Volume 74
Issue 1 *Dickinson Law Review - Volume 74, 1969-1970*

10-1-1969

# Liability of a State for Interest on a Judgment

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# LIABILITY OF A STATE FOR INTEREST ON A JUDGMENT

The doctrine of sovereign immunity is firmly rooted in early English Common Law,[1] and although it has been reviewed, reported and logically assailed in numerous articles,[2] it clings tenaciously to modern jurisprudence.[3] A state's liability on claims for positive relief brought by citizens of the defendant state is limited absent a mitigating statute.[4] One facet of any claim is interest; the immunity doctrine, therefore, is directly relevant to the liability of a state for interest. This Comment will consider the liability of a state for interest by analyzing case law surrounding and interpreting statutes which have been construed to be a waiver of immunity but which make no provision for interest on judgments obtained thereunder. The analysis here does not extend to actions against municipalities.[5] A number of states have enacted

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1. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW (2nd ed. 1909):

> The rule which in later times will be expressed by the phrase 'The King Can Do No Wrong' causes no difficulty. That you can neither sue nor prosecute the king is a simple matter of fact, which does not require that we shall invest the king with any non-natural attributes or make him other than the sinful man that he is. The king can do no wrong; he can break the law; he is below the law though he is below no man and below no court of law. It is quite conceivable that he should be below a court of law. In the second half of the [thirteenth] century some lawyers are already arguing that this is or ought to be the case.

*Id.* at 515-16. The American counterpart to the English rule was eliminated at an early date in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1872) only to be vigorously revived in the form of the eleventh amendment to the Constitution. *See* THE FEDERALIST No. 81; Petty v. Tennessee-Missouri Bridge Comm'n., 359 U.S. 275 (1959); BLACKS LAW DICTIONARY 1568 (4th ed. 1951).

2. *See, e.g.*, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Gellhorn and Laver, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325 (1954); Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954); Wade, *Liability in Tort of the Central Government of the United Kingdom*, 29 N.Y.U. L. REV. 1416 (1954); Swartz, *Public Tort Liability in France*, 29 N.Y.U. L. Rev. 1432 (1954); Note, *Oregon's Governmental Tort Liability from a National Perspective*, 48 ORE. L. REV. 95 (1969); Note, *Handling Tort Claims Against the State of Iowa*, 17 DRAKE L. REV. 189 (1968).

3. *E.g.*, Fosbre v. Washington, 456 P.2d 335 (Wash. 1969).

4. 81 C.J.S. *States* § 196 (1953); 49 AM. JUR. *States, Territories and Dependancies* § 75 (1943).

5. 18E MCQUILLEN, MUNICIPAL CORPORATIONS § 53.24 (3d ed. 1963); Annot. 24 A.L.R.2d 928 (1952).

legislation waiving the immunity of municipalities but have retained the principle of immunity to actions against the state.[6]

PRELIMINARY MATTERS—SOVEREIGN IMMUNITY GENERALLY

A search of the statutes and case law interpreting statutes of the fifty states indicated:

1. Eleven states which have statutes which may be termed Tort Claims Acts.[7] Some statutes of this type, however, expressly allow contract actions as well.[8] The form of the action to be followed and the court in which the action must be brought varies.
2. A number of states which have waived tort or contract immunity against only a specified department or branch of state government excluding municipalities.[9] These states have in common:
   a. A reservation of the principle of sovereign immunity to actions, tort or contract, against the state generally.
   b. Waivers, commonly found in the enabling acts of the department or agency, in words similar to "[the agency is hereby granted the power to] sue and be sued."[10]
3. Several states which have created a court of claims for the

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6. *E.g.*, ALA. CODE ANN. tit. 37, §§ 502-04 (1959); ARK. STAT. ANN. tit. 17, §§ 701-22 (1968); GA. CODE ANN. tit. 69, § 308 (1967); LA. REV. STAT. §§ 13:5101-5110 (1968).

7. ALASKA STAT. ANN. tit. 9, § 950.250 (Supp. 1968); ARIZ. REV. STAT., § 12-821 (1956); HAWAII REV. STAT. tit. 36, § 662-1 (1968); ILL. STAT. ANN. ch. 37, § 439.1 (1969); IOWA CODE ANN. ch. 613, § 613.8 (Supp. 1969); KENTUCKY REV. STAT. ch. 44, § 44.070 (1959); MASS. GEN. LAWS ANN. ch. 12, § 3 (1966); N.C. GEN. STAT. ch. 143, § 291 (Supp. 1967); N.Y. CT. OF CLAIMS LAW § 8 (1963); UTAH CODE ANN. § 63-30-11 (1968); WASH. REV. CODE § 4.92.010 (Supp. 1967).

