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## Sovereign Immunity--Contract Obligations Can Be Enforced against the State of Oklahoma in an Ordinary Action at Law

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# RECENT DEVELOPMENTS

SOVEREIGN IMMUNITY—CONTRACT OBLIGATIONS CAN BE ENFORCED AGAINST THE STATE OF OKLAHOMA IN AN ORDINARY ACTION AT LAW. *State Board of Public Affairs v. Principal Funding Corp.*, 542 P.2d 503 (Okla. 1975).

In *State Board of Public Affairs v. Principal Funding Corp.*,<sup>1</sup> the Oklahoma Supreme Court held that when

a person or entity enters into a valid contract with the proper State officials and a valid appropriation has been made therefor, the State has consented to being sued and waived its governmental immunity to the extent of its contractual obligations and such contractual obligations may be enforced against the State in an ordinary action at law.<sup>2</sup>

In so holding, the supreme court took a step, albeit small, towards abrogating the state's sovereign immunity from suit on its contracts.<sup>3</sup>

Principal Funding had entered into a written rental agreement with the State Board of Public Affairs.<sup>4</sup> The state refused to pay some of the rental installments due under the agreement because it believed the lease to be terminated. Principal Funding then brought an action at law against the state to recover the rental payments allegedly due. The state demurred on the ground that the trial court lacked jurisdiction over it in

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1. 542 P.2d 503 (Okla. 1975). This case was first considered by the Oklahoma Supreme Court in *State ex rel. State Bd. of Pub. Affairs v. Principal Funding Corp.*, 519 P.2d 503 (Okla. 1974).

2. 542 P.2d at 506. This holding modified *State ex rel. Department of Highways v. McKnight*, 496 P.2d 775 (Okla. 1972), and cases of similar import cited note 7 *infra*. *State ex rel. State Bd. of Pub. Affairs v. Principal Funding Corp.*, 519 P.2d 503 (Okla. 1974), was overruled.

3. In *Schrom v. Oklahoma Indus. Dev.*, 536 P.2d 904 (Okla. 1975), the supreme court carved out an exception to sovereign immunity in tort actions. There it was held that a department of the state which has purchased liability insurance has waived its immunity to the extent of the insurance coverage and thus given its consent to be sued.

4. The State Board of Public Affairs is responsible for making "all necessary contracts by or on behalf of the State for any buildings or rooms rented for the use of the State . . . ." OKLA. STAT. tit. 74, § 63 (1971).

such an action in the absence of its express consent to suit. The trial court overruled the demurrer. On appeal, the supreme court held that an ordinary action at law could not be maintained against the state without its express consent. However, it also noted that when the state has properly entered into a contract for which a valid appropriation has been made and then refuses to pay its legal contractual obligations after the other party to the contract has fully performed, that an action in mandamus would lie to compel the state's payment of the obligation.<sup>5</sup> Upon remand, Principal Funding proceeded in mandamus and was granted the requested relief. The state appealed and the supreme court handed down the decision under consideration here.

As exemplified by the holding of the Oklahoma Supreme Court in its first consideration of the *Principal Funding* case,<sup>6</sup> the rule in Oklahoma has been, prior to the holding in the second *Principal Funding* decision, that the state in its sovereign capacity cannot be sued without its express consent.<sup>7</sup> This rule became part of the common law in Oklahoma as in many states. In some states this principle has become law through constitutional provision.<sup>8</sup> The rationale for the sovereign's immunity from suit<sup>9</sup> has ancient origins. It was alluded to in the seventeenth century by Thomas Hobbes.

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5. *State ex rel. State Bd. of Pub. Affairs v. Principal Funding Corp.*, 519 P.2d 503, 505 (Okla. 1974).

