2002

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STATE COURT SOVEREIGN IMMUNITY: JUST WHEN IS THE EMPEROR ARMOR-CLAD?

Jack Druff*

I. INTRODUCTION

Imagine yourself the State’s attorney involved in highly sensitive preliminary negotiations to settle a class action lawsuit involving a politically charged topic such as school desegregation or prison reform. In the course of negotiations, the presiding judge informs you that the State may not only have waived sovereign immunity by the very act of exploring settlement but that, regardless of whether the court actually approves the settlement, the State might further be bound by concessions it provisionally agreed to make as a condition of settlement. Such a situation, unthinkable in a private class action, may actually arise under current Arkansas law, which appears to provide that officers of the executive branch, whether wittingly or not, can waive the State’s sovereign immunity by their conduct and can commit the State to various positions simply by provisionally subscribing to them in the course of settlement negotiations.

The ensuing discussion addresses the Arkansas Supreme Court’s theoretically disturbing and often self-contradictory pronouncements on the issue of the State’s sovereign immunity. Part II considers the constitutional framework upon which the doctrine of sovereign immunity rests, concluding that the supreme court over time has developed a concept of waiver that conflicts with the literal text of the constitution and effects a qualified transfer of legislative decision-making power to the judiciary. Part III suggests that in the recent case of Lake View School District No. 25 v. Huckabee,1 the court may have extended the concept of waiver even further, ruling for the first time that the State might waive its immunity not only by the legislature’s delegating its decision-making powers to the courts, but also by the executive’s conduct in conditionally attempting to compromise claims against the State. This section further suggests that as a corollary to this novel concept of waiver, the court in Lake View verged on adopting an extraordinary new rule of evidence—that if the State seeks to settle a

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putative class action, it will not only waive its immunity but also be bound by its representations in the proposed class settlement even if the settlement is never approved. Finally, Part IV suggests that the confusing case law regarding the scope of sovereign immunity merely complicates a problem that should properly be addressed by way of constitutional amendment.

II. THE CONSTITUTIONAL BASES FOR SOVEREIGN IMMUNITY AND THE COURT’S INCONSISTENT JURISPRUDENCE

A. Sovereign Immunity and the Obligation to Pay the State’s Just Debts

The doctrine of state court sovereign immunity is set forth in the Arkansas Constitution, article V, section 20, which provides: “The State of Arkansas shall never be made defendant in any of her courts.” This provision must be read in conjunction with Arkansas Constitution article XVI, section 2, which provides that the legislature shall arrange for payment of all “just and legal debts” incurred by the State. In *Fireman’s Insurance Co. v. Arkansas State Claims Commission*, the supreme court considered the interplay of these two constitutional provisions. The court approvingly invoked a “long and unequivocal line of cases” establishing that “the constitutional prohibition [of suits against the State] was not merely declaratory that the State could not be sued without her consent, but that *all* suits against the State were expressly forbidden.”

By statute, the General Assembly has delegated to the Arkansas State Claims Commission (“Claims Commission”) its constitutional duty to pay all the State’s just debts. In *Fireman’s*, the court expressly

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2. ARK. CONST. art. V, § 20. Unless otherwise noted, all constitutional provisions mentioned or cited in this article refer to provisions of the Arkansas Constitution.

3. ARK. CONST. art. XVI, § 2. This provision might be read as complementing Arkansas Constitution article II, section 13, which provides generally that “[e]very person is entitled to a certain remedy in the laws.” However, in *Hardin v. City of DeValls Bluff*, 256 Ark. 480, 485, 508 S.W.2d 559, 563 (1974), the supreme court held that the constitution does not require affording claimants “redress for asserted wrongs against counties and cities acting in their governmental capacities.” By extension, it appears that article II, section 13 could not independently be read as obligating the State to provide a forum to entertain claims against it.


5. Id. at 455, 784 S.W.2d at 773.

6. See ARK. CODE ANN. § 19-10-204(a) (LEXIS Supp. 2001). Subject to certain inapplicable exceptions, the Claims Commission has “exclusive jurisdiction over *all*
pronounced this post-deprivation procedure consistent with due process. The court further stated:

[T]he Claims Commission is an arm of the General Assembly and the General Assembly has total control over the determination of, and subsequent funding for, payment of the "just debts and obligations of the state"—all other avenues of redress through legal proceedings being barred by the sovereign immunity provision of the Arkansas Constitution . . . .

In Hanley v. Arkansas State Claims Commission, the court emphasized the terms "total control" in referring to the General Assembly's power over payment of debts and "all other avenues of redress" in quoting the recited passage from Fireman's, thus suggesting a continued policy of avoiding any waiver of sovereign immunity. The court noted that the Claims Commission was established in 1949 precisely because sovereign immunity barred judicial resolution of claims against the State and that "all appeals of the Commission's rulings must be heard by the General Assembly, and not the courts."

B. Waiving Sovereign Immunity: Separation of Powers Implications

Despite the foregoing, the court in Fireman's acknowledged at least one instance in which the State might be made a defendant in her own courts:

The only exception to total and complete sovereign immunity from claims which has been recognized by this court occurs when the state is the moving party seeking specific relief. In that instance the state is prohibited from raising the defense of sovereign immunity as a defense to a counterclaim or offset.

Notwithstanding the court's claim that this passage recited the "only exception to total and complete sovereign immunity," the State in fact waives its immunity under other circumstances, albeit usually under

claims against the State of Arkansas and its several agencies, departments, and institutions." Id. (emphasis added).

