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

JOINT REPLY TO AMICUS BRIEFS OF LOS ANGELES UNIFIED SCHOOL DISTRICT, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES

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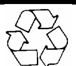

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I. The Los Angeles Unified School District forces its contractors to file a threat to sue the district before the district will investigate and negotiate a contract claim. This is a distortion of the tort claims act and a breach of the duty of good faith and fair dealing under Restatement (Second) of Contracts § 205.

The Los Angeles Unified School District's amicus brief says that the district will not investigate a claim from its contractors until the contractor threatens to sue the district under the tort claims act.[1]

We should presume that the district does not mean exactly what it says. If it owes a progress payment, it probably does not demand a claim under the act before it pays it. It may likewise perform other parts of the contract without a claim. How the district distinguishes what it will do or will not do without a tort claim the district does not say, except to say that if it chooses, it will not investigate the claim without a threat from the

[1] Los Angeles Unified School District brief, 4-5.

contractor to sue. If the contractor has a claim or an issue that is not spelled out under the contract, or if it has a claim for extras, the district demands that the contractor threaten to sue the district before the district will investigate to see whether the claim is justified.

This turns the tort claims act inside out. The tort claims act is not a means to thwart valid claims, which the public entity will know that it owes when it investigates them. This Court has said more than once that the purpose of the tort claims act is to facilitate investigation and payment of claims, not litigation under the tort claims act.[2] No court has ever suggested that the act may be used as a sword—as a conscious means to thwart or disadvantage a legitimate claim.

The unified school district boasts that it settles 66

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[2] *Stockett v. Association of California Water Agencies Joint Powers Insurance Agency*, 34 Cal.4th 441, 446 (2004); *City of San Jose v. Superior Court*, 12 Cal.3d 447, 455 (1974).

percent of its claims this way.[3] This is surely an obtuse statistic. If the district did not force contractors to hire lawyers to file claims, the district would doubtless settle a greater percentage of claims, including those it burdens in this way. If the tort claims act does not require claims in contract cases, the unified school district breaches the act by demanding one. If the claims act is held to require a claim on a contract, the district breaches the act, because no claim under the tort claims act is due until the contractor has a cause of action. The contractor does not accrue a cause of action when it acquires a claim that the district should in good faith investigate and pay with no thought to litigating it. The district's breach of the act is a likewise a breach of the underlying contract. It requires the contractor to threaten to sue the district to get performance from the district that is due under

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[3] Los Angeles Unified School District brief, 6.

their agreement—the fair investigation of a claim and its payment if it is just.

The district's 66-percent settlement rate takes no heed of the claims that would settle without the district's putting the contractor to the burden to hire a lawyer to file a claim. Those additional cases would undoubtedly swell the 66 percent to something greater if the district settled all claims that were due—those for which no tort claims act claim was due and otherwise. No one should have to hire a lawyer to draft and file a claim that is due or can be avoided by negotiation. Contractors who do not file claims because of the district's policy would doubtless prove up their claims in about the same proportion as those who do. This means that these claims would settle and add to the district's 66 percent. It is not the 66 the district has its eye on, but the 34.

There seems to be only one reason for such a policy. It reduces the number of claims the district will pay, because it reduces the number of claims it will examine. Some percentage of the claims it refuses to examine undoubtedly go away, not because they are not due, but because of friction or inertia. The district is not making the distinction on proper grounds—between claims it should pay and those it should not. It is making it on improper grounds—between those it ignores, but whose owner persists, and those it ignores, but whose owner does not. It is ignoring the claim, not the failure to persist in it, that is a breach of the duty of good faith and fair dealing.

The district doubtless knows from the divided cases on the subject that many contractors believe that no claim is necessary under the tort claims act in contract cases. The district counts on that proportion of contractors not to file a tort claims act claim and by this means refuses

to pay them what is due, which its contract duty of good faith and fair dealing obligates it to investigate and pay.

The district's policy is thus a breach of contract. Restatement (Second) of Contracts § 205 imposes a duty of good faith and fair dealing on each contracting party. The parties must work to assure to each other the benefit of the bargain.[4] If one party has an issue or a claim under their contract, the other party must stand ready to hear it, to investigate it if it seems genuine, and pay it if it is due.[5]

This episode proves how difficult it has been to keep

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[4] The covenant of good faith and fair dealing is implicit in every contract. *Cates Construction, Inc. v. Talbot Partners*, 21 Cal.4th 28, 43 (1999); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 683 (1988). Neither party must do anything to injure the rights of the other. *Silberg v. California Life Ins. Co.*, 11 Cal.3d 452, 460 (1971). Compensation for breach of the covenant is limited to contract damages except in insurance cases. *Foley*, at 684.

