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RECENT LEGISLATION

ABROGATION OF SOVEREIGN IMMUNITY IN CONTRACT CASES IN MARYLAND

I. INTRODUCTION

In 1976 the Maryland General Assembly enacted legislation which prohibits both state and local units of government from raising the defense of sovereign immunity in certain contract cases.¹ The Act provides that the defense of sovereign immunity cannot be raised in "an action in contract based upon a written contract"² executed after July 1, 1976, on behalf of the state or a political subdivision "by an official or employee acting within the scope of his authority."³ Suit must be brought against the state or political subdivision "within one year from the date on which the claim arose or within one year after completion of the contract . . . whichever is later."⁴ The state and local governments are not, however, liable for punitive damages.⁵ To implement the Act, the state, municipalities and counties are required to provide adequate funds in their budgets for the satisfaction of final judgments against them.⁶ The prohibition of the Act extends to the state, chartered counties, code counties, counties governed by county commissioners, and municipal corporations, as well as to the officers, departments, agencies, boards and commissions thereof.⁷

Prior to the enactment of this legislation, the Maryland courts had steadfastly adhered to the common law doctrine of sovereign immunity which constituted a complete defense to any tort or contract action against the state, unless, by specific legislative exception, the state had consented to be sued in the particular circumstances of the case.⁸ In contract cases, the doctrine did not

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1. Law of May 4, 1976, ch. 450, 1976 Md. Laws 1180 (codified at MD. ANN. CODE art. 41, § 10A (Supp. 1976); art. 23A, § 1A (Supp. 1976); art. 25, § 1A (Supp. 1976); art. 25A, § 1A (Supp. 1976); art. 25B, § 13A (Supp. 1976)).
 2. MD. ANN. CODE art. 41, § 10A(a) (Supp. 1976); art. 23A, § 1A(a) (Supp. 1976); art. 25, § 1A(a) (Supp. 1976); art. 25A, § 1A(a) (Supp. 1976); art. 25B, § 13A(a) (Supp. 1976).
 3. *Id.*
 4. *Id.* art. 41, § 10A(c) (Supp. 1976); art. 23A, § 1A(c) (Supp. 1976); art. 25, § 1A(c) (Supp. 1976); art. 25A, § 1A(c) (Supp. 1976); art. 25B, § 13A(c) (Supp. 1976).
 5. *Id.* art. 41, § 10A(b) (Supp. 1976); art. 23A, § 1A(b) (Supp. 1976); art. 25, § 1A(b) (Supp. 1976); art. 25A, § 1A(b) (Supp. 1976); art. 25B, § 13A(b) (Supp. 1976).
 6. *Id.* art. 41, § 10A(d) (Supp. 1976); art. 23A, § 1A(d) (Supp. 1976); art. 25, § 1A(d) (Supp. 1976); art. 25A, § 1A(d) (Supp. 1976); art. 25B, § 13A(d) (Supp. 1976).
 7. *Id.* art. 41, § 10A (Supp. 1976); art. 23A, § 1A (Supp. 1976); art. 25, § 1A (Supp. 1976); art. 25A, § 1A (Supp. 1976); art. 25B, § 13A (Supp. 1976).
 8. *E.g.*, *Calvert Assocs. Ltd. Partnership v. Dept. of Employment and Social Serv.*, 277 Md. 372, 357 A.2d 839 (1976).

fully extend to counties or municipalities. These political subdivisions could cancel a contract entered into in the exercise of a governmental function, but could not avoid liability for damages incurred to the time of cancellation on the ground of sovereign immunity.⁹ The doctrine could not be evaded by bringing an action nominally against an officer or employee of the state.¹⁰ On the other hand, officers or employees of the state could be personally sued for actions taken without right or authority.¹¹

II. ANALYSIS OF THE OPERATIVE SECTIONS OF THE ACT

Under the Act the defense of sovereign immunity cannot be raised if the plaintiff meets three initial requirements: (1) the action must be an "action in contract," (2) "based upon a written contract," (3) "executed on behalf of the state by an official or employee acting within the scope of his authority."¹²

The term "action in contract" is generally expressed in contradistinction to the term "action in tort." The former flows from the breach of a duty arising out of a contract, express or implied, while the latter flows from the breach of a general duty imposed by law.¹³ Actions at law are generally divided into two classes, *ex contractu* and *ex delicto*, *ex contractu* being the equivalent of an "action in contract."¹⁴ Under the Maryland Rules of Procedure, the action of assumpsit is the proper form of action for recovery upon causes of action arising in contract.¹⁵ The legislature chose to limit the scope of the Act to contract actions, thus leaving actions in tort subject to the common law defense of sovereign immunity.¹⁶ The distinctions between actions *ex contractu* and actions *ex delicto*, however, have become somewhat blurred over the years.¹⁷ As a result, it is possible to frame a tort action as an action in contract. A plaintiff could bring an action for breach of an implied contract for services between the state and its citizens rather than a tort action for negligence if, for example, the state's failure to clear the roads of

9. *American Structures, Inc. v. Mayor of Baltimore*, 278 Md. 356, 364 A.2d 55 (1976).