7. *Fireman's*, 301 Ark. at 457, 784 S.W.2d at 775.
8. Id. at 458, 784 S.W.2d at 775.
10. Id. at 166, 970 S.W.2d at 201.
11. Id., 970 S.W.2d at 201.
12. 301 Ark. 455, 784 S.W.2d 774 (citing Parker v. Moore, 222 Ark. 811, 262 S.W.2d 891 (1953)).
13. Id., 784 S.W.2d at 774.
compulsion. As the court noted in *Solomon v. Valco, Inc.*, 14 "[e]xceptions to the rule prohibiting suits against the state are few." 15 For instance, the State now submits to illegal-exaction suits filed pursuant to Arkansas Constitution article XVI, section 13, which expressly authorizes such suits by citizens, only because the supreme court has declared that this provision takes priority over Arkansas Constitution article V, section 20, which dictates that the State not appear as a defendant in her own courts. 16 Similarly, the State occasionally accedes to suit in federal court as a condition of receiving crucial federal grant money. 17 On occasion, the State has allowed itself to be sued in other circumstances. 18 Even when the State allows suit, as when the Highway Department condemns property without first making provisions for compensation, the supreme court frequently seeks to characterize the consent to suit as something other than a waiver of sovereign immunity. 19 Hence, the court in *Solomon* simply declared that "[c]ondemnation cases are . . . not considered claims against the state." 20 The State is further deemed not to have waived its sovereign immunity when it is statutorily obligated to appear, as in dependency-neglect proceedings. 21

Because article XVI, section 2 charges the General Assembly with paying the State's debts, any such waiver of immunity or consent to suit implicates the separation of powers doctrine established in Arkansas Constitution article IV, section 2, which requires that the three branches of government—legislative, executive, and judi-

15. *Id.* at 107, 702 S.W.2d at 7.
16. *See* Massongill v. County of Scott, 337 Ark. 281, 285, 991 S.W.2d 105, 108 (1999). "We have in the past recognized the evident tension between the State's sovereign immunity and the constitutional right of the people to contest an illegal exaction. We resolved that conflict in favor of the people's ability to recover funds wrongfully expended." *Id.*, 991 S.W.2d at 108 (citations omitted).
cial—remain separate and distinct and that such separation be strictly enforced.\textsuperscript{22} In \textit{Fireman's}, the only Arkansas case squarely to address the issue, the supreme court declared that the legislature had "without question delegated to the Commission duties which are, under the Constitution, solely the duties of the General Assembly."\textsuperscript{23} This delegation would appear to be constitutionally unimpeachable precisely because the Commission is "an arm of the General Assembly."\textsuperscript{24} However, the courts comprise a separate branch of government, and any delegation to them of the duty to determine whether a debt exists would appear to constitute an unlawful delegation of powers in violation of the separation of powers doctrine.

Any such waiver would admittedly amount to only a partial delegation of legislative powers—the power to determine the \textit{existence} of the State's debts, with the discretion actually to \textit{pay} such debts presumably remaining in the legislature. However, this discretion is sharply limited by the directive in article XVI, section 2 that the legislature indeed pay the State's "just and legal debts."\textsuperscript{25} Given this constitutional directive, merely determining that a debt exists would trigger an absolute obligation to discharge it. Transferring to the courts the duty to determine the State's debts is thus a very real transfer of power from one branch to the other. The legislature would consequently appear to be constitutionally precluded from waiving sovereign immunity—not by operation of article V, section 20,\textsuperscript{26} which the Arkansas Supreme Court has broadly read as permitting legislative \textit{waiver} \textsuperscript{7}—but rather by operation of article XVI, section 2\textsuperscript{28} and article IV, section 2,\textsuperscript{29} which mandate that the legislature alone determine and pay the State's debts.\textsuperscript{30}

\textsuperscript{22} See generally Oates v. Rogers, 201 Ark. 335, 347, 144 S.W.2d 457, 463 (1940). Under the classic division of powers, the legislature makes the laws and appropriates state revenues, the executive administers the law and expends the appropriations, and the judiciary interprets the law. See Chaffin v. Ark. Game & Fish Comm'n, 296 Ark. 431, 757 S.W.2d 950 (1988); Fed. Express Corp. v. Skelton, 265 Ark. 187, 578 S.W.2d 1 (1979); Hooker v. Parkin, 235 Ark. 218, 357 S.W.2d 534 (1962).


\textsuperscript{24} Id., 784 S.W.2d at 775.

\textsuperscript{25} ARK. CONST. art. XVI, § 2.

\textsuperscript{26} See supra text accompanying note 2.


\textsuperscript{28} See supra text accompanying note 25.

\textsuperscript{29} See supra note 22 and accompanying text.

\textsuperscript{30} Professor L. Scott Stafford offers a different analysis of this issue. See Scott Stafford, \textit{Separation of Powers and Arkansas Administrative Agencies: Distinguishing Judicial}
Despite the established fact of waiver under specified circumstances, as noted in Fireman's, the court has frequently declared that article V, section 20 flatly prohibits the State from consenting to be sued in its own courts. The Arkansas Supreme Court has more recently echoed this principle in Grine v. Board of Trustees, noting that sovereign immunity "arises from express constitutional declaration" and that consent to suit is consequently "expressly withheld by the Constitution of this State." However, shortly after having suggested that invoking sovereign immunity is not a matter of discretion, the court in Grine allowed that the State can indeed waive its sovereign immunity: 

\[\text{[S]}\]overn immunity is jurisdictional immunity from suit, and where the pleadings show the action is one against the State, the

