Sovereign Immunity and the Settlement Of Contract Claims Against the State

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•THE writer has not conceived the purpose of this paper to be for the examination and cataloging of the various kinds of contract disputes which have arisen within the respective states. Rather, the existence of a dispute (without defining its character) is assumed. Nor is this paper concerned with administrative procedures established pursuant to administrative rule-making powers conferred by statute upon state agencies. Instead, it is concerned with those administrative and judicial procedures which have been specifically provided for by the respective state legislatures.

It is hoped that this paper may serve (in military parlance) as a kind of "staging area" from which deeper assaults of inquiry might be made. For example, most state agencies charged with the duty of constructing public works are delegated a corollary power to establish rules for the administration of the work for which they are responsible. It may be assumed that in some jurisdictions, public works agencies have established purely administrative procedures for the resolution of contract disputes. This would seem to follow especially in those jurisdictions where the legislature has enacted an administrative procedure act. A state-by-state survey would probably reveal valuable administrative formulas lying beneath the strata of statutory procedure. Such information would only be disclosed through personal inquiries of the various administrative officers of state agencies involved in the construction of public works, but the effort would certainly be worthwhile.

Initial research into the subject matter of this paper posed some particularly vexing problems. First, there was a dearth of written authority concerning the settlement of contract claims against the states. Second, by contrast, there was a superabundance of material discussing sovereign immunity and the settlement of tort claims. Any cherished bit of contract claims discussion was usually lumped together with a discussion of tort claims and treated in an almost off-hand or incidental manner. Typical of such discussion is the following:

> Immunity of the sovereign from suability is an ancient principle of the law, both in contract and tort cases. The sovereign may waive, and at times has waived, this immunity in part, by express statutory provisions. The United States as a sovereign has long abandoned the principle of nonsuability in contract cases, at first by private acts allowing recovery against the government for private claims, and then by the establishment in 1855 of the Court of Claims with jurisdiction over claims against the United States founded upon any law of Congress or upon any contract, express or implied, and by the enactment in 1887 of the Tucker Act granting concurrent jurisdiction to the Federal District Courts in cases involving claims not exceeding $10,000.00 1 A.L.R.2d 222 at p. 224.[1]

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[1] See also 49 Am.Jur., States, Territories, and Dependencies, § 62 p. 274 and 81 C.J.S., States, § 194 et seq., p. 1260.

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Although the merging of such material makes the task more difficult, when analyzed, it becomes apparent that by utilizing the entire body of law relating to sovereign immunity and the settlement of all kinds of claims against the states, some worthwhile conclusions may be drawn. Therefore, although the emphasis of this paper is upon the settlement of contract claims, frequent excursion is, of necessity, made into the other areas of claims settlement.

Rather than overburden the following discussion with footnotes, an appendix containing a state-by-state summary of the statutory claims procedures is provided.

THE DOCTRINE OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity had its genesis in the English common law and was transported to this country notwithstanding the non-existence of a sovereign ruler as that term was understood in English jurisprudence. Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P. 2d 107 (1963); Spanel v. Mounds View School District, 264 Minn. 279, 118 N.W. 2d 795 (1962); City of Fairbanks v. Schaible, 375 P. 2d 201 (1962); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962); Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2d 1 (1961); Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961); McAndrew v. Mularchuk, 33 N.J. 172, 162 A. 2d 820 (1960); Molitor v. Kaneland Community Unit District, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959). Those courts which have recently abrogated the doctrine of sovereign immunity have felt little restraint in brushing aside the doctrine of stare decisis since, they reason, sovereign immunity was essentially a court made rule.

To understand the doctrine of sovereign immunity it is important to note that it is composed of two facets. The courts speak on the one hand in terms of the "substantive defense of sovereign immunity" and on the other hand of the "procedural defense of sovereign immunity." Legislation may provide a procedure for the adjudication of claims against the state, but before the courts will hold that the legislature has waived sovereign immunity it must also be clearly manifest that the legislature intended the state to be substantively liable for claims against it. McDowell v. State Highway Commissioner, 365 Mich. 268, 112 N.W. 2d 491 (1962); Holytz v. City of Milwaukee, supra; State v. Miser, 50 Ariz. 244, 72 P. 2d 408; State v. Sharp, 21 Ariz. 424, 189 Pac. 631 (1920). This would be particularly true in at least ten states where the constitutions provide that "suits may be brought against the state in the manner and in such courts as the legislature may prescribe."[2] Moreover, in those jurisdictions in which the supreme courts have recently abrogated the substantive defense of sovereign immunity, a claim against the state might still be subject to the procedural defense of sovereign immunity unless the legislature prescribes the procedural means for collection. Holytz v. City of Milwaukee, supra.

Probably due to the inherent differences between contract claims and tort claims the courts have found little difficulty holding that the state has waived its sovereign immunity on contract claims. Thus, in Watkins v. Department of Highways, 290 S.W. 2d 28 (Ky. 1956), the court states the following typical reasoning:

> Surely when the Department of Highways was authorized to enter into this contract, the legislature contemplated a binding agreement legally enforceable by both parties. A mutuality of obligation was created. To deny appellant's right of action would be to destroy the sanctity of all contracts made by state agencies and would seriously impair the operation of our government. It may be said that the legislature, in authorizing the department to enter into a contract, by necessary implication authorized it to sue or be sued thereon.[3]

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[2] Arizona, California, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, Washington, Wisconsin and Wyoming.

[3] See also 49 Am.Jur., States, Territories, and Dependencies, § 74, p. 285.

Notwithstanding the ease with which the courts have held the states to have waived their sovereign immunity with respect to contract claims, there are certain attributes of sovereignty which may still defeat or impair the collection of contract claims against states. Probably the most notable, are those in which state constitutions require that the legislature first prescribe the "manner and in what courts" suits may be brought against the state. As pointed out by the Wisconsin Supreme Court in Holytz v. City of Milwaukee, supra, unless the legislature prescribes the procedure for bringing an action against the state, the fact that substantive sovereign immunity has been abrogated may be of no comfort to an aggrieved claimant. It is a general rule that the contract upon which claimant relies must ordinarily rest upon some legislative authorization and absent such enactment, a contract claim may be uncollectable. 49 Am. Jur. States, Territories, and Dependencies, § 62, p. 275. In addition, there must be a valid appropriation from which payment can be made for "Unless there is an appropriation, courts have no power to enforce a contract of a state, even though they do not doubt its validity." 49 Am. Jur., supra.

STATE CLAIMS PROCEDURES

Although the procedures adopted by the states to redress private claims are varied and each bears certain intricacies peculiar to the jurisdiction involved, some general patterns emerge. Thus, there are five basic methods by which private claims are adjusted:

1. Statutes which consent to suits against the state in the state courts of general jurisdiction;
2. Statutes creating an administrative board or commission, which in some jurisdictions is empowered to render final decisions and in other jurisdictions, renders merely recommendatory findings;
3. Statutes creating administrative court of claims empowered to render quasi-judicial judgments;
4. A constitutional provision authorizing the establishment of a court of claims arising to the dignity of other constitutionally established courts; and
5. Adjudication by state legislatures culminating in the passage of special or general relief bills for the benefit of aggrieved claimants.

Consent to Suit Jurisdictions

Suits against the state in those jurisdictions in which a consent statute has been enacted are not without restriction. In most such jurisdictions some specific limitations or conditions are embodied in the enactment itself. For example, consent may be limited to suits on contracts (North Dakota) or for "contract or for negligence" (Arizona). Other consent statutes impose conditions such as serving notice upon an administrative officer of the public agency involved, within prescribed time limits. In some jurisdictions the courts have by judicial interpretation imposed other limitations. Some courts, for example, have held that the consent did not extend to tort actions where the language embodied in such legislation used the words "all claims." Murdock Parlor Grate Co. v. Comm., 152 Mass. 28, 24 N. E. 854, Houston v. State, 98 Wis. 481, 74 N. W. 111.

As late as 1962, the Wisconsin Supreme Court in Holytz v. City of Milwaukee, supra, notwithstanding the abrogation in that case of the doctrine of sovereign immunity, indicated that the statutory language consenting to suits against the state on "all claims," had been construed as applying only to claims against the state in debt. While declining to pass upon the question specifically (since the subject had not been submitted to it in briefs) the Wisconsin court suggested that before a tort suit could be maintained against the state, the legislature must prescribe the procedure.

Administrative Boards or Commissions

In Alabama, Arkansas, California, Idaho, Iowa, Nebraska and South Carolina, ex officio claims boards have been established by statute with jurisdiction over claims filed against the state. While typically such boards are staffed by three constitutional

state officers acting in ex officio capacities, the board's jurisdictions are quite different both with respect to power and subject matter.

