MICHAEL M. POLLAK
SCOTT J. VIDA
DANIEL P. BARER *
JUDY L. McKELVEY
LAWRENCE J. SHER
HAMED AMIRI GHAEMMAGHAMI
JUDY A. BARNWELL
ANNA L. BIRENBAUM
VICTORIA L. GUNTHER

Of Counsel
BARRY P. GOLDBERG

* CERTIFIED SPECIALIST, APPELLATE LAW
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

POLLAK, VIDA & FISHER
ATTORNEYS AT LAW
11150 WEST OLYMPIC BOULEVARD
SUITE 980
LOS ANGELES, CALIFORNIA 90064-1839

TELEPHONE
(310) 551–3400
FAX
(310) 551-1036
E-MAIL
law@pvandf.com
INTERNET
www.pvandf.com

Retired
GIRARD FISHER

August 7, 2014

Direct Dial: (310) 203-1621

Hon. William W. Bedsworth, Acting Presiding Justice
Hon. Richard D. Fybel, Association Justice
Hon. David A. Thompson, Associate Justice
Fourth District Court of Appeal, Division Three
C/o Clerk of Divison Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Re: Klug v. City of Laguna Beach
Case No. : G048554

LEAGUE OF CALIFORNIA CITIES' AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' REQUEST FOR PUBLICATION [CRC 8.1105, 8.1120(a)]

Dear Justices Bedsworth, Fybel, and Johnson:

In accordance with rule 8.1120(a) of the California Rules of Court, the League of California Cities (the "League") and the California State Association of Counties ("CSAC") respectfully request that this Court certify for publication the opinion it issued in *Klug v. City of Laguna Beach*, filed July 23, 2014. As explained below, the opinion meets the criteria for publication set forth in rule 8.1105(c) of the California Rules of Court, because it applies existing rules of law to a set of facts significantly different from those stated in published opinions; explains existing rules of law; and involves a legal issue of continuing public interest.

The League is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The *Klug* opinion addresses and analyzes the claim-presentation requirements under the Government Claims Act, as applied to a progressive-loss claim for property damage. The Government Claim Act's application to particular types of claims is an issue of continuing public interest, because plaintiffs who wish to bring almost any kind of lawsuit for damages under California law against a public entity must satisfy the Act's procedural requirements. (Gov. Code, § 945.4.) Although California's courts have rendered numerous decisions interpreting and applying the Act's requirements, there remain significant questions about the rules for presenting a timely claim (or seeking relief for failing to present a timely claim) in particular circumstances. The *Klug* opinion answers some of those questions. In particular:

- At pages 3-8, the Court applies the concepts of delayed discovery and appreciable harm to a case of alleged progressive loss, and determines that the cause of action accrued (and the time to present a claim) ran from the date that the claimants reasonably suspected a connection between their health problems and the diesel fumes of which they complained. This is an issue that recurs often in claims against

public entities, particularly those involving medical malpractice and property damage. It is also an area in which the law is still developing, as shown by cigarette-smoker cases such as *Pooshs v. Philip Morris* (2011) 51 Cal.4th 788, 801-802 and *Grisham v. Philip Morris* (2007) 40 Cal.4th 623, 643-646. To our knowledge, there is no other published case applying the doctrines to physical symptoms in a Government Claims Act context. Publishing this Court's holding on the subject would assist courts and practitioners in addressing accrual issues in these cases.

• At pages 10-11, the Court explains that Government Code section 911.4 -- which permits claimants who miss the six-month deadline to present a claim to apply to the public entity for leave to file a late claim -- applies only to claims for personal injury or personal property. Although that rule is implicit in Government Code sections 911.4, subdivision (a) (confining that statute to "claim[s] that [are] required by Section 911.2 to be presented not later than six months after the accrual of the cause of action") and 911.2, subdivision (a) (limiting six-month-deadline claims to death, personal injury, injury to personal property, and injury to growing crops), and the case of *Wheeler v. County of San Bernardino* (1978) 76 Cal.App.3d 841, 848[1], no published decision has squarely held that section 911.4 (or the other provisions of the Act regarding late-claim excuse, such as Government Code sections 911.3 or 946.6) does not apply to one-year-deadline claims.

