Chapter 2—Pre-Filing Procedures

Lawyers traditionally think of the filing of a complaint and the service of a summons as the means to start a lawsuit. Certain types of litigation, however, require that the plaintiff follow various pre-filing procedures. These cases include claims against the government and its employees, claims against decedents' estates, certain types of actions requiring presuit consultation with an expert, and certain types of actions requiring court approval.

§ 2.01 Claims Against Governmental Entities and Employees

At common law, the doctrine of sovereign immunity shielded governmental entities from civil liability.[1] Over time, however, a number of judicial and statutory exceptions accumulated until the supreme court finally repudiated the doctrine of sovereign immunity in California altogether in 1961.[2] In 1963, the legislature responded to the supreme court's decision by enacting the Tort Claims Act,[3] which restored the sovereign immunity of governmental entities except as otherwise provided by statute[4] and simultaneously created statutory liability on the part of governmental entities in most of the situations in which a private party would be

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[1] People v. Superior Court (Pierpont), 29 Cal. 2d 754, 756, 178 P.2d 1, 2 (1947); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 105 (3d ed. 1988).

[2] Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 457, 11 Cal. Rptr. 89, 90 (1961).

[3] GOV. CODE §§ 810–996.6.

[4] GOV. CODE § 815(a).

subject to liability.[5] The Act conditions an injured party's right of recovery on compliance with the claim filing requirements and time limits set forth in the Act.[6]

[A] The Claims Procedure

➡ Exceptions

Unless the plaintiff pleads and proves his compliance with the Act, or an excuse from compliance, the trial court lacks jurisdiction[7] and must dismiss the case.[8] The Act's immunities and claim filing requirements extend to actions against public employees for injuries resulting from an act or omission in the scope of the defendant's employment as a public employee. The Act bars such an action against the public employee if an action against the employing public entity for such injury is barred for failure to comply with the claims procedures.[9] An employee acts within "the scope of his employment" when he is engaged in work he was employed to perform or when an act is incident to his duty and was performed for the benefit of his employer and not to serve his own purpose. The proper inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the employee which were authorized by the employer. "Scope of

➡ Ignorance of Defendant's Status as a Public Employee

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[5] GOV. CODE §§ 815.2 (liability for injuries caused by the negligence of public employees); § 815.6 (liability for failure to discharge a mandatory duty); § 835 (liability for injuries caused by a dangerous condition of public property). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:647–657 (1996).

[6] GOV. CODE §§ 905, 905.2.

[7] Kim v. Walker, 208 Cal. App. 3d 375, 384, 256 Cal. Rptr. 223, 228 (1989).

[8] Redlands High School Dist. v. Superior Court, 20 Cal. 2d 348, 358, 125 P.2d 490, 495 (1942).

[9] GOV. CODE § 950.2; *see* Mazzola v. Feinstein, 154 Cal. App. 3d 305, 310, 201 Cal. Rptr. 148, 152 (1984). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 242 (4th ed. 1997).

employment" includes willful and malicious torts as well as negligence. That an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not necessarily mean the employee acted outside the scope of his employment.[10]

Although one may plausibly question the propriety of allowing those injured by private parties to file suit any time within the period permitted by the applicable statute of limitations (anywhere from one to four years from the accrual of the cause of action, depending on the type of action brought) but requiring those injured by governmental entities to present a claim not later than six months after the accrual of the cause of action,[11] the claim filing requirements have survived attacks on the grounds that they violate litigants' constitutional rights to due process and equal protection.[12]

The Tort Claims Act applies to "all claims for money or damages" against governmental entities.[13] This includes:

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[10] Fowler v. Howell, 42 Cal. App. 4th 1746, 1750–51, 50 Cal. Rptr. 2d 484, 487 (1996) (employee who has been encouraged to complain and provided a procedure to complain of sexual harassment by a coworker acts within the scope of his employment by making such a complaint).

[11] GOV. CODE § 911.2.

[12] Tammen v. County of San Diego, 66 Cal. 2d 468, 481, 426 P.2d 753, 761, 58 Cal. Rptr. 249, 257 (1967); Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 504, 370 P.2d 334, 335, 20 Cal. Rptr. 630, 631 (1962). *But cf.* Ebersol v. Cowan, 35 Cal. 3d 427, 441, 673 P.2d 271, 280–81, 197 Cal. Rptr. 601, 610–11 (1983) (Bird, C.J., concurring on the ground that the claim filing and time limitation violates the Equal Protection Clause).

[13] GOV. CODE §§ 905, 905.2. *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 228, 229 (4th ed. 1997).

- intentional torts[14]
- claims for partial indemnity[15]
- claims by a government employee against a co-employee if the claim is not covered by workers' compensation[16]
- nuisance claims.[17]

In bringing a class action against a public entity based on individual claims otherwise subject to the Act, one must file a claim on behalf of the class.[18]

The Act does not apply actions seeking the recovery of specific property.[19] A litigant need not comply with the Act in order to pursue other legal remedies against public entities.[20] Thus, the Act permits a hospital, without having filed a claim, to petition for a writ of mandate to compel a county to adopt standards for the medical

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[14] Burgdorf v. Funder, 246 Cal. App. 2d 443, 446, 54 Cal. Rptr. 805, 808 (1966).

[15] Gehman v. Superior Court, 96 Cal. App. 3d 257, 261, 158 Cal. Rptr. 62, 65 (1979).

[16] Miner v. Superior Court, 30 Cal. App. 3d 597, 601, 106 Cal. Rptr. 416, 419 (1973).

[17] State v. Superior Court (Hall), 159 Cal. App. 3d 331, 338, 205 Cal. Rptr. 518, 521–22 (1984).

[18] City of San Jose v. Superior Court, 12 Cal. 3d 447, 456, 525 P.2d 701, 707, 115 Cal. Rptr. 797, 803 (1974). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 230 (4th ed. 1997).

[19] Hibbard v. City of Anaheim, 162 Cal. App. 3d 270, 275, 208 Cal. Rptr. 733, 736 (1984). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 235 (4th ed. 1997).

[20] Minsky v. City of Los Angeles, 11 Cal. 3d 113, 128, 520 P.2d 726, 732, 113 Cal. Rptr. 102, 108 (1974) (a claim for the specific recovery of property is not a claim for "money or damages" as used in the Act); Snipes v. City of Bakersfield, 145 Cal. App. 3d 861, 869–70, 193 Cal. Rptr. 760, 765 (1983) (the limitation of the Act's notice-of-claim provisions to "claims for money or damages" exempts actions seeking specific relief other than money or damages, such as injunctive or declaratory relief).

care of the indigent but not to seek reimbursement for care the hospital had previously provided.[21] But if the injured party neglects to file a claim in the manner that the Act requires, he may not seek damages from the responsible governmental entity,[22] even if the governmental entity had actual knowledge of the circumstances surrounding the claim.[23] Where the Act requires compliance with its claim filing procedures, the plaintiff must allege compliance or circumstances excusing compliance; without such allegations, the complaint is subject to a general demurrer.[24]

[B] Exceptions

[1] Certain Claims Against Local Public Entities

Government Code section 905 provides a number of exceptions with respect to claims against local public entities:

- for the refund of any tax, assessment, or fee, or of any related penalties, costs or charges
- in connection with which the filing of a notice of lien, statement of claim, or stop notice as required under any provision of law relating to mechanics', laborers' or materialmen's liens

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[21] Madera Community Hosp. v. County of Madera, 155 Cal. App. 3d 136, 148, 201 Cal. Rptr. 768, 776 (1984).

[22] GOV. CODE § 945.4.

[23] City of San Jose v. Superior Court, 12 Cal. 3d 447, 455, 525 P.2d 701, 706, 115 Cal. Rptr. 797, 802 (1974); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 227 (4th ed. 1997).

[24] Snipes v. City of Bakersfield, 145 Cal. App. 3d 861, 865, 193 Cal. Rptr. 760, 762 (1983).

- by public employees for fees, salaries, wages, mileage, or other expenses and allowances[25]
- for which worker's compensation is the exclusive remedy
- for public assistance
- for goods, services, provisions, or other assistance rendered for a recipient of public assistance
- for benefits under any public retirement or pension system[26]
- for principal or interest upon bonds and other debt securities
- by the state or by a state department or agency or by another local public entity
- for unemployment insurance 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
- for the recovery of penalties or forfeitures relating to public works projects.[27]

If such claims are not governed by other statutes or regulations, the local public entity may adopt its own claims procedure.[28]

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[25] This exemption applies only to claims for salaries and wages which have been earned but not paid. Loehr v. Ventura Community College Dist., 147 Cal. App. 3d 1071, 1080, 195 Cal. Rptr. 576, 581 (1983).

[26] This exemption is limited to earned benefits, Loehr v. Ventura County Community College Dist., 147 Cal. App. 3d 1071, 1080, 195 Cal. Rptr. 576, 581 (1983), and does not include pension benefit claims based on promissory estoppel, Baillargeon v. Department of Water & Power, 69 Cal. App. 3d 670, 681, 138 Cal. Rptr. 338, 344 (1977).

[27] *See* LABOR CODE §§ 1720 *et seq*. *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 231–234 (4th ed. 1997).

[28] GOV. CODE § 935(a).

[2] Ignorance of Defendant's Status as a Public Employee

The Act does not bar a cause of action against a public employee if the plaintiff pleads and proves that he did not know or have reason to know, within the period for the presentation of a claim to the employing public entity, that the injury was caused by the public entity or a public employee in scope of his employment.[29]

[3] Claims Under the California Fair Employment and Housing Act

The Act's claims procedures do not apply to claims under the California Fair Employment and Housing Act.[30] The purposes of the Tort Claims Act are to give the governmental entity an opportunity to settle claims before suit, to permit investigation while the facts are still fresh, to facilitate fiscal planning for potential liabilities, and to avoid similar liabilities in the future. The California Fair Employment and Housing Act requires the filing of a claim with the Department of Fair Employment and Housing, administrative investigation, and service of the complaint on the employer. Because these requirements fulfill the purposes of the Tort Claims Act, the Act's claim requirements do not apply to actions under the California Fair Employment and Housing Act.[31]

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[29] GOV. CODE § 950.4.

[30] GOV. CODE §§ 12900 *et seq. See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:660 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 238 (4th ed. 1997).

[31] Snipes v. City of Bakersfield, 145 Cal. App. 3d 861, 865, 193 Cal. Rptr. 760, 761 (1983).

[4] Claims Against the State Compensation Insurance Fund

The State Compensation Insurance Fund is not subject to the provisions of the Government Code applicable to state agencies generally.[32] This exclusion includes the Tort Claims Act claim filing requirements.[33]

[5] Claims Under Federal Statutes

Because the Constitution provides that federal law prevails over state law,[34] a litigant need not comply with the Tort Claims Act's claim filing requirements in order to pursue a claim under federal law. The Supreme Court so held in *Felder v. Casey,*[35] which involved the application of Wisconsin's notice-of-claim statute to an action under a federal civil rights statute:

> A state law that conditions [a litigant's right of recovery under section 1983 of Title 42 of the United States Code] upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court.[36]

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[32] INS. CODE § 11873(a).

[33] Courtesy Ambulance Serv. v. Superior Court, 8 Cal. App. 4th 1504, 1514, 11 Cal. Rptr. 2d 161, 165 (1992).

[34] Art. VI, cl. 2.

[35] 487 U.S. 131 (1988). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:659 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 236–237 (4th ed. 1997).

[6] Duplicative Claims

A litigant need not file a claim with a governmental entity before filing suit if such a claim would precisely mirror a claim already filed by another interested party. Thus, in *San Diego Unified Port District v. Superior Court*[37] the court held that an injured worker's filing of his claim against a governmental entity as required by the Tort Claims Act also satisfied the filing requirement for the employer's workers' compensation carrier. The court carefully distinguished two cases denying the widows of deceased workers the right to piggyback their actions on the claims filed by the workers' compensation carrier or the employer.[38] As the court noted, the widows' claims posed the prospect of liability for wrongful death, rather than the limited liability to the employer (or its workers' compensation carrier) under the Labor Code. Thus, the carrier's or employer's claim did not necessarily inform the governmental entity about its potential liability. To allow the widow a free ride on the carrier's or employer's claim would undermine the purpose of the Tort Claims Act claim filing requirement to enable the governmental entity to make sound fiscal plans in light of anticipated liabilities.

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[36] Felder v. Casey, 487 U.S. 131, 153 (1988). *Accord*, Williams v. Horvath, 16 Cal. 3d 834, 842, 548 P.2d 1125, 1130, 129 Cal. Rptr. 453, 458 (1976).

[37] 197 Cal. App. 3d 843, 848, 243 Cal. Rptr. 163, 165 (1988). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:662–:665 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 230, 240, 249 (4th ed. 1997).

[38] Pacific Tel. & Tel. Co. v. County of Riverside, 106 Cal. App. 3d 183, 190, 165 Cal. Rptr. 29, 32 (1980); Roberts v. State, 39 Cal. App. 3d 844, 848, 114 Cal. Rptr. 518, 521 (1974).

The same principle excuses an insurer suing in subrogation to its insured's claim against a public entity from having to file a duplicate claim.[39] The insurer, however, is subject to the same defenses and time limits as the insured; if the insured failed to file a timely claim, the insurer's subsequent payment of the insured's loss does not revive the opportunity to file a claim.[40]

Because of its uncertain bounds, it would be foolhardy for a lawyer to pass up the opportunity to file a timely claim in reliance on this exception.

[7] Unidentified Entities

Government Code section 53051 requires that public agencies file a statement in the Roster of Public Agencies maintained in the office of the secretary of state and of the county clerk of each county in which the public agency maintains an office. If a governmental entity has not complied with this requirement during the 70 days immediately following the accrual of a plaintiff's cause of action, the plaintiff's failure to present a claim to the governmental entity does not bar the plaintiff's suit against that entity.[41] This exception applies even when the entity's failure to file did not mislead the plaintiff.[42]

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[39] Smith v. Parks Manor, 197 Cal. App. 3d 872, 881, 243 Cal. Rptr. 256, 261 (1988).

[40] Commercial Union Assurance Co. v. City of San Jose, 127 Cal. App. 3d 730, 735, 179 Cal. Rptr. 814, 817 (1982).

[41] GOV. CODE § 946.4(a)(1); *see* Banfield v. Sierra View Local Dist. Hosp., 124 Cal. App. 3d 444, 456–57, 177 Cal. Rptr. 290, 296 (1981). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:669–:671 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 227 (4th ed. 1997).

[8] Inverse Condemnation

One need not file a claim in order to maintain an action against a public entity for inverse condemnation.[43] If, however, the plaintiff submits such a claim, the public entity must process it according to the normal procedures.[44]

[9] Partial Payment

When a tortfeasor makes partial payment on a claim against him, he may lull the victim into thinking that the victim need not pursue his legal claim against the tortfeasor. This is particularly true when an insurance company makes advance payments on behalf of one of its insureds. Insurance Code section 11583 addresses this potential source of unpleasant surprise by providing:

> Any person . . . who makes . . . an advance or partial payment, shall at the time of beginning payment, notify the recipient thereof in writing of the statute of limitations applicable to the cause of action which such recipient may bring against such person as a result of such injury . . . , *including any time limitations within which claims are required to be made against the state or any local public entity when such payments are made on behalf of such public entities.* Failure to provide such written notice shall operate to toll any such applicable statute of limitations or time limitations from the time of such advance or partial payment until such written notice is actually given.

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[42] Wilson v. San Francisco Redevelopment Agency, 19 Cal. 3d 555, 562, 564 P.2d 872, 876, 138 Cal. Rptr. 720, 724 (1977).

[43] GOV. CODE § 905.1; City of Los Angeles v. Superior Court, 73 Cal. App. 3d 509, 510, 142 Cal. Rptr. 292, 292 (1977).

[44] GOV. CODE § 905.1.

This statute applies to public entities.[45] Only the recipient of the advance payments may invoke section 11583's tolling provision.[46] Printing of the notice on the back of the payment check does not satisfy the statute.[47]

The notification is not required if the recipient is represented by an attorney.[48] The statute of limitations is tolled from the date of the advance payment to the date on which the claimant retains counsel or the date upon which the statutory notice is given, whichever comes first.[49]

[10] Estoppel

A governmental entity may be estopped from interposing the plaintiff's failure to file a claim as a defense if the entity somehow misled the plaintiff into believing that a claim was not necessary.[50] In *Elmore v. Oak Valley Hospital District.*[51] a patient sued the "Oak Valley Hospital." The defendant demurred to the complaint on the ground that the Oak Valley Hospital was operated by a public agency, the "Oak Valley Hospital District," and that the plaintiff had not filed a claim as required by

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[45] Maisel v. San Francisco State Univ., 134 Cal. App. 3d 689, 694, 185 Cal. Rptr. 694, 697 (1982) (case remanded for a determination whether the entity's furnishing of medical care constituted an "advance or partial payment"). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:672 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 246–248 (4th ed. 1997).

[46] Evans v. Dayton Hudson, 234 Cal. App. 3d 49, 53–54, 285 Cal. Rptr. 550, 552 (1991).

[47] Conlin v. Del Mar Paving, 234 Cal. App. 3d Supp. 6, 10, 286 Cal. Rptr. 33, 35 (1991).

[48] INS. CODE § 11583.

