S202037

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

CITY OF LONG BEACH'S REPLY BRIEF

Of an Unpublished Decision of the Second Appellate District of the
Court of Appeal
Case No. B200831

Reversing a Judgment of 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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INTRODUCTION

The Answer Brief on the Merits rings hollow. Specifically, McWilliams' claim that *Ardon v. City of Los Angeles* disposes of this matter is simply untrue, as is his assertion that the relevant provisions of the Government Claims Act are clear and unambiguous. Despite McWilliams' efforts to reduce the Court's task to rote application of defined terms read in isolation, the question of vital importance to all California cities, counties and special districts remains: did the Legislature intend to exclude local ordinances from the definition of "statute" in section 905, subd. (a)?[1] McWilliams' proposed answer — which dismisses relevant legislative history and context — would drastically alter the legal landscape on which both the Legislature and local governments have long relied. This case warrants a more studied review that properly takes into account the legislative history of the Government Claims Act and the policy considerations which animate the Act.

LEGAL DISCUSSION

I. *Ardon* Does Not Decide This Case

Ardon v. City of Los Angeles (2011) 52 Cal.4th 241 ("*Ardon*") does not dispose of this appeal. *Ardon* itself says so and this Court's unanimous decision to grant review of the unpublished Court of

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[1] All unspecified section references are to the Government Code.

Appeal decision underlying this case demonstrates that the Court maintains that view. Moreover, *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65 (hereinafter, "*Batt*") has not been overruled by *Ardon* implicitly or otherwise. (Respondent's Answer Brief on the Merits ("Answer Brief"), p. 3.) Rather, *Ardon* expressly distinguished *Batt* on the basis that it "considered statutes or municipal ordinances enacted to provide specific procedures for filing tax[2] claims against governmental entities—procedures that are not applicable or required in this case [i.e., *Ardon*]." (*Ardon, supra,* 52 Cal.4th 241, 250.) Even Appellant acknowledges the point, as he must. (Answer Brief at 22, n. 27 ("[T]his Court distinguished rather than rejected Batt in its *Ardon* decision, this Court did not address, because it did not need to, whether municipal ordinances can provide the applicable claims procedures for local tax refunds or if section 910 preempts them.").

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[2] As in the Opening Brief, the City uses "tax" to refer to taxes, assessments and fees, as the differences among these revenue measures is not significant for construction of section 905, subd. (a), although it is certainly true that particular revenue measures are subject to some specific statutes while others are governed by general statutes. (E.g., Revenue & Taxation Code.)

II. If the Government Claims Act Were Unambiguous, the Parties Would Not Be Before This Court

As the City's Opening Brief on the Merits ("Opening Brief") demonstrates, the Government Claims Act cannot be read to use "statute" and "enactment" as the Act's stated definitions suggest. (Opening Brief, pp. 31–34.) Indeed, every Court of Appeal but that here has read section 905, subd. (a) differently than what Appellant claims to be its "plain meaning." As but one example, *County of Los Angeles v. Superior Court (Oronoz)* (2008) 159 Cal.App.4th 353, 365 (hereinafter, "*Oronoz*") construed *Batt*'s holding as dicta and declined to follow it. (*Id.* at n. 9.) That same division of the Court of Appeal recognized *Batt*'s language as a holding in this case, but summarily rejected it and *Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412 (hereinafter, "*Pasadena Hotel*"). (Opinion of the Second District Court of Appeal, Division Three, filed March 28, 2012 at 11.)[3]

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[3] Two of the three justices who decided *Oronoz* decided *Ardon*. Justice Joan Dempsey Klein changed her position in *Ardon* to repudiate *Oronoz*. While Justice Dempsey Klein joined the decision below in this case (Opening Brief, p. 8, n.10), the DCA declined to publish its opinion even though it plainly involved important unresolved questions and despite Appellant's request that it do so. (*Id.* at p. 11; see also City of Long Beach's Petition for Review, p. 14.)

A. Section 905's Subdivisions Do Not Evidence Intent to Preempt Local Ordinances

Appellant contends the Legislature's revision of language provided by the Law Revision Commission for section 905, subd. (b) to delete "other provisions of law" is evidence of intent to exclude ordinances from subdivision (a). (Answer Brief, p. 18.) However, the claim is ahistorical error. The Legislature excluded "other provisions of law" from what is now section 905, subd. (a), while retaining "any provision of law" in section 905, subd. (b) because subdivision (b) is intended to include judge-made law while subdivision (a) is intended to exclude it. As with section 905, subd. (a) itself, the Legislature's intent can be identified by resort to legislative history.

In 1959, when the Government Claims Act was first enacted, mechanics liens and stop notice claims were governed by judge-made "equitable lien" remedies and by the Legislature. The long-standing law in California as of 1959 (and presently) was that mechanics' liens cannot attach to public property. (E.g., *J.W. Theisen v. County of Los Angeles* (1960) 54 Cal.2d 170, 176.) Thus, when a primary contractor on a public works project fails to pay, a subcontractor can claim against public funds due the primary contractor via a stop payment notice. This Court surveyed the history of the mechanics' lien and stop notice remedies in *Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803. The Court explained that as mechanics liens were not effective to protect subcontractors and material suppliers, "the courts and the

Legislature evolved alternative remedies — the equitable lien and the stop notice — which attach directly to the [construction] loan fund." (*Id.* at p. 827; see also *Smith v. Anglo-California Trust Co.* (1928) 205 Cal. 496, 502; *Doud Lumber Co. v. Guaranty Sav. & Loan Assn.* (1967) 254 Cal.App.2d 585, 588-590 [listing elements of judicially created equitable lien].) The stop notice remedy was the Legislature's remedy creating a right in subcontractors to public funds allocated to pay the contractor who had failed to pay the subcontractor as required. (*J.W. Theisen, supra,* 54 Cal.2d at p. 177 [discussing stop notice procedure available against public entities under former Code of Civil Procedure section 1192.1].) The judge-made equitable lien remedy was also available against public entities. (*Stansbury v. Frazier* (1920) 46 Cal.App. 485, 488; *Goldtree v. City of San Diego* (1908) 8 Cal.App. 505, 508-510 [constitutional requirement of a remedy for mechanics and materialmen authorized judicially created remedy for public works projects, where the Legislature had not, at that time, enacted such a remedy].) This created some confusing overlap between the remedies as discussed in *Connolly Development.*

Although Civil Code section 3264 abolished the judge-made equitable lien remedy in 1969, that remedy was still available in 1959, when section 703, subd. (b) [the precursor of today's section 905, subd. (b)] was enacted. (*Connolly Development, Inc., supra,* 17 Cal.3d at p. 826 n.24; see also *Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp.* (1975) 44 Cal.App.3d 460, 464-465 [discussing history

of equitable lien remedy and its abolition by Civil Code section 3264].) Thus, the Legislature used "any provision of law" in subdivision (b) of former section 703 to include both judge-made and statutory remedies; it was meant to distinguish legislation from common law, and not to distinguish state from local laws. Indeed, it is unlikely the Legislature used "any provision of law" to include municipal charters and ordinances, given that the sources of law governing mechanics liens and stop notices were common law and state — not local — legislation. Thus, the Legislature's use of the terms "statute" and "any provision of law" in former section 703, subds. (a) and (b) (and present section 905, subds. (a) and (b)[4]) undermines rather than supports Appellant's position.

