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Sovereign Immunity in Mississippi 1982 to 1995: A Practical Tool for Lawyers and Judges

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SOVEREIGN IMMUNITY IN MISSISSIPPI 1982 TO 1995: A PRACTICAL TOOL FOR LAWYERS AND JUDGES[1]

Richard Smith-Monahan

I. Introduction

The State of Mississippi has long enjoyed immunity from liability for its tortious acts through a judicially created common law rule and through a series of complicated legislative enactments. Sovereign immunity was derived from the English concept that the King could do no wrong, and it relieved the state and its political subdivisions from amenability for harm done to its citizens.[2] The doctrine of sovereign immunity first appeared in Mississippi in the mid-nineteenth century in cases such as *County of Yalabusha v. Carbry*[3] and *Anderson v. State*.[4] After its original recognition, sovereign immunity remained intact as a common law doctrine in Mississippi for almost a century and a half.

Over the course of the past decade, the doctrine of sovereign immunity has undergone such complex changes in both the Mississippi Supreme Court and the Mississippi Legislature that it has become a difficult task for both lawyers and judges to determine when sovereign immunity will or will not apply. Further, even when the doctrine is applicable, the determination of whether the immunity derives from a legislative or judicial source is often unclear, and thus lawyers face confusion in deciding what procedural requirements must be followed in both bringing a claim against the government and in asserting the immunity as a defense. This Comment focuses first on the changes in the doctrine of sovereign immunity from 1982 to the present, discussing ambiguities in both statutory language and the opinions of the Mississippi Supreme Court. Second, the Comment examines the present state of the doctrine of sovereign immunity and how it may apply to suits brought against the State of Mississippi or its political subdivisions, depending on the time the causes of action accrue. Finally, the Comment briefly analyzes potential constitutional challenges to sovereign immunity as it stands in Mississippi today.

II. SOVEREIGN IMMUNITY: 1982 TO 1995

Judicially created sovereign immunity in Mississippi endured for approximately 140 years before finally being abrogated by the Mississippi Supreme Court in 1982 in *Pruett v. City of Rosedale*.[5] The court held that "the absolute sovereign immunity doctrine is out of date in modern society and modern legal concepts"

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1. This Comment focuses on the immunity of the State of Mississippi and its political subdivisions for torts. Qualified good faith immunity enjoyed by public officials in their individual capacity is not addressed.
2. Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982).
3. 11 Miss. 529 (1844).
4. 23 Miss. 459 (1852).
5. 421 So. 2d 1046 (Miss. 1982).

and abolished all judicially created immunity for the State of Mississippi and its political subdivisions.[6] Justice Bowling, writing for the court, expressed the policy that any supervision or control over a person's right to bring suit against the sovereign should be handled by the legislature and not the court.[7] The court made its holding prospective only and delayed its application until July 1, 1984, thus giving the Mississippi Legislature an opportunity to act.[8]

The Mississippi Legislature responded to the *Pruett* decision in 1984 by enacting a comprehensive sovereign immunity statute.[9] The provisions of the statute, however, were not to take effect until July of 1985. Until that time, section 11-46-6[10] provided that the common law doctrine of sovereign immunity, as it existed prior to the Mississippi Supreme Court's decision in *Pruett*, was to be applied by the Mississippi courts. The section stated:

> This act shall apply only to claims that accrue on or after July 1, 1985, as to the state, and on or after October 1, 1985, as to political subdivisions. Claims that accrue prior to July 1, 1985, as to the state or, prior to October 1, 1985, as to political subdivisions, shall not be affected by this act but shall continue to be governed by the case law governing sovereign immunity as it existed immediately prior to the decision in the case of *Pruett v. City of Rosedale*, 421 So. 2d 1046, and by the statutory law governing sovereign immunity existing prior to July 1, 1985.[11]

