees

January 1963

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

NOTE

This pamphlet begins on page 1001. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

STATE OF CALIFORNIA
CALIFORNIA LAW REVISION COMMISSION

January 2, 1963

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

The Commission herewith submits its recommendation on one portion of this subject—claims, actions and judgments against public entities and public employees. This is one of a series of reports prepared for the 1963 legislative session containing the recommendations of the Commission relating to various aspects of the subject of sovereign immunity. The Commission also has published a research study relating to sovereign immunity prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

Respectfully submitted,

HERMAN F. SELVIN, *Chairman*

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utes of 1959), and to amend Section 8.1 of the Solano County Flood Control and Water Conservation District Act (Chapter 1656, Statutes of 1951), and to amend Section 53 of the Solvang Municipal Improvement District Act (Chapter 1635, Statutes of 1951), and to amend Section 8 of the Sonoma County Flood Control and Water Conservation District Act (Chapter 994, Statutes of 1949), and to amend Section 10 of the Sutter County Water Agency Act (Chapter 2088, Statutes of 1959), and to amend Section 23 of the Upper Santa Clara Valley Water Agency Law (Chapter 28, Statutes of 1962 (1st Ex. Sess.)), and to amend Section 2.5 of the Vallejo Sanitation and Flood Control District Act (Chapter 17, Statutes of 1952 (1st Ex. Sess.)), and to amend Section 13 of the Ventura County Flood Control Act (Chapter 44, Statutes of 1944 (4th Ex. Sess.)), and to amend Section 8 of the Yolo County Flood Control and Water Conservation District Act (Chapter 1657, Statutes of 1951), and to amend Section 10 of the Yuba County Water Agency Act (Chapter 788, Statutes of 1959), and to amend Section 40 of the Yuba-Bear River Basin Authority Act (Chapter 2131, Statutes of 1959), relating to claims, actions and judgments against public entities and public officers, agents and employees.

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

SECTION 1. Part 3 (commencing with Section 900) is added to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. __ of the 1963 Regular Session, to read:

PART 3. CLAIMS AGAINST PUBLIC ENTITIES

CHAPTER 1. GENERAL

Article 1. Definitions

900. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this part.

Comment: This section is based on similar provisions found in the definitions or general provisions portions of various codes. See, for example, Section 5 of the Government Code.

The definitions contained in Part 1 of Division 3.6 will, of course, apply to this part. Part 1 contains the following provisions:

810. Unless the provision or context otherwise requires, the definitions contained in this part govern the construction of this division.

810.2. "Employee" includes an officer, agent or employee, but does not include an independent contractor.

810.4. "Employment" includes office, agency or employment.

810.6. "Enactment" means a constitutional provision, statute, charter provision, ordinance or regulation.

810.8. "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.

811. "Law" includes not only enactments but also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

811.2. "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

811.4. "Public employee" means an employee of a public entity.

811.6. "Regulation" means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret or make specific the law enforced or administered by the employee or agency.

811.8. "Statute" means an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act.

900.2. "Board" means:

(a) In the case of a local public entity, the governing body of the local public entity.

(b) In the case of the State, the State Board of Control.

Comment: "Board" has been defined to facilitate the drafting of provisions that apply both to the State and to local public entities.

900.4. "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State.

Comment: The definitions of "State" and "local public entity" are based on the definition of "local public entity" contained in Government Code Section 700.

900.6. "State" means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

Comment: See the comment to Section 900.4.

901. For the purpose of computing the time limits prescribed by Sections 911.2, 911.4 and 912, the date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which

would be applicable thereto if there were no requirement that a claim be presented to and be acted upon by the public entity before an action could be commenced thereon.

Comment: This section is based on the second paragraph of Government Code Section 715, which applies to claims against local public entities. There is no existing comparable statutory provision that applies to claims against the State.

Article 2. General Provisions

905. There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against local public entities except:

(a) Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification or adjustment of any tax, assessment, fee or charge or any portion thereof, or of any penalties, costs or charges related thereto.

