IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI, Guardian, on Behalf of Eric Radaszewski,	)	
Plaintiff,	)	
v.	)	No. 01 C 9551
	)	Judge John W. Darrah
BARRY S. MARAM, Director of the Illinois Department of Healthcare and Family Services,	)	Magistrate Judge Ian Levin
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMORANDUM REGARDING ENFORCEMENT OF SETTLEMENT AGREEMENT

INTRODUCTION

On September 23, 2005, Plaintiff, by her attorneys, reported to Magistrate Judge Levin that settlement had been reached. (Civil Docket, 01 C 9551, Document 45). Pursuant to the settlement, which had been negotiated up to and agreed upon immediately prior to walking into the Magistrate Judge's courtroom on September 23rd, Defendant's counsel drafted a final version of a Settlement Agreement and General Release ("Settlement Agreement") that fully and accurately reflected all terms of the settlement. Plaintiff does not claim the Settlement Agreement is inaccurate; rather, she wants previously agreed upon terms changed. By letter dated October 18, 2005, Plaintiff's counsel tried to renegotiate matters (which she had expressly accepted as agreed) concerning waiver of sovereign immunity, a forum for enforcement, and the confidentiality clause.

After the Magistrate Judge terminated the referral upon settlement, this Court set the matter for status hearing on November 3, 2005. (Civil Docket, 01 C 9551, Document 47). After

the parties appeared at the November 3rd status hearing, the Court entered an order continuing status to December 6, 2005, "for either presentation of dismissal order or scheduling for trial." (Civil Docket, 01 C 9551, Document 48).

At the December 6, 2005 status hearing on the settlement, one of Plaintiff's counsel, Mr. Eliot Abarbanel, portrayed the case as "settled" but for some items, including an enforcement mechanism. Senior Assistant Attorney General John E. Huston informed the Court that agreement had been reached on all issues and that Plaintiff had reneged on her agreement. The Court ordered the parties to brief the issue of the enforcement of the Settlement Agreement. (Civil Docket, 01 C 9551, Document 49). Specifically, the Court expressed interest in whether the Illinois Court of Claims, which has exclusive jurisdiction to hear and determine claims against the State founded upon any contract entered into with the State, could provide Plaintiff with an effective forum for enforcement of the Settlement Agreement.

The terms in the Settlement Agreement and General Release Defendant tendered to Plaintiff subsequent to the September 23rd Magistrate Judge's status hearing accurately reflect the agreements reached and reported to the Magistrate Judge. (Civil Docket, 01 C 9551, Document 45). Plaintiff now tries to persuade this Court to impose terms onto the settlement that Defendants did not and could not agree to. As will be shown below, Plaintiff has an adequate means of enforcing the Settlement Agreement. Consequently, this Court should decline to impose any further terms on Defendant, and should dismiss this action pursuant to the Agreed Order of Dismissal.

FACTS

Between the period of April 27, 2005 and September 23, 2005, the parties engaged in a series of settlement conferences with Magistrate Judge Ian Levin, pursuant to this Court's

referral order of October 27, 2004. Throughout the settlement process, Plaintiff pressed for the retention of jurisdiction by the federal court to enforce any settlement the parties reached. Defendant steadfastly rejected the proposal that the federal court retain jurisdiction to enforce an agreement to settle this action and would not agree to any order that retained jurisdiction in the District Court. Plaintiff could not persuade Magistrate Judge Levin that the federal court should retain jurisdiction. Magistrate Judge Levin told the parties that the federal court would not retain jurisdiction. Plaintiff then abandoned her position that the federal court should retain jurisdiction to enforce the agreement, and pressed for other mechanisms, including the state's administrative processes and retention of jurisdiction by the Circuit Court of DuPage County, Illinois. The DuPage County Circuit Court case, *Radaszewski v. Maram*, 00 CH 1474, consists only of state-law claims which this Court remanded after the Defendant removed the DuPage County case to federal court. *See Radaszewski v. Garner*, 2002 WL 31430325 (N.D. Ill. Oct. 21, 2002). On the counts remanded to DuPage County Circuit Court, the court awarded judgment on the pleadings for the Defendant. The Plaintiff appealed. The appellate court reversed and remanded the case finding that the Plaintiff should be allowed to prove facts at trial contesting the Department's rulemaking activities under the State's Administrative Procedure Act. After remand, the only issue before the DuPage County Circuit Court involves the Department's rulemaking under state law. The Plaintiff's Motion to Reinstate the DuPage County case after remand is pending, subject to the Defendant's objections to reinstatement.

During the period settlement discussions took place with the Magistrate Judge, the parties discussed enforcement of the agreement and the state's sovereign immunity. At all times, Defendant's discussion strictly conformed to the Illinois Attorney General's General Settlement Agreement and Release. According to office policy, the format and language of a number of

provisions, including language stating that sovereign immunity is not waived and language requiring dismissal of the action with prejudice, is mandatory and is not subject to negotiation. A copy of the Attorney General's General Settlement Agreement form is attached hereto as Exhibit A. Since confidentiality is a provision of the Settlement Agreement and the terms of the Settlement Agreement relating to the specifics of the funding of services to Mr. Radaszewski are not in dispute, Defendant does not feel it appropriate to submit the Settlement Agreement with the agreed upon terms. Rather, Defendant will illustrate the agreements the parties reached by referring the Court to Exhibit A, and disclosing such facts about the substantive agreements that do not run afoul of the confidentiality provision. Defendant is willing to submit the Settlement Agreement and all correspondence to this Court for an *in camera* review.

The parties, through their counsel, met outside Magistrate Judge Levin's courtroom prior to the status hearing on September 23, 2005 to discuss substantive terms of the settlement. The parties reached agreement on all elements of the settlement. In addition to the agreement on the substantive relief, Senior Assistant Attorney General John E. Huston and Assistant Attorney Christopher Gange also discussed the issues of enforcement, confidentiality and sovereign immunity with counsel for Plaintiff, Ms. Sarah Megan and Mr. Eliot Abarbanel. Ms. Megan and Mr. Abarbanel specifically agreed to entry of a Settlement Agreement that: 1) did not retain jurisdiction in the federal court to enforce the Settlement Agreement; 2) kept the provisions concerning non-waiver of the state's sovereign immunity; and 3) kept the Settlement Agreement's confidentiality provisions. At the status hearing on settlement on September 23, 2005, Plaintiff's counsel, Ms. Megan and Mr. Abarbanel, informed the Magistrate Judge that the case had settled. All that remained was drafting an agreement for signature incorporating a newly accepted substantive provision concerning a cap on the number of hours of payment for

private duty in-home nursing. The Magistrate Judge promptly issued a minute order noting settlement of the case and terminating the referral for settlement. (Civil Docket, 01 C 9551, Document 45).

On October 4, 2005, counsel for Defendant drafted and mailed to Plaintiff's counsel a letter and draft Settlement Agreement accurately incorporating the terms of the settlement for approval and signature. That Settlement Agreement, except for Paragraph 1, included the terms contained in the General Settlement Agreement at Exhibit A.[1] In general, settlement in cases defended in federal court by the Illinois Attorney General's Office that do not involve class actions, such as the present case, are effected by the General Settlement Agreement. By its terms, the Settlement Agreement cannot be entered as an order of the court nor filed with the court. Exhibit A, ¶ 11. The Settlement Agreement contemplates that the parties will submit an Agreed Order of Dismissal With Prejudice to the Court. Exhibit A, ¶ 6.

Since the relief provided to Plaintiff here is reimbursement for an agreed upon number of private duty in-home registered nursing services and reimbursement for additional hours up to a specified maximum on a showing of medical need, it is simply an agreement for the payment of money from the State of Illinois. The General Settlement Agreement is designed for just those circumstances. Exhibit A. The parties to this case merely amended and tailored Paragraph 1 of the Settlement Agreement to fit the circumstances of Mr. Radaszewski's care. There is no provision in the Settlement Agreement negotiated by the parties that changes the terms or operation of the Medicaid program or any Departmental policies.

[1] The portions of Paragraph 1 of the Settlement Agreement material to this case call for the Department to: 1) continue to pay for private duty in-home registered nursing services for a certain number of hours; and 2) pay for an increase in such nursing hours not to exceed a certain cap upon a demonstration of "medical necessity."

In addition, the Settlement Agreement may not be modified without the written agreement of the parties and the Illinois Attorney General. Exhibit A, ¶ 10. The Settlement Agreement contains a provision that Plaintiff may not disclose the terms and conditions of the Settlement Agreement to anyone. Exhibit A, ¶ 11. Finally, the Settlement Agreement states that it shall not be construed as a waiver of the state's sovereign immunity. Exhibit A, ¶ 12.

On October 18, 2005, after Defendant tendered the Settlement Agreement described above, Plaintiff's counsel sent a letter to Defendant's counsel that tried to renegotiate matters that Plaintiff had previously expressly accepted as agreed. Among other things, the October 18th letter wanted the Defendant to waive sovereign immunity, agree that enforcement of the Settlement Agreement would be in the Circuit Court of DuPage County, and waive the confidentiality clause. Plaintiff and her counsel have refused to sign the Settlement Agreement.

The parties have appeared before this Court twice on status. After the November 3, 2005 status hearing, counsel for Plaintiff orally attempted to renegotiate terms of the Settlement Agreement to which they had previously agreed. Defendant's counsel informed Plaintiff's counsel that those matters were previously agreed upon, and renegotiation would not be entertained.[2] By order of this Court, entered December 6, 2005, the parties were directed to file briefs on the enforcement issue. (Civil Docket, 01 C 9551, Document 49).

Plaintiff filed her Memorandum Regarding Enforcement of Settlement Agreement on January 10, 2006, hereinafter "Pltf's Memorandum of Law." (Civil Docket, 01 C 9551, Document 50). Plaintiff analyzed four possible enforcement mechanisms and rejected three of those methods. Despite the fact that Plaintiff now seeks to reinstate the case in DuPage County,

[2] The parties continued to tweak than language of the substantive portion of the Settlement Agreement, at Paragraph 1, up to November 30, 2005. On that date, Defendant mailed to Plaintiff's counsel a final draft of the Settlement Agreement that incorporated those minor changes to Paragraph 1. The matters negotiated concerning Paragraph 1 in October and November, 2005 are not in dispute.

Plaintiff concluded that the only viable enforcement mechanism was to have this Court retain jurisdiction for purposes of enforcing the Settlement Agreement. (*Id*. at, p. 10). Since Plaintiff is repudiating state administrative procedures and the retention of jurisdiction in the Circuit Court of DuPage County, Illinois, Defendant's response will only address two of the mechanisms discussed by Plaintiff: 1) the Illinois Court of Claims, and 2) retention of jurisdiction by the United States District Court.

ARGUMENT

I. THE ILLINOIS COURT OF CLAIMS HAS EXCLUSIVE JURISDICTION TO ENFORCE THE SETTLEMENT AGREEMENT. IN ADDITION, THE ILLINOIS COURT OF CLAIMS COULD AFFORD COMPLETE RELIEF.

As a general rule, settlement agreements in lawsuits brought in federal courts are contracts subject to enforcement in state courts. *Kokkonen v Guardian Life Ins. Co. of America,* 511 U.S. 375, 381-382, 114 S. Ct. 1673, 1677 (1994); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

The Illinois Constitution of 1970 abolished the doctrine of sovereign immunity "[e]xcept as the General Assembly may provide by law." Ill. Const. 1970, art. XIII, § 4. A copy of this portion of the Illinois Constitution is attached hereto as Exhibit B. Pursuant to its constitutional authority, the Illinois General Assembly reestablished sovereign immunity in the State Lawsuit Immunity Act. 745 ILCS 5/0.01 *et seq*. A copy of this statute is attached hereto as Exhibit B *City of Springfield v. Allphin*, 74 Ill.2d 117, 123, 23 Ill.Dec. 516, 384 N.E.2d 310 (1978). A copy of this opinion is attached hereto as Exhibit D. Section 1 of that enactment states that "[e]xcept as provided in [an act] to create the Court of Claims * * * the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1. The Court of Claims Act, in turn, provides that the Court of Claims shall have exclusive jurisdiction over "[a]ll claims against the

State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8(b). A copy of this statute is attached hereto as Exhibit E. *PHL, INC. v. Pullman Bank and Trust Co*., 216 Ill.2d 250, 836 N.E.2d 351, 356-57 (2005). A copy of this opinion is attached as Exhibit F.

Since the Settlement Agreement is a contract between a private party and the State of Illinois (the Director of the Illinois Department of Healthcare and Family Services, in his official capacity), the Illinois Court of Claims has exclusive jurisdiction over any claim based on the Settlement Agreement. 705 ILCS 505/8(b). Contrary to Plaintiff's claims, at pp. 6-9, of her Memorandum of Law, the Court of Claims would afford Plaintiff a complete remedy.

Plaintiff's conclusion that the Illinois Court of Claims "would not serve as a means of enforcement in this case" (Pltf's Memorandum of Law at p. 6) is based on the wrong election of remedies and a misunderstanding of the Settlement Agreement.

Under the substantive terms of the Settlement Agreement at Paragraph 1, Defendant agreed to, first, "provide reimbursement for a service plan of care . . . consisting of up to "xxx" hours of private in-home registered nurse ("RN") services . . . ." The Settlement Agreement is very clear that the Defendant is providing **reimbursement** for registered nursing services, and not actually providing the nursing services. Reimbursement for services is by its very nature monetary, and a failure to properly reimburse is remedied by an award of money damages in the Court of Claims. *A-Reliable Auto Parts & Wreckers, Inc. v. The State of Illinois,* 54 Ill. Ct. Cl. 455, 2001 W.L. 34677738, *1 (Ill. Ct. Cl. 2001). A copy of this opinion is attached as Exhibit G. In no other forum could Plaintiff be awarded money damages. Consequently, there is no need to address any remedy Plaintiff might seek that included injunctive relief or specific performance.

Second, as stated previously at footnote 1, Defendant agreed, additionally, under the substantive terms of Paragraph 1 of the Settlement Agreement to make reimbursement for an

additional number of nursing hours up to a maximum cap upon Plaintiff's showing of medical necessity. Were Defendant to breach the agreement to increase the number of nursing hours to the cap limit, the Court of Claims would have jurisdiction to declare the Defendant in breach of the Settlement Agreement on the basis of the evidence of medical need submitted. In cases cited by Plaintiff, (Pltf's Memorandum of Law at p. 7), the Court of Claims has consistently ruled that it has jurisdiction to render a declaratory judgment and/or award monetary damages if appropriate. *A-Reliable Auto Parts & Wreckers, Inc. v. The State of Illinois,* 54 Ill. Ct. Cl. 455, 2001 W.L. 34677738, *1 (Ill. Ct. Cl. 2001); *Ace Coffee Bar, Inc. v. The University of Illinois*, 51 Ill. Ct. Cl. 395, 1999, W.L. 33246477, *2 (Ill. Ct. Cl. 1999). A copy of this opinion is attached hereto as Exhibit H. Simply stated, if Defendant were to breach either prong of the substantive portions of Paragraph 1 of the Settlement Agreement, the Plaintiff's remedy is an action for monetary damages against the State of Illinois. The only forum for that relief under the authorities cited on pages 7 through 9 of this Response is the Illinois Court of Claims. By bringing the appropriate claims in the Illinois Court of Claims, Plaintiff has a forum to seek an adjudication/remedy for an alleged breach of the Settlement Agreement. *Johnson v. Board of Trustees of the University of Illinois,* 2003 WL 22117778, *2 (N.D. Ill.). A copy of this opinion is attached hereto as Exhibit I. The Illinois Court of Claims affords effective and complete relief.

II. THE COURT HAS NO AUTHORITY TO PLACE CONDITIONS ON A VOLUNTARY DISMISSAL UNDER FRCP 41(a)(1). THE DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES AND ITS DIRECTOR, IN HIS OFFICIAL CAPACITY, ARE THE STATE OF ILLINOIS AND CANNOT AGREE TO THE RESERVATION OF JURISDICTION BY THIS COURT TO ENFORCE SETTLEMENT.

In *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 114 S. Ct 1673 (1994), the Supreme Court held that when a district court simply dismisses a claim under FRCP 41(a)(1)(ii),

"by filing a stipulation of dismissal signed by all the parties who have appeared in the action and causes the dismissal to be with prejudice, if the stipulation so specifies," "jurisdiction of the court over disputes arising out" of that agreement is not implied. *Id*. at 114 S.Ct. 1673, 1675 (1994). Instead, because enforcement of the Settlement Agreement "is more than just a continuation or renewal of the dismissed suit," the district court must require its own basis for jurisdiction. *Id.* at 1675-76; *Johnson v. Board of Trustees of the University of Illinois,* 2003 WL 22117778, *2 (N.D. Ill.).

On September 23, 2005, Plaintiff agreed to settlement of this action and her counsel so announced to Magistrate Judge Levin. Such settlement expressly reserved the State's sovereign immunity, and did not reserve jurisdiction in the federal court to enforce the agreement. Plaintiff then repudiated her obligation to enter and sign the Settlement Agreement and General Release that accurately reflected the agreement of the parties. *See King v. Walters*, 190 F.3d 794 (7th Cir. 1999). Instead, she now comes to this Court, and requests that the Court impose a condition on the Settlement Agreement that Defendant never agreed to, will not now agree to, and that Plaintiff abandoned during the settlement process after the condition had been rejected by Magistrate Judge Levin.