6. *Id.*

7. *See Henry v. Oklahoma Turnpike Auth.*, 478 P.2d 898 (Okla. 1970), *citing State ex rel. Department of Highways v. Keen*, 354 P.2d 399 (Okla. 1960); *State ex rel. Williamson v. Superior Court*, 323 P.2d 979 (Okla. 1958); *Duncan v. State Highway Comm'n*, 311 P.2d 203 (Okla. 1957); *State ex rel. Commissioners of Land Office v. Duggins*, 258 P.2d 891 (Okla. 1955); *Mountcastle v. State*, 193 Okla. 506, 145 P.2d 392 (1944); *Donaldson v. Board of Regents*, 190 Okla. 269, 122 P.2d 139 (1942); *Patterson v. City of Checotah*, 187 Okla. 587, 103 P.2d 97 (1940); *Jack v. State*, 183 Okla. 375, 82 P.2d 1033 (1937); *State Highway Comm'n v. Adams*, 178 Okla. 270, 62 P.2d 1013 (1937); *State Highway Comm'n v. Brixey*, 178 Okla. 118, 61 P.2d 1114 (1936); *Hawks v. Walsh*, 177 Okla. 564, 61 P.2d 1109 (1936); *Antrim Lumber Co. v. Sneed*, 175 Okla. 47, 52 P.2d 1040 (1936); *Wentz v. Potter*, 167 Okla. 154, 28 P.2d 562 (1934); *State ex rel. Commissioners of Land Office v. Board of Comm'rs*, 166 Okla. 78, 25 P.2d 1074 (1933); *Hawks v. Bland*, 156 Okla. 48, 9 P.2d 720 (1932); *National Sur. Co. v. State Banking Bd.*, 49 Okla. 184, 152 P. 389 (1915); *Love v. Filtsch*, 33 Okla. 131, 124 P. 30 (1912); *James v. Trustees of Wellston Township*, 18 Okla. 56, 90 P. 100 (1907).

8. *See* ALAS. CONST. art II, § 21; ARIZ. CONST. art. 4, § 18; CAL. CONST. art. 3, § 5; CONN. CONST. art. 11, § 4; DEL. CONST. art. 1, § 9; FLA. CONST. art. 10, § 13; IND. CONST. art. 4, § 24; KY. CONST. § 231; LA. CONST. art. 3, § 35, art. 19, § 26; MICH. CONST. art. 9, § 22; NEV. CONST. art. V, § 22; N.Y. CONST. art. 6, § 18(b), art. 6, § 9; N.D. CONST. art. I, § 22; OHIO CONST. art. I, § 16; ORE. CONST. art. IV, § 24; PA. CONST. art. 1, § 11; S.C. CONST. art. 17, § 2; S.D. CONST. art. III, § 27; TENN. CONST. art. 1, § 17; WASH. CONST. art. 2, § 26; WIS. CONST. art. 4, § 27; WYO. CONST. art. 1, § 8.

9. The state's immunity from suit must be distinguished from its immunity from liability. Immunity from suit developed from the premise that the king is sovereign.

The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civil Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that can bind, can release; and therefore he that is bound to himselfe onely, is not bound.<sup>10</sup>

Justice Holmes explained the rationale when he said: "A sovereign is exempt from suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."<sup>11</sup>

The holding in the second *Principal Funding* decision represents a logical modification of a line of cases developing from dicta in one of the first Oklahoma cases upholding the state's immunity from suit on its contracts.<sup>12</sup> *Love v. Filtsch*<sup>13</sup> was an action in mandamus to compel the payment of rent by the state growing out of its contract with a private individual. The claim was denied on the ground that the state could not be sued without its express consent. However, in disallowing the claim, the court also seemed to be influenced by the fact that the legislature had made no appropriation of funds for the contract and that the amount of the claim was disputed.<sup>14</sup> Two interlocking principles can be drawn from the cases that have developed from this dicta in *Love*. If, on the one hand, no definite fund has been set aside by the state specifically for the payment of its obligation under a contract, a judg-

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See 1 W. BLACKSTONE, COMMENTARIES \*243; 2 H. BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 33 (Thorne ed. 1968). Immunity from liability developed from the familiar premise that the "king can do no wrong," that the king is possessed with absolute perfection in his political capacity. See 1 W. BLACKSTONE, COMMENTARIES \*246. In the contract area, sovereign immunity from suit is of primary concern.