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*Power and Legislative Power, 7 U. ARK. LITTLE ROCK L.J. 279 (1984).* Stafford suggests that "separation of powers requires that the legislature retain the ultimate authority to appropriate public funds for the payment of the 'just and legal debts' of the state," thus rendering any judicial determination of those debts objectionable as being purely advisory. *Id.* at 291. He then suggests that this problem could be resolved if the legislature "appropriate[d] in advance the funds from which to pay any claims determined by the courts and thereby ensure that the courts would be able to enforce their determinations." *Id.* However, if the legislature vested in the courts the power to determine debt, that determination would be far from advisory since the legislature would be constitutionally obligated to pay the debt. Moreover, it is unclear how Professor Stafford's proposed solution, which would give the courts final decision-making power, avoids the separation of powers problem. *Id.* at 353. I do agree with Professor Stafford that if the transfer of power were deemed illusory because payment remains wholly contingent on legislative consent, the very fact of that contingency would preclude trial courts from hearing such claims. In *Travelers Indemnity Co. v. Olive's Sporting Goods, Inc.*, the Arkansas Court of Appeals held that determining the amount of an unlitigated, contingent claim is "not appropriate for declaratory judgment" and that any such determination "would be tantamount to issuing an advisory opinion, something courts are prohibited from doing." 25 Ark. App. 81, 83-84, 753 S.W.2d 284, 286 (1988), *rev'd on other grounds*, 297 Ark. 516, 764 S.W.2d 596; *see also* Waldrip v. Davis, 40 Ark. App. 25, 27, 842 S.W.2d 49, 49 (1992); Kunz v. Jarnigan, 25 Ark. App. 221, 227, 756 S.W.2d 913, 917 (1988) (acknowledging that trial courts are forbidden to render advisory opinions). Although claims heard and resolved by the courts will obviously have been litigated, the claims will nevertheless remain contingent on legislative approval for payment. A ruling that in effect declares "I think you should pay this if you want to" has a decidedly advisory ring.

31. 301 Ark. 451, 455, 784 S.W.2d 771, 774 (1990).
32. *See, e.g.*, Fairbanks v. Sheffield, 226 Ark. 703, 706, 292 S.W.2d 82, 84 (1956) (declaring that sovereign immunity is a constitutional mandate that "cannot be waived by the General Assembly"); Ark. State Highway Comm'n v. Nelson Bros., 191 Ark. 629, 634, 87 S.W.2d 394, 396 (1935).
34. *Id.*, 2 S.W.3d at 58 (quoting Pitcock v. State, 91 Ark. 527, 535, 121 S.W. 742, 745 (1909)).
trial court acquires no jurisdiction. However, unlike subject-matter jurisdiction, sovereign immunity can be waived."35

In its most recent pronouncement on the subject, the Arkansas Supreme Court declared:

Ark. Const. art. 5, § 20, grants sovereign immunity and a general prohibition against awards of money damages in lawsuits against the State of Arkansas and its institutions. The doctrine of sovereign immunity is rigid, and, as such, the immunity may be waived only in limited circumstances. Thus, where the suit is one against the State and there has been no waiver of immunity, the trial court acquires no jurisdiction.36

As illustrated in Fireman's, one variety of waiver occurs automatically when the State decides to seek relief in the courts; in that instance, the State is deemed to have consented to have the courts resolve any claim of offset or counterclaim. Moreover, notwithstanding the court's declaration to the contrary in Fairbanks v. Sheffield,37 the courts have established that the legislature can waive the State's sovereign immunity. As the court noted in Arkansas Office of Child Support Enforcement v. Mitchell:

We have held that the doctrine of sovereign immunity is rigid and, as such, immunity may be waived only in limited circumstances. Under the doctrine, the State possesses jurisdictional immunity from suit. Where the suit is one against the State and there has been no waiver of immunity, the trial court acquires no jurisdiction. We have recognized exceptions to the doctrine of sovereign immunity when an act of the legislature has created a specific waiver of immunity, and when the State is the moving party seeking specific relief.38

As the foregoing discussion should suggest, the two exceptions to sovereign immunity recited in Mitchell raise separation of powers concerns that the supreme court has in the past chosen to ignore. Perhaps in the interests of fairness or judicial economy, the court has simply declared that the State exposes itself to suit when the State itself

35. Id. at 796-97, 2 S.W.3d at 58 (citing Brown v. Ark. State HVACR Licensing Bd., 336 Ark. 34, 984 S.W.2d 402 (1999)).


37. 226 Ark. at 706, 292 S.W.2d at 84.

38. 330 Ark. at 345-46, 954 S.W.2d at 911 (citations omitted); accord Ark. Pub. Defender Comm'n v. Burnett, 340 Ark. 233, 237, 12 S.W.3d 191, 193 (2000). As noted above, Fireman's recites only the latter of these bases for suit against the State. See supra text accompanying note 12.
elects to sue. The court has left unaddressed the question of whether this principle runs afoul of the constitutional imperatives that the State cannot be sued and that only the legislature can determine the State's just debts. The court has been similarly reticent regarding the constitutional question of why the General Assembly should be permitted to delegate to the judiciary the legislative task of entertaining claims against the State. As discussed in the next section, the court has recently compounded this apparent constitutional difficulty by suggesting that not only the General Assembly through legislation but also the executive branch through conduct might waive the State's sovereign immunity.