Plaintiff concedes that state officials cannot by their actions waive sovereign immunity since waiver is solely within the province of the Illinois General Assembly. (Pltf's Memorandum of Law at p. 6). However, Plaintiff now asks this Court to impose this condition on Defendant. (Pltf's Memorandum of Law at p. 10).

A court has no authority to disapprove or place conditions on a dismissal under FRCP 41 (a)(1). *Republic of the Philippines v. Westinghouse Electric Corporation,* 43 F.3d 65, 81 n. 21 (3rd Cir. 1994); *Gardiner v. A.H. Robbins Co.,* 747 F.2d 1180, 1190 (8th Cir. 1984). This is

especially true where both parties agreed to the terms of dismissal (no waiver of sovereign immunity and no retention of federal jurisdiction for enforcement). Plaintiff's action in refusing to sign the Settlement Agreement can only be deemed to be judge shopping, since at the settlement conferences Magistrate Judge Levin told Plaintiff that the federal court would not retain jurisdiction, and Plaintiff agreed to settlement without retention of federal jurisdiction. Plaintiff should not be rewarded for her attempt to take a second bite from the apple. In any event, Defendant objects to this Court placing any conditions on the Settlement Agreement. Defendant cannot agree to any conditions that this Court might impose at Plaintiff's belated request.

Finally, Plaintiff's conduct in agreeing to settlement and then attempting to renegotiate the terms of the settlement, both informally by correspondence to Defendant's counsel and by her litigation before this Court, has a chilling effect on the settlement process. There is no incentive to negotiate a "settlement" and then have to litigate what has already been explored, rejected, and already settled. *See King v. Walters*, 190 F.3d 794 (7th Cir. 1999). Plaintiff's case of "settler's remorse" should be dealt with by simply requiring Plaintiff to live up to her agreement. *See King v. Walters*, 190 F.3d 794 (7th Cir. 1999). Any other ruling simply encourages a party to agree to one thing to the Judge presiding over the settlement conferences, and then attempt to get what the party wanted all along from another Judge. Such a process wastes the parties' and court's time and resources, discourages the resolution of cases through the mechanisms usually utilized in the District Court, and calls into question the sincerity of the representations made during the settlement conferences. The Court should admonish parties to cases in the District Court that conduct such as Plaintiff's will not be condoned by enforcing the Settlement Agreement against the Plaintiff.

WHEREFORE, for the reasons stated above, Defendant requests that this Court:

1) deny Plaintiff's request that the federal court retain jurisdiction for purposes of enforcement of the settlement agreement; 2) enforce Plaintiff's agreement to settle this matter on the terms embodied in the Settlement Agreement and General Release tendered to Plaintiff on November 30, 2005; and 3) enter the Agreed Order of Dismissal With Prejudice.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

By: */s/ John E. Huston*
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DATED: February 10, 2006

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Case Caption)

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release, ("Agreement"), is made and entered into by and between the Plaintiff (full name), (hereinafter "Plaintiff"), and the Defendants (full names) (hereinafter "Defendants").

RECITALS

WHEREAS, the Plaintiff filed this lawsuit in the United States District Court for the Northern District of Illinois, Eastern Division, entitled (Case Title), Number (Case Number), (hereinafter referred to as "Action") alleging violations of rights protected by statute(s), regulation(s), common law, the Constitution of the State of Illinois and/or the Constitution of the United States;

WHEREAS, the Defendants deny the allegations and deny any statutory, common law, constitutional or regulatory violations, and affirmatively state that the Plaintiff has failed to state a claim upon which relief can be granted; and

WHEREAS, so as to avoid further expense and in recognition of the positions of the parties to the above case, the parties wish to settle and compromise the pending Action, thereby terminating this litigation;

IT IS HEREBY AGREED, by and between the parties as follows:

1. In consideration for the full and complete settlement of this claim, the Plaintiff shall receive the payment of the sum of (written amount) ((numeric amount)) payable from appropriations made to the Indemnification Fund administered by the Illinois Department of Central Management Services pursuant to the State Employee Indemnification Act. 5 ILCS 350/0.01 et seq. The amount payable under this Agreement shall be subject to state laws governing the State Comptroller's obligation to withhold funds that the Plaintiff may owe to other persons or to state agencies. The Plaintiff may contest the validity of these claims through applicable state procedures.

2. It is expressly agreed that the Defendants in their individual capacities shall not be responsible for payment of any sum under this Agreement.

3. It is further understood and agreed that the above tendered consideration is not to be construed as an admission of any liability therefore, such liability having been expressly denied. No inducements or representations have been made by any agent or attorney of any party hereby released as to the legal liability or other responsibility of any party claimed responsible, and it is agreed that this release applies

to known or unknown injuries, costs, expenses and/or damages alleged to have been suffered or incurred by the Plaintiff due to the actions or inactions of the Defendants as stated in the Plaintiff's complaint(s) filed in the Action, and is intended to be a full and complete disposition of the entire claim(s) and/or cause(s).

4. The Plaintiff, his heirs, successors and assigns, agrees to release, and hereby releases and forever discharge the Defendants in their individual and official capacities, the Illinois Department of (agency name) and the State of Illinois, their agents, former and present employees, successors, heirs and assigns and all other persons (hereinafter "Releasees") from all actions, claims, demands, setoffs, suits, causes of action, controversies, disputes, equitable relief, compensatory and punitive damages, costs and expenses which arose or could have arisen from the facts alleged or claims made in the Action, which the Plaintiff owns, has or may have against the Releasees, whether known or unknown, from the beginning of time until the effective date of this Agreement, including but not limited to those at law, in tort (including actions under 42 U.S.C. Section 1983) or in equity.

5. The Plaintiff and his attorney release, waive and relinquish any claims or rights to attorney's fees, expenses and costs allegedly incurred or due in the Action pursuant to 42 U.S.C. Section 1988, or under any other statute, rule or common law provision.

6. The parties agree that the Action shall be dismissed with prejudice and without attorney's fees, costs or expenses by submitting a fully executed Stipulation to Dismiss to the Court for entry of an order reflecting said dismissal within ten (10) days of full execution of this Agreement.

7. No promise has been made to pay or give the Plaintiff any greater or further consideration other than as stated in this Agreement. All agreements, covenants, representations and warranties, express or implied, oral or written, of the parties hereto concerning the subject matter of this Agreement are contained in this Agreement. No other agreements, covenants, representations or warranties, express or implied, oral or written, have been made by any party hereto to any other party concerning the subject matter of this Agreement. All prior and contemporaneous negotiations, possible and alleged agreements, representations, covenants and warranties, between the parties concerning the subject matter of this Settlement Agreement are merged into this Settlement Agreement. This Agreement contains the entire agreement between the Parties.

8. The Plaintiff enters into this Agreement as a free and voluntary act with full knowledge of its legal consequences. The Plaintiff has not relied on any information or representations which are not contained in this Agreement.

9. This Agreement shall be construed and interpreted in accordance with the laws of the State of Illinois, without regard to principles of conflict of laws.

10. This Agreement may not be changed, modified or assigned except by written agreement of the Plaintiff, the Illinois Department of (agency name) and the Illinois Attorney General.

11. The Plaintiff shall not file this Agreement in any court or disclose to anyone the terms and conditions of this Agreement, and all terms otherwise discussed in settlement negotiations or any particulars thereof, except as is necessary to enforce the terms of this Agreement or except as expressly required by law. Upon inquiry, the Plaintiff shall simply state that these matters were settled to the satisfaction of the parties.

12. This Agreement shall not be construed to constitute a waiver of sovereign immunity of the State of Illinois or (agency name).

13. If any provision of this Agreement is declared invalid or unenforceable, the balance of this agreement shall remain in full force and effect.

14. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all counterparts so executed shall constitute one agreement binding on the parties hereto, notwithstanding that all of the parties are not signatory to the same counterpart.

AGREED:

_____

Plaintiff Date

_____

Counsel for Plaintiff Date

_____

On behalf of Defendants Date

Title:_____

EXHIBIT B

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CONSTITUTION OF THE STATE OF ILLINOIS
ARTICLE XIII. GENERAL PROVISIONS

§ 4. Sovereign Immunity Abolished

Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.

Current through 4/1/2005

EXHIBIT C

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 745. CIVIL IMMUNITIES
ACT 5. STATE LAWSUIT IMMUNITY ACT

➡5/0.01. Short title

§ 0.01. Short title. This Act may be cited as the State Lawsuit Immunity Act.

Current through P.A. 94-726 of the 2005 Reg. Sess.

➡5/1. Immunity of State as defendant or party in court

<Text of section as amended by P.A. 93-414>

§ 1. Except as provided in the Illinois Public Labor Relations Act, [FN1] the Court of Claims Act, [FN2] or Section 1.5 of this Act, the State of Illinois shall not be made a defendant or party in any court.

[FN1] 5 ILCS 315/1 et seq.

[FN2] 705 ILCS 505/1 et seq.

➡5/1.5. Exceptions; State employees

§ 1.5. Exceptions; State employees.

(a) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Age Discrimination in Employment Act of 1967 against the State in State circuit court or federal court.

(b) An employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Fair Labor Standards Act of 1938 against the State in State circuit court or federal court.

(c) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Family and Medical Leave Act, 29 U.S.C. 2601 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Family and Medical Leave Act against the State in State circuit court or federal court.

(d) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Americans with Disabilities Act of 1990 against the State in State circuit court or federal court.

(e) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as amended, if committed by an employer covered by that Act may bring an action under Title VII of the Civil Rights Act of 1964 against the State in State circuit court or federal court.

Current through P.A. 94-726 of the 2005 Reg. Sess.

EXHIBIT D

Supreme Court of Illinois.
The CITY OF SPRINGFIELD et al., Appellees,
v.
Robert H. ALLPHIN, Director of Revenue, et al.
Appeal of Robert H. ALLPHIN.
No. 49897.

Oct. 6, 1978.
Rehearing Denied Jan. 25, 1979.

City and unincorporated association of state municipalities sought declaratory judgment that bill, which reduced Department of Revenue's service charge for collection of municipal retailers' occupation taxes and municipal service occupation taxes from four to two percent of taxes collected, became effective on day that governor's veto was overridden and sought to have Director of Department of Revenue, state treasurer, and state comptroller ordered to refund excess service charge to plaintiff. The Circuit Court, Sangamon County, Byron E. Koch, J., entered judgment declaring effective date of bill and dismissed count for failure to state cause of action, and plaintiffs appealed. The Appellate Court, Fourth Judicial District, 50 Ill.App.3d 44, 8 Ill.Dec. 11, 365 N.E.2d 249, reversed and remanded with directions, and Director of Revenue appealed. The Supreme Court, Clark, J., held that bill was effective on date when governor's veto was overridden, rather than on the following July 1st.

Affirmed as modified and remanded with directions.

West Headnotes

[1] Courts 472.1
106k472.1 Most Cited Cases
Action wherein city and unincorporated association of state municipalities sought declaratory judgment that bill, which reduced Department of Revenue's service charge for collection of municipal retailers' occupation taxes and municipal service occupation taxes from four to two percent of taxes collected, became effective on date governor's veto was overridden and sought to have Director of Department of Revenue, state treasurer and state comptroller ordered to refund excess service charge to plaintiff was not action against state which could only have been brought in the court of claims. S.H.A. ch. 127, § 801.

[2] Courts 472.1
106k472.1 Most Cited Cases
Where issue is whether a state officer has refused to disburse appropriated funds according to law, and relief sought is injunction directing that those funds be released in accordance with appropriation, action is not one against the state required to be brought in court of claims. S.H.A. ch. 127, § 801.

[3] States 191.10
360k191.10 Most Cited Cases
(Formerly 360k191(2))
Where action is, in effect, one to quiet title in realty, adverse to interest of state, where there is no issue as to lawfulness of state officer's actions in obtaining title, action is against the state. S.H.A. ch. 127, § 801.

[4] Taxation 2871
371k2871 Most Cited Cases
(Formerly 371k604)
Taxpayer's failure to avail himself of extensive statutory procedures which exist for protection of taxpayer's interest may constitute a waiver of his rights against the state.

[5] States 123
360k123 Most Cited Cases
Framers of 1970 Constitution did not intend the requirement that all "payments from public funds" be made "only as authorized by law" as a limitation upon powers of circuit courts to fashion appropriate remedies. S.H.A.Const.1970, art. 8, § 1(b).

[6] Statutes 248
361k248 Most Cited Cases
Date on which a bill "becomes a law" need not coincide with date on which that law becomes effective. S.H.A.Const.1970, art. 4, § 10.

[7] Statutes 255
361k255 Most Cited Cases
Effective date of law which was subject of simple, nonamendatory veto would be time of its final legislative action prior to presentation to the governor. S.H.A. ch. 131, § § 21-23; S.H.A.Const.1970, art. 4, § § 9, 10.

[8] Courts 89
106k89 Most Cited Cases
A well-reasoned opinion of the Attorney General is entitled to considerable weight in resolving a question of first impression in state regarding construction of Illinois statute; however, such opinions are not binding upon the court.

[9] Statutes 255
361k255 Most Cited Cases

Effective date of public act which reduced Department of Revenue's service charge for collection of municipal retailers' occupation taxes and municipal service occupation taxes from four to two percent of taxes collected would be day on which second house overrode the governor's veto, rather than on the following July 1st. S.H.A.Const.1970, art. 4, § § 9(c), 10; S.H.A. ch. 24, § § 8-11-1, 8-11-5; ch. 131, § 21 et seq.

****311 *120 ***517** Thomas R. Meites, Sp. Asst. Atty. Gen., Chicago, for appellants.

Frank M. Pfeifer and Thomas W. Kelty, Pfeifer & Kelty, P. C., and Fredric Benson, Corp. Counsel, Springfield, for appellees.

CLARK, Justice:

This case involves several aspects of the relationship between Illinois municipalities, which may impose certain taxes, and the State of Illinois, whose agents collect those taxes and distribute to the municipalities the revenue therefrom. Because of the complex nature both of that relationship itself, and of the role of the courts Vis-a-vis that relationship, we deem it necessary to set forth the facts of the dispute in some detail.

Plaintiff city of Springfield is an Illinois municipality ***121** which has, pursuant to sections 8-11-1 and 8-11-5 of the Illinois Municipal Code (Ill.Rev.Stat.1973, ch. 24, pars. 8-11-1, 8-11-5), enacted a municipal retailers' occupation tax and a municipal service occupation tax (Municipal Code of Springfield, secs. 41.33 through 41.39). Plaintiff Illinois Municipal League is an unincorporated association of Illinois municipalities. (See Ill.Rev.Stat.1973, ch. 24, par. 1-8-1.) It apparently is conceded that some or all of the league's member municipalities also have enacted such taxes. (For convenience, the city and the league's member municipalities hereinafter will be referred to collectively as "plaintiffs" or "plaintiff municipalities.")

Defendant Robert Allphin was the Director of Revenue at the institution of this cause and, as such, was the officer in charge of the Illinois Department of Revenue. (See Ill.Rev.Stat.1973, ch. 127, par. 4.) The Department is empowered to collect the municipal retailers' occupation tax and the municipal service occupation tax on behalf of plaintiffs. (Ill.Rev.Stat.1973, ch. 24, pars. 8-11-1, 8-11-5.) In doing so, the Director was empowered to enforce plaintiffs' ordinances. (Ill.Rev.Stat.1973, ch. 127, par. 39b1.) After collecting the tax, the Department was required to "forthwith pay over to the State Treasurer, ex officio, as trustee, all taxes and penalties collected." (Ill.Rev.Stat.1973, ch. 24, pars. 8-11-1, 8-11-5.) On or before the 25th day of each calendar month, the Department was required to certify to the State Comptroller the amount of money payable to plaintiffs, as determined according to a statutory formula. The formula calls for the State's retention of a specified percentage of the amount otherwise payable to plaintiffs, to compensate the State for the cost of collecting and administering the tax. Within 10 days of the receipt of the Director's disbursement certification, the State Comptroller must draw orders for the disbursement of plaintiffs' share and for the deposit of the State's share into the General Revenue Fund. Ill.Rev.Stat.1973, ch. 24, pars. 8-11-1, ***122** 8-11-5.

Public Act 78-1255 reduced the State's share from 4% To 2%. The central issue in this case is whether the Act became effective on December 5, 1974, or on July 1, 1975. The Director claims that the Act did not become effective until the latter date. Accordingly (with an exception not relevant here), during the period December 5, 1974, through June 30, 1975, he followed the old formula and certified that the larger amount be withheld by the State, and a correspondingly smaller amount be disbursed to plaintiffs.

****312 ***518** Plaintiffs, however, claim that the Act became effective on the earlier date, and that in the interim (between December 5 and June 30) the Director wrongfully certified that the higher amount be withheld, resulting in the State's wrongfully withholding about $3 million from the plaintiff municipalities. In count I of their first amended complaint, plaintiffs sought a declaratory judgment (see Ill.Rev.Stat.1973, ch. 110, par. 57.1) that the Act became effective on the earlier date. In counts II through IV plaintiffs seek reimbursement from funds currently being collected by the State. (The pleadings, however, do not precisely describe the funds to be placed into the protest fund. E. g., count II, paragraph 11, refers to "tax revenues presently being collected," and count III, paragraph 10, refers to "sales tax receipts presently being collected.")

Defendants moved to dismiss the amended complaint, arguing (1) that the Act did not become effective until the later date, and, alternatively, (2) even if the Act became effective on the earlier date, the circuit court was without power to grant the relief requested. The circuit court granted judgment for defendants as to count I and dismissed counts II through IV.