10. *Stanley v. Mellor*, 168 Md. 465, 178 A. 106 (1935). See generally MD. ANN. CODE art. 32A, § 12A *et seq.* (1957) (the Attorney General has statutory authority to defend state officers or employees acting within the scope of their employment); art. 78A, § 16c (1957).

11. *United States v. Cordy*, 58 F.2d 1013 (D. Md. 1932).

12. MD. ANN. CODE art. 41, § 10A(a) (Supp. 1976); art. 23A, § 1A(a) (Supp. 1976); art. 25, § 1A(a) (Supp. 1976); art. 25A, § 1A(a) (Supp. 1976); art. 25B, § 13A(a) (Supp. 1976).

13. *International Printing Pressmen & Ass'ts Union v. Smith*, 145 Tex. 399, 198 S.W.2d 729, 735-37 (1947).

14. Md. Rules 340, 342.

15. Md. Rule 340(b)(1).

16. See Law of May 4, 1976, ch. 450, 1976 Md. Laws 1180-81 (preamble).

17. See 1 H. SACHS, JR., *POE'S PLEADING AND PRACTICE* § 52 (6th ed. 1970) [hereinafter cited as 1 H. SACHS, JR.].

ice and snow proximately caused an accident.¹⁸ To avoid that possibility,¹⁹ the legislature specified that actions in contract must be based upon a "written contract."²⁰

A written contract is generally defined as one in which all terms are in writing.²¹ Whether a contract partly in writing and partly oral would be considered a written contract within the meaning of the Act is potentially a matter of some dispute²² since the phrase has no single or uniform meaning.²³ Professor Corbin suggests that the term "written contract" should be interpreted in light of the circumstances surrounding the passage of the legislation:

The meaning that is intended to be conveyed by [the term "written contract,"] when used . . . by a legislature in a statute, must be determined by the usual processes of interpretation in the light of all the relevant surrounding circumstances. The same is true as to the meaning that is in fact conveyed to one who hears or reads it. When such meanings, so determined, are at variance it depends upon our opinions of policy and justice whether legal effect shall be given to any one of them or to none. Often the choice will depend primarily upon the purpose with which the term is used . . . by the legislature.²⁴

In light of the legislative purpose in inserting the term "written contract" into the Act, the Maryland courts should broadly construe this term. Contracts partly oral and partly written should be considered written contracts, provided the essential terms are in writing, and notwithstanding the fact that parol evidence may be necessary to supply additional terms.

Beyond these executory ambiguities, there remains the problem of what kinds of written agreements are comprehended by the term "contract." For example, an issue may arise as to whether a

18. REPORT OF THE GOVERNOR'S COMMISSION TO STUDY SOVEREIGN IMMUNITY, app. B-13 (1976) [hereinafter cited as GOVERNOR'S REPORT].

19. See discussion p. 346 *infra*; in which it is noted that the legislature inserted the term "written contract" after the governor vetoed a previous bill providing for liability in "any action of contract." In his veto message, the governor expressed his concern that a contract action might be brought construing essential government services to be an implied contract.

20. MD. ANN. CODE art. 41, § 10A(a) (Supp. 1976); art. 23A, § 1A(a) (Supp. 1976); art. 25, § 1A(a) (Supp. 1976); art. 25A, § 1A(a) (Supp. 1976); art. 25B, § 13A(a) (Supp. 1976).

21. *Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Loomis*, 142 Ill. 560, 32 N.E. 424, 426 (1892).

22. *Compare* *Novosk v. Reznick*, 323 Ill. App. 544, 550, 56 N.E.2d 318, 321 (1944) (a contract is not in writing unless all the terms are in writing, thus, a contract is considered an oral contract if parol evidence is necessary to supply any missing term) *with* *Stanley v. Chastek*, 34 Ill. App. 2d 220, 180 N.E.2d 512, 519-20 (1962); *Lyons v. Moise's Ex'r.*, 298 Ky. 858, 183 S.W.2d 493 (1944) (a contract is a written contract when the essential terms are in writing notwithstanding the fact that parol evidence is necessary to supply a missing term).

23. 1 A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 31 (1963).

24. *Id.*

lease is a contract within the meaning of the Act.²⁵ In an action against the state on a written lease, the state may argue that the Act did not abrogate sovereign immunity since, at common law, a lease is not a contract but a conveyance of an interest in real property.²⁶ In opposition to this theory, a plaintiff could argue that under the modern view, a lease is a contract for the purchase of a possessory interest in real property.²⁷ There is some indication that the Maryland Court of Appeals would consider a written lease to be a written contract within the meaning of the Act.²⁸ In *Progressive Friendship Savings and Loan Association v. Rose*,²⁹ in which a corporate tenant sued a sub-tenant for rent, the court stated that a lease is a form of contract subject to the general rules governing the creation and construction of contracts.³⁰ To complete the argument, since a suit for rent under a written lease may be brought in assumpsit,³¹ which is an action in contract,³² two statutory requirements have been satisfied.