8. *E.g.*, ARIZ. REV. STAT. § 12-821 (1956); S.D. CODE tit. 33, § 0604 (Supp. 1960).

9. Jones v. Scofield Bros., 73 F. Supp. 395 (1947) (to determine what branches by the state are liable for their torts or are liable on their contracts one must look at the various enabling acts of the departments); Georgia Highway Dept. v. Knox-River Constr. Co., 117 Ga. App. 453, 160 S.E.2d 641 (1968) (the doctrine of sovereign immunity is not applicable to an action against the state highway department based on breach of its contractual obligations); Alexander v. South Dakota, 74 S.D. 48, 48 N.W.2d 830 (1951); Stanley v. South Carolina State Highway Department, 249 S.C. 230, 153 S.E.2d 687 (1967); Allen v. Texas, 410 S.W.2d 52 (Tex. Civ. App. 1967).

10. The language allowing an agency of a state to sue and be sued has raised some interesting problems with regard to the meaning and extent of the waiver. See the discussion in text accompanying notes 28-41 *infra*.

trial of causes against the state.[11] These statutes are commonly construed to not constitute a waiver of sovereign immunity[12] and to only permit the legislature to allow or deny claims on an ad hoc basis. The payment or denial is ultimately dependent upon the action of the legislature; the court of claims acts only in an advisory capacity. There are, unfortunately, no statistics regarding the consistency of the legislatures in following the recommendations made by the courts.

4. A few states which provide for the payment of claims through direct appropriation by the legislature.[13]
5. A number of states which must be considered to be substantially immune from any action by a citizen for positive relief.[14]

There is also case authority that a state may be sued on its contracts in the absence of waiver statutes when the state engages in a proprietary function.[15]

The majority of cases which deny recovery of interest do so on the ground that "actions" against the state are prohibited in the absence of statutes waiving immunity.[16] The state's liability for interest, therefore, centers on the unexpressed major premise that the interest action is separate and distinct from the action for the principal amount. It is submitted, however, that the interest action is derivative by its very nature. Certainly, there can be no recovery for interest in the absence of a showing that funds on which the interest is calculated were wrongfully retained, actually or constructively, by the defendant. Since the legislature saw fit to allow the primary action in a waiver statute, the derivative action for interest should be allowed by the same enactment.

To facilitate the consideration of cases involving interest claims

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11. *E.g.*, COLO. REV. STAT. ch. 130, § 10-1 (1966); CONN. GEN. STAT. ch. 53, § 4-141 (1966); IDAHO CODE ANN. § 67-1008 (1949); MISSOURI STAT. ANN. § 33.120 (1969); W. VA. STAT. § 14-2-1 (Supp. 1968).

12. Dinwiddie v. Siefkin, 299 Ill. App. 316, 20 N.E.2d 130 (1939) (held: The state had not waived immunity in spite of the enactment of a Court of Claims Act). *But see* Moore v. Illinois, 21 Ill. Ct. Claims 282 (1951).

13. D.C. CODE tit. 1, § 1-901 (1967); LA. REV. STAT. § 13:5108 (1968); S.C. CONST. art. 17, § 2 (1860).

14. Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Carolina, South Dakota, Rhode Island, Vermont, Wyoming.

15. *E.g.*, Spaur v. Greely, 150 Colo. 279, 372 P.2d 730 (1962); Grant Constr. Co. v. Burns, 92 Idaho 408, 443 P.2d 730 (1962); Youngstown Mines v. Prout, 266 Minn. 450, 124 N.W.2d 328 (1963); Mississippi Highway Comm'n v. Wunderlich, 194 Miss. 119, 11 So. 2d 437 (1943); Meens v. Montana State Bd. of Educ., 127 Mont. 515, 267 P.2d 981 (1954); Stadler v. Curtis Gas, Inc., 151 N.W.2d 915 (Neb. 1967); Northern Pac. Ry. v. Morton County, 131 N.W.2d 557 (N.D. 1964); Rocell Constr. Co. v. New York, 208 Misc. 364, 141 N.Y.S.2d 463 (Ct. Cl. 1955); Jenkins v. Wisconsin, 13 Wis. 2d 503, 108 N.W.2d 924 (1961); 81 C.J.S. *States* § 120 (1954).

16. Fosbre v. Washington, 456 P.2d 335 (Wash. 1969).

against the state, the decisions will be grouped according to the type of action. It should be further noted that, especially in the tort area, statutes waiving immunity are in some instances recent developments, and, therefore, claims for interest have not occurred with frequency, if at all.

