
In the
Supreme Court
of the
State of California

S139237

CITY OF STOCKTON et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent,

CIVIC PARTNERS STOCKTON, LLC,

Real Party in Interest.

CALIFORNIA COURT OF APPEAL · THIRD APPELLATE DISTRICT · NO. C048162
SUPERIOR COURT OF SACRAMENTO · HON. JEFFREY GUNTHER · 03AS00193

OPENING BRIEF ON THE MERITS

MALCOLM A. MISURACA (33553)
LAW OFFICES OF MALCOLM A. MISURACA
1118 Ferdinand Street
Coral Gables, Florida 33134
(415) 305-5485 Telephone
(800) 787-4719 Facsimile

*Attorney for Real Party in Interest,
Civic Partners Stockton, LLC*



TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. Issues for Review	1
II. Statement of the Case	3
A. Nature of the Case	3
B. Summary of Material Facts	4
III. Argument.....	16
A. <i>Confusion over whether contract is covered by the California Tort Claims Act is legitimate. It arises in several sources, but is traced ultimately to California Government Code § 814.....</i>	16
B. <i>There is no conflict between Zottman or Amelco, on the one hand, and Minsky and Holt, on the other. They have been comfortably reconciled for many decades</i>	37
C. <i>No claim under the tort claims act is required or equitable estoppel. Civic was entitled to a trial court hearing on estoppel.....</i>	45
D. <i>The city and agency’s cross complaint waived the tort claims act.....</i>	63
E. <i>The trial court erroneously ruled that the federal courts have exclusive jurisdiction over an issue of the ownership of copyrighted plans, but did not dismiss Civic’s restitution claims</i>	70

IV. Conclusion..... 71
CERTIFICATE OF COMPLIANCE..... 73
DECLARATION OF SERVICE

TABLE OF AUTHORITIES

CASES

<i>Alliance Financial v. City and County of San Francisco</i> , 64 Cal.App.4th 635 (1998)	<i>passim</i>
<i>Amelco Electric v. City of Thousand Oaks</i> , 21 Cal.4th 228 (2002)	1, 37, 45
<i>Argenti v. City of San Francisco</i> , 16 Cal. 255 (1860)	40
<i>Baillergeon v. Department of Water & Power</i> , 69 Cal.App.3d 670 (1977).....	69
<i>Baines Pickwick Limited v. City of Los Angeles</i> , 72 Cal. App. 4th 298 (1999)	<i>passim</i>
<i>Barner v. Leeds</i> , 24 Cal.4th 676 (2000)	17
<i>Bertone v. City and County of San Francisco</i> (1952) 111 Cal.App.2d 579.....	35, 36, 41
<i>Bertorelli v. City of Tulare</i> , 180 Cal.App.3d 432 (1986).....	46, 52, 53
<i>California Cigarette Concessions v. City of Los Angeles</i> , 53 Cal.2d 865 (1960).....	51, 53
<i>City of Long Beach v. Mansell</i> , 3 Cal.3d 462 (1970)	59, 60
<i>City of Saratoga v. Huff</i> , 24 Cal.App.3d 978 (1972).....	20, 41

<i>Coleman v. State Personnel Board</i> , 52 Cal.3d 1102 (1981).....	23
<i>County of Los Angeles v. Byram</i> , 36 Cal.2d 694 (1951).....	20, 41
<i>Crow v. State of California</i> , 222 Cal.App.3d 192 (1990).....	23, 24
<i>Dolch v. United California Bank</i> , 702 F.2d 178 (9th Cir. 1983).....	70
<i>Driscoll v. City of Los Angeles</i> , 67 Cal.2d 297 (1967).....	53
<i>E.H. Morrill v. State of California</i> , 65 Cal.2d 786 (1967).....	3, 17, 22–24
<i>Elkins v. Derby</i> , 12 Cal.3d 410 (1974).....	69
<i>Farrell v. County of Placer</i> , 23 Cal.2d 624 (1944).....	47, 49, 52, 59
<i>First Street Plaza Partners v. City of Los Angeles</i> , 65 Cal.App.4th 650 (1998)	40, 57, 58
<i>Foster v. McFadden</i> , 30 Cal.App.3d 943 (1973).....	50, 62
<i>Frederichsen v. City of Lakewood</i> , 6 Cal.3d 353 (1971)	47, 50, 51, 53, 58
<i>Gonzales v. State of California</i> , 68 Cal.App.3d 621 (1977).....	23, 24, 35

<i>Green v. State Center Comm. College,</i> 34 Cal.App.4th 1348 (1995)	52, 62
<i>Grosso v. Mirimax Film Corp.,</i> 383 F.3d 965 (9th Cir. 2004)	71
<i>Harris v. State Personnel Board,</i> 170 Cal.App.3d 639 (1985), overruled on other grounds	23
<i>Hart v. County of Alameda,</i> 76 Cal.App.4th 766 (1999)	<i>passim</i>
<i>Herzo v. City of San Francisco,</i> 33 Cal. 134 (1867)	41
<i>Hibbard v. City of Anaheim,</i> 162 Cal.App.3d 270 (1984)	31
<i>Holt v. Kelly,</i> 20 Cal.3d 560 (1978)	<i>passim</i>
<i>John R. v. Oakland Unified School Dist.,</i> 48 Cal.3d 438 (1989)	46, 47, 50, 51, 53, 65
<i>Lacy v. City of Monrovia,</i> 44 Cal.App.3d 152 (1974)	46, 51, 53
<i>Leach v. Dinsmore</i> (1937) 22 CA2dSupp 735	35
<i>Lipman v. Brisbane Elem. School Dist.,</i> 55 Cal.2d 224 (1961)	17
<i>Loehr v. Ventura County Comm. College Dist.,</i> 147 Cal.App.3d 1071 (1983)	<i>passim</i>

<i>Long v. City of Los Angeles</i> , 68 Cal.App.4th 782 (1988)	31
<i>Longshore v. County of Ventura</i> , 25 Cal.3d 14 (1979)	22–24
<i>Los Angeles Dredging Co. v. City of Long Beach</i> , 210 Cal. 348 (1930)	40
<i>McCracken v. City of San Francisco</i> , 16 Cal. 591 (1860) (Field, C.J.)	20, 40
<i>Metropolitan Life Ins. Co. v. Deasy</i> , 41 Cal.App. 667 (1919)	41
<i>Miller v. McKinnon</i> , 20 Cal.2d 83, 91 (1942).....	19, 40, 59
<i>Minsky v. City of Los Angeles</i> , 11 Cal.3d 113 (1974).....	<i>passim</i>
<i>Muskopf v. Corning Hosp. Dist.</i> , 55 Cal.2d 211 (1961).....	17
<i>Myers v. County of Orange</i> , 6 Cal.App.3d 626 (1970)	52
<i>National Auto. & Cas. Ins. Co. v. Pitchess</i> , 35 Cal.App.3d 62 (1973)	23, 24
<i>Ocean Services Corporation v. Ventura Port District</i> , 15 Cal.App.4th 1762 (1993)	49, 52
<i>People v. San Bernadino High School Dist.</i> , 67 Cal.App. 67 (1919)	41

<i>Phillips v. Desert Hospital Dist.</i> , 49 Cal.3d 699 (1989).....	<i>passim</i>
<i>Pimental v. City of San Francisco</i> , 21 Cal. 351 (1963)	40
<i>Rand v. Andreatta</i> , 60 Cal.2d 846 (1964).....	46, 47, 50, 53, 65
<i>Reams v. Cooley</i> , 171 Cal. 150 (1915)	19, 40, 41
<i>Sachs v. City of Oceanside</i> , 151 Cal.App.3d 315 (1984).....	23
<i>San Diego Unified Port Dist. v. Superior Court</i> , 197 Cal.App.3d 843 (1988).....	46, 51, 53
<i>San Francisco Gas Co. v. City of San Francisco</i> , 9 Cal. 453 (1858)	40
<i>Santee v. Santa Clara County Office of Education</i> , 220 Cal.App.3d 701 (1990).....	51
<i>Schaefer Dixon Associates v. Santa Ana Watershed Project Auth.</i> , 48 Cal.App.4th 524 (1996)	52
<i>TrafficSchoolOnline v. Clarke</i> , 112 Cal.App.4th 736 (2003)	17, 30
<i>Trindade v. Superior Court</i> , 29 Cal.App.3d 857 (1973).....	67

Western Title Guaranty Co. v. Sacramento & San Joaquin Drainage Dist.,
235 Cal.App.2d 815 (1965)..... 23

Wheeler v. County of San Bernardino,
76 Cal.App.3d 841 (1978)..... 46, 52

Wilson v. San Francisco Redevelop. Agency,
19 Cal.3d 555 (1977)..... 17

Wilson v. Tri-City Hospital Dist.,
221 Cal.App.3d 441 (1990)..... 50, 54

Youngman v. Nevada Irrig. Dist.,
70 Cal.2d 240 (1959)..... 58, 59

Zottman v. City and County of San Francisco,
20 Cal. 96 (1862) 1, 20, 37, 40, 45

STATUTES

California Government Code § 812..... 31, 33

California Government Code § 814..... *passim*

California Government Code § 905.....21, 24, 31

California Government Code § 905.2..... 35, 36

California Government Code § 905.2(c)20, 21, 24, 31, 32

California Government Code § 910.8..... 46–48, 61

California Government Code § 911..... 48

Political Code § 688 21

OTHER AUTHORITIES

CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE
(CEB 2005) *passim*

CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE
(CEB 2006) 67

D. Dobbs, THE LAW OF REMEDIES: Damages, Equity,
Restitution § 4.3(3) at 385 (2d ed. 1993)..... 36

RECOMMENDATION OF THE CALIFORNIA LAW REVISION
COMMISSION RELATING TO SOVEREIGN IMMUNITY:
No. 1—Tort Liability of Public Entities and Public
Employees, 4 Calif. L. Rev. Comm. 807 (1963)..... 17, 25

RECOMMENDATION OF THE CALIFORNIA LAW REVISION
COMMISSION RELATING TO SOVEREIGN IMMUNITY:
No. 1—Tort Liability of Public Entities
and Public Employees, 5 Calif. L. Rev. Comm.
102 (1963)30, 35, 38, 41

RESTATEMENT OF RESTITUTION § 1(e) and Topic 2
(ALI 1937) 71

1 B. Witkin, SUMMARY OF CALIFORNIA LAW, *Contracts* § 116
(9th ed. 1989) 39

I. Issues for Review.

Issue No. 1. Did Civic owe a claim to the agency before suing the agency? *Baines Pickwick Limited v. City of Los Angeles*, 72 Cal. App. 4th 298, 310 (1999), argues that given the ongoing confusion and conflict in the courts of appeal on the reach of the tort claims act, the broad importance of this issue, and its likely recurrence, this issue should be settled by the California Supreme Court or the legislature.