On appeal, the Appellate Court, Fourth District, reversed as to count I (agreeing with plaintiffs' position on the effective date of the Act). As to counts II through IV, ***123** the appellate court in effect vacated the circuit court's judgment, and remanded the cause to permit plaintiffs to amend their pleadings to pray for an alternative remedy suggested by the appellate court. (50 Ill.App.3d 44, 50-51, 8 Ill.Dec. 11, 365 N.E.2d 249. We granted defendant Allphin's petition for leave to appeal. We affirm the judgment of the appellate court as to count I, modify the judgment as to the remaining counts, and remand the cause to the circuit court. (For convenience, we will continue to refer to "defendants" even though the defendant Treasurer and the defendant Comptroller no longer are parties and have taken no position on the merits, promising instead that they will perform whatever ministerial acts are necessary to enforce the decree.)

[1] We postpone discussion of the effective date of the Act until we have addressed defendants' other arguments. Defendants first contend that the circuit court was without power to grant the requested relief because this action was, in effect, a suit against the State, and as such only could have been brought in the Court of Claims. (See Ill.Rev.Stat.1973, ch. 127, par. 801.) We disagree. The drafters of our 1970 constitution considered the question of sovereign immunity to suits against the State in some detail. (See generally 2 Record of Proceedings, Sixth Illinois Constitutional Convention 871 (hereinafter cited as Proceedings); 3 Proceedings 1829-45.) In the end, the drafters adopted language permitting the General Assembly to reenact sovereign immunity. "Though our constitution of 1970 abolished sovereign immunity (Ill.Const. 1970, art. XIII, sec. 4) it was restored by the General Assembly, as the Constitution permitted." (Department of Revenue v. Appellate Court (1977), 67 Ill.2d 392, 394, 10 Ill.Dec. 536, 537, 367 N.E.2d 1302, 1303.) Thus, the net effect of the legislature's response to the "sovereign immunity" provisions of the 1970 Constitution must be viewed as an adoption of the law as it existed under the 1870 ***124** Constitution. Yet even under the 1870 Constitution, the instant action would not be considered a suit against the State.

"[2][3] Whether or not a particular action falls within the prohibition of the constitution has not been determined solely by an identification of the formal parties to the record. The determination has rather depended upon the particular issues involved and the relief sought." (Moline Tool Co. v. Department of Revenue (1951), 410 Ill. 35, 37, 101 N.E.2d 71, 72.) Where the issue is whether a State officer has refused to disburse appropriated funds according to law, and the relief sought is an injunction directing that those funds be released in accordance with the appropriation, the action is not one against the State. (County of Cook v. Ogilvie (1972), 50 Ill.2d 379, 383, ****313 ***519** 280 N.E.2d 224.) This is because "(t)he presumption obtains that the State, or a department thereof, will not, and does not, violate the constitution and laws of the State, but that such violation, if it occurs, is by a State officer or the head of a department of the State, and such officer or head may be restrained by a proper action instituted by a citizen." (Schwing v. Miles (1937), 367 Ill. 436, 441-42, 11 N.E.2d 944, 947.) On the other hand, where the action is, in effect, one to quiet title in realty, adverse to the interest of the State (where there is no issue as to the lawfulness of a State officer's actions in obtaining title), the action is against the State. Schwing v. Miles (1937), 367 Ill. 436, 11 N.E.2d 944. See also Georgeoff v. State (1965), 32 Ill.2d 534, 538, 207 N.E.2d 466.

More difficult are some of the cases involving suits by taxpayers seeking refunds of disputed taxes. In Montgomery Ward & Co. v. Stratton (1930), 342 Ill. 472, 477, 174 N.E. 547, the taxpayer availed itself of a statutory remedy of paying a disputed tax under protest (which temporarily prohibited the deposit of the disputed amount into the State treasury), but then failed to pursue the case in the manner provided by the statute. Instead the taxpayer sought to reduce its future taxes by the disputed amount. This court ***125** held that the taxpayer was barred from "obtain(ing) indirectly what it could not obtain directly" (a refund from the State treasury). (342 Ill. 472, 477, 174 N.E. 547, 550.) However, there is some ambiguity in the opinion, as to whether its holding was based upon constitutional grounds, or merely an equitable one, I. e., waiver. Our research has revealed no subsequent decision of this court relying upon Montgomery Ward in support of the broad proposition for which it is advanced by defendants that the Constitution bars one from obtaining indirectly what one could not obtain directly.

Adams v. Nudelman (1940), 375 Ill. 217, 30 N.E.2d 742, is of limited applicability here, because its applicability has been narrowed substantially in subsequent decisions of this court. In Adams, taxpayers filed suit for a refund of taxes which had not been paid under protest and, consequently, already had been paid to the State treasury. Plaintiffs sought relief either out of the State treasury, or out of funds currently being collected by the State and not

yet deposited in the treasury. This court held (1) that the suit was against the State, and, alternatively, (2) that no relief could be had without a legislative appropriation. (375 Ill. 217, 219, 30 N.E.2d 742.) However, almost immediately, in People ex rel. Swartchild & Co. v. Carter (1941), 376 Ill. 590, 594, 35 N.E.2d 64, and People ex rel. Adams v. McKibben (1941), 377 Ill. 22, 24, 35 N.E.2d 321 the court narrowed Adams second alternative holding, limiting it to the prevention of payments directly from the State treasury, and refusing to apply it to court or administrative orders which had the effect of withholding funds from the State treasury. A decade later, in Moline Tool Co. v. Department of Revenue (1951), 410 Ill. 35, the court also narrowed Adams first alternative holding, stating that "a proceeding to review the determination of an agency of State government which, itself, has the force of a judicial determination" is not a suit against the State. 410 Ill. 35, 38, 101 N.E.2d 71, 73.

***126** While Moline Tool was a proceeding under the Administrative Review Act (Ill.Rev.Stat.1949, ch. 110, par. 264 Et seq.), its applicability is not confined to such cases. (E. g., E. H. Swenson & Son v. Lorenz (1967), 36 Ill.2d 382, 385, 223 N.E.2d 147.) The Swenson case also is particularly significant in that, like the instant case, it involved a claim that a State department wrongfully directed that certain funds be withheld from plaintiffs. This court rejected defendants' claim that, because the burden of any declaratory judgment would fall upon the State, the action was one against the State, and therefore barred by sovereign immunity. Rather, the court intimated that the action was, in essence, a review of the legality of the defendants' withholding of funds from plaintiffs, and as such was not a suit against the State. Significantly, the court capped its analysis by observing: "We think that the basic nature of the plaintiffs' claim ****314 ***520** is not altered by the circumstance that in this case the Department * * * was able to resort to self-help * * *." 36 Ill.2d 382, 385, 223 N.E.2d 147, 149.

[4] Our review of the foregoing cases leads us to conclude that the issues involved in the instant case (the effective date of a statute) and the relief requested (a declaratory judgment and the withholding of certain funds from the State treasury) do not render the instant case a suit against the State. That the relief requested necessarily will have an impact on the State's General Revenue Fund is not dispositive. As in Swenson, defendants' resort to "self-help," in ordering the deposit of the disputed funds into the State's General Revenue Fund does not prohibit the courts from fashioning an appropriate form of relief. The cases relied upon by defendants for the contrary proposition (E. g., Adams v. Nudelman; Montgomery Ward & Co. v. Stratton), to the extent they remain viable, involve the ancient and much-litigated adversary relationship between the taxpayer and the tax collector. Extensive statutory procedures exist for the protection of the taxpayer's ***127** interest in an orderly fashion which also will protect the State's interest. A taxpayer's failure to avail himself of such procedures may constitute a waiver of his rights against the State. (See, E. g., S.A.S. Co. v. Kucharski (1972), 53 Ill.2d 139, 142, 290 N.E.2d 224.) The instant case, however, involves the fiduciary relationship between the State government's central tax-collection authorities, and local governments who would be, in practical effect, at the mercy of those authorities if there were no equitable means to remedy unlawful actions of State officers. Neither our constitution nor any act of the General Assembly contemplates that State officers be given such unlimited power.

[5] Finally, contrary to defendants' position, the framers of our 1970 constitution apparently did not intend the requirement that all "payments from public funds" be made "only as authorized by law" (Ill.Const.1970, art. VIII, sec. 1(b)) as a limitation upon the powers of the circuit courts to fashion appropriate remedies. (See 2 Proceedings 871 (colloquy of delegates Kamin and Cicero).) (None of the foregoing, however, is intended to address limitations imposed upon the judicial power of the United States by the eleventh amendment to the United States Constitution. (Cf. Edelman v. Jordan (1974), 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662, 675-76.) There might well be a difference between a State's amenability to suit in State and Federal court. See, E. g., McDonald v. Illinois (7th Cir. 1977), 557 F.2d 596.)

[6] We now turn our attention to the merits of the underlying dispute. Our constitution directs the General Assembly to "provide by law for a uniform effective date for laws passed prior to July 1 of a calendar year," and further provides that bills "passed after June 30 shall not become effective prior to July 1 of the next calendar year unless the General Assembly by the vote of three-fifths of the members elected to each house provides for an earlier ***128** effective date." (Ill.Const.1970, art. IV, sec. 10.) It therefore is important not to confuse the date on which the bill "becomes a law" with the date on which that law becomes effective; the two need not coincide.

To execute its responsibilities under section 10 of

article IV, the legislature enacted and the Governor approved "An Act in relation to the effective date of laws" (Ill.Rev.Stat.1971, ch. 131, par. 21), which provided as follows:

> "A law passed prior to July 1 of a calendar year and after June 30, 1971, shall become effective on October 1 following its becoming a law unless by its terms it specifically provides for a different effective date. A law passed prior to July 1, 1971, shall become effective on July 1, 1971, or upon its becoming a law, whichever is later, unless such law by its terms specifically provides for a different effective date."

In People ex rel. Klinger v. Howlett (1972), 50 Ill.2d 242, 278 N.E.2d 84, this court held that a bill which had been the subject of an amendatory veto by the Governor (see Ill.Const.1970, art. IV, sec. 9(e)) did not "pass" ****315 ***521** for purposes of the foregoing constitutional and statutory provisions until the legislature had approved the Governor's specific recommendations. The court reasoned that "passage" meant "the last legislative act necessary so that the bill would become law upon its acceptance by the Governor without further action by the legislature" (50 Ill.2d 245, 247, 278 N.E.2d 87), and that the approval of the Governor's recommended amendments to the language previously adopted by the legislature was such a legislative act, before which no bill may be said to have "passed" (50 Ill.2d 245, 247-48, 278 N.E.2d 84).

[7] Subsequent to the 1972 decision in People ex rel. Klinger v. Howlett, the legislature passed and the Governor approved "An Act to revise the law in relation to the effective date of laws * * * " (1973 Ill.Laws 196, Ill.Rev.Stat.1973, ch. 131, pars. 21 through 26), which, Inter alia, provided that "(f)or purposes of determining the effective ***129** dates of laws, a bill is 'passed' at the time of its final legislative action prior to presentation to the Governor pursuant to paragraph (a) of Section 9 of Article IV of the Constitution" (Ill.Rev.Stat.1973, ch. 131, par. 23). We need not and we do not decide whether this new statutory definition of "passage" is constitutional and, if so, what impact, if any, it has upon the effective date, as determined according to Klinger, of laws which have been subject to an amendatory veto. (But see Gherardini, Effective Date of Laws, 11 J.Mar.J.Prac. & Proc. 363, 375 (1978).) The instant case involves only the question of the effective date of a law which had been the subject of a simple, nonamendatory veto, and we hold that, in this situation, the new statutory provision accurately codifies our interpretation of the constitutional provision.

Public Act 78-1255, which did not contain an effective date, originally passed in the General Assembly (as Senate Bill 265) on May 29, 1974. The Governor vetoed the bill on July 26, 1974; the Senate voted by the requisite three-fifths majority to override the veto on November 21, 1974, and the House did the same on December 5, 1974, on which date the bill became a law. (See Ill.Const.1970, art. IV, sec. 9.) Thus, the question presented is whether, for purposes of section 10 of article IV (Ill.Const.1970, art. IV, sec. 10) and section 1 of "An Act in relation to the effective date of laws" (Ill.Rev.Stat.1975, ch. 131, par. 21), Senate Bill 265 "passed" at the time of its initial passage by the General Assembly. We conclude that it did.

Unlike the override of an amendatory veto, the override of a simple nonamendatory veto does not involve any additional "legislative act" (50 Ill.2d 242, 247, 278 N.E.2d 84), as that term is used in Klinger, because the original language of the bill remains intact, and no additional time need lapse to assure that the public has adequate notice of that language. Rather, the situation here is analogous to that in ***130** Board of Education v. Morgan (1925), 316 Ill. 143, 147 N.E.34 (construing Ill.Const.1870, art. IV, sec. 13), where a bill passed by the General Assembly prior to July 1 and approved by the Governor subsequent to July 1 was, for purposes of determining its effective date, held to have "passed" prior to July 1. In determining the effective date of an act, we see no reason to treat the legislature's override of the Governor's simple veto any differently than the Governor's signature. Each has the same effect on the contents of the enactment and the public's notice thereof. To the extent that the purpose of determining the effective date of an act according to the date of its passage is to afford the public adequate notice of the contents of the enactment (see, E. g., 6 Proceedings 1390), actions which similarly affect the contents should have a similar effect upon their effective date. To the extent that the constitutional provision is intended as a check upon the year-round drafting of laws by the legislature (see, E. g., 4 Proceedings 2900-03), that intent also is in no way undermined by our holding today.

[8][9] Although it is true that the Constitution itself uses the term "passes" to describe the legislature's override of the Governor's veto as well as the legislature's ****316 ***522** initial passage of a bill (Ill.Const.1970, art. IV, sec. 9(c)), that usage is not dispositive of the meaning of the term in the different context of section 10 of article IV. (Cf. generally Chapman v. County of Will (1973), 55 Ill.2d 524, 304 N.E.2d 287.) We find additional support for this

conclusion in an opinion of the Attorney General (1975 Ill.Atty.Gen.Op. 77) regarding the effective date of Public Act 78-1257, which has a legislative history similar to the act at issue here. As the appellate court correctly noted (50 Ill.App.3d 44, 47, 8 Ill.Dec. 11, 365 N.E.2d 249), a well-reasoned opinion of the Attorney General is entitled to considerable weight in resolving a question of first impression in this State regarding the construction of an Illinois statute (People v. Simpkins (1977), 45 Ill.App.3d ***131** 202, 207, 3 Ill.Dec. 969, 359 N.E.2d 828; Alsen v. Stoner (1969), 114 Ill.App.2d 216, 222, 252 N.E.2d 488; Strat-O-Seal Manufacturing Co. v. Scott (1966), 72 Ill.App.2d 480, 485, 218 N.E.2d 227; City of Champaign v. Hill (1961), 29 Ill.App.2d 429, 442, 173 N.E.2d 839; see generally Scott, The Role of Attorney General's Opinions in Illinois, 67 Nw.U.L.Rev. 643, 649-53 (1972)), though, of course, such opinions are not binding upon this court (People v. Savaiano (1976), 66 Ill.2d 7, 16, 3 Ill.Dec. 836, 359 N.E.2d 475; Rogers Park Post No. 108 v. Brenza (1956), 8 Ill.2d 286, 292, 134 N.E.2d 292). Accordingly, we hold that Public Act 78-1255 became effective on December 5, 1974, the day on which the second house overrode the Governor's veto.

Finally, because we hold that the remedy requested by plaintiffs was an appropriate one, we need not reach the merits of the alternative remedy suggested by the appellate court. We do direct, however, that, upon remand, the circuit court grant plaintiffs leave to amend their complaint to define more precisely the tax revenue from which the plaintiffs may obtain reimbursement. The relief requested should be amended to limit the funds from which each plaintiff municipality may obtain relief to the municipal retailers' occupation tax revenues and municipal service occupation tax revenues subsequently collected by the Director on its behalf. The net effect of such relief should be to reduce the amount of such taxes withheld by the State until the earlier overwithholding is compensated for.

For the foregoing reasons, the judgment of the appellate court is affirmed, as modified, and the cause is remanded to the circuit court with directions to proceed in accordance with the views expressed in this opinion.

Affirmed as modified; cause remanded, with directions.

KLUCZYNSKI, J., took no part in the consideration or decision of this case.

74 Ill.2d 117, 384 N.E.2d 310, 23 Ill.Dec. 516

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EXHIBIT E

Formerly cited as IL ST CH 37 ¶ 439.8

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 705. COURTS
COURT OF CLAIMS
ACT 505. COURT OF CLAIMS ACT

➡505/8. Court of Claims jurisdiction

§ 8. Court of Claims jurisdiction. The court shall have exclusive jurisdiction to hear and determine the following matters:

(a) All claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency; provided, however, the court shall not have jurisdiction (i) to hear or determine claims arising under the Workers' Compensation Act [FN1] or the Workers' Occupational Diseases Act, [FN2] or claims for expenses in civil litigation, or (ii) to review administrative decisions for which a statute provides that review shall be in the circuit or appellate court.

(b) All claims against the State founded upon any contract entered into with the State of Illinois.

