

SENATE JUDICIARY COMMITTEE
Senator Ellen M. Corbett, Chair
2007-2008 Regular Session

AB 1678	A
Assemblymember De La Torre	B
As Amended May 14, 2007	
Hearing Date: June 19, 2007	1
Government Code	6
GMO:rm	7
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SUBJECT

Public Officials: Conflicts of Interest
Action to Void Public Contract: Statute of Limitations

DESCRIPTION

This bill would enact a four-year statute of limitations to commence an action to void a contract in violation of existing law that prohibits specified public officials from having a financial interest in a contract entered into by the public official in his or her official capacity or by any board or body of which he or she is a member. The four years would run from the time the plaintiff discovered, or in the exercise of reasonable care should have discovered, the violation.

BACKGROUND

Government Code 1090 prohibits Members of the Legislature, and state, county, district, judicial district, and city officers or employees from having any financial interest in any contract made by them in their official capacity, or by any board or body of which they are members. They are also prohibited from being purchasers at any sale or vendors at any purchase made by them in their official capacity. Government Code 1092 provides that a contract made in violation of 1090 may be avoided at the instance of any party other than the officer with interest in the contract, and requires that the contract must have been made in the official capacity of

(more)

the officer or by a board or body of which the official was a member. Both 1090 and 1092 have spawned hundreds of cases, each court affirming the principle that government officials owe paramount loyalty to the public and that private or personal financial considerations of a public official should not be allowed to enter the decision making-process.

Two years ago, Albert Robles, former Treasurer of the City of Southgate in the author's district, was convicted of fraud, money laundering, and public corruption in the conduct of the city's business. During his tenure, various contracts were let by the city that resulted in kickbacks of more than \$1.2 million to Robles and his associates; law firms friendly to Robles ran up huge legal fees, charging hourly rates far above what other municipalities allow; some city employees received huge raises and extravagant severance packages; yet some employees, such as two police captains, a lieutenant and the chief of police, were so mistreated they sued the city and the city has had to spend large sums to defend itself. There were alleged payoffs in the award of a \$48-million trash-hauling contract, a \$24-million housing project for senior citizens, and a \$4-million contract to oversee sewer improvements. The city's redevelopment agency had entered into \$30 million worth of contracts during Robles' term, but only had \$24 million in available redevelopment funds. A developer, for example, was given \$12 million by the city to create moderate-income housing after selling him a seven-acre parcel for \$1. Robles' actions left the city with even more legal fees from lawsuits stemming from the corrupt practices, and a reserve fund that dwindled from \$8 million to \$3 million in a few years. One law firm has been ordered by the federal court to return over \$500,000 in legal fees charged to the city for representing Robles before grand juries. In short, this small city has had to lay off workers, raise taxes, freeze hiring, and sell off property to meet its obligations.

Additionally, Southgate has attempted to block some of the contracts Robles and his cohorts issued, with limited success. While the city is struggling with its financial condition, it has had to spend several million dollars in legal fees trying to undo bad deals from Robles' term of office. Because of the complexity of the cases, the city

is running into statute of limitations problems in bringing lawsuits to avoid some of these contracts.

Presently the state courts are split as to the statute of limitations applicable to lawsuits brought pursuant to violations of Gov. Code 1090. The leading case of Marin Healthcare Dist. v. Sutter Health 2002) 103 Cal.App.4th 861 found that actions brought under Gov. C. Sec. 1090 are subject to the statutes of limitations in the Code of Civil Procedure for actions other than for recovery of real property (C.C.P. 335 et seq.) and fall in the "catch-all" provision of Code of Civil Procedure Sec. 343: "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

This bill would establish a four-year statute of limitations for commencing actions to avoid contracts where a violation of 1090 has occurred.

CHANGES TO EXISTING LAW

Existing law prohibits Members of the Legislature, and state, county, district, judicial district, and county officers or employees from having any financial interest in any contract made by them in their official capacity, or by any board or body of which they are members. (Government Code 1090. All references are to the Government Code unless otherwise indicated.)

Existing law provides that a contract made in violation of Gov. Code 1090 may be avoided at the instance of any party except the officer who is interested in the contract, and may not be avoided because of the interest of the officer unless the contract is made in the official capacity of the officer or the body or board of which he or she is a member. (1092.)

Existing law establishes statutes of limitations for the commencement of actions but does not specify which statute of limitations applies to claims under 1090 or 1092.

Existing law provides that other than for actions to recover real property, the time for commencement of actions

given to an individual or to an individual and the state is within one year upon a statute for a penalty or forfeiture unless another statute prescribes a different limitation, or within one year for an action upon a statute for a forfeiture or penalty given to the people of this state. (Code of Civil Procedure 340.)

Existing law provides that an action for relief not specifically identified in statute must be commenced within four years after the cause of action has accrued. (Code of Civil Procedure 343.)