Issue No. 2. *Minsky v. City of Los Angeles*, 11 Cal.3d 113,120-122 (1974), and *Holt v. Kelly*, 20 Cal.3d 560, 564-565 (1978), exempt claims for restitution from the tort claims act. Are Civic's claims for restitution barred as a matter of law, because *Zottman v. City and County of San Francisco*, 20 Cal. 96 (1862), and *Amelco Electric v. City of Thousand Oaks*, 21 Cal.4th 228 (2002), are argued not to permit quasi contract claims against municipalities?

Issue No. 3. The agency persuaded Civic to settle their potential dispute and give up its assets without filing a claim with the agency under the tort claims act.

When a public entity takes the initiative to negotiate for the consent of a private party to what would otherwise be a breach of contract by the agency, and when their negotiations result in a settlement, and when the private party transfers assets to the agency on its faith in the settlement, must the private party file a claim under the tort claims act before enforcing the settlement or suing for restitution when the agency disavows it, but will not restore the plaintiff's assets?

Issue No. 4. When a public agency is sued by a private party for restitution, and the agency cross-complains for breach of an express contract, does the agency waive a claim under the tort claims act for damages the private party claims against the agency on

the same facts and transactions alleged in the cross complaint?

Issue No. 5. Is a party barred from claiming ownership of copyrighted property in a state court, because federal courts have exclusive jurisdiction over copyright cases?

II. Statement of the Case.

A. Nature of the Case.

Civic Partners filed this action for declaratory relief and damages on January 14, 2003. The trial court overruled the agency's demurrer to the second amended complaint on August 30, 2004, because the California Tort Claims Act does not require a claim for breach of contract. The trial court (Gunther, J.) cited *E.H. Morrill v. State of California*, 65 Cal.2d 786 (1967).

The agency petitioned for mandate on October 28, 2004. The court of appeal issued a permanent writ on October 4, 2005.

Civic petitioned for rehearing October 18, 2005, which was denied October 21. The court of appeal filed its decision on October 4, 2005¹ and published it on October 28.²

This Court granted review on February 1, 2006.

B. Summary of Material Facts.

These facts are drawn from (1) Civic's pleadings and (2) its offer of proof in the court of appeal.³ The court of appeals did not acknowledge the offer of proof, which should have been given effect.⁴

In 2001, Civic held a redevelopment contract from the Stockton Redevelopment Agency to restore the old

¹ Exhibit 1 to this petition.

² Exhibit 2 to this petition.

³ Civic offer of proof, 12/21/2004, attachment 1 to this brief.

⁴ *Minsky v. City of Los Angeles*, 11 Cal.3d 113, 117 n. 2 (1974) (when demurrer might be sustained without leave to amend, court must "accept additional facts alleged by plaintiff in an augmented record on appeal.")

Hotel Stockton.⁵ The City of Stockton leased from Civic 65,000 square feet in the upper floors of the hotel, but withdrew from the lease in August 2001.⁶ Civic suggested to the agency that housing for the elderly should replace the city's lease and could be financed by federal and state housing tax credits.

The agency agreed to this substitution. Civic spent the last four months of 2001 revising its hotel plans, investing \$800,000 to market the housing tax credits, and preparing for the 2002 tax credit allocations.⁷

Steve Pinkerton was the agency's director of housing and development. He and his deputy Jim Rinehart were the perennial contacts the agency

⁵ Second amended complaint, petitioners' court of appeal exhibit 1, ¶ 3.

⁶ Second amended complaint, ¶¶ 4, 6.

⁷ Second amended complaint, ¶¶ 13-15.

appointed to deal with Civic.⁸ Mr. Pinkerton had authority under Civic's hotel contract to make substantial adjustments to it.⁹

Mr. Pinkerton approached Civic in December 2001 to request that Civic permit a new developer, Cyrus Youssefi, to take over the upper floors of the hotel and to make the tax credit application that Civic had prepared to make.¹⁰ Mr. Pinkerton's proposal surprised Civic, but he reassured Civic that if Civic consented the agency would restore Civic's investment in the hotel.¹¹

Civic with misgivings agreed to listen.¹² Mr. Pinkerton, Mr. Youssefi, and Youssefi's lawyer repeated the offer in Civic's offices in early January

⁸ Second amended complaint, ¶¶ 10, 19, 26.

⁹ Civic hotel agreement, ¶ 10.19, attached to exhibit 1 to petition for writ.

¹⁰ Second amended complaint, ¶ 17; Civic offer of proof, ¶¶ 1-4.

¹¹ Civic offer of proof, ¶ 4.

¹² Second amended complaint, ¶ 16.

2002. They reiterated that if Civic consented the agency would repay Civic's investment in the hotel.¹³

In late January 2002, Mr. Pinkerton emailed Civic¹⁴ that he was authorized to negotiate Civic's withdrawal from the upper floors of the hotel and to agree to Civic's reimbursement with city council approval.¹⁵ (Mr. Pinkerton appeared under the hotel contract to have that authority in any case.¹⁶)

Pinkerton said that the agency intended to honor Civic's hotel agreement. If Mr. Youssefi failed to get the necessary tax credits, the agency would return to Civic to work out the next step.¹⁷ Pinkerton suggested ways to repay Civic's investment and invited from Civic a

¹³ Civic offer of proof, ¶¶ 6-7.

¹⁴ Civic offer of proof, figure 1, attachment 1 here.

¹⁵ January 20 email, figure 1, Civic offer of proof.

¹⁶ Hotel agreement, ¶ 10.19. Mr. Pinkerton and his deputy were the perennial contacts the agency appointed to deal with Civic on every aspect of the hotel in implementing the hotel development agreement.

¹⁷ January 20 email, ¶ 8.

more detailed list of repayments.¹⁸

By February 19, 2002 Civic had agreed in principle to the transfer to Youssefi. Civic and the agency were negotiating the specifics. Mr. Pinkerton asked Civic to deliver its architectural plans to Youssefi, who must use them in his 2002 tax credit application, due no later than March 25.¹⁹

Civic was cautious. It had paid \$600,000 for its plans and had as yet no signed agreement from the agency to transfer the hotel to Mr. Youssefi and to restore Civic's investment.²⁰ Still, Mr. Youssefi needed the plans, and Civic had a long relationship with Mr. Pinkerton.

Civic and Mr. Pinkerton agreed in writing on February 19 that Civic was the owner of its plans. It would deliver them to the agency, but the agency would

¹⁸ January 20 email, ¶¶ 1, 3-5, final paragraph.

¹⁹ Second amended complaint, ¶ 23.

withhold them from Mr. Youssefi until the transfer agreement with the agency was signed.²¹ On March 15, Mike Herrero of Civic and Mr. Pinkerton agreed to the final list of Civic's hotel investments the agency would repay.²² The list was made up of cash and payments in kind, including(1) \$600,000 for Civic's architectural plans, (2) \$800,000 to repay Civic's tax credit investment, (3) an agreement to negotiate exclusively with Civic for redevelopment of the nearby B & M Building, and (4) repayment of Civic's hotel overhead.²³ The agency immediately made good several of its commitments of March 15.²⁴ It delivered to Civic the exclusive negotiating agreement on the B & M Building,

²⁰ Second amended complaint, ¶¶ 21, 23-24.

²¹ Offer of proof, February 19 letter, figure 2.

²² Offer of proof, March 15 memorandum, figure 3.

²³ Second amended complaint, ¶ 37; Civic offer of proof, figure 3.

²⁴ Second amended complaint, ¶ 27; Civic offer of proof, ¶ 14.

urging Civic to sign and return it to make planning commission and council agendas on April 1 and 2.²⁵ Civic signed and returned it.²⁶ Mr. Pinkerton told Civic that he had contacted Paramount Financial to arrange to repay Civic's \$800,000 investment.²⁷ He said the agency was aggregating the funds to repay Civic's overhead.²⁸ Sometime before March 25 the agency gave Civic's hotel plans to Mr. Youssefi—without authority, since no transfer agreement was in place. Youssefi used them in his tax credit application on March 25.²⁹ The agency gave Mr. Youssefi possession of the hotel in a new development agreement on March 19. This step

²⁵ Civic offer of proof, ¶ 16.

²⁶ Civic offer of proof, ¶ 16

²⁷ Civic offer of proof, ¶ 17.

²⁸ Civic offer of proof, ¶ 19.