Assuming a breach can be proven, the plaintiff then must show that the written lease was "executed on behalf of the state"³³ or a political subdivision "by an official or employee acting within the scope of his authority."³⁴ The term "scope of authority" is not capable of accurate definition.³⁵ In the law of agency, however, it has been held to include both actual and apparent authority.³⁶ Article 31, Section 3 of the Maryland Code provides:

An officer or agent of the State or any county, township or municipal corporation, who is charged or entrusted with the construction, improvement or keeping in repair of any

25. From time to time, issues may arise as to whether certain written agreements are written contracts. The discussion of whether a written lease is a written contract is intended only to be illustrative of these questions.

26. Cf. 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952) (Professor Casner notes that a lease is both a conveyance and a contract, although the covenants in a lease are not mutually dependent so that a breach of the landlord's covenants generally does not relieve the tenant of his obligation to pay rent).

27. *Arthur Treacher's Fish & Chips, Inc. v. Children Terrace Ltd. Partnership*, 272 Md. 720, 327 A.2d 282 (1974); *Phoenix Savings and Loan, Inc. v. Striner Enterprises, Inc.*, 265 Md. 205, 209, 288 A.2d 902, 904-05 (1972); *Progressive Friendship Savings and Loan Ass'n v. Rose*, 235 Md. 169, 201 A.2d 8 (1964).

28. *Arthur Treacher's Fish & Chips, Inc. v. Children Terrace Ltd. Partnership*, 272 Md. 720, 327 A.2d 282 (1974); *Phoenix Savings and Loan, Inc. v. Striner Enterprises, Inc.* 265 Md. 205, 209, 288 A.2d 902, 904-05 (1972); *Progressive Friendship Savings and Loan Ass'n v. Rose*, 235 Md. 169, 201 A.2d 8 (1964).

29. 235 Md. 169, 201 A.2d 8 (1964).

30. *Id.* at 174, 201 A.2d at 11.

31. 1 H. SACHS, JR., *supra* note 17, § 132.

32. Md. Rule 340(b)(1).

33. MD. ANN. CODE art. 41, § 10A(a) (Supp. 1976); art. 23A, § 1A(a) (Supp. 1976); art. 25, § 1A(a) (Supp. 1976); art. 25A, § 1A(a) (Supp. 1976); art. 25B, § 13A(a) (Supp. 1976).

34. *Id.*

35. See *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 113 S.W. 429, 431 (1908); *Adams v. S.C. Power Co.*, 200 S.C. 438, 441-42, 21 S.E.2d 17, 18-19 (1942).

36. *Angerosa v. White Co.*, 248 App. Div. 425, 432-33, 290 N.Y.S. 204, 208-09 (1936).

building or work of any kind, or with the management or providing for any public institution, shall not make any contract binding or purporting to bind the State, or any county, township or any municipal corporation to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended, and applicable to such purpose, such officer or agent who wilfully or knowingly makes or participates in making a contract without such appropriation or authority, shall be personally liable thereon, and the State, county, township or municipal corporation in whose name or behalf the same was made, shall be not liable thereon.³⁷

This provision requires that in order to be acting within the scope of his authority, an officer or agent of the state or political subdivision must have been entrusted with the performance of some governmental function.³⁸ In addition, the officer or agent must have entered into a contract for the payment of money on behalf of the state pursuant to a specific, unexpended legislative appropriation for the purposes of that contract.³⁹ This would seem to limit the authority of state agents to bind the state contractually to specific actual authority, thus precluding the liability of the state or political subdivisions on contracts made by agents acting under apparent authority.

A potential problem which may affect the interaction between Article 31 and the Act is the difference between "officer or agent" as used in Article 31, and "official or employee" as used in the Act. Arguably, there is no genuine distinction in fact between the two provisions inasmuch as an official would likely be considered an officer, and an employee an agent.⁴⁰ A more significant problem is whether an entity is an agency of the state. In *Board of Trustees of Howard Community College v. John K. Ruff, Inc.*,⁴¹ the Maryland Court of Appeals looked to the following factors in determining that the Board of Trustees of a community college was a state agency: whether there is substantial state funding;⁴² whether there is the power of eminent domain; whether the state establishes general policies of operation; and whether the powers are bestowed by public general laws.⁴³ Once this analysis reveals that the entity is an

37. MD. ANN. CODE art. 31, § 3 (1957).

38. MD. ANN. CODE art. 31, § 3 (1957) describes in broad terms such governmental functions as improving or repairing buildings or providing for any public institution.