III. SOVEREIGN IMMUNITY AND THE LAKE VIEW DECISION

A. Waiver by Conduct

In Lake View School District No. 25 v. Huckabee,39 the supreme court addressed a trial court's disposition of a widely publicized class action that challenged the State's system of school financing as unconstitutional because of the disparity in available funds for the State's school districts. After much maneuvering, the parties negotiated a proposed settlement and circulated an agreed settlement order that included various stipulations, including the following: Lake View school district's efforts led to an increase in school funding totaling approximately $130 million; Lake View should be awarded its attorneys' fees; and Lake View should be precluded from challenging as unconstitutional various legislation enacted in 1995 and 1997 designed to address what the court in 1994 had determined to be inadequacies in the school financing formula.40

In accordance with the prescribed procedures for handling class actions,41 the chancery court approved notice of the proposed settlement to putative class members and scheduled a fairness hearing on the proposed agreed order.42 The American Civil Liberties Union (ACLU) objected to the agreed order, in part because it precluded any further constitutional challenge to the 1995 and 1997 legislation.43 In the course of several hearings conducted in March and April of 1998, the

40. Id. at 489, 10 S.W.3d at 897.
41. See ARK. R. CIV. P. 23.
42. Lake View, 340 Ark. at 489, 10 S.W.3d at 85.
43. Id. at 489-90, 10 S.W.3d at 897.
court concluded that the ACLU had standing to raise its objections, expressed "great concern" over the settlement provision purporting to foreclose future litigation, and declined to approve the agreed order. Following the court’s rejection of the agreed order, counsel for the State nevertheless announced that the State stood by its contents.

Lake View then moved for a determination of its attorneys’ fees and a final adjudication of the merits. Although the State now opposed an award of fees, counsel for the State continued to “[affirm] the Agreed Order recitation that a $130 million fund was created by Lake View’s efforts.” In considering the State’s opposition to an award of attorneys’ fees, the trial court referred to an “immunity argument” the State had raised. The court further approved a notice to class members that Lake View’s counsel would be awarded $7 million and that the case would be dismissed. On June 8, 1998, the State submitted by brief its argument that sovereign immunity barred an award of attorneys’ fees. The court subsequently conducted a hearing on these issues and entered its final order on August 17, 1998.

The court concluded that Lake View’s fourth amended complaint was rendered moot by Arkansas Constitution amendment 74, which authorizes funding variances among school districts based upon local taxes. The court further noted that the 1995 and 1997 legislation was presumptively constitutional and had not been challenged as without a rational basis in Lake View’s pleadings. The court declined either to award attorneys’ fees, in part because it held that sovereign immunity barred recovery from the State, or to address Lake View’s waiver-of-sovereign-immunity argument, which it concluded had not been raised in a timely fashion.

On appeal, the supreme court disagreed that either Amendment 74 or the 1995 and 1997 legislation mooted Lake View’s complaint, instead holding that Lake View must be permitted to present its case that these constitutional and legislative provisions failed to correct the

44. Id. at 490, 10 S.W.3d at 897.
45. Id., 10 S.W.3d at 898.
46. Id. at 491, 10 S.W.3d at 898.
47. Id., 10 S.W.3d at 898.
48. Lake View, 340 Ark. at 491, 10 S.W.3d at 898.
49. Id., 10 S.W.3d at 898.
50. Id., 10 S.W.3d at 898.
51. Id. at 492, 10 S.W.3d at 898.
52. Id., 10 S.W.3d at 898.
53. Id., 10 S.W.3d at 899.
54. Lake View, 340 Ark. at 492-93, 10 S.W.3d at 899.
disparities among school districts identified in the 1994 order. With respect to the stipulations contained in the rejected agreed order, the court remarked:

There is no doubt that Lake View agreed to dismiss the case and forego future litigation if its attorneys' fees and costs were paid. But the chancery court refused to sign the order because it barred future contests on the unconstitutionality of the school funding system. The court also refused to approve attorneys' fees of $7 million, following Lake View's agreement that the case was moot. At that point, the agreement among the parties had fallen through, and the parties were back to square one on the compliance issue. Under these circumstances, Lake View was entitled to move on with its cause of action and press for a compliance trial.

The court further ruled that the trial court had erred in refusing to award Lake View its attorneys' fees. The court held that "there is no question but that a substantial economic benefit has accrued not only to the poorer school districts as a direct result of Lake View's efforts but to the state as a whole." In partial support of this conclusion, the court offered the following:

The chancery court acknowledged that through Lake View's efforts, the State was getting a fair school funding formula. And Tim Humphries of the Attorney General's Office told the chancery court that the State of Arkansas stood by the language in the Agreed Order even after the court refused to sign it. Also, at the April 6, 1998 hearing, James M. Llewellyn, Jr., on behalf of the State advised the chancery court that "at least One Hundred Million and probably more" was created by the effects of Amendment 74 alone and that "all of us still stand on the Agreed Order recitation that there was [a] One Hundred and Thirty Million Dollar fund created." Mr. Llewellyn further advised the chancery court that the court should reconsider the Agreed Order because "we all believe that you're the proper person to say what is a reasonable attorneys' fee."

The supreme court also rejected the trial court's conclusion that the State had failed to raise the issue of sovereign immunity in a timely fashion. The court concluded that the issue of sovereign immunity

55. Id. at 493-94, 10 S.W.3d at 900.
56. Id. at 494, 10 S.W.3d at 900.
57. Id. at 495-97, 10 S.W.3d at 900.
58. Id. at 495, 10 S.W.3d at 900.
59. Id. at 495-96, 10 S.W.3d at 901.
60. Lake View, 340 Ark. at 497, 10 S.W.3d at 901.
was clearly implicated insofar as state revenues would be tapped to pay the attorneys’ fees. However, in a totally unprecedented mode of analysis, the court felt obliged to consider whether the State’s conduct in the course of the litigation may have amounted to a waiver of sovereign immunity. Specifically, the court observed:

It is axiomatic that the State of Arkansas can voluntarily waive a sovereign-immunity defense. In addition, the State can consent to being sued. We conclude that when the State of Arkansas signed off in two published notices to the class members advocating that attorneys’ fees be paid and continued to push for payment of attorneys’ fees even after the chancery court refused to sign the Agreed Order, it waived its sovereign-immunity defense to payment of those fees. We do understand that the State was seeking resolution of this litigation by supporting payment of those fees, but we are hard pressed to reconcile published notices to class members supporting fees and representations to the chancery court to the same effect with a later claim of immunity.