²⁹ Second amended complaint, ¶ 30; Civic offer of proof, ¶ 18.

was at least problematic, because Civic's hotel agreement was still in force. Pinkerton had promised in his January 30 email that if Mr. Youssefi faltered in his tax credit application, the agency would honor Civic's hotel agreement.³⁰

Mr. Youssefi took over Civic's \$800,000 tax credit investment with Paramount.³¹ The agency had said that it was assembling the funds to repay Civic. The agency permitted Youssefi to claim as his own the \$800,000 and the remainder of Civic's hotel investments to prove Youssefi's credit-worthiness to the tax credit allotment board.³²

In April, the bankers on Civic's adjacent cinema project sought reassurance from the agency that the hotel project was alive and well. Mr. Pinkerton, Mike Herrero from Civic, and Civic's bankers discussed

³⁰ Second amended complaint, ¶ 28.

³¹ Second amended complaint, ¶ 37.

the hotel. Mr. Pinkerton confirmed that Civic had transferred the upper floors of the hotel to Mr. Youssefi and that the hotel was “on schedule.”³³

Nothing threatened this cooperation for the full six months after Mr. Pinkerton made his first approach to Civic in December 2001. In July 2002 the agency abruptly reversed itself, claiming that Civic had been in breach of its hotel agreement when Mr. Youssefi took over the hotel four months earlier.³⁴ The agency ejected Civic from the balance of the hotel.³⁵

The agency never repaid the investments on the March 15 list or returned the assets Civic had yielded to the agency or Mr. Youssefi on the faith of the

³² Second amended complaint, ¶ 36.

³³ Civic offer of proof, ¶ 21.

³⁴ Second amended complaint, ¶ 38; Civic offer of proof, ¶ 22.

³⁵ Second amended complaint, ¶ 38; Civic offer of proof, ¶ 23.

agency's agreement to make restitution to Civic.³⁶

The agency then attempted to take over Civic's lease with Kirkorian Theatres in the cinema project next door.³⁷ When this failed, the agency gave the cinema to the Barketts, a prominent Stockton family³⁸ and advertised for a cinema operator to replace Kirkorian.³⁹ Phil Harris of the Signature Theatres chain declared himself a candidate for operator, but complained to the Stockton newspaper that the agency had allowed so little time for response to its ad that there must be an undisclosed agreement between the agency and an insider.⁴⁰ To quiet Mr. Harris, the agency made him theater operator,⁴¹ and he ceased to

³⁶ Second amended complaint, ¶ 37; Civic offer of proof, ¶¶ 23-26.

³⁷ Second amended complaint, ¶ 43.

³⁸ Second amended complaint, ¶ 44.

³⁹ Second amended complaint, ¶ 44.

⁴⁰ Second amended complaint, ¶¶ 44-46.

⁴¹ Second amended complaint, ¶ 46.

complain. The agency terminated Civic.⁴²

The agency never repaid Civic for its hotel or cinema plans.⁴³ It went instead directly to Civic's architect without Civic's knowledge and took possession of Civic's original plans, working papers, drawings, and engineering calculations and designs.⁴⁴ The agency claimed it could not repay Civic for its plans because the agency did not know how much Civic had paid for them.⁴⁵ This amount had been nailed down in the earlier negotiations, not to mention that the agency was at this minute sitting with the architect and had only to ask what Civic had paid.

The agreement Civic had signed in March on the

⁴² Second amended complaint, ¶ 47.

⁴³ Civic offer of proof, ¶¶ 25-26.

⁴⁴ Civic offer of proof, ¶ 26; second amended complaint, ¶ 32.

⁴⁵ Second amended complaint, ¶ 34.

B & M Building disappeared;⁴⁶ the agency never set it before the planning commission or council.

Civic's hotel and cinema agreements and the letter signed on February 19 recited that Civic owned its architectural plans.⁴⁷ When Civic claimed ownership of the plans in the superior court, the agency responded that determining their ownership was within the exclusive jurisdiction of the federal courts, because the plans were copyrighted. The trial court (McMaster, J.) agreed and held that Civic could not claim ownership in the state courts.⁴⁸ The trial court invited Civic to sue on its express contracts,⁴⁹ which contained a provision that Civic owned its plans.⁵⁰ When Civic made this

⁴⁶ Civic offer of proof, ¶ 23.

⁴⁷ Second amended complaint, ¶ 33.

⁴⁸ Order on demurrer, 3/9/04, exhibit 3, Civic's return to petition.

⁴⁹ Order on demurrer, exhibit 6, Civic's return to petition.

⁵⁰ Hotel agreement § 9.7, exh. 1, second amended complaint.

claim⁵¹ the agency for the first time—15 months after the case began—claimed a defense under the tort claims act.

III. Argument.

A. Confusion over whether contract is covered by the California Tort Claims Act is legitimate. It arises in several sources, but is traced ultimately to California Government Code § 814.

The legislature enacted the California Tort Claims Act in 1963. It has been called by this name ever since, but the name is not official. The *Baines Pickwick* case suggested in 1999 changing the name of the act to the “California Government Claims Act,” to eliminate confusion over contract and tort,⁵² but that change would miss the act’s treatment of liability as well as claims and its almost complete preoccupation with tort. Calling the act exclusively a “claims act” would likewise

⁵¹ Second amended complaint, ¶¶ 54-60.

⁵² *Baines Pickwick Limited v, City of Los Angeles*, 72 Cal. App.4th 298, 304 (1999).

be a play on ambiguity, because a claim may be the cause of action or the threat to sue.

The leading text and countless cases call the act the “California Tort Claims Act.”⁵³ This was inevitable.

The California Law Revision Commission and Professor Arvo Van Alstyne of UCLA invariably described their subject as government torts against the discarded background of sovereign immunity.⁵⁴ The *Muskopf* and *Lipman* cases,⁵⁵ which began the upheaval over sovereign immunity, dealt only in tort. The tort claims

⁵³ See, e.g., *Barner v. Leeds*, 24 Cal.4th 676, 682 (2000); *Wilson v. San Francisco Redevelop. Agency*, 19 Cal.3d 555, 557 (1977); *E. H. Morrill v. State of California*, 65 Cal.2d 787 (1967); *TrafficSchoolOnline v. Clarke*, 112 Cal.App.4th 736 (2003); CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE §§ 1.4, 1.40 (CEB 2005).

⁵⁴ See, e.g., RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION RELATING TO SOVEREIGN IMMUNITY: No. 1—Tort Liability of Public Entities and Public Employees, 4 Calif. L. Rev. Comm. 807 (1963).

⁵⁵ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211 (1961); *Lipman v. Brisbane Elem. School Dist.*, 55 Cal.2d 224 (1961).

act contains rare and scattered references to contract, but this is a word here and there among thousands of words on respondeat superior, dangerous conditions of public property, early and late claims on torts, payment of judgments in tort, and thousands more words on the minute applications of these doctrines to levees, aqueducts, inherently dangerous places, emergency medical care, fire suppression, mental patients, the spread of disease, inmates of prisons and jails, police protection, recreation in hazardous and remote places, unpaved roads, public beaches and lifeguards, land failures from natural conditions, traffic signals under the control of an emergency vehicle, failures to inspect property, government licensing and permits, and all of these subjects when done for the public by someone other than a public employee.⁵⁶

⁵⁶ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE chapters 11-12 (CEB 2005).

Professor Van Alstyne turned occasionally to contract, arguing that contracts did not warrant routine pre-suit claims, and saying they posed only “a somewhat intermediate problem”⁵⁷ in the tort claims act. A local public entity is reasonably expected to know what contracts it has made, to have made them in writing with board or council approval, to administer them in an organized way, and to know how much it owes on them. A public contract made in violation of the prescribed statutory “mode of contracting” will not be enforced, regardless whether a claim is filed under the claims act.⁵⁸ If a public contract becomes troubled, it is likely to attract the early attention of risk management.

⁵⁷ *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635, 642 (1998).

⁵⁸ *Reams v. Cooley*, 171 Cal. 150, 153-154 (1915); *Miller v. McKinnon*, 20 Cal.2d 83, 91 (1942).

Implied contracts might sometimes be litigated, but an illegal implied contract will not be enforced with or without a tort claims act claim.⁵⁹ Claims in express contract are a breed apart. Only “express contract” is mentioned in the claims provisions of the act and then only for claims against the state.⁶⁰

Contract cases stand in contrast to the slip-and-fall or the auto accident, to the dangerous condition of

⁵⁹ *Zottman v. City of San Francisco*, 20 Cal. 96 (1862). When an illegal public contract that does not violate the “mode of contracting” or a contract implied in law results in unjust enrichment of the public entity, it will be enforced by compelling restitution to the innocent private party. *McCracken v. City of San Francisco*, 16 Cal. 591 (1860) (Field, C.J.); *County of Los Angeles v. Byram*, 36 Cal.2d 694, 698 (1951); *City of Saratoga v. Huff*, 24 Cal.App.3d 978, 997-998 (1972).

⁶⁰ Calif. Gov’t. Code § 905.2(c).

public property or the hazardous scenic easement, to the errant public employee or the break of a levee or dam—where warning of a potential tort is the exception and where negligence leaves not much evidence behind and presents a delayed opportunity to investigate.

The tort claims act satisfied neither Professor Van Alstyne’s misgivings about contract nor the demand for a claim on every dollar. The act is silent on contract in Government Code § 905 on claims to local public entities. Government Code § 905.2(c) demands a claim to the state only on “express contract.”