### Tort Actions

The enactment of legislation which waives immunity but makes no provision for interest has resulted in a division of case authority on the question of the state's liability for interest.

In *Reeves v. Louisiana*[17] plaintiff was awarded interest from the date of judgment. Although the statute under which the action was brought was silent on the subject of interest, the court reasoned that the tort statute had been enacted following judicial recognition in several cases of plaintiff's right to interest in *contract* actions. It therefore considered the legislature to have authorized the application of interest by its silence on the subject. The relevant statute provided:

> [S]uits authorized by the legislature against the state . . . are to be governed by the same procedure required in suits between private individuals and the effect of this authorization is to be nothing more than a waiver of the state's immunity from suit.[18]

The *Reeves* court, although it evidently felt the claim for interest to be a separate action and thus subject to limitation by the general rule of immunity, was willing to resort, in partial support of its decision, to a weak argument to allow interest. Although legislative silence is admittedly ambiguous, it is not often interpreted as a positive approval of a course of action. The result, however, was further supported by a consideration of the language of the statute quoted above. The court interpreted that language in accordance with its plain meaning and, accordingly, allowed interest against the state as it would be allowed against any private litigant.

Similar language was considered by the Kentucky courts in *Kentucky v. Young*[19] where plaintiff claimed interest on an amount found due it by reason of the state's negligence. The court, in allowing the claim, considered the statute under which the action was brought:

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17. 232 La. 116, 94 So. 2d 1 (1957).
18. *Id.* at 117, 94 So. 2d at 2.
19. 380 S.W.2d 239 (Ky. 1964).

> The court shall enter its findings on the order book as a judgment of the court, and such judgment shall have the same effect and be enforceable as any other judgment of the court in civil cases.[20]

The court reasoned:

> [T]he statute authorizing the procedure in this case provides in substance that the judgment of the circuit court shall be enforceable against the Commonwealth as any other judgment would be enforceable, *which is equivalent to saying that the attributes of any other judgment would follow this one.*[21]

Although the courts in *Reeves* and in *Young* construed statutes according to the apparent plain meaning of words, most courts construe similar statutes in the light of a rule of strict construction.[22] As a result the plain meaning of words becomes irrelevant. Instead, the majority rule dictates the immunity of the sovereign absent an *explicit* statutory waiver.[23] Although no court has called for it, the rule presumably requires the use of the word "interest" in order for claimant to recover.[24] The case of *Fosbre v. Washington*[25] is representative of the strict majority view. The provisions of the statute there construed were: "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 it if were a private person or corporation."[26] It is to be noted that the statute in *Fosbre* is substantially similar to the statutes construed in *Reeves* and in *Young*. The *Fosbre* court found the state immune from an interest action. The rationale is consistent with the view taken by the majority of states denying recovery in the absence of express terminology. The dissent, on the other hand, urged the adoption of the rule stated in *Reeves* and *Young* although those cases were not cited.[27]

### A. *"Sue and Be Sued" Statutes*

Although *Fosbre* stands alone as a decision denying recovery of interest under a statute like the provision there construed, other courts, construing different statutory language, have reached analogous results. It would appear that unqualified wording in an enabling statute granting a department or agency the power to

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20. *Id.* at 240.
21. *Id.* at 241.
22. Fosbre v. Washington, 456 P.2d 335 (Wash. 1969); cases and text accompanying notes 28-41.
23. In Holton & Hunkel Greenhouse, Inc. v. New Hampshire, 274 Wis. 337, 80 N.W.2d 371 (1957), the statute provided for costs but did not provide for interest in explicit terms. The court accordingly denied the claim for interest.
24. *Id.*
25. 456 P.2d 335 (Wash. 1969).
26. WASH. REV. CODE § 4.92.080 (Supp. 1967).
27. 456 P.2d 337 (Wash. 1969) (dissenting opinion).

"sue and be sued" would allow actions in contract *or* tort. Yet, a majority of courts have held that this wording constitutes a waiver to contract actions only. Thus, decisions of this type construe wording not to waive immunity in tort despite the apparent plain meaning of the wording. In this respect these decisions lend support to the majority's rationale in the *Fosbre* decision.