[49] Associated Truck Parts, Inc. v. Superior Court, 228 Cal. App. 3d 864, 870, 279 Cal. Rptr. 76, 79–80 (1991).

the Tort Claims Act. The plaintiff filed an amended complaint alleging that when his attorney had attempted to ascertain whether "Oak Valley District Hospital" was listed in the Roster of Public Agencies, he was advised that there was no such listing. The superior court sustained the defendant's demurrer without leave to amend, and the plaintiff appealed. The court of appeal reversed, explaining that in order to apply the doctrine of estoppel to a public entity, the plaintiff must prove four elements:

> (1) The party to be estopped must be apprised of the facts;
>
> (2) He must intend that his conduct shall be acted upon, and must so act that the party asserting the estoppel had a right to believe it was so intended;
>
> (3) The other party must be ignorant of the true state of facts; and
>
> (4) He must rely upon the conduct to his injury.[52]

The court of appeal held that the facts as pleaded were sufficient to support an estoppel of the defendant.

All public entities, when identifying themselves for any purpose, must disclose their status as public entities.[53] A governmental entity may satisfy this requirement by disclosing its status on its letterhead stationery and on its representatives'

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[50] Ocean Servs. Corp. v. Ventura Port Dist., 15 Cal. App. 4th 1762, 1776, 19 Cal. Rptr. 2d 750, 757 (1993) ("The claims statute may not be invoked to penalize a plaintiff who at the behest of a public entity has been induced not to take action . . . ."). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:673–:678 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 293–295 (4th ed. 1997).

[51] 204 Cal. App. 3d 716, 251 Cal. Rptr. 405 (1988).

[52] 204 Cal. App. 3d at 724, 251 Cal. Rptr. at 410.

[53] GOV. CODE § 7530.

identification cards.[54] If an entity's failure to comply with this statute causes a claimant reasonably to believe that the entity was not a public agency, then the claimant is relieved of the Tort Claims Act filing requirements, provided that he acts with reasonable diligence.[55]

[11] Duress or Intimidation

Acts of violence or intimidation on the part of a public entity that are intended to prevent the filing of a claim may estop the entity from complaining that the plaintiff did not file a timely claim.[56]

Example: *P* and his parents sue *District*, accusing *P*'s teacher of molesting *P*. The plaintiffs allege that the teacher threatened to accuse *P* of initiating the contacts if he disclosed them. *District* demurs to the complaint on the ground that the plaintiffs did not comply with the claims procedure. The court sustains the *District*'s demurrer.

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[54] The term "letterhead stationery" does not include medical records. Rojes v. Riverside Gen. Hosp., 203 Cal. App. 3d 1151, 1165–66, 250 Cal. Rptr. 435, 442 (1988), *overruled on other grounds*, Passavanti v. Williams, 225 Cal. App. 3d 1602, 1607, 275 Cal. Rptr. 887, 890 (1990).

[55] GOV. CODE § 911.4; Rojes v. Riverside Gen. Hosp., 203 Cal. App. 3d 1151, 1166, 250 Cal. Rptr. 435, 443 (1988), *overruled on other grounds*, Passavanti v. Williams, 225 Cal. App. 3d 1602, 1607, 275 Cal. Rptr. 887, 890 (1990).

[56] Christopher P. v. Mojave Unified School Dist., 19 Cal. App. 4th 165, 173, 23 Cal. Rptr. 2d 353, 359 (1993) (teacher's warning to child not to tell authorities of child's molestation excused child's failure to submit a claim). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:679–:680 (1996).

The court erred. The time for filing a claim against *District* was tolled during the period that the teacher's threats deterred the plaintiffs from pursuing their claims.[57]

[12] Defensive Cross-Claims for Indemnity

If a defendant public entity files a cross-claim for indemnity against another defendant, presumably the public entity has received notice of the event giving rise to the dispute and has had an opportunity to investigate the facts and to consider whether to settle the claim. It would serve no purpose to condition the cross-defendant's right to file a purely defensive cross-claim for indemnity against the public entity on the cross-defendant's compliance with the claims procedure. Therefore, the cross-defendant is not required to file a claim under these circumstances.[58]

[13] Claims by Public Entities Against Local Entities

Government Code section 905 provides that the state of California, its departments and agencies, and other local public entities do not have to file claims before suing a local public entity.[59] Local public entities, however, have the power

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[57] John R. v. Oakland Unified School Dist., 48 Cal. 3d 438, 446, 769 P.2d 948, 952, 256 Cal. Rptr. 766, 770 (1989).

[58] Krainock v. Superior Court, 216 Cal. App. 3d 1473, 1478–79, 265 Cal. Rptr. 715, 718 (1990). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:666–:667 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 239 (4th ed. 1997).

[59] GOV. CODE § 905(i). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 1:661 (1996).

to enact ordinances requiring the filing of claims in situations otherwise excepted by section 905.[60] If the state fails to comply with the local public entity's claims procedure, it forfeits its right to sue that entity.[61]

[14] Actions on Judgments Against Local Public Entities

An action on a judgment against a local public entity is not governed by the claim filing requirements of the Tort Claims Act. Those requirements are intended to give the public entity the opportunity to investigate the factual basis of the claim while the evidence is fresh, to settle meritorious cases without litigation, and to consider the fiscal implications of potential liability. These purposes are clearly related to unadjudicated claims. Once a claim has been litigated and a final judgment entered, the time has passed for investigating the merits, settling without litigation, and gauging potential liability. The judgment conclusively determines the merits of the claim and the liability of the public entity.[62]

[15] Other Exceptions

Though sections 905 and 905.2 of the Government Code list a number of exceptions to the Tort Claim Act's claim filing requirements, those exceptions do not exhaust the types of claims which may be exempt. A court may recognize a new exception in an appropriate case.[63]

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[60] GOV. CODE § 935(a).

[61] City of Ontario v. Superior Court, 12 Cal. App. 4th 894, 903, 16 Cal. Rptr. 2d 32, 37 (1993).

[62] Barkley v. City of Blue Lake, 47 Cal. App. 4th 309, 316–17, 54 Cal. Rptr. 2d 679, 684 (1996).

[63] Snipes v. City of Bakersfield, 145 Cal. App. 3d 861, 868, 193 Cal. Rptr. 760, 764 (1983) (the Act does not apply to claims under the California Fair Employment and Housing Act, GOV. CODE §§ 12900 *et seq.*).

[C] Contents of the Claim

[1] Required Information

Government Code section 910 sets forth the information that must be included in a claim under the Tort Claims Act:

> (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.
>
> (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known.
>
> (f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether jurisdiction over the claim would rest in municipal or superior court.[64]

As long as these general elements are present, it is not necessary that the claim comply with formal pleading standards.[65]

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[64] *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:681–:682 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 243–244 (4th ed. 1997).

[65] Blair v. Superior Court, 218 Cal. App. 3d 221, 224, 267 Cal. Rptr. 13, 15 (1990).

[2] Defective Claims

If the claimant fails to provide these six items of information in his claim, the Act does not bar his cause of action, provided that his defective claim substantially complies with the Act. To gauge the sufficiency of a particular claim, two tests are applied: Is there some compliance with all of the statutory requirements? Is this compliance sufficient to constitute substantial compliance?[66] Thus, complaint letters to a hospital did not constitute substantial compliance where the letters totally failed to transmit the required documents to the statutorily designated agent and failure to indicate that a monetary claim was being asserted.[67]

The plaintiff substantially complies with the claim requirements by providing sufficient information "to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit."[68] For instance, if a parent's and child's claim demands compensation to the parent for medical expenses incurred on behalf of the child, the child may recover compensation for the medical expenses, even though no claim for medical expenses was made on the child's behalf. In this instance the parent's and child's joint claim provides the public entity all of the information necessary to settle the

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[66] City of San Jose v. Superior Court, 12 Cal. 3d 447, 456–57, 525 P.2d 701, 707, 115 Cal. Rptr. 797, 803 (1974). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 263, 265–267, 291 (4th ed. 1997).

[67] Wood v. Riverside Gen. Hosp., 25 Cal. App. 4th 1113, 1118, 31 Cal. Rptr. 2d 8, 10 (1994).

[68] City of San Jose v. Superior Court, 12 Cal. 3d 447, 456, 525 P.2d 701, 707, 115 Cal. Rptr. 797, 803 (1974). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:683–:686, :690–:692, :702–:709 (1996).

claim, to investigate the facts, to plan for its potential liability, and to avoid similar liabilities in the future.[69] The claimant, however, cannot invoke the rule of substantial compliance if his defective claim omits any essential item of information required by the Act.[70]

If the claimant omits from his claim form a theory of recovery or category of damage, he may not pursue that theory or category in the courts should the public entity reject his claim. Thus, if a prisoner's claim charges his keepers with medical malpractice, he may not pursue a cause of action based on the theory that his keepers had been negligent in failing to obtain medical assistance promptly.[71] And

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[69] White v. Moreno Valley Unified School Dist., 181 Cal. App. 3d 1024, 1030–31, 226 Cal. Rptr. 742, 745 (1986).

[70] Dilts v. Cantua Elementary School Dist., 189 Cal. App. 3d 27, 37, 234 Cal. Rptr. 612, 618 (1987) (letters omitted the name and post office address of the claimant, the names of the public employees involved in the claimant's discharge, and the circumstances of the discharge); Loehr v. Ventura Community College Dist., 147 Cal. App. 3d 1071, 1083, 195 Cal. Rptr. 576, 583–84 (1983) (letter by a wrongfully discharged public employee demanding reinstatement did not demand monetary compensation, did not contain an estimate of the claimant's harm, and failed to state the circumstances giving rise to the claimant's causes of action).

[71] Nelson v. State, 139 Cal. App. 3d 72, 80, 188 Cal. Rptr. 479, 484 (1982). *Accord*, Fall River Joint Unified School Dist. v. Superior Court, 206 Cal. App. 3d 431, 434–35, 253 Cal. Rptr. 587, 589 (1988) (plaintiff whose claim charged the defendant school district with negligently maintaining a door could not pursue a cause of action based on the theory that the school officials had negligently supervised students engaged in horseplay); Donohue v. State, 178 Cal. App. 3d 795, 804, 224 Cal. Rptr. 57, 62 (1986) (plaintiff who submitted a claim charging the Department of Motor Vehicles with negligence in allowing an uninsured motorist to take a driver's test could not pursue a cause of action based on the theory that the examiner had negligently supervised the driver during the test).

if a landowner files a claim of property damage caused by a mud slide, he may not recover compensation for personal injury or emotional distress.[72]

➡Time Limits

If, however, the claimant can prove that within the applicable time period he did not know or have reason to know the identities of the public employees who caused his injury, he may pursue his lawsuit, even if he bases it on the tortious conduct of an employee not named in the claim form.[73] This is because Government Code section 910(e) requires that the claim form identify the responsible public employees only "if known."

➡Notice of Defects

If the public entity regards the claim as defective, it must notify the claimant or forfeit its objection.

[3] Amendment

A claimant may amend his claim at any time before (a) the expiration of the time to present a claim, or (b) the public entity has taken final action on the claim, whichever is later, if the amended claim relates to the same transaction or occurrence which gave rise to the original claim.[74]

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[72] State *ex rel.* Dep't of Transp. v. Superior Court, 159 Cal. App. 3d 331, 337–38, 205 Cal. Rptr. 518, 520 (1984).

[73] Williams v. Braslow, 179 Cal. App. 3d 762, 773, 224 Cal. Rptr. 895, 901 (1986).

[74] GOV. CODE § 910.6; Norwood v. Southern Cal. Rapid Transit Dist., 164 Cal. App. 3d 741, 744, 211 Cal. Rptr. 6, 8 (1985). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:693 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 268 (4th ed. 1997).

[4] Forms

The Act provides that public entities may provide forms for claimants to use in presenting their claims. If the claim substantially complies with the requirements of the form, the claim is deemed to be in conformity with the Act. One need not use the public entity's form in presenting a claim,[75] but in view of the deference the Act pays to claims on the public entity's form, a claimant should use the entity's form is one exists. If the public entity has no form, a claimant may use Form: Claim Against Public Entity.

[D] Special Local Claims Procedures

The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any entity board or employee is a party, provisions governing the presentation of any claims relating to the agreement and the consideration and payment of such claims.[76] A claims procedure established by agreement exclusively governs the claims to which it relates, except that if the procedure so prescribed requires a claim to be presented within a period of less than one year after the accrual of the cause of action and the claimant does not present a claim within the required time, the claimant may apply to the public entity for leave to present a claim.[77] A claims procedure established by agreement may include a requirement that a claim be presented and acted upon as a prerequisite to suit.[78]

➡ Permission to File a Late Claim

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[75] GOV. CODE § 910.4.

[76] GOV. CODE § 930.2. *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 258–261 (4th ed. 1997).

[77] GOV. CODE § 930.4.

➡Exceptions

Claims against a local public entity for money or damages which are excepted the general claims requirements and which are not governed by any other statutes or regulations, are governed by the procedure prescribed in any charter, ordinance, or regulation adopted by the local public entity.[79] The procedure so prescribed may include a requirement that a claim be presented and acted upon as a prerequisite to suit[80] but may not provide for a shorter time for the presentation of claims or a longer time for entity response than the Government Code applies to claims against public entities generally.[81] If the prescribed procedure requires the claimant to present a claim within a period of less than one year after the accrual of the cause of action and the claimant does not present a claim within the required time, the claimant may apply to the public entity for leave to present a late claim.[82]

➡Permission to File a Late Claim

Similar rules apply to the State Board of Control.[83]

[E] Submission of Claims

If the claimant intends to assert a cause of action against the state, he must deliver his claim to an office of the State Board of Control or mail his claim to the principal office of the State Board of Control.[84] If the claimant intends to pursue a cause of action against a local public entity, he must deliver or mail his claim to the clerk, secretary, or auditor of that entity.[85] In order to obtain the correct name and

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[78] GOV. CODE § 930.6.

[79] GOV. CODE § 935(a).

[80] GOV. CODE § 935(b).

[81] GOV. CODE § 935(b), (c).

[82] GOV. CODE § 930.4.

[83] GOV. CODE §§ 930, 930.4, 930.6.

address of a local public entity, one may consult the Roster of Public Agencies maintained by the secretary of state and by the county clerk.[86]

[1] Defective Submissions

If the claimant submits his claim to the wrong entity, his claim is not valid.[87]

Example: *P* sends a claim to the legal department of the county medical center where he was treated. He should have submitted the claim to *County*'s board of supervisors. The board does not receive the claim from the medical center. *P* files suit against *County,* which moves for summary judgment. The trial court grants the motion.

The court ruled correctly. *P*'s presentation of a claim to the medical center's legal department would have constituted substantial compliance only if the misdirected claim had been actually received by the board.[88]

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[84] GOV. CODE § 915(b). The address of the principal office of the State Board of Control is: 770 "L" Street, Suite 850, Sacramento, California 95814–2772. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:694–:700, :710–:726 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 252 (4th ed. 1997).

[85] GOV. CODE § 915(a).

[86] GOV. CODE § 53051. The address of the secretary of state is: 1230 "J" Street, Room 209, Sacramento, California 95814.

[87] Jackson v. Board of Educ., 250 Cal. App. 2d 856, 859, 58 Cal. Rptr. 763, 765 (1967). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 264–265 (4th ed. 1997).

[88] Life v. County of Los Angeles, 227 Cal. App. 3d 894, 900, 278 Cal. Rptr. 196, 200 (1991), *disagreeing with* Jamison v. State, 31 Cal. App. 3d 513, 107 Cal. Rptr. 496 (1973).

If, however, the claimant submits his claim to the correct entity but to the wrong official, the claim is valid if (1) the claim was actually forwarded to the correct official within the statutory time period, or (2) the recipient had a legal duty under the circumstances to forward the claim to the correct official.[89]

[2] Time Limits

The limitations period applicable to claims against public entities is set forth in Government Code section 911.2, which provides:

> 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 . . . not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented . . . not later than one year after the accrual of the cause of action.[90]

[a] Accrual

For purposes of the Act, 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 apply to the cause of action if there were no requirement that the claimant present a claim to the public entity.[91] In the normal case, a cause of action accrues for purposes of the applicable statute of limitations upon the occurrence of the last fact essential to the cause of action.[92] In some situations, however, the law postpones the date of accrual

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[89] Jamison v. State, 31 Cal. App. 3d 513, 517, 107 Cal. Rptr. 496, 498 (1973).

[90] *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 245 (4th ed. 1997).

[91] GOV. CODE § 901. *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 246–249 (4th ed. 1997).

[92] Saliter v. Pierce Bros. Mortuaries, 81 Cal. App. 3d 292, 296, 146 Cal. Rptr. 271, 274 (1978).

until the plaintiff discovers, or through the exercise of reasonable diligence could have discovered, the fact that he has been injured[93] or the fact that the defendant's wrongdoing caused the injury.[94] In order to raise the issue of belated discovery, the plaintiff must state when the discovery was made and the circumstances behind the discovery and plead facts showing that the failure to discover was reasonable, justifiable, and not the result of a failure to investigate or act.[95]

[b] Equitable Indemnity Claims

The discovery rule described above does not apply to claims for equitable indemnity. Government Code section 901 provides, "[T]he date upon which a cause of action for equitable indemnity or partial equitable indemnity accrues shall be the date upon which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity." This means that if a defendant wishes to pursue a claim for partial equitable indemnity against a public entity which may share responsibility for the plaintiff's injury, the defendant must submit his claim to that entity within six

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[93] *E.g.*, CODE CIV. PROC. § 340.5 (actions for medical malpractice).

[94] Leaf v. City of San Mateo, 104 Cal. App. 3d 398, 408, 163 Cal. Rptr. 711, 716 (1980).