Professor Van Alstyne would have said this was backwards, because it is probably the government’s implied contracts, not its express contracts, that would profit from a pre-suit claim.⁶¹ As the act has been

⁶¹ The focus on express or implied contracts has a long and murky history in California law. In one three year period, for example, Political Code § 688, a precursor twice-removed to section 905.2(c), switched back and forth between claims on express contract, implied contract, and both express and implied contracts.

sorted out, the contract implied in law requires no claim;⁶² some courts of appeal miss the distinction between contracts implied in law and in fact and the distinction between claims to the state and to a local public entity. These cases erroneously conclude that every contract, express or implied, requires a claim.⁶³ The CEB does badly here, as well.⁶⁴ Early cases began to cement a reading of the tort claims act that it does not apply in contract. In *E. H. Morrill*,⁶⁵ relied on by the trial judge here, and in *Longshore v. County of Ventura*,⁶⁶ this Court held:

⁶² *Minsky v. City of Los Angeles*, 11 Cal.3d 113, 120-121 (1974); *Holt v. Kelly*, 20 Cal.3d 560, 564-565 (1978).

⁶³ *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635, 642 (1998). This language appears in subsequent cases on this issue, including the opinion of the court of appeal here, all of which adopt the error in *Alliance Financial*.

⁶⁴ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 5.9 (CEB 2005).

⁶⁵ *E. H. Morrill v. State of California*, 65 Cal.2d 787 (1967).

⁶⁶ *Longshore v. County of Ventura*, 25 Cal.3d 14 (1979).

The shield provided by the Tort Claims Act expressly excluded actions arising on contract. [§ 814; *E.H. Morrill Co. v. State of California* (1967), 65 Cal.2d 787, 793. . . .] A claim for compensation for services already performed is contractual, and thus is exempt [citing cases].⁶⁷

This language sponsored a line of court of appeal cases (*Pitchess, Gonzales, Harris, Sachs, and Western Title*⁶⁸) that hold contract actions do not require pre-suit claims under the act. The cases that reach the opposite result (*Hart, Loehr, Crow, Baines Pickwick, and Alliance Financial*⁶⁹) reject the *Pitchess/Gonzales* line of

⁶⁷ *Longshore*, 25 Cal.3d at 23.

⁶⁸ *National Auto. & Cas. Ins. Co. v. Pitchess*, 35 Cal.App.3d 62 (1973); *Gonzales v. State of California*, 68 Cal.App.3d 621, 628 (1977); *Harris v. State Personnel Board*, 170 Cal.App.3d 639, 643 (1985, overruled on other grounds, *Coleman v. State Personnel Board*, 52 Cal.3d 1102, 1119 (1981); *Sachs v. City of Oceanside*, 151 Cal.App.3d 315, 321 (1984); *Western Title Guaranty Co. v. Sacramento & San Joaquin Drainage Dist.*, 235 Cal.App.2d 815, 820 (1965).

⁶⁹ *Hart v. County of Alameda*, 76 Cal.App.4th 766, 778 (1999); *Loehr v. Ventura County Comm. College Dist.*, 147 Cal.App.3d 1071, 1079 (1983); *Crow v. State of California*, 222 Cal.App.3d 192 (1990); *Baines Pickwick Limited v. City of Los Angeles*, 72 Cal.App.4th 298, 305 (1999); *Alliance Financial v.*

cases by ignoring it, by referring to it as “the earlier cases,” or by holding that it misses the distinction between liability or immunity and claims. The *Hart/Loehr* line argues that *Morrill* and *Longshore* dealt in immunity, not claims, because Government Code § 814 of the act, invoked in *Morrill* and *Longshore* and the *Pitchess/Gonzales* line, applies only to part 2 of the act.⁷⁰ They focus, as well, on the phrase “money or damages” in sections 905 and 905.2(c) in the claims section in the act, to which we will turn in a moment.⁷¹

What the *Hart/Loehr* cases miss is an accurate meaning of section 814. This is the meaning that applies section 814 beyond part 2 on liability and to every corner of the act. Here is section 814 as it

City and County of San Francisco, 64 Cal.App.4th 635, 641-642 (1998).

⁷⁰ *Crow v. State of California*, 222 Cal.App.3d 192, 198 (1990); *Loehr v. Ventura County Comm. College Dist.*, 147 Cal.App.3d 1071, 1079 (1983).

⁷¹ *Alliance Financial v. City and County of San Francisco*,

appears in Deering's and West:

§ 814. Statute's inapplicability to contractual liability or non-monetary relief. Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee. Added Stats 1963 ch 1681.

Titles to statutes added by legal publishers are ordinarily of little impact, but in this case the title makes a good claim on authority. The legislative note to section 814, following the law revision commission report,⁷² provides in part:

The doctrine of sovereign immunity has not protected public entities in California from liability arising out of contract. This section makes it clear that this statute has no effect on the contractual liability of public entities or public employees.

64 Cal.App.4th 635, 641 (1998).

⁷² RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION RELATING TO SOVEREIGN IMMUNITY: *No. 1—Tort Liability of Public Entities and Public Employees*, 4 Calif. L. Rev. Comm. 807, 836 (1963).

Deering's and West have keyed the title to section 814 to the word "statute" in the legislative note. The title says no more than the legislature said. If the "statute" excludes contract, the tort claims act excludes contract, or so it seems. The *Hart/ Loehr* cases entirely missed the legislative note and the title to section 814. The issue here is whether they were right to do so.

This question remains unanswerable except by return to the 1963 legislature. Few lawyers would think that to understand the tort claims act after 40 years means reading the Government Code and its legislative notes only in context with the original bills, but this is precisely what is necessary. We must read the act not as it was enacted, but as it was proposed.

The 1963 legislature enacted six bills to assemble the tort claims act.⁷³ Section 814 appeared in the first bill. Neither Professor Van Alstyne, the law revision

⁷³ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 1.45 (CEB 2005).

commission, the legislature or its staff, nor the state and local agencies, public groups, law professors, and lawyers who tracked the enactment of the tort claims act seemed to appreciate that when section 814 became part of Division 3.6 of the Government Code, a single tort claims act would become one statute assembled from six bills. The plain meaning of “statute” would be the tort claims act. From this inexplicable oversight, one case after another has foundered on section 814, and much injustice has probably been done in rejecting suits in contract, until *Baines Pickwick* saw in 1999 that the *Hart/Loehr* line of cases was not enough to put the issue to rest and would never be enough.⁷⁴

Section 814 contains another broken phrase—the reference to liability on contract “or . . . relief other than money or damages.” Deering’s and West read this as “non-monetary relief,” eliding the two words, to

⁷⁴ *Baines Pickwick Limited v. City of Los Angeles*, 72

distinguish it from recovery on contract.

On its face, the act distinguishes “money” from “damages,” but because the reader parses “money or damages” as redundant, the phrase elides to “monetary damages,”⁷⁵ or “non-monetary relief.”⁷⁶ This Court in *Phillips* speaks of “monetary damages.”⁷⁷ Nowhere in the *Hart/Loehr* line of cases is this disjunctive in section 814 given explicit attention. The *Hart/Loehr* line reads it as conjunctive or additive, holding that since the phrase is all-encompassing, contract must fall within the claims requirement, because it is certainly a case of “money or damages.”⁷⁸ These cases claim to draw support from the words

Cal.App.4th 298, 310 (1999).

⁷⁵ *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 701 (1989); *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635, 644 (1998).

⁷⁶ Calif. Gov’t. Code § 814 (title).

⁷⁷ *Phillips v. Desert Hospital*, 49 Cal.3d 699, 709 (1989).

⁷⁸ *Alliance Financial v. City and County of San Francisco*,

“express contract” in section 905.2(c), but they employ their own elision to say that this means that every contract, express or implied, state or local, is drawn into the tort claims act,⁷⁹ when 905.2(c) applies only to the state and speaks only of “express contract.”

The *Hart/Loehr* line applies a *diminuendo* to the *Minsky* and *Holt* line of cases,⁸⁰ which are discussed in the next section. Otherwise, *Hart/Loehr* would have to concede that “money or damages” does not mean “all money or damages.”

Minsky and *Holt* are restitution cases. They are filed usually to recover money for conversion of assets that passed into the hands of the defendant by mistake

64 Cal.App.4th 635, 642-644 (1998).

⁷⁹ *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635, 641 (1998); *Hart v. Alameda County*, 76 Cal.App.4th 766, 778-779 (1999)(citing *Alliance Financial*).

⁸⁰ *Minsky v. City of Los Angeles*, 11 Cal.3d 113 (1974); *Holt v. Kelly*, 20 Cal.3d 560 (1978).

or misadventure.⁸¹ They fall well within the rubric of “money or damages,” but are judicially exempted from the tort claims act, because no one is permitted “to profit from his own wrong.”⁸² “Money or damages,” Van Alstyne’s structure to add contract to the act, means some “monetary damages,” but not all, because equity has taken a hand.

The *Hart/Loehr* cases assert that *Holt* and *Minsky* have not been applied “outside the bailee context”⁸³ or “the criminal context.”⁸⁴ This sounds serious, but cannot be accurate. The “bailee context” is not the diminutive that was intended. A bailee is subject to the

⁸¹ *Minsky v. City of Los Angeles*, 11 Cal.3d 113, 120-121 (1974). Professor Van Alstyne took account of the liability of public entities for conversion, which he said was a tort that was waived to sue for restitution in *indebitatus assumpsit*. 5 Calif. L. Rev. Comm. 102, at 233 (1963).

⁸² *Holt v. Kelly*, 20 Cal.3d 560, 565 (1978).

⁸³ *TrafficSchoolOnline, Inc. v. Clarke*, 112 Cal.App.4th 736 (2003), citing *Hart v. Alameda County*, 76 Cal.App.4th 766, 780-781 (2000).