This understanding of the history is not inconsistent with the Legislature's use of "other provisions of law" in what is now section 905, subd. (e). By that reference, the Legislature intended to allow exceptions to the Government Claims Act to derive from a variety of legal sources as to welfare claims (which are heavily regulated by federal, state and County regulations and policies), and simultaneously implemented the Law Revision Commission's advice to leave undisturbed local claiming requirements for tax and fee refunds. Again, like mechanics liens, welfare claims are not governed by local law, but by state and federal law, much of its

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[4] Section 905, subd. (b) was amended to change "any provision of law" to "any law" in 2008. (Cal. Stats. 2008, Ch. 383, § 1.)

regulatory law from the social welfare bureaucracy. Moreover, as discussed in the Opening Brief, none of the terms by which the Legislature refers to the sources of law for claiming requirements is used consistently and with precision throughout the Act. (Opening Brief at pp. 30–34.)

Finally, the 1959 Law Revision Commission Report sharpens the point that the phrase "other provisions of law" used in subdivisions (b) and (e) are not intended to distinguish mechanics liens and welfare claims from tax refund claims. Indeed, the intent was the opposite — the Commission's reasons for excluding all three sorts of claims from the Government Claims Act were the same:

> "Also excluded [from the unified claims statute] are ... claims required by the mechanics' and materialmen's lien laws ... [and] claims for aid under public assistance programs .... In most of these instances, the basic objectives of early investigation to prevent litigation and discourage false claims which support a uniform procedure for tort and inverse condemnation claims are not applicable; and **orderly administration of the substantive policies governing the enumerated types of claims strongly suggests that claims procedure should be closely and directly integrated into such substantive policies.** Obvious and compelling reasons appear for gearing tax refund claims to the assessment, levy and collection dates and procedures; establishing special

> modes for protecting mechanics and material suppliers on public projects [and] providing an uncomplicated routine procedure for processing the tremendous volume of...public assistance claims..."

(2 Cal. Law Revision Com. Rep. (1959) p. A-117, attached to this Brief as an Appendix (emphasis supplied).)[5] Thus, there was no "deliberate" or "meaningful" reason for the Legislature to have used "statute" in section 905, subd. (a) and "other provisions of law" in subdivisions (b) and (e). Rather, the distinction is between positive law provided by one form of law-maker or another, and judge-made common law. McWilliams' claim to the contrary is simply historical error.

B. Obvious Inconsistencies in the Government Claims Act's Use of Defined Terms May Not Be Simply Ignored

Appellant "merely seeks a direct application of section 910 as written." (Answer Brief, p. 13.) In other words, if the Court would simply agree that the Government Claims Act's ambiguous and inconsistent terms are not in fact ambiguous or inconsistent, everyone could avoid the inconvenient fact that direct application of those terms leads to illogical results the Legislature plainly did not

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[5] Excerpts from 2 Cal. Law Revision Com. Rep. (1959) are appended to this brief pursuant to Rule of Court, rule 8.520, subd. (h) for the convenience of the Court.

intend. Appellant's position fails to persuade. While Appellant attempts to dismiss the ambiguity of the Government Claims Act's definition of "regulation" by claiming that the term is not at issue here (Answer Brief, p. 13), his position ignores the fact that **all** portions of the statute that adopted the modern Claims Act are relevant to its construction — a position both he and the Court of Appeal below acknowledge. (Answer Brief, p. 12.)

Appellant also asks this Court to construe section 995.2 so that conflicts of interest are identified by "rule or regulation ... of the public entity" because this phrase is separated from "statute" by an "or." (Answer Brief, pp. 13-14.) However, not only does this reading simply read "statute" out of the Act, but it merely reframes the question. "Regulation" is defined as a state or federal regulation and also has no meaning as applied to local governments. (See § 811.6.) The fact remains that the 1963 Legislature added definitions to the 1959 statute without the care that such a task demanded, creating a cluster of interpretative puzzles of which this case is but one. (Opening Brief, pp. 19–26.)

Finally, Appellant claims the interpretative problems of sections 811.6 and 995.2 can be ignored because he can construe section 905, subd. (a) without problem to reach the result he seeks. The rules of statutory construction, however, are not mere tools for an advocate to reach a preferred result. They are tools courts use to accomplish the legislative purpose, which is as it must be in a

democracy. Courts do not play "gotcha" with the Legislature and achieve ends the Legislature did not intend merely because the language of one statutory section, read in isolation, can reach those ends. The goal of all rules of statutory construction is the same: courts seek to discern the legislative intent and to effectuate it. As the Opening Brief demonstrates, that intent was not to impose a uniform state-wide process for claims under disparate local taxing ordinances when the Legislature demonstrated via section 905, subd. (a) that diversity, not uniformity, was appropriate for tax-claiming procedures. (Opening Brief, pp. 27-30.) Nor was that the intent when the Law Revision Commission's report which constitutes the legislative history of the Act makes plain that, like mechanics liens and welfare claims, claims for tax refunds are best integrated with the substantive statutes creating the liabilities to which the claims relate. (2 Cal. Law Revision Com. Rep. (1959) p. A-117.)

III. Appellant Cannot Escape the Legislative History of the Government Claims Act

The issue before the Court is the meaning of the 1963 statute's adoption of definitions of "statute," "enactment," "regulation" and related terms. Accordingly, the variety of formulations in the 1959 Act ("statute," "statutes or regulations," "charter, ordinance or regulation adopted by the local public entity") reinforce the City's argument that the one-size-fits-all definitions of the 1963 statute

were not well considered as they applied to 1959 language. (Opening Brief, pp. 19–26.) In the teeth of this language, McWilliams argues the Legislature never used "statute" alone when it had local governments in mind. (Answer Brief, p. 14, n. 19.) This statement is self-serving and conclusory; it assumes the result McWilliams seeks to prove — that the term "statute" as used in section 905, subd. (a) excludes local legislation.