In *State ex rel. Fatzer v. Kansas Turnpike Authority*[28] the state attempted to have the Authority's enabling act, which provided the Authority had the "sue and be sued" power, declared unconstitutional as imposing or possibly imposing a liability against the state in contravention of article XI, sections 6 and 7 of the Kansas constitution. The court noted:

> Without further discussion we think it may be said that if contract liability is what is meant [by the state's argument that the Act was unconstitutional] the question was laid to rest in the last case cited [*State ex rel. Boynton v. Kansas State Highway Commission*[29]]. If tort liability is meant, it must suffice to say that at no place in the Act is there any waiver of the state's immunity.[30]

In the *Highway Department* decision the court noted that the state's liability in contract actions was limited to the funds appropriated for the construction of the highway while in the *Turnpike Authority* decision, the matter of tort liability was summarily dismissed as quoted. The underlying rationale, although unstated, must be that the state is immune in the absence of specific legislation and the "sue and be sued" provision will not be construed to amount to such specific waiver.

In a further example of the strict construction placed on the language "sue and be sued," an Oklahoma court in *State ex rel. State Insurance Board v. District Court of Oklahoma County*[31] noted:

> Under that section [Oklahoma Statutes Annotated tit. 85, § 131 (1952)] the Fund may sue and be sued only in connection with matters arising under the insurance contracts which it makes. To subject the Fund to the payment of claims for torts of its officers or employees would be to appropriate public monies to a private use. No such appropriation can be made under our Constitution.[32]

No state has a constitution which denies interest explicitly. That result stems from the court's interpretation of the constitution,

28. 176 Kan.. 683, 273 P.2d 198 (1954).
29. 138 Kan. 913, 283 P.2d 770 (1934).
30. 176 Kan. at 691, 273 P.2d at 205.
31. 278 P.2d 841 (Okla. (1955).
32. *Id.* at 843.

and, as such, may be overturned by the court consistently with the Constitution.

In the later case of *State ex rel. State Insurance Fund v. Bone*[33] the Oklahoma court overturned its earlier decision and did not feel bound to follow its earlier decision by any constitutional prohibition. The court stated:

> [W]e now hold that the State Insurance Fund is a business enterprise as distinguished from a purely governmental activity and tort liability attaches and may be adjudicated pursuant to the consent statute.[34]

One of the few decisions which attempts to give a supporting rationale for denying that the words "sue and be sued" constitutes a waiver of immunity is *Vigil v. Penitentiary of New Mexico*.[35] There the court construed a "sue and be sued" provision to refer to contract actions only. In support of that result the court cited an earlier decision which stated:

> The home [action against a state supported home] not having been given the right to commit wrongs upon individuals and it not having been contemplated that it would do so, the right to sue the home for tort was never contemplated or conferred.[36]

This reasoning is dubious support for the denial of a just claim. If defendant *had* been given the right to commit wrongs, the act creating the home would have been struck down as unconstitutional. To bar an action on the grounds that no wrongs were anticipated is merely to restate, without justification, the proposition that the words "sue and be sued" do not constitute a waiver of tort immunity.

Messr's Irish and Protho[37] have suggested that the American branch of the rule of sovereign immunity finds the reason for its existence not in logical reasoning but in the impecunious financial structure of the states at the time of the decision in *Chisolm v. Georgia*.[38] Thus, an attempt to discover an underlying rationale for the immunity doctrine is born of futility. In what may at least be partial recognition of the inequities of the doctrine of strict construction as applied to the words "sue and be sued" the Supreme Court of the United States rendered the decision of *Petty v. The Tennessee-Missouri Bridge Commission*.[39] There, plaintiff sought recovery for the wrongful death of her husband by drowning on a ferryboat owned and operated by the Commission. Both the federal district court and the circuit court of appeals found for de-

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33. 344 P.2d 562 (Okla. 1959).
34. *Id.* at 569.
35. 52 N.M. 224, 195 P.2d 1014 (1948).
38. *Id.* at 226, 195 P.2d 1016.
37. Irish and Protho, *The Politics of American Democracy* 123 (1959).
38. 2 U.S. (2 Dall.) 419 (1792).
39. 359 U.S. 275 (1959).

fendant on the grounds of sovereign immunity despite the wording "sue and be sued" in the compact act creating the Commission. There was, in addition, case authority in both states that the "sue and be sued" wording amounts only to a waiver of immunity to contract actions. The majority of the Court considered that the Commission derived its authority from the United States Congress through the compact act creating it. The Court, therefore, reasoned that the "sue and be sued" language should be given a federal interpretation and held the wording to constitute a waiver to contract and tort actions. In effect, the sovereignty of the states was abandoned when the party states agreed to enter the compact and submit to federal authority. The dissent, written by Mr. Justice Frankfurter, argued that the state interpretations of the "sue and be sued" language should be of paramount importance and should, therefore, bar the tort action.[40]

Thus, in the majority of cases, the words "sue and be sued," despite their plain meaning, result only in a liability in contract. Courts adopting this view do so on the grounds that waivers of immunity should be strictly construed.[41]

B. *Insurance Statutes*

Since the majority of courts disallow tort actions despite the "sue and be sued" wording, it follows in accordance with the strict construction rule that they should disallow tort actions in instances where statutes have been enacted allowing agencies of the state to obtain liability insurance. Accordingly the majority of courts which have considered such statutes and the actions taken by officials under the statutes have found the statutes *not* to constitute a waiver of immunity from suit.[42] If there is statutory authority to obtain insurance and yet case authority construing that fact not to amount to a waiver of liability, both the legislative intent and the purpose of the added insurance costs becomes, at best, mysterious.