[95] Bastian v. County of San Luis Obisbo, 199 Cal. App. 3d 520, 527, 245 Cal. Rptr. 78, 80–81 (1988) (news photographer's claim against county based on sheriff's tampering with the scene of an accident, resulting in the dismissal of the photographer, accrued when the photographer discovered what the sheriff had done). *Accord*, Dujardin v. Ventura County Gen. Hosp., 69 Cal. App. 3d 350, 355–56, 138 Cal. Rptr. 20, 22–23 (1977) (claim against county for prescribing the claimant a Dalkon shield accrued when the claimant learned that the Dalkon shield was unsafe and was being removed from the market). *But see* Gutierrez v. Mofid, 39 Cal. 3d 892, 902, 705 P.2d 886, 892, 218 Cal. Rptr. 313, 319 (1985) (accrual of claim is not delayed by the claimant's receipt of discouraging legal advice).

months after being served with the plaintiff's complaint. This is so even if the defendant had no way of knowing of the public entity's involvement until long after the initiation of discovery.[96]

[3] Claims by Criminal Defendants

A person charged with crime may not maintain file a suit for damages against a peace officer or public entity based on conduct of the peace officer relating to the offense for which the person is accused.[97] While the criminal charges are pending, the running of the applicable statute of limitations is tolled.[98] But the pendency of criminal charges does not toll the claim filing requirement.[99] Therefore, if one's client claims that the police committed some actionable wrong against him, one should take care to file a claim before the expiration of the Tort Claims Act limitation period, even if the criminal charges have not yet been resolved.

[F] Public Entity Response

Unless the claimant and the public entity agree in writing to extend the time within which the public entity is to respond to the claim, the public entity must

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[96] Greyhound Lines, Inc. v. County of Santa Clara, 187 Cal. App. 3d 480, 485, 231 Cal. Rptr. 702, 704 (1986); People v. Superior Court (Shortstop), 143 Cal. App. 3d 754, 760, 192 Cal. Rptr. 198, 202 (1983). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 250–251 (4th ed. 1997).

[97] GOV. CODE § 945.3.

[98] GOV. CODE § 945.3. Criminal charges are "pending" for purposes of section 945.3 until the date of judgment and sentencing. McAlpine v. Alameda County Superior Court, 209 Cal. App. 3d 1, 8, 257 Cal. Rptr. 32, 37 (1989).

[99] GOV. CODE § 945.3. *See also* McMartin v. County of Los Angeles, 202 Cal. App. 3d 848, 858, 249 Cal. Rptr. 53, 58 (1988) (upholding constitutionality of section 945.3).

respond within 45 days after the claim is presented.[100] In the case of a claim against a local public entity, the board may act on a claim in one of the following ways:

- If the board finds the claim is not a proper charge against the public entity, it must reject the claim.
- If the board finds the claim is a proper charge against the public entity and is for an amount justly due, it must allow the claim.
- 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 must either reject the claim or allow it in the amount justly due and reject it as to the balance.
- 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.[101]

If the board allows the claim in whole or in part or compromises the claim, it may require the claimant, if the claimant accepts the amount allowed or offered to settle the claim, to accept it in settlement of the entire claim.[102] The local public entity must pay the amount allowed on the claim or in compromise of the claim in the same manner as if the claimant had obtained a final judgment against the local public entity for that amount, but the claim may be paid in up to ten equal annual installments[103] only if the claimant agrees in writing to that method of payment. If an

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[100] GOV. CODE § 912.4(a), (b). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:727–:733 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 253–256 (4th ed. 1997).

[101] GOV. CODE § 912.6(a).

[102] GOV. CODE § 912.6(b).

[103] *See* GOV. CODE § 970.6.

agreement for payment of the claim in installments is made, the local public entity, in its discretion, may prepay any one or more installments or any part of an installment.[104] In the case of a claim against the state, the State Board of Control acts on claims in accordance with the procedures that the board, by rule, has prescribed.[105]

[1] Rejection

If the public entity does not act upon the claim within the required time period, the claim is deemed rejected on the last day of the period within which the board was required to act upon the claim.[106] Whether the public entity rejects the claim or simply fails to act upon it, the public entity must give the claimant written notice of its action (or inaction)[107] by personally delivering the notice to the claimant or by mailing it to whatever address the claimant designated in his claim form as the address to which the public entity should send notices.[108]

The Act provides a suggested form of notice:

> Notice is hereby given that the claim which you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of $_____ and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law).[109]

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[104] GOV. CODE § 912.6(c).

[105] GOV. CODE § 913.

[106] GOV. CODE § 912.4(c).

[107] GOV. CODE § 913(a).

[108] GOV. CODE § 915.4.

[109] GOV. CODE § 913(a).

Use of this form, however, is optional. If the notice advises the claimant that the public entity has denied his claim, the notice is effective, even though it omits the date on which the claimant presented his claim, the nature of the action taken or announcement of rejection by operation of law, and the date of that action or rejection by operation of law.[110] The date of rejection is unimportant because the claimant's six months time to sue begins to run on the date of mailing.[111] The Act also requires the public entity to give a warning in substantially the following form:

> Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6.
>
> You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.[112]

The Act, however, does not require that the public entity include the date of mailing in the notice or attach a proof of service.[113] Thus, if for some reason the claimant wishes to file his lawsuit at the last possible moment, he must investigate to determine the date the notice was "deposited in the mail." If the public entity fails to give written notice as the Act requires, the claimant's limitations period is extended until two years from the accrual of the cause of action.[114]

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[110] Chalmers v. County of Los Angeles, 175 Cal. App. 3d 461, 465, 221 Cal. Rptr. 19, 20–21 (1985).

[111] GOV. CODE § 945.6(a)(1).

[112] GOV. CODE § 913(b).

[113] Dowell v. County of Contra Costa, 173 Cal. App. 3d 896, 898, 219 Cal. Rptr. 341, 342 (1985).

[2] Notice of Defects

If the public entity determines that a claim fails to comply substantially with the Act and is therefore defective, the public entity may either "give written notice of [the claim's] insufficiency, stating with particularity the defects or omissions therein" within 20 days[115] or waive any defense "as to the sufficiency of the claim based upon a defect or omission in the claim as presented."[116] A communication constitutes a claim sufficient to trigger the public entity's duty to notify if the communication discloses the existence of a claim which, if not satisfactorily resolved, will result in a lawsuit against the entity.[117] If the public entity sends a

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[114] GOV. CODE § 945.6(a)(2). If the claimant simultaneously submits a claim and an application to file a late claim and the public entity gives notice of its rejection of the latter without giving notice of its rejection of the claim itself, then the public entity may not avail itself of the six-month limitations period, and the plaintiff may sue any time within the two years following the accrual of the cause of action. Jenkins v. County of Contra Costa, 167 Cal. App. 3d 152, 156–57, 213 Cal. Rptr. 126, 128–29 (1985).

[115] GOV. CODE § 910.8. Submission to a public entity of notice of an intent to sue a health care provider pursuant to Code of Civil Procedure section 364 triggers the notify-or-waive provisions of Government Code section 910.8. Phillips v. Desert Hosp. Dist., 49 Cal. 3d 699, 710–11, 780 P.2d 349, 357, 263 Cal. Rptr. 119, 127 (1989). An attorney's letter directing further correspondence with respect to an accident to him did not trigger the notify-or-waive provision. Green v. State Center Community College Dist., 34 Cal. App. 4th 1348, 1356, 41 Cal. Rptr. 2d 140, 145 (1995). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:688–:689 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 257, 269–271 (4th ed. 1997).

[116] GOV. CODE § 911.

[117] Phillips v. Desert Hosp. Dist., 49 Cal. 3d 699, 709, 780 P.2d 349, 356, 263 Cal. Rptr. 119, 126 (1989); Green v. State Center Community College Dist., 34 Cal. App. 4th 1348, 1358, 41 Cal. Rptr. 2d 140, 146 (1995).

notice of insufficiency, it may not take further action on the defective claim for a period of 15 days after such notice is given.[118] Whether or not it decides to provide a notice of insufficiency, the public entity must notify the claimant within 45 days after the claim is presented whether the claim, defective or otherwise, was timely filed. The notice must be in substantially the following form:

> The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim.
>
> Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code.
>
> You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.[119]

Thus, if a section 910.8 notice of insufficiency is sent, the board must make a timeliness determination within 10 days after the last date the claimant could amend the claim to cure the insufficiency identified. Failure to provide such notice of untimeliness waives the public entity's defense based on untimeliness even if the claim is otherwise insufficient, unless the claimant has failed to state in the claim an address where such notices should be sent.[120]

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[118] GOV. CODE § 910.8.

[119] GOV. CODE § 911.3(a). *See* Dixon v. City of Turlock, 219 Cal. App. 3d 907, 913, 268 Cal. Rptr. 510, 514 (1990) (public entity that rejected original claim as untimely did not forfeit its objection to the claim's untimeliness when it sent the claimant notice that she could file lawsuit within six months in response to her amended claim).

[G] Relief from Late Claims

[1] Permission to File a Late Claim

➡ Form: Application for Permission to Present a Late Claim

If the claimant fails to submit his claim within the required six months, he may apply to the public entity for permission to present his claim late.[121] The tardy claimant must present his application within a reasonable time, not exceeding one year after the accrual of his cause of action, must state the reason for his delay in presenting his claim, and must attach his proposed claim to his application.[122] If the claimant sends his application to the wrong entity, the correct entity has the authority to permit the submission of a late claim only if it actually receives the application within the one-year period.[123]

[a] Tolling of the One-Year Period

The Tort Claims Act provides, "In computing the one-year period under this subdivision, time during which the person who sustained the alleged injury, damage, or loss is a minor shall be counted, but the time during which he is mentally incapacitated and does not have a guardian or a conservator of his person shall not be counted."[124] The supreme court has interpreted this statute as meaning that the

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[120] GOV. CODE § 911.3(b).

[121] GOV. CODE § 911.4(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:757–:760 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 272, 273, 283–285 (4th ed. 1997).

[122] GOV. CODE § 911.4(b).

[123] GOV. CODE § 915(c); Munoz v. State, 33 Cal. App. 3d 1767, 1780, 39 Cal. Rptr. 2d 860, 866 (1995).

[124] GOV. CODE § 911.4(b). *Accord,* CODE CIV. PROC. § 352(b). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:761–:762 (1996).

one-year time limit is not tolled during the period that a mentally incapacitated minor does not have a guardian or conservator.[125] In other words, the exception for unprotected, mentally incapacitated persons applies only to adults. The legislature presumably contemplated that a minor's natural guardian would take responsibility for submitting an application to file a late claim, regardless of the mental condition of that minor.

[b] Grounds

The public entity is obligated to grant an application for leave to present a late claim if the claimant meets any one of the following requirements:

> (1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2.
>
> (2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.
>
> (3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time.
>
> (4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.[126]

Thus, although a minor's guardian has an obligation to submit an application on behalf of the minor for leave to file a late claim within a reasonable time, not

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[125] Hernandez v. County of Los Angeles, 42 Cal. 3d 1020, 1026–27, 728 P.2d 1154, 1158–59, 232 Cal. Rptr. 519, 523–24 (1986).

[126] GOV. CODE § 911.6(b). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:763–:765 (1996).

exceeding one year after the accrual of the minor's cause of action, the minor is entitled to virtually automatic relief if his application is timely.

[2] Judicial Relief from Late Claims

➡ Form 2.3: Petition for Relief from Claim Requirements

If the public entity denies the application for leave to file a late claim, or if the entity fails or refuses to act upon the application within 45 days (in which case the application is deemed denied),[127] the claimant may petition the court[128] for an order relieving the claimant from his obligation to submit a timely claim to the public entity before filing suit.[129]

The claimant must serve the clerk, secretary, or board of the public entity, or the State Board of Control or its secretary if the public entity is the state, with the petition and notice of the hearing not less than ten days before the hearing.[130] The petition must show (1) that the claimant applied for permission to submit a late claim, (2) the reason why his claim was late,[131] (3) the information required to be

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[127] GOV. CODE § 911.6(c).

[128] The petition is made to "a court which would be a competent court for the trial of an action on the cause of action to which the claim relates and which is located in a county or judicial district which would be a proper place for the trial of such action." GOV. CODE § 946.6(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:766, :773 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 286–288 (4th ed. 1997).

[129] GOV. CODE § 946.6(a).

[130] GOV. CODE § 946.6(d). For claims against the state, the papers must be served at any office of the Attorney General (1515 "K" Street, Suite 511, Sacramento, CA 95815 *or* 300 S. Spring Street, Los Angeles, CA 90013 *or* 455 Golden Gate Avenue, San Francisco, CA 94102 *or* 110 West "A" Street, Suite 700, San Diego, CA 92101) or on the Director of Transportation (1120 "N" Street, Sacramento, CA 95814) if the claim relates to the Department of Transportation.

included in a claim. If the court finds that the claimant submitted his application for leave to file a late claim in a timely manner (*i.e.*, within a reasonable time not exceeding one year[132]), that the claimant has established one or more of the four excuses set forth above, and that public entity denied the application to file a late claim or allowed 45 days to go by without acting on it, then the court must relieve the claimant from his obligation to submit a timely claim to the public entity before filing suit.[133] The denial of a petition for judicial relief is an appealable order.[134]

If the public entity rejects a claim as untimely, rather than on its merits, the claimant must choose among three options: (1) file an application for leave to submit a late claim and then file a petition for judicial relief if the public entity denies the application; (2) file a complaint for damages, alleging compliance with the claim procedure and thereby placing the requirement of timeliness in issue; and (3) doing both. There is authority supporting the third option. In *Ngo v. County of Los Angeles* the court observed, "[W]e perceive no bar to a claimant simultaneously seeking relief under section 946.6 and filing a complaint alleging compliance with the claims statute."[135] However, contrary authority holds that if the claimant files a petition for judicial relief and litigates the issue of timeliness, then the claimant will be collaterally estopped by an adverse judgment in the petition proceeding. In

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[131] The claimant must make a factual showing to support a claim of excusable neglect. Tackett v. City of Huntington Beach, 22 Cal. App. 4th 60, 66, 27 Cal. Rptr. 2d 133, 136 (1994).

[132] GOV. CODE § 911.4(b).

[133] GOV. CODE § 946.6(c).

[134] Dockter v. City of Santa Ana, 261 Cal. App. 2d 69, 74, 67 Cal. Rptr. 686, 690 (1968).

[135] 207 Cal. App. 3d 946, 952, 255 Cal. Rptr. 140, 143 (1989).

Gurrola v. County of Los Angeles[136] plaintiff Juan Gurrola alleged that he was the surviving heir of Ruben Gurrola, who died on December 4, 1980, allegedly as the result of Los Angeles County's negligent medical treatment. Juan Gurrola did not submit a claim to the County until December 22, 1981. He contended that his cause of action against the County did not accrue until November 18, 1981, when he first obtained medical information concerning the cause of death. On January 20, 1982, the County informed the plaintiff that his claim had been rejected as untimely and that because of the time that had elapsed no application for consideration of a late claim would be accepted. The plaintiff filed a petition for judicial relief, but the court denied the petition. The plaintiff then filed a complaint for damages alleging compliance with the claims procedure. The County demurred to the complaint on the ground that the trial court's earlier denial of the plaintiff's petition was res judicata on the issue of his compliance with the claims procedure. The trial court sustained the demurrer, and the plaintiff appealed. The court of appeal affirmed, holding that because Gurrola had placed his compliance with the claim procedure in issue and had allowed the adverse judgment to become final without appealing, he was barred from relitigating the issue in the personal injury action.[137]

[a] "Mistake, Inadvertence, Surprise or Excusable Neglect"

Claimants seeking relief from the Act's claim filing requirements most often rely on the first of the four statutory excuses to justify relief: "mistake, inadvertence, surprise or excusable neglect." Yet, of the four excuses, the first is the least susceptible to precise definition. The claimant must show more than that he did not

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[136] 153 Cal. App. 3d 145, 200 Cal. Rptr. 157 (1984).

[137] Gurrola v. County of Los Angeles, 153 Cal. App. 3d 145, 153, 200 Cal. Rptr. 157, 161–62 (1984).

discover a fact until too late; he must establish that in the use of reasonable diligence he failed to discover it.[138] The standard is the same as is required to set aside a default judgment under Code of Civil Procedure section 473(b).[139] Beyond this one cannot lay down hard and fast rules.

In general, the courts tolerate mistakes unless the claimant or his attorney otherwise failed to act diligently in investigating the circumstances of the loss and pursuing the claimant's remedies. Thus, for instance, in *Ebersol v. Cowan*[140] an emotionally disturbed passenger bit the plaintiff bus driver, who had no previous experience with personally injury claims and did not know of the Tort Claims Act claim filing requirements. Nevertheless, the bus driver diligently sought legal representation, despite having received assurances from nine lawyers that she had no claim. Twenty-seven days after the expiration of the limitations period, Ebersol applied for leave to file a late claim, which the county denied. The supreme court held that the trial court had abused its discretion in denying Ebersol's petition for relief from the claim filing requirements.[141] But the courts deny relief where the claimant, without justification, failed to pursue his claim[142] or where the claimant's lawyer acted in an unreasonable or dilatory manner.[143]

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[138] Cole v. City of Los Angeles, 187 Cal. App. 3d 1369, 1376, 232 Cal. Rptr. 624, 627 (1986). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:768–:772 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 276–281 (4th ed. 1997).

[139] Ebersol v. Cowan, 35 Cal.3d 427, 435, 673 P.2d 271, 276, 197 Cal. Rptr. 601, 606 (1983).

[140] 35 Cal. 3d 427, 673 P.2d 271, 197 Cal. Rptr. 601 (1983).