Instead of allowing the Act to take force the following July, however, the Mississippi Legislature reenacted the Act in 1985 and postponed the effective date of the comprehensive statute until July of 1986.[12] The Mississippi Legislature repeated this same process in each of the succeeding years through 1992, maintaining the pre-*Pruett* law on the issue of sovereign immunity.[13]

In 1992, the Mississippi Supreme Court in *Presley v. Mississippi State Highway Commission*[14] held that section 11-46-6 was unconstitutional because it violated the doctrine of separation of powers as well as Article 4, Section 61 of the Mississippi Constitution.[15] Four justices went on to hold that the court's opinion was only to apply prospectively.[16] Thus, all cases arising prior to *Presley* were to still be governed by section 11-46-6 and the law as it existed before

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6. *Id.* at 1047.
7. *Id.* at 1051.
8. *Id.* at 1052.
9. Miss. Code Ann. §§ 11-46-1 to -23 (Supp. 1984).
10. MISS. CODE ANN. § 11-46-6 was included in MISS. CODE ANN. § 11-46-7 as an editor's note until 1987. Hereinafter both will be refered to and cited as § 11-46-6.
11. MISS. CODE ANN. § 11-46-6 (Supp. 1984).
12. MISS. CODE ANN. § 11-46-6 (Supp. 1985).
13. MISS. CODE ANN. § 11-46-6 (See supplements for this statute for the consecutive years 1986-1992).
14. 608 So. 2d 1288 (Miss. 1992).
15. *Id.* at 1294-98. The Mississippi Constitution provides: "No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length." MISS. CONST. art. IV, § 61.
16. *Presley*, 608 So. 2d at 1298-1301.

Pruett. Three justices dissented to this portion of the opinion, however, concluding that the holding should also apply retroactively.[17] The remaining two justices dissented and stated that section 11-46-6 was not unconstitutional at all.[18] The two dissenters provided no specific intimation as to prospective or retroactive application of the plurality's holding.

Thus, the plurality's ruling in *Presley* left two very important questions unanswered. The first issue was whether *Presley* would apply prospectively or retroactively. The second inquiry was, since pre-*Pruett* sovereign immunity would no longer be applied to causes of action arising after *Presley*, what would be the law on sovereign immunity?

A. Prospective or Retroactive Application of Presley

The Mississippi Supreme Court's first indication of *Presley's* applicability came in the court's opinion in *Churchill v. Pearl River Basin Development District*.[19] In *Churchill*, the plaintiff's injury had accrued on August 1, 1981 — before the court had delivered its opinion in *Pruett*.[20] Thus, the common law on sovereign immunity which existed before *Pruett* clearly governed the case. Justice McRae writing for the court went on, however, to discuss *Presley* and the retroactive application of its holding.[21] Justice McRae stated that the only portion of *Presley* which had precedential value was the ruling that section 11-46-6 was unconstitutional.[22] Since there was no majority vote on the issue of retroactivity, Justice McRae opined that the issue had not been conclusively determined.[23]

Later in 1993, Justice Prather adopted Justice McRae's reasoning in *Morgan v. City of Ruleville*.[24] In *Morgan*, the City of Ruleville's purported negligence occurred on May 30, 1987.[25] As of that date, section 11-46-6 required the pre-*Pruett* law to be applied concerning the city's sovereign immunity and *Presley* had not yet been decided. The Mississippi Supreme Court considered at length its decisions in *Presley* and *Churchill* and concluded that *Presley* had no precedential value on the issue of its own retroactivity.[26] The court then held, without further discussion, that section 11-46-6 applied to the case and that pre-*Pruett* law governed.[27] Thus, although the court did not state so emphatically, it appeared to have answered the question: *Presley* is *not* to be applied retroactively.

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17. *Id.* at 1301-10 (McRae, J., concurring in part and dissenting in part).
18. *Id.* at 1310-11 (Lee, J., dissenting).
19. 619 So. 2d 900 (Miss. 1993).
20. *Id.* at 904.
21. *Id.*
22. *Id.*
23. *Id.*
24. 627 So. 2d 275 (Miss. 1993).
25. *Id.* at 276-77.
26. *Id.* at 278.
27. *Id.* at 278-79.