[5] RESTATEMENT (SECOND) OF CONTRACTS § 205, comment *e* (1979)(duty of good faith and fair dealing extends to assertion, settlement, and litigation of contract claims and defenses; violation to "conjure up a pretended dispute").

public entities from distorting the tort claims act. Repeatedly the Court has said that the act is not meant as a trap for the unwary, but as a reasonable basis to give the public entity a "heads up" to a claim.[6] No court has ever said that the tort claims act is meant as a substitute for the contract duty of good faith and fair dealing, which has a part to play here. This means that the act does not excuse conduct by the public entity that breaches its contract by improperly claiming to rely on the tort claims act. The act is not a license to breach a contract, but when it is used in that way, the Court should hold that the act is waived.

The district's amicus brief illustrates the difference between contract and tort claims under the tort claims act. When a tort is committed, it is not unreasonable for a public entity to need a tort claims act claim, if only

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[6] *Stockett v. Association of California Water Agencies Joint Powers Insurance Agency*, 34 Cal.4th 441, 446 (2004).

to inform it that there is something to be investigated. The California Tort Claims Act has required tort claims since its inception. There may be a good deal that the entity does not know about a tort claim when it first appears. It may well have insurance and outside adjusters to handle the claim, whereas in contract claims it can expect to deal with issues itself.

These obvious aspects of tort claims cannot be said of contracts. If a contractor has a contract with the district, the district knows it, certainly to the point that if the contractor brings to the district's attention an issue under the contract, the district needs no tort claims act claim to know that the contract exists. This point multiplies itself along the way. If the contract is an active contract, the district knows it and is undoubtedly iterating on it periodically. If the district owes money on the contract, the district knows it. If the contractor asks for money the district does not presently believe it owes, the

district knows it. The notion in the district's amicus brief that the district needs a tort claim to know it has an issue to deal with ignores what the district knows. It rejects the contractor's efforts to avoid having to file a claim—to negotiate claims with the district short of a lawsuit. Tort claims are one thing, but in contracts the parties owe each other more than that under Restatement § 205.

The district says not a word in its amicus brief about how the City of Stockton dealt with Civic Partners when their contract was in full force and good standing. The city committed an astonishingly aggravated and dishonest act against Civic Partners—going to Civic to acknowledge that Civic's contract entitled it to restitution of its investment when the city substituted Mr. Youssefi for Civic in the hotel. It induced Civic to give up its assets on the promise that the city's duty of restitution would be done, then repudiated its duty when it had Civic's assets in hand. The district is silent on these disreputable

facts—suggesting that it might have done the same or chooses to stand in solidarity with another public entity that did, no matter what wrong or injustice is implicated.

If the unified school district has an implicit position on the record in this case, it is that it would demand a claim under the tort claims act before reacting, even if it found that its contractor had been treated by district staff as shamefully as Civic was treated by the City of Stockton.

Part of this problem of moral obtuseness is that many public agencies appear to regard the tort claims act as a working vestige of sovereign immunity, to be fashioned as the district does into an unjustified policy to defeat meritorious claims. Things were not meant to be this way.

The school district comes to the issue of this case only on page 8 of its amicus brief. It begins by saying that the plain language of the statute expressly limits

its effect to part 2 of the tort claims act. It is an imperative, the district says, that we follow legislative intent. This is well said, but the legislature declared that intent in the legislative note to section 814. It said that the "statute" was not meant to apply to contract. To this the district is silent; only those examples of legislative intent that suits its purposes capture its attention.

The district disputes what appears to be the plain meaning of this Court's holdings in the *Morrill* and *Longshore* decisions. While it concedes that "certain cases" cite *Morrill* and *Longshore* for the proposition that contracts are not subject to the tort claims act, the district chides the courts of appeal that have done so for not reading *Morrill* and *Longshore* "carefully."[7] The silent subtext to this presumptuous aside must be that this Court likewise did not decide them carefully.

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[7] Los Angeles Unified School District brief, 11.

The point is that there are reasons why this issue has never been satisfactorily disposed of, as the *Baines Pickwick* decision conceded. Two sets of courts of appeal, each ostensibly reading carefully, have disagreed about *Morrill* and *Longshore*. There is ample reason from the legislative note to section 814 to say that the exemption for contract applies throughout the "statute," which is what *Morrill* and *Longshore* and the *Pitchess* and *Gonzales* line of cases held. If the district has read the legislative note to section 814 carefully, it does not say so, since it fails to mention it. All the district can say is that the *Pitchess* and *Gonzales* line of cases "impermissibly expand" section 814 to exclude contract, when it was the legislative note—of which the district says nothing—that expressly invited them to take up that reading.

II. The counties and cities are of two minds. They cite this Court's decisions in Minsky and Holt on the one hand and call for their overruling on the other.