(b) Claims in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any provision of law relating to mechanics', laborers' or materialmen's liens.

(c) Claims by public employees for fees, salaries, wages, mileage or other expenses and allowances.

(d) Claims for which the workmen's compensation authorized by Division 4 (commencing with Section 3201) of the Labor Code is the exclusive remedy.

(e) Applications or claims for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs, and claims for goods, services, provisions or other assistance rendered for or on behalf of any recipient of any form of public assistance.

(f) Applications or claims for money or benefits under any public retirement or pension system.

(g) Claims for principal or interest upon any bonds, notes, warrants, or other evidences of indebtedness.

(h) Claims which relate to a special assessment constituting a specific lien against the property assessed and which are payable from the proceeds of such an assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it.

(i) Claims by the State or by a State department or agency or by another local public entity.

(j) Claims arising under any provision of the Unemployment Insurance Code, including but not limited to claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed.

(k) Claims for the recovery of penalties or forfeitures made pursuant to Article 1 of Chapter 1 of Part 7 of Division 2 of the Labor Code (commencing with Section 1720).

(*l*) Claims governed by the Pedestrian Mall Law of 1960, Division 13 (commencing with Section 11000) of the Streets and Highways Code.

Comment: This section is the same in substance as Government Code Section 703. See new Section 935 for procedure for claims excepted from Chapters 1 and 2.

905.2. There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the State:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by enactment.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express contract, (2) for an injury for which the State is liable or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution.

(d) For which settlement is not otherwise provided for by enactment.

Comment: This section—which restates the substance of portions of Government Code Sections 620, 621 and 641—is patterned after Section 630 (Title 2 of the CAL. ADMIN. CODE) of the Rules of the State Board of Control.

905.4. Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part shall not be construed to be an exclusive means for presenting claims to the Legislature nor as preventing the Legislature from making such appropriations as it deems proper for the payment of claims against the State which have not been submitted to the board or recommended for payment by it pursuant to Chapters 1 and 2 of this part.

Comment: This section is the same in substance as Government Code Section 625.

905.6. This part does not apply to claims against the Regents of the University of California.

Comment: This section codifies existing law as declared by two trial court decisions which, the Commission is advised, held that neither the State nor the local public entity claims presentation procedures apply to claims against the University of California.

905.8. Nothing in this part imposes liability upon a public entity unless such liability otherwise exists.

Comment: This section is new. It makes clear that the claims presentation provisions do not impose substantive liability; some other statute must be found that imposes liability.

CHAPTER 2. PRESENTATION AND CONSIDERATION OF CLAIMS

Article 1. General

910. A claim shall be presented by the claimant or by a person acting on his behalf and shall show:

(a) The name and post office address of the claimant;

(b) The post office address to which the person presenting the claim desires notices to be sent;

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;

(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; and

(e) The amount claimed as of the date of presentation of the claim, together with the basis of computation thereof.

Comment: This section is the same as the first paragraph of Government Code Section 711, which applies to local public entities. This section will substitute a more specific statement of the contents of a claim for the very general statement found in Government Code Section 621, which applies to the State and requires that "any person having a claim against the State . . . shall present it to the board . . . , accompanied by a statement showing the facts constituting the claim."

910.2. The claim shall be signed by the claimant or by some person on his behalf. Claims against local public entities for supplies, materials, equipment or services need not be signed by the claimant or on his behalf if presented on a billhead or invoice regularly used in the conduct of the business of the claimant.

Comment: This section is the same as the second paragraph of Government Code Section 711, which applies to local public entities. It will eliminate the requirement of Government Code Section 621 that claims against the State be "verified in the same manner as complaints in civil actions." Claims against local public entities are not required by existing law to be verified.

910.4. The board may provide forms specifying the information to be contained in claims against the public entity. If the board provides forms pursuant to this section, the person presenting a claim need not use such form if he presents his

claim in conformity with Sections 910 and 910.2. If he uses the form provided pursuant to this section and complies substantially with its requirements, he shall be deemed to have complied with Sections 910 and 910.2.