The supreme court in Lake View thus ruled that the State can waive sovereign immunity and accede to suit solely by conduct suggesting some state liability in a particular lawsuit, even though it has not sought any affirmative relief in the lawsuit and the legislature has not expressly waived immunity. This novel proposition is unsupported by any of the cases cited by the court in the passage just quoted.

The suggestion in Lake View that an arguable entry of appearance can nullify a constitutional proscription against suit is itself inconsistent with the court’s pronouncement only a month and four days earlier in Arkansas Public Defender Commission v. Burnett, where the court stated: “Unless sovereign immunity is waived, the doctrine prohibits imposing liability upon the State. We have recognized two exceptions to the doctrine

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61. Id. at 496, 10 S.W.3d at 901.
62. Id. at 496-97, 10 S.W.3d at 901 (citations omitted). See infra note 63 for a discussion of the cases cited by the court in the quoted passage.
63. Although the court in Newton v. Etoch acknowledged that sovereign immunity can be waived, it failed even to mention how such a waiver might be effected. 332 Ark. 325, 331, 965 S.W.2d 96, 99 (1998). The court in State v. Mitchell expressly declared that a waiver can be effected only by legislative action or by the State’s affirmatively seeking relief in the courts. 330 Ark. 338, 345-47, 954 S.W.2d 907, 910-12 (1997). The court in State v. Tedder merely acknowledged in passing that the General Assembly can waive sovereign immunity through legislation. 326 Ark. 495, 496 932 S.W.2d 755, 756 (1996). Finally, Ozarks Unlimited Resources Cooperative v. Daniels merely acknowledged without elaboration that the government might waive immunity or consent to suit. 333 Ark. 214, 221, 969 S.W.2d 169, 172 (1998).
of sovereign immunity: (1) where the State is the moving party seeking specific relief; and (2) where an act of the legislature has created a specific waiver of immunity.\(^{65}\)

Nothing in this formulation suggests that the State can waive sovereign immunity by conduct amounting to constructive consent.\(^{66}\) However, to add to the confusion, immediately after reciting the standard just quoted, the court in *Burnett* remarked that the State had not “entered its appearance” in the action at issue, suggesting that waiver can also be effected by responsive pleading.\(^{67}\)

The suggestion that the State’s efforts to settle a claim might amount to constructive consent to suit was raised most recently in *Milberg, Weiss, Bershad, Hynes, and Lerach v. State*,\(^{68}\) which arose from a claim for attorneys’ fees purportedly incurred in the class action tobacco litigation. In *Milberg*, the State settled its claims by consent decree against the defendant tobacco companies.\(^{69}\) The appellant-attorneys, who claimed to have represented the class plaintiffs on

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65. *Id.* at 237, 12 S.W.3d at 193 (emphasis added).

66. With respect to actions in federal court, the United States Supreme Court has clearly expressed its hostility to the notion of inferring that a state has constructively consented to suit. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court approvingly recalled a previous ruling:

> [W]e observed (in dictum) that there is “no place” for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we emphasized that we would “find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.”

527 U.S. 666, 678 (1999) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)). The Court then overruled *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), which held that a state constructively consents to suit under the Federal Employers’ Liability Act by operating a railroad in interstate commerce. The Court observed: “We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it.” *Coll. Sav. Bank*, 527 U.S. at 680. The Court based its ruling on the following familiar general formulation regarding waiver:

> The classic description of an effective waiver of a constitutional right is the “intentional relinquishment or abandonment of a known right or privilege.” “[C]ourts indulge every reasonable presumption against waiver” of fundamental constitutional rights. State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. And in the context of *federal* sovereign immunity—obviously the closest analogy to the present case—it is well established that waivers are not implied.

*Id.* at 682 (citations omitted). Given the equally impeccable constitutional pedigree of state sovereign immunity, this reasoning would appear to apply to the issue of waiver and consent in state court as well.


68. 342 Ark. 303, 28 S.W.3d 842 (2000).

69. *Id.* at 309, 28 S.W.3d at 846.
behalf of the State, argued that the chancellor had erred in ruling that
the State had not waived its sovereign immunity defense against the
appellants' claims for attorneys' fees. The supreme court affirmed
the chancellor's decision on this point.71

The court's reasoning in reaching its conclusion bears some
analysis. The court began by offering the following familiar formula-
tion regarding sovereign immunity:

Sovereign immunity is jurisdictional immunity from suit. This
defense arises from Article 5, § 20, of the Arkansas Constitution,
which provides: "The State of Arkansas shall never be made a
defendant in any of her courts." This court has consistently inter-
preted this constitutional provision as a general prohibition against
awards of money damages in lawsuits against the state and its
institutions. The doctrine of sovereign immunity is rigid and may
only be waived in limited circumstances. This court has recognized
only two ways in which a claim of sovereign immunity may be
surmounted: (1) where the state is the moving party seeking specific
relief; and (2) where an act of the legislature has created a specific
waiver of immunity.72