[141] Ebersol v. Cowan, 35 Cal. 3d 427, 435, 673 P.2d 271, 276 197 Cal. Rptr. 601, 606 (1983). *Accord*, Bettencourt v. Los Rios Community College Dist., 42 Cal. 3d 270, 277–78, 721 P.2d 71, 75, 228 Cal. Rptr. 190, 193–94 (1986) (abuse of discretion to deny relief where claimant's attorney mistakenly filed claim with the wrong entity but diligently sought to remedy the mistake when he discovered the error); Bertorelli v. City of Tulare, 180 Cal. App. 3d 432, 442, 225 Cal. Rptr. 582, 587 (1986) (trial court abused its discretion in denying relief where the public entity's adjuster lulled the claimant into not consulting a lawyer by engaging in continuous settlement negotiations); Lawrence v. State, 171 Cal. App. 3d 242, 246, 217 Cal. Rptr. 200, 202 (1985) (sheriff's office misinformed attorney's secretary that accident site, which belonged to the state, was county property); Moore v. State, 157 Cal. App. 3d 715, 724, 203 Cal. Rptr. 847, 852–53 (1984) (trial court abused its discretion in denying relief where a lawyer mistakenly believed that his client's broadly worded claim would embrace a cause of action for medical malpractice); Kaslavage v. West Kern County Water Dist., 84 Cal. App. 3d 529, 538, 148 Cal. Rptr. 729, 734 (1978) (diligent but flawed investigation failed to disclose correct identity of public entity); Syzemore v. County of Sacramento, 55 Cal. App. 3d 517, 524, 127 Cal. Rptr. 741, 745 (1976) (trial court abused its discretion in denying relief to a layman "unlearned in the law, ignorant of the claim requirement and . . . unaware of the existence of a tenable cause of action"); Flores v. Board of Supervisors, 13 Cal. App. 3d 480, 484–85, 91 Cal. Rptr. 717, 719 (1970) (attorney's failure to open file). *But see* Tsingaris v. State, 91 Cal. App. 3d 312, 314, 154 Cal. Rptr. 135, 136 (1979) (declining to follow *Syzemore*).

[142] Cole v. City of Los Angeles, 187 Cal. App. 3d 1369, 1376–77, 232 Cal. Rptr. 624, 627 (1986) (claimant's pain did not excuse her delay in filling out claim form); El Dorado Irrigation Dist. v. Superior Court, 98 Cal. App. 3d 57, 62–63, 159 Cal. Rptr. 267, 270 (1979) (a mere lack of knowledge of the claim-filing requirement and its time limitation is insufficient); Drummond v. County of Fresno, 193 Cal. App. 3d 1406, 1411, 238 Cal. Rptr. 613, 616 (1987) (accident victim's mental and emotional preoccupation with his permanent quadriplegia and his ignorance of the law as to the claim filing requirements did not constitute adequate cause for the delay in filing his application). *But see* Powell v. City of Long Beach, 172 Cal. App. 3d 105, 110, 218 Cal. Rptr. 97, 100 (1985) (worker's mistaken belief that worker's compensation was his exclusive remedy was reasonable).

[b] Incapacity

The incapacity referred to in Government Code section 911.6 relates to the capacity of claimant, not the capacity of those charged with the care of the claimant.

Example: *P* is injured in an automobile accident and incapacitated. An attorney hired to act on her behalf files a timely claim against *School District*. *P* files an application to file a late claim with *City*, which *City* denies. *P* applies for judicial relief. The trial court denies *P*'s petition on the ground that her incapacity did not cause her failure to file a timely claim.

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[143] Tammen v. County of San Diego, 66 Cal. 2d 468, 478, 426 P.2d 753, 759–60, 58 Cal. Rptr. 249, 255–56 (1967) (trial court abused its discretion in granting relief where the claimant's lawyer failed to investigate the identity of potential defendants before filing suit); City of Fresno v. Superior Court, 104 Cal. App. 3d 25, 34, 163 Cal. Rptr. 807, 812 (1980) (accord); *see* Lutz v. Tri-City Hosp., 179 Cal. App. 3d 807, 811, 224 Cal. Rptr. 787, 790 (1986) (no excusable neglect where claimant and his counsel failed to discover hospital's public status despite having received hospital bills and records disclosing that status); Mitchell v. State, 163 Cal. App. 3d 1016, 1022–23, 210 Cal. Rptr. 266, 270 (1985) (counsel's conscious failure to file a claim against a governmental entity after making a legal determination that no cause of action existed was not excusable neglect); Torbitt v. Fearn, 161 Cal. App. 3d 860, 866–67, 208 Cal. Rptr. 1, 5 (1984) (no excusable neglect where counsel failed to investigate the facts or research the law concerning the liability of a known potential defendant); DeYoung v. Del Mar Thoroughbred Club, 159 Cal. App. 3d 858, 864–65, 206 Cal. Rptr. 28, 32 (1984) (no excusable neglect where counsel delayed two months in filing application for relief after learning of public entity's possible responsibility); Shank v. County of Los Angeles, 139 Cal. App. 3d 152, 157, 188 Cal. Rptr. 644, 647–48 (1983) (no excusable mistake where claimant's counsel failed to notice public entity name on correspondence from hospital). *But see* Bettencourt v. Los Rios Community College Dist., 42 Cal. 3d 270, 280–81, 721 P.2d 71, 76–77, 228 Cal. Rptr. 190, 195–96 (1986) (counsel's failure to notice public entity's name on correspondence held excusable, distinguishing *Shank*).

The court erred. The issue was the incapacity of *P*, not that of the unnamed person who retained counsel to file a claim for *P* against *School District*.[144]

[c] Showing Required

The claimant bears the burden of proof with respect to most of the issues that the petition presents.[145] Conclusory allegations will not suffice; the claimant must set forth *facts* establishing his entitlement to relief.[146] If, however, the claimant meets his burden of proving "mistake, inadvertence, surprise or excusable neglect" (see the first excuse set forth above), then the public entity bears the burden of proving that it would be prejudiced in its defense of the claim if the court relieved the claimant of his obligation to file a claim.[147] The public entity must show that the lateness of the claim has substantially impaired the entity's ability to present a full and fair defense on the merits.[148] The court makes in own independent determination whether the claimant has established his entitlement to relief from the claim filing requirement, based on the petition, any affidavits offered in support of or opposition to the petition, and any additional evidence received at the hearing on

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[144] Draper v. City of Los Angeles, 52 Cal. 3d 502, 508, 802 P.2d 367, 371, 276 Cal. Rptr. 864, 868–69 (1990). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 274–275 (4th ed. 1997).

[145] Shaddox v. Melcher, 270 Cal. App. 2d 598, 600, 76 Cal. Rptr. 80, 82 (1969). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:775–:813 (1996).

[146] Dunston v. State, 161 Cal. App. 3d 79, 83–84, 207 Cal. Rptr. 196, 198–99 (1984).

[147] GOV. CODE § 946.6(c)(1).

[148] Ramariz v. County of Merced, 194 Cal. App. 3d 684, 688, 239 Cal. Rptr. 774, 777 (1987).

the petition.[149] In order to promote the public policy favoring disposition based on their merits, any doubts regarding the granting of relief under section 946.6 are resolved in favor of the claimant.[150]

[d] Time Limits

The petition for relief from the Tort Claims Act claim filing requirements is subject to its own six-month statute of limitations.[151] The limitations period begins to run when the application for leave to file a late claim is denied or is deemed to be denied (*i.e.*, 45 days after submission of the application[152]), not from when the public entity notifies the claimant of its denial of his claim. Thus, the only ways to make sure that one's petition is timely is to check at the end of 45 days to see if the entity denied the application without notifying the claimant or to file the petition no later than six months after submitting the application.[153]

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[149] GOV. CODE § 946.6(e).

[150] Bettencourt v. Los Rios Community College Dist., 42 Cal. 3d 270, 276, 721 P.2d 71, 73, 228 Cal. Rptr. 190, 192 (1986).

[151] GOV. CODE § 946.6(b). The section 946.6(b) limitations provision is applied as rigorously as any other statute of limitations. Lineweaver v. Southern Cal. Rapid Transit Dist., 139 Cal. App. 3d 738, 740–41, 189 Cal. Rptr. 29, 30–31 (1983). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:767–:814 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 289, 290 (4th ed. 1997).

[152] GOV. CODE § 911.6(c).

[153] *But see* Rason v. Santa Barbara City Hous. Auth., 201 Cal. App. 3d 817, 825, 247 Cal. Rptr. 492, 497 (1988) (suggesting that if the public entity commits a "considerable" delay in notifying the claimant of its denial of his application, "due process might estop the public entity from asserting that the six-month period ran from the date action was taken").

If the claimant files a timely petition for relief but delays an unreasonably long time before serving the public entity with the petition and notice of hearing, the court will presume prejudice to the public entity. Denial of the petition under these circumstances does not constitute an abuse of discretion.[154]

If the court issues an order granting the claimant's petition for relief from the claim filing requirements, the claimant must file his lawsuit within 30 days after the date of that order.[155] If the claimant filed a earlier lawsuit prematurely, he need not refile a new lawsuit.[156]

[H] Statute of Limitations

[1] Limitations Period

If the public entity gives notice of its nonacceptance of the claim in accordance with the requirements described above, then the claimant must file suit not later than six months after the date the public entity delivered the notice to the claimant or deposited it in the mail.[157] "Six months" means six calendar months or 182 days,

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[154] Han v. City of Pomona, 37 Cal. App. 4th 552, 560, 43 Cal. Rptr. 2d 616, 620 (1995).

[155] GOV. CODE § 946.6(f); Fritts v. County of Kern, 135 Cal. App. 3d 303, 307, 185 Cal. Rptr. 212, 214–15 (1982); *cf.* County of Nevada v. Superior Court, 183 Cal. App. 3d 806, 808–09, 228 Cal. Rptr. 447, 449 (1986) (where the local rules require that the attorney prepare a formal order for the judge's signature, the 30-day period begins to run from the time the judge signs the order, not from the entry of the judge's minute order); Todd v. County of Los Angeles, 74 Cal. App. 3d 661, 664–65, 141 Cal. Rptr. 622, 624 (1977) (claimant's minority does not toll the running of the 30-day limitations period).

[156] Davalos v. County of Los Angeles, 142 Cal. App. 3d 57, 61, 190 Cal. Rptr. 711, 714 (1983).

[157] GOV. CODE § 945.6(a)(1). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:734–:738, :751–:752 (1996).

whichever is longer.[158] If the six month period ends on a holiday, the time to file suit is extended to the next day that is not a holiday.[159] The six-month deadline does not apply to actions filed in federal court.[160]

The five-day extension of the time to respond provided in Code of Civil Procedure section 1013(a) when a document is served by mail does not apply to notices of denials of claims.[161] If the public entity does not satisfy the Act's notice requirements, then the claimant has two years from the accrual of his cause of action within which to filed his action.[162] The limitation periods imposed by the Tort Claims Act supercede those imposed by other statutes of limitations. Thus, a suit against a public entity for medical malpractice that is timely under the one-year statute of limitations for medical malpractice actions[163] is nevertheless barred if it was not filed within the limitations period imposed by the Tort Claims Act.[164] Conversely, a personal injury suit against a public entity that was filed within the limitations period imposed by the Tort Claims Act was timely, even though it was

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[158] Gonzalez v. County of Los Angeles, 199 Cal. App. 3d 601, 604, 245 Cal. Rptr. 112, 113 (1988) (reconciling GOV. CODE § 945.6(a)(1) with GOV. CODE §§ 6803 and 6804).

[159] CODE CIV. PROC. § 12a; DeLeon v. Bay Area Rapid Transit Dist., 33 Cal. 3d 456, 461, 658 P.2d 108, 111, 189 Cal. Rptr. 181, 184 (1983).

[160] *Cf.* Halus v. San Diego County Assessment Appeals Bd., 789 F. Supp. 327, 329 (S.D. Cal. 1992).

[161] Smith v. City and County of San Francisco, 68 Cal. App. 3d 227, 231, 137 Cal. Rptr. 146, 148 (1977).

[162] GOV. CODE § 945.6(a)(2).

[163] CODE CIV. PROC. § 340.5.

[164] Anson v. County of Merced, 202 Cal. App. 3d 1195, 1199, 249 Cal. Rptr. 457, 458–59 (1988).

filed after the one-year statute of limitations for personal injury actions.[165] The same is true of a personal injury action against a public employee.[166]

[2] Amended Claims

If a claimant files an amended claim and the public entity separately rejects both the original claim and the amended claim, the limitation period begins to run as of the date of the rejection of the amended claim.[167]

Example: *P* submits a claim for the wrongful death of her father. *Public Entity* rejects it. *P* and her siblings file an amended claim, which *Public Entity* likewise rejects. The heirs file suit within six months of the rejection of the amended claim but more than six months after the rejection of the original claim. The trial court dismisses their complaint.

The trial court erred. The limitations period began to run from the rejection of the amended claim. The suit was timely as to all the heirs, including *P,* even though her original claim had been rejected more than six months before suit.[168]

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[165] Schmidt v. Southern Cal. Rapid Transit Dist., 14 Cal. App. 4th 23, 30, 17 Cal. Rptr. 2d 340, 344 (1993).

[166] Massa v. Southern Cal. Rapid Transit Dist., 43 Cal. App. 4th 1217, 1223, 51 Cal. Rptr. 2d 164, 167–68 (1996).

[167] Norwood v. Southern Cal. Rapid Transit Dist., 164 Cal. App. 3d 741, 744, 211 Cal. Rptr. 6, 8 (1985). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:739–:742 (1996).

[168] Norwood v. Southern Cal. Rapid Transit Dist., 164 Cal. App. 3d at 744, 211 Cal. Rptr. at 8.

This principle does not apply, however, when the "amended" claim adds nothing to the original claim.

Example: *Guardian* submits a claim on behalf of *Minor* to *Public Entity*, which *Public Entity* rejects. More than six months later *Guardian* seeks leave to file a late claim identifying *Public Entity*'s employees responsible for the *Minor*'s injuries. *Public Entity* denies *Guardian*'s request, and *Guardian* files suit. The trial court upholds *Public Entity*'s decision.

The court ruled correctly. The original claim was complete in and of itself and was sufficient to support suit against both the entity and its employees. Thus, it would not have availed *Minor* to permit the late "amended" claim because his suit would still have been barred by the six-month limitation period, which began to run upon the rejection of the original claim.[169]

[3] Fictitious Defendants

➡ Parties—Fictitious Defendants

In cases in which the plaintiff does not know the name of the person who harmed him, section 474 the Code of Civil Procedure permits the plaintiff the avoid the running of the statute of limitations by suing the unknown defendant under a fictitious name and amending the complaint when he learns the defendant's true name. This procedure is available when a plaintiff submits a timely claim to a public entity, files suit within the Tort Claims Act limitations period, and later serves an employee of the public entity as a "Doe" defendant.[170] This procedure, however,

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[169] Julian v. City of San Diego, 183 Cal. App. 3d at 176, 229 Cal. Rptr. at 668.

does not work when the plaintiff submits a timely claim to a public entity, files suit without naming the public entity as a defendant, and then attempts to serve the entity as a "Doe" defendant.[171]

[4] Equitable Tolling

The doctrine of equitable tolling governs the application of the Tort Claims Act limitations periods. The running of the limitations period is tolled when an injured person has several legal remedies and, reasonably and in good faith, pursues one, if the defendant is not prejudiced.[172] This is true even if the exhaustion of one remedy is not a prerequisite to the pursuit of the other. Thus, if a claimant files a timely claim, which is denied, sues the public entity in federal court, and then files suit against the public entity in state court, the running of the Tort Claims Act limitation period is tolled during the time the federal lawsuit was pending.[173] Similarly, the

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[170] Olden v. Hatchell, 154 Cal. App. 3d 1032, 1038, 201 Cal. Rptr. 715, 719 (1984). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:743–:745 (1996).

[171] Chase v. State, 67 Cal. App. 3d 808, 813–14, 136 Cal. Rptr. 833, 835–36 (1977). In this writer's opinion, the holding in *Chase* is unsound and cannot be squared with *Olden*, *supra*. In those rare cases in which the plaintiff can otherwise satisfy the requirements of section 474 when serving a public entity, to whom he has previously submitted a claim, as a "Doe" defendant, there appears no reason in principle why the fiction employed in section 474 should not apply to public entities as it does to all other defendants.

[172] Elkins v. Derby, 12 Cal. 3d 410, 414, 525 P.2d 81, 84, 115 Cal. Rptr. 641, 644 (1974). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:746–:748 (1996).

[173] Addison v. State, 21 Cal. 3d 313, 320–21, 578 P.2d 941, 944–45, 146 Cal. Rptr. 224, 227–28 (1978).

limitations period is tolled during the time a plaintiff pursues a worker's compensation claim against the public entity for the same injury.[174] Application of the doctrine of equitable tolling requires timely notice, lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff.[175]

Tolling, however, does not occur when a claimant delays filing suit because he mistakenly believes that he must first file a claim.

Example: *P* attempts to gain permission to file a late claim and later seeks judicial relief from the claim filing requirements. *Public Entity,* however, did not register its name with the Roster of Public Agencies, so that *P* is free to ignore the claim-filing requirements. The trial court sustains *Public Entity*'s demurrer.

The court ruled correctly. The running of the applicable limitations period was not tolled during the period that the claimant delayed filing suit while he exhausted the claim-filing requirements since, as a matter of law, the claim-filing requirements did not apply.[176]

It appears that other limitations periods are tolled during the period when a claimant is delayed from suing a public entity by the operation of the Tort Claims Act claim procedure.[177]

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[174] Elkins v. Derby, 12 Cal. 3d 410, 414, 525 P.2d 81, 83–84, 115 Cal. Rptr. 641, 643–44 (1974).

[175] Addison v. State, 21 Cal. 3d at 319, 578 P.2d at 943–44, 146 Cal. Rptr. at 227.

[176] Banfield v. Sierra View Local Dist. Hosp., 124 Cal. App. 3d 444, 457, 177 Cal. Rptr. 290, 296 (1981).