Comment: This section is new. It permits public entities to provide a form that a claimant may use in lieu of submitting a claim containing the information specified in new Section 910. However, a claimant is not required to use the form provided by the public entity; he may submit his claim in compliance with new Sections 910 and 910.2.

910.6. (a) A claim may be amended at any time before the expiration of the period designated in Section 911.2 or before final action thereon is taken by the board, whichever is later, if the claim as amended relates to the same transaction or occurrence which gave rise to the original claim. The amendment shall be considered a part of the original claim for all purposes.

(b) A failure or refusal to amend a claim, whether or not notice of insufficiency is given under Section 910.8, shall not constitute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented complied substantially with Sections 910 and 910.2 or a form provided under Section 910.4.

Comment: Paragraph (a) governs the amendment of claims. Existing law applying to local public entities (Government Code Section 711) provides that "a claim may be amended at any time, and the amendment shall be considered a part of the original claim for all purposes." There is no existing statutory provision relating to amendment of claims against the State.

Paragraph (b) is based on a portion of Government Code Section 712 which applies to local public entities.

910.8. (a) If in the opinion of the board a claim as presented fails to comply substantially with the requirements of Sections 910 and 910.2, or with the requirements of a form provided under Section 910.4 if a claim is presented pursuant thereto, the board may, at any time within 20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein.

(b) Such notice may be given personally to the person presenting the claim or by mailing it to the address, if any, stated in the claim as the address to which the person presenting the claim desires notices to be sent. If no such address is stated in the claim, the notice may be mailed to the address, if any, of the claimant as stated in the claim.

(c) The board may not take action on the claim for a period of 15 days after such notice is given.

Comment: This section is the same as Government Code Section 712, which applies to local public entities, except that (1) Section 712 provides for notice of insufficiency within 50 days instead of within 20 days, and (2) Section 712 prohibits board action on the claim for a period of 20 days instead of 15 days. The shorter time limits under new Section 910.8 are necessary because this legislation is designed to give the board an opportunity to consider the claim before court action may be commenced. Under existing law, there is no similar provision that provides for notice of insufficiency of claims against the State.

The board may delegate to an employee of the entity the function of ruling on the sufficiency of claims and giving notice of insufficiency if the board deems it more convenient to do so than to perform this function itself. See new Sections 912.8 and 935.4.

> 911. Any defense based upon a defect or omission in a claim as presented is waived by failure of the board to give notice of insufficiency with respect to such defect or omission as provided in Section 910.8, 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.

Comment: This section is the same as Government Code Section 713, which applies to local public entities. No comparable statutory provision now exists with respect to claims against the State.

> 911.2. A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.

Comment: This section is substantially the same as the first paragraph of Government Code Section 715, which applies to local public entities. It will provide a shorter period of time for presenting a claim against the State than the existing law (Government Code Sections 643 and 644), which provides that a claim arising under Sections 17000 to 17003, inclusive, of the Vehicle Code shall be presented to the board within one year after the claim first arose or accrued and that other claims shall be presented within two years after the claim first arose or accrued.

> 911.4. 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. The application shall be presented to the pub-

lic 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.

Comment: Sections 911.4 to 911.8 are new. These sections permit public entities to grant leave to present a late claim under certain circumstances. This will make a court proceeding to obtain leave to present a late claim necessary only in those cases where the public entity does not grant such leave. Under the existing law applicable to local public entities, late claims may be presented only in limited types of cases and a court proceeding is necessary in every case before a late claim may be presented. New Section 911.6 states the types of cases where late claims may be presented.

911.6. (a) The board shall grant or deny the application within 35 days after it is presented to the board. If the board does not act upon the application within 35 days after the application is presented, the application shall be deemed to have been denied on the 35th day.