⁸⁴ *Hart v. Alameda County*, 76 Cal.App.4th 766, 780-781 (2000).

law of restitution, where the bailee's unjust enrichment by converting conditional possession of another's property into possession hostile to the owner entitles the owner to recover the property or to recover "money or damages" for its conversion or for breach of trust.⁸⁵ Other cases take *Minsky* and *Holt* at face value as applying the whole law of restitution.⁸⁶

Hart/Loehr cases wager everything on section 812 and on "money or damages" in sections 905 and 905.2(c). If section 814 reaches the entire tort claims act, it is not necessary for us to reach sections 905 and 905.2(c). *Alliance Financial* holds that the tort claims act applies to every claim "sounding in tort, contract, or any other legal theory."⁸⁷ This is untrue, if only

⁸⁵ *Minsky v. City of Los Angeles*, 11 Cal.3d 113, 120-121 (1974).

⁸⁶ *Long v. City of Los Angeles*, 68 Cal.App.4th 782 (1988); *Hibbard v. City of Anaheim*, 162 Cal.App.3d 270 (1984).

⁸⁷ *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635, 642 (1998).

because of section 905.2(c) (“express contract”) as a claim against the state only) and *Holt* and *Minsky*.

“Money or damages” means some money or damages, but not all because, to avoid unfair limits within the tort claims act, pressure is imposed to find a defense in estoppel against defending under the act or to find a waiver of its provisions. This creates an ad hoc equity that departs at times from otherwise neutral estoppel or waiver rules. See argument C, below. “Money or damages” appears redundant—the flaw that leads to elision—but not everyone agrees. A suit for damages is always a suit for money, but Professor Van Alstyne argued that a suit for “money” is not always a suit for damages.⁸⁸ “Money” due *on a contract*, he asserted, must be distinguished from “damages” for *breach* of contract.⁸⁹ This is thin, yet he based

⁸⁸ *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635, 644 (1998).

⁸⁹ *Baines Pickwick Limited v. City of Los Angeles*, 72

everything on it. It was the only signal he wrote into the tort claims act to suggest that contract would be drawn into the claims requirements despite section 812's universal application. This does not work. A suit for “money” due on a contract—once the money has not been not paid when due—is a suit for “damages” or “monetary damages.” Professor Van Alstyne has imposed too much on this single phrase. Treating the two words as disjunctive when the reader sees redundancy invites misunderstanding. It forces the disjunctive between them to convey by itself a grand scheme to incorporate contracts into the tort claims act, when he might simply have said that “this act requires claims in contract cases.” The reader rightfully rejects his taxonomy, because of section 814 and because money *equals* damages.

Cal.App.4th 298, 305 (1999).

The law seeks plain meanings, not a wink or a nod. Plain meaning is how people perceive words in context and juxtaposition. A policy presented as a single word makes the “trap for the unwary” that the claims act revolution meant to avoid. It produces competing lines of cases over forty years. Public officials come to understand that when claims are not filed on contracts, they are expected on thin grounds to reject these claims even when they know they are just. Every calling has its secrets, but this calling cannot be better off for it.

The California Continuing Education of the Bar two-volume series—California Government Tort Liability Practice—is perhaps the leading text on tort claims, but it perpetuates the error in the *Hart/Loehr* line and adds some loose language of its own.⁹⁰

⁹⁰ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE (CEB 2005).

The only tort claim for which need to comply appears to be doubtful is a claim for conversion of chattels, in which the plaintiff intends to sue on an assumpsit theory. See, e.g., *Bertone v. City and County of San Francisco* (1952) 111 CA2d 579 . . . (dictum); *Leach v. Dinsmore* (1937) 22 CA2dSupp 735 . . . [and] 5 Cal L Rev Comm'n Reports 233 (1963). The doubt arises because Govt C §905.2 requires the presentation of claims for money or damages “on express contract,” but is silent on implied contract actions such as assumpsit. . . . The failure to provide expressly for presentation of a contractual claim in other than “express contract” cases, however, tends to imply that compliance is not required if the wrongful conversion is pleaded on an assumpsit theory. See *Gonzales v. State* (1977) 68 CA3d 621 . . . (claims presentation not required when plaintiff is seeking recovery of illegally collected fines on implied contract theory).⁹¹

Holt and *Minsky* hold that actions in assumpsit are not for “money or damages,” even when the plaintiff’s property has been dissipated, and the plaintiff has nothing to sue for but money. The CEB does not take *Holt* and *Minsky* into account when it should, even

⁹¹ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 5.36 (CEB 2005).

when *Minsky* expressly adopted *Bertone*, which the CEB cites. It relies instead on section 905.2, which applies only to the state. Quasi contract exempt from the act in *Minsky* and *Holt* is not a contract claim in any case.

The implied in law contract is often called a quasi contract. The most important thing about this implied contract or quasi contract is that it is not a contract in any sense. It is a rule of law that requires restitution to the plaintiff of something that came into the defendant's hands but in justice belongs to the plaintiff.⁹²

The CEB can only recommend “adherence to the claims procedures in implied contract [sic] cases, pending definitive resolution of this statutory ambiguity.”⁹³

⁹² D. Dobbs, *THE LAW OF REMEDIES: Damages, Equity, Restitution* § 4.3(3) at 385 (2d ed. 1993).

⁹³ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 5.36 at 193 (CEB 2005).

B. There is no conflict between Zottman or Amelco, on the one hand, and Minsky and Holt, on the other. They have been comfortably reconciled for many decades.

The city and the agency argue that *Minsky v. City of Los Angeles*, 11 Cal.3d 113 (1974), and *Holt v. Kelly*, 20 Cal.3d 560 (1978), conflict with *Zottman v. City and County of San Francisco*, 20 Cal. 96 (1862), and *Amelco Electric v. City of Thousand Oaks*, 21 Cal.4th 228 (2002). By this they mean that there is never a right to restitution from a public entity, even when it breaches a trust and takes private property.

The implications of this claim, if only for the law of inverse condemnation—the “constitutional trespass” — would be enough to discard it. They led Professor Van Alstyne to argue that plaintiff may waive the conversion and sue in *indebitatus assumpsit*, avoiding the claims act. This is the rationale of *Holt* and *Minsky*. Here is what Professor Van Alstyne says:

The availability of assumpsit (a *contractual* remedy) . . . greatly simplifies the liability problem; for the doctrine of governmental immunity applies only to *torts*, and governmental entities generally are amenable to suit and liability in contract⁹⁴

Once again, even from Professor Van Alstyne, there is a concession that a contractual remedy may have no place in a tort claims act.

Civic gave up its assets to the redevelopment agency while they negotiated the settlement of the agency's potential breach of Civic's hotel agreement by imposing Mr. Youssefi on Civic. This was a breach the agency was determined to avoid. See argument D.

The agency approached Civic *before* Civic had a claim. The agency offered to restore Civic's investment in the hotel, while it rushed Mr. Youssefi into the hotel to meet the deadline to apply for federal and state tax credits. On the strength of the agency's apparent good

⁹⁴ 5 Calif. L. Rev. Comm. at 233-234 (1963).

faith, Civic transferred its hotel investments to the agency, or it allowed them to pass to Mr. Youssefi once the agency committed on February 19 not to give Civic's hotel plans to Youssefi until the agency and Civic had signed a binding transfer agreement. The agency gave the plans—and a great deal more of Civic's assets—to Mr. Youssefi with no such agreement in place. It then first performed, then repudiated, the settlement with Civic and converted Civic's assets in the bargain.

This wickedness makes out a textbook case of unjust enrichment—the conversion of another's assets, which have been delivered into the defendant's hands by mistake or in misapprehension of what the defendant intends.⁹⁵ Civic gave up rights and physical assets believing from what Mr. Pinkerton and Mr. Youssefi said that Civic would be given proper credit for the assets and that the tearing hurry was

⁹⁵ 1 B. Witkin, *SUMMARY OF CALIFORNIA LAW, Contracts* § 116, 118 (9th ed. 1989).

produced by Mr. Youssefi's need to replace Civic in time to apply for the housing tax credits.

On this evidence the city claims that *Zottman*⁹⁶ prohibits claims for restitution against cities. This is not accurate. The *Zottman* line of cases “ordinarily” or “generally” prohibits quasi contract against cities, but only when relief would permit the city or the plaintiff to circumvent the statutory “mode of contracting” imposed on the city, usually public bidding.⁹⁷ A line of cases equally as venerable as *Zottman* affirms as a matter of “natural justice” that a city has a duty not to convert the property of its citizens, and if it does, it must pay restitution.⁹⁸ Van Alstyne cites the same cases in

⁹⁶ *Zottman v. City of San Francisco*, 20 Cal. 96 (1862).

⁹⁷ *First Street Plaza Partners v. City of Los Angeles*, 65 Cal.App.4th 650, 655 (1998); *Miller v. McKinnon*, 20 Cal.2d 83, 87 (1942); *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 353 (1930); *Reams v. Cooley*, 171 Cal.150 (1915).

⁹⁸ *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453 (1858); *Argenti v. City of San Francisco*, 16 Cal. 255 (1860); *McCracken v. City of San Francisco*, 16 Cal. 591 (1860); *Pimental v. City of San Francisco*, 21 Cal. 351 (1963); *Herzo v. City of San*

discussing restitution against public entities.⁹⁹

Minsky and *Holt* exempt restitution from the tort claims act. The agency argues that this exception is “very limited” and that *Minsky* and *Holt* have not been applied “outside the bailee context.” This is error, as we have said earlier, if only because *Minsky* explicitly adopted *Bertone v. City and County of San Francisco*,¹⁰⁰ where the city accepted property in trust and converted it.