Still further, Appellant errs in claiming that Professor Van Alstyne's study is not legislative history of the Government Claims Act. (Answer Brief, p. 20.) To the contrary, Professor Van Alstyne's study directly informed the Law Revision Commission's positions and the Commission attached the study to the draft statute it recommended to the Legislature. (See Opening Brief, Appendix, p. A-1.) Indeed, this Court has already determined that the Study **is** the legislative history of the Act:

> [T]he Law Revision Commission has stated that it excluded from the scope of the unified claims statute then proposed by the Commission all 'claims for tax exemption, cancellation or refund.' (See 2 Cal. Law Revision Com. Rep. (1959) p. A-117.) ... the intent of the commission in regard to [the meaning of 905(a) and former 703(a)] may be deemed to be the intent of the Legislature.

(Pasadena Hotel, supra, 119 Cal.App.3d at 415, n.3.)

Finally, there is nothing to indicate that the Legislature's change from "other provisions of law" to "statute" was meant to exclude local ordinances. In fact, the opposite is true. (See discussion at section II.A., *supra*). Appellant's attempt to discredit these sources is therefore baseless.

IV. Cities Across California, Large and Small, Have Long Understood the Use of "Statute" in Section 905, Subd. (a) to Include Local Ordinances

In trying to avoid the force of the authorities the City cites in its Opening Brief, Appellant misses the point: as to whether local claiming ordinances govern claims for refunds of local taxes, neither this Court nor either party writes on a blank slate. California has a long-standing practice of deferring to local charters and ordinances to provide refund claiming procedures for local taxes, and the ahistorical reading of section 905, subd. (a) that Appellant advances here would make a sea change in the law. Review of the extensive case law which the City discussed in its Opening Brief at pp. 35–41 reveals that the City is hardly alone in understanding "statute" in section 905, subd. (a) to include local ordinances. (See *Batt, supra,* 155 Cal.App.4th at 77–78 [relying on local ordinance governing tax refunds]; *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1139 [*"Flying Dutchman"*] [relying on local ordinance imposing "pay first, litigate later" rule]; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79

Cal.App.4th 242, 249 n. 5 [enforcing municipal code provision regarding tax refund claims]; *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 483 [local business license tax subject to "pay first, litigate later" rule]; *Volkswagen Pacific v. City of Los Angeles* (1972) 7 Cal.3d 48, 60-63 ["*Volkswagen Pacific*"] [enforced a municipal ordinance requiring pre-suit filing of a claim for refund of local tax];[6] *Pasadena Hotel, supra,* 119 Cal.App.3d at 415, n. 3 [enforcing Pasadena's local claiming requirements after careful review of legislative history].[7]"

Indeed, even this Court in *Ardon* implicitly recognized the

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[6] Although Appellant claims this Court did not enforce in *Volkswagen Pacific* a local tax refund claiming ordinance (Answer Brief, p. 15), he may be alone in that understanding. (*See Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 249 n. 5 ["The California Supreme Court has observed that by [local ordinance and charter] provisions the City 'prescribes that a claim be presented as a prerequisite to suit for tax refund.'].)

[7] Appellant makes much of the fact that *Pasadena Hotel* was decided by the same court as *Oronoz* and *Ardon*. (Answer Brief, p. 16.) However, the cases were decided in 1981, 2008, and 2009, respectively. Although Justice Dempsey Klein's remarkably long service places her on all three panels, the latter cases can hardly be said to be the considered reflection of the *Pasadena Hotel* panel, as is true of the *Ardon* panel's rejection of *Oronoz* and that panel's decision not to publish its decision in this case.

validity of local ordinances addressing tax refunds. As noted above, this Court was careful to distinguish rather than to overrule *Batt.* (*Ardon, supra,* 52 Cal.4th at 250.) Moreover, unlike the case at bar, no local ordinance was in issue in *Ardon.* (*Id.* at 246, n.2.) Nevertheless, the *Ardon* opinion twice references alternative claiming requirements under a local ordinance. (*Id.* at 250 ("[the foregoing] cases all considered statutes or municipal ordinances enacted to provide specific procedures for filing tax claims against governmental entities") and at p. 251 ("the claim here did not involve any applicable municipal code or statute governing claims for refunds").) Neither does *Ardon* cite or abrogate *Pasadena Hotel,* even though the parties there cited the case to the Court.

Appellant's efforts to distinguish *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242, and *Flying Dutchman, supra,* 93 Cal.App.4th 1129, also fail. (Answer Brief, pp. 15–16.) That those cases did not cite and discuss section 811.8's definition of "statute" is not error; it reflects that the *Batt* and *Flying Dutchman* courts viewed section 905, subd. (a) as the City does: it uses "statute" differently than the term is defined in section 811.8, which was adopted with liability and immunity in mind, not the establishment of claiming requirements for local tax refund claims.

A. Major Cities Around California Adopted Claiming Procedures for Transient Occupancy and Utility Users Taxes

There is further evidence that the Legislature left to local governments the task of providing refund claim procedures specific to local taxes: California's largest cities have legislated local refund claiming procedures for transient occupancy or "bed taxes" and for utility taxes, or both. By contrast, even though state law authorizes, and partly regulates the substance of, local bed and utility taxes (Opening Brief, pp. 29–30), the Legislature has provided no claiming procedures.

Thus — in addition to the City of Long Beach — Los Angeles, San Jose, Sacramento, Oakland and San Francisco have all adopted local claiming requirements for refunds of bed or utility taxes (or both).[8] Likewise, San Diego and Fresno collect bed taxes and have

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[8] See Long Beach Municipal Code §§ 3.64.030 and 3.64.055 (bed tax imposition and refund procedures); Los Angeles Municipal Code §§ 21.7.3 and 21.7.12 (bed tax imposition and refund procedures), §§ 21.1.3 and 21.1.12 (communications users tax imposition and refund procedures) and § 21.07 (general refund procedures); San Jose Municipal Code §§ 4.72.040 and 4.72.130 (bed tax imposition and refund procedures), §§ 4.70.500 and 4.70.700 (utility tax imposition and refund procedures) and chapter 4.82 (general refund procedures); Sacramento City Code §§ 3.28.030 and 3.28.150 (bed tax imposition and refund procedures), §§ 3.32.030 and 3.32.160 (communications users tax imposition and refund procedures) and § 3.04.070 (general tax refund procedures); Oakland Code of Ordinances §§ 4.24.030 and 4.24.120 (bed tax imposition and refund

legislated local refund claim procedures specific to that tax.[9] The existence of these ordinances across the most populous cities in California[10] reflects a broad understanding that the Legislature left to local governments the task of establishing claiming procedures tailored to local needs. These are the same reasons that animated section 905, subd. (a)'s exception for taxes generally: one-size-fits-all solutions may work for ordinary tort and contract claims, but are not

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procedures) and §§ 4.28.030 and 4.28.180 (utility tax imposition and refund procedures); San Francisco Business & Tax Regulations Code § 502 (imposition of bed tax) and § 6.15-1 (general tax refund procedure); see also *Batt, supra,* 155 Cal.App.4th at 77 (applying San Francisco Business & Tax Regulation Code section 6.15-1 to bed tax refund claim). These code sections are attached to the City's Motion for Judicial Notice filed herewith ("MJN,") at Exhs. B through G.

