



August 23, 2017

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Re: *DMV responsibilities under AB103, and Hernandez v. DMV*

Dear Secretary Kelly and Director Shiomoto,

I write on behalf of the Plaintiff/petitioners in *Hernandez v. DMV*, Alameda Co. Super. Ct. Case No. RG16836460 to discuss the DMV's responsibilities under AB 103 and how the *Hernandez* defendants (hereinafter the "DMV") plan to comply.¹ We contact you because we hope to come to a mutually beneficial solution rather than resorting to further litigation.

As you know, *Hernandez v. DMV* challenges the DMV's suspension of driver's licenses for failures to pay traffic fines and fees, and failures to appear to contest traffic tickets. The trial court recently overruled the DMV's demurrer on all counts, finding Plaintiffs had sufficiently alleged statutory and constitutional claims against the DMV, and the Court of Appeal denied the DMV's petition for a writ of mandate on that ruling. The case is now moving full-speed ahead towards a trial date of October 12, 2018 and the parties are beginning to engage in robust discovery – including discovery into the practices of 58 county court systems as well as the DMV's internal operating procedures and practices.

¹ As you likely know, communication between attorneys and public officials, even about litigation, is explicitly permitted by the California Rule of Professional Conduct 2-100 (C)(1).

As you also know, the landscape underlying this case shifted significantly with the June 27, 2017 passage of AB 103 (Stats. 2017, Ch. 17, Secs. 51-54). This legislation amended the only statute that authorized the DMV to maintain a license suspension for failure to pay or failure to appear – Vehicle Code section 13365. It also amended the statutes authorizing courts to give notice to DMV of willful failures to pay traffic fines (Vehicle Code sections 40509 and 40509.5) and directing how those suspensions are to be cured.

We write now to inform you that the DMV is violating its responsibilities under the new law. Although the DMV agrees that it may no longer suspend licenses for failure to pay going forward, it continues to violate the law by *maintaining* its legacy database of license suspensions for failures to pay. The maintenance of failure to pay suspensions violates the plain language and meaning of the new statute and unlawfully restricts the driving privileges of hundreds of thousands of drivers solely because they could not afford to pay a traffic ticket.

We believe it would be in the best interests of all parties involved to reach a resolution on this issue and on the litigation as a whole in light of the new legal landscape.

First, the words in Vehicle Code section 13365 are unambiguous: “The suspension shall continue until the suspended person’s driving record does not contain any notification of a violation of subdivision (a) of Section 40508.” Subdivision (a) of Vehicle Code section 40508 describes the misdemeanor offense of failure to appear. Thus, the statute under which plaintiffs and hundreds of thousands of other drivers have suffered suspension, section 13365, now provides that those suspensions may continue only until their records show no failure to *appear*. Accordingly, the DMV may no longer maintain suspensions for failure to pay, for drivers whose records show no failure to appear.

Second, if the Legislature had intended that existing failure-to-pay suspensions continue, it would not have repealed the process and conditions for ending those suspensions. Vehicle Code sections 40509 and 40509.5 are the provisions allowing courts to notify DMV of failures to appear. When DMV receives such notices, it suspends licenses pursuant to § 13365. Prior to AB 103, these notification statutes also provided that courts could notify DMV of willful failures to pay. *See* former Veh. Code sec. 40509(b), 40509.5(b). Importantly for today, these statutes also contained the method for motorists to cure failure-to-pay suspensions: “If [after a court reports a failure to pay to DMV], the fine is fully paid, the magistrate or clerk of the court shall issue and file with the [DMV] a certificate showing the fine has been paid.” *See id.* In other words, a motorist who had fully paid his or her fine was entitled to a process by which court personnel were *required* to notify DMV of the payment, and following

which DMV was in turn required under Section 13365 to lift the suspension because the record would no longer show a failure to pay.

By passing AB 103, however, the Legislature not only removed authority for future failure-to-pay suspensions, *it also deleted the cure provisions of Sections 40509 and 40509.5*. If the continuation of any failure-to-pay suspensions had been anticipated, there would have been no reason to delete these provisions. Indeed, if failure-to-pay suspensions continue, there is now *no* statutory method for a driver to cure the nonpayment and insist upon reinstatement. Statutes should not be read to require such absurd results. *See California School Employees Assn v. Governing Board*, 8 Cal. 4th 333, 340 (1994) (citing cases).

We anticipate that the DMV may argue that Plaintiffs seek a “retroactive” application of AB 103, and that such retroactive application is not lawful, but this is not the case. A retroactive application of law is one that “change[s] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct.” *Californians for Disability Rights v. Mervyn’s*, 39 Cal.4th 223, 230-31. AB 103 did not change the legal consequences of past conduct: underlying driving offenses have not been changed and the fines, fees, probation, and other legal consequences for past conduct have not altered. Instead, the state has abandoned a particular collection mechanism for recouping those fees and the procedure to be followed as to license suspensions has been changed. Applying new statutory procedures to actively maintained suspensions, like applying new procedures to pending cases, is a prospective, not retroactive, application of the law. *See, e.g., Tapia v. Superior Court*, 53 Cal.3d 282, 288 (1991) (a statute that “relate[s] to the procedure to be followed in the future” is prospective, not retroactive).

Finally, these legacy failure-to-pay suspensions are the vestige of practices that have now been largely abandoned. Continuing to maintain the suspensions is not just contrary to law, it is contrary to the policy articulated by the Governor when he proposed the repeal of suspensions for failure to pay, which was ultimately adopted as AB 103:

Repeal of Driver’s License Suspension

In the past, when the State Penalty Fund has faced shortfalls, the solution has often been to further increase fines and penalties. While this approach increases revenues generated by those who pay the amount owed, it places an undue burden on those who cannot afford to pay. This approach has led to an increasing amount of fines and penalties going uncollected. For example, in 2008-09, uncollected debt was \$5.5 billion and has grown to \$9.7 billion in 2015-16 – a 76-percent increase.

One of the collection methods that courts can use to collect outstanding debt is to suspend driver's licenses for failure to pay. Often, the primary consequence of a driver's license suspension is the inability to legally drive to work or take one's children to school. Therefore, the Budget *eliminates the statutory provisions* related to suspending driver's licenses for failure to pay fines and penalties.

See Governor Brown's 2017-18 California State Budget, Full Budget Summary at 35 (emphasis added).² So long as the DMV maintains existing failure-to-pay suspensions, it continues the harms to California families that AB 103 was designed to end.

To avoid unnecessary expenditure of resources, and to meet the policy goals underlying AB 103, we invite you to meet with us to discuss a potential resolution to this issue. We envision that a successful agreement on this issue would also help facilitate a resolution to the litigation. Please let us know by Wednesday, August 29, whether you are amenable to such a meeting.

Sincerely,

/s/

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² Available at <http://www.ebudget.ca.gov/FullBudgetSummary.pdf>.

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