The Mississippi Supreme Court affirmed its holding in *Morgan*, again without any explanation, in *Coplin v. Francis*.[28] In Coplin, the plaintiff's cause of action against the county accrued on September 20, 1985.[29] This date was after enactment of section 11-46-6 but before the court's opinion in *Presley*. The court concluded in one sentence that the county enjoyed sovereign immunity on the date of the plaintiff's injury.[30] Therefore, the implication of *Morgan* and *Coplin* is that *Presley's* holding is prospective only and section 11-46-6 applies to causes of action which arose prior to *Presley*.

This is the interpretation adopted by the federal district courts construing Mississippi sovereign immunity law. In *Newsom v. Stanciel*,[31] the district court held that *Presley* had no application to cases which arose prior to its mandate, and thus section 11-46-6 governed.[32] Likewise, in *Wesley v. Mississippi Transportation Commission*,[33] the district court applied pre-*Pruett* law on sovereign immunity to a claim against the State of Mississippi which accrued on April 4, 1991 — before the *Presley* decision.[34]

B. Sovereign Immunity After Presley

Presley was decided on August 31, 1992,[35] and immediately following, in a special session, the Mississippi Legislature responded by amending certain sections of the comprehensive sovereign immunity statute to make the provisions effective as of September 16, 1992.[36] The 1992 Special Session amendments performed three important functions for the Mississippi Legislature: (1) section 11-46-3 of the comprehensive sovereign immunity statute was made immediately effective, thus providing governmental entities with immunity against suit;[37] (2) section 11-46-6, which had been declared unconstitutional by the court in *Presley*, was repealed;[38] and (3) governmental entities were given the discretionary authority to purchase liability insurance which, if purchased, would waive the government's immunity up to the amount of coverage.[39]

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28. 631 So. 2d 752 (Miss. 1994).
29. *Id.* at 755.
30. *Id.*
31. 850 F. Supp. 507 (N.D. Miss. 1994).
32. *Id.* at 515.
33. 857 F. Supp. 523 (S.D. Miss. 1994).
34. *Id.* at 530.
35. Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288 (Miss. 1992).
36. Act of Sept. 16, 1992, ch. 3, §§ 1-5, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-3 (Supp. 1995) (amended April 1, 1993), § 11-46-6 (Supp. 1995), § 11-46-16 (Supp. 1995), § 71-3-5 (1995)) (§ 5 set the effective date of the Act and therefore is codified at MISS. CODE ANN. §§ 11-46-6, 11-46-16, and 71-3-5, which have not been amended since September 16, 1992).
37. Act of Sept. 16, 1992, ch. 3, § 1, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-3 (Supp. 1995) (amended April 1, 1993)).
38. Act of Sept. 16, 1992, ch. 3, § 2, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-6 (Supp. 1995)).
39. Act of Sept. 16, 1992, ch. 3, § 3, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-16 (Supp. 1995)).

In the regular session in 1993, the Mississippi Legislature enacted the entire comprehensive sovereign immunity statute which had been on the books for the previous nine years.[40] The statute became effective on April 1, 1993, but many of the provisions did not take effect until October 1, 1993.[41] The statute remains in force as of the time of this Comment.[42]

III. THE EFFECTS OF TIME OF ACCRUAL ON SOVEREIGN IMMUNITY

As discussed above, the doctrine of sovereign immunity in Mississippi derived from a mix of legislative and judicial decisions. Although the basic concept of immunity of the sovereign has remained constant, the source from which the immunity stems has potentially important substantive effects. Further, the source of the immunity may alter the procedural requirements for making a claim against the state or one of its political subdivisions. These differences hinge on the time the plaintiff's suit accrues. The following section examines these variations.