(b) The board shall grant the application where:

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

(2) The claimant was a minor during all of the time specified in Section 911.2 for the presentation of the claim; or

(3) The claimant 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; or

(4) The claimant died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

Comment: Government Code Section 716 (which applies to local public entities) permits presentation of a late claim only if the public entity would not be unduly prejudiced thereby, and then only in cases where the claimant was a minor, was physically or mentally incapacitated, or has died. New Sections 911.6 and 912, on the other hand, permit presentation of late claims in these cases even though the public entity may be prejudiced thereby. In addition, these sections permit the presentation of late claims in cases where the failure to present the claim was through mistake, inadvertence, surprise or excusable neglect if the public entity would not be unduly prejudiced thereby.

Government Code Section 646 (which applies to claims against the State) permits late presentation of a claim of a minor, an insane person, a person imprisoned on a criminal charge or undergoing execution of sentence of a criminal court, a married woman if her husband is a necessary party with her in commencing the action thereon, or an incompetent person. No showing of lack of prejudice is required under Section 646.

See also the comments to Sections 911.4 and 912.

911.8. Written notice of the board's action upon the application shall be given to the claimant personally or by mailing it to the address, if any, stated in the proposed claim as the address to which the person making the application desires notices to be sent. If no such address is stated in the claim, the notice shall be mailed to the address, if any, of the claimant as stated in the claim. No notice need be given when the proposed claim fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

Comment: See the comment to Section 911.4.

912. (a) As used in this section, "superior court" means:

(1) In the case of a claim against a local public entity, the superior court of the county in which the local public entity has its principal office.

(2) In the case of a claim against the State, the superior court of any county in which the Attorney General has an office.

(b) The superior court shall grant leave to present a claim after the expiration of the time specified in Section 911.2 where the application to the board under Section 911.4 was made within a reasonable time not to exceed one year after the accrual of the cause of action and was denied or deemed denied pursuant to Section 911.6 and:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect unless the public entity against which the claim is made establishes that it would be unduly prejudiced if leave to present the claim were granted; or

(2) The claimant was a minor during all of the time specified in Section 911.2 for the presentation of the claim; or

(3) The claimant 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; or

(4) The claimant died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(c) Application to the superior court for leave to present a claim under this section must be made by a petition showing (1) that application was made to the board under Section 911.4 and was denied or deemed denied and (2) the reason for the failure to present the claim. A copy of the proposed claim shall be attached to the petition. The petition shall be filed within 20 days after the application to the board is denied or deemed denied.

(d) A copy of the petition and the proposed claim and a written notice of the time and place of hearing thereof shall be served (1) on the clerk or secretary or board of the local public entity if the claim is against a local public entity, or

(2) on the State Board of Control or its secretary if the claim is against the State, not less than 10 days before the hearing.

(e) The court shall make an independent determination upon the application. 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.

Comment: This section is based on Government Code Section 716, which relates to local public entities. See the comment to Section 911.6. The requirement of Government Code Section 716 that the petition be verified has been eliminated.

There is no similar existing statutory procedure for petitioning a court for leave to file a late claim against the State. However, Government Code Section 646 permits the presentation of claims against the State by certain persons under disability within two years after the disability ceases. See the comment to Section 911.6. In addition, the claims presentation procedure is not the exclusive means for presenting claims to the Legislature. See Government Code Section 625—renumbered Section 905.4 by this legislation.

912.2. If an application for leave to present a claim is granted by the board pursuant to Section 911.6, or if a petition for leave to present a claim is granted by the court pursuant to Section 912, the claim shall be deemed to have been presented to the board upon the day that leave to present the claim is granted.

Comment: Section 912.2 is new. It is necessary in order to fix the date from which to compute the time within which the board must act on the claim under new Section 912.4.

912.4. The board shall act on a claim in the manner provided in Section 912.6 or 912.8 within 45 days after the claim has been presented. If a claim is amended, the board shall act on the amended claim within 45 days after the amended claim is presented. The claimant and the board may extend the period within which the board is required to act on the claim by written agreement made before or after the expiration of such period. If the board fails or refuses to act on a claim within the time prescribed by this section, the claim shall be deemed to have been rejected by the board on the last day of the period within which the board was required to act upon the claim. If the period within which the board is required to act is extended by agreement, whether made before or after the expiration of such period, the last day of the period within which the board is required to act shall be the last day of the period specified in such agreement.