(c) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted. On December 31, 1996, the court shall make a one-time adjustment in the maximum awards authorized by this subsection (c), to reflect the increase in the cost of living from the year in which these maximum awards were last adjusted until 1996, but with no annual increment exceeding 5%. Thereafter, the court shall annually adjust the maximum awards authorized by this subsection (c) to reflect the increase, if any, in the Consumer Price Index For All Urban Consumers for the previous calendar year, as determined by the United States Department of Labor, except that no annual increment may exceed 5%. For both the one-time adjustment and the subsequent annual adjustments, if the Consumer Price Index decreases during a calendar year, there shall be no adjustment for that calendar year. The changes made by Public Act 89-689 apply to all claims filed on or after January 1, 1995 that are pending on December 31, 1996 and all claims filed on or after December 31, 1996.

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Trustees of Chicago State University, the Board of Trustees of Eastern Illinois University, the Board of Trustees of Governors State University, the Board of Trustees of Illinois State University, the Board of Trustees of Northeastern Illinois University, the Board of Trustees of Northern Illinois University, the Board of Trustees of Western Illinois University, or the Board of Trustees of the Illinois Mathematics and Science Academy; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Trustees of Chicago State University, the Board of Trustees of Eastern Illinois University, the Board of Trustees of Governors State University, the Board of Trustees of Illinois State University, the Board of Trustees of Northeastern Illinois University, the Board of Trustees of Northern Illinois University, the Board of Trustees of Western Illinois University, or the Board of Trustees of the Illinois Mathematics and Science Academy is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims pursuant to the Line of Duty Compensation Act. [FN3]

(g) All claims filed pursuant to the Crime Victims Compensation Act. [FN4]

(h) All claims pursuant to the Illinois National Guardsman's Compensation Act. [FN5]

(i) All claims authorized by subsection (a) of Section 10-55 of the Illinois Administrative Procedure Act [FN6] for the expenses incurred by a party in a contested case on the administrative level.

[FN1] 820 ILCS 305/1 et seq.

[FN2] 820 ILCS 310/1 et seq.

[FN3] 820 ILCS 315/1 et seq.

[FN4] 740 ILCS 45/1 et seq.

[FN5] 20 ILCS 1825/1 et seq.

[FN6] 5 ILCS 100/10-55.

Current through P.A. 94-726 of the 2005 Reg. Sess.

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EXHIBIT F

Supreme Court of Illinois.
PHL, INC., et al., Appellees,
v.
PULLMAN BANK AND TRUST COMPANY et al.
(Judy Baar Topinka, Treasurer,
Appellant).
PHL, Inc., et al., Appellees,
v.
Pullman Bank and Trust Company et al. (Pullman
Bank and Trust Company,
Appellant).
Nos. 96250, 96294.

June 3, 2005.
Rehearing Denied Sept. 26, 2005.

Background: Prospective purchasers of two mortgage loans originated through Illinois Insured Mortgage Pilot Program and held in trust brought action against State Treasurer and trustee, alleging Treasurer's refusal to close on the sale. The Circuit Court, Madison County, Randall A. Bono, J., granted summary judgment to plaintiffs. Defendants appealed. The Appellate Court affirmed. Appeal was allowed.

Holding: The Supreme Court, McMorrow, C.J., held that State Treasurer's refusal to close on sale of mortgage loans simply involved alleged breach of contract and did not involve Treasurer acting in excess of her constitutional authority, and thus, officer suit exception to State's sovereign immunity did not apply, under which exception the action would not be considered a suit against State and the Court of Claims therefore would not have exclusive jurisdiction over the action.
Reversed and remanded with directions.

Freeman, J., filed a dissenting opinion.

West Headnotes

[1] States 191.10
360k191.10 Most Cited Cases
Officer suit exception to state's sovereign immunity applies where an action at law or suit in equity is maintained against a state officer or the director of a state department on the ground that, while claiming to act for the State, he violates or invades the personal and property rights of the plaintiff under an unconstitutional act or under an assumption of authority which he does not have, so that such suit is not against the state.

[2] Courts 472.1
106k472.1 Most Cited Cases

[2] States 191.10
360k191.10 Most Cited Cases
State treasurer's refusal to close on sale of two mortgage loans originated through Illinois Insured Mortgage Pilot Program and held in trust for state simply involved an alleged breach of contract and did not involve treasurer acting in excess of her constitutional authority, and thus, officer suit exception to state's sovereign immunity did not apply, under which exception the action would not be considered a suit against state and the Court of Claims therefore would not have exclusive jurisdiction over the action; treasurer's refusal to close after execution of buy-sell agreement with prospective loan purchasers was based on treasurer choosing to follow Attorney General's advice, and while state constitution made treasurer responsible for safekeeping, investment, and disbursement of monies and securities deposited with treasurer, such general grant of authority did not prohibit treasurer from receiving or choosing to follow Attorney General's advice on legal matters relating to proper interpretation of trust documents for the mortgage program. S.H.A. Const. Art. 5, § 18; S.H.A. 705 ILCS 505/8(b); 745 ILCS 5/1.

[3] States 66
360k66 Most Cited Cases
A state officer's erroneous exercise of a broad grant of delegated authority does not constitute an ultra vires act.

[4] States 191.10
360k191.10 Most Cited Cases
Sovereign immunity will not bar a cause of action in the circuit court where the plaintiff seeks to bar a state officer from taking future actions in excess of his delegated authority.
***352** Lisa Madigan, Attorney General, Springfield (Gary S. Feinerman, Solicitor General, Deborah L. Ahlstrand, Assistant Attorney General, Chicago, of counsel), for appellant Judy Baar Topinka.

Andrew B. David, Pamela S. DiCarlantonio, of Sugar, Friedberg & Felsenthal, Chicago, for appellant Pullman Bank & Trust Company.

William J. Harte, Joseph E. Tighe, Chicago, for appellees.

****829** Chief Justice McMORROW delivered the opinion of the court:

Section 8(b) of the Court of Claims Act provides that the Court of Claims shall have exclusive jurisdiction over "[a]ll claims against the State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8(b) (West 2000). At issue in this case is whether plaintiffs' claim for breach of contract, which was brought against the Treasurer of the State of Illinois, constitutes an action "against the State" so as to come within this provision. The appellate court concluded that it did not. No. 5-00-0206 (unpublished order under Supreme Court Rule 23). For the reasons that follow, we reverse.

BACKGROUND

In 1982, the State of Illinois established the Illinois Insured Mortgage Pilot Program (Mortgage Program) in an effort to stimulate economic development within the state. Although the workings of the Mortgage Program are somewhat complicated, it may be said, in general, that the program was implemented through the creation of a trust, funded with state money, from which loans were made to various commercial enterprises that had difficulty obtaining conventional financing. [FN1]

> FN1. The original investment of state funds for the Mortgage Program trust was made under section 22 1/2 of the Deposit of State Moneys Act (Ill.Rev.Stat.1983, ch. 130, par. 41a), a general provision which, at that time, authorized the state Treasurer, with the approval of the Governor, to invest state funds in programs such as the Mortgage Program trust.

The details of the Mortgage Program, including the terms governing the creation of the trust and the manner in which loans were to be made by the trustee, were embodied in a purchase agreement, a trust indenture and a servicing agreement (collectively, the Trust Agreement). The Trust Agreement was executed on July 14, 1982, by the State of Illinois, acting through Treasurer Jerome Cosentino, with the concurrence of Governor James Thompson, and American National Bank and Trust Company of Chicago, both individually and as trustee. Under the terms of the Trust Agreement, the state is the sole owner of the trust estate and, through the Treasurer, directs the trust's activities.

In November 1982, in connection with the Mortgage Program, a first mortgage loan in the amount of $13.4 million was made to an Illinois limited partnership known as the Collinsville Hotel Venture. The funds from the loan were used by the partnership to finance a hotel in Collinsville, Illinois, which is now known as the Collinsville Holiday Inn. In December 1983, a first mortgage loan was made to another limited partnership, known as the President Lincoln Hotel Venture, in the ***353 **830** amount of $15.5 million. The funds from this loan were used to finance the construction of a hotel in Springfield, Illinois, which is now known as the Springfield Renaissance Hotel.

Throughout the 1980s, both hotel ventures had difficulties meeting their obligations under the Mortgage Program loans. As a result, both loans were restructured on at least two occasions. In 1992, a dispute arose between the hotel ventures and then-Treasurer Patrick Quinn regarding a term of the restructured loan agreements which required each hotel venture to provide the Mortgage Program trustee with a yearly "reliance letter." The trustee and Treasurer threatened to declare the loans in default because they believed that the reliance letters they had received were inadequate. In response, the hotel ventures filed suit against the Treasurer and trustee to enjoin the declaration of default.

The circuit court of Cook County dismissed the hotel ventures' action based on the doctrine of sovereign immunity. In October 1994, the appellate court affirmed. See *President Lincoln Hotel Venture v. Bank One,* 271 Ill.App.3d 1048, 208 Ill.Dec. 376, 649 N.E.2d 432 (1994). The hotel ventures' request for rehearing in the appellate court was denied on May 5, 1995. Thereafter, the hotel ventures filed a petition for leave to appeal in this court, which remained pending until October 1995.

In November 1994, defendant Judy Baar Topinka was elected Treasurer of the State of Illinois. After assuming office, Treasurer Topinka installed defendant Pullman Bank and Trust Company (Pullman Bank) as trustee of the Mortgage Program trust.

Beginning in December 1994, and continuing through the first part of 1995, the hotel ventures engaged in discussions with Treasurer Topinka about the possibility of purchasing the hotel venture loans from the state. The terms of sale which were discussed included the settlement of the reliance letter litigation, which was still ongoing at that time. As a result of these discussions, the plaintiffs in this case, which are two entities described in the record as having a "business relationship" with the hotel ventures, agreed to purchase the hotel venture loans. Plaintiff PHL, Inc., agreed to buy the first mortgage loan relating to the Collinsville Holiday Inn for $6.3 million, while plaintiff The President Lincoln Hotel Corporation agreed to pay $3.7 million to acquire the

first mortgage loan relating to the Springfield Renaissance Hotel.

On April 19, 1995, plaintiffs entered into separate buy-sell agreements with Pullman Bank, as trustee of the Mortgage Program trust, to purchase the hotel venture loans. The agreements were identical, except for the name of the buyer and the purchase price. Joinders to the agreements were signed by the hotel ventures and Treasurer Topinka. Both buy-sell agreements expressly stated that they were being entered into, in part, to settle the reliance letter litigation and both agreements contained provisions in which the state agreed not to pursue any claims against the hotel ventures in relation to the loans. Closing on the buy-sell agreements was set for June 1995.

After the Treasurer and trustee signed the buy-sell agreements, Attorney General Jim Ryan publicly stated that he would review the terms of the agreements. In July 1995, the Attorney General announced that he would not approve the buy-sell agreements.

The Attorney General's decision to withhold approval of the agreements rested on two grounds, the first of which was financial. In a report prepared by a group of ***354 **831** University of Illinois professors, the combined value of the two hotel venture loans was estimated at approximately $18 million to $19 million. Thus, because the state was to receive a total of only $10 million under the buy-sell agreements, the Attorney General concluded that the consideration the state was to receive for the hotel venture loans and the settlement of the reliance letter litigation was inadequate.

The second reason the Attorney General gave for withholding approval of the buy-sell agreements was found in an opinion letter issued by the Attorney General on July 10, 1995. See 1995 Ill. Att'y Gen. Op. No. 95-003. In this opinion, the Attorney General observed that the Trust Agreement, as it then existed, did not authorize the Mortgage Program trustee to settle mortgage loans for an amount less than their full value. The buy-sell agreements, however, did so. Therefore, the Attorney General concluded, unless the Trust Agreement was amended, at the direction of the state, the trustee would have no authority to surrender or execute the documents necessary to close on the buy-sell agreements.

The Attorney General's opinion further observed that the Trust Agreement did not specify who may execute the consent to amend the Trust Agreement on behalf of the state, nor the form the consent should take. The Attorney General noted, however, that the Governor's involvement was "indispensable to the creation and ongoing operation" (1995 Ill. Att'y Gen. Op. No. 95-003, at 7) of the Mortgage Program and, further, "that in 1992, when a similar outstanding loan was settled, the Governor's signature was affixed to the direction authorizing the Trustee to execute the instruments necessary to accept the settlement." 1995 Ill. Att'y Gen. Op. No. 95-003, at 7-8. Moreover, according to the Attorney General, the Trust Agreement itself provides "that the parties to the Agreement include the Trustee and the State of Illinois, which is described as 'acting by and through its Treasurer * * *, with the consent of its Governor * * *.' " 1995 Ill. Att'y Gen. Op. No. 95-003, at 8. From this, the Attorney General concluded that

> "it was clearly contemplated by the parties that the representatives of the State, for purposes of acting under the Trust Agreement, are the Treasurer and the Governor, and that the concurrence of both the Governor and the Treasurer is necessary to validate actions taken on behalf of the State thereunder. Consequently, it is my opinion that both the Governor and the Treasurer must authorize the amendment of the Trust Agreement and give their consent to the proposed transaction in order to effectuate it." 1995 Ill. Att'y Gen. Op. No. 95-003, at 9.

Because the Governor had not authorized any amendment of the Trust Agreement or consented to the buy-sell agreements, the Attorney General concluded that the agreements were invalid.

After the Attorney General made his views on the buy-sell agreements known, Treasurer Topinka publicly indicated that she disagreed with the Attorney General's financial assessment of the agreements. The Treasurer stated that, in her view, the buy-sell agreements represented the best financial deal that could be made by the state with respect to the hotel venture loans. Nevertheless, based on the legal opinion of the Attorney General, and because the Governor had not consented to the buy-sell agreements, the Treasurer declined to close on the agreements.

In October 1995, the hotel ventures, the Treasurer, Pullman Bank as the Mortgage Program trustee, and the Attorney General executed an agreement settling the reliance ***355 **832** letter litigation. Plaintiffs in the case at bar were not parties to this settlement, which did not reference the buy-sell agreement or any sale of the hotel venture loans. The same day that the settlement agreement was reached, the hotel ventures withdrew their petition for leave to appeal in

the reliance letter litigation which was pending before this court. See *President Lincoln Hotel Venture v. Pullman Bank & Trust Co.,* 163 Ill.2d 586, 212 Ill.Dec. 436, 657 N.E.2d 637 (1995) (petition for leave to appeal withdrawn).

Approximately two months after the settlement of the reliance letter litigation, on December 29, 1995, plaintiffs filed the present action in the circuit court of Madison County against the Treasurer and Pullman Bank. In their complaint, plaintiffs alleged that the Treasurer possessed the "unqualified constitutional authority" to approve the sale of the hotel venture loans without the concurrence of the Governor. Plaintiffs further alleged that, by adhering to the Attorney General's legal opinion and failing to close on the buy-sell agreements, the Treasurer was "acting in derogation of her constitutional duties and in abuse of her discretion and authority." Plaintiffs requested the circuit court to "[o]rder the Treasurer to perform her constitutional duties" and to enforce the provisions of the buy-sell agreements calling for the state to sell the hotel venture loans.

The litigation which followed the filing of plaintiffs' suit was lengthy and involved. It is recounted here only as necessary to address the issues presented in this appeal.

After plaintiffs filed their complaint, both the Treasurer and Pullman Bank filed motions to dismiss, in which they argued that plaintiffs' cause of action was barred by sovereign immunity. Defendants maintained that, although plaintiffs' suit for breach of contract was brought against the Treasurer in her individual capacity, the state was in fact the real party in interest because a judgment in favor of plaintiffs would require the state to divest itself of the hotel ventures loans. In addition, because Pullman Bank was merely the agent of the state and could only act at the direction of the Treasurer with respect to the trust estate, defendants maintained that any action against Pullman Bank was also against the state. Defendants further noted that, under section 8(b) of the Court of Claims Act (705 ILCS 505/8(b) (West 2000)), the Court of Claims has exclusive jurisdiction over claims brought against the state for breach of contract. Thus, defendants argued that the circuit court lacked jurisdiction to hear plaintiffs' complaint and that the suit properly belonged in the Court of Claims. The circuit court denied defendants' motions to dismiss.

Thereafter, the Treasurer filed a motion for summary judgment in which she argued that the buy-sell agreements were unenforceable as a matter of law both because the Governor had not consented to them and because they lacked the Attorney General's approval. This latter argument was based on the fact that the buy-sell agreements were not simply contracts, but also settlement agreements which conclusively resolved the then-pending reliance letter litigation. Citing to *Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority,* 98 Ill.2d 58, 74 Ill.Dec. 548, 456 N.E.2d 50 (1983), the Treasurer maintained that it is the prerogative of the Attorney General to settle pending litigation in which the state is involved. Thus, according to the Treasurer, because the Attorney General had not consented to the settlement portions of the buy-sell agreements, the settlement was invalid. And, the Treasurer argued, because the settlement of the reliance litigation was a material ***356 **833** covenant to the buy-sell agreements, the agreements themselves never became valid contracts and were therefore unenforceable. Pullman Bank also filed a motion for summary judgment which raised similar arguments.

In response to defendants' motions, plaintiffs filed a cross-motion for summary judgment, in which they argued that the Treasurer had the exclusive authority to close on the buy-sell agreements and that the Attorney General's approval of the buy-sell agreements was unnecessary. Plaintiffs did not dispute defendants' contention that, in general, it is the prerogative of the Attorney General to settle state litigation. However, plaintiffs argued that, in this case, the settlement of the reliance letter litigation in October 1995, although separate from the buy-sell agreements, nevertheless rendered the settlement portions of the buy-sell agreements irrelevant. Accordingly, because the settlement portions of the buy-sell agreements were no longer at issue, plaintiffs maintained that the Attorney General's approval was not needed and that the court could order specific performance of the buy-sell agreements.