[177] *See* CODE CIV. PROC. § 356; *cf.* Dillon v. Board of Pension Comm'rs, 18 Cal. 2d 427, 431, 116 P.2d 37, 39–40 (1941); Brown v. Huntington Beach Union High School Dist., 15 Cal. App. 3d 640, 647, 93 Cal. Rptr. 417, 421 (1971) (question left undecided).

§ 2.02 Claims Against Decedents' Estates

[A] Procedure

A creditor of a decedent may not commence an action against the decedent's estate on a cause of action against the decedent unless the creditor has filed a claim against the estate and the estate's representative has rejected it.[178] This includes the continued prosecution of a lawsuit commenced against the decedent during his lifetime.[179] This rule applies to any of the following:

(1) Liability of the decedent, whether arising in contract, tort, or otherwise.

(2) Liability for taxes incurred before the decedent's death, whether assessed before or after the decedent's death, other than property taxes and assessments secured by real property liens.

(3) Liability of the estate for funeral expenses of the decedent.[180]

This rule applies whether the decedent's obligation to pay is due, not yet due,[181] or contingent and whether the amount is liquidated or not.[182]

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[178] PROB. CODE §§ 9002(b), 9351. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:825–:828, :830–842 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 210 (4th ed. 1997).

[179] PROB. CODE § 9370(a). If the representative's notice of rejection contains a statement that the plaintiff has three months within which to apply for an order to substitute the representative in the action or proceeding, the plaintiff must comply. *Id.* § 9370(a)(3).

[180] PROB. CODE § 9000(a).

[181] *E.g.*, the heirs' right to compensation for the wrongful death of a victim alive at the time of the decedent's death.

[182] PROB. CODE § 9000(a).

The submission of a claim is an indispensable element of a cause of action against a decedent's estate and must be pleaded and proved.[183] If, however, the estate's representative fails to raise the defect, the estate may be estopped to complain.[184]

[B] Exceptions

[1] Claims Covered by Insurance

If the plaintiff agrees to limit his recovery against a defendant decedent to the insurance benefits provided by any liability insurance policy covering the plaintiff's claim, the plaintiff need not file a claim before pursuing an action against a decedent's estate.[185] The plaintiff should name as the defendant "Estate of (name of decedent), Deceased," but serve the summons on the insurer.[186] The plaintiff may enforce his judgment only against the insurance company and not against property of the estate.[187] If the limitations period otherwise applicable to the plaintiff's claim has not expired at the time of the decedent's death, the plaintiff may commence his action at any time within one year after the expiration of the limitations period otherwise applicable.[188] If the insurer seeks reimbursement under the policy for any

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[183] Kennedy v. Bank of Am., 237 Cal. App. 2d 637, 654, 47 Cal. Rptr. 154, 165 (1965).

[184] Rogers v. Hirschi, 141 Cal. App. 3d 847, 852, 190 Cal. Rptr. 575, 577–58 (1983).

[185] PROB. CODE §§ 550–550, 9390. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:839–:840 (1996).

[186] PROB. CODE § 552(a).

[187] PROB. CODE § 554(a).

[188] PROB. CODE § 551.

liability of the decedent (*e.g.*, policy deductibles, costs, and attorneys' fees), the insurer must comply with the probate claim procedure.[189]

[2] Enforcement of Security Interests

The holder of a mortgage or other lien on property in a decedent's estate, including a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien without complying with the probate claims procedure, provided that the holder of the lien, in his complaint, waives all recourse against other property in the estate.[190]

[3] Claims by Public Entities

The probate claim filing requirements apply to public entities.[191] With respect to taxes[192] and other miscellaneous liabilities,[193] the probate claim filing requirements apply only after written notice or request to the public entity.[194]

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[189] PROB. CODE § 9390(c).

[190] PROB. CODE § 9391. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:841 (1996).

[191] PROB. CODE § 9200. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:842 (1996).

[192] If the representative of an estate or any other person subject to liability for a decedent's taxes submits a written request to the Franchise Tax Board or the State Board of Equalization for a deficiency determination, the board must mail a notice of deficiency determination within four months. *See* REV. & TAX CODE § 6487.1 (sales and use taxes), § 8782.1 (use fuel taxes), § 19517 (income tax), § 30207.1 (cigarette taxes), § 32272.1 (alcoholic beverage taxes), § 38418 (timber yield taxes), § 40078 (energy resources surcharges), § 41077 (emergency telephone users surcharges), § 43203 (hazardous substances taxes), § 46204 (oil spill response, prevention, and administration fees), § 55063 (State Board of Equalization fees), § 60316 (diesel fuel taxes).

[C] Contents of the Claim

A claim against a decedent's estate must satisfy these requirements:

- The creditor or person acting on behalf of the creditor must support the claim with an affidavit stating:

  (1) The claim is a just claim.

  (2) If the claim is due, the facts supporting the claim, the amount of the claim, and that all payments on and offsets to the claim have been credited.

  (3) If the claim is not due or contingent, or the amount is not yet ascertainable, the facts supporting the claim.

  (4) If the affidavit is made by a person other than the creditor, the reason it is not made by the creditor.[195]

- If the estate's representative so requires, the creditor must produce

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[193] The representative of the estate of a deceased employer must send written notice of the employer's name and address, his own name and address, and such other information as the Director of Employment Development may require. Within four months after the mailing of the notice, the director must present his claim for contributions, penalty, and interest based upon the wages the deceased employer paid during his lifetime. UNEMP. INS. CODE § 1090. If a decedent incurred liability for state hospital patient charges for himself, his spouse, father, mother, or child, the State Department of Mental Health must, within four months after receiving a written request, send the representative of his estate a claim for costs and charges. WELF. & INST. CODE § 7277.1. The estate representative or estate attorney must give the Director of Health Services notice of the decedent's death if the representative knows or has reason to believe that the decedent received state-financed health care or was the surviving spouse of a person who received that health care. The director has four months after notice is given in which to file a claim. PROB. CODE § 9202.

[194] PROB. CODE § 9201(a)(2).

[195] PROB. CODE § 9151(a).

"satisfactory vouchers or proof."[196]

- If the claim is based on a written instrument, the creditor must attach to the claim the original or a copy of the instrument with all endorsements.[197]

Form: Creditor's Claim (Probate)

The Judicial Council has prescribed a form for claims against estates. The creditor must file the claim with the court in which the probate of the debtor estate is pending and serve a copy on the estate's representative.[198] The creditor must serve the claim on the personal representative within the later of 30 days of the filing of the claim or four months after letters issue to a personal representative. Service is not required after the personal representative has allowed or rejected the claim.[199] If the creditor does not file the claim and serve the personal representative within the time limits set forth above, the claim is invalid.[200]

If the creditor makes a written demand for payment within four months after the date letters of administration were first issued to the estate's representative, the representative may waive formal defects and elect to treat the demand as a valid

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[196] PROB. CODE § 9151(b). An original voucher may be withdrawn after a copy is provided, which is then attached to the claim.

[197] PROB. CODE § 9152(a). If a copy is attached, the original instrument must be exhibited to the estate's representative or the court on demand unless it is lost or destroyed, in which case the claim must state the fact that the original instrument was lost or destroyed. If the claim or a part of the claim is secured by a mortgage, deed of trust, or other lien that is recorded in the county recorder's office for the county in which the property is located, the creditor need only describe the security interest and refer to the date or volume and page of its record. PROB. CODE § 9152(b).

[198] PROB. CODE § 9150(b).

[199] PROB. CODE § 9150(c).

[200] PROB. CODE § 9150(d)

claim by paying the amount demanded before the expiration of 30 days after the four-month period if the debt was justly due, the debt was paid in good faith, the amount paid was the true amount owed over and above all payments and offsets, and the estate is solvent.[201]

[D] Time Limits

[1] Claims

A creditor must file his claim within four months after the date the court issued letters of administration to the estate's representative.[202] If, however, the representative first learns of the creditor less than 60 days before the expiration of the four-month period and then gives the creditor notice of the administration of the debtor's estate,[203] the creditor has 60 days in which to file his claim.[204]

Upon the petition of a creditor or of the personal representative, the court may allow the creditor to file a claim after the deadline if *either*:

(1) the personal representative failed to send proper and timely notice of administration of the estate to the creditor and the petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate, *or*

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[201] PROB. CODE § 9154(a).

[202] PROB. CODE § 9100(a)(1). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:834–:837 (1996).

[203] Probate Code section 9051 provides that the representative shall give notice within the later of (1) four months after the date letters are first issued and (2) 30 days after the personal representative first knows of the creditor.

[204] PROB. CODE § 9100(a)(2).

(2) the creditor had no knowledge of the facts giving rise to the claim more than 30 days before the time for filing a claim and the petition is filed within 60 days after the creditor has actual knowledge of both the existence of the.[205]

The court may not allow the creditor to file a late claim after the court makes an order for final distribution of the estate.[206]

[2] Suits

The estate's representative must allow or reject any claim filed against the estate.[207] The representative is required to give the creditor written notice of the allowance or rejection of the claim.[208] If the representative has not acted upon the claim within 30 days after filing, the creditor may treat the claim as having been rejected on the 30th day.[209]

A rejected claim is subject to the following limitations periods:

(1) If the claim is due at the time the notice of rejection is given, three months after the notice is given.

(2) If the claim is not due at the time the notice of rejection is given, three months after the claim becomes due.[210]

The claim is also subject to the normally applicable statute of limitations, but the filing of a claim tolls the statute until the representative allows or rejects the claim.[211]

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[205] PROB. CODE § 9103(a).

[206] PROB. CODE § 9103(b).

[207] PROB. CODE § 9250(a).

[208] PROB. CODE § 9250(b).

[209] PROB. CODE § 9256.

[210] PROB. CODE § 9353(a).

§ 2.03 Actions for Medical Malpractice

[A] Attorney's Duty to Give Notice.

Code of Civil Procedure section 364 requires than an attorney commencing an action based upon a health care provider's professional negligence[212] first give that provider at least 90 days' notice.[213] The attorney must also send the notice to the Medical Board of California or the Board of Podiatric Medicine, as applicable.[214] The notice must inform the defendant of the legal basis of the claim and the type of loss sustained, including specific notification of the nature of the injuries suffered.[215] Failure to comply with this notice requirement does not invalidate the claim, and the plaintiff need not allege compliance with the notice requirement,[216] but noncompliance is grounds for professional discipline by the State Bar of California.[217]

➡ Form 2.5: Notice of Intention to Commence Action Against Health Care Provider

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[211] PROB. CODE § 9352(a).

[212] Section 364 does not apply to intentional tort claims. Noble v. Superior Court, 191 Cal. App. 3d 1189, 1193–94, 237 Cal. Rptr. 38, 40–41 (1987).

[213] CODE CIV. PROC. § 364(a). This requirement does not apply with respect to any defendant whose name is unknown to the plaintiff when he files his complaint and who is identified by a fictitious name, pursuant to section 474. *Id.* § 364(e). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:856–:862, :867 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 218 (4th ed. 1997).

➡ Fictitious Defendants

[214] CODE CIV. PROC. § 364.1.

[215] CODE CIV. PROC. § 364(b).

[216] Toigo v. Hayashida, 103 Cal. App. 3d 267, 269, 162 Cal. Rptr. 874, 874–75 (1980).

[217] CODE CIV. PROC. § 365.

➡Claims Against Governmental Entities and Employees

➡Contents of the Claim

The section 364 notice requirement is distinct from the claim requirements imposed under the Tort Claims Act. Unless the notice satisfies the specific requirements of the Tort Claims Act, the notice is not a substitute for a claim, but the public entity recipient of the notice will forfeit the right to rely upon the shortcomings of the notice as a defense unless it notifies the sender.[218]

[B] Extension of Statute of Limitations.

Section 364(d) of the Code of Civil Procedure provides that if the plaintiff serves notice within 90 days of the expiration of the applicable statute of limitations,[219] the limitations period is tolled for 90 days from the service of the notice.[220] Though section 364(d) provides that the time for the commencement of the action is "extended 90 days from the service of the notice," the supreme court, to avoid the absurd results flowing from a literal interpretation of the statute, construed the statute as tolling the running of the limitations period for 90 days.[221] The plaintiff

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[218] Phillips v. Desert Hosp. Dist., 49 Cal. 3d 699, 706, 780 P.2d 349, 353–354, 263 Cal. Rptr. 119, 123–24 (1989).

[219] CODE CIV. PROC. § 340.5.

[220] CODE CIV. PROC. § 364(d); Anson v. County of Merced, 202 Cal. App. 3d 1195, 1204–05, 249 Cal. Rptr. 457, 462 (1988). There is a split of authority on the question whether the 90-day tolling period applies only to section 340.5's one-year "discovery" period, not to the three-year "outside" limitations period. *Compare* Rewald v. San Pedro Peninsula Hosp., 27 Cal. App. 4th 480, 487, 32 Cal. Rptr. 2d 411, 415 (1994) (the 90-day tolling period does not apply to the three-year "outside" limitations period), *with* Russell v. Stanford Univ. Hosp., 44 Cal. App. 4th 1798, 1805–06, 52 Cal. Rptr. 2d 645, 649 (1996) (the 90-day tolling period applies both to section 340.5's one-year "discovery" period and to the three-year "outside" limitations period). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:863–:866, :870 (1996).

cannot take advantage of the 90-day extension unless the defendant receives actual notice of the plaintiff's intent to sue.[222]

➡ Claims Against Governmental Entities and Employees

If the plaintiff files a Tort Claims Act claim which does not satisfy the specific requirements of the medical malpractice notice provision, then a separate section 364 notice is proper and will toll the statute of limitations pursuant to section 364(d).[223] That a notice may ultimately function as a tort claim for purposes of the Tort Claims Act under certain circumstances (if the governmental agency fails to timely notify the claimant that the document does not substantially comply with the Tort Claims Act) does not mandate the reverse conclusion that a tort claim is deemed a notice under other circumstances (if it includes specific information about the nature of the injuries suffered). A claimant who has complied with the letter and spirit of both section 364 and the Tort Claims Act is entitled to the full benefit of both statutes, including tolling for 90 days of the six-month limitations period of Government Code section 945.6. Having relied upon the section 364(d) extension to file an action more than six months after the date of mailing of the notice of rejection, the claimant is not subject to losing his lawsuit by a later determination that nonessential information in the tort claim constituted the detailed facts about the injury required by section 364. The claimant is not required, in order to attempt to avoid such an outcome, to craft his claim so tightly as to provide only the bare minimum of information required by the Tort Claims Act and therefore nothing

➡ Contents of the Claim

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[221] Woods v. Young, 53 Cal. 3d 315, 325, 807 P.2d 455, 460, 279 Cal. Rptr. 613, 618 (1991).

[222] Hanooka v. Pivko, 22 Cal. App. 4th 1553, 1560, 28 Cal. Rptr. 2d 70, 74 (1994).

[223] Anson v. County of Merced, 202 Cal. App. 3d 1195, 1204–05, 249 Cal. Rptr. 457, 462 (1988).

which might later be construed as a specific statement concerning "the nature of the injuries suffered."[224]

Code of Civil Procedure section 356, which tolls the running of the statute of limitations when the commencement of an action is "stayed by . . . statutory prohibition," does not apply to the 90-day waiting period mandated in section 364(a).[225]

Although the notice requirement does not apply to defendants sued by fictitious names,[226] the service of the notice on named defendants tolls the running of the limitation period as to fictitiously named defendants.[227]

[C] Settlement Demands

Whenever, prior to the service of a complaint upon a defendant in any action arising out of the professional negligence of a physician, a demand for settlement or offer to compromise is made on a patient's behalf, the demand or offer must be accompanied by an authorization to disclose medical information to the persons or organizations insuring, responsible for, or defending professional liability that the physician may incur.[228] The authorization[229] must permit disclosure of the

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[224] Wurts v. County of Fresno, 44 Cal. App. 4th 380, 387, 51 Cal. Rptr. 2d 689, 693–94 (1996).

[225] Woods v. Young, 53 Cal. 3d 315, 324, 807 P.2d 455, 459, 279 Cal. Rptr. 613, 617 (1991).

[226] CODE CIV. PROC. § 364(3).

[227] Grimm v. Thayer, 188 Cal. App. 3d 866, 871, 233 Cal. Rptr. 687, 689–90 (1987).

[228] CIV. CODE § 56.105. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:872 (1996).

[229] Civil Code section 56.11 sets forth detailed requirements for the form of an authorization for release of medical information.

information that is necessary to investigate issues of liability and the extent of potential damages in evaluating the merits of the patient's claim. If the defendant makes a request for medical information pursuant to the authorization, the defendant must give notice to the patient. These requirements are independent of the requirements of Code of Civil Procedure section 364.

§ 2.04 Actions Requiring Presuit Consultation

With a respect to a number of causes of action the legislature has required that the plaintiff obtain a presuit consultation from an expert to make a threshold determination that the action is not frivolous.

[A] Actions Against Architects, Professional Engineers, and Land Surveyors

➡Form: Certificate of Merit

Code of Civil Procedure section 411.35 provides that before serving on any defendant a complaint for professional negligence against an architect, professional engineer, or land surveyor,[230] an attorney must file a consultation certificate. The purpose of section 411.35 is to require a plaintiff to obtain independent support of the merits of his action before serving the defendant,[231] thereby discouraging the filing of frivolous lawsuits.[232]

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[230] Section 411.30 formerly imposed a consultation requirement in medical malpractice actions. This version of the statute, however, was repealed by its own terms as of January 1, 1989.

[231] Adams v. Roses, 183 Cal. App. 3d 498, 504, 228 Cal. Rptr. 339, 342 (1986). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:873–:879, :886 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 204 (4th ed. 1997).

[232] Ponderosa Ctr. Partners v. McClellan/Cruz/Gaylord & Assocs., 45 Cal. App. 4th 913, 915, 53 Cal. Rptr. 2d 64, 65 (1996).