Comment: This section is new. Under Government Code Sections 643 and 644, an action may not be brought against the State until the claim is rejected or disallowed in whole or in part, and no time is

prescribed within which the State Board of Control must act on the claim. On the other hand, under existing law, an action may be brought against a local public entity as soon as the claim has been presented.

Although this section provides that a claim is deemed to be rejected if the board does not act within 45 days, it expressly authorizes the claimant and the board to extend the 45-day period by agreement. In addition, new Section 913.2 authorizes reconsideration and settlement of claims within the period allowed for commencing an action. Settlement or compromise of pending litigation is covered by new Sections 948 (State) and 949 (local public entities).

912.6. (a) In the case of a claim against a local public entity, the board shall act on a claim in one of the following ways:

(1) If the board finds the claim is not a proper charge against the public entity, it shall reject the claim.

(2) If the board finds the claim is a proper charge against the public entity and is for an amount justly due, it shall allow the claim.

(3) If the board finds the claim is a proper charge against the public entity but is for an amount greater than is justly due, it shall either reject the claim or allow it in the amount justly due and reject it as to the balance.

(4) If legal liability of the public entity or the amount justly due is disputed, the board may reject the claim or may compromise the claim.

(b) In the case of a claim against a local public entity, if the board allows the claim in whole or in part or compromises the claim, it may require the claimant, if he accepts the amount allowed or offered to settle the claim, to accept it in settlement of the entire claim.

Comment: This section is based on Government Code Section 717; but subdivision (a)(4), authorizing compromise of claims, is new.

912.8. In the case of claims against the State, the board shall act on claims in accordance with such procedure as the board, by rule, may prescribe. It may hear evidence for and against them and, with the approval of the Governor, report to the Legislature such facts and recommendations concerning them as it deems proper. In making recommendations the board may state and use any official or personal knowledge which any member may have touching any claim. The board may authorize any employee of the State to perform such functions of the board under this part as are prescribed by the board; but, subject to Section 935.6, the board may not authorize an employee to allow, compromise or settle a claim.

Comment: This section is based on Government Code Sections 620 (second paragraph) and 622, which apply to the State. It authorizes the Board of Control to prescribe, by rule, the procedure for disposi-

tion of claims. Giving the board this broad authority permits the elimination of the provisions of Government Code Section 621 relating to notice of time and place of hearing on the claim and allows the repeal of Government Code Section 624, which permits the automatic denial of any claim covered by insurance. See new Section 965, which provides for payment of allowed claims when a sufficient appropriation for payment exists.

913. Written notice of any action taken under Section 912.6 or 912.8 rejecting a claim in whole or in part shall be given to the person who presented the claim. Such notice may be given by mailing it to the address, if any, stated in the claim as the address to which the person presenting the claim desires notice to be sent. If no such address is stated in the claim, the notice may be mailed to the address, if any, of the claimant as stated in the claim. No notice need be given when the claim fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

Comment: This section is based on the second paragraph of Government Code Section 717, which applies to local public entities. There is no similar statutory provision relating to claims against the State.

913.2. The board may, in its discretion, within the time prescribed by Section 945.6 for commencing an action on the claim, re-examine a previously rejected claim in order to consider a settlement of the claim.

Comment: This section is new.

Article 2. Manner of Presentation and of Giving Notice

915. (a) A claim, any amendment thereto, or an application to the public entity for leave to present a late claim shall be presented to a local public entity by:

(1) Delivering it to the clerk, secretary or auditor thereof; or

(2) Mailing it to such clerk, secretary or auditor or to the governing body at its principal office.

(b) A claim, any amendment thereto, or an application for leave to file a late claim shall be presented to the State by:

(1) Delivering it to an office of the State Board of Control; or

(2) Mailing it to the State Board of Control at its principal office.

