DATE: March 12, 1986
TO: Henry Pepper, Deputy Director, Water Utilities Department
FROM: City Attorney
SUBJECT: Water Billings and the Statute of Limitations

From time to time, questions have arisen over the contractual relationship between the City and water customers and the applicable statute of limitations for such situations. While each case may have factual distinctions that should have it individually analyzed, the following overview should be of assistance in reviewing most situations.

We understand from the Customer Services Supervisor that the majority of all water service is initiated by way of a telephone call to the department in which a citizen requests service. Where an agreement is manifested whether by words or conduct, a contract is formed. Simpson, Law of Contracts (West, 1954). There is no difference in legal effect, however, between express contracts and contracts implied in fact, i.e. the mutual agreement of the parties is implied from their conduct. However viewed, the act of calling for water service establishes a valid promise to pay for the services rendered either through an express promise or the act of calling and accepting the water service.

Express contracts may be further segregated into oral and written contracts. Some contracts, not pertinent here, must be in writing to be valid. California Civil Code section 1624. For purposes of enforcement, however, oral and written contracts though equally valid have differing statutes of limitations.

Statutes of limitations exist to bar stale claims. Such statutes do not erase the debt, but rather simply bar the remedy of judicial enforcement. For contracts founded upon a writing, the statute of limitations is four (4) years:

> Sec. 337. Four Years--Contracts and Accounts.
> Within four years. 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real

property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

California Code of Civil Procedure section 337

For contracts not founded on a writing, the statute of limitations is two (2) years.

Sec. 339. Two Years--Oral Contracts--Abstracts or Insurance of Title--Breach of Duty of Sheriff, Constable or Coroner--Rescission.

Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code; ....

California Code of Civil Procedure section 339

While most new service results from an oral or implied agreement, there are two significant factors which would allow the department to assert that the four (4) year statute is the applicable statute of limitations.

First California Code of Civil Procedure section 337 2. provides the four (4) year limitation "upon a book account." A book account is created by either the agreement or the conduct of the parties. While the mere memorial of a debt in an account book can not be used as a devise to extend the statute of

limitations beyond an oral contract, the parties by conduct provide that monies due under their oral agreement shall be the subject of an account between them. In such an event, the cause of action arises from the account and not the underlying contract. Parker v. Shell Oil Co., 29 Cal.2d 503, 507 (1946).

We believe that the running accounts regularly kept and billed bimonthly on each consumer can qualify as a book account.

> If there is an account relation between the parties the requirements as to the character of the book or books and the manner in which the account must have been kept to be acceptable as a book account under section 337, subdivision 2, supra, are not very stringent. "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (Egan v. Bishop, 8 Cal.App.2d 119, 122 (47 P.2d 500).) The book must show against whom and in whose favor the charges are made. (Wright v. Loaiza, 177 Cal. 605, 607 (171 P. 311).) It must have been kept in the ordinary course of business. (Epley v. Cunningham, 134 Cal.App.2d 769, 770 (286 P.2d 380).) It must state the debits and credits of the transactions involved completely enough so that the amount due to the claimant can be reasonably determined from it. (Robin v. Smith, 132 Cal.App.2d 288, 291 (282 P.2d 135).)
>
> Warba v. Schmidt,
> 146 Cal.App.2d 234, 238 (1956)

Hence those bills qualifying as book accounts are subject to a four (4) year statute of limitations. Bailey v. Hoffman, 99 Cal.App. 347 (1929); 1 Cal.Jur.3d Accounts and Accounting Sec. 11 (1972).

Secondly, California Code of Civil Procedure section 339 limits oral obligations to two (2) years "except as provided in Section 2725 of the Commercial Code." Section 2725 of the Uniform Commercial Code was designed to introduce a uniform statute of limitations for sales contracts. The Uniform

Commercial Code is designed, however, to only apply to the sale of "goods." Thus whether a particular transaction is governed by the Uniform Commercial Code depends on whether the subject of the transaction, here water, can be construed as "goods."

We believe an excellent argument can be made that the sale of water by a public utility is a sale of goods. First "goods" are broadly defined in the Uniform Commercial Code:

> Sec. 2105. (Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit")
>
> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2107).
>
> California Uniform Commercial Code section 2105

Bulk gasoline and fuel oil have been held to fall within this definition and hence their sale is governed by the provisions of the Uniform Commercial Code. Steiner v. Mobil Oil Corp., 20 Cal.3d 90 (1977).

Secondly, both the selling of electricity (Helvy v. Wabash County REMC, 278 N.E.2d 608 (Ind. 1972)) and the selling of gas (Gardiner v. Philadelphia Gas Works, 197 A.2d 612 (Pa. 1964))

were held to be within the definition of "goods" and hence subject to the four (4) year statue of limitations. As to the electricity, the court reasoned that the substance was existing and movable with existence and movability existing simulta-neously. Surely the same properties apply to water and hence would bring water within the definition of "goods." 48 A.L.R.3d 1060, (1973) U.C.C. - "Goods" - Product of Public Utility.

Since the sale of water to utility customers can be construed as a sale of "goods," it would fall within the California Uniform Commercial Code four (4) year statute of limitations for commencing actions unless expressly reduced.

> Sec. 2725. (Breach of contract for sale; Limitation of actions; Accrual of action; Time for bringing second action; Retrospective operation of section)

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> California Uniform Commercial Code section 2725.

Therefore excellent arguments exist that regular water accounts are subject to a four (4) year statute of limitations based on their construction as book accounts or as the sale of goods.

However, we must stress that individual circumstances may well affect the collection posture of a particular bill. As we noted, the statute of limitations does not extinguish the charge, it merely bars the remedy. Hence action on the part of the debtor may revive the debt. An acknowledgment or promise to pay in writing and signed by the party to be charged will take the case outside the statute of limitations. California Code of Civil Procedure section 360. Further such an acknowledgment of the debt may be evidenced from several writings such as letters, notices and checks. In construing this section, Bank of America v. McRae, 81 Cal.App.2d 1, 11 (1947) held:

> "'If one of the series of papers which appear to have some relation to the same matter is signed by the party to be charged, this is enough, as all the papers are to be
>
> considered together as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to.'"
>
> We think there is adequate competent evidence in this case to show a written promise of the defendant to pay the three notes, to prevent the statute of limitations from barring this action, and to estop him from denying his liability on those notes.

You should likewise recognize that the validity of past due bills may be affected by the conduct of the department's agents. Hence equitable estoppel could operate to bar collection of bills that have been previously inaccurately charged. Equitable estoppel is a doctrine of law to prevent individuals from profiting from their own wrong. To be applicable, the party must be in control of the facts and intend to influence the action of another. The other party must be ignorant of the true facts and

must rely on the actors conduct to his detriment. Canfield v. Prod, 67 Cal.App.3d 722, 731 (1977).

From the above, you can see that a variety of factors bear on the collectability of a service bill. While this memorandum has outlined the major areas, unique fact situations should be reviewed with this office. We recognize the need for priority on these matters and are committed to supplying expeditious answers to individual fact situations.

JOHN W. WITT, City Attorney
By
Ted Bromfield
Chief Deputy City Attorney

TB:js:134(x043.2)
ML-86-26