10. T. HOBBS, LEVIATHAN ch. 26, pt. 2, at 141 (1914).

11. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). See also *Seaboard Air Line R.R. v. Sarasota-Fruitville Drainage Dist.*, 255 F.2d 622 (5th Cir.), cert. denied, 358 U.S. 836 (1958); *Crain v. Government of Guam*, 195 F.2d 414 (9th Cir. 1952); *Bergner v. State*, 144 Conn. 282, 130 A.2d 293 (Sup. Ct. Err. 1957); *Bergner v. State*, 20 Conn. Supp. 503, 141 A.2d 253 (Super. Ct. 1958); *Cox v. Board of Comm'rs*, 181 Md. 428, 31 A.2d 179 (1943); *Dougherty v. Vidal*, 37 N.M. 256, 21 P.2d 90 (1933); *State ex rel. Department of Highways v. McKnight*, 496 P.2d 775 (Okla. 1972); *Griffis v. State*, 68 S.D. 360, 2 N.W.2d 666 (1942); *Springville Banking Co. v. Burton*, 10 Utah 2d 100, 349 P.2d 157, 167 (1960) (Henriod, J., commenting on concurring opinion of Wade, J.).

12. *Love v. Filtsch*, 33 Okla. 131, 124 P. 30 (1912).

13. *Id.*

14. *Id.* at 135, 124 P. at 32.

ment against it would operate directly to control the action of the state and subject it to liability because the judgment would have to be paid out of general state funds. Therefore, such a suit could not be maintained against the state without its express consent.<sup>15</sup> If, on the other hand, the state has set aside a definite sum for the payment of a contractual obligation in the form of an appropriation or other legislative enactment, an action in mandamus can be brought against the state for the payment of the claim.<sup>16</sup> Mandamus will lie in such a situation because the fact that there is a definite sum for payment of the claim gives the plaintiff a clear legal right to the requested relief.<sup>17</sup> This latter principle was the basis for the cause of action suggested to the plaintiff by the court in the first *Principal Funding* decision.<sup>18</sup>

The second *Principal Funding* decision retained the requirement of an appropriation of some sort for maintenance of suit against the state.<sup>19</sup>

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15. See, e.g., *State Highway Comm'n v. Green-Boots Constr. Co.*, 199 Okla. 477, 187 P.2d 209 (1947); *First Nat'l Bank v. Bradley*, 186 Okla. 488, 98 P.2d 897 (1940); *Potter v. State Highway Comm'n*, 184 Okla. 171, 86 P.2d 293 (1939); *State Highway Comm'n v. Brixey*, 178 Okla. 118, 61 P.2d 1114 (1936); *Hawks v. Walsh*, 177 Okla. 564, 61 P.2d 1109 (1936); *Antrim Lumber Co. v. Sneed*, 175 Okla. 47, 52 P.2d 1040 (1935); *Wentz v. Potter*, 167 Okla. 154, 28 P.2d 562 (1934); *National Sur. Co. v. State Banking Bd.*, 49 Okla. 184, 152 P. 389 (1915); *State Banking Bd. v. Oklahoma Banker's Trust Co.*, 49 Okla. 72, 151 P. 566 (1915); *Lankford v. Schroeder*, 47 OKLA. 279, 147 P. 1049 (1915); *Lovett v. Lankford*, 47 Okla. 12, 145 P. 767 (1915).

16. Such an action would be against the state auditor.

The State Auditor shall be the disbursing agency of the State and shall draw either checks or warrants payable at the State Treasury, in payment of all claims, including payrolls, against the State which shall be by law directed to be paid out of the Treasury.

OKLA. STAT. tit. 62, § 41.18 (1971).

17. See, e.g., *Fortinberry Co. v. Blundell*, 206 Okla. 261, 242 P.2d 427 (1952); *State Highway Comm'n v. Green-Boots Constr. Co.*, 199 Okla. 477, 187 P.2d 209 (1947); *Carter v. Miley*, 187 Okla. 530, 103 P.2d 933 (1940); *State ex rel. Telle v. Carter*, 170 Okla. 50, 39 P.2d 134 (1934); *Edwards v. Carter*, 167 Okla. 287, 29 P.2d 610 (1934); *Riley v. Carter*, 165 Okla. 262, 25 P.2d 666 (1933). *But cf. Marland v. Hoffman*, 184 Okla. 391, 89 P.2d 287 (1939); *Champlin v. Carter*, 78 Okla. 300, 190 P. 679 (1920). For a writ of mandamus to issue, *Marland* and *Champlin* required a showing of a plain legal duty on the part of the respondent not involving the exercise of discretion, and lack of an adequate remedy at law for the plaintiff. These are also required by statute in Oklahoma before a writ of mandamus can issue. OKLA. STAT. tit. 12, §§ 1451-52 (1971). However, in comparing *Marland* and *Champlin* with the cases cited at the beginning of this note, it appears that these two requirements are not in issue when the plaintiff can show a clear legal right to satisfaction of his claim by reason of the existence of a specific fund set aside therefor by a legislative appropriation or other legislative enactment.