Francisco, 33 Cal. 134 (1867); *Reams v. Cooley*, 171 Cal. 150 (1915); *Metropolitan Life Ins. Co. v. Deasy*, 41 Cal.App. 667 (1919); *People v. San Bernadino High School Dist.*, 67 Cal.App. 67 (1919); *County of Los Angeles v. Byram*, 36 Cal.2d 694 (1951); *City of Saratoga v. Huff*, 24 Cal.App.3d 978 (1972).

⁹⁹ 5 Calif. L. Rev. Comm. 233 n. 50.

¹⁰⁰ 111 Cal.App.2d 579 (1952).

No one contends that Civic's hotel contract was void in the manner of its making. No one contends that the settlement agreement Civic negotiated with Mr. Pinkerton would have been void once it was adopted by the agency's board. Civic transferred assets on the faith of Mr. Pinkerton's statement that their agreement would be firm and final before Civic's assets went to Mr. Youssefi. The city and the agency *cross complain* on Civic's hotel development agreement, which they acknowledge survived its replacement in March 2002 by Mr. Youssefi's duplicative redevelopment contract on the same hotel.

If any contract in this case is void for the manner of its adoption, it is Mr. Youssefi's hotel contract, which was granted when Civic still held its hotel agreement.¹⁰¹

Mr. Youssefi came from nowhere.¹⁰² There was no RFP

¹⁰¹ Second amended complaint, ¶ 28.

¹⁰² Mr. Youssefi had never been associated with the hotel project, yet he showed up with Mr. Pinkerton fully

to find him or others, no public notice to Civic or other developers that a replacement for Civic was being sought, no public bidding, no warning to Civic until Mr. Youssefi was wrapped safely in the agency's arms and felt that he could appear in Civic's offices to introduce himself and announce that he was Civic's replacement. This was two months before he had a hotel redevelopment agreement signed by the agency's board—the *ne plus ultra* of the agency's argument against Civic's reliance on its correspondence with the agency.¹⁰³ The city and the agency successfully demurred to Civic's complaint when it sought to impose on them the commitment for restitution in the February 19 and March 15 settlement documents with Mr. Pinkerton. They demurred because these letters were not adopted by the city council or the

prepared to promise Civic the return of its investment. Civic Offer of Proof, ¶¶ 6-7.

¹⁰³ Civic offer of proof, ¶¶ 6-7.

agency board.¹⁰⁴

Civic's assets had passed amicably on the agency's commitment that Mr. Youssefi would not profit from them in the absence of a formal settlement agreement with Civic.¹⁰⁵ It was four months after Mr. Youssefi was installed in the hotel and in possession of Civic's assets before the agency repudiated its settlement with Civic and seized the remainder of its hotel rights.¹⁰⁶ In the interim the agency told Civic's bankers as late as mid-April that the settlement with the agency was firm.¹⁰⁷

¹⁰⁴ Tentative order, 3/9/04. page 2.

¹⁰⁵ February 19, 2002, Civic to Agency, Civic offer of proof, Figure 2.

¹⁰⁶ The agency went directly to Civic's architect and took possession under claim of right of Civic's original plans and all of the architect's working papers. Second amended complaint, ¶ 32; Civic offer of proof, ¶ 26.

The hotel agreement did not authorize the agency to do this, because it provided that the agency first repay to Civic its investment in the plans. Hotel agreement, exhibit 1 to petition for writ, ¶ 9.7. The agency avoided Civic's rights by its direct approach to the architect and did the same on the cinema. Second amended complaint, ¶ 32.

¹⁰⁷ Civic offer of proof, ¶ 21.

None of this because of *Zottman* or *Amelco* qualifies to escape restitution under *Holt* and *Minsky*.

If the agency claims the exception from the tort claims act in *Holt* and *Minsky* is “very limited,” the agency has not said why or described these limits. If the agency means that the exception is narrower than the law of restitution, it has cited no authority for that proposition. The cases that describe “the bailee context” embrace restitution.

C. No claim under the tort claims act is required for equitable estoppel. Civic was entitled to a trial court hearing on estoppel.

To avoid a breach of contract, the agency approached Civic before Civic had a claim against the agency. At the moment of Mr. Pinkerton’s approach in January 2002, all was well. He reassured Civic from the first that all would remain well. They negotiated for a settlement of a claim the agency hoped to avoid. Not until July 2002 did the agency disclose a different

intention, and by that time Civic's hotel and its assets were in Mr. Youssefi's hands.

Civic believes from these facts (1) that the agency is estopped to defend under the claims act and (2) that the agency waived a defense under the act by failing to advise Civic in writing under Government Code section 910.8 that it regarded their exchange of correspondence as an insufficient claim by Civic and required that Civic augment its claim.

In other cases of estoppel or waiver arising from contacts between the parties, there is a completed tort and a mature tort claim when those dealings begin.¹⁰⁸ The issue is then whether plaintiff before filing suit had sufficient interaction with the entity to satisfy the twin

¹⁰⁸ *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438 (1989); *Rand v. Andreatta*, 60 Cal.2d 846, 849-850 (1964); *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 701-702 (1989); *Lacy v. City of Monrovia*, 44 Cal.App.3d 152, 155 (1974); *Wheeler v. County of San Bernardino*, 76 Cal.App.3d 841 (1978); *San Diego Unified Port Dist. v. Superior Court*, 197 Cal.App.3d 843 (1988); *Bertorelli v. City of Tulare*, 180 Cal.App.3d 432, 438 (1986).

purposes of the tort claims act (estoppel) or had provided to the entity at least a deficient claim, which triggered the entity's duty under section 910.8 (defense-waiver).

What distinguishes estoppel from defense-waiver – both are forms of estoppel – is whether at least a deficient claim has been made to the entity. Equitable estoppel does not depend on a claim's having been filed;¹⁰⁹ defense-waiver depends on a deficient “claim,” but not on substantial compliance with the act.¹¹⁰ The “claim” for defense-waiver need not be the claim described in the tort claims act; it need not even be

¹⁰⁹ *Farrell v. County of Placer*, 23 Cal.2d 624, 627 (1944); *Frederichsen v. City of Lakewood*, 6 Cal.3d 353, 357 (1971); *Rand v. Andreatta*, 60 Cal.2d 846, 850 (1964); *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438 (1989).

¹¹⁰ *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 701-702 (1989). The court of appeals held that “only substantial compliance” was required for defense-waiver, which was error. Opinion, 16.

intended by the plaintiff as a claim under the act.¹¹¹ Thus the claimant might even be surprised hear that the agency regards their correspondence or other dealings as a claim.

Notice under section 910.8 yields time to absorb the agency's point of view and to react to it. If there is any hesitancy, a section 910.8 notice will get the claimant's attention. If the agency fails to give the 910.8 notice, it waives under section 911 any deficiency in the claim.

¹¹¹ *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 709 (1989).

The final issue is what results if while a claim or its equivalent is pending—or even when no claim has been filed—the agency takes advantage of the claimant in a material way. Thus, for example, an insurance adjuster for the agency leads the claimant not to file a claim by intimating that settlement will be at hand when certain particulars are ironed out.¹¹² Or the agency leads the claimant into a series of adjustments in their dealings that amount to detrimental reliance or even the loss of material assets¹¹³—as in this case.

This court's decisions in *Farrell*,¹¹⁴ *Phillips*,¹¹⁵

¹¹² *Farrell v. Placer County*, 23 Cal.2d 624, 627 (1944).

¹¹³ *Ocean Services Corporation v. Ventura Port District*, 15 Cal.App.4th 1762 (1993) (port director encouraged developer to continue performing while port district in breach).

¹¹⁴ *Farrell v. Placer County*, 23 Cal.2d 624 (1944).

¹¹⁵ *Phillips v. Desert Hospital District*, 43 Cal.3d 699 (1989).

Rand,¹¹⁶ *Frederichsen*,¹¹⁷ and *John R.*¹¹⁸ established the rules for equitable estoppel and defense-waiver.

One, equitable estoppel does not depend on the filing of a late or defective claim; in a proper case, no claim is required.¹¹⁹ Defense waiver is triggered by letters or some other writing whose purpose is to pass sufficient information to permit the agency to investigate the dispute.¹²⁰

Two, traditional equitable estoppel ordinarily requires “some affirmative act” on the part of the public

¹¹⁶ *Rand v. Andreatta*, 60 Cal.2d 846 (1964).

¹¹⁷ *Frederichsen v. City of Lakewood*, 6 Cal.3d 353 (1971).

¹¹⁸ *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438 (1989).

¹¹⁹ *Frederichsen v. City of Lakewood*, 6 Cal.3d 353, 358 (1971); *Rand v. Andreatta*, 60 Cal.2d 846, 849-850 (1964).

¹²⁰ *Wilson v. Tri-City Hospital Dist.*, 221 Cal.App.3d 441, 449 (1990); *Foster v. McFadden*, 30 Cal.App.3d 943, 947 (1973) (letter to be forwarded to insurer); *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 701-702, 710 (1989) (approving *Foster v. McFadden*).

entity,¹²¹ perhaps a breach of the trust or confidence that has been established with the claimant.¹²² Courts of appeal have nonetheless found equitable estoppel under the tort claims act when the agency has done nothing to draw the claimant in, yet has gained from the claimant or others sufficient facts to approximate a claim from the claimant.¹²³

Three, there need be no intent to file a claim or to comply with the act to raise an estoppel against

¹²¹ *John R. v. Oakland Unified School District*, 48 Cal.3d 438 (1989).

¹²² *Frederichsen v. City of Lakewood*, 6 Cal.3d 353, 358-360 (1971).