39. *Id.*

40. *Marine v. Service Trucking Co.*, 225 Md. 315, 170 A.2d 188 (1960) (employee synonymous with servant); *Heiliger v. Sheldon*, 236 Iowa 146, 18 N.W.2d 182, 189 (1945) (officer equivalent to official). See also W. SEAVY, HANDBOOK OF THE LAW OF AGENCY § 6 (1964).

41. 278 Md. 580, 366 A.2d 360 (1976).

42. In this case, a 50% funding by the state was considered substantial.

43. 278 Md. at 586-87, 366 A.2d at 364.

agency of the state, the only remaining determination is whether the official or employee acted within the scope of his authority.

The Act provides a statute of limitations of one year from the "date on which the claim arose or within one year after completion of the contract giving rise to the claim, whichever is later."⁴⁴ By analogy to the general statute of limitations in the Maryland Code,⁴⁵ it can reasonably be concluded that the "date on which the claim arose" is the equivalent of the date of breach. The statute provides that a civil action is to be filed within three years from "the date it accrues."⁴⁶ The Maryland Court of Appeals has held that in contract actions, the statute of limitations begins to run from the date of the alleged breach.⁴⁷ Therefore, since "the date [the action] accrues" means date of breach, the provision "date on which the claim arose" in the Act should be given a similar interpretation.

With respect to suits against counties and municipalities, there is a question as to whether the Maryland Code provision relating to notice of claims against these potential defendants⁴⁸ applies to actions in contract under the Act. The Code provides:

No action shall be maintained and no claims shall be allowed against any municipal corporation or against any county or Baltimore City for unliquidated damages for any injury or damage to person or property unless within 180 days . . . written notice . . . shall be presented either in person or by registered mail. . . .⁴⁹

Although one could argue that the breach of a contractual obligation is a claim for "unliquidated damages for . . . injury or damage to person or property,"⁵⁰ the cases arising under this statute are exclusively tort cases.⁵¹ The notice of claims provision seems to deal with tort rather than contract actions. The rationale underlying this provision may be that because the general statute of limitations for civil actions runs for three years, the notice requirement would assist the counties and municipalities in marshalling the facts for their defense since over a three year period evidence may be lost, memories may fade and witnesses may become unavailable. Under the one year limitations of the Act, this danger is minimized.

44. MD. ANN. CODE art. 41, § 10A(c) (Supp. 1976); art. 23A, § 1A(c) (Supp. 1976); art. 25, § 1A(c) (Supp. 1976); art. 25A, § 1A(c) (Supp. 1976); art. 25B, § 13A(c) (Supp. 1976).

45. MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1974).

46. *Id.*

47. *Mumford v. Staton, Whaley & Price*, 254 Md. 697, 255 A.2d 359 (1969); *Killen v. George Washington Cemetery, Inc.*, 231 Md. 337, 190 A.2d 247 (1963).

48. MD. ANN. CODE art. 57, § 18 (Supp. 1976).

49. *Id.* § 18(a) (Supp. 1976).

50. *Id.*

51. *See, e.g., Loewinger v. Prince George's County*, 266 Md. 316, 292 A.2d 67 (1972); *Rich v. Mayor of Baltimore*, 265 Md. 647, 290 A.2d 777 (1972); *Jackson v. Bd. of County Comm'rs*, 233 Md. 164, 195 A.2d 693 (1963).

Several potential difficulties inhere in the Act's mandate that the state and local governments budget adequate funds annually for the satisfaction of judgments against them.⁵² In *Board of Trustees of Howard Community College v. John K. Ruff, Inc.*,⁵³ the lower court found the board of trustees liable under a contract entered into prior to the effective date of the Act, in which it agreed to pay the general contractor's sales taxes on building materials. The Maryland Court of Appeals found that the legislature had expressly given its consent to suits against the boards of trustees of community colleges by a previous statute.⁵⁴ Despite the statutory consent to be sued, the court raised the defense of sovereign immunity *sua sponte*, holding that the defense would still be viable if funds had not been appropriated for the purpose of satisfying the judgment and funds could not be provided by taxation.⁵⁵ The court then remanded the case for a determination of whether there were any funds available to satisfy a judgment since the court determined as a matter of law that the board does not have the power to raise funds by taxation.⁵⁶

In a post-Act case, although prohibited from raising the defense of sovereign immunity specifically, the state or local government might recite at trial or on appeal the fact that no funds were currently available, that the particular governmental unit did not have the power to tax, and that a court is not a unit of government within the meaning of the Act.⁵⁷ The court would then have an opportunity to raise the defense. It is clear, however, that the Act contemplates that the state or local government will budget adequate funds *after* judgment has been rendered, since the Act states, for example, that "the Governor annually shall provide in the State budget adequate funds for the satisfaction of any final judgment, after the exhaustion of any right of appeal, *which has been rendered* against the State. . . ."⁵⁸ Since the Act envisions

52. See note 6 *supra*, and accompanying text.

53. 278 Md. 580, 366 A.2d 360 (1976).