18. *State ex rel. State Bd. of Pub. Affairs v. Principal Funding Corp.*, 519 P.2d 503, 505 (Okla. 1974). Mandamus as a possible remedy against the state to compel payment of a claim was also recognized by the court in *State ex rel. Department of Highways v. McKnight*, 496 P.2d 775, 784 (Okla. 1972).

19. OKLA. CONST. art. 5, § 55 provides in part: "No money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of the funds under its man-

However, the requirement that the action be brought in the form of mandamus has no been eliminated. The importance of the second *Principal Funding* decision is that it allows an *action at law* to be maintained against the state upon a contract without its express consent so long as there has been an appropriation for the contract.

Oklahoma is not alone in its requirement of an appropriation before a suit can be instituted against the state without its consent.<sup>20</sup> However, some states have judicially abrogated the doctrine of sovereign immunity from suit on contracts under different theories where no such requirement is made,<sup>21</sup> and a few states have eliminated the doctrine entirely through legislative enactment, establishing special courts of claims to handle such actions against the state.<sup>22</sup> It is submitted that Oklahoma should follow these latter states and rid itself of, as Justice Traynor put it, this "anachronism without rational basis."<sup>23</sup> Opponents of the doctrine have reasoned that if a state is to gain the benefits of its contracts, it should also shoulder the burdens. Eliminating this vestige of government irresponsibility would seem to be especially urgent today when the public's desire for government responsibility is so strong.

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agement, except in pursuance of an appropriation by law . . . ." A case strictly construing this section is *Ling-Leeper Lumber Co. v. Carter*, 161 Okla. 5, 17 P.2d 365 (1933). There are, however, situations where an appropriation per se is not required. *See, e.g., Fortinberry Co. v. Blundell*, 206 Okla. 261, 242 P.2d 427 (1952); *State ex rel. Telle v. Carter*, 170 Okla. 50, 39 P.2d 134 (1934); *Edwards v. Carter*, 167 Okla. 287, 29 P.2d 610 (1934); *Riley v. Carter*, 165 Okla. 262, 25 P.2d 666 (1933). Thus, the Oklahoma courts may, under certain circumstances, interpret the appropriation requirement liberally.

20. The Indiana Supreme Court so held in *Carr v. State*, 127 Ind. 204, 26 N.E. 778 (1891). The "appropriation" rationale of this case has been followed by many courts which have abrogated contract immunity, although some of these courts have modified the rationale somewhat. *See, e.g., Ace Flying Serv., Inc. v. Colorado Dep't of Agric.*, 136 Colo. 19, 314 P.2d 278 (1957), *aff'd on rehearing*, 141 Colo. 467, 348 P.2d 962 (1960); *George & Lynch, Inc. v. State*, 197 A.2d 734 (Del. 1964); *Regents of Univ. Sys. v. Blanton*, 49 Ga. 602, 176 S.E. 673 (Ga. App. 1934); *Grant Constr. Co. v. Burns*, 92 Idaho 408, 443 P.2d 1005 (1968); *V.S. DiCarlo Constr. Co. v. State*, 485 S.W.2d (Mo. 1972); *Muns v. State Bd. of Educ.*, 127 Mont. 515, 267 P.2d 981 (1954).

21. For a thorough discussion of the different theories adopted by courts in their abrogation of contract immunity see Comment, *Sovereign Immunity in Contract Suits: Victim of Judicial Abrogation in Iowa*, 59 IOWA L. REV. 360, 365 (1973).

22. The most comprehensive of these are: N.Y. CT. CL. ACT §§ 1-30 (McKinney 1963), *as amended*, (McKinney Supp. 1975-76); WASH. REV. CODE §§ 4.92.010-170 (1962), *as amended*, (Supp. 1974), §§ 4.96.010-020 (Supp. 1974).

23. *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).