The California Association of Counties and the League of California Cities oscillate between describing Civic's restitution claim as nothing more than a label attached to a claim for money or damages and calling for this Court to overrule *Minsky*[8] and *Holt*[9], the decisions that exempt restitution claims from the tort claims act.[10]

Restitution claims are not a "label,"[11] but a separate

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[8] *Minsky v. City of Los Angeles*, 11 Cal.3d 113 (1974).

[9] *Holt v. Kelly*, 20 Cal.3d 560 (1978).

[10] Counties and Cities amicus brief, 14 n. 5. The amicus brief takes issue with the holding in *Minsky* that the act does not apply to restitution claims, arguing that "*amici* contend, however, that the same policy objectives [of the act] do in fact apply in the bailee context. . . . [A tort claim] would have vindicated several important policies underlying the claims statute. . . ."

[11] The counties and cities label the restitution claims a label. They argue that the plaintiff "cannot avoid a claim [under the tort claims act] by relabeling a claim as 'implied contract' or 'restitution.'" They say it is not a matter of how a claim is titled, but whether it seeks money or damages. Counties and Cities amicus brief, 13.

category in the law of obligations. There is a whole law of restitution, which is exclusive of contract or tort when it needs to be.[12] The necessity to avoid unjust enrichment is so compelling that a plaintiff may waive a claim in tort and sue in restitution and may have remedies in restitution greater than in tort. Restitution is not an "ancillary claim in equity,"[13] but the queen and flagship of Equity.[14] This is not a label, but the election of a powerful remedy. Eventually the counties and cities concede the point, because they call for *Minsky* and *Holt* to be overruled, which they would not do if they believed that Civic was exceeding *Minsky* and *Holt* with labels and tricks. The counties and cities, in the end, concede that

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12 RESTATEMENT OF RESTITUTION (1937).

13 Counties and Cities amicus brief, 1.

14 RESTATEMENT OF RESTITUTION, Part I, *The Right to Restitution*, Introductory Note, 9 (1937)(from the beginning of its existence the extraordinary jurisdiction of chancery was preoccupied with restitution unavailable at law in contract).

by their lights *Minsky* and *Holt* create "a significant loophole" in the act.[15]

The counties and cities argue broadly that governing boards are not always aware of contracts made in their name.[16] This seems a play on words. The governing board may not know from day to day of every contract made in its behalf by a city or county, but it is always aware that contracts are being made and that they carry liabilities for the county or city. It does not take a government tort claim to learn what the county's or city's liability on these contracts is at a given moment; it takes routine oversight. If a contractor appears with a claim, there is no magic in its being a tort claims act claim to cause the county or city to investigate it. This Court has held more than once that an approach to a public entity with a contract claim in some form other than a tort claims

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[15] Counties and Cities amicus brief, 2.

[16] Counties and Cities amicus brief, 8.

act claim will satisfy the act if it presents the county or city with sufficient warning that there is a claim that must be investigated and settled.[17]

It is, in other words, the tort claim qua tort claim that the counties and cities insist upon, even though less formal and legalistic claims may satisfy the act. Why do they insist on the piece of paper instead of the substance? Because the lack of the piece of paper permits them in their way of looking at the act to deny the claim, whether or not it has merit. Time and again, in the face of the requirement to investigate and pay when the incentive to do so has been created by the plaintiff, public entities would rather deny the claim. This is a serious flaw in the way public entities do business and a violation of the contract duty of good faith and fair dealing.

The Court should make it clear once again that a

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[17] See, *e.g.*, *Stockett v. Association of California Water Agencies Joint Powers Insurance Agency*, 34 Cal.4th 441 (2004).

claim for restitution for the kind of abusive conduct that the City of Stockton used against Civic Partners is not "an ancillary equitable claim to [a] complaint,"[18] but a favored, protected, and sublime claim, free of the demands of the tort claims act.

III. Conclusion.

The amicus briefs here have had an unintended, but important effect. They illustrate how unreconciled major public agencies in California remain to the decisions limiting the effect and requirements of the tort claims act. Judicial review is expected; repeated oversight of the same error is not.

If public entities obey the duty in their contracts to employ good faith and fair dealing in investigating and resolving claims—a duty that *precedes* all consideration of the need for tort claims act claims in contract cases—it

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[18] Counties and Cities amicus brief, 14-15.

will become irrelevant to them whether they have received a tort claims act claim in contract cases. This distinguishes tort claims act claims in tort from claims on contract. In the contract there is a duty to deal with a claim before a statutory threat to sue is presented; in tort claims, there is not.

When the legislature and later the Court said that tort claims act claims are unnecessary in contract cases, they were reflecting not only legislative intent, but the simple working truth of the matter. Claims in contract are dealt with under Restatement § 205.

Dated: August 28, 2006

THE LAW OFFICES OF MALCOLM A. MISURACA

By______________________________

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Malcolm A. Misuraca certifies under penalty of perjury that:

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