54. MD. ANN. CODE art. 77A §1 (1-1) (Supp. 1976).

55. The court followed the holding in *Univ. of Md. v. Maas*, 173 Md. 554, 197 A. 123 (1938), in which the plaintiff's contract claim was precluded by the defense of sovereign immunity even though the legislature had provided that the university could be sued, because no funds were available, and the university could not raise funds by taxation.

56. *Bd. of Trustees of Howard Community College v. John K. Ruff, Inc.*, 278 Md. 580, 595-96, 366 A.2d 360, 369 (1976).

57. See *Smith v. Higinbotham*, 187 Md. 115, 48 A.2d 754 (1946). Quite summarily, the author concludes that a court is not such a governmental unit since the general term "other unit of state government" should, under the rule of *ejusdem generis*, be interpreted in light of the preceding phrase which mentions only officers or units of government within the executive branch. If, however, the governmental unit was a county or municipality the court would be precluded from raising the absolute defense of sovereign immunity since the doctrine never fully extended to these entities. See note 9 *supra*.

58. MD. ANN. CODE art. 41 § 10A(d) (Supp. 1976); art. 23, § 1A(d) (Supp. 1976); art. 25, § 1A(d) (Supp. 1976); art. 25A, § 1A(d) (Supp. 1976); art. 25B, § 13A(d) (Supp. 1976) (emphasis added).

appropriations only after a final judgment, it would be inappropriate for the courts to raise the defense of sovereign immunity *sua sponte* before the governor and the legislature had an opportunity to provide the funds as contemplated in the Act.

An added benefit in appropriating funds after judgment is that the state budgetary process is rendered more certain, since the state is not required to speculate as to the amount of judgments to be rendered in any given year. The disadvantage with this approach is that successful plaintiffs may be denied the ability to collect on a judgment for a substantial period of time. If, for example, a claimant were to receive a judgment against the state immediately after the fiscal budgetary process had been completed, the litigant would have to wait for an entire year for satisfaction. When there is a substantial delay from judgment to collection, it is conceivable that the successful plaintiff would be denied interest since the Act makes no mention of additional appropriations for interest payments. The apparent policy behind the denial of interest payments is that since the claimant is being given a right which he would not otherwise possess, he should not be given additional benefits at the expense of the taxpayer. On the other hand, the successful plaintiff is being denied the use of his funds for a substantial period of time without compensation. On balance, the litigant should be able to collect interest on his judgment. This conclusion is supported by the legislative policy in passing the Act.⁵⁹ The General Assembly recognized that the state has a moral obligation to fulfill contractual obligations just like any other contracting party. Requiring the state to pay interest on judgments is, therefore, consistent with this policy.

Should the state legislature or local government refuse to appropriate sufficient funds in any given year, there is currently no procedure whereby judgments may be resubmitted in subsequent years.⁶⁰ The legislature should deal with this problem by providing that unsatisfied judgments be given priority based on date of judgment when appropriations are made available. If the legislature should fail to do so, in an appropriate case, the court should adopt a rule that the priority of satisfaction should be based on date of judgment.

III. LEGISLATIVE AND JUDICIAL HISTORY OF SOVEREIGN IMMUNITY IN MARYLAND

Although the doctrine of sovereign immunity is a product of the common law and although courts in other states have abrogated sovereign immunity in contract by judicial decision,⁶¹ the Maryland

59. See Law of May 4, 1976, ch. 450, 1976 Md. Laws 1180-81.

60. The successful plaintiff would be left without a remedy since, presumably, a plaintiff cannot execute on judgments rendered against the state.

61. *E.g.*, *Kersten Co. v. Dep't of Social Servs.*, 207 N.W.2d 117 (Iowa 1973).

Court of Appeals had been unwilling to do so in light of the history of the doctrine in this state.⁶² In 1786, the legislature provided that Maryland citizens could sue the state for money damages and that if a jury found for the plaintiff the state was required to pay the amount of judgment.⁶³ This Act, however, was repealed in 1820.⁶⁴ The court also considered the circumstances surrounding the case of *St. John's College v. State*⁶⁵ to be further evidence that the power to sue the state must come from the legislature. In 1858, the General Assembly passed a resolution tantamount to giving its consent for the state to be sued in this particular case.⁶⁶ The fact that prior legislative approval was necessary to permit the litigation was used by the court to bolster its view that any change in the doctrine of sovereign immunity must come from the legislature.⁶⁷ These actions of the General Assembly were interpreted by the court as clear evidence that the legislature believed itself to be the appropriate branch of government to deal with sovereign immunity. The court seemed to ignore the fact that since sovereign immunity is a judge-made doctrine, legislative intervention should be unnecessary for its abrogation.⁶⁸ The repeal in 1820 of a prior legislative abrogation of sovereign immunity could have been interpreted as handing the matter back to the court to exercise its discretion concerning a common law doctrine, and not as expressing the desire that the matter remain a legislative prerogative.⁶⁹

