

CLIENT NEWS BRIEF

Taxpayer Organization Lacks Standing To Bring Conflict Of Interest Lawsuit; Court's Decision Questions Part of Recent Lease-Leaseback Case

The fourth district court of appeal recently addressed the question of whether taxpayer organizations have standing to sue to invalidate an agreement due to an alleged conflict of interest under Government Code section 1090. In *San Bernardino County v. Superior Court (San Bernardino)* (August 17, 2015) 239 Cal. App. 4th 679, the court held that taxpayer organizations may not sue to void an agreement under Government Code section 1090 unless they are parties to the agreement or are appropriately challenging the agreement under some other, independent legal theory.

In *San Bernardino*, two taxpayer organizations challenged a \$102 million dollar settlement agreement between the County of San Bernardino, the San Bernardino County Flood Control District (collectively "County"), and Colonies Partners, L.P. The settlement agreement was based on the allegation that the County took 67 acres of Colonies' land for use as part of a regional flood-control facility. A trial court validated the settlement agreement in March, 2007. However, four years later, the San Bernardino County District Attorney's Office secured a felony bribery conviction against a former county supervisor for bribes received from Colonies in exchange for his vote approving the settlement agreement. Shortly thereafter, the taxpayer organizations brought suit, seeking to have the settlement agreement declared void in violation of Government Code section 1090 because of the former supervisor's personal financial interest.

Government Code section 1090 forbids public officers from being financially interested in any contract made by them in their official capacity. However, *San Bernardino* concluded that nothing in section 1090, *et seq.*, grants non-parties to government contracts the right to sue on behalf of a public entity to void contracts made in violation of section 1090. As a result, the appellate court found that the taxpayer organizations, which were not parties to the agreement, lacked standing under Government Code section 1090 to void the agreement on the County's behalf. The court left open the possibility that under a different fact pattern, taxpayer organizations could have standing to sue under Government Code section 1090; for example, where the organizations represent individual members who suffer loss or injury resulting from the public entity's actions.

The taxpayer organizations alternatively argued they had standing to void the agreement based on Code of Civil Procedure section 526a, which gives citizens standing to prevent the illegal expenditure or waste of public funds by a public entity, and under common law. However, the court found that taxpayer suits are authorized only if the public entity is under a duty to act and refuses to do so. Because a public entity is not duty-bound to pursue particular legal claims, taxpayer organizations lack standing under section 526a and the common law to force public entities to file certain types of lawsuits. Taxpayer organizations cannot compel government entities to take a particular course of action unless the public entity already has a legal duty to do so.

It is worth noting that the fifth district court of appeal in *Davis v. Fresno Unified School District* (June 1, 2015) 237 Cal. App. 4th 261, allowed a third party lawsuit

November 2015
Number 68



Harold M. Freiman
Partner
Walnut Creek Office
hfreiman@lozanosmith.com



Carey Hawkins Ash, Ph.D.
Associate
Sacramento Office
cash@lozanosmith.com



CLIENT NEWS BRIEF

November 2015
Number 68

under section 1090 to move forward. In *Davis*, a contractor and the school district entered into a “lease-leaseback” agreement for construction of school facilities. The contractor was alleged to have served as a pre-construction consultant and then later was hired as the contractor. A third party sued, alleging among other issues that hiring the same entity to provide pre-construction services and then to do the work under contract violated section 1090. The court of appeals reversed a decision to dismiss that lawsuit, and concluded that the third party could raise the section 1090 conflict issue. (See [Client News Brief No. 30, June 2015](#)). The fourth district’s decision in *San Bernardino* appears to be in conflict with *Davis*. While *San Bernardino* attempted to distinguish the holding of *Davis* on procedural grounds, the court also concluded that to the extent *Davis* “may be read as treating Government Code section 1090 as an independent source of standing” to bring a third party lawsuit, the court “do(es) not find that interpretation persuasive and decline(s) to adopt it.” Because a split in appellate authority now appears to exist regarding whether third parties can bring a third party lawsuit under section 1090, consultation with legal counsel may be appropriate when considering related issues.

If you have any questions regarding Government Code section 1090, conflicts of interest, or the rights of taxpayer organizations relative to public agencies organization, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).