Some statutes, on the other hand, provide that the insurance contract constitutes a waiver of immunity.[43] These statutes commonly limit the liability of the insured agency to the face amount of the policy. Whether courts of this view would allow claimant's

40. 359 U.S. 283 (1959) (dissenting opinion).
41. E.g., Oklahoma ex rel. State Ins. Fund v. District Court, 278 P.2d 841 (Okla. 1955).
42. *E.g.*, Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957); Jones v. Scofield Bros., 73 F. Supp. 395 (D.C. Md. 1947).
43. *E.g.*, IND. STAT. ANN. § 39-1819 (1965).

action for interest on the judgment if the judgment exceeds the coverage maximum probably depends upon whether the insurer or the insured bears the added interest expense.[44]

In light of the decisions which have construed "sue and be sued" and insurance permission statutes not to mean what the

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44. A large number of contemporary insurance contracts contain what the industry and the courts have labeled "standard clauses." The standard liability insurance policy provides that the insurer shall pay "all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon." 2 R. LONG, LAW OF LIABILITY INSURANCE §§ 9.01-9.02 (1966); "Indemnity and liability insurance policies now usually provide for the payment on behalf of the insured of "all sums" which he shall become legally obligated to pay by reason of a risk within the terms of the policy." 15 G. COUCH, INSURANCE 2d § 56:9 (1964); "Under most policies, the insurer is liable for interest on judgments rendered against the insured, even though the amount renders the total recovery in excess of the policy limits." 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4899 (1962). *See, e.g.*, Hawkeye-Security Ins. Co. v. Indemnity Ins. Co., 260 F.2d 361 (10th Cir. 1958) (Insurer agreed to pay "all sums" which the insured might become legally obligated to pay); River Valley Cartage Co. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 242, 161 N.E.2d 101 (1959) (Insurer agreed to pay "all interest accruing after entry of judgment"); Underwood v. Buzby, 236 F.2d 937 (3d Cir. 1956) (Insurer agreed to pay "all interest accruing after entry of judgment"); 2 R. LONG, LAW OF LIABILITY INSURANCE §§ 9.01-9.02 (1966); 15 G. COUCH, INSURANCE 2d § 56.9 (1964); 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4899 (1962). The clause cited is most commonly used in contemporary contracts. Ramsey, *Interest On Judgments Under Liability Insurance Policies*, 1957 INS. L.J. 407; *accord*, Pigg v. International Indemnity Co., 86 Cal. App. 671, 261 P. 486 (1927) where a variation on the standard clause was included in the contract as follows:

> [P]rovided, however, that the company's liability shall in no event exceed [policy limit] for damages for such injuries to any one person. *And will in addition* (1) defend (certain suits); (2) pay (certain expenses)-(b) pay all taxed costs; (c) pay all interest accruing upon such part of such damages awarded by judgment as is not in excess of the company's limit of indemnity as above defined.

*Id.* at 675, 261 P. at 488; In Consolidated Underwriters v. Richards' Adm'r, 276 Ky. 275, 124 S.W.2d 54 (1939) another variation of the "standard clause" was included in the contract:

> In addition to these limits the Underwriters will also pay expense incurred by them in connection with the investigation and adjustment of claims under insuring clauses one and two; all costs taxed against the subscriber in any legal proceeding while being defended by the Underwriters on behalf of the subscriber. . . ; interest accruing after entry of judgment upon such part thereof as shall not be in excess of the Underwriters' liability as limited in insuring clauses one and two. . . .