[9] See San Diego Municipal Code §§ 35.0103 and 35.0122 (TOT imposition and refund procedure); Fresno Municipal Code §§ 7-603 and 7-613 (same). These code sections are attached at MJN, Exhs. H and I.

[10] The City seeks notice of the ordinances of State's largest cities as a matter of convenience but believes that any random sample of municipal codes of California cities would prove the point — all local governments have understood their authority to legislate in this area and the Legislature has respected that authority by not duplicating or displacing these rules even as to taxes otherwise partly governed by State statute.

appropriate for local tax refund claims. Again, as the Law Revision Commission noted, such claiming procedures are best integrated with the legislation that substantively governs the taxes. (2 Cal. Law Revision Com. Rep. (1959) p. A-117.)

B. Statutes Are Interpreted In Light of Their Contexts

Appellant claims that the City provides no authority for its position that the context can require a court to look beyond a statutory definition to discern its meaning even when, as here, a literal reading produces illogical results the Legislature could not have intended. (Answer Brief, pp. 12–13.) However, *Volkswagen Pacific* itself demonstrates that legislative history can be consulted to confirm that context requires that a statutory definition not control — even though the Court then had no need to delve into the legislative history for section 905, subd. (a) briefed here. (See *Volkswagen Pacific, supra,* 7 Cal.3d at 62-63.) Of course, many cases rely on legislative history and other principles of statutory interpretation to conclude context requires a court to disregard a definition contained elsewhere in a given code when construing a particular statute. (E.g. *Diamond View Limited v. Herz* (1986) 180 Cal.App.3d 612, 618-619 [context and legislative history required that the civil harassment restraining order rule of Code Civ. Proc. § 527.6 used "person" to exclude limited partnerships, despite general definition in Code Civ. Proc. § 17 to the contrary]; *Boy Scouts of*

America Nat. Foundation v. Superior Court (2012) 206 Cal.App.4th 428, 447-478 [context indicated that Legislature intended for "persons" in Code Civ. Proc. § 340.1(a)(1) to mean only natural persons, despite general definition of Code Civ. Proc. § 17]; *Kern County Water Agency v. Watershed Enforcers* (2010) 185 Cal.App.4th 969, 981-982 [legislative history and context required conclusion that public agency was within the definition of "person" under the California Endangered Species Act (CESA), despite no explicit reference to public agencies in the statutory definition, and despite explicit reference to public agencies in other CESA provisions]; *American Liberty Bail Bonds, Inc. v. Garamendi* (2006) 141 Cal.App.4th 1044, 1053-1054 [context and legislative history required "subject person" in Ins. Code § 1748.5 to include only natural persons despite Ins. Code § 19 to the contrary].)

In short, statutory definitions are not talismans that produce winners and losers. They are evidence of legislative intent that must be weighed in the balance with all other such indicia so a court may discern and implement the Legislature's actual intent.

V. The City's Ordinances Impose a Local Claiming Requirement with Which McWilliams Did Not Comply

As the City established in its Opening Brief, Long Beach's ordinances apply to bar McWilliams' purported class claim. (Opening Brief, pp. 12–16.) McWilliams attempts to dismiss the Long Beach Municipal Code ("LBMC") by questioning the simplicity of

the City's ordinance (Answer Brief, p. 25) and arguing that LBMC section 3.68.160 "merely" provides that a service provider may request a refund, and no refund can be paid without a claim (*id.* at p. 23). However, that is all that the Government Claims Act itself would do: require a claim and authorize a refund. What more would Appellant have the LBMC do? What law requires the LBMC to do more? In any event, Appellant himself concedes that LBMC section 3.48.070 can be read to establish a claiming requirement. (Answer Brief, p. 25) ("[S]ection 3.48.070 declares that it is the intent of the City Council to provide for making refunds, even if the procedures are not 'expressly authorized,' so long as they are not 'expressly prohibited.")

Additionally, Appellant's argument regarding LBMC section 3.68.160, subsection (D) is misleading. (Answer Brief, p. 24, n. 30.) The City added subsection (D) to section 3.68.160 by adopting an ordinance on September 12, 2006, **one** month after Appellant filed his **administrative** claim (MJN, Exh. A), before the claim was denied by operation of law and well before this suit was filed. In any event, the ordinance that added subsection (D) stated that it was "declaratory of existing law and express[es] the intent of the City in the adoption of the utility users tax on telephones ... in 1990." (*Id.*) Thus, that subsection is properly applied to McWilliams' claim. (See *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 ["A statute that merely clarifies, rather than changes, existing law is

properly applied to transactions predating its enactment"].)

Appellant's contention that the City has no history demonstrating that it has construed its claiming ordinances as it now construes them is likewise unpersuasive. The City represents that it has never entertained a class claim for a tax refund, no published case law involving such claims exists despite the City's large size and litigation case load, and there is a complete dearth of evidence in this record to suggest otherwise. Moreover, Appellant has failed — in more than 6 years of litigation— to identify any evidence to the contrary. Just as the silence of a dog trained to bark at intruders suggests the absence of intruders, this silence speaks loudly. (See *In re DirecTV Early Cancellation Litigation* (C.D. Cal. 2010) 738 F.Supp.2d 1062, 1075 [citing Arthur Conan Doyle short story *Silver Blaze*].)

VI. Public Policy Supports the Trial Court's Reading of Section 905, Subd. (a)

The City has demonstrated that the text of the Government Claims Act, understood in light of the limited sweep of its definitions permitted by section 810 and in light of its legislative history, requires the interpretation of section 905, subd. (a) followed by the trial court below. That construction is supported by public policy as well.