The court then offered several reasons why the State had not waived
sovereign immunity against the attorneys' claims for fees in the
tobacco litigation. First, it noted that the appellants had never been
given leave to intervene in the underlying chancery court action and
that their claim consequently could not be characterized as a "counter-
claim or offset" of the sort that might defeat sovereign immunity.73
Second, the court rejected the argument that the State had waived its
immunity by moving to amend the consent decree to include appellants
on a negotiated list of outside counsel to be paid by the tobacco
litigants.74

The State's motion might arguably have been characterized as
directly related to the terms of the settlement and hence part of the
settlement negotiation process. In support of their argument, the
appellants invoked Lake View, in which the court had ruled that the
State waived sovereign immunity in part by conditionally agreeing in
the course of settlement negotiations that it would pay plaintiffs'

70. Id. at 320, 28 S.W.3d at 853-54.
71. Id. at 323, 28 S.W.3d at 856.
72. Id. at 320-21, 28 S.W.3d at 854 (citations omitted).
73. Id. at 321, 28 S.W.3d at 854.
74. Milberg, 342 Ark. at 323, 28 S.W.3d at 855.
attorneys' fees if the proposed settlement were approved. The court distinguished *Lake View* as follows:

The state's actions in *Lake View* are distinguishable, in that, there, the state not only advocated the payment of attorney's fees in general, it advocated that the fees be paid from state funds. Here, however, the State advocated only that Appellants be paid attorney's fees from the tobacco companies. . . . Additionally, unlike the situation in *Lake View*, the State did not continue to push for attorney's fees on behalf of Appellants. To the contrary, the State withdrew its motion before any action had been taken by the chancery court. It is thus clear that the State never waived its immunity from a claim for attorney's fees to be collected from State coffers. Accordingly, our decision in *Lake View* does not require a reversal of the chancellor's finding that the State was entitled to the defense of sovereign immunity.\(^{75}\)

The court concluded that the appellants were limited to seeking recovery of fees directly from the State before the Claims Commission.\(^{76}\)

With respect to the question of waiver, what is perhaps most striking about *Milberg* is that in the very act of reasserting that the State can waive sovereign immunity only by legislative action or by itself seeking specific judicial relief, the court acknowledged that the State might waive its immunity by a third route—by conditionally admitting state liability in the course of settlement negotiations. Although the court went on to conclude that no such waiver had occurred in the case before it, the court's decision is fully consistent with the conclusion in *Lake View* that the State can waive its immunity merely by attempting to settle a dispute. Both cases thus suggest that executive conduct can locate in the judiciary a decision-making power that the constitution locates exclusively in the legislative branch of government.

B. The Evidentiary Implications of *Lake View*

The court's pronouncements in *Lake View* and *Milberg* raise certain disturbing evidentiary as well as jurisdictional questions. Subsection (e) of the Arkansas Rules of Civil Procedure Rule 23 provides that any compromise of a class action must be approved by the court after class members have been provided notice of the proposed settlement and an

\(^{75}\) *Id.* at 323, 28 S.W.3d at 855.

\(^{76}\) *Id.* at 324, 28 S.W.3d at 856.
opportunity to object. Rule 408 of the Arkansas Rules of Evidence provides that evidence of offering or accepting certain consideration in compromising a disputed claim is not admissible to prove either liability on or the amount of a claim. Rule 408 exists to promote complete candor among litigants and thereby to encourage settlements. The effect of Rule 408 is to keep the finder of fact's judgment from being influenced by a litigant's acknowledgment during settlement negotiations of potential exposure. However, the rule's purpose can be frustrated in a class action because filing and sending notice of a proposed agreed order of settlement necessarily publicizes settlement terms that the court may reject based on the response to the notice or on its own motion. In such a situation, the court is left to resolve factual disputes knowing what resolution the parties deem fair. The rejected order might even stipulate as to certain facts upon which the parties agreed solely to effect a settlement. Such a result clearly violates the spirit of Rule 408.

The scenario just recited may have been played out in Lake View. As previously noted, the parties negotiated and circulated an agreed order that included a provision for attorneys' fees, but the chancery court eventually rejected the proposed settlement. Assuming these were the only relevant facts, the appropriate course under Rule 408 would appear to have been for the court to treat everything in the agreed order as a nullity, including any waiver of sovereign immunity and any stipulation regarding the value of any common benefit the plaintiffs may have bestowed on the State by pursuing their action. However, the court in Lake View made no such effort to rebag the cat, instead ruling that a waiver of sovereign immunity for the limited purpose of negotiating a settlement would survive the breakdown of the settlement process. Moreover, the court declared in Milberg that the plaintiffs' pursuit of Lake View had created a common benefit fund of $130 million—a statement supported by its inclusion as a stipulation

77. ARK. R. CIV. P. 23(e).
78. ARK. R. EVID. 408; cf. ARK. R. CRIM. P. 25.4 (providing that, with certain limited exceptions, neither the fact nor the substance of criminal plea negotiations will be admissible in any criminal, civil, or administrative proceeding).
81. Id. at 496, 10 S.W.3d at 901.
These events might be read as supporting the proposition that the State will be bound by anything contained in a proposed class action settlement agreement regardless of whether the settlement is approved. In short, it appears that Rule 23 may trump Rule 408, at least when the government is the class action defendant.