[1] Contents of the Certificate

The certificate must state that the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable and meritorious cause for the filing of the action. The person consulted must render an opinion that the defendant was or was not negligent in the performance of the applicable professional services.[233] Alternatively, the certificate may state that the attorney was unable to obtain the required consultation because of the imminent expiration of the statute of limitations.[234] If the attorney elects the latter course, the attorney must file a regular certificate (regarding review and consultation) within 60 days after filing the complaint.[235] If the attorney is unable to obtain the required consultation after three separate good faith attempts with three separate architects, professional engineers, or land surveyors, none of whom would agree to such a consultation, the attorney may so certify and thereby avoid the consultation requirement.[236]

[2] Consultant's Qualifications

The consultant is qualified to give the needed advice if the consultant is licensed to practice in California or any other state and either practices his profession or

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[233] CODE CIV. PROC. § 411.35(b)(1). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:880–:885 (1996).

➡ Actions for Medical Malpractice

[234] CODE CIV. PROC. § 411.35(b)(2). Note that while compliance with section 364 tolls the running of the statute of limitations in medical malpractice cases, section 411.35 does not.

[235] CODE CIV. PROC. § 411.35(b)(2).

[236] CODE CIV. PROC. § 411.35(b)(3).

teaches in an accredited college or university. The consultant must be licensed and practice or teach in the same discipline as the defendant, and the attorney must reasonably believe that the consultant is knowledgeable concerning the relevant issues involved in the particular action.[237] One may not choose a party to the action as one's consultant for purposes of section 411.35.

[3] Exceptions

If the attorney intends to rely solely on the doctrine of res ipsa loquitur as defined in Evidence Code section 646 or exclusively on the defendant's failure to inform the plaintiff of the consequences of a procedure, section 411.35 does not apply. Upon filing the complaint, however, the attorney must certify that he is solely relying on the doctrines of res ipsa loquitur or failure to inform of the consequences of a procedure and for that reason is not filing a certificate.[238]

[4] Privilege

An attorney who submits a consultation certificate has a privilege to refuse to disclose the identity of the consultant and the contents of the consultation.[239] The privilege is also held by the consultant. If, however, the attorney claims that he could not obtain the required consultation, the court may require the attorney to divulge the names of the professionals refusing the consultation.

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[237] CODE CIV. PROC. § 411.35(b)(1). A professional engineer may be qualified to render an opinion concerning the alleged professional negligence of an architect. Ponderosa Ctr. Partners v. McClellan/ Cruz/Gaylord & Assocs., 45 Cal. App. 4th 913, 917, 53 Cal. Rptr. 2d 64, 67 (1996).

[238] CODE CIV. PROC. § 411.35(d).

[239] CODE CIV. PROC. § 411.35(e). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:890–:891 (1996).

[5] Consequences of Non-Compliance

Failure to file the required certificate can have serious consequences for the plaintiff.[240]

[a] Demurrer

A failure to file a certificate in accordance with this section 411.35 shall be grounds for a demurrer under Code of Civil Procedure section 430.10 or a motion to strike pursuant to section 435.[241] The statute is silent with respect to the consequences of filing a defective certificate, but presumably a defective certificate is not "a certificate . . . as required by Section 411.35," so that the defendant could attack the defective certificate by means of a demurrer to the complaint.

[b] Attorney Discipline

A violation of section 411.35 may constitute unprofessional conduct and provide grounds for discipline against the attorney (except for a failure to file a certificate within 60 days after filing the complaint and certificate provided for by section 411.35(b)(2) (inability to obtain a consultation because of the imminent expiration of the statute of limitations)).

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[240] *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:887–:889.3, :892–:893 (1996).

[241] CODE CIV. PROC. § 411.35(g).

[c] Sanctions

If the defendant professional wins,[242] the trial court may verify compliance with section 411.35 by requiring the plaintiff's attorney to reveal the name, address, and telephone number of the consultants the attorney relied upon.[243] The attorney must disclose the consultant's name, address, and telephone number to the trial judge in an in camera proceeding at which the defendant is not present. If the judge finds that the attorney failed to comply with section 411.35, the judge may order the attorney or his client to pay any reasonable expenses, including attorneys' fees, incurred by another party as a result of the failure to comply with section 411.35.[244]

[B] Actions by Common Interest Development Associations Against Contractors

Code of Civil Procedure section 411.36 imposes an identical regimen in "occupational negligence" actions against contractors by common interest development associations under Code of Civil Procedure section 383. "Occupational negligence" is defined as "a negligent act or omission in the construction, reconstruction, repair, or improvement of a structure or other work of improvement which is the proximate cause of a construction defect or of damage to property resulting from such a construction defect."[245]

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[242] Dismissal pursuant to a settlement does not satisfy the statute's requirement of a "favorable conclusion." Korbel v. Chou, 27 Cal. App. 4th 1427, 33 Cal. Rptr. 2d 190 (1994).

[243] CODE CIV. PROC. § 411.35(h).

[244] "Attorneys' fees" includes fees for paralegal services. Guinn v. Dotson, 23 Cal. App. 4th 262, 269–70, 28 Cal. Rptr. 2d 409, 414 (1994).

[C] Actions Based on Sexual Abuse of a Minor

Code of Civil Procedure section 340.1 requires a plaintiff in a civil action for recovery of damages suffered as a result of childhood sexual abuse who is 26 years of age or older to file certificates of merit.[246] He must file a separate set of certificates for each defendant named in the complaint.[247] The plaintiff's attorney must sign a certificate and attest to facts showing that the attorney has reviewed the facts of the case, that the attorney has consulted with at least one mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes knows the relevant facts and issues involved in the particular action, and that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action. The person consulted may not be a party to the litigation. The consultant must also sign a certificate and attest to facts showing that he is licensed to practice and practices in this state and is not a party to the action, that he is not treating and has not treated the plaintiff, and that he has interviewed the plaintiff and knows the relevant facts and issues involved in the particular action and has concluded, based on his knowledge of the facts and issues, that in his professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse. [248]

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[245] *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:879 (1996).

[246] CODE CIV. PROC. § 340.1(d).

[247] CODE CIV. PROC. § 340.1(f).

[248] CODE CIV. PROC. § 340.1(e).

Alternatively, the attorney may attest to facts showing that he could not obtain the required consultation because a statute of limitations would bar the action and that he could not obtain the required certificates before the expiration of the statute of limitations. If the attorney files the alternative certificate, he must file the usual certificates within 60 days after filing the complaint.[249] If he allows the statute of limitations to expire without filing either certificate, the client's claim is barred, even if she files a complaint within the limitations period.[250]

The plaintiff may not serve his complaint until the court has reviewed the certificates of merit in camera and has found, based solely on the certificates, that there is "reasonable and meritorious cause" for the filing of the action. The duty to serve the defendant or defendants with process does not attach until that time.[251]

A violation of section 340.1 may constitute unprofessional conduct and may be the grounds for discipline against the attorney.[252] A failure to file certificates in accordance with section 340.1 is grounds for a demurrer or a motion to strike.

If the defendant wins, the court may, upon the motion of a party or upon the courts own motion, verify the plaintiff's compliance with section 340.1 by requiring the attorney for the plaintiff to reveal the names, addresses, and telephone numbers of the consultants that he relied upon in preparation of the certificate of merit. The names, addresses, and telephone numbers must be disclosed to the trial judge in camera and in the absence of the moving party. If the court finds there has been a

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[249] CODE CIV. PROC. § 340.1(e).

[250] Doyle v. Fenster, 47 Cal. App. 4th 1701, 55 Cal. Rptr. 2d 327 (1996).

[251] CODE CIV. PROC. § 340.1(g).

[252] CODE CIV. PROC. § 340.1(h).

failure to comply with this section, the court may order the plaintiff, his attorney, or both, to pay any reasonable expenses, including attorney's fees, the defendant incurred.[253]

§ 2.05 Actions Requiring Presuit Court Clearance

The legislature has determined that the assertion of certain causes of action so threatens the public welfare that the plaintiff must obtain court approval before filing suit.

[A] Attorney Conspiracy Claims

Section 1714.10 of the Code of Civil Procedure provides that one may not include in one's complaint a cause of action against an attorney for a civil conspiracy[254] with his client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, unless one obtains permission from the court. The statute was enacted because defense counsel were "routinely" threatened with claims that they were conspiring with their insurance company clients in refusing to settle tort actions. As a result of threatened and actual litigation, defense counsel were required to notify their malpractice insurance carriers, resulting in increased premium costs.[255]

The court must determine whether the plaintiff has established that there is a "reasonable probability" that the party will prevail in the action. The plaintiff must file a verified petition, accompanied by the proposed pleading and supporting

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[253] CODE CIV. PROC. § 340.1(n).

[254] The statute includes claims for "aiding and abetting" in the term "conspiracy." Howard v. Superior Court, 2 Cal. App. 4th 745, 3 Cal. Rptr. 2d 575 (1992).

affidavits stating the facts upon which the liability is based.[256] A section 1714.10 hearing is "a special proceeding of a civil nature" and, as such, is subject to the normal discovery rules.[257] The court orders service of the petition upon the proposed attorney-defendant and permits the defendant to submit opposing affidavits. The petition must be granted if the proposed pleading is legally sufficient and the evidentiary showing to support it makes out a prima facie case of conspiracy between the attorney and the client.[258] The court must deny the motion where either the facts asserted in the proposed amended complaint are legally insufficient to support a conspiracy claim or the evidence provided in the supporting and opposing affidavits either negates or fails to reveal the actual existence of a triable claim.[259]

Example: *W* files an action against *H*, her former husband, and against *D*, her former husband's attorney. She alleges that *D* and *H*'s new wife forc-

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[255] Hak Fu Hung v. Wang, 8 Cal. App. 4th 908, 920, 11 Cal. Rptr. 2d 113, 119 (1992). The specific purpose of the statute was to respond to the decision of the court of appeal in Wolfrich Corp. v. United Servs. Auto. Ass'n, 149 Cal. App. 3d 1206, 1211, 197 Cal. Rptr. 446, 449 (1983), holding that attorneys may incur liability for conspiracies with their clients. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:354–:376 (1996); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 207 (4th ed. 1997).

[256] Burtscher v. Burtscher, 26 Cal. App. 4th 720, 727, 31 Cal. Rptr. 2d 682, 686 (1994).

[257] Hak Fu Hung v. Wang, 8 Cal. App. 4th 908, 924, 11 Cal. Rptr. 2d 113, 122 (1992).

[258] Hak Fu Hung v. Wang, 8 Cal. App. 4th 908, 931, 11 Cal. Rptr. 2d 113, 127 (1992).

[259] *Cf.* College Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 719, 8 Cal. 4th 1236A, 882 P.2d 894, 903, 34 Cal. Rptr. 2d 898, 907 (1994) (construing CODE CIV. PROC. § 425.13). The denial of a petition is a determination on the merits and bars a subsequent action on the same cause of action. Castro v. Higaki, 31 Cal. App. 4th 350, 37 Cal. Rptr. 2d 84 (1994).

ibly dispossessed *W* from premises she had leased from *H*. The trial court denies *D*'s motion to dismiss under section 1714.10.

The court ruled correctly. *W* alleged that *D* had resorted to self-help in unilaterally retaking possession in circumstances in which a lawyer would serve a notice to quit, file an unlawful detainer action, and get a court order, thus stating a cause of action for conspiracy.[260]

The filing of the petition, proposed pleading, and accompanying affidavits tolls the running of any applicable statute of limitations until the final determination of the matter.[261] The court's order is immediately appealable.[262]

The plaintiff's failure to obtain the required court order is a defense to any action for civil conspiracy filed in violation of the applicable statute, Code of Civil Procedure section 1714.10.[263] The defendant must raise the defense upon his first appearance, by demurrer, motion to strike, or such other motion or application as may be appropriate. The defendant forfeits the defense if he fails to raise it in a timely manner.[264]

Court permission is not required to assert a cause of action against an attorney for a civil conspiracy with his client, where (1) the attorney has an independent legal duty to the plaintiff or (2) the attorney's acts go beyond the performance of a

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[260] Burtscher v. Burtscher, 26 Cal. App. 4th 720, 726–27, 31 Cal. Rptr. 2d 682, 686 (1994).

[261] CODE CIV. PROC. § 1714.10(a).

[262] CODE CIV. PROC. § 1714.10(d).

[263] CODE CIV. PROC. § 1714.10(b).

[264] CODE CIV. PROC. § 1714.10(b).

professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain.[265]

The filing of the petition, the proposed pleading, and accompanying affidavits tolls the running of the statute of limitations.[266]

[B] Negligence Claims Against Officers and Directors of Nonprofit Corporations

Code of Civil Procedure section 425.15 provides that one may not assert a negligence claim against a person serving without compensation[267] as a director or officer[268] of a nonprofit corporation[269] unless the court has entered an order allowing the action. As with conspiracy claims against attorneys, the plaintiff must file a verified petition for leave to file his complaint and must include affidavits stating the facts upon which liability is based and serve the petition upon the party whom the plaintiff wishes to sue. The defendant has the right to submit opposing affidavits. The court is to allow the filing of the pleading containing the claim if it determines that the plaintiff has "established evidence that substantiates the claim."

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[265] CODE CIV. PROC. § 1714.10(c).

[266] CODE CIV. PROC. . § 1714.10(a).

[267] The payment of "per diem, mileage, or other reimbursement expenses" does not constitute "compensation." CODE CIV. PROC. § 425.15(d). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:377–:384 (1996).

[268] The statute extends only to claims that the officer or director was acting within the scope of his duties as an officer or director. CODE CIV. PROC. § 425.15(a).

[269] The statute extends only to nonprofit corporations that are tax exempt and that do not illegally discriminate. CODE CIV. PROC. § 425.15(e).

The court must deny the motion if either the facts asserted in the proposed amended complaint are legally insufficient to support a punitive damages claim or the evidence provided in the supporting and opposing affidavits negates or fails to reveal the actual existence of a triable claim.[270] The filing of the petition, proposed pleading, and supporting affidavits tolls the running of the statute of limitations.[271] Section 425.15 does not affect the plaintiff's right to sue the nonprofit corporation itself for any negligent act or omission of a volunteer officer or director.[272]

[C] Punitive Damages Claims Against Health Care Providers

Code of Civil Procedure section 425.13 provides that in any action for damages arising out of the professional negligence of a health care provider, one may not assert a claim for punitive damages without the court's permission. After filing a complaint for malpractice, the plaintiff may move the court for leave to file an amended pleading claiming punitive damages. The parties may submit affidavits supporting and opposing the motion. The court must determine whether the plaintiff has established that there is a "substantial probability" that the plaintiff will obtain an award of punitive damages.[273] The court must deny the motion if either the facts asserted in the proposed amended complaint are legally insufficient to support a

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[270] *Cf.* College Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 719, 8 Cal. 4th 1236A, 882 P.2d 894, 903, 34 Cal. Rptr. 2d 898, 907 (1994) (construing CODE CIV. PROC. § 425.13).

[271] CODE CIV. PROC. § 425.15(a).

[272] CODE CIV. PROC. § 425.15(c). The statute provides that "[n]othing in this section shall affect the plaintiff's right to discover evidence on the issue of damages." CODE CIV. PROC. § 425.15(b). What this provision means is not clear.

punitive damages claim or the evidence provided in the supporting and opposing affidavits negates or fails to reveal the actual existence of a triable claim.[274]

The plaintiff must file the motion within two years after the complaint or initial pleading was filed and not less than nine months before the date the matter is first set for trial, whichever is earlier.[275] The legislature provided the nine months prior to trial limitation for at least two important reasons: (1) to provide a health care defendant with adequate notice of the claim and an ample period to conduct appropriate discovery and (2) to prevent the "last minute" insertion of a punitive damages claim into a case that has been prepared for trial without consideration of that issue. The outside limit of two years from the filing of the complaint also prevents the delayed assertion of a claim for punitive damages in a case where the issues and discovery requirements are likely to have become fixed.[276]

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[273] The plaintiff must make a prima facie showing of malice, oppression, or fraud, keeping in mind the clear and convincing evidence standard applicable to punitive damages claims. Looney v. Superior Court, 16 Cal. App. 4th 521, 539–40, 20 Cal. Rptr. 2d 182, 192–93 (1993). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:327–:345 (1996).

[274] College Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 719, 8 Cal. 4th 1236A, 882 P.2d 894, 903, 34 Cal. Rptr. 2d 898, 907 (1994).

[275] CODE CIV. PROC. § 425.13(a). The nine month deadline does not apply when a statute confers on the plaintiff the right to an early trial setting. Looney v. Superior Court, 16 Cal. App. 4th 521, 536, 20 Cal. Rptr. 2d 182, 190–91 (1993). "The date the matter is first set for trial" refers to the first trial date, not to the date of the first trial-setting conference. Brown v. Superior Court, 224 Cal. App. 3d 989, 993, 274 Cal. Rptr. 442, 445 (1990).

[276] Goodstein v. Superior Court, 42 Cal. App. 4th 1635, 1642, 50 Cal. Rptr. 2d 459, 463 (1996).