In some states, the board has jurisdiction over all claims filed against the state. In some states the board's jurisdiction is limited to the consideration of liquidated contract claims. Where there is an existing appropriation which may be identified, the board may, in some jurisdictions, upon approving the claim, order payment by the state officer charged with the responsibility of disbursing state funds. Where such board is not empowered to order disbursement from an existing appropriation, or where the board is authorized to order disbursements but no appropriation is available, a report of claims upon which there has been a favorable ruling is made to the legislature for action.

Administrative Courts of Claims

Following the example of the Federal Government, Illinois and West Virginia created a court of claims. Although they were denominated "courts" they were, strictly speaking, special instrumentalities of their respective legislatures.

In 1953, the legislature of West Virginia abrogated the court of claims and transferred its powers and duties to the attorney general.

The courts of claims in Illinois and West Virginia were established to avoid constitutional restrictions providing that these states shall not be made defendants in any court of law or equity. Since such courts were established as special legislative instrumentalities, their adjudication of claims against these states do not offend the prohibition.

The Michigan court of claims, unlike that of Illinois, is established more within the framework of the judiciary. Its judges are circuit court judges who are directed by the administrator of the supreme court to conduct court of claims sessions. While trials are to the court and not to juries, generally the same procedural rules as followed by the circuit courts govern, except where the supreme court has formulated special procedural rules for the court of claims to follow. However, while the court of claims may direct the payment of its awards from a particular appropriation, where such appropriation is insufficient, the award must be reported to the legislature for payment.

Constitutional Court of Claims

In 1949, a constitutional amendment in New York established the New York court of claims as the first such court to be constitutionally established by any state.[4]

The New York court of claims is even more firmly a part of the judiciary than the Michigan court of claims. It is comprised of twelve judges, each of whom must have had ten years' experience in the practice of law prior to appointment. While its record must be reported to the legislature it must also be reported to the judicial council. Evidence which would establish the liability of the state must be of the same kind and character as would establish liability against an individual or corporation and appeals may be taken to the appellate division of the supreme court.

In waiving its sovereign immunity and providing a means of redress for claimants against the state, New York has perhaps assumed the most comprehensive liability for the acts of its officers and agents that has yet been assumed by any state. The statutory language waiving sovereign immunity provides that:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as apply to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

[4] Constitution of New York, Article VI, Section 9, formerly Article VI, Section 23.

Legislative Determination

In jurisdictions where the legislature is not constitutionally precluded from auditing or allowing the claim or account of a party,[5] state legislatures take some part in resolving claims against the state. The typical legislative process has been very ably outlined by a Harvard Law Review article as follows:

> The traditional first step toward recognizing so-called moral claims has been for the legislature to entertain petitions by private individuals for relief. At every session most state legislatures today entertain scores of claims for damages and grant a considerable number of awards. Generally a bill must be introduced by a legislator and is then sent to a standing committee for hearing and recommend disposition. For successful applicants the product is an act in one of two forms--depending upon the state involved rather than the nature of the claim. Petitioner is either given permission to sue the state or awarded a direct appropriation.
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> A major weakness found in the legislative system is the inability of legislators to give adequate consideration to the claims presented. . . .The claims may never be sent to a committee for hearing; and in any event legislative committees in most state's do not have the investigative facilities or the notions of evidence and procedure that would make justice more certain. To protect against fraudulent or unfounded claims it is necessary to either appropriate for only the obvious cases of governmental wrongs or to authorize suit against the state. If the legislative practice is to appropriate, the legitimate claims in which the fault of the state is not obvious may be rejected. . . .68 Harvard L.Rev. 506, 507.

Miscellaneous Procedure

One hybrid procedure which has not yet been discussed is followed in Idaho and North Carolina. The supreme courts of these states have original jurisdiction to hear claims against the state. Decisions, however, are merely recommendatory to the legislature.

ADMINISTRATIVE PROCEDURES FOR RESOLVING CONTRACT DISPUTES WITH FEDERAL AGENCIES

Where a contractor's claim against the Federal Government is based upon a breach of an express or implied condition of a contract, or the claim is for unliquidated damages, the administrative procedures which have been established within Federal agencies and departments cannot be employed by the contractor in seeking redress. Cramp v. United States, 216 U.S. 494; Continental Illinois Nat'l. Bank and Trust Co. of Chicago v. United States, 126 Ct. Cl. 631, 115 F. Supp. 892 (1953). Only the Comptroller General or the courts can reform contracts or grant equitable relief. Braucher, "Arbitration Under Government Contracts," 17 Law and Contemp. Prob., 473, 493-94 (1952). The following discussion is limited to contractual disputes which may properly be determined by the Federal administrative process.

A standard provision is contained in nearly all Federal Government construction contracts, which to some extent limit and govern the procedures which must be

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[5] The constitutions of Michigan and New York contain such a provision. New York Constitution, Art. III, Sec. 19; Mich. Constitution, Art. V, Sec. 34. However, as has previously been noted, other means have been provided in these states for private claimants to seek redress.

followed in reconciling contract disputes. This is characterized as the "standard disputes clause."[6] It generally provides that where a dispute cannot be resolved at the local engineering level the contractor may, within 30 days, appeal to the head of the department or agency or his duly authorized representative. In all such appeals the department head's decisions with respect to questions of fact are final and conclusive unless fraudulent, capricious, arbitrary, or so grossly erroneous as to imply bad faith. In appeals to the head of the agency the contractor is afforded a hearing at which he may present evidence in support of his position.

There are at least fourteen Federal administrative boards or commissions which have been designated the authorized representatives of the department or agency head to hear and resolve contract appeals.[7] In those departments or agencies where no board of administrative contract appeals has been established arrangements are sometimes made with another Federal agency to receive cases which may be referred to it for disposition. In such instances the findings are generally merely recommendatory and are subject to final decision by the head of the agency under which the contract was entered.

Since the procedures before the Department of Defense's Armed Services Board of Contract Appeals (ASBCA) are said to typify those of the other Federal agencies, it is worthwhile to discuss the method by which its contract appeals are resolved.

When a contractor is unable to resolve a dispute at the local engineering level with the "contracting officer" he receives a written notice that such officer's decision is final, and that he must file his notice of appeal with such officer within the time specified in the contract. The contracting officer is required to transmit the notice of appeal to the ASBCA within ten days of its receipt together with any "complaint" which the contractor might have served upon him.

The complaint is an instrument in the nature of a pleading which sets forth the contractor's claims, with appropriate references to the provisons of the contract upon which he relies and the dollar amount demanded. If it has not already been served upon the contracting officer, the contractor must file his complaint with the ASBCA within thirty days after his notice of appeal has been docketed.

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[6] "(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

(1) The Department of Defense, the Armed Services Board of Contract Appeals (2) Army Corps of Engineers Board of Contract Appeals (3) Department of Interior Board of Contracts Appeals (4) Post Office Department Board of Contract Appeals (5) General Services Administration Board of Contract Appeals (6) Atomic Energy Commission (7) Department of Agriculture Contract Disputes Board (8) Department of Agriculture Procurement Board (9) National Aeronautics and Space Administration Board of Contract Appeals (10) Veteran's Administration Contract Appeals Board (11) Agency for International Development Board of Contract Appeals (12) Federal Aviation Agency Contract Appeals Panel (13) Department of Commerce Appeals Board (14) Coast Guard Board of Contract Appeals.

Within thirty days after service of the complaint, counsel for the Government must file an "answer" setting forth the Government's defense to each claim. In addition, within this thirty days, the "contracting officer" must file his findings of fact, the written decision from which the appeal was taken, the contract, plans, specifications, change orders, and pertinent correspondence between the parties.

A prehearing procedure, similar in many respects to pretrial procedure under the Federal Rules of Civil Procedure, is provided. Either party may be heard upon motion to dismiss for lack of jurisdiction. Written interrogatories, depositions, orders to produce, and requests for admission are available. However, leave of the board to take depositions will not ordinarily be granted unless the deponent cannot appear at the hearing or unless the hearing is waived. Prehearing conferences may be held by the board for reasons similar to those for holding pretrial conferences in the Federal district courts.

If the contractor desires, he may waive his right to a hearing and have his case submitted upon the record augmented by oral argument and legal briefs submitted by counsel for both parties.

Hearings are usually conducted by one member of the board with the proceedings being stenographically recorded. Witnesses are sworn before they testify and the admissibility of evidence is governed by the rules of admissibility which are applied in nonjury trials in the Federal district courts. While the hearing may be conducted by one member of the board, a three member division must render the board's decision in which a majority of the division must concur. The decision is reduced to writing and served upon the parties.

Where the contractor has pursued his remedies under the standard disputes clause before the appropriate board, he may submit his claim to the general accounting office for review. However, the review of the comptroller general is limited to the record of the proceedings of the board of contract appeals, and the decision of such board will not be disturbed unless "fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

The general accounting office does not conduct formal hearings, but its claims division may conduct informal interviews and receive evidence in writing. Settlements made by the claims division bind the executive agencies unless reversed by the comptroller general.