¹²³ *Lacy v. City of Monrovia*, 44 Cal.App.3d 152, 155 (1974) (claimant may rely on claim filed by another); *San Diego Port District v. Superior Court*, 197 Cal.App.3d 843 (1988) (same); *but see Santee v. Santa Clara County Office of Education*, 220 Cal.App.3d 701, 713 (1990) (actual knowledge of claim not sufficient to estop agency); *California Cigarette Concessions v. City of Los Angeles*, 53 Cal.2d 865, 871 (1960) (pre-tort claims act; cannot rely on allegations of unknown persons).

the agency.¹²⁴

Fourth, if the claimant receives assurances from the agency that the agency will redress the damages from the claim, the claimant need not engage counsel, perhaps for several months, after its dealings with the agency.¹²⁵

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, but instead to wait until the conflict has stabilized.¹²⁶

Fifth, not every element of traditional estoppel must be met; it is enough that the government acts in

¹²⁴ *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699 (1989); *Wheeler v. County of San Bernardino*, 76 Cal.App.3d 841 (1978); *Myers v. County of Orange*, 6 Cal.App.3d 626, 637 (1970).

¹²⁵ *Farrell v. County of Placer*, 23 Cal.2d 624, 627-628 (1944); *Ocean Services Corp. v. Ventura Port Dist.*, 15 Cal.App.4th 24, 32 (1993); *Bertorelli v. City of Tulare*, 180 Cal.App.3d 432 (1986); *but see, Green v. State Center Comm. College*, 34 Cal.App.4th 1348, 1358 (1995) (hiring lawyer not sufficient if lawyer does not threaten litigation); *Schaefer Dixon Associates v. Santa Ana Watershed Project Auth.*, 48 Cal.App.4th 524, 534 (1996) (same).

¹²⁶ *Ocean Services Corporation v. Ventura Port Dist.*, 15 Cal.App.4th 1762 (1993).

an “unconscionable manner” or merely gains sufficient information to investigate the claim.¹²⁷

Sixth, equitable estoppel and defense-waiver raise issues of fact, and they must be submitted for hearing and decision to the trial court.¹²⁸

The court of appeal did not discuss most of these rules. It dealt with equitable estoppel in a single paragraph and only with Civic’s claim that the failure to raise the claims act at the earliest opportunity creates an estoppel to rely on the act.¹²⁹ It dismissed the evidence for estoppel in the February 19 and March 15

¹²⁷ *Frederichsen v. City of Lakewood*, 6 Cal.3d 357, 359 (19971); see cases in which government does not act, yet estoppel arises, *e.g.*, *Lacy v. City of Monrovia*, 44 Cal.App.3d 152, 155 (1974); *San Diego Unified Port. Dist. v. Superior Court*, 197 Cal.App.3d 843 (1988); *Bertorelli v. City of Tulare*, 180 Cal.App.3d 432 (1986).

¹²⁸ *California Cigarette Concessions v. City of Los Angeles*, 53 Cal.2d 865, 868 ; *Rand v. Andreatta*, 60 Cal.2d 846, 850 (1964); *Driscoll v. City of Los Angeles*, 67 Cal.2d 297, 305 (1967); *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438 (1989)(remand for required hearing); *Bertorelli v. City of Tulare*, 180 Cal.App.3d 432 (1986) (uncontradicted evidence).

¹²⁹ Opinion, 16.

correspondence by stating that “Civic did not pursue a *cause of action* based on these alleged violations.”¹³⁰ This was a serious error. Civic had been denied a cause of action to sue directly on the February 19 and March 15 correspondence, but this did not mean that they were not (1) a source of estoppel to raise the claims act defense and (2) the facts demonstrating a right to restitution. See argument E. No case holds that to serve as an estoppel correspondence must constitute an independent cause of action. Letters in several cases have been sufficient to raise an estoppel without being independently sued on.¹³¹

The court of appeal rejected defense-waiver estoppel by limiting its consideration to the February 19 and March 15 correspondence—thus ignoring the

¹³⁰ *Ibid.* (emphasis added).

¹³¹ *Phillips v. Desert Hosp. Dist.*, 49 Cal.3d 699, 701-702 (1989); *Wilson v. Tri-City Hosp. Dist.*, 221 Cal.App.3d 441, 449 (1990); *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635 (1998) (letters and invoices).

agency's approach to Civic in its email of January 30.¹³²

The court complained that they lacked “the date, place, and other circumstances of the occurrence,” when the correspondence *was* the occurrence. The letters were the act of persuading Civic to yield possession of the hotel and its investments to Mr. Youssefi, which the agency and Mr. Youssefi would then convert to their own use. The court of appeal argued, as well, that the correspondence did not give a description of the indebtedness, when the March 15 memorandum listed in detail the payments and set-asides to be made by the agency. From this the court said there was no “substantial compliance” with the claim requirements.¹³³

Conceding that lack of substantial compliance did not rule out a defense-waiver, the court reviewed the

¹³² Civic offer of proof, figure 1.

¹³³ Opinion, 18.

facts and held that even if the agency was aware of all these facts, they were not on notice of Civic's claim.¹³⁴ The court of appeal labeled the February and March correspondence an effort to "mitigate damages from Petitioners' earlier breaches or for new contractual arrangements. . . ." ¹³⁵

This is not accurate. The agency approached Civic long after they had agreed to mitigate the *city's* breach of its lease by substituting senior housing for the lease in the upper floors of the hotel.¹³⁶ They were not mitigating the city's past breach, but avoiding a present breach by the agency when it installed Mr. Youssefi in

¹³⁴ Opinion, 26.

¹³⁵ *Ibid.*

¹³⁶ The city breached its lease in August 2004. The agency agreed that Civic could substitute housing for the elderly in the space abandoned by the city; and Civic spent four months making this substitution and preparing to apply for housing tax credits. The agency then presented Mr. Youssefi to take over the hotel contract between Civic and the agency, not to mitigate damages from the breach of the lease, which Civic and the agency had accomplished four months earlier. Second amended complaint, ¶¶ 4, 6, 13-15, 17; Civic offer of proof, ¶¶ 1-4.

Civic's place in the hotel. This possibility had never come up before.

For the court of appeal to decide these facts against Civic's interest instead of remanding for a hearing on the estoppel was error. To turn the facts into something that contradicted the second amended complaint was error.

In reaction to all this the agency changes the subject, claiming that Civic is alleging a prohibited "contract by estoppel" and citing *First Street Plaza Partners v. City of Los Angeles*, 65 Cal.App.4th 650, 669 (1998), as authority. The dividing line between a "contract by estoppel" and equitable estoppel blurs at the margins. *First Street Partners* holds that where a contract with a city is not made in the required "mode of compliance," there can be no estoppel to deny the contract. The mode of compliance is the dividing

line.¹³⁷ Thus in *Youngman*,¹³⁸ this Court approved a “contract by estoppel” (1) when this result was supported, as in Civic’s case, by a past valid contract for which the new provisions were an extension, (2) when no public bidding was avoided, and (3) when justice required the agency to make good on its commitments. The district in *Youngman* was not unjustly enriched, but it was bound in contract nonetheless.

No such rules apply in equitable estoppel to raise a claims act defense, which relieves compliance with the claims act even when no claim is filed, defective or otherwise.¹³⁹ Efforts by some courts to compare lack of compliance with the tort claims act to a breach in the

¹³⁷ *First Street Plaza Partners v. City of Los Angeles*, 65 Cal.App.4th 650, 655 (1998).

¹³⁸ *Youngman v. Nevada Irrig. Dist.*, 70 Cal.2d 240 (1959).

¹³⁹ *Frederichsen v. City of Lakewood*, 6 Cal.3d 353, 357 (1971).

mode of contracting were rebuffed in *Farrell*.¹⁴⁰

Where the settlement agreement that the agency and Civic were negotiating would not be illegal when adopted by the agency's board, and when Civic invoked the need for a lawful agreement as a condition to giving Mr. Youssefi its plans, the "contract by estoppel" that this Court found in *Youngman* is made out. This Court held in *Mansell*¹⁴¹ that there is no longer the bar to estoppel against the government that there was in *Miller v. McKinnon*.¹⁴² A prescribed mode of contracting must be respected, but if this is not an issue, the injustice that will result from declining to recognize a contract must be outweighed by the damage done to some other important public interest by invoking the

¹⁴⁰ *Farrell v. County of Placer*, 23 Cal.2d 624, 630 (1944).

¹⁴¹ *City of Long Beach v. Mansell*, 3 Cal.3d 462, 496-497 (1970).

¹⁴² *Miller v. McKinnon*, 20 Cal.2d 83 (1942).

estoppel.¹⁴³ Civic never made a choice between equitable estoppel and claims-waiver estoppel, and none is required.¹⁴⁴ Civic argues that it substantially complied with the claims statute, but if it did not, that equitable estoppel applies. The two doctrines are complementary; if the court finds one, it stops; if it does not find the first, it passes on to the other.¹⁴⁵

The court of appeal singled out as lack of substantial compliance the absence of Civic's name and address, which the agency well knew from four years of dealing with Civic. Civic's name and address were listed in their hotel contract¹⁴⁶ and the February 19 letter. The law revision commission intended that a

¹⁴³ *City of Long Beach v. Mansell*, 3 Cal.3d 462, 496-497 (1970).

¹⁴⁴ *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 712 (1989)(either estoppel or defense-waiver effective without the other).