If a plaintiff, by virtue of the quick trial setting practices of {fast track} courts, is placed in a position where he cannot reasonably comply with the narrow time limits set out in section 425.13, the trial court has the power to make such orders as will reasonably avoid such a result, while at the same time remaining faithful to the underlying purposes of section 425.13. The plaintiff must be able to show, in order to be entitled to such relief, that (1) he was unaware of the facts or evidence necessary to make a proper motion under section 425.13 more than nine months prior to the first assigned trial date, (2) he made diligent, reasonable, and good faith efforts to discover the necessary facts or evidence to support such a motion more than nine months prior to the first assigned trial date, (3) after assignment of the trial date he made reasonable, diligent, and good faith efforts to complete the necessary discovery, (4) he filed her motion under section 425.13 as soon as reasonably practicable after completing such discovery (but in no event more than two years after the filing of his initial complaint) and (5) the defendant will suffer no surprise or prejudice by reason of any shortened time period and will be given every reasonable opportunity to complete all necessary discovery in order to prepare to meet the plaintiff's punitive damage allegations.[277]

"Professional negligence" means "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."[278] It includes a hospital's failure to protect its patient from batteries committed by

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[277] Goodstein v. Superior Court, 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459, 465 (1996).

hospital employees.[279] An action for damages "arises out of" the professional negligence of a health care provider if the injury for which damages are sought is directly related to the professional services provided by the health care provider.[280] Whenever an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, the action, even one based on an intentional tort claim, arises out of the professional negligence of a health care provider, and the party must obtain court permission to amend his complaint to seek punitive damages.[281]

Section 425.13 does not apply exclusively to claims by injured patients. Rather, it applies to any foreseeable injured party, including patients, business invitees, staff members or visitors provided the injuries alleged arose out of professional negligence.[282]

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[278] Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, 187, 832 P.2d 924, 928, 10 Cal. Rptr. 2d 208, 212 (1992) (relying on the Medical Injury Compensation Reform Act).

[279] United Western Medical Centers v. Superior Court, 42 Cal. App. 4th 500, 504, 49 Cal. Rptr. 2d 682, 685 (1996).

[280] Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, 191, 832 P.2d 924, 930, 10 Cal. Rptr. 2d 208, 214 (1992). *But see* Temple Community Hosp. v. Superior Court, 43 Cal. App. 4th 595, 603–04, 51 Cal. Rptr. 2d 57, 62–63 (1996) (statute does not apply to spoliation of evidence claim based on hospital's alleged destruction of defective medical equipment); Cedars-Sinai Medical Ctr. v. Superior Court, 43 Cal. App. 4th 605, 614, 50 Cal. Rptr. 2d 831, 836 (1996) (statute does not apply to spoliation of evidence claim based on hospital's alleged destruction of medical records).

[281] Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, 191, 832 P.2d 924, 931, 10 Cal. Rptr. 2d 208, 215 (1992).

[282] Williams v. Superior Court, 30 Cal. App. 4th 318, 324, 36 Cal. Rptr.2d 112, 115 (1994).

Example: *P* files a complaint alleging that *Hospital* invited her to draw blood from a patient who had a propensity to attack female personnel. *Hospital* knew of the patient's propensity but did not warn *P.* As *P* attempted to draw blood from the patient, he thrashed about while attempting to grab her breast and caused the needle, already contaminated with his blood, to puncture *P*'s gloved hand and lacerate her thumb. Two days later *P* was informed the patient had tested positive for HIV. *P* includes a claim for punitive damages. *Hospital* moves to strike the allegations and prayer for punitive damages based upon the claim having been made in violation of section 425.13. The court grants the motion.

The court ruled correctly. Section 425.13 applies to claims by persons other than patients, and *Hospital*'s breach of its duty to warn *P* was professional negligence.[283]

Section 425.13's requirement of a court order as a condition precedent to including a claim for punitive damages in an action arising out of the professional negligence of a health care provider is not jurisdictional, and absent timely objection to a complaint's inclusion of a punitive damages claim without court permission, the protection conferred by section 425.13 is forfeited.[284]

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[283] Williams v. Superior Court, 30 Cal. App. 4th 318, 323–27, 36 Cal. Rptr.2d 112, 114–16 (1994).

[284] Vallbona v. Springer, 43 Cal. App. 4th 1525, 1534, 51 Cal. Rptr. 2d 311, 317 (1996).

[D] Punitive Damages Claims Against Religious Corporations

One may not include a claim for punitive damages in a complaint against a religious corporation unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of such an amended pleading based on affidavits showing that the plaintiff has established evidence indicating that the plaintiff will meet the clear and convincing evidence standard of proof for punitive damages.[285] The plaintiff must adduce "sufficient evidence to establish a prima facie case for punitive damages, having in mind the higher clear and convincing standard of proof."[286] The court must deny the motion if either the facts asserted in the proposed amended complaint are legally insufficient to support a punitive damages claim or the evidence provided in the supporting and opposing affidavits negates or fails to reveal the actual existence of a triable claim.[287]

[E] Actions by Vexatious Litigants

[1] Prefiling Orders

➡ Form: Prefiling Order—Vexatious Litigant

A court may, on its own motion or the motion of any party, make an order prohibiting a vexatious litigant from filing any new litigation in the California courts in propria persona without first obtaining permission from the presiding judge of the

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[285] CODE CIV. PROC. § 425.14.

[286] Rowe v. Superior Court, 15 Cal. App. 4th 1711, 1723, 19 Cal. Rptr. 2d 625, 632 (1993).

[287] *Cf.* College Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 719, 8 Cal. 4th 1236A, 882 P.2d 894, 903, 34 Cal. Rptr. 2d 898, 907 (1994) (construing CODE CIV. PROC. § 425.13).

court where the vexatious litigant proposes to file his action.[288] A vexatious litigant is a person who does any of the following:

- maintains in propria persona, in the preceding seven years,[289] at least five lawsuits, other than in a small claims court, which the vexatious litigant lost or unjustifiably permitted to remain pending at least two years without bringing to trial or hearing;[290]
- after losing a case, repeatedly relitigates or attempts to relitigate in propria persona either (1) the validity of the judgment in the earlier action or (2) the cause of action or any of issue of fact or law determined by the judgment in the earlier action;[291]
- while acting in propria persona, repeatedly files meritless motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics

[288] CODE CIV. PROC. § 391.7(a). This section of the vexatious litigants provisions applies only to vexatious litigants appearing in propria persona. Camerado Ins. Agency, Inc. v. Superior Court, 12 Cal. App. 4th 838, 844, 16 Cal. Rptr. 2d 42, 46 (1993). A "prefiling" order does not constitute an unlawful prior restraint on the vexatious litigant's right to petition and does not violate due process. Wolfgram v. Wells Fargo Bank, 53 Cal. App. 4th 43, ??, 61 Cal. Rptr. 2d 694, 705 (1997). *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 339–343 (4th ed. 1997).

[289] The filing of the motion establishes the point from which the seven-year period must be retroactively measured. Stolz v. Bank of Am. Nat'l Trust & Sav. Ass'n, 15 Cal. App. 4th 217, 224, 19 Cal. Rptr. 2d 19, 23 (1993). The fact that a case was "commenced" outside the seven-year window does not necessarily exclude it from consideration if it was subsequently prosecuted or maintained by the plaintiff in propria persona within the seven-year window. *Id.* at 225, 19 Cal. Rptr. 2d at 24.

[290] CODE CIV. PROC. § 391(b)(1). Inclusion in the "five lawsuits" of lawsuits against the government does not violate the vexatious litigant's constitution right to petition. Wolfgram v. Wells Fargo Bank, 53 Cal. App. 4th 43, ??, 61 Cal. Rptr. 2d 694, 705 (1997).

that are frivolous or solely intended to cause unnecessary delay;[292] or

- has previously been declared to be a vexatious litigant by any state or federal court in any action based upon the same or substantially similar facts, transaction, or occurrence.[293]

The clerk is prohibited from filing any litigation presented by a vexatious litigant subject to a court order unless he obtains an order from the presiding judge permitting the filing.[294] The presiding judge should permit the filing of new litigation only if it appears that the litigation has merit and has not been filed for purposes of harassment or delay.[295] If the clerk accepts the filing by mistake, any party may file and serve a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order. The filing of the notice automatically stays the litigation. Unless the plaintiff obtains court permission with ten days, the action is automatically dismissed. If the

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[291] CODE CIV. PROC. § 391(b)(2). Section 391(b)(2) refers to "final determinations" and to prior litigation that has been "finally determined." This means cases in which judgments are no longer subject to direct appeal. Trident U.K., Inc. v. Superior Court, 50 Cal. App. 4th 911, 915, 57 Cal. Rptr. 2d 913, 101 (1996); Childs v. PaineWebber Inc., 29 Cal. App. 4th 982, 994, 35 Cal. Rptr. 2d 93, 101 (1994).

[292] CODE CIV. PROC. § 391(b)(3); *see, e.g., In re* Luckett, 232 Cal. App. 3d 107, 283 Cal. Rptr. 312 (1991).

[293] CODE CIV. PROC. § 391(b)(4). The Judicial Council maintains a record of vexatious litigants subject to prefiling orders and disseminates the list to the court clerks. *Id.* § 391.7(d). A previous case is substantially similar to a previous case if the two cases arise from essentially the same facts, transaction or occurrence. Devereaux v. Latham & Watkins, 32 Cal. App. 4th 1571, 1581, 38 Cal. Rptr. 2d 849, 854 (1995).

[294] CODE CIV. PROC. § 391.7(c).

[295] CODE CIV. PROC. § 391.7(b).

presiding judge permits the filing, the stay remains in effect, and the defendants need not plead, until ten days after the defendants are served with a copy of the order.[296]

[2] Security

The presiding judge, when making a prefiling order, may condition the filing of new litigation on the furnishing for the benefit of the defendants an undertaking to assure payment of the defendants' reasonable expenses, including attorneys' fees, incurred in litigations maintained by a vexatious litigant.[297] At any time until final judgment is entered, a defendant may move the court for an order requiring the plaintiff to furnish security. The defendant must show that the plaintiff is a vexatious litigant and that there is no reasonable probability that he will prevail.[298] The defendant may file such a motion even if the plaintiff has obtained prefiling

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[296] CODE CIV. PROC. § 391.7(c).

[297] CODE CIV. PROC. §§ 391(c), 391.7(b). So far the requirement of security is concerned, a litigant represented by counsel may also be declared a vexatious litigant. *In re* Shieh, 17 Cal. App. 4th 1154, 1166, 21 Cal. Rptr. 2d 886, 894 (1993) (litigant declared vexatious after hiring attorneys who served as "mere puppets"). The legislature intended it to apply, at least as to the first and fourth categories of vexatious litigants (CODE CIV. PROC. § 391(b)(1), (4)), to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past. Camerado Ins. Agency, Inc. v. Superior Court, 12 Cal. App. 4th 838, 842, 16 Cal. Rptr. 2d 42, 44 (1993).

[298] CODE CIV. PROC. § 391.1. To satisfy its burden of showing that the plaintiff has no reasonable probability of prevailing, the defendant must show that the plaintiff's recovery is foreclosed as a matter of law or that there are insufficient facts to support recovery by the plaintiff on his legal theories, even if all the plaintiff's facts are credited. Devereaux v. Latham & Watkins, 32 Cal. App. 4th 1571, 1582–83, 38 Cal. Rptr. 2d 849, 855 (1995).

approval. Moreover, the fact that the court may find that the litigation has "merit" to satisfy a prefiling order does not preclude a later finding that the plaintiff has no reasonable probability of prevailing.[299] The vexatious litigant who employs an attorney avoids the prefiling requirements but may still have to post security.[300]

If the defendant files a motion for security before trial, the litigation is stayed, and the defendant need not plead, until ten days after the motion is ruled upon. If the court grants the motion, the litigation is stayed until ten days after the plaintiff furnishes the required security and notifies the defendant. If the defendant files the motion after trial, the litigation is stayed for such period after the denial of the motion or the furnishing of the required security as the court may determine.[301] If the vexatious litigant fails to furnish the ordered security, the court must dismiss his case.[302]

[F] Claims Arising from a Person's Exercise of the Constitutional Right of Petition or Free Speech

If a plaintiff files a cause of action against a person arising from any act of that person in furtherance of his right of petition or free speech under the United States or California Constitutions in connection with a public issue (known as a "SLAPP" suit),[303] the defendant may make a special motion to strike.[304] The statute extends to causes of action arising under federal law.[305]

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[299] Devereaux v. Latham & Watkins, 32 Cal. App. 4th 1571, 1587, 38 Cal. Rptr. 2d 849, 858 (1995).

[300] Camerado Ins. Agency, Inc. v. Superior Court, 12 Cal. App. 4th 838, 842, 16 Cal. Rptr. 2d 42, 44 (1993).

[301] CODE CIV. PROC. § 391.6.

[302] CODE CIV. PROC. § 391.4.

The defendant may file the motion within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.[306] The defendant must notice the motion for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing. All {discovery} proceedings in the action are stayed upon the filing of the notice of motion. The stay of discovery remains in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted.[307] If the plaintiff makes a showing that a defendant or witness possesses evidence the plaintiff needs to establish a prima facie case, the court must give the plaintiff a reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated. The trial court must liberally exercise its discretion by authorizing reasonable and specified discovery

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[303] The statute's constitutionality was upheld in Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 863–68, 44 Cal. Rptr. 2d 46, 51–54 (1995). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:543.5–:543.6, 7:206.1–:206.18 (1996).

[304] CODE CIV. PROC. § 425.16(b). The statute does not apply to an enforcement action brought in the name of the people by the attorney general, district attorney, or city attorney, acting as a public prosecutor. *Id.* § 425.16(d). The statute does not impair the defendant's remedies that predate the statute, including the cause of action for malicious prosecution. Lucas v. Swanson & Dowdall, 53 Cal. App. 4th 98, ??, 61 Cal. Rptr. 2d 507, 511–12 (1997).

[305] Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 1117–18, 57 Cal. Rptr. 2d 207, 213 (1996).

[306] CODE CIV. PROC. § 425.16(f).

[307] CODE CIV. PROC. § 425.16(g); Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, ??, 61 Cal. Rptr. 2d 58, 67 (1997); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 646–47, 49 Cal. Rptr. 2d 620, 631 (1996).

when the plaintiff shows that evidence to establish a prima facie case is held, or known, by the defendant or its agents and employees. Though the statute says that the motion to strike "shall be noticed for hearing not more than 30 days after service," nothing in the statute prevents the court from continuing the hearing to a later date so that the discovery it authorized can be completed.[308]

If the defendant wins, he may recover his attorneys' fees and costs incurred in making the motion.[309] If the court finds that the defendant's special motion to strike was frivolous or was solely intended to cause unnecessary delay, the court must award costs and reasonable attorney's fees to the plaintiff pursuant to Code of Civil Procedure section 128.5.[310]

[1] Public Issues

A defendant moving to strike a complaint under Code of Civil Procedure section 425.16 has the burden of making a prima facie showing that the lawsuit arises from any act in furtherance of his right of petition or free speech under the United States or California Constitution in connection with a public issue.[311] The defendant may

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[308] Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (1995).

[309] CODE CIV. PROC. § 425.16(c); Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, ??, 61 Cal. Rptr. 2d 58, 67 (1997); Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785, 54 Cal. Rptr. 2d 830, 835 (1996); Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 39 Cal. App. 4th 1379, 1383, 46 Cal. Rptr. 2d 542, 544 (1995).

[310] CODE CIV. PROC. § 425.16(c). Despite the statute's wording, the defendant's recovery is limited to *reasonable* attorneys' fees as well. Robertson v. Rodriguez, 36 Cal. App. 4th 347, 361–62, 42 Cal. Rptr. 2d 464, 472 (1995).

meet this burden by showing that the act which forms the basis for the plaintiff's cause of action was

- a written or oral statement made before a legislative, executive, or judicial proceeding[312]
- a written or oral statement in connection with an issue under consideration or review by a legislative, executive, or judicial body[313]
- a written or oral statement was made in a place open to the public or a public forum in connection with an issue of public interest.[314]

The courts have held that the statute does not apply to

- a defamation suit based on a comment to a reporter on a judicial proceeding if the subject of the comment is not a matter of public interest[315]

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[311] Linsco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc., 50 Cal. App. 4th 1633, 1639, 58 Cal. Rptr. 2d 613, 616–17 (1996) (suit to enjoin non-lawyers from representing investors in securities arbitrations did not concern a public issue); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 646, 49 Cal. Rptr. 2d 620, 630 (1996).

[312] CODE CIV. PROC. § 425.16(e). The first subdivision is not limited to petitioning activities. Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, ??, 61 Cal. Rptr. 2d 58, 62 (1997).

[313] CODE CIV. PROC. § 425.16(e). This category includes statements to prospective litigants in a dispute between groups of court reporters. Peters v. Saunders, 50 Cal. App. 4th 1823, 1831, 58 Cal. Rptr. 2d 690, 695 (1996). The second subdivision is not limited to petitioning activities. Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, ??, 61 Cal. Rptr. 2d 58, 62 (1997).

[314] CODE CIV. PROC. § 425.16(e); Wilcox v. Superior Court, 27 Cal. App. 4th 809, 820, 33 Cal. Rptr. 2d 446, 452 (1994). This category includes statements made at a meeting of court reporters concerning prospective litigation. Peters v. Saunders, 50 Cal. App. 4th 1823, 1831–32, 58 Cal. Rptr. 2d 690, 695 (1996).

- a consultant's advice to a county regarding a purchasing decision[316]
- a suit to enjoin non-attorneys from representing investors in securities arbitrations.[317]

A cause of action "arising from" the defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.[318] There is a split of authority whether the statute extends to oral statements concerning a matter of public interest but made privately.[319] It extends to private statements seeking support for a petition to a public agency for redress of grievances.[320] To invoke section 425.16 the defendant does not have to show that every statement he made about the plaintiff was made in furtherance of his First Amendment rights. He only needs to show the plaintiff's cause of action arises from any act in furtherance of his right of petition or free speech.[321]

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[315] Zhao v. Wong, 48 Cal. App. 4th 1114, 1133, 55 Cal. Rptr. 2d 909, 921 (1996). *But see* Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, ??, 61 Cal. Rptr. 2d 58, 63 (1997) (rejecting *Zhao*'s assertion that the second subdivision does not protect free speech activities that are unrelated to petitioning efforts).