JUDICIAL PROCEDURE FOR RESOLVING CONTRACT DISPUTES WITH FEDERAL AGENCIES

Where a contractor has not received a satisfactory administrative decision, he is entitled to a judicial review either in the court of claims or in a Federal district court. The jurisdiction of the Federal district court is expressly limited to contract claims of $10,000 or less.[8] In either court a judgment may be rendered against the United States upon any contract claim founded upon the "constitution, any Act of Congress, any regulation of an executive department, [and] upon any express or implied contract."

The scope of judicial review of administrative decisions in contract appeals now appears to be somewhat clearer than in the immediate past. The Supreme Court in United States v. Carlo Bianchi and Company, 323 U.S. 709, 83 S.Ct. 1409 (1963), discussed the issue of whether in a contractor's suit, the court is limited to a review of the administrative record on issues of fact submitted for administrative determination or may receive new evidence. It was decided that unless the board's decision is fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith, the court is limited solely to a consideration of the record before the administrative board. Moreover, before a court may receive new evidence which was not before an administrative board on the basis that the board's decision was "not

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[8] 28 U.S.C. § 1346(a)(2).

supported by substantial evidence" the "substantial evidence" standard must be met.

> . . .The statement goes to the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.

In discussing the value of the procedures for contract disputes before the United States Court of Claims it was said that:

> Before the Court of Claims was created, a citizen could obtain satisfaction of his contractual claims against the United States only by petitioning Congress for relief. He appeared in the legislative halls in the role of a supplicant petitioning for the bounty of the sovereign, and no matter how meritorious his claim, he had no "right" to demand compensation for the Government's breach of contract. Since the founding of the Court of Claims in 1855, the formal status of the citizen asserting a claim against the Government has improved steadily. It reached its apex in the highly symbolic 1953 act giving the Court of Claims the status of a court established under article III of the Constitution. Claims against the Government, therefore, are now regarded as matters of right just as claims against private parties are; no longer is the claimant considered, even formally, a petitioner for a gift from the legislature. 49 Va. L.Rev. 773.

CONCLUSION

Sovereign immunity, for centuries a fundamental legal concept, is undergoing spectacular change. This change was underscored by Professor Davis when he wrote:

> Sovereign immunity in state courts is on the run. State courts are taking the offensive against it. The development during the five years 1958-1963 is deep and dramatic. The movement is gaining momentum. The states that have abolished large chunks of immunity are, chronologically, Florida, Colorado, Illinois, New Jersey, California, Michigan, Wisconsin, Alaska, Minnesota and Arizona. The action of these ten states makes it easier for other states to do the job. One may confidently expect that other states will follow. 3 Davis, Administrative Law Treatise, § 25.01, p. 76 (Supp. 1964).

More subtle, are the changes which are being wrought through the legislative process. In its 1964 session, the Michigan legislature passed Senate Bill No. 1132 waiving the state's sovereign immunity for bodily injuries and property damage resulting from defective highways and dangerous and defective conditions in public buildings. In Washington a statute of recent origin provides that "The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." Revised Code of Washington, § 4.92.090.

In every instance where sovereign immunity has been recently changed, the motivating force has been the modern attitude of repugnance which judges and legislators feel where a state is allowed to escape its moral responsibilities in the aftermath of death and personal injuries. Although there is a similar feeling of repugnance when

the state escapes a moral contractual obligation, it is lesser in degree. Consequently, what is happening is that the legal reformation which is converting the state's "sovereign immunity" into "sovereign responsibility" has virtually ignored the public works contractor.

The procedures embraced in New York, Michigan and Illinois for redressing private claims against the state commend themselves to the other states. In these states, claims, whether in contract or in tort, are heard and adjudicated before courts of claims. Contract claimants were probably given more adequate consideration in the enabling legislation in these states because, at the time, legal opinion was not concerned with the single-minded purpose of redressing death or personal injury losses.

It must be emphasized, however, that merely providing a judicial forum for the resolution of disputes with the states is not enough. With our society embarked upon vast new public works projects, contract claims alone would soon hopelessly congest the courts to the end that only samplings of justice would emerge. Administrative means of settling claims must be utilized to supplement judicial processes. In states where there are existing administrative procedures, they must be refined and where none exist they should be established. Many of the procedures of Federal administrative agencies could be modified and adopted for state practice. And broader use might be made of administrative procedure acts in states where such legislation has been adopted.[9]

Those who are concerned with the efficient administration and operation of state government must assume the responsibility of working out efficient and equitable procedures for the settlement of all kinds of claims against the states as the doctrine of sovereign immunity wanes. Proper limits of liability must be established, however, if state government is to function without placing its officers and employees in peril for performing their public responsibilities.

The California Law Revision Commission study published in early 1963 is probably the most elaborate work yet made concerning sovereign immunity. It proved to be a priceless legislative tool in revising the claims procedures in California. Its application, however, is largely limited to problems peculiar to that state. What is needed now is a comprehensive study of the claims procedures of all the states to the end that specific, concrete recommendations could be made for states falling within certain categories.

In Arizona, in the less than two years since the Arizona supreme court abrogated sovereign immunity, tort suits demanding in the aggregate in excess of four million dollars have been filed against the state highway department. This is nearly four times the total sum of damages claimed in tort suits against all other state departments and agencies. An Indianapolis-type automobile race at the state fairgrounds recently resulted in injuries to scores of spectators when a driver lost control of his car and plummeted into a crowded grandstand. Were it not for this extraordinary event Arizona's experience would show the highway department defending tort suits demanding total damages of eight to ten times those of all other state agencies. If the experience in other states is similar to Arizona's, state highway departments may expect to have four to ten times the exposure to tort suits as all other state departments and agencies combined. It would therefore, be most appropriate for the Highway Research Board to underwrite a definitive study into the field of sovereign immunity and the settlement of all kinds of claims against the state. If properly conceived, such a work would be an invaluable legislative tool.

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2. 49 Am.Jur., States, Territories, and Dependencies, § 62.
3. 81 C.J.S., States, § 194 et seq. p. 1260.

[9] Almost two-thirds of the states now have some kind of administrative procedure legislation. Davis, Administrative Law Cases, 572 (1959).

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F. Conclusion

1. 3 Davis, Administrative Law Treatise, Chapter 25 §§ 25.01 - 25.17.
2. Davis, Administrative Law Cases, 572 (1959).

Appendix

STATE BY STATE SUMMARY OF THE STATUTORY CLAIMS PROCEDURE OF THE VARIOUS STATES[1]

ALABAMA

The Code of Alabama, 1940, as amended, Title 55, Chapter 10, Article 2, §§ 333-344, provides that all personal injury, property damage and contract claims against the State may be presented to the State Board of Adjustment. The public officers composing this board are the Director of Finance, the Treasurer, the Secretary of State and the State Auditor.

The Board of Adjustment is characterized as a fact-finding quasi-judicial body. State v. Brandon, 244 Ala. 62, 12 So. 2d 319, 325. It has the power to subpoena the attendance of witnesses, issue subpoenas duces tecum to obtain documents, and to punish for contempt through the state courts of general jurisdiction.

Following a hearing by the Board of Adjustment, a ruling is made. If a claim is resolved against the State, payment is made from the current appropriation of the agency involved if it has a sufficient balance available. Each year the Alabama

[1] A number of states are not discussed. This results from one of two reasons. Either the state had no statutory procedure or the library facilities used by the writer were limited to that extent.

Legislature appropriates $200,000 for the payment of those claims for which the State's agencies may not have adequate appropriations.

When there is neither an agency appropriation available, nor a balance contained in the legislature's annual claims appropriation, the claim is temporarily uncollectable. However, claims previously denied for this reason may be subsequently allowed. State v. State Board of Adjustment, 249 Ala. 542, 32 So. 2d 216.

ALASKA

The Alaska Statutes, Title 44, State Government, Part 8, Chapter 77, §§ 44.77.010 et seq., provide for the settlement of contract claims against the State.

It is required that claims be presented to the appropriate administrative or executive officer of the State agency involved. If disallowed by such officer, the claimant has 60 days within which to apply for a review by the Department of Administration.

Peculiarly, the appeal from a disallowance by the Department of Administration is to the Department of Administration. However, on such appeal a hearing is provided. If a claim is allowed following the hearing it becomes a binding judgment and the State's warrant is issued against the correct appropriation.

ARKANSAS

The Arkansas Statutes, 1947, Sections 13-1401 et seq., create the Arkansas State Claims Commission, which is comprised of three members, two of whom are attorneys. It has jurisdiction over all claims against the State except for those based upon personal injuries and the death of State employees.