*Id.* at 285, 124 S.W.2d at 59. In any of the three clauses cited it will be noted that the insurer promises to pay to the injured third party, on behalf of the insured, interest on the judgment. Notice, however, the crucial distinction between the wording used in the first clause cited and the two clauses immediately following. In the clauses cited last the insurer has carefully limited its liability to interest on the policy limits or the judgment whichever is the smaller figure. In the clause set forth in the text, on the other hand, the obligation of the insurer is expressed in terms of "all" interest. Because there are situations where the judgment is greater than the policy limits, the insurer's limitation of which figure shall be used in the computation of interest is significant.

statute apparently says or implies, the result in *Fosbre v. Washington*[45] may be better understood. Although the decision may be better comprehended, the reasoning behind it and other similar decisions depends upon the rule of strict construction. The rule, in turn, has little support in logic or policy. One decision, however, has indicated the purpose of the strict rule to be the protection of the state from burdensome interference with the performance of governmental functions and the perservation of public funds.[46] That reasoning, however, is identical to the reasoning propounded to support the rule of immunity and as such is subject to attack for the reasons enumerated in the cases and articles considering the rule of immunity.[47] Additional support for the strict construction rule might lie in the possible uncertainty among lawyers and resultant litigation generated when a statute may be said to have intended interest by implication. Supporting arguments for the rule, however, are of little weight when contrasted with the more weighty arguments of legislative intent, the plain meaning of words, a concern for an equitable result, and the derivative nature of the interest claim.

### Contract Actions

Cases in this area should be read with a consideration of the view, taken in some states, that a state waives immunity by entering a contract in the proprietary field.[48] Contracts for purely governmental purposes, on the other hand, are viewed by the majority of states as made under and subject to the doctrine of sovereign immunity.[49]

Practically all states have interest statutes which regulate the rate, usually six per cent, of interest in the absence of any controlling contractual rate.[50] These statutory rates are not, of course, considered to amount to a waiver of immunity under the majority view since they are general in nature.[51] In *Georgia State Highway Department v. Knox-River Construction Co.*[52] the Georgia Supreme

45. 456 P.2d 335 (Wash. 1969).
46. United States v. Lee, 106 U.S. 196 (1882); Glassman v. Glassman, 309 N.Y. 436, 131 N.E.2d 721 (1956).
47. See note 2 *supra.*
48. Rieth-Riley Constr. Co. v. Indian Village, 214 N.E.2d 208 (Ind. App. 1966); Todd v. Board of Educ., 154 Neb. 606, 48 N.W.2d 706 (1951); Jenkins v. Wisconsin, 108 N.W.2d 924 (Wis. 1961); 81 C.J.S. *States* § 120 (1954).
49. 81 C.J.S. *States* § 120 (1954).
50. See note 44 *supra.*
51. *E.g.*, Boucher v. Doyal, 210 So. 2d 75 (La. 1968).
52. 117 Ga. App. 453, 160 S.E.2d 641 (1968).

Court allowed claimant interest on liquidated damages determined to have been wrongfully withheld by the state. The interest aspect of the decision turned upon the construction of the enabling act creating the Highway Department.[53] Since the act was held to be a waiver of immunity to contract actions against the Department, the court found the general interest statute controlling as to the amount of interest.[54]

In *Otto B. Ashbach & Sons v. Minnesota*[55] a road contractor sued for retained compensation and interest thereon for work performed under a contract. The court cited the general rule disallowing interest but then noted an exception where the statute might have "reasonably" intended such a result. The statute there construed provided:

> [in suits arising out of contracts for the construction of highways] the state hereby waives immunity from suit in connection with such controversy and hereby confers jurisdiction on the district courts of the state to hear and try out such controversies in the manner provided for the trial of causes in the district court.[56]

After citing cases from other jurisdictions allowing interest where similar statutes were held to have "reasonably" intended the allowance of interest, the court noted:

> Such decisions are based on the theory that since the state has consented to submit to civil litigation, it thereby has placed itself in the same position as other litigants, and, like them, rendered itself liable for interest on any debts which the courts may determine are owing from it.[57]

The decision, however, rests upon the initial determination by the court that the language of the statute did "reasonably intend" that the state consented to suit as any other litigant. That determination is the key to interest liability; without it no liability ensues. It was this first important step that the majority in *Fosbre v. Washington*[58] declined to take and, under a statute which might be said to have imposed an even clearer interest liability on the state, refused to find liability. Thus, a claimant seeking interest has, despite the existence of a statute the plain meaning of which causes the state to incur liability as an ordinary litigant, the burden of persuading the court that the statutory language "reasonably intends" liability for interest as well as liability for the principal sum. The *Ashbach* court felt the language of the statute there construed to have "reasonably intended" interest liability. That court reached its decision without discussing the "reasonable

53. GA. CODE ANN. § 95-1605 (1967).
54. GA. CODE ANN. § 110-304 (Supp. 1967).
55. 78 N.W.2d 446 (Minn. 1956).
56. *Id.* at 447.
57. *Id.* at 450.
58. 456 P.2d 335 (Wash. 1969).

intention" of the statute. The majority in *Fosbre*, however, felt that language even stronger than that in *Ashbach* did not intend liability for interest.