However, the court might not accept such a neat summary of its ruling. Significantly, the court appears to have been struck by the particular strength and breadth of state support for the agreed order, noting that the full legislative council and the governor had advocated its approval. Moreover, the court ruled that the State had waived sovereign immunity not only because it had advocated the payment of attorneys' fees in the notice to class members—an event that occurred before the court rejected the proposed agreed order—but also because it had "continued to push" for payment of fees even after the rejection. In its recitation of the facts, the court further stressed that the State had announced, even after the rejection, that it stood generally by the agreed order and specifically by the recitation therein that Lake View's efforts had created a $130 million fund. Given the court's focus on these post-rejection ratifications of the agreed order, it is unclear that it would consider anything contained in the proposed order an admission in itself. Nevertheless, the court's focus in the recited paragraph on the substance of the class notice remains significant. It may be that the court is inclined to treat as an admission anything that has already been publicized in accordance with the procedural

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83. *Lake View*, 340 Ark. at 489, 10 S.W.3d at 897.
84. *Id.* at 490, 10 S.W.3d at 897.
85. *Id.* at 496, 10 S.W.3d at 901.
86. *Id.* at 490-91, 10 S.W.3d at 898.
87. For purposes of comparison, one might consider the approach currently applied to obligatory determinations of just compensation made by the Arkansas State Highway Commission in condemnation proceedings. As the court declared in *Arkansas State Highway Commission v. Johnson*:

We conclude that when the commission is required by federal or state law to reach a determination of just compensation and to communicate that information to the landowner, the court, or third parties, it is by statutory definition more than an offer or compromise figure. While it is true that a jury or court may award more or less than the amount stated, that does not change the fact that such a statement constitutes an admission of the constitutional entitlement of the condemnee, and it should be admissible as evidence to rebut the condemnor's contentions that the condemned property is worth less than the amount stated as just compensation.

300 Ark. 454, 463, 780 S.W.2d 326, 331 (1989). I do not believe that a term in a proposed class action settlement should be treated as the evidentiary equivalent of "an admission of . . . constitutional entitlement." *Id.*
requirements for maintaining a class action. Perhaps the court simply feels it would be unseemly for the State to repudiate a position it has publicly endorsed—a factor that may likewise have influenced the court in the *Johnson* ruling.88

The court's ruling in *Lake View* may have limited application beyond this single, unusual, and high-profile class action; indeed, at the conclusion of its opinion, the court itself felt compelled to emphasize "that this is a unique case with a unique set of circumstances."89 It may be that *Lake View* will consequently be largely ignored in the future as sui generis—i.e., as a case in which a unique set of circumstances prompted a somewhat result-oriented decision. It seems doubtful that the court would extend its ruling to cover the substance of settlement negotiations in any other type of civil or criminal litigation. Rule 408 has a long and noble history, which the court may have tacitly ignored in this instance both because Rule 23 dictated public disclosure and because the State proved disturbingly eager to ratify representations initially offered only on condition of settlement. The court's holding in *Lake View* consequently appears limited in its application.

If one were to adopt the most draconian possible interpretation of *Lake View*, concluding that it rendered admissible against the State the substance of any settlement negotiations, be the case civil or criminal, the General Assembly might be inclined effectively to overrule the

88. See supra note 87.
89. *Lake View*, 340 Ark. at 497, 10 S.W.3d at 902. Among these circumstances might be what seems the court's distaste that the State advocated a proposed settlement that both the trial court and, in retrospect, the supreme court itself felt would have ill served the class members' interests. The court further seemed nettled that the State appeared to ratify the substance of this proposed settlement even after the trial court had rejected it, only to withdraw that ratification later. The court's point may simply be that the State should not be permitted publicly and voluntarily to concede and then later to deny that a case had resulted in a substantial benefit to Arkansans. The court has more recently found occasion to comment on the relative effects of a defendant's conceding or disputing a substantial benefit:

Nor do we see recovery as appropriate under a substantial-benefit theory such as we approved in *Lake View Sch. Dist. No. 25 v. Huckabee*. In *Lake View*, the State waived sovereign immunity, acknowledged that a substantial benefit in a fixed dollar amount had accrued to the State due to the attorneys' efforts, and urged the court to approve the attorney's fees. Here, the nonpaying corporations have acknowledged no benefit that resulted from the attorneys' efforts and have never recognized the attorney's entitlement to attorney's fees. The two situations are entirely different.

Fox v. AAA U-Rent It, 341 Ark. 483, 491, 17 S.W.3d 481, 486 (2000). This passage suggests that the court might limit applying its new category of waiver by admission to the singular instance in which the State has conceded a public benefit that triggers a public obligation to pay attorneys' fees.
court by legislatively declaring the confidentiality of such information. Any effort to do so would appear to raise separation of powers concerns. The supreme court has stated that in case of a conflict between a legislative enactment and a court rule, the court “will defer to the General Assembly, when conflicts arise, only to the extent that the conflicting court rule’s primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme.” However, as the court acknowledged in *Price v. Price*, this rule does not always apply: “An exception to the foregoing rule exists when the statutory rule is based upon a fixed public policy which has been legislatively or constitutionally adopted and has as its basis something other than court administration.”

The *Sypult* rule and the *Price* exception may be qualified by the voters’ recent approval of Arkansas Constitution amendment 80, which, inter alia, reorganized the court system in Arkansas. Section 9 of amendment 80 provides that the legislature by two-thirds vote may amend or annul “[a]ny rules promulgated by the Supreme Court pursuant to Sections 5, 6(B), 7(B), 7(D), or 8 of this Amendment.” The referenced sections acknowledge that the supreme court may by its rules exercise general superintending control over inferior courts. However, section 9 does not independently authorize the legislature to annul or abridge the rules referenced in section 3 of amendment 80, which provides: “The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.”