Proceedings are commenced before the Commission by filing a verified complaint with the State Comptroller. The claimant is provided a hearing at which he is entitled to fully examine and cross-examine witnesses. The Commission's findings are binding upon all parties, and judicial review is expressly precluded. Final determination upon claims which the Commission has approved resides in the legislature.

ARIZONA

The Arizona Revised Statutes, Sections 12-821 through 12-826, establish a procedure for bringing an action against the State "on contract or for negligence."

Such claims must have been presented to the appropriate State agency and disallowed and where the pleadings fail to so allege, the complaint is subject to dismissal since these are conditions which must be met before the court has jurisdiction of the subject matter. State of Arizona v. Miser, (1937) 50 Ariz. 244, 72 P. 2d 408.

A two-year statute of limitations applies and the plaintiff must file a bond of not less than $500 to secure the payment of all costs incurred by the State if he fails to recover judgment.

If plaintiff recovers a judgment he is entitled to interest from the time the obligation accrued. It is the duty of the Governor to report such judgments to the legislature. But the State Auditor is not authorized to draw his warrant for the payment of such judgment, until the legislature has made its appropriation.

In Stone v. Arizona Highway Commission, (1963) 93 Ariz. 384, 381 P. 2d 108, the Arizona Supreme Court abrogated the doctrine of sovereign immunity. In so doing, it specifically overruled a line of cases including the Miser case, cited above, upholding the State's sovereign immunity with respect to its torts. In the Miser case the claimant contended that A.R.S. § 12-821, et seq., constituted a waiver by the legislature of the State's sovereign immunity for "negligence." It was held that while this legislation had provided a procedure for bringing actions against the State for negligence, it had not waived the State's substantive defense of sovereign immunity. The Stone decision made no mention of these sections, in abrogating the substantive defense of sovereign immunity, but it must be presumed that they are still operative.

CALIFORNIA

The California Government Code, Sections 900 through 960.5, prescribes one of the most comprehensive of all state claims procedures. It resulted largely from the

California Law Revision Commission's studies following the California Supreme Court's abrogation of the Doctrine of Sovereign Immunity. Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (196_).

The State Board of Control is vested with jurisdiction over claims against the State (1) where no appropriation was made for payment, (2) where the appropriation has been exhausted, (3) upon the State's express contracts, (4) upon injuries for which the State is liable, (5) for the State's eminent domain taking and (6) any other claim for which settlement is not otherwise provided.

A minimum requirement is established for the data that claims must contain. The board is authorized to provide forms upon which claims are to be presented and if any claim is insufficient in detail, the board can require additional submissions.

If a person has a claim based upon death, personal injury or personal property damage, he must present it to the board within 100 days after his cause of action accrues. However, the board can authorize a claim to be filed within a reasonable time thereafter but not after the expiration of one year. Where more than 100 days has elapsed since one's claim accrued, application must be made to the board showing good reason or excusable neglect for the delay. If the board denies a claimant's application to file a late claim, he may petition the superior court for review.

Any other claim (including contract claims) must be submitted to the board within one year after the cause of action accrues. There is no provision for filing such claims after the expiration of one year.

The Board of Control is required to act upon claims within 45 days after they are filed or they will be taken as having been denied. When a claim is allowed, the board is authorized to designate the fund from which it is to be paid, and the agency involved makes payment unless the funds are administered by the controller, in which case, he makes payment from the correct appropriation. In the event the appropriation is insufficient, the board, with the approval of the Governor, reports the facts together with its recommendations to the legislature. Where the agency's appropriation is insufficient, it is conceived that payment will be from a subsequent "omnibus claim appropriation" made to the board for that purpose.

In addition to the statutory administrative procedure provided for the settlement of claims, the Board of Control is authorized to allow a State agency to include provisions in its written contracts concerning the presentation of claims to that agency for the consideration and payment of such claims. An interesting note by the California Law Revision Commission to this provision states that it would have no effect on contract provisions such as those contained in contracts entered into by the Department of Public Works, which require the contractor to give prompt notice of claims for extra services, since such provisions do not relate to "claims which are required to be presented to the board."

In the event the Board of Control rejects a person's claim he is afforded an opportunity to bring an action against the State in the courts. However, before the action is commenced it is required that claims must first have been presented and acted upon by the Board of Control. Suit must be brought within 6 months after the Board has acted upon the claim. The court in which the action is brought may require a surety bond of at least $100 upon the application of the public entity affected.

If a judgment is rendered in favor of a claimant against the State, the controller pays it from the appropriation of the agency concerned. However, if such appropriation is insufficient, the Governor reports the same to the legislature for action.

COLORADO

The Colorado Revised Statutes, 1953, Sections 3-2-1 and 3-3-1, establish a Division of Accounts and Control which is headed by the State Controller. It is granted rule-making powers and is charged with the power and duty among others, "to receive, hear, and settle all claims against the State and issue warrants for the payment thereof from the treasury."

CONNECTICUT

The General Statutes of Connecticut, Section 4-61, provide that a person having a claim against the State sounding in contract may bring an action in the superior court of Hartford County for a trial without a jury.

The plaintiff must have notified the State agency involved within 2 years after his acceptance of the contract, of his intention to assert his claim, and he must commence the action within 3 years from the date he accepted the contract.

IDAHO

The Idaho Code, Sections 67-1008 and 67-1009, provides that claims against the State may be presented to the Board of Examiners for review. Claimant must show that he has presented his claim to the Auditor for the board within 2 years after its accrual. The Board of Examiners is delegated rule making powers to facilitate the handling of matters over which it has jurisdiction.

The Idaho Constitution, Art. V, § 10, provides that the state Supreme Court shall have original jurisdiction to hear claims against the state and to render recommendatory decisions for the advice of the legislature. It is also provided that no process in the nature of execution may issue against the state.

IOWA

The Iowa Code Annotated, Sections 25.1, et seq., establishes the State Appeals Board. When a claim is submitted to the board it is referred to a Special Assistant Attorney General. He drafts a report and proposed findings and delivers them to the board which makes the determination. If the board makes an award for the claimant, payment is made from the appropriation or fund of original certification unless it has lapsed, in which case payment is made out of "any money in the State treasury not otherwise appropriated."

Sections 22.2, et seq., establish the Board of Appeal (note that this board does not bear the identical name as the one discussed above). The Board of Appeal has jurisdiction over claims relating to contracts for the construction of public buildings or other public improvements in an amount greater than $25,000.

The Board of Appeal has three members. Two are appointed by the Governor. The third member is the Comptroller. Its members have four-year terms of office.

Hearings before the Board of Appeal are de novo and the claimant may present any relevant evidence he may have. The Board's decision is final.

ILLINOIS

The Illinois Annotated Statutes, Title 37, Section 439.01 through 439.23, constitute the Illinois Court of Claims Act.

The Court of Claims is comprised of three judges appointed by the Governor with the advice and consent of the senate to terms of six years with annual salaries of $6,500. Each may sit separately or they may appoint a commissioner to hear evidence. Court of Claims hearings do not provide for juries, but before a decision is binding the concurrence of at least two judges is required.

The Court of Claims has jurisdiction to hear and determine: (1) all claims against the State founded upon any law of the State of Illinois or upon any regulation thereunder except claims relating to workmen's compensation; (2) all claims against the State founded upon any contract; (3) claims relating to unjustly served prison terms; (4) cases sounding in tort, provided that an award for damages may not exceed the sum of $25,000; (5) counterclaims or set-offs for recoupment by the State against any claimant; (6) all claims in connection with the overpayment of taxes or fees.

The Court of Claims is granted general authority to establish rules of practice, to appoint commissioners, and to exercise such powers as are necessary to effectuate compliance with its lawful orders. It may issue subpoenas for the attendance of witnesses, the production of evidence and can compel obedience to its orders by proceedings for contempt.

A claimant may commence an action in the Court of Claims by filing a petition stating the persons interested therein, together with the reasons why they are so interested and the occurrence, transaction or event, giving rise to his alleged claim. Such petition must be verified by the affidavit of the claimant, his agent or attorney.

Upon reasonable notice, any one of the judges or a commissioner appointed for such purposes may conduct a hearing and may require the attendance of the claimant or other witnesses for examination. A transcript of such proceedings must be filed with the clerk of the court. The court is required to file its determination with the clerk in written opinion form for publication.

New trials may be granted for any reason which would be a sufficient ground for granting a new trial in the courts of general jurisdiction. A final determination against a claimant shall forever bar a further claim.

The clerk of the Court of Claims transmits to the General Assembly (at every regular session) a statement of all decisions in favor of claimants which have been rendered in the preceding two years, together with a synopsis of the nature of such claims. It is the expressed policy of the General Assembly (as embodied in the Court of Claims Act) to make no appropriation for the payment of any claim against the State unless it has been awarded by the Court of Claims.

A general two-year statute of limitations applies with respect to most claims cognizable in the Court of Claims. Those arising from a contract are the most notable exceptions. Contract claims may be filed until five years after they have accrued.