¹⁴⁵ *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 712 (1989)

¹⁴⁶ Hotel contract, ¶ 10.1; Civic offer of proof, figure 2.

missing would trigger the defense-waiver provisions of the act.¹⁴⁷ Likewise, the court of appeal's demand for the circumstances of the "occurrence" and a list of damages from Civic was inexplicable when the agency and Civic were negotiating to avoid the "occurrence" in the first instance and arranging to pay the repay the full list of Civic's investments in the March 15 memorandum.

The only reason why the agency did not notify Civic that its "claim" was deficient was that the agency wanted to avoid breaching its contract or antagonizing Civic, giving Civic cause to present precisely such a claim. If their negotiations had not succeeded, Civic would not have given up its assets. No settlement was possible without the exchange of terms, payments, and

¹⁴⁷ Van Alsyne notes, Calif. Gov't. Code § 910.8 (addresses omitted, but later furnished).

set asides in the January 30 email, the February 19 letter, and the March 15 memorandum.

The court of appeal's decision suggests that before the defense waiver provisions of the act can be satisfied, the plaintiff must unequivocally threaten the agency with litigation. This would be a problem here, if true. When the agency approached Civic, the one episode it wanted to avoid was a threat by Civic to sue.

Depending on the circumstances, no unequivocal threat to sue is required; it is only necessary that the agency know that if the negotiations are not successful, a lawsuit is almost certain to follow.¹⁴⁸ The agency

¹⁴⁸ *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699 (1989); *Foster v. McFadden*, 30 Cal.App.3d 943 (1973); *Alliance Financial v. City and County of San Francisco*, 64 Cal.App.4th 635, 647 (1998) (letter sufficient even if no threat of imminent litigation); *Hart v. Alameda County*, 7 Cal.App.4th 766 (2000) (no claim required where defendant holding plaintiff's property as of right); *but see Green v. State Center Comm. Coll. Dist.*, 34 Cal.App.4th 1348, 1358 (1995) (distinguishing *Phillips* and *Foster*).

could not be in doubt that if it ejected Civic from the hotel and converted Civic's several million dollars in investments, litigation would begin.

D. The city and agency's cross complaint waived the tort claims act.

The city and the agency allege in their cross complaint that Civic in August 2001 breached the hotel lease by the city and the hotel development agreement with the agency.¹⁴⁹ The statute of limitations for each breach was four years on a written agreement.

Civic alleges in its second amended complaint that the city breached the lease in 2001, but that Civic and the agency agreed to substitute for the city's lease senior housing in the same space.¹⁵⁰ Only in 2002 did the agency bring Mr. Youssefi into the hotel to replace Civic, and then only with Civic's consent. Only in July 2002 did the agency, with Civic's assets in its hands,

¹⁴⁹ Cross complaint, ¶¶ 21-23

¹⁵⁰ Second amended complaint, ¶¶ 4, 6, 13-15.

repudiate the settlement reached in March 2002.¹⁵¹

These claims illustrate a serious potential trap in the tort claims act. The city or agency may wait four years to sue Civic on the same facts and transactions on which they assert that Civic must file a claim within one year. The city and the agency might delay four years until August 2005 to sue Civic, but by July 2003 Civic must have filed a claim or by the city and agency's reading of the tort claims act Civic will be barred even if the city and agency sued Civic later.

The agency and city seek to avoid this evident injustice by arguing that Civic filed suit first. When they cross-complained, Civic argued that the cross complaint estopped them from invoking the claims act on the same facts and transactions. The court of appeal avoided the estoppel by making a finding that "the fact Petitioners knew enough to file a cross-

¹⁵¹ Second amended complaint, ¶ 38; Civic offer of proof, ¶ 22.

complaint does not prove that they were aware of Civic's claim before this action was filed [in January 2003]."¹⁵²

Civic was under no burden to "prove" an estoppel to the court of appeal, which could hold no trial or hearing on the issue. Civic has not been given the hearing in the trial court to which it was entitled on the estoppel.¹⁵³ Civic petitioned for rehearing in the court of appeal on this point, which was refused. Civic's second amended complaint and its offer of proof demonstrate that the city and the agency knew of Civic's potential claim by their correspondence with Civic in January, February, and March 2002, many months before Civic filed suit. They not only knew of the claim, but promised to avoid damaging Civic by restoring its investment in the hotel. By that means

¹⁵² Opinion, 27.

¹⁵³ *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438 (1989); *Rand v. Andreatta*, 60 Cal.2d 846 (1964).

they took with Civic's consent all its hotel assets for Mr. Youssefi. Their cross-complaint alleges that Civic was in breach of contract the previous August, which means that they knew their claims, yet decided they would make restitution to Civic in 2002.

The court of appeal's decision creates a serious potential for abuse of the tort claims act, first between the statute of limitations and the much shorter claims period, and second by diverting attention to what the government claims to know when the action is filed, when its cross complaint makes that question irrelevant.

Professor Van Alstyne argued that before the government may be estopped by a cross complaint, it must *file* the original action, which provokes a cross complaint from the defendant. He did not consider the potential for claims in rejoinder by the original plaintiff.

The CEB picks up this line.¹⁵⁴ This seems clear error. If the government knows enough to sue and perhaps intends to sue, but waits out the claims act to see if the private party sues first, it should make little difference *who* sues first. If the government claims the private party breached a contract, but continues to commit the government to performance, no arbitrage between the statute of limitations and the claims period should be open to the government when this was not clearly intended by the legislature, however much Professor Van Alstyne considered it.¹⁵⁵ The aim of the tort claims

¹⁵⁴ California Government Tort Liability Practice § 5.35 (CEB 2006) (estoppel only when government first to file).

¹⁵⁵ Where plaintiff sues within the statute of limitations and defendant cross-complains after the statute runs, the cross complaint is not barred. *Trindade v. Superior Court*, 29 Cal.App.3d 857, 859-860 (1973).

act is not to preserve vestiges of sovereign immunity, but to weigh claims and defenses on whether they satisfy the purposes of the act.

If the city and the agency had claimed the claims act defense promptly, Civic would if nothing else have filed a claim within the remaining claims period to preserve itself from the potential of this defense. It is not filing its cross-complaint that determines estoppel, but the government's delay in raising the act as a defense, either by suing after the claims period has run, or by withholding the defense until the claims period has run. When a plaintiff has alternative claims and sues on one, the statute of limitations is tolled on the other while plaintiff pursues in good faith an

alternative remedy.¹⁵⁶ There needs to be such a doctrine in the tort claims act.

The agency claims that it did not realize that it had a defense on the claims act until this Court's *Bodde* decision came down in May 2004. Nothing in *Bodde* remotely supports this position. If the agency claims that the act applies to contract and always has, the agency knew in January 2003 when this action was filed a year-and-a-half before *Bodde* that it would defend under the act.

¹⁵⁶ *Baillergeon v. Department of Water & Power*, 69 Cal.App.3d 670, 683 (1977); *Elkins v. Derby*, 12 Cal.3d 410, 414 (1974).

E. The trial court erroneously ruled that the federal courts have exclusive jurisdiction over an issue of the ownership of copyrighted plans, but did not dismiss Civic's restitution claims.

Civic had earlier alleged that its hotel plans were copyrighted and that Civic owned the copyright.¹⁵⁷ The trial court dismissed Civic's claims that it owned its copyright, but never discussed Civic's restitution claims.¹⁵⁸ It decided that Civic's contract claims were not within the tort claims act and proceeded no further.¹⁵⁹ Civic had demonstrated that the issue of ownership of copyrighted material is exclusively an issue of state law if no relief under the copyright statute is sought.¹⁶⁰ The court of appeal remanded to the trial

¹⁵⁷ Complaint, 1/13/03.

¹⁵⁸ Civic opposition to demurrer to second amended complaint, exhibit no. 4 to petition for writ of mandate. The trial court never reached this issue, because it ruled that the tort claims act did not apply to Civic's claims. Ruling on demurrer to second amended complaint, exhibit no. 8 to petition for writ of mandate.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Dolch v. United California Bank*, 702 F.2d 178 (9th Cir. 1983).

court to consider Civic's restitution claim.¹⁶¹

If a defendant converts the plaintiff's assets and employs them to make a profit in excess of their intrinsic value, the defendant is liable for that profit in restitution.¹⁶² There is no conflict in jurisdiction between state law restitution and federal copyright claims.¹⁶³

IV. Conclusion.

The Court should find that Civic's complaint makes out a claim for restitution, as well as a claim on express contracts, neither of which is barred for want of

¹⁶¹ Opinion, 29.

¹⁶² RESTATEMENT OF RESTITUTION § 1(e) and Topic 2 (ALI 1937).

¹⁶³ *Grosso v. Mirimax Film Corp.*, 383 F.3d 965 (9th Cir. 2004).

a claim under the tort claims act. The agency's apparently deliberate and bad faith effort to convert Civic's assets after committing to restore Civic's investment in the hotel yielded its unjust enrichment, and Mr. Youssefi's, for which under *Minsky* and *Holt* no claim is due.

The Court should remand to the trial court to determine on appropriate notice and hearing whether the city and the agency are estopped to defend under the claims act or are barred by the defense-waiver provisions of the tort claims act. The Court should find as a matter of law that the city and agency's cross complaint, while a legitimate pleading, waives their defense under the act.

Dated: March 13, 2006

THE LAW OFFICES OF MALCOLM A. MISURACA

By _____
Malcolm A. Misuraca
Counsel for Real Party in Interest

Certificate of Length

Malcolm A. Misuraca certifies that this opening brief consists of 11,347 words, as determined by the word processing program that produced it.

This brief follows rules for capitalization from The Chicago Manual of Style (14th ed. 1993) and The New York Times Manual of Style and Usage (1999).

Dated: March 13, 2006

Malcolm A. Misuraca