(c) A claim, amendment or application shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided in this section if it is actually received by the clerk, secretary, auditor or board of the local public entity, or is actually received at an office of the State Board of Control, within the time prescribed for presentation thereof.

Comment: This section is based on Government Code Section 714, which applies to local public entities. There is no similar statutory provision relating to claims against the State.

915.2. If a claim, amendment to a claim or application to a public entity for leave to present a late claim is presented or sent by mail under this chapter, or if any notice under this chapter is given by mail, the claim, amendment, application or notice shall be mailed in the manner prescribed in this section. The claim, amendment, application or notice must be deposited in the United States post office, or a mailbox, sub-post office, substation, or mail chute, or other like facility regularly maintained by the government of the United States, in a sealed envelope, properly addressed, with postage paid. The claim, amendment, application or notice shall be deemed to have been presented and received at the time of the deposit. Proof of mailing may be made in the manner prescribed by Section 1013a of the Code of Civil Procedure.

Comment: This section is new. It makes clear that a claim, amendment to a claim, application to present a late claim, or any notice, is deemed to have been presented and received at the time of deposit in the mail. The section is based in part on Section 1013 of the Code of Civil Procedure relating to service by mail.

CHAPTER 3. PROCEEDINGS TO DETERMINE CONSTITUTIONALITY OF CLAIMS AGAINST THE STATE

Comment: This chapter is the same as Article 3 (commencing with Section 630) of Chapter 1 of Division 3.5 of Title 1 of the Government Code and supersedes that article.

920. As used in this chapter, "omnibus claim appropriation" means an act of appropriation, or an item of appropriation in a budget act, by which the Legislature appropriates a lump sum to pay the claim of the State Board of Control or its secretary against the State in an amount which the Legislature has determined is properly chargeable to the State.

920.2. Promptly following the effective date of an omnibus claim appropriation, the board or its secretary shall submit to the Controller a claim covering the full amount of the appropriation made in the omnibus claim appropriation. Any such claim is exempt from the provisions of Chapter 4 (commencing with Section 925) of this part, and the board shall have those powers necessary to administer and disburse the omnibus claim appropriation.

920.4. If the Controller believes or has reason to believe that the payment of any portion of the omnibus claim appropriation may violate the provisions of the Constitution, he shall withhold payment of the questioned portion and shall

issue his warrant for the remainder of the appropriation. The secretary, subject to the board's approval, shall promptly disburse the undisputed portion of the omnibus claim appropriation and shall promptly give notice to the Joint Legislative Budget Committee of the Controller's action concerning the withheld portion.

920.6. Unless the Joint Legislative Budget Committee within 60 days after receipt of such notice advises the board in writing that the Legislature desires to reconsider any part of the withheld portion, the board shall institute proceedings to compel the Controller to issue his warrant for the balance of the omnibus claim appropriation. The board shall prosecute any such proceeding to final determination and shall disburse the funds finally paid over to it. Funds subject to such proceedings shall continue to be available until the end of the fiscal year in which final determination of the proceeding occurs.

920.8. If the Joint Legislative Budget Committee advises the board that the Legislature desires to reconsider any part of the omnibus claim appropriation withheld by the Controller, no further action shall be taken with respect to that part and the money appropriated therefor shall revert to funds from which they were appropriated, pending further legislative action. The board, however, shall institute proceedings as provided in Section 920.6 to compel payment of the remainder of the omnibus claim appropriation withheld by the Controller.

CHAPTER 4. PRESENTATION OF CLAIMS TO STATE CONTROLLER

Comment: This chapter is the same as Article 1 (commencing with Section 600) of Chapter 1 of Division 3.5 of Title 1 of the Government Code and supersedes that article.

925. As used in this chapter, "board" means the State Board of Control.

925.2. Claims for expenses of either house of the Legislature or members or committees thereof, and claims for official salaries fixed by statute, are exempt from this chapter and Section 13920.

925.4. Any person having a claim against the State for which appropriations have been made, or for which state funds are available, may present it to the Controller in the form and manner prescribed by the general rules and regulations adopted by the board for the presentation and audit of claims.