When an individual has a claim as a result of personal injuries, he is required to file a notice with the attorney general and with the clerk of the Court of Claims, giving the name of the person to whom the cause of action has accrued, the date and the time of the accident, its place and location and the identity of the attending physician, if any. If such notice is not given the action may be dismissed and forever barred.

MASSACHUSETTS

The Massachusetts General Laws, Chap. 258 §§ 1 through 4A, prescribe the procedure by which a claimant may prosecute his claim against the Commonwealth in the Superior Court.

The Superior Court has jurisdiction over all claims whether at law or in equity against the Commonwealth. Such actions are commenced in a petition to the court, stating clearly and concisely the nature of the claim and the damages sought.[2]

It is provided that trial shall be without a jury; that it shall be conducted in open court and that questions of law may be appealed to the Supreme Judicial Court as in other cases. When a final judgment is rendered against the Commonwealth, the clerk of the Superior Court is obliged to transmit a certified copy to the Comptroller who notifies the Governor and draws his warrant against the State treasurer for payment.

MICHIGAN

The Michigan Statutes Annotated, Sections 27A. 6401 through 27A. 6475, constitute the Court of Claims Act.

The Administrator of the Supreme Court designates one or more circuit judges to sit as judge of the Court of Claims, and to hold four sessions each year in the city of Lansing, unless otherwise directed.

The Attorney General is responsible for representing the interests of the State in all matters before the court.

The State Administrative Board is granted discretionary authority (upon the advice of the Attorney General) to hear and allow claims against the state of less than $100. When such small claims are allowed, they are paid in the same manner as are judgments rendered by the Court of Claims.

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[2]Numerous claims upon contract both expressed and implied have been brought against the Commonwealth under these provisions. Lewis v. Commonwealth, 122 N.E.2d 888; New England Foundation Co. v. Commonwealth, 100 N.E.2d 6; Arthur A. Johnson Corp. v. Commonwealth, 60 N.E.2d 364; Pioneer Steel Erector's Inc. v. Commonwealth, 181 N.E.2d 670.

The Court of Claims has exclusive jurisdiction to hear and determine "ex contractu" and "ex delicto" claims against the State whether such claims are liquidated or unliquidated. The State may counterclaim and, if it prevails, recover an enforceable judgment against the claimant. The judgments of the court are res adjudicata and become final unless they are appealed.[3]

The procedural rules followed in the Court of Claims are the same as those of the circuit courts, except that the Supreme Court may make special rules. The Court of Claims has the power to issue subpoenas for the attendance of witnesses and production of evidence, and to punish for contempt.

As a condition precedent to maintaining an action in the Court of Claims, a claimant must file a written claim (or written notice of his intention to do so) with the clerk of the court within one year after his claim has accrued. Such claim or notice must set forth in some detail the nature of the claim and be signed and verified by the claimant.

Where a claim has arisen as the result of a defective roadway or a dangerous or defective public building, the claimant must serve a verified notice upon the appropriate agency specifying his injury and stating the nature of the alleged defect within 60 days of the time the injury occurred. This notice is "a condition to any recovery." Enrolled Senate Bill No. 1132, 1964.

Trial before the Court of Claims is without a jury. New trials may be granted for cause and appeals may be taken to the State Supreme Court in the same manner and under the same rules of practice as appeals from the circuit courts.

If the claimant recovers a judgment against the State in the Court of Claims, the court may specify in the judgment the appropriation from which payment must be made. However, if the Auditor General determines that the appropriation specified is insufficient, payment will be made from an appropriation which has been made for this purpose. And, in the event that appropriation is insufficient, the judgment will be reported to the next session of the legislature and paid as soon as money becomes available.

MINNESOTA

The Minnesota Statutes Annotated, Sections 3.66 through 3.75 and 3.76, create the State Claims Commission and define its authority and jurisdiction.

The commission is composed of six members, three of whom are senators appointed by the committee of committees and three are members of the house of representatives appointed by the speaker of the house. It is empowered to direct its clerk (the Director of Research) to administer oaths and affirmations and to issue summons, orders, statements and awards.

The commission is directed to adopt rules of procedure "to assure a simple, expeditious and inexpensive consideration of claims," and to permit a claimant to appear and be heard in his own behalf or through "a qualified representative." The commission is not bound by common law or statutory rules of evidence, but may accept "any information that will assist it in determining the factual basis of the claim."

Claims are instituted by the filing of a written notice (identifying the claimant, stating the circumstances giving rise to the claim, and designating the State agency concerned) with the commission clerk. The clerk then transmits a copy of the notice to the State agency involved. Four members must consider each claim before the commission can make its determination. When a decision is rendered, the commission

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[3] As late as 1962 the Michigan Supreme Court upheld the doctrine of sovereign immunity in a suit against the State for injuries allegedly sustained as a result of the failure of the highway department to remove water from the highway. This ruling followed a long line of cases holding that the statutory language, to-wit "ex delicto," did not clearly and sufficiently manifest the legislature's intention that the state be liable for its torts. McDowell v. State Highway Comm'r, 365 Mich. 268, 112 N.W.2d 491. However, on May 19th of this year the Governor of Michigan signed into law, Senate Bill No. 1132. This act would appear to clearly and sufficiently manifest the legislature's intent to waive tort sovereign immunity for bodily injuries and property damage resulting from defective highways and dangerous and defective conditions in public buildings.

must file a statement of its reasons with the clerk, together with the reasons of any dissenting member. In the event the commission finds for a claimant it must also file an itemized statement of the amount of the award.

The commission is authorized to consider claims which "but for some statutory restrictions, inhibitions, or limitations could be maintained in the courts of the State." In the event the commission approves a claim and recommends an award, it is expressly provided that no liability is imposed upon the State unless the legislature has previously made an appropriation for its payment, or unless the amount of the award is less than $2,500 and the legislature has previously made a general appropriation for the payment of such awards.

The commission is expressly granted jurisdiction over the following matters: (1) claims which the State "should in equity and good conscience discharge and pay;" (2) claims in the nature of set-off or counterclaim on behalf of the State; (3) any claim referred to the commission by the head of a State agency for an advisory determination; (4) for injury or death of an inmate of a State penal institution; (5) claims arising out of the care or treatment of a person in a State institution; (6) for personal injury, death or property damage sustained by a member of the militia or national guard while in the service of the State.

Claims over which the commission is expressly precluded jurisdiction are those: (1) for personal injury, death or property damage incurred because of wild animals; (2) arising out of contract claims to which another code section applies; (3) for disability or death benefits otherwise provided for by the workmen's compensation statutes; (4) for unemployment compensation; (5) for relief or public welfare; (6) claims for which a proceeding may be maintained against the State in the courts.

In addition, the commission's jurisdiction is further expressly limited. It cannot consider claims which have previously been rejected by the legislature or those which have been barred by a statute of limitations, unless such barred claims are referred to the commission by the legislature.

The Governor or any head of a State agency may refer claims to the commission for advisory determinations. Such claims are considered informally and when a determination is made a brief opinion is prepared for the information and guidance of the officer who has made the submission. Notwithstanding an advisory consideration by the commission, a claimant may subsequently present his claim.

In its hearings the commission may stipulate the questions it wishes to have argued. Any member may examine or cross-examine witnesses, and the commission may call witnesses or require the production of evidence not elicited or submitted by the parties. Compliance with the commission's subpoenas for the attendance of witnesses and the production of documents may be compelled by application to the district court with its contempt sanctions.

When a claim is not in excess of $1,000 and does not arise under an appropriation for the current fiscal year and it is approved by the attorney general as one within the jurisdiction of the commission which should be paid, it may be considered by the commission informally upon the record submitted.

At the time the legislature convenes a list of all awards recommended by the commission for appropriation is certified to the commissioner of administration. He includes all awards so certified in the budget estimates which are submitted to the Governor.

Sections 161.34 and 3.751 delegate a certain measure of power to its courts to redress contract claims against the state.

In at least two instances the Minnesota legislature has provided a general waiver of the State's immunity. It is provided that (1) "when a controversy arises out of any contract for the construction or repair of State trunk highways entered into by the commissioner or by his authority, in respect to which controversy a party to the contract would be entitled to redress against the State . . ., the State hereby waives immunity from suit in connection with such controversy and confers jurisdiction on the district courts of the State to hear and try the controversy in the manner provided for trial of causes in the district courts. . ." M.S.A. § 161.34; (2) "when a controversy arises out of any contract for work, services, or the delivery of goods entered into by

any State agency . . . and when no claim against the State has been filed in the State claims commission, or made in a bill pending in the legislature for the same redress against it, the State hereby waives immunity from suit in connection with such controversy and confers jurisdiction in the district court to hear and determine any such controversy in the manner provided for the trial of causes in the district court. . ." M.S.A. § 3.751.