Existing case law, Marin Healthcare Dist. v. Sutter Health (2002) 103 Cal.App.4th 861, held that claims brought pursuant to 1090 or 1092 are based on the public's right to be free of a government contract made under the influence of a financial conflict of interest and therefore the applicable statute of limitations is not one based on the remedy sought. Marin, thus, held that these claims are subject to the "catch-all" statute of limitations provided in the Code of Civil Procedure.

This bill would provide that claims brought under 1092 shall be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation of 1090 in the making of a contract.

COMMENT

1. Need for the bill

According to the author, the absence of a statute of limitations applicable specifically to 1092 actions has resulted in ambiguities that disadvantage public entities trying to void contracts made by public officials in violation of conflicts of interest rules. The author argues that 1090 claims "often involve coordinated action between members of approving boards and private parties. They often hide their relationships to one another at the time of approval of the illegal contracts, and it is not until later wherein the public entities discover the illegal activities and seek justice under section 1090. Thus, a minimum of a four-year statute of limitations from the date of discovery by the public

entity of the illegality of the contract would protect a public entity's right to recovery under section 1090."

Apparently, defendants in the 1090 actions brought by the city of Southgate and by other public entities in similar situations have been asserting that the one-year statute of limitation for forfeitures apply to the public entities' claims. This bill would establish a four-year statute of limitations for 1092 actions that are based on violations of the conflict of interest prohibitions of 1090. It would therefore give public entities more time to gather information and develop their cases for voiding contracts that are grounded on violations of the public trust.

2. Marin Healthcare District v. Sutter Health and the Attorney General's Conflict of Interest Handbook

The Attorney General's Handbook on Conflict of Interest states that 1090 "basically prohibits the public official from being financially interested in a contract or sale in both his or her public and private capacities. In *Thomson v. Call* (1985) 38 Cal.3d 633, 649, the California Supreme Court reiterated the long-standing purpose and framework of Section 1090. The purpose of Section 1090 is to make certain that 'every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.' (*Id.* at p. 650.)." The handbook further states that courts have held that a contract made in violation of 1090 is void; that any payments made to a third party must be returned and no future payments may be made; and that the public entity is entitled to retain any benefits it receives under the contract. (Citations omitted.)

The Attorney General's handbook also states that despite the language in 1092 that a contract "may be avoided," case law "has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable." On this basis, the applicable statute of limitations would relate to the nature of the

remedy sought by a lawsuit to avoid the contract, which in most cases would be a forfeiture and thus a one-year statute of limitations would apply.

In Marin, supra, the Marin Healthcare District, a political subdivision of the state, brought suit to recover possession of a publicly owned hospital and related assets that it had leased and transferred in 1985 to defendant Marin General (owned by Sutter Health). The District claimed the 1985 agreements were void because its chief executive and legal counsel had a financial interest in the agreements at the time of their execution, in violation of 1090. The trial court held the suit was time-barred because it was filed 12 years later.

The appellate court in Marin was the first to squarely address the applicable statute of limitations for suits to void a contract in violation of Government Code 1090 or its predecessor statute. The court clearly stated that claims made under 1090 or 1092 are subject to applicable statutes of limitations. However, the appellate court's decision in Marin articulated a different basis for 1090 and 1092 claims than the nature of the remedy sought, which is what the various statutes of limitations in the Code of Civil Procedure is based upon. The court stated that claims brought pursuant to 1090 or 1092 are based on the public's right to be free of a government contract made under the influence of a financial conflict of interest and therefore the applicable statute of limitations is not one based solely on the remedy sought. While it appears the court agreed that the one-year statute of limitations for forfeitures could apply to the facts of that defendants), the court also said that even the four-year catch-all statute of limitations in C.C.P. 343 would bar the District's case because its claim was filed 12 years after it entered the contract in question.

More importantly, the Marin court held that applying C.C.P. 343 to the subject contracts "on the ground of illegality would certainly be consistent with existing case authority. (E.g., Moss v. Moss (1942) 29 Cal.2d 640, 644-645 [holding that cause of action for cancellation of

an agreement is governed by 343, in part because there is "no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality"; Zakaessian v. Zakaessian (1945) 70 Cal.App.2d 721, 725 [161 P.2d 677] ["[o]rdinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure" unless, for example "the gravamen of the cause of action stated involves fraud or a mistake"]; (other citations omitted)." Thus, even though the Marin decision did not expressly hold that for all 1092 claims the applicable statute of limitations is four years under C.C.P. 343, it provides sufficient rationale for AB 1678 to articulate a four-year statute of limitations specifically for 1092 actions.

This bill would provide that a 1092 claim must be brought within four years of a plaintiff's discovery, or in the plaintiff's exercise of reasonable care should have discovered, of a conflict-of-interest violation under 1090. The relation back to the date of discovery of the violation for purposes of the statute of limitations is consistent with existing law.

Support: None Known

Opposition: None Known

HISTORY

Source: Author

Related Pending Legislation: None Known

Prior Legislation: None Known

Prior Vote: Asm. Cmte. on Local Gov. (Ayes 7, Noes 0)
Asm. Flr. (Ayes 75, Noes 0)