*A. Pre-*Presley *Causes of Action*

Morgan and *Coplin* imply that all causes of action which arose prior to *Presley* are governed by the law on sovereign immunity as it existed prior to *Pruett*.[43] Thus, all causes of action which accrued before August 31, 1992, are governed by judicially created sovereign immunity as it has traditionally existed.

Morgan v. City of Ruleville[44] provides a thorough summary of sovereign immunity at common law. Whether or not the state or one of its political subdivisions enjoys immunity for tortious conduct depends upon whether the entity was engaged in a "governmental" or a "proprietary" function at the time of the plaintiff's injury.[45] The distinction between the two types of functions is essential because the entity is immune if performing a governmental function and enjoys no immunity if performing a proprietary function.[46]

The difference between governmental and proprietary functions is unclear and leaves a lot of room for creative argument. The court in *Morgan* suggested that governmental functions are those which an entity " 'is required by state law to engage in and to perform.' "[47] The court listed specific actions which have been found governmental:

> [T]he decision whether to place traffic control devices at an intersection; establishment and regulation of schools, hospitals, poorhouses, fire departments,

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40. MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1993).
41. *Id.*
42. MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1993).
43. *See supra* notes 17-28 and accompanying text.
44. 627 So. 2d 275 (Miss. 1993).
45. *Id.* at 279 (citing Webb v. Jackson, 583 So. 2d 946, 952 (Miss. 1991)).
46. *Id.* (citing *Webb*, 583 So. 2d at 952; White v. City of Tupelo, 462 So. 2d 707, 708 (Miss. 1984); Nathaniel v. City of Moss Point, 385 So. 2d 599, 601 (Miss. 1980)).
47. *Id.* (quoting Anderson v. Jackson Mun. Airport Auth., 419 So. 2d 1010, 1014-15 (Miss. 1982)).

> police departments, jails, workhouses, and police stations; the adoption and enforcement of ordinances and regulations for the prevention of the destruction of property by fire and flood, and the manner and the character of the construction of the buildings.[48]

Proprietary functions, often called "corporate" functions, are those which are " 'not required or imposed . . . by law,' " but are activities which the governmental entity " 'is free to perform or not.' "[49] "Proprietary activities are those which, while beneficial to the community and very important, are not vital to a [governmental entity's] functioning."[50] These functions include:

> The operation of a city garbage dump; the construction and maintenance of sewage outlets to and from buildings; the maintenance and repairing of streets; the construction and maintenance of sidewalks; the operation and management of an electrical power plant by a municipality; the construction of a nuisance, such as a hog pond, close to the plaintiff's residence; the operation by the city of a fair, baseball park, or football stadium; the operation of a fire hydrant; the hauling of dirt and trash by the city; the operation and maintenance of a zoo; the creation of a dangerous situation regarding trees near sidewalks, streets or neutral areas; the operation of river landings for ingress and egress by boats; the construction and maintenance of a bridge over a gulley or ditch near a sidewalk or street; the construction and maintenance of a drain to provide for controlling rainfall; the offensive odors from a negligently operated sewage system; the supervision of the construction of a wall of a building not owned by the city; the overhead traffic control signal lights and stop signs at intersection.[51]

In sum, if the State of Mississippi or its political subdivision is performing a governmental, as opposed to a proprietary, function the entity enjoys sovereign immunity for torts committed by the entity or its employees.[52] If sovereign immunity exists for a governmental entity, a plaintiff may still be entitled to recover if the entity has purchased liability insurance which covers the type of injury the plaintiff has suffered.[53] In *Churchill v. Pearl River Basin Development District*,[54] the Mississippi Supreme Court waived a governmental entity's sovereign immunity up to the amount that the entity is covered by liability insurance.[55]

If a plaintiff brings a suit against a governmental entity relying on the fact that the entity has insurance, the plaintiff should be aware of dicta in *Morgan v. City of Ruleville*[56] which suggests that the Mississippi Municipal Liability Plan (hereinafter M.M.L.P.) is *not* insurance which waives sovereign immunity.[57] In *Morgan*, the court found that the City of Ruleville was performing a proprietary