After hearing argument, the circuit court denied defendants' motions for summary judgment and granted plaintiffs' cross-motion. In so ruling, the circuit court held that consent of neither the Governor nor the Attorney General was necessary to render the buy-sell agreements enforceable. In a subsequent order, the court held that plaintiffs had been ready, willing and able to fulfill their obligations under the buy-sell agreements in June 1995. Finally, on March 13, 2000, the circuit court entered judgment in favor of plaintiffs. The court ordered the Treasurer and Pullman Bank, as trustee of the Mortgage Program trust, to specifically perform the buy-sell agreements. Defendants appealed.

In a divided opinion, the appellate court affirmed. No. 5-00-0206 (unpublished order under Supreme Court Rule 23). The appellate court rejected defendants' contention that plaintiff's suit was barred by sovereign immunity. In so holding, the appellate court observed that an exception to the doctrine of sovereign immunity applies when the state officer who is the subject of the complaint acts in excess of his or her authority. The appellate court reasoned that this exception was applicable in the case at bar because the Treasurer had "back[ed] out of an obligation based on an opinion of the Attorney General" and, in so doing, had improperly "relegat[ed]" her constitutional authority as Treasurer to the Attorney General.

Both defendants filed separate petitions for leave to appeal in this court. The petitions were allowed and defendants' appeals were consolidated.

ANALYSIS

The Illinois Constitution of 1970 abolished the doctrine of sovereign immunity "[e]xcept as the General Assembly may provide by law." Ill. Const. 1970, art. XIII, § 4. Pursuant to its constitutional authority, the General Assembly reestablished sovereign immunity in the State Lawsuit Immunity Act. 745 ILCS 5/0.01 *et seq.* (West 1998); *City of Springfield v. Allphin,* 74 Ill.2d 117, 123, 23 Ill.Dec. 516, 384 N.E.2d 310 (1978). Section 1 of that enactment states that "[e]xcept as provided in [an act] to create the Court of Claims * * * the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (West 1998). The Court of Claims Act, in turn, provides that the Court of Claims shall have exclusive jurisdiction over "[a]ll claims against the State founded upon any contract entered into ***357 **834** with the State of Illinois." 705 ILCS 505/ 8(b) (West 2000).

As they did in the courts below, defendants maintain that plaintiffs' complaint is barred from the circuit court by section 8(b) of the Court of Claims Act. Defendants contend that plaintiffs' complaint is one for breach of contract; that Pullman Bank may act only at the direction of the Treasurer and, therefore, the Treasurer's actions are the relevant focus of inquiry in this case; that the complaint against the Treasurer is, in fact, against the state because a judgment in plaintiffs' favor would "operate to control the actions of the State" (emphasis omitted) (*Currie v. Lao,* 148 Ill.2d 151, 158, 170 Ill.Dec. 297, 592 N.E.2d 977 (1992)) by forcing the state to sell the hotel venture loans; and, therefore, that plaintiffs' complaint must be heard in the Court of Claims.

Plaintiffs, in response, do not dispute that their complaint alleges a breach of contract, that the Treasurer's actions should be the focus of this appeal, or that an adjudication in their favor would cause the state to sell the hotel venture loans. Nevertheless, plaintiffs contend that section 8(b) is not controlling in the case at bar because an exception to the doctrine of sovereign immunity, often referred to as the "officer suit" exception, is applicable here.

[1] In Illinois, the leading historical expression of the officer suit exception is found in *Schwing v. Miles,* 367 Ill. 436, 11 N.E.2d 944 (1937):

> "where the action at law or suit in equity is maintained against a State officer or the director of a department on the ground that, while claiming to act for the State, he violates or invades the personal and property rights of the plaintiff under an unconstitutional act, or under an assumption of authority which he does not have, such suit is not against the State. (*Noorman v. Department of Public Works and Buildings, supra* [366 Ill. 216, 8 N.E.2d 637 (1937)]; *Fitts v. McGhee,* 172 U.S. 516 [19 S.Ct. 269, 43 L.Ed. 535]; *United States v. Lee,* 106 id. 196 [106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171]; *White Eagle Oil and Refining Co. v. Gunderson* [48 S.D. 608], 205 N.W. (S.Dak.) 614; 43 A.L.R. 397.) The presumption obtains that the State, or a department thereof, will not, and does not, violate the constitution and laws of the State, but that such violation, if it occurs, is by a State officer or the head of a department of the State, and such officer or head may be restrained by proper action instituted by a citizen." *Schwing,* 367 Ill. at 441-42, 11 N.E.2d 944.

Stated otherwise, it is said that when an action of a state officer is undertaken without legal authority, such an action "strips a State officer of his official status * * * [and] his conduct is not then regarded as the conduct of the State, nor is the action against him considered an action against the State." *Moline Tool Co. v. Department of Revenue,* 410 Ill. 35, 37, 101 N.E.2d 71 (1951).

The officer suit exception has a long and complex history, with its origination in the federal courts. See *Schwing,* 367 Ill. at 441, 11 N.E.2d 944, citing *Fitts v. McGhee,* 172 U.S. 516, 19 S.Ct. 269, 43 L.Ed. 535 (1899); *United States v. Lee,* 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882); see also *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In Illinois, the officer suit exception has been described as a means of protecting the rights of plaintiffs:

> "[W]here the defendant officer act[s] in excess of his statutory authority, the rights of the plaintiffs to

be free from the consequences of his action outweigh the interest of the State which is served ***358 **835** by the sovereign immunity doctrine." *Senn Park Nursing Center v. Miller,* 104 Ill.2d 169, 188, 83 Ill.Dec. 609, 470 N.E.2d 1029 (1984).

See also *Moline Tool Co.,* 410 Ill. at 37, 101 N.E.2d 71 (not all suits against state officers are barred because "[s]uch a holding would have blunted the effectiveness of many constitutional guaranties by preventing their judicial enforcement").

In *Smith v. Jones,* 113 Ill.2d 126, 100 Ill.Dec. 560, 497 N.E.2d 738 (1986), this court held that the officer suit exception may be raised, as a general matter, in breach of contract cases which would otherwise fall under section 8(b) of the Court of Claims Act. *Smith,* 113 Ill.2d at 131-32, 100 Ill.Dec. 560, 497 N.E.2d 738. However, this court also held that the exception does not apply when the action which the plaintiff alleges was taken in excess of authority is simply a breach of contract and nothing more. *Smith,* 113 Ill.2d at 132-33, 100 Ill.Dec. 560, 497 N.E.2d 738 ("The plaintiffs [’] complaint, thus, alleges only that the Director exceeded his authority by breaching a contract. Such an allegation does not deprive the defendants of the protection of the bar of sovereign immunity"). In the case at bar, defendants cite to *Smith* and contend that plaintiffs' cause of action is merely a breach of contract case and, therefore, that the officer suit exception is inapplicable.

[2] Plaintiffs, however, maintain that the present case is unlike *Smith.* According to plaintiffs, in this case, the Treasurer did not simply breach a contract, she also acted in excess of her legal authority, specifically, the authority given her under article V, section 18, of the Illinois Constitution of 1970. That provision states:

"The Treasurer, in accordance with law, shall be responsible for the safekeeping and investment of monies and securities deposited with him, and for their disbursement upon order of the Comptroller." Ill. Const. 1970, art. V, § 18.

Plaintiffs allege in their complaint that the Treasurer acted "in derogation of her constitutional duties" under article V, section 18, by "adhering to the Attorney General's financial analysis and legal opinion." Thus, plaintiffs contend, the officer suit exception applies and their complaint properly belongs in the circuit court.

Initially, we note that the Treasurer did not, in fact, adhere to the Attorney General's financial analysis of the buy-sell agreements. Indeed, there has never been any question in this case that, after the Attorney General announced the findings from the report prepared by the University of Illinois professors, the Treasurer publicly stated that, in her view, the buy-sell agreements were the best financial deal that could be made for the state with respect to the hotel venture loans. The circuit court, in its order on the parties' cross-motions for summary judgment, stated as an "undisputed fact" that "[t]he parties never closed on the Buy-Sell Agreements or the related Settlement Agreements because, on advice of the Attorney General, the Treasurer refused to do so." On appeal, the appellate court agreed, stating that "[a]fter entering into the Agreements, the Treasurer declined to act, based upon the advice contained in an opinion letter." No. 5-00-0206 (unpublished order under Supreme Court Rule 23). The lower courts' statements of the facts are not contested by the parties on appeal. Thus, with respect to whether the Treasurer acted "in derogation of her constitutional duties," the question we must decide is whether the Treasurer's decision to "adher[e] to the Attorney General's * * * legal opinion" violated article V, section 18, of the Illinois Constitution. The answer to this question is no.

***359 **836** Article V, section 18, is a general grant of authority. Nothing in that provision forbids the Treasurer from receiving or following the advice of the Attorney General on a legal matter relating to the proper interpretation of trust documents. Accordingly, the fact that the Treasurer, in this case, chose to adopt the Attorney General's legal opinion interpreting the Trust Agreement as her own does not mean that she acted outside the authority given to her under the constitution. [FN2]

FN2. The dissent states that the Treasurer disagreed with the Attorney General's opinion letter and that she "publicly characterized the opinion as 'illogical' and 'unrealistic.' " 216 Ill.2d at 277, 296 Ill.Dec. at 843, 836 N.E.2d at 366 (Freeman, J., dissenting). Although the dissent does not indicate the source of the Treasurer's statements, it appears that the dissent has taken them from an allegation found in plaintiffs' complaint and that the allegation has been misquoted. In paragraph 40 of their complaint, plaintiffs alleged that "on July 11, 1995, the Treasurer issued a press release stating that the *University of Illinois report* was 'illogical' and 'unrealistic.' " (Emphasis added.) Paragraph 40 alleges that the Treasurer disagreed with the financial assessment offered by the University of Illinois professors, not that the Treasurer

disagreed with the Attorney General's opinion letter. In addition, the press release described in plaintiffs' complaint was not mentioned in any of the circuit court's subsequent rulings and we have been unable to locate it in the record.

Plaintiffs nevertheless express concern that a holding in this case that the Treasurer did not violate the constitution would mean that the Attorney General would have "veto authority over the Treasurer's right to enter into contracts to sell state investments." We disagree. As noted, in July 1995, the Attorney General issued an opinion letter in which he reasoned that the buy-sell agreements were invalid because, in order for those agreements to take effect, an amendment to the Trust Agreement was required and such an amendment could not be made, under the terms of the Trust Agreement itself, without the consent of the Governor. From the Treasurer's perspective, the Attorney General's opinion was persuasive authority but it was not legally binding. See *President Lincoln Hotel Venture,* 271 Ill.App.3d at 1056, 208 Ill.Dec. 376, 649 N.E.2d 432; *Bonaguro v. County Officers Electoral Board,* 158 Ill.2d 391, 399, 199 Ill.Dec. 659, 634 N.E.2d 712 (1994). The opinion did not, in a legal sense, stop or block the Treasurer from taking any action she wished with respect to the buy-sell agreements. The Treasurer, of her own volition, decided to follow the legal advice of the Attorney General and forgo closing on the buy-sell agreements. Nothing in our decision in this case forces the Treasurer to adopt the advice of the Attorney General or gives the Attorney General the authority to unilaterally invalidate contracts entered into by the Treasurer. Our holding is simply that when, as in this case, the Treasurer chooses to follow the legal advice of the Attorney General regarding the proper interpretation of trust documents, the Treasurer does not violate article V, section 18. [FN3]

FN3. The dissent states that the Treasurer's decision to forgo closing on the buy-sell agreements was not "voluntary" (216 Ill.2d at 277, 296 Ill.Dec. at 843, 836 N.E.2d at 366 (Freeman, J., dissenting)) and repeatedly asserts that the Attorney General "would not *allow*" the Treasurer to proceed with the buy-sell agreements (emphasis in original) (216 Ill.2d at 275-79, 296 Ill.Dec. at 842-43, 836 N.E.2d at 365-66. (Freeman, J., dissenting)). Notably, however, the dissent never identifies the means by which the Attorney General prevented the Treasurer from closing on the agreements. The closest the dissent comes to doing so is the dissent's statement that the "Attorney General placed the Treasurer in a situation where she was forced to choose between doing her job, *i.e.,* exercising her judgment on financial matters with respect to the Trust, or following the unsought advice of a fellow state officer." 216 Ill.2d at 276, 296 Ill.Dec. at 842, 836 N.E.2d at 365. (Freeman, J., dissenting). In other words, according to the dissent, the Treasurer's actions were not "voluntary" because she had to decide whether or not to follow the Attorney General's legal opinion. This reasoning is unpersuasive. If the Treasurer chose to follow the Attorney General's legal opinion, then, by definition, her actions were voluntary.

***360 **837** In addition, we note that were we to hold that the officer suit exception applies in this case, it would follow that every time the Treasurer decided to adopt any legal advice she would risk violating the constitution. Indeed, counsel for plaintiffs essentially conceded this point during oral argument before this court. Explaining why plaintiffs believe the Treasurer acted improperly in this case, counsel stated that "the Treasurer had a responsibility not to allow the Attorney General to dissuade her from her contract." But this assertion is unreasonable. The Treasurer should not be placed in the position of having to refuse to hear legal advice in order to avoid violating the constitution. Important decisions affecting the finances of this state should not have to be made in a legal vacuum.

The appellate court below, in discussing whether the Treasurer had exceeded her constitutional authority, concluded that the Treasurer's argument that the buy-sell agreements were ineffective without the Governor's consent was incorrect, as was her contention that the Attorney General's approval was necessary because the buy-sell agreements settled the reliance letter litigation. Based on these conclusions, the appellate court determined that the Treasurer had exceeded her constitutional authority because, as the appellate court stated, she had no authority *not* to execute the buy-sell agreements. Again, we disagree.

[3] It is well settled that a state officer's erroneous exercise of a broad grant of delegated authority does not constitute an *ultra vires* act. As the United States Supreme Court has stated:

"[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.

> The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. *A claim of error in the exercise of that power is therefore not sufficient.*" (Emphasis added.) *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628, 1636 (1949).

In the case at bar, we express no opinion on whether the Governor's consent was, in fact, required to effectuate the buy-sell agreements or whether the Attorney General's approval of the agreements was needed because the agreements settled litigation in which the state was involved. We note, however, that even accepting the appellate court's holdings on these issues as correct, the most that can be said with respect to the Treasurer's actions is that (1) she misread the terms of the Trust Agreement as requiring the Governor's consent for an amendment to that agreement when such consent was not, in fact, required and (2) she incorrectly believed that the settlement provisions contained in the buy-sell agreements were material covenants to those agreements when, in fact, ***361 **838** the provisions were rendered irrelevant by the settlement of the reliance letter litigation in October 1995. These are errors of contract and trust interpretation. They are not actions forbidden under article V, section 18, and, hence, they are not *ultra vires* acts.

The parties also contest whether plaintiffs' cause of action is one which seeks prospective relief within the meaning of this court's decision in *Bio-Medical Laboratories, Inc. v. Trainor,* 68 Ill.2d 540, 12 Ill.Dec. 600, 370 N.E.2d 223 (1977). As this court has noted, *Bio-Medical Laboratories* "stands for the proposition that if a plaintiff is not attempting to enforce a present claim against the State, but rather seeks to enjoin a State officer from taking future actions in excess of his delegated authority, then the immunity prohibition does not pertain." *Ellis v. Board of Governors of State Colleges & Universities,* 102 Ill.2d 387, 395, 80 Ill.Dec. 750, 466 N.E.2d 202 (1984); see also *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (drawing a distinction between prospective and retrospective relief in the context of sovereign immunity). Plaintiffs contend that their cause of action is not a present claim because they seek only to compel the Treasurer to take future action, *i.e.,* to close on the buy-sell agreements. Defendants, however, maintain that because plaintiffs' action is one for breach of contract, it necessarily seeks to enforce current or existing agreements. Thus, according to defendants, plaintiffs' cause of action cannot be viewed as simply seeking prospective relief.

[4] The rule stated in *Bio-Medical Laboratories* is that sovereign immunity will not bar a cause of action in the circuit court where the plaintiff seeks to bar "a State officer from taking future actions *in excess of his delegated authority.*" (Emphasis added.) *Ellis,* 102 Ill.2d at 395, 80 Ill.Dec. 750, 466 N.E.2d 202. Because we have determined that, in this case, the Treasurer did not take any action in excess of her delegated, constitutional authority, we need not consider whether plaintiffs' cause of action is a present claim or one which seeks prospective relief.

Finally, the dissent states that it is troubled by this court's approach to the question of "whether the Court of Claims can provide the remedy of specific performance." 216 Ill.2d at 282, 296 Ill.Dec. at 846, 836 N.E.2d at 369 (Freeman, J., dissenting). The dissent states that "[i]t would appear from the conclusion reached by this court that the implicit answer to that question is yes." 216 Ill.2d at 282, 296 Ill.Dec. at 846, 836 N.E.2d at 369. (Freeman, J., dissenting). This statement is incorrect. Nowhere in this opinion has this court made any determination, either explicit or implicit, as to whether the remedy of specific performance is available in the Court of Claims. Our decision in this case is limited solely to the question of whether the circuit court had jurisdiction to consider plaintiffs' complaint and, specifically, whether the officer suit exception is applicable in this case. The parties have not briefed the issue of whether the remedy of specific performance is available in the Court of Claims, and it is not necessary to decide that issue in order to resolve this case.