925.6. The Controller shall not draw his warrant for any claim until it has been audited by him in conformity with law and the general rules and regulations adopted by the board, governing the presentation and audit of claims. Whenever the Controller is directed by law to draw his warrant for any pur-

pose, the direction is subject to this section, unless it is accompanied by a special provision exempting it from this section.

925.8. If the Controller approves a claim he shall draw his warrant for the amount approved in favor of the claimant.

926. If he disapproves a claim, the Controller shall file it and a statement of his disapproval and his reasons with the board as prescribed in the rules and regulations of the board.

926.2. The Controller shall not entertain for a second time a claim against the State once rejected by him or by the Legislature unless such facts are subsequently presented to the board as in suits between individuals would furnish sufficient ground for granting a new trial.

926.4. Any person who is aggrieved by the disapproval of a claim by the Controller, may appeal to the board. If the board finds that facts are presented justifying such action, the Controller shall reconsider his rejection of the claim.

926.6. After final rejection of a claim by the Controller following reconsideration, any person interested may appeal to the Legislature by filing with the board a notice of appeal. Upon receipt of such notice the board shall transmit to the Legislature the rejected claim, all papers accompanying it, and a statement of the evidence taken before the board.

926.8. Whenever a governmental agency of the United States, in the collection of taxes or amounts owing to it, is authorized by federal law to levy administratively on credits owing to a debtor, it may avail itself of the provisions of this section and claim credits owing by the State to such debtor, in manner as follows:

It shall file a certification of the facts with the state department, board, office or commission owing the credit to the debtor prior to the time the state agency presents the claims of the debtor therefor to the State Controller or to the State Personnel Board. The state agency in presenting the claim of the debtor shall note thereon the fact of the filing of the certificate and shall also note any amounts owed by the debtor to the State by reason of advances or for any other purpose.

Subject to the provisions of Sections 12419.4 and 12419.5, the State Controller shall issue his warrant payable to the United States Treasurer for the net amount due the debtor, after offsetting for any amounts advanced to the debtor or by him owing to the State, or as much thereof as will satisfy in full the amount owing by the debtor to the United States as so certified; any balance shall be paid to the debtor.

CHAPTER 5. CLAIMS PROCEDURES ESTABLISHED BY AGREEMENT

930. The State Board of Control may, by rule, authorize any state agency to include in any written agreement to which the agency is a party, provisions governing (a) the presenta-

tion, by or on behalf of any party thereto, of any or all claims which are required to be presented to the board arising out of or related to the agreement and (b) the consideration and payment of such claims. A claims procedure established by an agreement made pursuant to this section exclusively governs the claims to which it relates, except that Sections 911.4 to 912.2, inclusive, are applicable to all such claims. As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

Comment: This section is new and is based on new Section 930.2, which relates to local public entities. See the comment to that section.

This section relates only to claims which are required to be presented to the State Board of Control. Thus, the section will have no effect on contract provisions, such as those contained in contracts entered into by the Department of Public Works, which require the contractor to give prompt notice of claims for extra services. These provisions will be valid without authorization of the State Board of Control, for these provisions do not relate to "claims which are required to be presented to the board."

930.2. The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any board or employee thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims. The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body. A claims procedure established by an agreement made pursuant to this section exclusively governs the claims to which it relates, except that Sections 911.4 to 912.2, inclusive, are applicable to all such claims.

Comment: This section is the same in substance as Government Code Section 705, except that Section 705 provides that the agreement may not provide a shorter time for presentation of claims than the time specified for presentation of claims under the general claims statute applicable to local public entities.

CHAPTER 6. CLAIMS PROCEDURES ESTABLISHED BY PUBLIC ENTITIES

935. Claims against a local public entity for money or damages which are excepted by Section 905 from Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part, and which are not governed by any other statutes or regulations expressly relating thereto,

shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity. The procedure so prescribed may include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon, but may not require a shorter time for presentation of any claim than the time provided in Section 911.2 nor provide a longer time for action upon any claim than the time provided in Section 912.4, and Sections 911.4 to 912.2, inclusive, are applicable to all claims governed thereby.