Telecommunications carriers **do** have an incentive to seek refunds on behalf of their customers. Appellant's claim to the

contrary (Answer Brief, p. 25) is untrue for two reasons. First, *Javor v. State Bd. of Equalization* (1974) 12 Cal.3d 790 —on which Appellant relies to make his claim — involved a different tax (a sales tax) and reached a limited holding "unique" to the "circumstances of [that] case." (*Id.* at 802–803.)[11] Second, as the City argued before the Court of Appeal, the telecommunications industry vigorously seeks to expand its market and, in particular, seeks to avoid taxes to lower the net cost of its services to consumers. Thus, the carriers are very assertive as to taxes on their services and understand their customers make decisions about competing carriers and technologies based on the total effective cost, including taxes. (See, e.g., *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747 [*"AB Cellular"*] [cell phone carriers sought mandate and declaratory relief, contending voter approval required for extension of utility tax to some wireless telephony charges].

To boot, all local telephone taxes are not created equal, and the single tax-claiming regime McWilliams seeks therefore does not

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[11]More specifically, *Javor* held that a "customer, who has erroneously paid an excessive sales tax reimbursement to his retailer who has in turn paid this money to the Board, may join the Board as a party to his suit for recovery against the retailer in order to require the Board in response to the refund application from the retailers to pay the refund owed the retailers into court or provide proof to the court that the retailer had already claimed and received a refund from the Board." (*Id.* at p. 802.)

make good policy and is therefore not likely to have been the legislative intent. (Answer Brief, p. 26.) *AB Cellular* demonstrates the point. Different cities and counties tax some or all of landline services, cellular services, monthly base bill amounts, charges per call, new wireless and internet technologies, to name only a few. In addition, different carriers do business in different communities, as the ubiquitous color-coded coverage maps in mobile phone stores attest. "Can you hear me now?" is a familiar slogan for a reason. The "chaotic" diversity resulting from local control of tax refunds that Appellant fears (Answer Brief, p. 5) is merely a reflection of the varied tools needed to address the diversity of taxes, tax collectors and tax payers that characterize our complex State and its energetic economy. The reverse is in fact the case: assuming state legislative control of claiming requirements that have historically been established by local governments that the Legislature never intended creates a vacuum in the law, resulting in a need to apply general rules of the Government Claims Act to tax cases for which they were never intended, creating the very chaos McWilliams fears.

Still further, nothing in the Government Claims Act accounts for the problem of applying its basic rules for tort and contract claims to claims for refund of privately collected taxes, precisely because the Legislature understood such claims to be addressed by local charters and ordinances because they are excluded from the Act by section 905, subd. (a). Appellant's effort to distinguish *IBM*

Personal Pension Plan v. City & County of San Francisco (2005) 131 Cal.App.4th 1291 (Answer Brief, p. 26, n. 32) is unpersuasive. That case involved exactly the same administrative issues that concern us here: a claimant did not have tax payment records and a risk of double recovery and unjust enrichment of tax collectors arose if claims by tax collectors and customers were permitted. (*Id.* at 1305.)

A. Sister States Do Not Permit Class Actions of the Sort Advanced by Appellant

The City cited in its Opening Brief cases in other states stating the policy rationale for precluding class actions for tax refunds. (Opening Brief, pp. 44–46.) It bears noting that eight states — Georgia, Missouri, Nebraska, New York, Pennsylvania, South Dakota, Tennessee and Washington[12] — prohibit class action claims

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[12] **Georgia** prohibits such claims. (See Ga. Code Ann. § 48-2-35(c)(5); see also *Georgia Dep't of Revenue v. Roof* (Ga. App. 2010) 690 S.E. 2d 442, 443.) For **Missouri**, see Mo. Rev. Stat. § 144.190; see also *State ex rel. Lohman v. Brown* (Mo Ct. App. 1997) 936 S. W.2d 607, 610. For **Nebraska**, see Neb. Rev. Stat. § 77-2798; see also *Livengood v. Nebraska State Patrol Retirement System* (Neb. 2007) 729 N.W.2d 55, 63. For **New York**, see *Neama v. Town of Babylon* (N.Y. App. Div. 2005) 18 A.D. 3d 836, 838. For **Pennsylvania**, see 72 Pa. Stat. Ann. § 5566b; see also *Dunn v. Bd. of Prop. Assessment, Appeals and Rvw* (Pa. Commw. Ct. 2005) 877 A.2d 504, 512. For **South Dakota**, see S.D. Codified Laws § 10-59-17; see also *Pourier v. South Dakota Dept. of*

for tax refunds. In addition, Illinois, Indiana and Utah limit such classes to those who have exhausted administrative remedies by claiming, paying under protest or otherwise.[13] Thus, the result reached by the trial court below puts California in good company.

B. The City is Enforcing its Laws, and There is No Evidence to the Contrary

McWilliams gratuitously claims the City should have settled this case and this justifies the class remedy he seeks. (Answer Brief, pp. 35–36.) That the City has not acceded to Appellant's demands in a case yet to be tried is not evidence that the City is treating its

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Revenue and Regulations (S.D. 2010) 778 N.W.2d 602, 605. For **Tennessee**, see Tenn. Code Ann. § 67-1-1802(a)(1); see also *Wicker v. Comm'r* (Tenn. Ct. App. 2010) 342 S.W.3d 35, 42-43. For **Washington**, see Wash Rev. Code § 82.32.180; see also *Lacey Nursing Center, Inc. v. Dep't of Revenue* (Wash. 1995) 905 P.2d 338, 343.

[13] **Illinois** allows such actions by default as not expressly barred, but it is limited under the voluntary payment doctrine to taxpayers who protested the tax on payment. (See *Jones v. Dep't of Revenue* (Ill. App. Ct. 1978) 377 N.E.2d 202.) **Indiana** requires individual refund claims prior to class action suits. (See Ind. Code § 6-8.1-9-7; see also *Ziegler v. Indiana Dep't of State Revenue* (Ind. T.C. 2003) 797 N.E.2d 881.) **Utah** allows such claims by statute, but requires exhaustion of administrative remedies. (See *Brumley v. Utah State Tax Comm'n* (Utah 1993) 868 P.2d 796.)

taxpayers unfairly and incurring unnecessary legal fees. Rather, it is evidence the City is enforcing its laws as they are written and in light of the intent of the City's elected legislators, not as Appellant — a single resident represented by a coterie of sophisticated class counsel from around the state and the country —would prefer.

Similarly, Appellant's claim the City could enforce arbitrary, unstated rules for claiming procedures if it prevailed in this case is completely off the mark. (Answer Brief, p. 4.) First, due process provides an outer limit to the City's ability to enforce rules that implicate its citizens' property. Second, case law demonstrates the courts' ability to save technically deficient but worthy claims under a substantial compliance rule. (E.g. *Ardon, supra,* 52 Cal.4th at 248 [discussing the application of the substantial compliance rule in *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447].) Such a rule, however, cannot be stretched so far as to allow class relief where none is authorized by a legislative body. Finally, the fear that a power might be abused is not reason to bar the Legislature from conferring it, especially where the equitable powers of our Courts are equal to the needs of justice should the occasion require.