48. *Id.* at 279 n.2 (quoting *Anderson*, 419 So. 2d at 1014 n.1).
49. *Id.* at 279 (quoting *Anderson*, 419 So. 2d at 1014).
50. *Id.*
51. *Id.* at 279 n.3 (quoting *Anderson*, 419 So. 2d at 1014-15 n.2).
52. *Id.* at 279.
53. *Id.* at 280.
54. 619 So. 2d 900 (Miss. 1993).
55. *Id.* at 906.
56. 627 So. 2d 275 (Miss. 1993).
57. *Id.* at 281.

function in operating a public pool.[58] Accordingly, the city did not enjoy sovereign immunity for its purported negligent operation of the pool.[59] Justice Prather went on, however, to address the issue of whether the M.M.L.P. would have waived sovereign immunity had the city been immune in the case.[60] Justice Prather, with four other justices concurring, concluded that the M.M.L.P. was self-insurance which would not waive sovereign immunity.[61] Thus, although the portion of the opinion on the M.M.L.P. is only dicta, it is a strong indication that the M.M.L.P. will not get a plaintiff around sovereign immunity. In fact, in *Newsom v. Stanciel*[62] a federal district court relied on *Morgan* in holding that the M.M.L.P. was not insurance which waived sovereign immunity for the City of Greenwood.[63]

*B. Post-*Presley *Causes of Action*

There are three separate time periods after *Presley* in which causes of action may accrue: (1) the period after *Presley* but before the 1992 Special Session amendments were passed; (2) the period after the 1992 Special Session amendments but before the entire comprehensive statute was enacted in 1993; and (3) the period after the 1993 comprehensive sovereign immunity statute was enacted. Differences in sovereign immunity law depend upon the time period during which the cause of action accrued. Each of the three periods are discussed below.

1. Post *Presley*/Pre-1992 Special Session

Presley was decided on August 31, 1992[64] and the 1992 Special Session amendments did not go into force until September 16, 1992.[65] Thus, technically speaking, for approximately fifteen days, *Pruett* was the law, and the State of Mississippi and its political subdivisions had no sovereign immunity. This is because *Presley* had declared section 11-46-6 unconstitutional, and the 1992 comprehensive sovereign immunity statute was not to go into force until 1993.[66] Accordingly, a plaintiff who was negligently injured by the State of Mississippi or one of its political subdivisions on September 1-15, 1992, may claim that since no statute was in force granting sovereign immunity during that time, *Pruett's* abrogation of sovereign immunity applies and the governmental entity is completely amenable to suit.

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58. *Id.* at 279.
59. *Id.*
60. *Id.* at 280-81.
61. *Id.* at 281.
62. 850 F. Supp. 507 (N.D. Miss. 1994).
63. *Id.* at 515.
64. Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288 (Miss. 1992).
65. Act of Sept. 16, 1992, ch. 3, §§ 1-5, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-3 (Supp. 1995) (amended April 1, 1993), § 11-46-6 (Supp. 1995), § 11-46-16 (Supp. 1995), § 71-3-5 (1995)) (§ 5 set the effective date of the Act and therefore is codified at MISS. CODE ANN. §§ 11-46-6, 11-46-16, and 71-3-5, which have not been amended since September 16, 1992).
66. *See Presley*, 608 So. 2d at 1288; MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1992).

2. Post-1992 Special Session/Pre-1993 Comprehensive Statute

From September 16, 1992, until April 1, 1993, the 1992 Special Session amendments were in force.[67] The 1992 Special Session amendments work essentially the same as judicially created sovereign immunity. Section 1 of the 1992 Special Session amendments provides immunity to the State of Mississippi and all of its political subdivisions but does not allow a municipality the protection of immunity when it performs a proprietary function.[68] Further, section 3 waives sovereign immunity up to the amount of liability insurance purchased by the governmental entity.[69] Thus, for a plaintiff whose cause of action accrued September 16, 1992, to March 31, 1993, the sovereign immunity defense works against her or him as it did at common law, prior to *Presley*.