The state may be liable for interest in the event that a contract to which it is a party allows it.[59] Thus, in *L.A. Reynolds Co. v. North Carolina Highway Commission*[60] where claimant sought return of funds wrongfully withheld and interest thereon, the court construed the contract provisions to amount to a waiver of immunity to the claim for interest. The parties had agreed upon a rate of 5% to be applied to any funds withheld more than ninety days after the completion of the project. There was, therefore, liability for interest in the amount specified.

Policy dictates that the state should be liable in all respects as a private litigant where it enters a contract despite the majority view denying liability except in proprietary contracts. If the private contracting party could not sue for breach by the state, few persons would be willing to enter contracts with the state. Thus, most enabling acts of state agencies which have the power to contract, provide that the agency may "sue and be sued." That language, as noted above, has been interpreted to mean liability only in contract.[61]

### Tax Cases

Cases in this area have uniformly denied claimant's action for interest and usually employ the rule of immunity in the absence of express statutory language indicating the state's liability for interest.

Where the appellant corporation prepaid a franchise tax and subsequently sought a refund, the court noted that the statute under which the claim was lodged did not explicitly allow for interest on the prepaid funds.[62] The court distinguished the case from an action brought to recover taxes where a credit was allowed for overpayment. Although the statute governing refund actions for credits and overpayments explicitly allowed interest, the statute concerning prepayments did not. It is submitted that there is little, if any, difference of substance between an action to regain funds where an overpayment or credit occurs and an action to regain

59. 81 C.J.S. *States* § 196 (1954).
60. 271 N.C. 40, 155 S.E.2d 473 (1967).
61. See text accompanying note 28 *supra*.
62. Jones-Hamilton Co. v. Franchise Tax Bd., 73 Cal. Rptr. 896 (1969).

funds after a prepayment. Despite the existence of separate statutory provisions for the prepayment action, a better result would be to allow interest on prepayment as well as overpayment or credited funds. The decision, however, may be supported by considering that it is in accord with the strict constructionist majority.

In *Public Service Co. of New Hampshire v. New Hampshire*[63] a claim for interest on taxes levied and paid under a statute later held to be unconstitutional was denied. The court noted:

> While the doctrine of sovereign immunity plays only a peripheral part in this decision, it is material to the extent that it is recognized that the plaintiff can recover interest only if the legislature has provided for it by statute, either expressly or by reasonable implication.[64]

In *Public Service* the applicable statute provided "[the treasurer] shall refund to the taxpayers the amount of any overpayment of the tax not otherwise appropriated."[65] Despite that wording the court found no liability for interest on the state. A liberal interpretation could have easily found the word "overpayment" to have included interest since interest only represents that which the taxpayer would have obtained had the funds remained in his possession.

Appellant made a claim to support the action for interest under a New Hampshire statute which allows the superior court to ". . . make such orders or decisions concerning all matters . . . as justice may require."[66] The court, however, after analyzing the legislative history of the refund statute under which the action for the principal amount was brought, found that there had been a deletion by the legislature of the section allowing taxpayer interest on refunds. It therefore concluded that the legislature had specifically intended to deny interest and accordingly disallowed the claim. The court further noted that if the applicable statute had indicated that the court

> should apply a liberal interpretation in favor of the taxpayer and a strict construction against the state, a different result would be expected. However, it has been settled law in this jurisdiction for many years that the state is not to be subjected to costs and interest unless the statute provides for it expressly or by implication.[67]

The substantive issue to be noted is the court's statement that interest could be allowed "by implication" from a statute. Evidently, the court felt that a stronger indication of implication is required than the mere words "overpayment" when combined with the

63. 149 A.2d 874 (N.H. 1959).
64. *Id.* at 876.
65. *Id.* at 876.
66. N.H. REV. STAT. ch. 83, § 10 (1955).
67. 148 A.2d at 877.

statute allowing the court to enter orders "as justice may require." As indicated above, a liberal interpretation of the word "overpayment" could have included interest. In light of the fact that the tax statute giving rise to the litigation was held unconstitutional and the possible construction of the overpayment statue when combined with the equitable statute, it is submitted that the court unnecessarily limited the right to interest by implication.

A New Jersey court felt restrained from awarding interest by provisions in the New Jersey Constitution prohibiting the court from ordering funds withdrawn from the state treasury in the absence of legislative appropriations.[68] Reference to constitutional limitations on the powers of a court in this area has been made in other decisions.[69] As stated above, no state constitution prohibits interest in explicit terms, the usual provision refers only to actions against the state. When an action for property wrongfully retained by a state is authorized by a waiver statute, it is submitted that the legislature intended claimant to have complete compensation. The derivative action for interest, not being foreign to the action for the principal, should also be permitted.