Realizing the total reluctance of the courts to modify the doctrine of sovereign immunity in contract cases,⁷⁰ the legislature made several attempts to make the change by statute. The first attempt came in 1973 when Delegate Joseph E. Owens (D-Montgomery County) introduced House Bill 1119 which provided that the state and local governments are "liable in any action of contract, and may not raise the defense of sovereign immunity, for any contract made by the state"⁷¹ or local government. This bill died in a Senate committee after passing the House.⁷² The next year Delegate Owens

62. *Calvert Assocs. Ltd. Partnership v. Dep't of Employment & Social Servs.*, 277 Md. 372, 357 A.2d 839 (1976).

63. Law of Jan. 20, 1786, ch. 53, 1786 Md. Laws (repealed 1820).

64. Law of Feb. 17, 1820, ch. 210, 1820 Md. Laws.

65. 15 Md. 330 (1860).

66. H.J. Res. 4, 1858 Md. Laws 663.

67. *Calvert Assocs. Ltd. Partnership v. Dep't of Employment & Social Servs.*, 277 Md. 372, 376-77, 357 A.2d 839, 841 (1976).

68. See *Stone v. Ariz.*, 93 Ariz. 384, 381 P.2d 107, 113 (1963); *Kersten Co. v. Dep't of Social Servs.*, 207 N.W.2d 117, 118 (Iowa 1973).

69. *But see Charles E. Brohawn & Bros., Inc. v. Bd. of Trustees of Chesapeake College*, 269 Md. 164, 304 A.2d 819 (1973). As recently as 1973 the court of appeals held that contract suits could not be maintained against the state, unless, by statute, the state has specifically consented to be sued in the circumstances of that particular case.

70. *Id.*

71. H.D. No. 1119, 1973 Sess.

72. GOVERNOR'S REPORT 100 (1976).

again filed a similar bill.⁷³ Although it passed both houses of the legislature, the governor vetoed for several reasons.⁷⁴ First, the bill did not specifically appropriate funds to satisfy final judgments. The governor considered such a provision essential to any legislation dealing with sovereign immunity in light of the views then prevailing in the Maryland Court of Appeals. In *University of Maryland v. Maas*,⁷⁵ the court had held that, even if sovereign immunity had been abrogated, a contract action is subject to the defense if no funds are available to satisfy the judgment and the agency sued cannot raise funds by taxation.⁷⁶ Secondly, the governor was concerned that liability under this bill "would far exceed its intended effect" in that the state might be liable in actions alleging breach of an implied contract to provide governmental services.⁷⁷

During the next session of the General Assembly in 1975, Delegate Owens filed a revised bill which included a provision that the immunity defense could not be raised in any action on a written contract,⁷⁸ thereby eliminating the possibility that an action could be brought on an implied contract for essential governmental services. The bill was similar to the 1976 Act in requiring that the governor and the governing bodies of the counties and municipalities provide adequate funds in their budgets for the satisfaction of any judgments.⁷⁹ The governor again exercised his veto power after the bill passed both houses of the legislature. Despite the requirement that the governor budget adequate funds for the satisfaction of any judgment, the governor felt that there was nothing to prevent the General Assembly from deleting these funds. In addition, it was uncertain whether the bill complied with the court's opinion in *University of Maryland v. Maas*⁸⁰ which held that even if immunity has been abrogated, a contract action would be subject to the defense of sovereign immunity if no funds were available and the agency could not raise funds by taxation.⁸¹

Finally, in 1976, the present statute was enacted and signed into law by the governor. It is interesting to note that the funding provisions of the 1975 bill remained intact despite the infirmities which the governor recognized. However, the Act differs from the previous proposals in several respects. First, the 1976 Act prohibits the state and local governments from raising the defense "in the

73. H.D. No. 5, 1974 Sess.

74. GOVERNOR'S REPORT, app. B-12 (1976).

75. 173 Md. 554, 197 A. 123 (1938).

76. *Id.* at 559, 197 A. at 125.

77. See note 74 *supra*.

78. H.D. No. 1672, 1975 Sess.

79. Compare *id.* with MD. ANN. CODE art. 41, § 10A(d) (Supp. 1976); art. 23A, § 1A(d) (Supp. 1976); art. 25, § 1A(d) (Supp. 1976); art. 25A, § 1A(d) (Supp. 1976); art. 25B, § 13A(d) (Supp. 1976).

80. 173 Md. 554, 197 A. 123 (1938).