3. Post-1993 Comprehensive Statute

The 1993 comprehensive statute effects two time periods differently as to sovereign immunity. The first period began on April 3, 1993, and ran until September 30, 1993.[70] Section 11-46-3 is the general immunity provision, and the language of section 11-46-3 essentially tracks the language of section 1 of the 1992 Special Session amendments.[71] Both sections provide the same immunity for the State of Mississippi and its political subdivisions.[72] Further, section 11-46-16 provides the same waiver of immunity for liability insurance as section 3 of the 1992 Special Session amendments.[73]

The additions provided by the 1993 statute during this first period are procedural. Section 11-46-7 makes the comprehensive statute the exclusive remedy against the governmental entity.[74] Thus, any plaintiff bringing an action against the State of Mississippi or its political subdivisions must meet the procedural filing requirements of section 11-46-11.[75] These requirements are simple to meet, but it is important to follow them or the plaintiff's claim may be barred.[76]

The second time period began on October 1, 1993, and is presently in effect.[77] Two important changes in the comprehensive statute occur during this second

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67. *See* Act of September 16, 1992, ch. 3, §§ 1-5, Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-3 (Supp. 1995) (amended April 1, 1993), § 11-46-6 (Supp. 1995), § 11-46-16 (Supp. 1995), § 71-3-5, (1995)) (§ 5 set the effective date of the Act and therefore is codified at MISS. CODE ANN. §§ 11-46-6, 11-46-16, and 71-3-5, which have not been amended since September 16, 1992); MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1993).

68. Act of Sept. 16, 1992, ch. 3, § 1, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-3 (Supp. 1995) (amended April 1, 1993)).

69. Act of Sept. 16, 1992, ch. 3, § 3, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-16 (Supp. 1995)).

70. MISS. CODE ANN. § 11-46-3 (Supp. 1993).

71. *See id. Compare with* Act of Sept. 16, 1992, ch. 3, § 1, 1992 Miss. Laws 4.

72. *Id.*

73. *See* MISS. CODE ANN. § 11-46-16 (Supp. 1993). *Compare with* Act of Sept. 16, 1992, ch. 3, § 3, 1992 Miss. Laws 4.

74. MISS. CODE ANN. § 11-46-7 (Supp. 1993).

75. MISS. CODE ANN. § 11-46-11 (Supp. 1993).

76. *Id.*

77. MISS. CODE ANN. § 11-46-3 (Supp. 1993).

time period. The first is a change in the general grant of sovereign immunity in section 11-46-3 for the State of Mississippi and its political subdivisions. The same grant of immunity is given to governmental entities except that the section which waived immunity for municipalities performing proprietary functions was removed.[78] Thus, if a plaintiff's claim against the governmental entity arose on or after October 1, 1993, the legislature has made the entity immune from suit even if it was performing a proprietary function.[79]

The second change is that as of July 1, 1993, for the State of Mississippi, and October 1, 1993, for the political subdivisions, section 11-46-5 provides a waiver of sovereign immunity for governmental entities.[80] Section 11-46-15 provides that the waiver of immunity is limited to $50,000.00 until July 1, 1997, at which time the limit increases to $250,000.00.[81] For claims arising after July 1, 2001, the limit is $500,000.00.[82]

In order to cover the liability of section 11-46-15, the Mississippi Legislature created the Tort Claims Fund.[83] Section 11-46-17 requires that governmental entities either contribute to the Tort Claims Fund or obtain insurance to cover the potential liabilities.[84] Further, section 11-46-17 provides that if any governmental entity has liability insurance in excess of the limits provided in section 11-46-15, sovereign immunity is waived up to the amount of such excess insurance.[85]