Insofar as Rule 408 is one of practice and procedure, it thus appears it would be subject to legislative amendment or reinterpretation only in accordance with the *Sypult-Price* doctrine.

Presumably, any proposed legislation designed to remedy *Lake View* would declare two things: (1) that the State could engage in settlement negotiations without waiving sovereign immunity; and (2) that Rule 408 would apply to those negotiations. Such legislation might well fall within the *Price* exception. Sovereign immunity is clearly a concept grounded in fixed public policy, not court administration.

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91. 341 Ark. 311, 16 S.W.3d 248 (2000).
92. Id. at 315, 16 S.W.3d at 251.
94. Id. §§ 5, 6(B), 7(B), 7(D), 8.
95. Id. § 3.
Moreover, it is a concept the supreme court has repeatedly recognized as subject solely to legislative modification. Likewise, Rule 408 reflects not so much a procedural requirement in the interests of court administration as a reflection of policy designed to facilitate settlements and, in the case of a government defendant, to save the public money. Consequently, the legislature might well be constitutionally empowered to enact a law of the sort just described.

IV. CONCLUSION

The Arkansas Constitution is perfectly straightforward regarding the scope of state court sovereign immunity—the State is never to be made a defendant in her own courts, and the legislature is charged with determining and paying the State’s just debts (the determination of which it has delegated to the Claims Commission). However, as the foregoing discussion should reflect, actual practice is considerably more complicated. The State is deemed to consent to be sued if it itself sues; the legislature can waive sovereign immunity and, if Lake View is to serve as a guide, the executive branch can waive sovereign immunity by engaging in conduct that might be interpreted as an accession to suit. It thus appears that the State is free to ignore the constitutional proscription against suit if it chooses to do so.

In all likelihood, this apparent disregard for the state constitution arises from the same source as the United States Supreme Court’s parallel liberality in construing the Eleventh Amendment96—an

96. The Eleventh Amendment provides that “the judicial power of the United States” does not extend to suits “commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. However, sovereign immunity is broader than the text of the Eleventh Amendment suggests. As acknowledged by the Supreme Court in Alden v. Maine, “sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.” 527 U.S. 706, 728 (1999). The Court explained: “The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.” Id. at 728-29. In Seminole Tribe of Florida v. Florida, the Court articulated this principle as follows:

“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.” That presupposition, first observed over a century ago in Hans v. Louisiana, has two parts: first, that each State is a sovereign entity in our federal system; and second, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” 517 U.S. 44, 54 (1996) (citations omitted). As illustrated in Seminole Tribe itself,
appreciation that the British-American legal tradition has always recognized the sovereign's right to submit to suit by an act of unconstrained grace.\textsuperscript{97} Simply put, it appears that both the sovereign's right to avoid suit and its right to accede to suit are deemed absolute, regardless of how the constitution might read.

This extra-textual liberality of construction is problematic in both theoretical and practical ways. In terms of theory, given this republic's condition as a sovereignty of the people, whose rights they themselves have delineated by constitution, it seems somehow inappropriate to afford the State a merely historical, extra-constitutional discretion. Moreover, even assuming a constitution is simply a social compact between the people and a disembodied sovereign known as "the State," history alone cannot justify allowing the state to renege on that compact by ignoring constitutional directives. If it could, the State might invoke history to avoid constitutional mandates other than those confirming sovereign immunity—a conclusion that would render the Constitution, if not the United States Supreme Court as its interpreter, potentially irrelevant.

In addition, given that the constitution unambiguously charges the legislature with determining and paying the State's just debts, it seems inescapable that any judicial assessment of damages against the State will constitute a violation of the separation of powers doctrine. The only way to avoid this problem would seem to be to apply the text of the constitution literally—an option that generates its own problems in that it would foreclose the sovereign's historical right to accede voluntarily to suit.

Certain practical difficulties further attend the concept of waiver as currently applied in Arkansas. Primary among these is the precedential, constraining effect of legislative and judicial determinations regarding the scope of sovereign immunity—a result that directly conflicts with the unfettered, ad hoc discretion sovereign immunity is historically supposed to afford the State. \textit{Lake View} can be read as illustrating this complication insofar as it suggests that the State will always waive its immunity by exploring settlement and that it will

\textsuperscript{97} See \textit{Alden}, 527 U.S. at 715 (referring to \textit{Nevada v. Hall}, 440 U.S. 410, 414 (1979)) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity.").
further be bound by conditional representations made in the course of settlement negotiations.

As discussed above, what is perhaps most troubling about the court's decision in *Lake View* is the suggestion that the State can inadvertently waive its sovereign immunity through the actions of an executive branch employee. The disturbing nature of this premise is only compounded by the court's casual willingness to bind the State to conditional representations that would normally be inadmissible under the Arkansas Rules of Evidence. Suggestions of this sort can only have the effect of paralyzing government lawyers in their efforts to compromise claims against the State.

As reflected in the foregoing discussion, the Arkansas Constitution is absolutely clear in directing that the State shall not be sued in her own courts. Given that clarity, it seems insufficient merely to invite the supreme court to reconcile its conflicting pronouncements regarding the scope of exceptions to sovereign immunity. Stated bluntly, the supreme court exists to interpret the constitution, not to rewrite it. This is not to ignore the practical reality that the State is virtually obliged to waive its immunity in certain instances, as when receiving substantial federal funding hinges on doing so. However, the appropriate way to accommodate that reality would appear to be by constitutional amendment, not by ad hoc, self-contradictory pronouncements that turn the plain meaning of the constitution on its head.