81. *Id.* at 559, 197 A. at 125.

courts of this state in an action in contract based upon a written contract."⁸² Prior bills used the term "action of contract," but this distinction is insignificant since both terms refer to actions *ex contractu*. The 1976 Act also states that punitive damages are not permitted in such suits,⁸³ and that the claim is subject to a one year statute of limitations.⁸⁴ Prior bills were silent on both points. Although previous bills made no mention of exhausting the right of appeal, the 1976 Act provides that the governor and governing bodies shall provide "adequate funds for the satisfaction of any final judgment, *after the exhaustion of any right of appeal*, which has been rendered"⁸⁵ against the state or local governments.

IV. BASES OF THE DOCTRINE AND APPROACHES IN OTHER JURISDICTIONS

An often-quoted paragraph from the 1871 case of *State v. Baltimore & Ohio Railroad*⁸⁶ states that "immunity belongs to the state by reason of her prerogative as a sovereign, and on the grounds of public policy."⁸⁷ At common law, the basis of the doctrine was that the king or sovereign was above the law and could do no wrong.⁸⁸ The prevailing rationale in more recent times has been that suits against the state would deplete the treasury of funds necessary for the day-to-day operation of government.⁸⁹ Many jurisdictions have found this rationale unpersuasive.⁹⁰ For example, the courts in Delaware, Missouri and North Carolina have held that the state has waived its immunity defense in contract cases when the contract was legislatively authorized.⁹¹ The state courts have found an overriding policy that "[a] truly democratic government should observe the same rules of conduct that it requires of its citizens."⁹² A Delaware court assumed that when the legislature authorizes a state agency to enter into contracts, the legislature contemplates a *valid*

82. MD. ANN. CODE art. 41, § 10A(a) (Supp. 1976); art. 23A, § 1A(a) (Supp. 1976); art. 25, § 1A(a) (Supp. 1976); art. 25A, § 1A(a) (Supp. 1976); art. 25B, § 13A(a) (Supp. 1976).

83. *Id.* art. 41, § 10A(b) (Supp. 1976); art. 23A, § 1A(b) (Supp. 1976); art. 25, § 1A(b) (Supp. 1976); art. 25A, § 1A(b) (Supp. 1976); art. 25B, § 13A(b) (Supp. 1976).

84. *Id.* art. 41, § 10A(c) (Supp. 1976); art. 23A, § 1A(c) (Supp. 1976); art. 25, § 1A(c) (Supp. 1976); art. 25A, § 1A(c) (Supp. 1976); art. 25B, § 13A(c) (Supp. 1976).

85. *Id.* art. 41, § 10A(d) (Supp. 1976); art. 23A, § 1A(d) (Supp. 1976); art. 25, § 1A(d) (Supp. 1976); art. 25A, § 1A(d) (Supp. 1976); art. 25B, § 13A(d) (Supp. 1976) (emphasis added).

86. 34 Md. 344 (1871).

87. *Id.* at 374.

88. *Ace Flying Serv., Inc. v. Colorado Dep't of Agriculture*, 136 Colo. 19, 24, 314 P.2d 278, 281 (1957).

89. *Id.*

90. See 53 N.C. L. REV. 1114 (1975).

91. *George & Lynch, Inc. v. State*, 57 Del. 158, 197 A.2d 734 (1967); *V. S. DiCarlo Constr. Co. v. State*, 485 S.W.2d 52 (Mo. 1972); *Smith v. State*, 23 N.C. App. 423, 209 S.E.2d 336 (1974).

92. *Smith v. State*, 23 N.C. App. 423, 426, 209 S.E.2d 336, 338 (1974).

contract,⁹³ and, traditionally, contracts are valid only when there is mutuality of obligations between the parties.⁹⁴ A contrary view is seen as attributing to the legislature a desire that its citizens expend large sums of money to carry out their contractual obligations to the state while denying them any right to enforce the state's obligations, thereby profiting the state at the citizen's expense.⁹⁵ There is justification for judicially abrogating sovereign immunity in that it is a common law doctrine.⁹⁶ Since sovereign immunity is a judge-made doctrine, legislative intervention should not be necessary for its abrogation.⁹⁷ The problem inherent in judicial abrogation is that the legislature ultimately has the responsibility to appropriate funds to satisfy judgments adverse to the state. For example, after the Iowa Supreme Court did away with the state's immunity in contract suits, it was unclear how judgments were to be handled, and legislative action was considered necessary in order to satisfy a judgment.⁹⁸

This problem inheres not only when immunity is judicially abrogated but also when the legislature acts to permit suits. If no funds have been appropriated, sovereign immunity may still attach. In Massachusetts, the legislature authorized suits against the state and set up a procedure for payment of claims after judgment.⁹⁹ The procedure required that the clerk of the court certify a copy of the judgment to the state comptroller who in turn was to notify the governor. The governor was then to draw a warrant for the proper amount on the state treasurer, who then paid the same from any appropriations earmarked for claims against the commonwealth.¹⁰⁰ A claimant made an attempt under this procedure to receive payment on a compromise settlement negotiated with a state agency in *George A. Fuller Co. v. Commonwealth*.¹⁰¹ Although the claim was held to be invalid because the procedures outlined above were not followed,¹⁰² the court noted that it is a fundamental principle of our system of government that the legislature has the sole power to authorize payment of claims against the state by virtue of the fact that it is the branch of government having the power to collect and appropriate funds.¹⁰³ As a general rule, the above view is incorpo-

93. *George & Lynch, Inc. v. State*, 57 Del. 158, 197 A.2d 734, 736 (1964).