The lack of appellate authority on this point has led to confusion on the part of both claimants (who attempt to invoke the late-claim procedures under the Act when one-year claims are rejected as untimely) and public entities (which are uncertain whether they must serve notice

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[1] In *Wheeler*, the county defendant took the position that the then-100-day claim presentation period applied to the plaintiff's claim for property damage, leading to the claimant filing a section 911.4 application with the claim attached and then a Government Code section 946.6 petition for relief. The appellate court held that the one-year deadline applied, and so the claim, presented within a year of accrual, was timely.

of an untimely claim under section 911.3 in response to property damage claims not presented within one year). Publication of the *Klug* decision would clarify to practitioners and the courts that the late-claim procedures do not apply to claims governed by the one-year deadline.

- At pages 9-10, the Court holds that alleged "misrepresentations" by the city (consisting of denial of liability) could not estop the city from raising time limitations if they occurred after the date of accrual, and did not involve inducement not to file a claim. Although this holding is based on existing case law, it is a recurring issue, and California's legal literature would benefit from this Court's clear and concise explanation of the rules governing public entity estoppel.

- At pp. 11-12, the Court rejects an argument that service of a notice of insufficiency at the same time as a notice of late claim as to allegations of injury more than six months before the claim confused and misled the plaintiffs, and violated the Government Claims Act. To our knowledge, there is no published authority on the interaction of insufficiency and untimeliness notices when served together. Publishing this holding would assist public entities in responding to claims like this that allege losses over a period of time. Many claims for progressive losses or other events that take place over a period of time involve some events that occurred within six months (or one year, if that claim deadline applies) of the date the claim was presented, and other events that occurred earlier than that. The entity will wish to preserve the argument that the claim is untimely as to the events that occurred outside the claim-presentation window, while addressing the more recent events on their merits. The Government Claims Act does not prescribe any specific method for doing so. The method Laguna Beach used in *Klug* permitted it to preserve the claim-timeliness defense as to the events more than six months before the claim was presented, and simultaneously advise the claimants that their claims that were not untimely were still insufficient. Publishing the decision will advise public entities, claimants, and the courts that following this procedure comports with the Act's requirements.

- Finally, at p. 12, the court holds that omission of the notice required by Government Code section 911.8, subdivision (b)from a notice denying an application for leave to present late claim is not prejudicial if the claimant nonetheless files a Government Code section 946.6 petition on time. This ruling is the corollary of the ruling *in D.C. v. Oakdale Joint Unified School Dist.* (2012) 203 Cal.App.4th 1572, 1580, that failure to provide a proper section 911.8, subdivision (b) notice does estop the public entity from challenging as tardy an *untimely* petition. But our research has not disclosed any other published decision that holds the failure to provide the notice has no effect if the petition is timely filed. Publication of this case would assist practitioners and the courts in dealing with this issue.

In conclusion, publishing the opinion would benefit public entities, the claimants who pursue matters against them, and the courts that adjudicate those disputes as a matter of continuing public interest. The decision provides needed clarity of the Government Claims Act's application, promotes judicial economy, and meets the standards for publication prescribed in rule 8.1105(c). The League and CSAC therefore respectfully urge the Court to certify the decision for publication.

Respectfully submitted,

POLLAK, VIDA & FISHER

DANIEL P. BARER

DPB:dpb
cc: Attached service list

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11150 W. Olympic Boulevard, Suite 980, Los Angeles, California 90064.

On **August 7, 2014**, I served the foregoing document described as **LEAGUE OF CALIFORNIA CITIES' AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' REQUEST FOR PUBLICATION** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

Court B. Purdy
Wentworth, Paoli & Purdy, LLP
4631 Teller Ave., Suite 100
Newport Beach, CA 92660
Counsel for Plaintiffs and Appellants *Trace Klug, Robert Klug, M.K. and S.K.*

Peter James Howell
Rutan & Tucker LLP
611 Anton Blvd., Suite 1400
Costa Mesa, CA 92626-1931
Counsel for Respondent *City of Laguna Beach*

[X] (**BY MAIL**) I deposited such envelopes in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid, as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with

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postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **August 7, 2014**, at Los Angeles, California.

Cindy Bischop

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