CONCLUSION

The officer suit exception to the doctrine of sovereign immunity is inapplicable under the facts of this case. Thus, section 8(b) of the Court of Claims Act is controlling, and the circuit court lacked jurisdiction to hear plaintiffs' complaint. Accordingly, the judgments of the circuit and appellate courts are reversed. The cause is remanded to the circuit court with directions to dismiss plaintiffs' complaint.

***362 **839** *Nos. 96250 & 96294--Appellate court judgment reversed; circuit court judgment reversed; cause remanded with directions.*

Justices GARMAN and KARMEIER took no part in the consideration or decision of this case.

Justice FREEMAN, dissenting:

The court reverses the judgments of the appellate and circuit courts in this case, which held that jurisdiction over this cause rested in the circuit court of Madison County. I am unable to join in the opinion, however, because I believe several of the more troubling aspects of this case have been overlooked in the court's haste to rule that jurisdiction lies not in the circuit court but in the Court of Claims. In my view, the court's conclusory analysis with respect to the issue of sovereign immunity is at odds with the spirit of the officer suit exception to the doctrine of sovereign immunity. I believe today's opinion will have a negative impact on the future willingness of private citizens to do business in Illinois with state officials and therefore respectfully dissent.

The sovereign immunity issue was first raised in the circuit court in a motion to dismiss filed by defendants. The trial judge denied the motion because he believed that the case involved an inseparable combination of contractual and constitutional issues, which were inappropriate issues for the Court of Claims to decide. The appellate court agreed, holding that, *inter alia,* "[s]overeign immunity cannot provide a defense where the court must determine if a State agent acted in violation of statutory or constitutional law or in excess of authority." *PHL, Inc. v. Pullman Bank & Trust Co.,* No. 5-97-1064, 297 Ill.App.3d 1142, 250 Ill.Dec. 96, 737 N.E.2d 718 (July 28, 1998) (unpublished order under Supreme Court Rule 23).

The genesis of this suit was the 1982 establishment of the Illinois Insured Mortgage Pilot Program (Mortgage Program), which, as the court correctly notes, was designed to stimulate economic development in depressed areas within central and downstate Illinois. State monies were used to create a trust, which would lend money to various commercial enterprises that had experienced difficulty obtaining conventional financing. The trust agreement at issue in this case was executed by the State of Illinois, with the Treasurer directing the trust's activities. Relevant here is the fact that the Treasurer was charged under this statutory program with the responsibility of overseeing the state's investment.

In November 1982 and December 1983, two loans were made pursuant to the Mortgage Program to different hotel ventures. Unfortunately during the years that ensued, these borrowers had difficulty in meeting their financial obligations under the Mortgage Program loans. The terms of the loans were eventually restructured, but new disputes subsequently arose over the terms of the restructuring. As a result of the disputes, in 1994, plaintiffs began discussions with Treasurer Judy Baar Topinka regarding the possibility of purchasing the loans from the state. These discussions led to the creation of the buy-sell agreements that are at the heart of this case. The Treasurer and the trustee signed the buy-sell agreement on April 19, 1995. At that time, the Treasurer held a news conference where she explained the agreement and the benefits it would inure to the state. According to the terms of the agreements, the closing date was to be on or before June 30, 1995.

Shortly thereafter, on May 3, 1995, the Illinois Attorney General announced that he would investigate the propriety of the Treasurer's selling of the loans to plaintiffs ***363 **840** and that the proposed closing would not take place until his review was completed. During the tenure of the " investigation," plaintiffs were told of the actions of the Attorney General with respect to his intervention into the buy-sell agreements and of the fact that the Treasurer "was acquiescent in the Attorney General's assertion that *he would make the ultimate decision related to her right to proceed with the buy-sell agreements.*" Affidavit of Kathleen Vyborny, Defendants' Appendix, at A-117. The final day for the closing, June 30, 1995, passed without action.

On July 11, 1995, the Attorney General announced that he would not "approve" the agreements based upon the financial advice of a team of University of Illinois professors. On that same date, he also sent an opinion to State Senator Penny Severns in which he took the position that the Treasurer does not have "the authority to create a program of this sort, which extends to matters far in excess of the Treasurer's statutory and constitutional duties." 1995 Ill. Att'y Gen. Op. No. 95-003, at 6. The Treasurer publicly disagreed with the Attorney General's financial assessment of the agreements because, in her view, the agreements represented the best financial deal that could be made by the state with respect to the initial hotel venture loans. According to the record, the proposed sale was 20% higher than any other offer received for the loans, 30% higher than the June 1994 appraised value of the loans, and 50% higher than the book value of those loans. As a result of the Attorney General's opinion, the deal was considered

"dead." Letter of Chief of Staff of the Attorney General, dated July 11, 1995, Defendants' Appendix, at A-112. In a letter to plaintiffs' attorney, the Attorney General spoke of the need to look to the future in light of the fact that the deal was dead and that "to that end, and to aid this office in an analysis of the current status of the agreement of or any future proposal, please consider this our request to you, on behalf of your clients, to allow us the opportunity to examine the books and expense records of both hotels." Letter of Chief of Staff of the Attorney General, dated July 11, 1995, Defendants' Appendix, at A-112. Soon thereafter, this lawsuit commenced.

Plaintiffs argue that the Treasurer acted in derogation of her constitutional duties in refusing to perform her agreement to divest the state's holdings with respect to the hotel ventures after entering into binding agreements to do so. Defendants respond that the doctrine of sovereign immunity deprives the circuit court of jurisdiction over this cause. They maintain that plaintiffs' cause of action is a simple breach of contract case and that, as such, it must be brought in the Court of Claims.

Whether an action is in fact one against the state and hence one that must be brought in the Court of Claims depends not on the formal identification of the parties, but rather on the issues involved and the relief sought. *Healy v. Vaupel,* 133 Ill.2d 295, 308, 140 Ill.Dec. 368, 549 N.E.2d 1240 (1990). The prohibition " 'against making the State of Illinois a party to a suit cannot be evaded by making an action nominally one against the servants or agents of the State when the real claim is against the State of Illinois itself and when the State of Illinois is the party vitally interested.' " *Healy,* 133 Ill.2d at 308, 140 Ill.Dec. 368, 549 N.E.2d 1240, quoting *Sass v. Kramer,* 72 Ill.2d 485, 491, 21 Ill.Dec. 528, 381 N.E.2d 975 (1978). The doctrine of sovereign immunity "affords no protection, however, when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court." *Healy,* ***364 **841** 133 Ill.2d at 308, 140 Ill.Dec. 368, 549 N.E.2d 1240 (and cases cited therein). The doctrine serves to "protect[ ] the State from interference in its performance of the functions of government and preserve[ ] its control over State coffers." *S.J. Groves & Sons Co. v. State,* 93 Ill.2d 397, 401, 67 Ill.Dec. 92, 444 N.E.2d 131 (1982).

The court holds that the officer suit exception to the doctrine of sovereign immunity is inapplicable here. In doing so, the court notes that "the most that can be said with respect to the Treasurer's actions is that (1) she misread the terms of the Trust Agreement as requiring the Governor's consent for an amendment to that agreement when such consent was not, in fact, required and (2) she incorrectly believed that the settlement provisions contained in the buy-sell agreements were material covenants to those agreements, when, in fact, the provisions were rendered irrelevant by the settlement of the reliance letter litigation in October 1995." 216 Ill.2d at 267, 296 Ill.Dec. at 837-38, 836 N.E.2d at 360-61. The court then concludes that these errors are "errors of contract and trust interpretation" and are not unconstitutional, *ultra vires* acts. I find this conclusion rather troubling under the facts of this case because this case concerns more than just mere questions of contract interpretation.

As an initial matter, my disagreement with my colleagues lies not in the recitation of facts, with which I agree, but rather in the interpretation of those facts. Similar to the lower courts, I am troubled by the way in which the Attorney General left the Treasurer with little choice but to follow his opinion even though the Treasurer did not agree with it. In this case, we have a very public disagreement between the Attorney General and the Treasurer as to what steps to take to protect the state's interest in the Trust Agreement. It is clear from the record that the Treasurer was represented by counsel when she entered into the agreements with plaintiffs. The record is also clear that the Treasurer *did not seek* the Attorney General's input into the matter. Had the Treasurer wanted the Attorney General's opinion, it stands to reason that she would have sought it *prior* to signing the agreements in the first place. The record indicates clearly that the Attorney General, on his own initiative, only entered into the fray after news accounts started to be published about the impending transaction. Indeed, the Attorney General's public posturing in this case at the time in question smacks more of sound-bite politics than of true legal or even financial acumen. As I shall explain, our state constitution does not give the Attorney General authority over the Treasurer in the manner that was exercised in this case. Nor does the Trust Agreement give the Attorney General the duties of oversight that the Attorney General willed unto himself. I believe that these concerns are what caused the lower courts that have addressed this issue to rule that sovereign immunity does not lie under these facts. The record makes clear that once the Attorney General entered into the matter, the Treasurer, for all and intents and purposes "opted out," despite her conviction that the deal she brokered was in the best financial interests of the state. The

record establishes that the Treasurer did not act in June because she was going to let the Attorney General make the ultimate decision on her right to close. It is clear from reviewing the contemporaneous statements regarding the transaction that are contained in the record that the Treasurer was ready and willing to execute the buy-sell agreements, which she believed to be in the best financial interests of the state, until the Attorney General intervened. As noted previously, plaintiffs were informed in early ***365 **842** May 1995, that the *ultimate decision* regarding the sale would be made by the Attorney General. And it is here where I part company with my colleagues because I do not believe that it is proper to use the doctrine of sovereign immunity under these circumstances. The Treasurer violated her constitutional obligation by allowing the Attorney General to make the *ultimate decision* regarding whether the sale would be made.

As I noted, the Trust Agreement does not charge the Attorney General with any oversight responsibilities. The Trust Agreement names the Treasurer as the constitutional officer charged with such duties. The record affirmatively demonstrates that, despite having this authority, it was the Attorney General who announced that he would not "approve" the agreements. Meanwhile, the Treasurer allowed the closing date to pass while she awaited the final word regarding its merits, both financial and legal, from the Attorney General. Thus, for all intents and purposes, it was the Attorney General who took charge of the oversight of the Trust Agreement. The Attorney General's review was not completed until July 10, 1995, and it was at that time that he publicly announced that the Treasurer did not have the authority to make the transaction and that her doing so was in excess of any of her statutory or constitutional duties. The Attorney General's July 11, 1995, letter to plaintiffs, in which he requested the books and expense records of both hotels, indicates to me, at least, that the Attorney General was taking over a greater role in the handling of the Trust Agreement.

In light of the above, the Attorney General killed the deal on the basis of his legal conclusion that the buy-sell agreements were invalid and his conclusion that the agreements were fiscally inadvisable for the state. These facts are recounted in the news accounts that were made a part of the record, which reveal that the Attorney General on the day that he announced that the deal was "dead" was quoted as saying, "After a careful, comprehensive review by both my staff and the U of I team, I conclude that it is not in the state's best interest * * * to settle. It's a bad deal for the state." Defendants' Appendix, at A-123. The Attorney General also took the position that any loan arrangement made by the Treasurer would need *his* approval. [FN4] Contrariwise, at a separate news conference held on the same day, the Treasurer was quoted as saying that she told the Attorney General that she "could not accept the numbers" and insisted that the deal she struck was financially the most lucrative the state could hope for. Defendants' Appendix, at A-121. Clearly, the record establishes that the Attorney General would not *allow* the Treasurer to proceed with this transaction. Stated simply, the situation we have at bar has two constitutional officers at loggerheads over who has the authority to do what. The Attorney General placed the Treasurer in a situation where she was forced to choose between doing her job, *i.e.,* exercising her judgment on financial matters with respect to the Trust, or following the unsought advice of a fellow state officer. The court states that the Treasurer's actions must be construed as voluntary because the Attorney General's advice was not legally binding and that she was free to disregard it. ***366 **843** I disagree because the tone and tenor of the contemporaneous comments suggest otherwise. The Attorney General repeatedly stated publicly that the deal would not go through without *his* approval. Indeed, letters contained in the record indicate that it was the Attorney General, not the Treasurer, who would examine "the books and expense records" with respect to any analysis of the agreement in question or any future proposal. It would seem that this type of conflict would fall within the officer suit exception to the doctrine at least with respect to the circumstances here.

> FN4. It is important to note that nowhere in the statutory program which spawned the Trust Agreement is authority to approve loan arrangements given to the Attorney General. Nor does the statute provide the Attorney General with fiscal oversight with respect to the best interests of the state. Rather, under the statutory framework of the Mortgage Program, the Treasurer was charged with these responsibilities.

On the day that the Attorney General stated his opinion and announced that the deal was dead, the Treasurer publicly characterized the opinion as "illogical" and "unrealistic" and likened the Attorney General's actions to "reversing the outcome of the Super Bowl on the basis of armchair speculation from Monday morning quarterbacks." The Treasurer further stated that the agreements were valid, yet still inexplicably followed the Attorney General's opinion.

The Treasurer's colorful sporting analogy reveals that the Treasurer did in fact delegate her duties to the Attorney General. The only way a Monday morning quarterback can control the outcome of the Super Bowl is if the officials whose job it is to rule on calls allow themselves to be reversed by others. The Treasurer, whose job it was to "make the call" in this case allowed herself to be reversed by an official who had no legal or constitutional right to "make the call." This demonstrates the type of constitutional derogation of duty that both the lower courts in this case were troubled by and why they ruled that the doctrine of sovereign immunity did not apply to this case. The court today chooses to characterize the Treasurer's actions as purely voluntary, but I do not. In my view, the Treasurer, at the time all of these events occurred, took a "my hands are tied" approach to the Attorney General's intervention. The plaintiffs allege that by taking such approach, the Treasurer delegated her constitutional duties in such a way as to render inapplicable the doctrine of sovereign immunity. I agree. The record indicates that the Treasurer believed the agreements were valid and the Attorney General was wrong on a financial level. The Treasurer was constitutionally and statutorily obligated to protect the state's assets and follow through on her contractual obligations.

In her brief, the Treasurer claims that her actions in failing to perform the contract cannot be equated with her violating any constitutional or statutory duty. I believe her argument, however, oversimplifies matters to an extent-- the Treasurer failed to perform the contract because the Attorney General would not let her proceed and she did nothing to prevent him from doing so. This raises the troubling specter of our Attorneys General having the power to invalidate every contract entered into by state officials at his or her whim. It is also suggests that the Attorney General has the power to "go over the head" of the Treasurer in matters related to the duties of her office. Such a holding would appear to be at odds with our case law in this area.

Under our current state constitution, the Treasurer "in accordance with law, shall be responsible for the safekeeping and investment of monies and securities deposited with him." Ill. Const. 1970, art. V, § 18. Although our Constitution does not provide a precise explanation of the Treasurer's duties, this court has noted that

> "[i]n the absence of a constitutional definition of his powers and duties the primal functions of a treasurer are necessarily implied. He is required to ***367 **844** perform the duty of receiving and safely keeping the public funds which are entrusted to him, even in the absence of a statute. The very name given to his office denotes his obligation in this regard and the constitution implies it. Both the power and the duty of receiving and safely keeping the public funds entrusted to him are within the purview of the powers and duties which are inherent in his office and in no way depend upon the authority of the General Assembly. He can neither be deprived of the power nor relieved of the duty." *People ex rel. Nelson v. West Englewood Trust & Savings Bank,* 353 Ill. 451, 465, 187 N.E. 525 (1933).

Moreover, the Treasurer, under the terms of the Trust Agreement, was made the state officer responsible for directing the trust activities, a trust which was funded with state monies.

Here, it is clear that the Treasurer believed that she had the authority to enter into the agreements and, until the time the Attorney General intervened, was prepared to close on the deal because she believed that it represented the best financial deal the state could get. These actions are consistent with her authority under the Trust Agreement and under her general duties as Treasurer. The Attorney General then stepped into the matter and asserted both his legal and financial opinions over it. I believe that once the Treasurer signed the agreements with plaintiffs, it was too late for the Attorney General to offer his opinion as to the validity of the agreements. Had the Attorney General had doubts about the legality of the Treasurer's actions, the better approach would have been for him to have initiated, as the state's chief legal officer, some type of injunctive action to preclude the sale in which a *judicial determination* regarding how many of this state's constitutional officers were needed to authorize these agreements could be made. In fact, the Attorney General's office's "Guidelines" suggest that this is the proper course of action to take in such instances. See appendix ("Statement of Policy of the Attorney General Relating to Furnishing Written Opinions, Adopted March 29, 1962"). [FN5] The legal questions regarding the authority to enter into the agreements are, at the end of the day, questions that can only be resolved with definitiveness by the judicial branch. Attorney General opinions are advisory in nature and are not binding upon the state or the courts. *Bonaguro v. County Officers Electoral Board,* 158 Ill.2d 391, 199 Ill.Dec. 659, 634 N.E.2d 712 (1994); W. Scott, *The Role of Attorney General's Opinions in Illinois,* 67 N.W. L.Rev. 643 (1972). Thus, we do not know whether the Attorney General's opinion is correct--the analysis used in today's opinion is such that judiciary need never determine whether that opinion withstands scrutiny.