[316] Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Eng'rs, 49 Cal. App. 4th 1591, 1602–03, 57 Cal. Rptr. 2d 491, 497–98 (1996).

[317] Linsco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc., 50 Cal. App. 4th 1633, 1638, 58 Cal. Rptr. 2d 613, 616 (1996).

[318] Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 648, 49 Cal. Rptr. 2d 620, 631 (1996).

[319] *Compare* Averill v. Superior Court, 42 Cal. App. 4th 1170, 1176, 50 Cal. Rptr. 2d 62, 65–66 (1996) (applying statute) *with* Zhao v. Wong, 48 Cal. App. 4th 1114, 1128–29, 55 Cal. Rptr. 2d 909, 918 (1996).

[320] Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830, 835 (1996).

The statute protects

- media defendants[322]
- politicians[323]
- persons who induce others to exercise their free speech rights[324]
- governmental entities.[325]

[2] Plaintiff's Showing

If the defendant makes the required showing, the burden then rests upon the plaintiff to show that there is a probability that he will prevail on the claim.[326] In making its determination, the court considers the pleadings and supporting and opposing affidavits.[327] The plaintiff must show that the allegations are sufficient to constitute a cause of action against the defendant and that there is sufficient admissible evidence to raise a triable issue of fact as to the plaintiff's entitlement to damages from the defendant. A motion to strike under section 425.16 thus operates

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[321] Peters v. Saunders, 50 Cal. App. 4th 1823, 1832, 58 Cal. Rptr. 2d 690, 696 (1996).

[322] Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, ??, 61 Cal. Rptr. 2d 58, 67 (1997) (newspaper held entitled to recover attorneys' fees from individual plaintiff); Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 863, 44 Cal. Rptr. 2d 46, 51 (1995).

[323] Beilenson v. Superior Court, 44 Cal. App. 4th 944, 946, 52 Cal. Rptr. 2d 357, 361 (1996).

[324] Ludwig v. Superior Court, 37 Cal. App. 4th 8, 17–18, 43 Cal. Rptr. 2d 350, 357 (1995).

[325] Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 1114, 57 Cal. Rptr. 2d 207, 211 (1996).

[326] CODE CIV. PROC. § 425.16(b); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 646, 49 Cal. Rptr. 2d 620, 630–31 (1996).

[327] CODE CIV. PROC. § 425.16(b); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 646, 49 Cal. Rptr. 2d 620, 631 (1996).

as a combined general demurrer and {motion for summary judgment} in reverse, requiring the plaintiff to demonstrate that he possesses a legally sufficient claim that is supported by competent, admissible evidence. The court must grant the defedant's motion to strike if the facts asserted in the proposed amended complaint are legally insufficient to support a claim or the evidence provided in the supporting and opposing affidavits either negates or fails to reveal the actual existence of a triable claim.[328]

§ 2.06 Causes of Action Requiring Notice

➡ Form 2.7: Notice of Rescission

➡ Form 2.8: Notice of Breach of Warranty

A number of causes of action include as an element of the claim a requirement that the plaintiff give the defendant notice of his claim or demand performance by the defendant. These include actions on demand instruments in which the plaintiff is seeking attorneys' fees,[329] actions for rescission of contracts,[330] actions for breach

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[328] Peters v. Saunders, 50 Cal. App. 4th 1823, 1833, 58 Cal. Rptr. 2d 690, 696 (1996) (plaintiff met his burden of proving the defendant's defamatory statements and threats of an illegal boycott);Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 784–85, 54 Cal. Rptr. 2d 830, 835 (1996) (absolute privilege entitled defendant to granting of its motion to strike); Wilcox v. Superior Court, 27 Cal. App. 4th 809, 823–24, 33 Cal. Rptr. 2d 446, 454–55 (1994); *cf.* College Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 719, 8 Cal. 4th 1236A, 882 P.2d 894, 903, 34 Cal. Rptr. 2d 898, 906–07 (1994) (construing CODE CIV. PROC. § 425.13).

[329] All-West Design, Inc. v. Boozer, 183 Cal. App. 3d 1212, 1226, 228 Cal. Rptr. 736, 744 (1986).

[330] CIV. CODE § 1691. Section 1691 further requires that the rescinding party offer to restore to the other party everything of value that the rescinding party received under the contract. CIV. CODE § 1691(b). But if the plaintiff has not previously given notice of rescission or offered to restore the benefits received under the contract, the service of a pleading seeking relief based on rescission is deemed to be such notice or offer.

of warranty in the sale of goods,[331] actions for violations of the Consumers Legal Remedies Act,[332] actions for libel or slander seeking general damages,[333] and actions for benefits conferred by mistake.[334]

§ 2.07 Actions for Damages Against Common Interest Development Builders

Civil Code section 1375 provides that before a homeowners association may commence an action for damages against the developer of a "common interest

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[331] COMM. CODE § 2607(3)(a); Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 525 P.2d 88, 92, 115 Cal. Rptr. 648, 652 (1974). The buyer must give notice within the time specified in the contract or, if the contract is silent on this subject, within a reasonable time after the buyer discovers the breach.

[332] CIV. CODE § 1782(a). Thirty days or more before filing an action for damages pursuant to this statute, the plaintiff must notify the defendant and demand that he correct, repair, replace, or otherwise rectify the goods or services alleged to have violated the statute. The notice must be in writing and must be sent by certified or registered mail, return receipt requested. The notice and demand requirement does not apply to actions for injunctive relief. CIV. CODE § 1782(d).

[333] CIV. CODE § 48a(1); Pridonoff v. Balokovich, 36 Cal. 2d 788, 790, 228 P.2d 6, 7–8 (1951). In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, the plaintiff may not recover more than special damages (defined as "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel") unless he demanded a correction and the defendant did not publish or broadcast one. The plaintiff must serve the publisher with a written notice specifying the statements claimed to be libelous and demand that the defendant correct them. The plaintiff must serve his notice and demand within 20 days after knowledge of the publication or broadcast of the statements he claims are libelous.

[334] *Cf.* Mitchell v. California Pac. Title Ins. Co., 79 Cal. App. 45, 52, 248 P. 1035, 1038 (1926). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 1:843–:855 (1996).

development"[335] (referred to in the statute as the "builder") for defects in the design or construction of the development, the association must meet the certain requirements.

[A] Written Notice to the Developer

The association must give the developer written notice, including all of the following:

- a preliminary list of the defects
- a summary of any survey of the home owners or of a questionnaire distributed to the home owners, if a survey was conducted or a questionnaire was distributed to determine the nature and extent of the defect
- a summary of the results of any testing conducted to determine the nature and extent of the defects or the actual test results.[336]

The notice commences the running of a period of time not to exceed 90 days during which the association and the developer must attempt to settle the dispute or to agree to submit the dispute to alternative dispute resolution. The association and the builder may agree to a longer period.[337] The notice tolls, for 150 days, the running of all statutory and contractual limitations on actions against all parties who

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[335] A "common interest development" is a community apartment project, a condominium project, a planned development, or a stock cooperative. CIV. CODE § 1351(c).

[336] CIV. CODE § 1375(b)(1). The communications required by CIV. CODE § 1375 must be served by mail, by personal service, or by substituted service. *Id.* § 1375(f)(2).

[337] CIV. CODE § 1375(b)(2).

may be responsible for the damages claimed. The association and the developer may agree in writing to a longer toling period.[338]

[B] The Developer's Rights to Presuit Discovery.

Within 25 days of the association's delivery of notice of its claim, the developer may request in writing to meet and confer with the board of directors of the association, to inspect the project, and to conduct testing in order to evaluate the claim. Unless the developer and the association agree otherwise, the meeting must occur no later than ten days from the date of the request, at mutually agreeable time and place. The discussions at the meeting are privileged communications and are not admissible in evidence in any civil action unless the association and the builder consent to their admission. The purpose of the meeting is to discuss

- the nature and extent of the claimed defects
- proposed methods of repair, to the extent that there is sufficient information
- proposals for submitting the dispute to alternative dispute resolution
- requests from the developer to inspect the project and conduct testing.[339]

If the developer requests a meeting with the association's board of directors, he must deliver to his liability insurer a copy of the association's notice of claim. The notice

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[338] CIV. CODE § 1375(b)(3)(A). This tolling provision applies to claims for indemnity applicable to the claim. *Id.* The developer may cancel the tolling of the statute of limitations at any time. The tolling of all application limitations periods ceases 60 days after the developer delivers written notice of cancellation to the association. *Id.* § 1375(b)(3)(B).

[339] CIV. CODE § 1375(c)(1). The developer's right to test includes testing that may cause physical damage to any property in the development. *Id.*

to the insurer triggers the insurer's duty to defend. The developer must notify the association when he gives notice to any insurer.[340]

If the association inspected or tested the premises before it gave notice of its claim to the developer, the association must make available for inspection and testing the areas it inpsected and tested. The developer must complete his inspection and testing within 15 days, unless the parties agree to a longer period. The manner in which the inspection and testing are to be conducted and the extent of any inspection and testing beyond what the association conducted before sending its notice of claim are to be set by agreement of the association and the developer.[341]

The developer must pay for its inspection and testing, must restore the property to the condition in which it existed before the testing, and must indemnify the association and the owner of any separate interest in the property for any damage caused by the testing.[342] The developer must conduct inspections of occupied separate interests in accordance with the governing documents of the association, unless the owner of a separate interest agrees otherwise. If the governing documents do not provide for inspection and testing of separate interests, the developer must conduct his inpsection and testing in a manner and at a time agreed to by the owner of the separate interest.[343] Unlike the discussions between the developer and the association, the results of the developer's inspection and testing are not inadmissible.[344]

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[340] CIV. CODE § 1375(c)(2).

[341] CIV. CODE § 1375(d)(1).

[342] CIV. CODE § 1375(d)(2).

[343] CIV. CODE § 1375(d)(3).

[C] The Developer's Settlement Offer

Within 30 days of the completion of his inspection and testing (or within 30 days of the meeting if he did not inspect or test) the developer must submit to the association a written settlement offer, including a concise explanation of the specific reasons for the terms of the offer. The offer may include an offer to submit the dispute to alternative dispute resolution.[345] The developer must also submit

- a request to meet with the board to discuss the settlement offer
- a statement that the developer has access to sufficient funds to satisfy the conditions of the settlement offer
- a summary of the developer's test results unless the association provided the developer its actual test results, in which case the developer must turn over his actual test results.[346]

No less than ten days later, the developer and the board must meet and confer to discuss the settlement offer.[347]

[D] Rejection of the Developer's Settlement Offer

If the board rejects the developer's settlement offer, the board must hold a meeting of the members of the association at least 15 days before suing the developer. At least 15 days before the meeting, the board must send the members written notice of the meeting, including

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[344] CIV. CODE § 1375(d)(4).

[345] CIV. CODE § 1375(e)(1)(B).

[346] CIV. CODE § 1375(e)(1)(A), (C), (D).

[347] CIV. CODE § 1375(e)(3).

- the purpose of the meeting to discuss problems that may lead to the filing of a lawsuit
- the options available to address the problems, including the filing of a lawsuit
- the developer's settlement offer, including any offer to submit the dispute to alternative dispute resolution
- the association's preliminary list of defects provided to the developer
- a list of any other documents provided to the developer
- information about where and when members may inspect the documents.

The discussions at the meeting and the matters sent to the members are privileged communications and are not admissible in evidence without the association's consent.[348]

If the developer breaches his obligations under section 1375, thereby relieving the association of its obligations before those obligations have been performed, the association may sue the developer 30 days after sending a written notice to the members including

- the preliminary list of defects provided to the developer
- a list of any other documents provided to the developer
- information about where and when members of the association may inspect those documents
- the options available to address the problems, including a lawsuit
- a statement that if five percent of the members request a special meeting to

[348] CIV. CODE § 1375(g)(1).

discuss the matter within 15 days of the notice, the association will hold a meeting of the members unless the association's governing documents provide for a different procedure for calling a special meeting of the members.[349]

[E] Judicial Review

If the association files suit against the developer without complying with section 1375, the developer may file a verified application for a stay. The developer must file the application no later than 90 days after he has served his answer to the plaintiff's complaint.[350] The court must schedule a hearing within 21 days of the application to determine whether the association substantially complied with the statute. The court, in its discretion, may determine the issue on affidavits or upon oral testimony.[351] If the court finds that the association did not substantially comply with the statute, the court stays the action for up to 90 days to allow the association to establish substantial compliance.[352] If the association does not establish substantial compliance, the court may dismiss the action without prejudice.[353]

§ 2.08 Actions to Enforce Common Interest Development Covenants and Restrictions

Civil Code section 1354 requires an attempt at alternative dispute resolution before initiating litigation to enforce the covenants and restrictions relating to a

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[349] CIV. CODE § 1375(g)(2).

[350] CIV. CODE § 1375(h)(1).

[351] CIV. CODE § 1375(h)(2).

[352] CIV. CODE § 1375(h)(3)(A).

[353] CIV. CODE § 1375(h)(3)(B).

"common interest development."[354] Before the filing of a civil action by either the association that manages the development or an owner or a member of the development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not exceeding $5,000, related to the enforcement of the governing documents, the parties are required to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The parties are relieved of this requirement if the statute of limitations would run within 120 days.[355]

The form of alternative dispute resolution chosen may be binding or nonbinding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. The Request for Resolution must include (1) a brief description of the dispute between the parties, (2) a request for alternative dispute resolution, and (3) a notice that the party receiving the Request for Resolution is required to respond within 30 days of receipt or the Request will be deemed rejected. One serves a Request for Resolution the same way one serves a complaint in a small claims action.[356] Parties receiving a Request for Resolution have 30 days to accept or reject alternative dispute resolution. If a party does not accept within 30 days, he is deemed to have rejected the Request. If alternative dispute resolution is accepted , the alternative dispute

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[354] A "common interest development" is a community apartment project, a condominium project, a planned development, or a stock cooperative. CIV. CODE § 1351(c).

[355] CIV. CODE § 1354(b).

[356] *See* CODE CIV. PROC. § 116.340.

resolution must be completed within 90 days of receipt unless the parties agree otherwise. [357]

A party filing an action to enforce the covenants and restrictions relating to a common interest development must file with the complaint a certificate stating that alternative dispute resolution has been completed. The failure to file a certificate is grounds for a demurrer or a motion to strike unless the plaintiff certifies in writing that one of the other parties to the dispute refused alternative dispute resolution before the filing of the complaint, that preliminary or temporary injunctive relief is necessary, or that alternative dispute resolution is not required because the limitation period for bringing the action would have run within the 120-day period following the filing of the action, or the court finds that dismissal of the action would result in substantial prejudice to one of the parties.[358]

§ 2.09 Actions Against Foster Parents

The legislature has established the Foster Family Home and Small Family Home Insurance Fund to pay on behalf of foster families claims of foster children and their guardians resulting out of the foster-care relationship and the provision of foster-care services.[359] The fund is liable for claims of foster children and their guardians for damages "arising from, and peculiar to, the foster-care relationship and the provision of foster-care services."[360] No one may bring a civil action against a

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[357] CIV. CODE § 1354(b).

[358] CIV. CODE § 1354(c).

[359] HEALTH & SAFETY CODE § 1527.1.

[360] HEALTH & SAFETY CODE § 1527.2.

foster parent for which the fund is liable unless he has first filed a claim against the fund and

- the fund has rejected the claim, or
- the fund has paid the claim but the plaintiff claims damages exceeding the payment.[361]

Within the applicable limitations period the plaintiff must file the claim in accordance with procedures and on forms prescribed by the State Department of Social Services or its designated contract agency.[362] The departments has 180 days within which to approve or reject a claim.[363] If the plaintiff does submit his claim in a timely manner, he has no recourse against the fund.[364] Although the substantial compliance doctrine may excuse technical deficiencies in a claim,[365] a Tort Claims Act claim filed with a local public entity or with the State Board of Control does not constitute substantial compliance with the fund's claim notice requirement.[366]

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[361] HEALTH & SAFETY CODE § 1527.6(d). The statute's constitutionality was upheld in Hill v. Newkirk, 26 Cal. App. 4th 1047, 1058–60, , 31 Cal. Rptr. 2d 859, 867–68 (1994). The fund is not required to file a statement with the Roster of Public Agencies. Becerra v . Gonzales, 32 Cal. App. 4th 584, 592, 38 Cal. Rptr. 2d 248, 253–54 (1995). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1:660.2 (1996).

➡Tort Claimts Act: Unidentified Entities

[362] HEALTH & SAFETY CODE § 1527.6(a), (b). "Designated contract agency" refers to another state agency with which the department has contracted to set up and operate the fund. *Id.* § 1527.1; Hill v. Newkirk, 26 Cal. App. 4th 1047, 1056, 31 Cal. Rptr. 2d 859, 865–66 (1994).

[363] HEALTH & SAFETY CODE § 1527.6(c).

[364] HEALTH & SAFETY CODE § 1527.6(b).

[365] Becerra v. Gonzales, 32 Cal. App. 4th 584, 592–93, 38 Cal. Rptr. 2d 248, 254 (1995).

[366] Becerra v. Gonzales, 32 Cal. App. 4th 584, 590–92, 38 Cal. Rptr. 2d 248, 252–53 (1995) (claim filed with State Board of Control); Hill v. Newkirk, 26 Cal. App. 4th 1047, 1057, 31 Cal. Rptr. 2d 859, 866 (1994) (claim filed with county). *Becerra* left open the question whether the doctrine would apply to a claim submitted to the State Board of Control which clearly set forth the plaintiff's assertion of a claim against the fund. *Bercerra*, 32 Cal. App. 4th at 593 n.5, 38 Cal. Rptr. 2d at 254 n.5.