When an action is brought under either of the above sections, the plaintiff must either commence his action (1) within 90 days after the State has furnished him a final estimate under the contract, or at his election; (2) within 6 months after the work has been completed. Each section also provides that a copy of the summons and complaint be served upon the Attorney General and that he has 40 days within which to file the State's answer. Thereafter, the case proceeds as other civil actions, and appeals may be taken to the supreme court "in the same manner as appeals in ordinary civil actions."

MONTANA

The Montana Constitution, Article VII, Section 20, creates an ex officio Board of Examiners composed of designated constitutional officers to examine and recommend adjustment of all claims filed against the State.

NEBRASKA

The Revised Statutes of Nebraska, 1943, as amended, Sections 81-857 through 81-861, establish the Sundry Claims Board and prescribe its powers and duties.

The Attorney General, Auditor of Public Accounts and the Tax Commissioner constitute the Sundry Claims Board. The board is empowered to receive and investigate "all claims against the State of Nebraska for the payment of which no moneys have been appropriated."

The board, in its discretion, may afford claimant a hearing after giving him 5 days written notice. The clerk of the legislature, who serves as secretary to the board, is empowered to administer oaths, compel the attendance of witnesses and the production of documents through the issuance of subpoenas, and enforce such powers by punishment for contempt.

Following its investigation the board may give its unqualified approval to a claim, approve it with limitations or conditions or may disapprove the claim entirely. Whether approved or rejected, the board must file every claim it has passed upon together with a concise statement of the facts brought out in its investigation, with the Secretary of the Board. Each such claim and factual statement is delivered to the chairman of the appropriate committee of the next legislature.

However, claims for negligence or other torts of $250 or less may be paid when approved by the board and the department head concerned, where such department has sufficient funds for payment. Such small claims need not be reported to the legislature for action.

Although tort claims of $250 or less may be authorized by the Sundry Claims Board, the statutory language of R.S.N. § 81-861 disavows that a general waiver of tort sovereign immunity is intended.

Pursuant to Revised Statutes of Nebraska, 1943, as amended, Section 24-319 through Section 24-336 and Section 25-218, the district courts are granted jurisdiction over claims against the State of Nebraska.

The district courts' claims jurisdiction extends to (1) those which have been presented to the Auditor of Public Accounts and have been rejected or disallowed, (2) claims for relief that may be presented to the legislature and those which are referred to the court by the legislature, (3) set-offs and counterclaims which may be available to the State as defenses, (4) those in which the State of Nebraska has a lien upon any real estate located within the State, and (5) certain others.

In his petition against the State the claimant must: (1) set forth the facts upon which his claim arose and the action of the legislature or the department of government upon which he relies; (2) identify persons who may be interested therein; (3) state

that he has made no assignment of his property or an award which might be obtained, and that he, as the claimant, is justly entitled to an allowance. The petition must be verified as are pleadings in other civil actions in the district court.

The court may enter a judgment either for the claimant or for the State. Judgments rendered against the State are transmitted by the clerk of the court to the legislature together with a statement of all claims adjudicated showing the amounts claimed and the judgment rendered by the court.

Civil actions to which the State is a party are entitled to priority in trial over other civil actions, and appeals are provided to the Nebraska Supreme Court.

Certified judgments rendered by the court are paid by the Auditor of Public Accounts from any special fund or appropriation applicable thereto; and if none has been provided, then from any available appropriation made to the department out of whose activity the cause of action arose. Where these appropriations are insufficient the judgment is stayed until the adjournment of the next regular session of the legislature, in which case the claimant is entitled to interest at the rate of ten percent per annum.

If a judgment is rendered against the claimant it may be collected (upon application of the Attorney General) in the same manner as judgments in the courts of general jurisdiction by execution thereon.

A two-year statute of limitations applies with respect to all claims against the State.

NEW YORK

The Constitution of the State of New York, Article VI, Section 9, establishes the Court of Claims to be comprised of at least eight judges to hear claims by or against the state. The judges are appointed by the Governor with advice and consent of the senate for a term of nine years.

The Court of Claims had its genesis as a separate entity in 1883 when the office of Canal Appraiser and the State Board of Audit were abolished and the claims then pending before those bodies were transferred to the Board of Claims. The new Board was composed of three commissioners who were appointed by the Governor. It was given jurisdiction to audit and determine all private claims against the State and counterclaims by the State.

In 1897 the Board of Claims became the Court of Claims with the power to prescribe its own rules of practice. Its members became judges. In 1911 the Court of Claims was again renominated the Board of Claims but its membership was increased to five. In 1922 the legislature repealed the 1911 Act and enacted the Court of Claims Act. However, it was not until 1949 when the people of the State of New York adopted a constitutional amendment that the Court of Claims became a constitutional court.

Pursuant to the New York Court of Claims Act the present court is comprised of twelve judges appointed by the Governor to nine-year terms, one of whom is designated by the Governor as the presiding judge. To be appointed judge, one must be an attorney, admitted to practice in the State of New York and be possessed of ten years' experience in the practice of law. An annual salary of $20,000 is provided.

The court is required to keep a record of the proceedings before it and to report to each legislative session the claims it has acted upon, together with a statement of the judgments rendered. It is also obliged to report to the judicial council.

Judgments against the State are paid out of an annual appropriation provided in the court's budget bill. On the first of each calendar year the clerk of the Court of Claims reports the court's disbursements to the Comptroller.

The waiver of sovereign immunity as embodied in the Court of Claims Act is expressed in the following language: "The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as apply to actions in the supreme court against individuals or corporations provided the claimant complies with the limitations of this article."

The Court of Claims has express jurisdiction over the following subject matter: (1) claims for the appropriation of property, breach of contract, for torts " . . . providing the claimant complies with the limitations of this article;" (2) torts committed

by members of the organized militia; (3) counterclaims and set-offs which the State may have available as defenses; (4) a claim by one who was wrongfully imprisoned for a crime which he did not commit providing he has received a pardon from the Governor

The court has the power to consolidate claims that have arisen out of the same facts or circumstances, to interplead parties, to perpetuate testimony, to correct or modify its prior rulings or orders, to establish rules of practice before itself, to prescribe procedural forms, and to exercise all powers necessary to effectuate the spirit of the Court of Claims Act.

It is an express statutory condition precedent to the right of any claimant to recover a judgment against the State in the Court of Claims to have complied with the following conditions: (1) in land appropriation cases the claim must have been filed within two years of its accrual; (2) wrongful death claims must have been filed within ninety days after the appointment of the executor or administrator of the estate unless within such ninety days notice of intent to file a claim has been filed, in which case the claimant may have two years within which to file his action; (3) personal injury or personal property damage claims must be filed within ninety days of the accrual of such claim or notice of intention to file a claim must be filed within such ninety days, in which case the claimant has two years within which to commence his action; (4) a contract claim or a notice of intention to file a contract claim must be filed within six months. Where a notice of intention to file a contract claim is served, the claimant has two years within which to file his claim. Notwithstanding the above requirements, the Court of Claims has discretion to permit a claimant to file within two years after his claim has accrued upon motion and affidavit showing a reasonable excuse for his failure, together with a statement to the effect that the State had knowledge of all the essential facts constituting the claim.

An action is commenced by the filing of a verified claim with the clerk of the Court of Claims and serving copies upon the Attorney General. It must state the time, the place and the circumstances under which the claim arose, the nature of the claim and the items of alleged damages or injuries and the total sum demanded. Where one elects to file his notice of intention to file a subsequent claim, his notice must contain the same information as a claim except that he need not itemize his damages nor state the total sum which he will demand.

It is expressly provided that judgments may be granted against the State only upon the same kind of evidence which would establish liability against an individual or corporation. Moreover, any statute of limitations which would bar an action against an individual or a corporation will also bar an action against the State. However, before any judgment in eminent domain in excess of $5,000 may be rendered, the judge must personally take a view of the premises.

Generally one judge may render a decision which will be binding upon the parties unless the presiding judge exercises his discretion, in which case he may order that as many as three judges shall make a determination. Where three judges are assigned to any case the concurrence is required.

The Attorney General is authorized, upon five days' notice, to take the sworn testimony of any claimant. As a corollary, any claimant is entitled to examine any state officer or employee upon making proof to the court of the materiality and necessity of such testimony.

Appeal from the judgments of the Court of Claims is provided to the appellate division of the Supreme Court. There the action of the Court of Claims may be affirmed, reversed or modified. The appeal may be dismissed, a new trial granted or remitted for further proceedings in the Court of Claims.

NORTH CAROLINA[4]

The North Carolina Constitution, Art. IV § 13, and the General Statutes of North Carolina, §§ 7-8, 7-9, vest the Supreme Court with original jurisdiction to hear claims against the State. That court describes its decisions as "merely recommendatory."