Comment: Section 935 is the same as Government Code Section 730, except Section 935 provides that the procedure prescribed pursuant to Section 935 may include a requirement that the claim be *acted upon* as a prerequisite to suit thereon. This change conforms to new Section 945.4, which bars suit until claim is rejected or deemed to be rejected.

It should be noted that where claims provisions impose a requirement of presentation or presentation and rejection prior to commencement of suit on the cause of action represented by the claim, the action cannot be commenced and the statute of limitations does not begin to run until the prescribed conditions have been satisfied. *Spencer* v. *City of Los Angeles,* 180 Cal. 103, 179 Pac. 163 (1919); *Southern Pac. Co.* v. *City of Santa Cruz,* 26 Cal. App. 26, 145 Pac. 736 (1914). See also *Hochfelder* v. *County of Los Angeles,* 126 Cal. App.2d 370, 272 P.2d 844 (1954); *Walton* v. *County of Kern,* 39 Cal. App.2d 32, 102 P.2d 531 (1940).

935.2. A local public entity may establish a claims board of not less than three members to perform such functions of the governing body of the public entity under this part as are prescribed by the local public entity. The local public entity may provide that, upon written order of the claims board, the auditor or other fiscal officer of the local public entity shall cause a warrant to be drawn upon the treasury of the local public entity in the amount for which a claim has been allowed or compromised or settled.

Comment: Sections 935.2 and 935.4 are new. They authorize a local public entity to delegate to a claims board or to an employee such functions relating to claims as the local public entity designates. However, an employee may not be delegated authority to settle finally a claim where the amount to be paid exceeds $5,000. These sections will permit the public entity, for example, to delegate such functions as ruling on the sufficiency of claims or automatically rejecting certain classes of claims.

935.4. A local public entity may authorize an employee of the local public entity to perform such functions of the governing body of the public entity under this part as are prescribed by the local public entity, but may not authorize such employee to allow, compromise or settle a claim against the local public entity if the amount to be paid pursuant to such allowance, compromise or settlement exceeds five thousand dollars ($5,000). Upon the written order of such employee,

the auditor or other fiscal officer of the local public entity shall cause a warrant to be issued upon the treasury of the local public entity in the amount for which a claim has been allowed, compromised or settled.

Comment: See the comment to Section 935.2.

935.6. The State Board of Control, by rule, may authorize any state agency to adjust and pay claims where the settlement does not exceed one thousand dollars ($1,000) or such lesser amount as the board may determine and a sufficient appropriation for such payment exists. Payments shall be made only upon approval of the settlement by the board. As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

Comment: This section is new. It permits the Board of Control to delegate the authority to settle certain small claims to the state agencies immediately concerned.

SEC. 2. Part 4 (commencing with Section 940) is added to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. __ of the 1963 Regular Session, to read:

PART 4. ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

CHAPTER 1. GENERAL

Article 1. Definitions

940. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this part.

Comment: This section is based on similar provisions found in the definitions or general provisions portions of various codes. See, for example, Section 5 of the Government Code. The definitions contained in Part 1 of Division 3.6 will, of course, apply to this part. Those definitions are set forth in the comment to Section 900.

940.2. "Board" means:

(a) In the case of a local public entity, the governing body of the local public entity.

(b) In the case of the State, the State Board of Control.

Comment: "Board" has been defined to facilitate the drafting of provisions that apply both to the State and to local public entities.

940.4. "Local public entity" includes a county, city, district, public authority, public agency, and any other political

CERTIFICATE OF SERVICE

I, Kimberly Nielsen, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on September 10, 2012, declarant served the **CITY OF LONG BEACH'S NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE IN SUPPORT OF ITS OPENING BRIEF ON THE MERITS** via U.S. Mail in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of September, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, PC

By: _____
Kimberly Nielsen

McWilliams v. City of Long Beach, et al.
Case No. S202037
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