### Eminent Domain Actions

Unlike the tax area, eminent domain decisions appear to uniformly allow claimant interest on the value of the condemned property from the time of taking to the time of payment. The distinction appears to be that the federal and state constitutional provisions demand "just compensation" for the citizen and that "just compensation" necessarily includes interest. Courts appear to consider the eminent domain power vested in the state and in some political subdivisions and departments to be the equivalent of statutes waiving sovereign immunity.

In *Arkansas State Highway Commission v. Stupenti*[70] the court, in awarding interest, noted that the words "just compensation" means interest as demanded from the time of taking to the date of payment. The court quoted from *Smyth v. United States*[71] which determined that the allowance of interest in eminent domain cases had its origin in the federal constitution and constitutes an exception to the general rule.

68. East Orange v. Palmer, 52 N.J. 329, 245 A.2d 327 (1968).
69. *See, e.g.*, State ex rel. Fatzer v. Kansas Tpk. Auth., 176 Kan. 683, 273 P.2d 198 (1954).
70. 257 S.W.2d 37 (Ark. 1953).
71. 302 U.S. 329 (1937).

In *New Hampshire Water Resources Board v. Pera*[72] the court cited the general rule and also noted the exception in eminent domain cases. Vermont courts have also rendered decisions compatible with *Pera* and *Stupenti*.[73]

### Miscellaneous Actions Against the State

This category consists of relatively uncommon actions against the state. Although a general rule may not be derived from the few decisions in this area, it is probably safe to say that courts are inclined to render liberal interpretations of statutes which might be considered waivers of immunity where the state has wrongfully exercised its police powers.[74]

In *Boucher v. Doyal*[75] civil servants entered suit against the state administrator of the division of unemployment security for reinstatement and back wages with interest thereon. Claimants alleged and proved their wrongful dismissal. The court, in denying the claim for interest, noted:

> It is now well settled that general laws relative to the payment of interest are not applicable to the state and its agencies and that neither the state nor any of its agencies may be cast for interest on an unpaid account in the absence of stipulation or express statutory authority for so providing.[76]

In *Florida Livestock Board v. Gladden*[77] the owner of hogs destroyed by the state sought recovery for their reasonable value and interest thereon from the time of destruction. The court, in holding claimant entitled to recover interest from the state, noted:

> Where statutory authorization to sue a state or agency is given, payment of interest on claims adjudicated under the statute may be impliedly authorized when the nature of the claim and the object designed in permitting such suits against the state or its agency warrant such implication.[78]

It is to be noted that the statute made no provision for interest.[79] In allowing the claim the court considered the purpose of the legislature in enacting the statute and considered, accordingly, "the object designed in permitting such suits." In that manner the Florida court went beyond the language of the statute and considered legislative intent. It is precisely this step that courts

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72. 226 A.2d 774 (1967).
73. 124 Vt. 407, 205 A.2d 813 (1964).
74. *E.g.*, Florida Livestock Board v. Gladden, 86 So. 2d 812 (Fla. 1956). The statute only provided that the Board could sue and be sued but the court found those words to mean liability for the wrongful destruction, a result contrary to the general rule of strict construction. *See* cases and text accompanying notes 28-41 *supra*.
75. 210 So. 2d 75 (La. 1968).
76. *Id.* at 84.
77. 86 So. 2d 812 (Fla. 1956).
78. Id. at 813.
79. Fla. Stat. Ann. ch. 15022, § 341.25 (1931).

applying the rule of strict construction decline to take. In so far as the case may stand for that proposition, it represents a significant expansion of the New Hampshire "reasonably intended" rule.

### Conclusion

The question whether a state will be liable for interest on judgments obtained against it is intimately associated with the doctrine of sovereign immunity. Since it is well established, despite logical and persistent criticism, that no action, with the exception of eminent domain actions, will lie against a state in the absence of a statute waiving immunity, the secondary action for interest has also been held to fail in the absence of explicit statutory waivers. Courts taking this view represent the majority and ground their decisions on the rule of strict construction. Thus, despite wording which apparently places the state in a position like that of an ordinary litigant, courts of this view have denied claims for interest.

The minority of courts, on the other hand, will consider whether the statute under which the claim was brought "reasonably" intended the allowance of interest. One Florida decision has considered the purpose of the statute rather than limiting itself to the wording. Although no other decision has expressly considered legislative purpose when construing waiver statutes, it probably constituted an element weighed by most courts of the minority view. It is submitted that the minority, which considers the purpose and reasonable effect of statutes, is the most equitable view.

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