See 216 Ill.2d at 266-67, 296 Ill.Dec. at 837-38, 836 N.E.2d at 360-61 (expressing "no opinion" as the correctness of the Attorney General's opinion). Unfortunately, the court's treatment of this issue prevents our courts from addressing any of these important matters.

> FN5. The Guidelines give four examples of situations in which no opinion will be issued. At least three of the four situations indicated in the guidelines are arguably at play in this case, including (i) opinions will not be furnished regarding the exercise of executive judgment, (ii) opinions should not be requested unless a *bona fide* need exists by the party requesting it with respect to the performance of his or her official duties, and (iii) opinions should not be furnished in cases of difficult or important questions of law and resort should be made to a declaratory judgment action. See appendix ("Statement of Policy of the Attorney General Relating to Furnishing Written Opinions, Adopted March 29, 1962").

***368 **845** The primary case upon which the court relies, *Smith v. Jones,* 113 Ill.2d 126, 100 Ill.Dec. 560, 497 N.E.2d 738 (1986), can be distinguished in that the plaintiffs there did not allege a violation of the law. Indeed, the complaint itself recognized that the state official's actions in question were done "pursuant to the *letter* of the [Lottery] Act and the rules and regulations thereunder." (Emphasis in original.) *Smith,* 113 Ill.2d at 132, 100 Ill.Dec. 560, 497 N.E.2d 738. The court in *Smith* stressed that the allegations of the complaint were only that the official exceeded his authority by breaching the contract. In contrast, the allegations here are that the Treasurer abdicated her authority to the Attorney General. Plaintiffs argue that the contract was breached, not because the Treasurer was following the letter of the law, but was allowing, contrary to the constitution and her duty under the Mortgage Program, another state official to make calls that she alone had the authority and the discretion to make. Whereas what was involved in *Smith* was, in the court's words, "simply a drawing in which the amount of prize money due the plaintiffs is in dispute" (*Smith,* 113 Ill.2d at 133, 100 Ill.Dec. 560, 497 N.E.2d 738), what is involved here is whether it is proper for a constitutional officer to pass her duties on to another constitutional officer.

As noted previously, one of the purposes of sovereign immunity is to preserve the state's coffers. Ironically, the court's decision to invoke the doctrine here does more to harm those coffers than to protect them. The record is replete with references to the financial cost to the state in maintaining the initial loans. The agreement reached by the Treasurer and the plaintiffs had many benefits--the first of which was that state would no longer be liable for the hotel properties, which had the potential to end up in foreclosure. The state was also to receive more money than was previously offered by other potential buyers. The record contains no mention of the current financial status of the loans, and the parties have not apprised us of any change to that status. As a result, there is no reason for this court to ignore the record evidence in this case, namely, that the agreements reached by the Treasurer had many financial benefits for the state. Based on the facts as they are currently before us, it is my belief that the application of sovereign immunity to this case frustrates, rather than serves, the goal behind the doctrine.

In my view, the court's opinion simply concludes that any errors made by the Treasurer in this case constitute errors of contract law. I believe this approach fails to address the crux of plaintiffs' arguments. The question is not whether the Treasurer made a mistake in interpreting a contract or a trust agreement. Rather, the question is whether the Treasurer abdicated her duty by allowing her actions to be dictated by the Attorney General knowing that the financial interests of the state were better served by closing on the agreements. The court states that the Treasurer "should not be placed in the position of having to refuse to hear legal advice in order to avoid violating the constitution." 216 Ill.2d at 266, 296 Ill.Dec. at 837, 836 N.E.2d at 360. I am not advocating putting the Treasurer in the position of "refusing to hear legal advice." The Treasurer in this case did not have to "refuse to hear" the Attorney General's advice, but she did have an obligation to refuse to *follow* that advice when she believed that the advice was not in the best interests of the state. The record makes clear that the Treasurer publicly and openly disagreed with the Attorney General on every level--she believed that her agreements with plaintiffs were valid and that the deal was in the financial interests of the state. ***369 **846** When such conflicts arise amongst constitutional officers, the solution is not for one to "back down" to the other as the court seemingly suggests today. I am concerned about this because I believe this case, at root, represents the ability of our citizens to trust and have faith in the actions of our public officials. They need to trust, for example, when dealing with a state treasurer in negotiations such as these, that another constitutional officer will not be able to "kill" the

deal with such unfettered power. Today's opinion certainly does not allay fears that dealings with state officials are not fair and evenhanded.

I also find another aspect of the court's opinion troubling. The court notes that the proper tribunal for the adjudication of this claim is the Court of Claims. Plaintiffs here, however, are seeking specific performance. During oral argument, the parties were asked whether the Court of Claims can provide the remedy of specific performance. It would appear from the conclusion reached by this court that the implicit answer to that question is yes. The Court of Claims, however, has persistently recognized that it cannot grant equitable relief (see *Garimella v. Board of Trustees of the University of Illinois,* 50 Ill. Ct. Cl. 350 (1996) (and cases cited therein)) despite pronunciations by this court and our appellate court which would appear to take a contrary view. See *Ellis v. Board of Governors of State Colleges & Universities,* 102 Ill.2d 387, 80 Ill.Dec. 750, 466 N.E.2d 202 (1984); *Management Ass'n of Illinois, Inc. v. Board of Regents of Northern Illinois University,* 248 Ill.App.3d 599, 188 Ill.Dec. 124, 618 N.E.2d 694 (1993); *Brucato v. Edgar,* 128 Ill.App.3d 260, 83 Ill.Dec. 489, 470 N.E.2d 615 (1984). Given the differing opinions that exist on this issue and the fact that questions were raised at oral argument with respect to it, I would order additional briefing on the matter so that our opinion in this case would speak clearly on this important issue.

In light of the above, I am unable to join in my colleagues' opinion and respectfully dissent.

APPENDIX

(SEAL)

STATEMENT OF POLICY
OF THE ATTORNEY GENERAL RELATING
TO FURNISHING WRITTEN OPINIONS
Adopted March 29, 1962

The Attorney General of the State of Illinois makes the following statement of policy relating to the constitutional and statutory duty to give written opinions.

A. Persons to Whom Opinions Will Be Issued

1. The Attorney General will furnish written opinions as required by law to the Governor and other elected and appointed State officers upon legal or constitutional questions relating to the duties of those officers, respectively.

2. The Attorney General will furnish written opinions to the officers of either branch of the General Assembly and chairpersons and minority spokespersons of committees thereof on matters that relate to their duties as such.

3. The Attorney General will consult with and advise the several State's Attorneys in matters relating to the duties of their offices and will furnish written opinions to State's Attorneys in matters relating to their official duties, when appropriate.

***370 **847** 4. The Attorney General is not authorized to furnish written opinions to the officers of, or attorneys for, public corporations, municipal corporations, townships or other policital subdivisions of the State, in the absence of specific statutory authority providing therefor.

5. The Attorney General is not authorized to furnish opinions to private persons or entities.

B. Form in Which Opinion Requests Should Be Made

1. Requests must be in the form of a letter and addressed to the Attorney General, attention Opinions Bureau, 500 South Second Street, Springfield, Illinois 62706.

2. All requests must contain a clear, concise question of law and a complete statement of the facts describing the situation out of which the legal issue arises. The Attorney General will not seek out the facts or infer the question from enclosed correspondence. All requests should name a person whom the staff of the Attorney General may contact to discuss the request.

3. Requests made by executive officers, by chairpersons, directors, heads or executive secretaries of boards, commissions, departments and agencies of the State, by officers of the General Assembly and its committees and commissions and by State's Attorneys must be signed or endorsed by such officers.

4. Requests from officers under the jurisdiction of the Governor must also be forwarded through his office, in accordance with his policy.

C. Situations in Which No Opinion Will Be Issued

1. The Attorney General will not furnish opinions regarding the exercise of executive judgment or discretion, nor on questions of fact.

2. The Attorney General will not furnish opinions on questions scheduled for determination by the courts.

3. No opinion should be requested unless a *bona fide* need exists by the party requesting it with respect to the performance of his or her official duties.

4. For a particularly difficult and important question of law, officials should resort to a declaratory judgment action whenever practicable, and the Attorney General may recommend this or other courses of action that may be more appropriate than the issuance of an opinion.

D. Miscellaneous Provisions

1. Officers requesting opinions and interested private parties or other governmental agencies may submit memoranda of law and policy and other statements and material for the consideration by the Attorney General. Such material should be submitted to the attention of the Opinions Bureau in the Springfield office of the Attorney General.
2. All official opinions of the Attorney General are signed by the Attorney General. Informal opinions and other letters signed by Assistant Attorneys General are not official opinions.
3. All opinions are on file in the Attorney General's office in Springfield.
***371 **848** 4. These guidelines do not apply to the furnishing of interpretive opinions by the Attorney General as administrator of the Franchise Disclosure Act of 1987 (815 ILCS 701/1 *et seq*.)
5. In order for the Attorney General to act in the best interests of the public and the State, all guidelines are subject to exception where special circumstances can be shown to warrant an exception.

Please note that it is very helpful for the Attorney General to be apprised of all background information relating to an opinion request. Further, any information relating to the *practical effect* of any particular resolution of a question posed should be included with a request for an opinion.

216 Ill.2d 250, 836 N.E.2d 351, 296 Ill.Dec. 828

END OF DOCUMENT

EXHIBIT G

Court of Claims of Illinois.
A-RELIABLE AUTO PARTS & WRECKERS, INC, Claimant,
v.
THE STATE OF ILLINOIS, Respondent.
(No. 00-CC-1562 Claim Dismissed.)

ORDER filed January 12, 2001.
VINCENT BRIZGYS, Attorney for Claimant.

JAMES E. RYAN, Attorney General (TOMAS A. RAMIEREZ, Assistant Attorney General, of counsel), for Respondent.

EPSTEIN, J.

ORDER

***1** This *replevin* claim against the Secretary of State for the return of the Claimant's confiscated motor vehicle and alternatively for damages, is before the court on the issue of this court's jurisdiction to issue writs of *replevin.* This jurisdictional issue was raised by the court (order of October 13, 2000), and has been separately briefed by the parties. Also pending is the Claimant's motion for summary judgment and the Claimant's motion to amend his complaint to abandon the damages claim, both of which were deferred pending disposition of the jurisdictional issue. (*Ibid.*)

The Respondent contends that this court lacks authority to issue writs of *replevin,* based on the limited jurisdiction granted in/8 of the Court of Claims Act (705 ILCS 505/8), and this court's decisions in *Garimella v. Board of Trustees of the University of Illinois,* 50 Ill.Ct.Cl. 350 (1996) (Court of Claims lack authority to issue injunctions) and *Rudolph v. State of Illinois et al.,* 53 Ill.Ct.Cl58 (No. 94 CC 0311, filed October 4, 2000) (Court of Claims lack authority to issue writs of *mandamus*).

The Claimant urges that because the *replevin* claim asserts that the Secretary of State and its police acted within the scope of [their lawfully authorized duties when the police seized plaintiff's [sic] vehicle. [and] does not allege that the State agency or employee acted outside the scope of its authority or in violation of the law, exclusive jurisdiction must lie in the Illinois Court of Claims *Healy v. Vaupel,* 131 Ill.2d at 311. Claimant contends that the issue in this case concerns the Secretary of State's interpretation of the Vehicle Code and that this court is the sole forum in which to resolve those statutory construction issues. Claimant also relies on *Management Association of Illinois, Inc. v. Board of Regents of Northern Illinois University,* 248 Ill.App.3d 599, 618 N.E.3d 697 (1993) and *Ellis v. Board of Governors of State Colleges and Universities,* 102 Ill.2d 387, 466 N.E.2d 202 (1984) for the proposition that this court has jurisdiction to grant injunctions against the State.

We agree with the Claimant that this court has jurisdiction over the subject matter of the dispute concerning the Secretary of State's seizure of Claimant's property pursuant to a State statute. That much is clear under our jurisdictional statute (/8, Court of Claims Act; 705 ILCS 505/8) and is confirmed by *Healy v. Vaupel, supra.* Thus we have jurisdiction to hear and determine this claim under/8 and could render a declaratory judgment or could award damages if appropriate.

***2** However, our jurisdiction in the sense of authority or empowerment to grant the *remedy* of a writ of *replevin* is a very different matter. This court has simply not been authorized by statute to issue orders mandating or prohibiting actions by any State officer or agency. What we said in *Rudolph, supra* about *mandamus* applies identically to *replevin:*

> The jurisdictional issue concerns our authority to issue writs of *mandamus.* Although, *mandamus* was one of the common law writs, and is a legal rather than equitable remedy as a matter of law and of history, we believe that the issue of this court's authority to grant such relief is governed by *Garimella v. Board of Trustees of the University of Illinois,* 50 Ill.Ct.Cl. 350 (1996)
>
> In *Garimella,* we held that this court lacks the authority to grant injunctive (equitable) relief, because the legislature had not conferred such power upon this court. Writs of *mandamus* directed at State officials or agencies are functionally equivalent to mandatory injunctions. The General Assembly has not conferred such remedial powers on this court in any form. (Moreover, in the years since *Garimella, supra,* the General Assembly has not statutory overruled our decision or empowered us to issue directives to State agencies or officers *Rudolph, supra* at 62).

The decisions in *Management Association of Illinois, Inc., supra,* and *Ellis, supra,* on which Claimant also relies, were reviewed and distinguished in our opinions in *Garimella, supra.* Neither decision provides or identifies a source of authority for this statutory court to issue any kind of mandatory or

prohibitory directives against the State.

Accordingly, we must dismiss the Claimant's plea for a writ of *replevin* for lack of jurisdiction. That, however, does not dispose of the entirety of this claim. There remains a pending alternative claim for damages, and claimant may seek to amend to pursue other relief as well. We will allow the claimant time to amend its complaint or to renew either or both of its pending motions.

Accordingly, it is hereby ORDERED:

1. Claimant's prayer for a writ of *mandamus* is dismissed for lack of jurisdiction;
2. This claim shall remain on the active docket, and Claimant's motions for summary judgment and for leave to amend its complaint are continued; and
3. Claimant is granted leave to file an amended complaint that does not contain a plea for a writ of *replevin* within 35 days after the date of this order;
4. Within 35 days after the date of this order, Claimant shall file a pleading renewing or abandoning its pending motions to amend and for summary judgment.

Not Reported in N.E.2d, 54 Ill.Ct.Cl. 455, 2001 WL 34677738 (Ill.Ct.Cl.)

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EXHIBIT H

99-CC-2001

Court of Claims of Illinois.
ACE COFFEE BAR, INC., Claimant,
v.
THE UNIVERSITY OF ILLINOIS, Respondent.

Opinion filed May 14, 1999.

JURISDICTION--*Court lacks injunctive authority but can make declaratory adjudications.*
Although the Court of Claims has no authority to issue injunctive relief, the Court can make declaratory adjudications in appropriate cases pursuant to its authority to hear and determine claims against the State.

JURISDICTION--*contract jurisdiction conferred by Court of Claims Act.*
Section 8(b) of the Court of Claims Act is the Court's contract jurisdiction and authorizes the Court to adjudicate claims against the State founded upon any contract entered into with the State of Illinois.

JURISDICTION--*vendor's claim alleging improper bidding process dismissed for lack of jurisdiction.*
A vendor's claim for declaratory and injunctive relief against a university arising out of an allegedly improper bidding process awarding a contract was dismissed for lack of subject matter jurisdiction, since the Court has no injunctive authority, and with regard to the vendor's request for declaratory relief, the Court lacked section 8(b) contract jurisdiction because the bid dispute was not a claim "founded upon" a contract within the meaning of the statute.

CALLAHAN, FITZPATRICK, LAKOMA & MCGLYNN (MICHAEL G. CONELLY, of counsel), for Claimant.

QUINLAN & CRISHAM, LTD. (MICHAEL I. ROTHSTEIN, of counsel), for Respondent.

OPINION

EPSTEIN, J.

***1** This claim for declaratory and injunctive relief against the University of Illinois is before the Court on the Respondent's section 2--619 motion to dismiss for want of subject matter jurisdiction and its section 2--615 motion to dismiss for failure to state a cause of action. Claimant has belatedly filed a response to part of the section 2--619 motion, which we allow *instanter*, but not to the section 2--615 motion. 735 ILCS 5/2--615, 2--619.

Nature of the Claim

This claim arises out of a competitive bidding by the Respondent University for the vending food and beverage services at, apparently, its Chicago campus. Claimant's complaint alleges that the Respondent issued a request for proposals ("RFP") in late 1997 that solicited competitive bids for a 5-year contract to provide those vending services, which was followed by a series of communications between University officials and prospective bidders in which the requirements and conditions of the solicited bids were discussed and the University is alleged to have made representations as to particular bid requirements (as to how commission rates could and could not vary for various components of the proposed contract). See pars. 4-10 of complaint.

Claimant alleges that the University improperly awarded the contract to a bidder that violated the bidding requirements (*id.*, par. 11), and asks for declaratory and injunctive relief--presumably at least partly in the alternative--to: (i) declare the winner's bid improper, declare all bids rejected, and clarify the RFP terms; (ii) enjoin the "enforcing" of the contract that was entered; (iii) order the Respondent to reconsider the bids that conformed to the RFP and to ascertain the best bid; and (iv) order a rebidding. *Id.*, prayer, at 4.