Thus, the result is that if a plaintiff has a claim which accrued on or after July 1, 1993, against the state, or on or after October 1, 1993, against a political subdivision, the entity will have sovereign immunity regardless of whether the activity is governmental or proprietary in nature.[86] The immunity will be waived, however, up to the amounts provided in section 11-46-15 in addition to any excess liability insurance carried by the entity.[87] Further, the plaintiff must remember that section 11-46-11 provides filing requirements which must be met.[88]

IV. CONSTITUTIONAL CHALLENGES TO SOVEREIGN IMMUNITY

The recent sovereign immunity statutes have several potential constitutional defects. For a plaintiff whose claim accrued while the 1992 Special Session amendments were in force, the plaintiff might try to challenge the section providing for discretionary purchase of insurance. Section 3 of the 1992 Special Session amendments provides that government entities have the discretion to

78. *Id.*
79. *Id.*
80. MISS. CODE ANN. § 11-46-5 (Supp. 1993).
81. MISS. CODE ANN. § 11-46-15 (Supp. 1993).
82. *Id.*
83. MISS. CODE ANN. § 11-46-17 (Supp. 1993).
84. *Id.*
85. *Id.*
86. *See* MISS. CODE ANN. § 11-46-3 (Supp. 1993).
87. *See* MISS. CODE ANN. §§ 11-46-5, -15, -17 (Supp. 1993).
88. MISS. CODE ANN. § 11-46-11 (Supp. 1993).

purchase liability insurance and, if they do so, sovereign immunity is waived up to the amount of coverage.[89] The effect of the section is that the plaintiff who has been injured by the governmental entity will have access to redress in a court of law if the entity, in its discretion, has purchased liability insurance, but will be deprived of any remedy if the entity has no liability insurance.

The plaintiff may argue that this provision violates the plaintiff's right to equal protection of the laws as secured by the Fourteenth Amendment.[90] The claimant who is injured by a governmental entity that has no liability insurance has no right to redress, while the plaintiff who is injured by a governmental entity that has liability insurance does have a right to some redress. No legitimate governmental objective is served by treating these two classes of plaintiffs differently based on whether the governmental entity, in its own discretion, saw fit to purchase an insurance plan.

The plaintiff may also argue that the provision violates the plaintiff's right to due process as secured by the Fourteenth Amendment.[91] Whether or not a claimant has a right to redress against a governmental entity depends entirely upon whether the entity purchased liability insurance. This determination is wholly within the entity's discretion. Hence, the plaintiff's right to redress is left to the discretion of each individual governmental entity. The entity has no incentive to purchase the insurance since, when it is uninsured, it is otherwise entirely immune from suit.

The Mississippi Constitution, article III, section 24, guarantees an individual the right to redress for wrongs done to her or him.[92] The section provides: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered, without sale, denial, or delay."[93] The section allows all plaintiffs an action for wrongs against them, regardless of whether the wrongs are public or private.[94] The plaintiff may argue that there is no rational basis for placing a plaintiff's constitutional right to recovery in the hands of each governmental entity, especially when the entity has no incentive whatsoever to protect the plaintiff's right. The same argument applies to the arbitrary cap placed on the plaintiff's recovery based on the amount of coverage in the particular insurance policy that the entity chose.

Plaintiffs whose causes of action accrued after the 1993 comprehensive statute was enacted may likewise challenge the insurance provisions in section 11-46-17.[95] Further, the plaintiff may challenge section 11-46-15 which limits the plaintiff's recovery to a certain amount depending upon the time the

89. Act of Sept. 16, 1992, ch. 3, § 3, 1992 Miss. Laws 4 (currently codified at MISS. CODE ANN. § 11-46-16 (Supp. 1995)).