While Appellant cites *M'Culloch v. State* (1819) 17 U.S. 316 (Reply Brief at p. 35, fn. 42) for the proposition that "the power to tax is the power to destroy" (while accusing the City of being "melodramatic"), the City respectfully submits that a class action refund coupled with a lucrative attorneys' fee award has a

substantial destructive power of its own. The essential government services funded by cities across California are of no less moment than those of Alexander Hamilton's National Bank.

VII. The Answer Brief Raises Points That Are Not Disputed

A. No Due Process Issue is Presented

The City and McWilliams agree that *McKesson v. Division of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18 would require a remedy if none were provided. However, in the lower courts McWilliams contorted the City's ordinances to establish a violation so he could defend his fifth and sixth causes of action. (Opening Brief, p. 14, n. 13.) Now, Appellant concedes those claims are baseless because the Government Claims Act would control if the City's claiming ordinances do not. (Answer Brief, p. 26.) However, Appellant's position does not answer the question presented by the City for which this Court granted review: what law applies?

Appellant is not left without a remedy if no class action lies here; if need be, his individual claim can be adjudicated on its own merits. The case law is clear that there is no constitutional requirement that Appellant be allowed to serve as a general at the head of an army. (Opening Brief, p. 43.) Indeed, local governments are far more amenable to non-legal remedies than the private parties for whom the class action remedy was designed: taxpayers are also

voters and remedies lie in elections of legislators and in the tools of direct democracy, including the initiative, referendum and recall. To boot, the number of signatures required to obtain an election on a measure to reduce or repeal a local tax is just 5% of the voters in a community who participated in the last gubernatorial election. (Cal. Const. art. XIII C, § 3; art. II, § 8, subd. (b).) As gubernatorial participation rates are commonly in the vicinity of 40%, this is a very small number: 5% of 40% is just 2% of the City's registered voters. More fundamentally, California law has not been impoverished by the lack of a lucrative class action fee award for counsel like the inter-state coalition at bar. The myriad cases in this Court's case reports alone under the names "Howard Jarvis Taxpayers Association" and "California Taxpayers' Association" demonstrate that individual refund claims, and claims for writ, declaratory and other prospective relief— coupled with fee awards under Code of Civil Procedure section 1021.5 — have been more than sufficient to correct those errors which taxing authorities have been unwilling or unable to fix without judicial assistance.

B. The City Does Not Dispute the Language of Article XI, Section 12 of the California Constitution

The City does not deny the language of article XI, section 12 of

our Constitution.[14] However, that section leaves open the question where the Legislature's power to control claiming procedures leaves off and where charter cities' home rule power to define the legal duties of taxpayers and private tax collectors begins. It is not for nothing that the Law Revision Commission recommended that substantive tax requirements and claiming procedures be governed by the same legislation.

Even if Article XI, section 12 controls this case, that section speaks to what the Legislature **may** do, not what the Legislature **did** do. The parties and virtually every city in the state still ask this Court to find the meaning of section 905, subd. (a). That the Government Claims Act generally occupies the field, as *Volkswagen Pacific* determined,[15] does not provide the Court much assistance because the Act itself expressly authorizes local claiming ordinances. (Cal. Gov. Code §§ 905, 935.) Again, the question before this Court is the legislative intent of section 905, subd. (a).

C. The City Does Not Dispute the Language of Code of Civil Procedure Section 313

Appellant relies on Code of Civil Procedure section 313 to argue the Government Claims Act governs tax refund claims against

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[14] All references in this brief to articles and sections are to the California Constitution.

[15] See *Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.3d 48, 62 n. 7.

public entities. (Answer Brief, p. 29.) The City does not, of course, dispute the language of that section. However, the statute states only that:"[t]he **general** procedure for the presentation of claims ... is prescribed by [the Government Claims Act]" (emphasis supplied.) That language does not help resolve the **specific** questions presented to this Court: What does the Government Claims Act say about local tax claims? Is there any reason to believe the Legislature intended uniform treatment of local tax refund claims and disparate treatment of state tax refund claims? Deciding these issues as the legislative history persuasively shows the Legislature intended avoids difficult questions as to where the state's power to prescribe claiming procedures ends and where the local power to prescribe the substantive legal obligations of taxpayers and tax collectors begins.

D. The City Does Not Dispute That the Government Claims Act Occupies the Field to Which it Applies

Appellant conflates whether there is **any** preemption by the Government Claims Act — plainly there is and the City does not claim otherwise — with whether there is preemption **here**. In other words, that the Government Claims Act controls the claims to which it applies does not determine its application in the first instance. Appellant's observation about the Government Claims Act's preemptive effect tells us nothing as to whether the Legislature

intended by the use of the term "statute" in section 905, subd. (a) to impose on all local tax refund claims a one-size-fits-all rule, ill-suited to taxes collected by private parties even though the Legislature plainly intended diverse rules for diverse state taxes. Neither does it explain why the Legislature has partly regulated many local taxes, but has never provided claim procedures for those very same taxes. Nor why the Legislature has not objected to the myriad local ordinances on point, just a few examples of which are identified above, and of which it is charged with notice because they existed when it adopted the statutes governing the bed and utility taxes as to which it has partially legislated. (*Orange County Employees Assn. v. County of Orange* (1993) 14 Cal.App.4th 575, 582 [strong presumption that Legislature means to preserve legal context which of which it has notice, but does not change].)

Additionally, Appellant's related argument that there is a conflict between the City's claim procedure and the Government Claims Act, is off-point. Appellant overreaches in his characterization of the Government Claims Act as "eliminat[ing] the balkanization of claims," suggesting that the Act would have been meaningless if it did not preempt local procedures. (Answer Brief, p. 30.) This position ignores the fact that section 905, subd. (a) already provides for a multiplicity of different tax refund procedures, even under his interpretation of the term "statute." (See Opening Brief, pp. 27–30.) Again, McWilliams argues **from** the

conclusion he seeks rather than **toward** it.