The Section 2--619 Jurisdictional Motion

We necessarily take up the section 2--619 motion first, as it attacks this Court's jurisdiction, which is always the threshold inquiry. Respondent's motion in this case attacks both aspects of subject matter jurisdiction: (1) remedial jurisdiction, *i.e.*, the Court's authority or power to grant the relief requested, and (2) adjudicatory jurisdiction, *i.e.*, the Court's authority to decide a particular issue or claim. Specifically, Respondent asserts that this Court lacks authority to make declaratory judgments or to grant injunctions; and that we cannot adjudicate this claim under our contract jurisdiction (see section 8(b) of the Court of Claims Act, 705 ILCS 505/8(b)) because there was no contract between the Claimant and the Respondent on which to predicate such jurisdiction.

Remedial Jurisdiction: Injunctions and Declarations

***2** We need not detail the parties' arguments on our injunctive power, because this Court has firmly held that we have none. (*Garimella v. Board of Trustees of the University of Illinois* (1996), 50 Ill. Ct. Cl. 350.) Claimant's arguments and the decisions it cites were

considered in *Garimella, supra.* Since our decision in *Garimella*, the General Assembly has not seen fit to enact a statute granting us injunctive power and the Supreme Court has not addressed the issue. We adhere to *Garimella.* This Court lacks authority to issue the injunctive orders requested in this case.

We reject, however, Respondent's contention that this Court lacks jurisdiction to make declarations of rights vis-a-vis the State. Although that authority is not spelled out explicitly in the Court of Claims Act, it is implicit in the statute's grant of authority to adjudicate--to "hear and determine" claims against the State (705 ILCS 505/8), and this Court has issued declarations with and without monetary awards since virtually the Court's creation in 1903 under several successive enabling Acts, and has previously upheld our declaratory jurisdiction. *See, e.g., Toledo, Peoria & Western R.R. Co. v. State* (1995), 48 Ill. Ct. Cl. 25, 27, and cases cited therein.

We observe that there are cases where a declaration by this Court--as the Court with the "exclusive jurisdiction" under the State Immunity Act (745 ILCS 5/1 *et seq.*) and under the Court of Claims Act--can be the *only* legal remedy for citizens who assert property and contract rights against the State. Such rights cannot ordinarily be enforced in the constitutional Courts, which are ousted of jurisdiction by statutory sovereign immunity unless the *State* elects to initiate a suit there, which the State may or may not ever choose to do.

Even when the State does elect to sue in the Circuit Court, the defendant's right to countersue the State in that lawsuit remains limited by sovereign immunity. Even when the State opens the door to Circuit Court jurisdiction, sovereign immunity closes that courthouse door to the point where *only* "defensive counterclaims that are asserted for the purpose of defeating the state's action, and not for the purpose of obtaining an affirmative judgment against the state" are permissible. See *People ex rel. Manning v. Nickerson* (1998), 184 Ill. 2d 245, 249-250, 702 N.E.2d 1278, 1280, 234 Ill. Dec. 375, 377 (State's claim for injunction to remove building from State land and for damages for use of the property, defendant's counterclaim for quiet title and ejectment allowed as same issue, but tort counterclaims barred by sovereign immunity).

***3** The *Nickerson* decision points out a significant category of cases where this Court's declaratory judgment authority is crucial. These are cases where a citizen disputes the State's title to real property, such as State easements and other defeasible or contingent interests in land. Without declaratory relief from this Court, a landowner or property Claimant may have no remedy at all to adjudicate their claimed rights. The ability to resolve legal title, which is critical to the free alienability of land and has been a fundamental precept of our English-American legal system for almost a thousand years, strongly militates for *some* Court to have jurisdiction to determine and declare legal ownership.

Although Illinois' sovereign immunity doctrine bifurcates jurisdiction between the constitutional Courts and this statutory Court, there is no apparent sovereign immunity reason to prohibit declaratory adjudications of land ownership whenever the State claims to be in title, as long as it is done in the proper forum. Indeed, our Supreme Court has held that such title disputes *must* be decided by this Court (*Gordon v. Department of Transportation* (1983), 99 Ill. 2d 44, 457 N.E.2d 403, 75 Ill. Dec. 409; *see also, Sass v. Kramer* (1978), 72 Ill. 2d 485, 381 N.E.2d 975, 21 Ill. Dec. 528), which is inhibited if not prohibited if declaratory judgments are not allowed. And if allowed for that purpose, it is not obvious why they are impermissible for other kinds of claims that may also be "heard and determined" by this Court. Certainly the Court of Claims Act makes no such distinction.

We also observe that, although less common, disputes over personalty can also generate ownership claims in this Court. This Court has even decided the ownership of a submarine embedded in Illinois (albeit in submerged ground). *See, A & T Recovery, Inc. v. State* (1996), 48 Ill. Ct. Cl. 490.

While these considerations are not a basis for expanding the purely statutory jurisdiction of this Court beyond the bounds of the statutory language, they are a strong reason not to adopt a cramped view of our authority in cases that we are given the power to "hear and determine."

For all of these reasons, where the law grants this Court jurisdiction to "hear and determine" a matter (705 ILCS 505/8), and that matter will be "determined" by a declaration of rights, this Court cannot decline to decide the claim merely because a monetary award is not sought or does not then lie. This Court can grant declarations in appropriate cases. This conclusion leads us to the second half of Respondent's section 2--619 motion: whether we have jurisdiction to decide this particular claim.

Adjudicatory Jurisdiction

***4** Respondent's section 2--619 motion contends that

this claim does not fall within section 8(b) of the Court of Claims Act (705 ILCS 505/8(b)) (the "Act"), which is the sole jurisdictional basis asserted by this Claimant. (See par. 3 of complaint.) Section 8(b) is this Court's "contract" jurisdiction that authorizes us to adjudicate "claims against the State founded upon any contract entered into with the State of Illinois." The jurisdictional analysis of whether this Court is empowered to "hear and determine" this claim under section 8 of the Court of Claims Act is, therefore, whether this is a claim "founded upon" a contract of the University.

Respondent argues that there is no contract between the Respondent and the Claimant that might support this Court's jurisdiction, and vigorously contends that the RFP itself--which the University issued and to which the Claimant and others responded--is not itself a contract and creates no protectible property (contract) rights under applicable Illinois law, citing *Polyvend v. Pickorius* (1979), 77 Ill. 2d 287, 395 N.E.2d 1376, but is merely an invitation for the submission of contract offers *to* the bid solicitor, here the University, citing *Hassett Storage Warehouse, Inc. v. Board of Election Commissioners* (1st Dist. 1979), 69 Ill. App. 3d 972, 387 N.E.2d 785; *Premier Electric Construction Co. v. Board of Education of City of Chicago* (1st Dist. 1979), 70 Ill. App. 3d 866, 388 N.E.2d 1088.

We agree that under Illinois law the RFP is not itself a contract and that an RFP does not give rise to contract rights or even, under *Polyvend, supra*, to protective property rights for due process purposes. Thus, it is fairly clear that no contract claim in the ordinary sense of that term--*i.e.*, a claim sounding in contract, asserting rights that arise by virtue of a contract--is or can be asserted on the basis of the RFP. That exhausts the arguments advanced to us and compels the conclusion that a section 8(b) contract claim is not presented here.

However, this straightforward contract claim analysis leaves one potentially dangling issue. Given the statutory language of section 8(b), we must ask whether this bid dispute can be said to be "founded upon" the one contract that is alleged in the complaint, *i.e.*, the contract awarded to the successful bidder that is challenged here on the ground that it was improperly awarded. Although it seems apparent that this dispute was triggered by the award of the contract, we conclude that that does not make this bid dispute a claim "founded upon" that contract. This claim is ultimately about the bid process, and only incidentally about the awarded contract. In reaching this conclusion, we make no categorical pronouncement on whether or not this Court's section 8(b) contract jurisdiction can extend beyond straightforward breach of contract and contract construction claims. The Court holds only that its section 8(b) jurisdiction does not reach this bidding dispute in which an unsuccessful bidder seeks to remedy an allegedly improper bidding process.

Conclusion and Order

***5** For the foregoing reasons, it is hereby ordered: This claim is dismissed for want of subject matter jurisdiction under section 8(b) of the Court of Claims Act.

Not Reported in N.E.2d, 51 Ill.Ct.Cl. 395, 1999 WL 33246477 (Ill.Ct.Cl.)

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EXHIBIT I

United States District Court,N.D. Illinois, Eastern Division.

Isaac D. JOHNSON, Plaintiff,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Defendant.

No. 03 C 00236.

Sept. 11, 2003.

John F. O'Meara, Attorney at Law, Chicago, IL, Isaac D. Johnson, pro se, Northbrook, IL, for plaintiff.
Robert E. Arroyo, Paul A. Patten, Jackson Lewis LLP, Chicago, IL, for defendant.

MEMORANDUM OPINION AND ORDER

GUZMAN, J.

***1** Plaintiff Isaac D. Johnson ("Johnson") has sued defendant Board of Trustees of the University of Illinois ("Board"). The Board has moved to dismiss Count II of the complaint pursuant to Fed.R.Civ.P. ("Rule") 12(b)(6). For the reasons provided in this Memorandum Opinion and Order, the Court grants the Board's motion to dismiss Count II of the complaint.

FACTS

On March 17, 2003, plaintiff Johnson filed a complaint against defendant Board of Trustees of the University of Illinois that alleges in Count I, race discrimination under Title VII of the Civil Rights Act, and in Count II, breach of the contract and settlement agreement stemming from an earlier case involving the parties. Compl. at p. 8 ¶ 1, 51-52. The motion to dismiss deals solely with Count II.

The settlement agreement arose as a result of settling *Johnson v. Univ. of Illinois,* No. 90 C 0968. Those who signed the agreement include Johnson, two of Johnson's attorneys, counsel for the University of Illinois at Chicago, and the controller and secretary of the Board of Trustees of the University of Illinois. Compl. Ex. A at 5. Contained within the contract is no agreement that the Northern District of Illinois shall have jurisdiction over enforcement of the contract. Compl. Ex. A. Judge Duff's final agreed order in this case stated:

IT IS HEREBY ORDERED THAT:

Petitioner Isaac D. Johnson's second petition for rule to show cause is dismissed with prejudice, all matters at issue having been fully compromised and settled, except that petitioner may file a petition for attorneys' fees and costs with respect to his second petition for rule to show case and the settlement thereof.

Id.

The Board moves to dismiss Count II for want of jurisdiction, arguing, inter alia, that the Illinois Court of Claims has exclusive jurisdiction over enforcement of contracts that involve the State as a party. Johnson responds, inter alia, that the Court retained jurisdiction over the settlement, and that the Board waived immunity by appearing before the Court pursuant to which the Agreed Order was entered.

DISCUSSION

Rule 12(b)(6) provides that a claim can be dismissed for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Thus, the rule authorizes a court to dismiss a claim based on an issue of law. *Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989). When making a determination as to whether a claim should be dismissed under Rule 12(b)(6), the court needs to assume that all facts alleged are true. *Id., see also Nat'l. Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 114 S.Ct. 798, 803, 127 L.Ed.2d 99 (1994). A claim must be dismissed if "as a matter of law, it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Neitzke,* 109 S.Ct. at 1832 (internal citation omitted). Thus, a "patently insubstantial complaint may be dismissed ... for want of subject-matter jurisdiction." *Id.*

***2** A state is a sovereign and is therefore, immune from suit. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 119 S.Ct. 2219, 2223, 144 L.Ed.2d 605 (1999). The State can waive its right to sovereign immunity by consenting to suit. *Id.* The test for determining whether immunity from federal-court jurisdiction has been waived by the State is a "stringent one." *Id.* Thus, a State does not consent to suit in the federal courts merely because it consents to suit in one of its own courts. *Id.*

The "classic" way to waive immunity is by "intentional relinquishment or abandonment of a known right or privilege." *Id.* (internal citation omitted). As such, a court must be shown that the State waived sovereign immunity either by "the most

express language or by such overwhelming implications ... as will leave no room for any other reasonable construction." *Ranyard v. Bd. of Regents,* 708 F.2d 1235, 1239 (7th. Cir.1983).

In Illinois, the Court of Claims has exclusive jurisdiction to hear and determine claims against the State founded upon any contract entered into with the State of Illinois. 705 ILCS 505/8. The Board of Trustees of the University of Illinois is an arm of the state, is not autonomous or independent of the State of Illinois, and therefore, contractual suits against it must be filed in the Court of Claims. *Tanner v. Bd. of Tr. of the Univ. of Illinois,* 48 Ill.App.3d 680, 6 Ill.Dec. 679, 363 N.E.2d 208, 210 (Ill.App.Ct.1977), *see also Ellis v. Bd. of Governors of State Coll. and Univ.,* 102 Ill.2d 387, 80 Ill.Dec. 750, 466 N.E.2d 202 (Sup.Ct.Ill., 1984) (holding that because the Board is the State for sovereign immunity purposes, all claims sounding in contract must be brought in the Court of Claims). Thus, simply because the State enters into and is obligated under a contract does not mean that it consents to suit in a place other than the Court of Claims. *Raymond v. Goetz,* 262 Ill.App.3d 597, 200 Ill.Dec. 13, 635 N.E.2d 114 (Ill.App.Ct.1994).

When the contract is a settlement agreement, the district court may have the power to enforce it under two circumstances: 1) where there is an independent basis for jurisdiction or 2) when the court retained jurisdiction over the settlement agreement in its final order. *VMS Sec. Litigation v. Prudential Sec. Inc.,* 103 F.3d 1317, 1321 (7th. Cir.1996). In *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), the Supreme Court held that when a district court simply dismisses a claim under Fed. Rule Civ. Pro. ("Rule") 41(a)(1)(ii), "by filing a stipulation of dismissal signed by all parties who have appeared in the action and causes the dismissal to be with prejudice, if the stipulation so specifies," "jurisdiction of the court over disputes arising out" of that agreement is not implied. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994) (internal citation omitted). Instead, because enforcement of the settlement agreement "is more than just a continuation or renewal of the dismissed suit," the district court must require its own basis for jurisdiction. *Id.* at 1675-76.

***3** For example, in *United Steel Workers of Am. v. Libby,* 895 F.2d 421 (7th. Cir.1990), the district court entered an order of dismissal that read as follows:
The Court having approved the Settlement Agreement, Response and Covenant Not to Sue, entered into by the parities ... IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint and the Counterclaim be and hereby are dismissed, with prejudice, each party bearing its own costs and attorney's fees.

United Steel Workers of Am. v. Libby, 895 F.2d 421, 422 (7th. Cir.1990). The terms of the settlement agreement were made a part of the record after the judge and the parties signed the settlement agreement. *Id.* When one of the parties later sought assistance from the district court in interpreting the settlement agreement, the Seventh Circuit held that the district court's outright dismissal of the case did not leave the court any basis for subsequent exercise of jurisdiction with regards to the settlement agreement. *Id.* at 422, 423-24. The court reasoned that in order for the district court to have jurisdiction over the settlement agreement, it needed to be possible to infer that the judge intended to retain jurisdiction. *Id.* at 423. There, the court stated that there was nothing in the order of dismissal to indicate any intention to retain jurisdiction over completion of the parties' agreement. *Id.*

In this case before us the Court lacks jurisdiction with regard to the settlement agreement. First, there is no independent basis for jurisdiction. Illinois law clearly states that contract claims involving the State must be brought in the Court of Claims unless the State waives that requirement. Here, the Board is the state for contract purposes.

Thus, in order for the Court to have jurisdiction, waiver must be shown. However, there is no indication of intentional relinquishment or abandonment of the right to immunity by the Board. There is no express language used by the Board to waive its right contained within the settlement agreement. Thus, the Board did not waive its right.

Secondly, there is no showing that the Court retained jurisdiction over the settlement agreement entered into by Johnson and the Board. Like *United Steel Workers,* the ordered of dismissal entered by Judge Duff contained no words to indicate any inference or intention to retain jurisdiction over completion of the parties' agreement. The two orders are nearly identical, the main difference being with how attorney's fees and costs would be dealt. However, language stating that Johnson could file a petition for costs and attorney's fees has nothing to do with the actual enforcement of the settlement agreement. Therefore, the order did not leave the Court any basis for subsequent exercise of jurisdiction with regards to the settlement agreement.

CONCLUSION

For the foregoing reasons, the Court grants the Board's motion to dismiss Count II of the complaint [# 6].

***4** SO ORDERED

N.D.Ill.,2003.
Johnson v. Board of Trustees of University of IL.
Not Reported in F.Supp.2d, 2003 WL 22117778 (N.D.Ill.)

Briefs and Other Related Documents (Back to top)

- 2003 WL 23666252 (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Motion to Dismiss (Apr. 29, 2003)
- 2003 WL 23666241 (Trial Motion, Memorandum and Affidavit) Plaintiff's Response to Defendant's Motion to Dismiss Count II (Apr. 14, 2003)
- 2003 WL 23666229 (Trial Pleading) Answer and Affirmative Defenses to Count I of Complaint (Mar. 17, 2003)
- 2003 WL 23666224 (Trial Pleading) Complaint (Jan. 13, 2003)
- 1:03CV00236 (Docket) (Jan. 13, 2003)

END OF DOCUMENT

CERTIFICATE OF SERVICE

JOHN E. HUSTON, one of the attorneys of record for the Defendant, hereby certifies that he caused a copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMORANDUM REGARDING ENFORCEMENT OF SETTLEMENT AGREEMENT** to be served by the Court's ECF/electronic mailing system upon the following:

Sarah Megan
Eliot Ababanel
Bernard H. Shapiro
Prairie State Legal Services
350 S. Schmale Rd., #150
Carol Stream, IL 60188

/s/*John E. Huston*____