[4] The latest material available to the writer relating to North Carolina was published in 1957.

Claims filed with the Supreme Court must state the nature of the claim and the grounds upon which they are based and served upon the Governor. The Supreme Court may direct the manner in which the trial shall be conducted. Issues of fact may be transferred to the superior court for determination.

When the Supreme Court has made its finding it is obliged to report the facts found, together with its recommendations and reasons therefor to the General Assembly for action.

NORTH DAKOTA

The North Dakota Century Code, Sections 32-12-02 through 32-12-04 and Section 32-1201, provides a procedure by which certain claims against the State may be prosecuted in the district court.

An action may be brought against the State "respecting title to real property" or "arising upon contract." The claimant is required to file a surety bond to secure the payment of costs incurred by the State in the event he fails to recover judgment. The amount of such bond is fixed by the clerk of the district court.

An action upon a contract is precluded unless the Department of Accounts and Procedures has disallowed the claim or has failed to act upon it for a period of ten days after it has been property presented to it for action.

Judgments against the State may be collected, but execution upon the property of the State is expressly prohibited. The clerk of the court furnishes a certified copy of such a judgment to the Department of Claims and Procedures, and when it has been approved by the Audit Board, payment is made if funds have been appropriated.

PENNSYLVANIA

Purdon's Pennsylvania Statutes, Title 72, §§ 4651-1 through 4651-10, establish a procedure for filing claims against the Commonwealth arising from contracts.

The Board of Arbitrations of Claims (as a part of the Department of the Auditor General) is the legislative instrumentality designated to hear contract claims. It is comprised of three members appointed by the Governor to terms of six years, two of whom receive an annual salary of $11,000 and one, the chairman, a salary of $13,500. The chairman must be an attorney. A second member must be a registered civil engineer, and the third member, a citizen who is neither an attorney nor an engineer.

All claims must be filed with the secretary of the board, the secretary of the department involved and the Attorney General. Unless a claim is filed within six months after it has accrued the board has no jurisdiction to hear it. The instrument filed with the board must be "a concise and specific written statement" setting forth the circumstances under which the claim arose and be signed and verified by the claimant. The department involved may file a verified answer within thirty days. When the answer is filed the issues are joined. Thereafter, the secretary of the board notifies the claimant thirty days in advance of a time and place where he may be heard.

The board is authorized to establish rules of practice governing its proceedings. At the request of a claimant or the Commonwealth, the secretary of the board may issue subpoenas for the attendance of witnesses or the production of papers and documents, and may enforce such powers by applying to the Court of Common Pleas for contempt citations.

Hearings before the Board of Arbitrations and Claims are public proceedings. The board may dismiss the claim or make an award for the claimant. Its awards are entered in the record and written opinions are filed. Costs may be awarded to either party or the order may state that each party shall bear its own costs.

Within thirty days the claimant or the Commonwealth, if either be aggrieved, may appeal to the Court of Common Pleas for a review of the Board's determination. It is provided that the Court of Common Pleas shall hear the appeal without a jury and upon the record which has been certified to it by the board. The findings made by the board with respect to questions of fact, if supported by substantial evidence, are conclusive. The Court of Common Pleas may affirm the award, set aside the board's determination, modify or remand the claim to the board for further disposition.

Payments upon awards made by the board are processed within thirty days of the final action taken. The secretary of the board certified to the secretary of the department involved, a statement of the action which has been taken and the identity of the person entitled to payment. The department involved then pays the award out of any funds which have been appropriated to it for the contract giving rise to the claim.

SOUTH CAROLINA

The Code of Laws of South Carolina, Sections 30-251 through 30-255, authorizes the State Budget and Control Board to settle claims against the state.

All claims for services rendered or for supplies furnished are presented to the board in the form of a petition. The petition must state the facts upon which the claim is based, together with any evidence which may be required by the board. It must be filed with the chairman at least twenty days before the General Assembly convenes. The board is obligated to examine the claims and report its findings to the House of Representatives', Ways and Means Committee, within ten days after the House convenes.

The House Ways and Means Committee may make provision for the payment of all approved claims in the appropriation bill introduced by the committee. Claims not submitted to the Board within three years "after the right to demand payment thereof accrues" are thereafter barred.

UTAH

The Utah Constitution, Article VII § 13, and the Utah Code, Sections 63-6-1, et seq., establish the Board of Examiners for the purpose of reviewing claims against the State.

The Board of Examiners is composed of three members: the Governor who acts as president, the Secretary of State who acts as secretary, and the Attorney General. It has jurisdiction "to examine all claims against the State for which funds have not been provided . . . except salaries or compensations of officers. . . ." It is the expressed legislative policy not to consider claims which have not been considered by the board. Meetings of the board may be called by the president or the two other members thereof, but must be called at least sixty days before each legislative session. Notice of meetings must be published in a newspaper of general circulation.

A record of the proceedings of the board is required to be kept. Any member may record his dissent. Abstracts of all claims are entered in the minutes of the board.

The board is authorized to establish its own procedural rules. Each member may take depositions but only the president may issue subpoenas for the attendance of witnesses and the production of records and documents.

If the board makes an award and no appropriation has been made or if an appropriation has been made and it has been exhausted, a transmittal is made to the legislature together with a statement of reasons for the board's action.

The board is required to report its facts and recommendations to the legislature thirty days before it convenes and to compile an abstract report showing the claims it has allowed and those it has rejected.

Any party who has been aggrieved by the board's disallowance may appeal to the legislature in which case a notice is filed with the board and its record is transmitted to the legislature.

VERMONT

The Vermont Statutes, Title 32, Sections 901, et seq., establish a Claims Commission to hear claims against the State.

The State Treasurer, Auditor of Accounts and Attorney General are the commission's three members. It has rule-making powers with respect to the procedures and hearings held before it and may issue summons to examine witnesses.

Claims against the State for which payment is "not otherwise specifically provided by law" may be filed with the commission in the form of a petition. The petitions must state the facts giving rise to the claim and be signed by the petitioner under oath. At

the hearing provided, the commission may examine the claimant or other witnesses under oath and may make awards up to $1,000.

When an award has been made by the Commission, the Auditor of Accounts is authorized to issue his warrant. When accepted by the claimant, the State is completely discharged. Such payments were charged against the State agency responsible for the claim or against a contingent fund.

In 1961 the Vermont General Assembly waived the State's sovereign immunity by the enactment of Title 12, Section 5601, et seq. While prohibiting execution upon State property for the satisfaction judgments, the General Assembly made the State liable for injuries to persons or property and loss of life caused by the State's employees while acting within the scope of their employment, under the same circumstances, manner and "extent as a private person would be liable." The State's liability, however, is limited to $75,000 for one person and $300,000 for each activity, condition or event. Exclusive jurisdiction in such matters is vested in the county courts.

The General Assembly expressly provided that the State assumed no liability with respect to (1) claims based upon the performance of discretionary functions by State officials exercising due care in the execution of a statute or regulation; (2) claims arising from the assessment or collection of a tax or from levying upon goods or merchandise; (3) claims arising from the imposition of a quarantine; (4) claims arising by reason of the fiscal operations of the State; (5) claims arising out of the combatant activities of the National Guard; (6) claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, fraud, interference with contractual right or invasion of the right of privacy; (7) any claim for which another remedy is specifically provided.

Claims of $500 or less may be settled by the Attorney General on his own motion. Where the amount of settlement would be greater than $500 the Attorney General may settle only with the approval of the court.

Judgments are paid by the State Treasurer from the appropriation of the department involved. Where a State employee has had a causal connection with the claim but he is not connected with any department, payment is made from the State treasury which is subsequently reimbursed by the Emergency Board. In the event an insurance policy is in effect, its provisions with respect to payment govern. Acceptance of payment by the claimant is final and conclusive and will bar any subsequent action by him against the State or any of the State's employees who may have been involved.

VIRGINIA

The Code of Virginia, Sections 2-193 through 2-199 and Sections 8-752 through 8-757, provides a procedure by which claims against the Commonwealth may be resolved.[5]

The Comptroller has been designated as the Commonwealth's administrative instrumentality to receive any person's "pecuniary claim" against the Commonwealth based upon "any legal ground." The Comptroller may allow claims within ten years from the time they accrued, but must call claims that are more than ten years old to the attention of the Governor and may allow them only if the Governor so directs.

If the Comptroller disallows a claim the party aggrieved may have redress to the circuit court of the city of Richmond by filing a petition or a bill in chancery. However, these proceedings must be commenced within three years after the claim accrued. The court is authorized to empanel a jury to determine the facts and to fix the amount of unliquidated claims. When the claimant prevails he may present his claim to the Comptroller for payment within two years of the court's decision. However, no judgment can be paid until a special appropriation has been passed.