94. 1 S. WILLISTON, *CONTRACTS* §1 (3d ed. 1957).

95. *Chapman v. State*, 104 Cal. 690, 38 P. 457 (1894); *Ace Flying Serv., Inc. v. Colorado Dep't of Agriculture*, 136 Colo. 19, 314 P.2d 278 (1957); *George & Lynch, Inc. v. State*, 57 Del. 158, 197 A.2d 734 (1964); *V. S. DiCarlo Constr. Co. v. State*, 485 S.W.2d 52 (Mo. 1972); *Smith v. State*, 23 N.C. App. 423, 209 S.E.2d 336 (1974).

96. *Charles E. Brohawn & Bros. v. Board of Trustees of Chesapeake College*, 269 Md. 164, 165, 304 A.2d 819, 820 (1973).

97. *See Kersten Co. v. Dep't of Social Servs.*, 207 N.W.2d 117, 118 (Iowa 1973).

98. *See* 59 IOWA L. REV. 360, 373-76 (1973).

99. MASS. GEN. LAWS ANN. ch. 258 §3 (West 1968).

100. *Id.*

101. 303 Mass. 216, 21 N.E.2d 529 (1939).

102. *Id.* at 220, 21 N.E.2d at 531.

103. *Id.*

rated into statutes abrogating the state's immunity. For example, Arizona requires that the governor report to the legislature all judgments rendered against the state.¹⁰⁴ Final payment of any judgment may not be made, however, until an appropriation is made by the legislature.¹⁰⁵

V. CONCLUSION

By the 1976 Act, Maryland has chosen to follow the lead of the majority of states by limiting the doctrine of sovereign immunity. The legislature should be commended for recognizing that "[t]here exists a moral obligation on the part of any contracting party, including the state or its political subdivisions to fulfill the obligations of a contract."¹⁰⁶ There are, however, several respects in which the Act needs revision in order to remove ambiguity and establish orderly procedures. First, by specifically amending the Act, the legislature should remove all doubt as to whether the defense of sovereign immunity may be raised in an action on a written lease. Secondly, the Act should be amended to provide that a claimant need not file a notice of claim with the county or municipality as otherwise provided by statute.¹⁰⁷ Thirdly, the Act should clarify the budget procedure for the satisfaction of final judgments. Since the Act contemplates appropriations after judgments have been rendered, the Act should specify that the successful plaintiff is entitled to interest from date of judgment. In light of the possibility that the legislature might refuse to provide funds in any given year, the Act should provide a procedure whereby unsatisfied judgments are given priority based on date of judgment when appropriations are later made available.

The author recommends the following italicized changes in Section 10A of Article 41, with parallel changes in Section 1A of Articles 23A, 25, and 25A, and Section 13A of Article 25B to remedy these problems:

(a) Unless otherwise specifically provided by the Laws of Maryland, the State of Maryland, and every officer, department, agency, board, commission, or other unit of State government may not raise the defense of sovereign immunity in the courts of this State in an action in contract based upon a written contract, *written lease, or any other written agreement*, executed on behalf of the State, or its

104. ARIZ. REV. STAT. § 12-826 (West 1956).

105. *Id.* § 12-826(c); see also *Commonwealth v. Shamrock Corp.*, 501 S.W.2d 584 (Ky. 1973).

106. Law of May 4, 1976, ch. 450, 1976 Md. Laws 1181-82.

107. MD. ANN. CODE art. 57, § 18 (Supp. 1976).

department, agency, board, commission, or unit by an official or employee acting within the scope of his authority.

. . . .

(d)(i) In order to provide for the implementation of this section, the Governor annually shall provide in the State budget adequate funds for the satisfaction of any final judgment, *with interest from date of judgment*, after the exhaustion of any right of appeal, which has been rendered against the State, or any officer, department, agency, board, commission, or other unit of government in an action in contract as provided in this section.

(ii) *Judgments against the State under this section shall be reported to the Comptroller of the Treasury, who shall maintain and annually report to the Governor an accounting of existing judgments. Upon appropriation of funds by the legislature, the Comptroller of the Treasury shall satisfy existing judgments in the order of date of judgment.*

As to counties and municipalities, a new subsection "e" should be added to Section 1A of Articles 23A, 25, and 25A, and Section 13A of Article 25B:

(e) A claimant need not file a notice of claim as provided in Maryland Code, Article 57, Section 18, to maintain an action in contract as provided under this section.

H. Dean Bouland