90. U.S. CONST. amend. XIV, § 1.

91. *Id.*

92. MISS. CONST. art. III, § 24.

93. *Id.*

94. *Id. See also* Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1302-03 (Miss. 1992) (McRae, J., dissenting) (suggesting that the doctrine of sovereign immunity was eviscerated with the adoption of article III, section 24, in 1890).

95. MISS. CODE ANN. § 11-46-17 (Supp. 1993).

plaintiff's cause of action accrues.[96] As with the cap on recovery based on insurance, the plaintiff may argue that section 11-46-15 arbitrarily limits the plaintiff's redress to an amount which is totally inadequate to compensate for the plaintiff's losses in violation of the plaintiff's due process rights. Also, the plaintiff may contend that section 11-46-15 violates the plaintiff's right to equal protection by, for example, denying any recovery at all to a plaintiff whose injury occurred *prior* to October 1, 1993, while allowing redress up to $50,000.00 for a plaintiff whose cause of action accrued *after* October 1, 1993.[97]

No cases have yet arisen in the Mississippi Supreme Court challenging the constitutionality of the latest sovereign immunity statutes. Since the court in *Presley* struck down section 11-46-6 of the 1992 sovereign immunity statute as unconstitutional,[98] the Mississippi Legislature has made some significant changes in the way the sovereign immunity defense applies to persons injured by a governmental entity. As shown above, many of these changes treat claimants unfairly and may be ripe for constitutional challenge. The legislature's latest attempt to immunize municipalities for proprietary or corporate functions[99] may itself be struck down as a violation of a plaintiff's due process rights considering the pervasiveness of the government's actions in modern times.

As Chief Justice Smith wrote for the Mississippi Supreme Court in *Albritton v. City of Winona*,[100] the Due Process Clause must be interpreted "under the social and economic conditions then existing, which conditions are ever changing and each case must be decided on the social and economic conditions that exist when the statute was enacted or, probably, at the time the case is decided."[101] "Growth is the life of the law, and when it ceases to grow and to keep pace with the social and economic needs it becomes a hindrance instead of an aid to the public welfare."[102] Sovereign immunity itself, especially when applied to proprietary functions, is out of step with our modern post-New Deal ideology that the government be involved in all aspects of an individual's life.

V. CONCLUSION

A plaintiff who has been injured by a tort committed by the State of Mississippi or one of its political subdivisions has several important considerations to keep in mind when deciding whether or not to file a suit. First is the time the plaintiff's cause of action accrued. This can make important differences in how the sovereign immunity law applies and any procedural requirements that must be met in filing the action. The plaintiff should also consider whether the governmental entity was performing a governmental or a proprietary function

96. MISS. CODE ANN. § 11-46-15 (Supp. 1993).
97. *See id.*
98. *Presley*, 608 So. 2d at 1288.
99. *See* MISS. CODE ANN. § 11-46-3 (Supp. 1993).
100. 178 So. 799 (Miss. 1938).
101. *Id.* at 806.
102. *Id.*

when it injured the plaintiff. If the activity was of a private nature no immunity will exist for the entity.

Further, the plaintiff should determine whether the governmental entity carried liability insurance that covered the injury the plaintiff suffered. Regardless of when the cause of action accrued, liability insurance always waives sovereign immunity up to the amount of the coverage. If the accident occurred after mid-1993, sovereign immunity will be waived up to a minimal amount specified in the statute.[103] Finally, the plaintiff may want to break new ground and challenge provisions of the sovereign immunity statute on constitutional grounds. In our modern day and age, not only does the government perform a tremendously wide range of functions, but it employs such a large number of individuals that the possibility of harm to the public is enormous. Statutory provisions which prohibit or limit a plaintiff's access to a court of law to seek compensation for injuries caused by a governmental entity fail to recognize modern economic realities. Governmental entities should no longer constitutionally be permitted to harm persons and have their liability limited to an insignificant amount or have their liability depend upon whether they, in their own discretion, chose to buy liability insurance.

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103. MISS. CODE ANN. § 11-46-15 (Supp. 1993).