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[5] Under the above cited statutory authority it has been held that court proceedings based upon contract will lie against the Commonwealth, Davis v. Marr, 200 Va. 479, 106 S.E.2d 722, but it has been held that actions based upon torts are not authorized. Elizabeth River Tunnel District v. Beecher, 202 Va. 452, 117 S.E.2d 685.

WASHINGTON

The Revised Code of Washington, Sections 4.92, 4.92.010, 4.92.140, and 4.92.090, provides a comprehensive judicial procedure for the redress and payment of claims against the State of Washington.

It is provided that "any person or corporation having any claim against the State" shall have a right of action in the superior court of Thurston County (except those cases involving real property which may be brought in the county where the land is situated or in tort cases which may be brought in Thurston County or the county where the claim arose). In any action brought against the State under these provisions, the claimant may be required to file a surety bond for costs to indemnify the State in the event he fails to recover judgment.

Section 4.92.090 provides that "The State of Washington, whether acting in its govmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." Such claims must be presented to the State Auditor within one hundred and twenty days from when the claim arose. The statement to the auditor must be verified and describe the conduct and circumstances of the injury or damage, the nature of the injury or damage and the names of persons involved, together with an itemization of the injury and the total amount claimed. An action cannot be maintained in the courts until a claim has first been filed with the State Auditor.

The execution of judgments against the State upon publicly owned property is prohibited. However, the Budget Director upon receiving a certified copy of the judgment is authorized to make payment from the State treasury. A tort claim account has been established in the State general fund for the payment of claims against the State. However, payments may be made from such fund only upon a final court judgment or upon settlement or adjustment by a department head with the approval of the Attorney General for claims of $500 or less.

The Attorney General is authorized to settle tort actions against the state but he must first secure the approval of the court, in which case a stipulation or judgment is entered. In such instances, the judge before whom any such action is pending may require the Attorney General or the plaintiff to produce and satisfy him with respect to any relevant or material evidence.

The Budget Director is authorized to pay tort claims and judgments against the State only upon the following conditions: (1) where the department head involved certifies that the claim was settled for $500 or less and has secured the approval of the Attorney General, or (2) the clerk of the court has transferred a certified copy of the judgment to him and the Attorney General has certified that it arose out of a tort action.

When payments are made by the Budget Director out of the tort claims account it is conceived that the department involved will, unless to do so would disrupt its operation, reimburse the tort claims account. Thus this account will in the ordinary operation of the system have a tendency to replenish itself. However, it is provided that the Budget Director may relieve a department involved from reimbursing the tort claims account where to do so would disrupt a department's operation. Therefore it may become necessary from time to time for the legislature to replenish this account.

In those instances where the tort claims account is reimbursed, the department involved is required to apportion such charges within its department to the various activities which contributed to liability. And where more than one department is involved, the Budget Director may make the apportionment between the departments whose activities contributed to the state's liability.

WEST VIRGINIA

The West Virginia Code of 1961, Sections 1143 through 1147(7), designates the Attorney General as the "special instrumentality of the legislature" to consider claims against the State and to recommend a course of disposition to the legislature.[6]

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[6] Until 1953 when these code sections were amended, a Court of Claims was the legally constituted legislative instrumentality. The Attorney General succeeded to many of the same powers and responsibilities formerly delegated to the Court of Claims.

It is expressly provided that the determinations of the Attorney General are not subject to judicial review, and further that no liability may be created by an Attorney General's determination unless an appropriation has previously been made.

The Attorney General's jurisdiction extends to those claims which "but for the constitutional immunity of the State from suit" or for some statutory limitation, could be brought in the courts. He is authorized to examine both liquidated and unliquidated claims, "ex contractu and ex delicto," which have equitable overtones, and to consider defensive set-offs and counterclaims which may be presented by the State. However, he is expressly precluded from considering claims arising as a result of particular kinds of State activity. They are those resulting from the militia or National Guard, injury or death to State prisoners, treatment of patients or inmates in state institutions, workmen's compensation, unemployment compensation, public assistance in the nature of relief and welfare and in any other instance where the claimant may have had recourse to the courts.

A person institutes his claim by filing it with the Attorney General. He is entitled to a hearing in accordance with the rules of procedure adopted by the Attorney General for such purposes. The Attorney General is empowered to issue subpoenas for the attendance of witnesses and in receiving evidence he is neither bound by the common law nor statutory rules of evidence. In the event a finding is made for the claimant, the Attorney General is required to make a written determination containing the reasons for his decision together with an itemized statement of the amounts recommended for payment. Interest upon any such awards is prohibited unless they are based upon a contract which provides for interest, in which case the interest specified in the particular contract governs.

Where a claim has arisen out of an activity of a State agency for which there is an existing appropriation, the claim may be submitted to the Attorney General by (1) the claimant whose claim has been rejected either by the State agency involved or the State auditor, (2) the head of the State agency involved, or (3) by the State Auditor. If the Attorney General finds for the claimant he certifies his findings to the head of the State agency concerned, the State Auditor and to the Governor. The Governor then is authorized to instruct the State Auditor to issue his warrant from the existing appropriation.

Where a claim arises out of an activity which is financed under a special appropriation the Attorney General has the authority upon finding for a claimant to requisition the State Auditor to issue his warrant for payment.

Where there is neither an existing appropriation nor a special appropriation out of which an Attorney General's award may be paid, he is required to transmit to the Director of the Budget an itemized statement of the awards he has made for inclusion in his appropriation recommendations. All documents, papers, briefs and transcripts of the testimony must be preserved and made available to the legislature upon request.

WISCONSIN

The Wisconsin Statutes, Sections 15.94 and 16.53(8), provide a procedure for the redress of "all claims requiring legislative action."

A claim against the State is submitted to the Director of the Department of Administration whose responsibility it is to examine them, note the funds to which they are chargeable and generally, to determine that all claims are in proper order. When this has been done the director refers these claims to the Claims Commission.

The Claims Commission was created to receive, investigate and make recommendations requiring legislative action and it is the express policy of the legislature to consider only those claims upon which the Claims Commission had made its recommendation.

The Claims Commission is comprised of five members who receive no additional compensation but are entitled to reimbursement for their actual and necessary out-of-pocket expenses. A representative of the Governor's office, the Department of Administration and the Attorney General's office, together with the chairman of the Senate Finance Committee and the chairman of the Assembly Finance Committee, constitute the Commission's membership.

Ten days' written notice is required to be given by the Commission to a claimant before his hearing is held, stating the time and the place thereof. The proceedings are required to be taken by a recording device although they do not have to be transcribed. The Commission may subpoena the attendance of witnesses and the production of records and documents. In receiving evidence the Commission is not bound by the common law or statutory rules of evidence and may take official notice of certain facts.

The Commission is required to report its findings and recommendations on all claims submitted to it for action to the legislature. If the Commission concludes in its findings that the State is legally liable or that the claim arose out of the causal negligence of a State employee or that there are equitable reasons why the State should pay, it is required to draft a bill reporting its findings and conclusions and submit it to a joint legislative committee on finance.

It is provided that with respect to claims of $500 or less, the Claims Commission may on its own cognizance without submission to the legislature order payment.

Sections 285.01 et seq. provide a means by which a person having a claim against the State may have redress to the courts where the legislature has refused to make an allowance. Such actions are commenced by filing service of process and pleadings upon the Attorney General. It is also required that a bond of not to exceed $1,000 may be filed by any such plaintiff to secure the State's costs.

No execution may be had against State property for satisfaction of one's judgment. However, after the clerk of the court has furnished a certified transcript of the judgment to the Department of Administration and that department has audited and examined the amount of damages so awarded, payment may be made from the State treasury.

It should be noted that in the case of Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962) the Wisconsin Supreme Court in abrogating prospectively the doctrine of sovereign immunity with respect to torts made some very significant comments concerning the above cited sections. It stated that since the Wisconsin constitution provided that "the legislature shall direct by law in what manner and in what courts suits may be brought against the State" it is questionable whether the statutory language authorizing suits against the State is broad enough to include suits sounding in tort. The court further noted that these sections have been construed as limited to claims against the State for debt but declined to pass upon the particular issue since it had not been briefed and submitted to the court for its determination. However, the court stated that before a suit may be commenced against the State under such a constitutional provision the legislature must specifically so provide.

WYOMING

In Wyoming claims against the State are presented to the State Auditor, pursuant to Wyoming Statutes 1957, Sections 9-71 through 9-77.

The State Auditor is authorized to receive evidence and examine witnesses under oath. If a decision in favor of a claimant is rendered and there is an existing appropriation from which payment can be made, the Auditor may draw his warrant for the amount he has allowed.

If there is no existing appropriation from which payment can be made, the claim may be certified to the legislature for payment. The legislature, as a matter of policy, will not act upon a claim until it has been considered by the State Auditor.

If a claimant is dissatisfied with the decision of the Auditor, he may appeal to the legislature.