E. The City Concedes That the Contested Taxes Have Been Paid

The City's reliance on article XIII, section 32 of our Constitution is not for its "pay first, litigate later" rule. The City concedes that the taxes that McWilliams contests have been paid.[16] Rather, the City relies on article XIII, section 32 for the broader principle that *Woosley v. State of California* (1992) 3 Cal.4th 758, 759 found there: class claims for tax refunds require express legislative authorization, a rationale that allows stable and predictable funding

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[16] However, that article XIII, section 32 establishes a pay-first-litigate-later rule for the protection of local government finance is of pressing concern, as evidenced by an outlying decision to the contrary and the speed with which another appellate court rejected it. (See *Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825, 831 [allowing taxpayer to challenge assessment of underpaid bed tax without first paying tax]; *Chodos v. City of Los Angeles* (2011) 195 Cal.App.4th 675, 679 ["We do not agree with that language [in *Anaheim*] to the extent it is inconsistent with the pronouncements in *Writers Guild, supra,* 77 Cal.App.4th at page 481, 91 Cal.Rptr.2d 603, and *Flying Dutchman, supra,* 93 Cal.App.4th at pages 1135–1136, 113 Cal.Rptr.2d 690, that the "pay first" principle applies to local governmental entities as a matter of public policy."].)

of essential government services.

VIII. The Merits of McWilliams' Complaint Remain Untested

The Answer Brief concludes dismissively, arguing the "IRS had conceded that the tax was illegal," as if only one tax were at issue here. In fact, there are two: the Federal Excise Tax ("FET") and a local Long Beach tax that makes reference to the FET. The parties dispute, and no court has yet had occasion to decide, the meaning of a reference in the Long Beach tax to the FET. While this Court accepts the factual allegations of a complaint when a case arises on demurrer, the Court does not accept Appellant's legal claims or its would-be inevitable victory on the untested merits of this case.

Moreover, the 1979 IRS ruling the City cites in construing its tax is no more a factual matter not suitable for judicial notice than the 2006 IRS ruling that Appellant cites (especially as that 2006 ruling is not cited in the complaint). (Answer Brief, p. 6, n. 7; p. 7.) While the well pleaded allegations of the complaint control in this appeal from an order sustaining a demurrer, a court need not accept facts which are contradicted by other information properly before the court, such as judicially noticeable materials. Finally, the legislative intent of Long Beach's telephone tax ordinance is a legal matter in any event.

CONCLUSION

Appellant's purported class claim for a refund of Long Beach's telephone tax is contrary to the ordinances that control here — ordinances enacted by the City, consistent with the Legislature's intent in section 905, subd. (a) to preserve cities' power to establish procedures to govern claims for refund of local taxes. Respectfully, the City asserts this Court should find that the trial court properly concluded that Appellant's class action allegations fail as a matter of law and affirm that court's ruling that this litigation cannot proceed as a class action.

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CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.520(c)

Pursuant to California Rules of Court, Rule 8.520(c), the foregoing Reply Brief by Defendant / Respondent the City of Long Beach contains 7,645 words (including footnotes, but excluding the tables and this Certificate) and is within the 8,400 word limit set by Rule 8.520, subd. (c), California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on November 14, 2012 at Los Angeles, California.

COLANTUONO & LEVIN, PC
TIANA J. MURILLO

Tiana J. Murillo

APPENDIX

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Presentation of Claims Against Public Entities

January 1959

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 35 of the Statutes of 1956 to make a study of the various provisions of law relating to the presentation of claims against public bodies and public employees to determine whether they should be made uniform and otherwise revised. The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

January 1959

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apply to claims against public officers and employees or only to claims against public entities.[584]

20. Existing statutes which expressly purport to apply to claims against public officers and employees are in many respects ambiguous, uncertain and overlapping. Although such statutes are fewer in number than provisions governing claims against public entities, they share most of the difficulties attributed above to the entity claims provisions.[585]

While the present law of this State governing the presentation of claims against public entities and their officers and employees is subject to criticism, the large number of claims statutes evidences a widespread acceptance of the basic policy underlying such procedural prerequisites. This policy postulates claims presentation as a means of giving prompt notice in order to allow for early investigation of the facts and not merely as a statute of limitations. The values to be secured from the procedure include early negotiated settlements in lieu of expensive and annoying litigation disruptive of governmental efficiency and the discouragement of stale and ill-founded claims. It is believed that these basic objectives can be achieved without the present "bramble bush" of claims statutes by unifying and revising our claims procedures. My recommendations as to the legislation necessary to accomplish this purpose follow.

Unified Statutory Treatment

It is recommended that the procedure applicable to claims against all forms of governmental agencies below the State level be set forth in a single statutory enactment to be incorporated into the Code of Civil Procedure. The procedure so provided should be uniformly applicable to all claims for money or damages upon which a legal action might be brought against the public entity involved.

Limitation on Entities Covered

Practically all of the important litigation concerning claims provisions is related to claims against public entities rather than the State. In part, this is due to the fact that the claims provisions relating to the State are considerably more liberal in the filing times allowed and do not partake of the ambiguities which arise from the mere concurrent existence of many different governmental subdivisions with varying powers and administrative structures. There is only one State but there are many counties, cities and districts. The State is unique, also, in the size of both its geographical and financial programs and the wide dispersion of those activities which might give rise to claims of various types. Unlike local entities, the State Legislature is not in continuous periodic session where claims may be considered and funds for payment authorized. From nearly every viewpoint, claims against the State and its various departments are subject to quite different considerations and should be governed by different procedures from those which apply to claims against local agencies. Accordingly, since the major legal problems relating to claims procedure appear to be confined to claims against local agencies only, it is recommended that claims against the State or any State agency be excluded from the scope of the proposed

[584] See pp. A-103-105 *supra*.
[585] See pp. A-105-113 *supra*.

statute. All other forms of governmental subdivisions, however, should be included; and in order to avoid any doubts and to ensure proper notice that State claims are separately treated, an express cross reference to the State claims statutes should be made.

Limitation on Claims Covered

The scope of the proposed unified claims statute is limited to claims for money or damages thereby excluding demands for injunctive or other forms of specific relief. This limitation is consistent with the scope of nearly all of the claims provisions presently found in California law. Also excluded are (1) claims for tax exemption, cancellation or refund; (2) claims required by the mechanics' and materialmen's lien laws; (3) claims for wages, salaries, fees and reimbursement of expenses of public employees; (4) claims arising under the workmen's compensation laws; (5) claims for aid under public assistance programs; (6) claims for money due under pension and retirement systems and (7) claims for interest and principal upon bonded indebtedness. In most of these instances, the basic objectives of early investigation to prevent litigation and discourage false claims which support a uniform procedure for tort and inverse condemnation claims are not applicable; and orderly administration of the substantive policies governing the enumerated types of claims strongly suggests that claims procedure should be closely and directly integrated into such substantive policies. Obvious and compelling reasons appear for gearing tax refund claims to assessment, levy and collection dates and procedures; establishing special modes for protecting mechanics and material suppliers on public projects; providing an uncomplicated routine procedure for processing the tremendous volume of salary, pension, workmen's compensation and public assistance claims; and permitting flexible, simple and automatic procedures for meeting obligations to bondholders.

