

CLIENT NEWS BRIEF

Government Code 1090 Challenges by Third Parties Clarified and Limited by California Supreme Court

The California Supreme Court has ruled that third parties (private citizens, taxpayers, watchdog groups, etc.) do not have legal standing to sue public agencies to invalidate contracts allegedly made in violation of Government Code section 1090.

Background

Government Code section 1090 is a “good government” law prohibiting public officials and public employees from participating in any way in the “making” or awarding of a contract in which they hold a financial interest. The penalties for violating Section 1090 are potentially severe, ranging from imposition of a fine to imprisonment.

Government Code section 1092 allows any contract made in violation of Section 1090 to be voided “at the instance of any party except the officer interested therein.” Previous case law had left open to interpretation the meaning of “party” in this provision. Thus, it was not clear whether Section 1092 created a private right of action to enforce Section 1090, or if that right was limited only to the actual parties to the contract.

San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego et al. (2019) __ Cal.5th __ (“San Diegans for Open Government”)

In 2015, a citizens’ taxpayer organization sued to invalidate bonds issued by the City of San Diego to refinance the baseball stadium at Petco Park, alleging that financing participants had a financial interest in the sale of the bonds in violation of Section 1090. The trial court determined that the taxpayer group lacked standing to sue on Section 1090 grounds, and dismissed the complaint. On appeal, the Court of Appeal reversed, finding in favor of the taxpayer group on the issue of standing, reasoning that public policy supports a third party plaintiff having the right to seek relief under Section 1092, and ruling that the phrase “any party” as used in Section 1092 conferred standing upon “any litigant with an interest in the subject contract[.]”

The Supreme Court reversed the appellate decision, holding that Section 1092’s language providing that “any party” may sue to avoid a contract involving a prohibited conflict of interest, only confers standing to sue upon the actual parties to the contract at issue. In this case, the court’s ruling meant that the plaintiff taxpayer organization did not have standing to bring suit or seek relief under Section 1092. In other words, the court determined a private right of action does not exist under Section 1092.

In reversing the lower appellate opinion, the Supreme Court applied basic rules of statutory interpretation in determining that the Legislature had not clearly

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indicated an intent to create a private right of action under Section 1092. The court found no compelling reason to infer such intent because sufficient enforcement mechanisms already exist to ensure compliance with Section 1090. The court acknowledged cases cited by the taxpayer group suggesting taxpayers have standing to sue to set aside a contract for a Section 1090 violation, but dismissed those authorities as either distinguishable or dicta.

The Supreme Court noted that its decision in *San Diegans for Open Government* does not reduce the available avenues for enforcement of Section 1090 violations or lessen the severity of the penalties for such violations. While Section 1092 was not deemed an appropriate avenue for taxpayer enforcement of Section 1090, the Supreme Court remanded the case back to the appellate court to determine the plaintiffs' ability to use alternative statutory provisions as an enforcement mechanism. Specifically, the Court of Appeal will expressly determine what type of relief plaintiffs are seeking, and whether such relief is available under Civil Code section 526a (Section 526a). Section 526a allows taxpayers to challenge government contracts where public funds will be spent illegally. However, Section 526a prohibits injunctive relief where the contract is a debt instrument, such as the bond purchase agreement at issue in this case. At oral argument in front of the Supreme Court, plaintiffs argued they were not seeking injunctive relief, and only sought the conflicted officers to be disgorged of profits from the contract. The Court of Appeal will have to sort out the availability of a remedy for plaintiffs under Section 526a on remand.

Regardless of how the courts ultimately rule on these other causes of action, the Supreme Court's prohibition on the use of Section 1092 by a taxpayer group remains significant, since Section 1092 calls for the contract to be voided, and allows a challenge to be brought for up to four years. The Civil Code bases for suit that the appellate court will now consider generally have much shorter statutes of limitation and do not provide for voiding the contract as a remedy.

This case highlights the importance of clearly identifying the parties to a public contract, and considering express exclusion of "third party beneficiaries" when drafting public contracts, in order to limit those who may sue.

For more information on issues arising from Government Code Sections 1090 or 1092, please contact one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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