Contract claims pose a somewhat intermediate problem. Insofar as the claim is one for breach of contract, the need for early investigation and negotiation is frequently as important as in the case of tort claims. Ordinary routine claims for money due on a contract, however, are in a different category and for purposes of administrative convenience should not be shackled with an elaborate formal claims procedure. Other types of non-routine contract claims such as claims for the value of goods or services on an implied contract theory lie somewhere between the first two classes. It is recommended that the new claims statute permit public entities to waive by contract compliance with the claims statutes as to causes of action founded upon express contract other than claims for damages for breach of contract.

Need for Constitutional Amendment

In order to provide for a uniform claims procedure applicable to charter cities as well as other local entities, it is recommended that a constitutional amendment be adopted. As pointed out previously, there is some doubt as to whether a statute of the type here proposed could be validly applied to some types of claims against charter cities, since such cities are vested by the constitution with legislative autonomy with respect to "municipal affairs." With some modifications the proposed amendment along these lines adopted by the Assembly

in 1953 [586] would serve to safeguard the statute adequately from successful attack.

Relationship to Existing Claims Provisions

One of the observable defects in present claims law is the tendency of claimants, not to mention lawyers and judges, to become confused as to which of several claims provisions applies in a particular case. To adopt a new uniform claims procedure as here recommended presents a problem as to what should be done with the existing statutes, charter provisions and ordinances. Unless the existing provisions are concurrently repealed, some unwitting claimants will in all likelihood attempt to comply with the specific claims procedure of a district law, city charter or city ordinance which procedure may not be in compliance with the new uniform claims statute. The proposed uniform claims procedure would not necessarily preclude the existing provisions from continuing to operate as traps for the unwary.

Express repeal of the existing provisions would, of course, be the desirable solution. Under the proposed constitutional amendment this could clearly be accomplished in legal contemplation. But as a practical matter, those claims provisions which are not found in statutory form such as city charters and ordinances would remain physically unchanged except by voluntary act of the city council and, in the case of charters, voters. Thus, although claims provisions in the codes and special district laws could and would be removed by amendment from future editions of such statute law, the charter and ordinance provisions would in many cases remain on the books to mislead the uninformed reader. Even to repeal the purely statutory provisions would require an exhaustive search of present statute law to avoid overlooking some provision; and although such a search was pursued in preparing the present report, the author is far from confident that every relevant provision was disclosed, for such is the inadequacy of the available indexes to our statute law.

Any solution to this dilemma should be designed to eliminate the "trap" possibilities. It is accordingly recommended (1) that the new uniform claims procedure be made *exclusively* applicable only where no other claims procedure is presently provided by law and (2) that the new statute provide that substantial compliance with any other claims procedure applicable to the type of claim which is in existence on the effective date of the new statute would be a sufficient *alternative* to compliance with the new statute. Thus limiting the alternative compliance clause would preclude valid enactment of further special claims provisions by charter or ordinance and would provide time for repeal of pre-existing provisions in an orderly fashion. In addition, it would be desirable to repeal expressly all existing procedural statutes relating to claims against counties, cities and districts concurrently with adoption of the new statute.

Many existing claims provisions, particularly in charters and ordinances, contain detailed procedures for auditing claims and for processing them through appropriate channels of authority. These

[586] Assembly Constitutional Amendment No. 23 (Reg. Sess. 1953), quoted in Comment, *California Claims Statutes—"Traps for the Unwary,"* 1 U.C.L.A. L. Rev. 201, 210 (1954).

matters are primarily of local administrative concern. They do not affect the claimant except incidentally insofar as the internal procedures may delay approval or rejection of the claim; and they do not create any danger of being a "trap." Accordingly, it is recommended that such auditing, accounting and internal processing procedures as may presently pertain to claims be left unchanged where they are not inconsistent with the express provisions of the new statute.

Retroactive Application

Upon adoption of the proposed uniform claims procedure, the problem of its applicability to claims which accrued prior to its effective date will undoubtedly arise.[587] As previously observed, in the absence of explicit provisions as to retroactivity of claims statutes, the California courts have disagreed as to the solution of the problem.[588] Litigation on the point should be prevented by express rule. If the new statute were made fully retroactive to allow all claims not barred by the statute of limitations to be presented within a fixed period after its effective date, many stale claims would undoubtedly be revived and additional burdens imposed on public funds. Limited retroactivity would have the same result, only to a lesser degree, and it would be difficult to fairly draw the line. It is recommended that the new law be made applicable only to causes of action which accrue after its effective date and that previously accruing causes of action be governed by the law, if any, applicable thereto prior to adoption of the new procedure.

Consequences of Noncompliance

Requirement of Prior Rejection

In some states, e.g., Connecticut,[589] compliance with the claims statute is excused if an action is commenced on the claim within the claim filing period.[590] Substantially the same rule appears to obtain in California where prior rejection is not expressly required as a condition precedent to suit.[591] If the claim statutes are regarded as a mere short statute of limitations, this view has merit. In general, however, the California Legislature and courts have regarded such procedures as much more than a time limitation. Commencement of a timely action on a claim before any demand has been made for payment defeats the basic policy of discouraging litigation. It may be true that service of the complaint gives adequate notice and equal opportunity for investigation but opportunity for negotiation and settlement *prior* to incurring the expense of litigation is completely precluded. Institution of a lawsuit not only obligates the claimant for attorney's fees and costs which will probably increase his minimum settlement figure, but frequently imposes a burden of needless annoyance and inconveniences to the public employees involved and to counsel for the local entity in preparing and filing an answer within the relatively short time allowed. Much expense

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[587] See Annot., *Municipality—Notice of Claim*, 14 A.L.R. 710 (1921).
[588] See notes 599-606 *supra*.
[589] See CONN. GEN. STAT. § 1180d (Supp. 1955).
[590] See Annot., *Commencement of Action as Notice*, 101 A.L.R. 726 (1936).
[591] See Porter v. Bakersfield & Kern Elec. Ry., 36 Cal.2d 532, 225 P.2d 223 (1950), discussed *supra* at A-97 at notes 447-50. Under the California view, it is service of the complaint rather than commencement of the action which constitutes compliance with the claim statute. Usually these two events occur closely together.

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 November 14, 2012, declarant served the **CITY OF LONG BEACH'S REPLY BRIEF** 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 14th day of November, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, PC

By: _____
Kimberly Nielsen

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Case No. S202037
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