

AUTHORITY OF THE LEGISLATIVE ASSEMBLY TO GRANT IMMUNITY TO POLITICAL SUBDIVISIONS AND THE STATE FOR YEAR 2000 COMPUTER LIABILITY

This memorandum addresses the authority of the Legislative Assembly to grant immunity for the state and political subdivisions with respect to potential liability resulting from year 2000 computer liability. The North Dakota Supreme Court abolished the legal doctrine of governmental immunity for political subdivisions in 1974 in *Kitto v. Minot Park District*, 244 N.W.2d 795. In 1994 the Supreme Court also abolished the doctrine of sovereign immunity for the state in *Bulman v. Hulstrand Construction Company*, 521 N.W.2d 632. However, the Supreme Court has acknowledged that political subdivisions and the state continue to possess immunity for discretionary actions.

POLITICAL SUBDIVISION GOVERNMENTAL IMMUNITY

The concept of governmental immunity for political subdivisions in North Dakota was instituted through judicial decisions and modified through the years until the North Dakota Supreme Court abolished the doctrine of governmental immunity in the *Kitto* decision in 1974. In *Kitto*, the Supreme Court limited the scope of its decision to exclude the essential acts of governmental decisionmaking, or discretionary acts. The court included within that category "acts traditionally deemed legislative or quasi-legislative, or judicial or quasi-judicial, in nature." However, the court did not further define discretionary acts or specify additional actions that may be deemed discretionary.

The 1977 Legislative Assembly adopted North Dakota Century Code (NDCC) Section 32-12.1-03, which limits the liability of political subdivisions for injuries or property damage caused by the negligence or wrongful act or omission of employees of political subdivisions. Section 32-12.1-03 specifically exempts a political subdivision or an employee of a political subdivision from liability for any claim that results from:

1. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act.
2. The decision to undertake or the refusal to undertake any judicial or quasi-judicial act.
3. The decision to perform or the refusal to exercise or perform a discretionary function or duty.
4. The failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities; or doing any fire extinguishment or

fire prevention work, rescue, resuscitation, or first aid.

Since the *Kitto* decision, the Supreme Court has decided a number of cases in which courts were faced with the determination of whether a particular act is a discretionary act for which a political subdivision is not liable. In one of the most recent decisions, the Supreme Court stated that the application of the discretionary function exception is determined by the nature of the conduct, not the status of the actor, and whether the conduct or choice is of the kind the discretionary function was designed to shield (*Olson v. City of Garrison*, 539 N.W.2d 663 (1995)).

In the *Olson* decision, the Supreme Court stated that the purpose of the discretionary function exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort, and the exception should shield only governmental action based on public policy considerations. The court further stated that public policy considerations, social, economic, or political, must be distinguished from more objective standards based on scientific, engineering, or technical considerations. The court concluded that the operation and maintenance by the city of Garrison of its city water main system rested on public policy considerations. The court stated that under the facts of the case the city's decisions regarding maintenance of water mains was a discretionary function for which the city should not be liable. However, the court did indicate that economic considerations, when reduced to ingredients such as budgetary constraints or choices involving whether to spend money, do not in themselves insulate government action.

STATE SOVEREIGN IMMUNITY

In the *Bulman v. Hulstrand Construction Company* decision, the North Dakota Supreme Court determined that the second sentence of Section 9 of Article I of the Constitution of North Dakota does not grant the state sovereign immunity. Section 9 of Article I reads as follows:

All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the

legislative assembly may, by law, direct.
(emphasis added)

In *Bulman*, as with the *Kitto* decision, the Supreme Court indicated that the state should be immune for discretionary acts, including legislative, judicial, quasi-legislative, and quasi-judicial functions.

As a response to the decision of the Supreme Court in *Bulman*, the 1995 Legislative Assembly adopted NDCC Chapter 32-12.2 to establish a procedure for bringing claims against the state. Subsection 3 of Section 32-12.2-02 provides that neither the state nor a state employee may be held liable for any of the following claims:

- a. A claim based upon an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule.
- b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the state or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.
- c. A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, order, rule, or resolution.
- d. A claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.
- e. A claim resulting from the assessment and collection of taxes.
- f. A claim resulting from snow or ice conditions, water, or debris on a highway or on a public sidewalk that does not abut a state-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a state employee.
- g. A claim resulting from any injury caused by a wild animal in its natural state.
- h. A claim resulting from the condition of unimproved real property owned or leased by the state.
- i. A claim resulting from the loss of benefits or compensation due under a program of public assistance.
- j. A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.
- k. A claim resulting from damage to the property of a patient or inmate of a state institution.
- l. A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.
- m. A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.
- n. A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.
- o. A claim for damage to property owned by the state.
- p. A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a state employee's operation of a rental vehicle if the vehicle is rented for a period of thirty days or less and the loss is not covered by the state employee's personal insurance or by the vehicle rental company.

Because there have been no appellate court decisions addressing the exceptions to the state's liability under Section 32-12.2-02 which may fall outside the discretionary function exclusion, it is not clear whether all the exceptions would be recognized by the courts as appropriate exclusions from liability. Although the Legislative Assembly has provided more exceptions for liability for the state under Section 32-12.2-02 than for political subdivisions under Section 32-12.1-03, it can be argued that the Legislative Assembly has greater power to provide exceptions to liability for the state than for political subdivisions because Section 9 of Article I of the constitution specifically authorizes the Legislative Assembly to enact legislation regarding the manner, the courts, and the cases in

which suits may be brought against the state. Thus, although the Supreme Court only indicated that the state is immune from suit resulting from the exercise of discretionary functions, it can be argued that the Legislative Assembly has broader authority to limit the types of suits that may be brought against the state.

CONCLUSION

Both the state and political subdivisions are subject to liability for injuries or damage to property caused by the negligence or wrongful acts or omissions of employees acting within the scope of their employ-

ment. However, the state and political subdivisions are not subject to liability for discretionary acts. It is not clear exactly what a discretionary act is; however, the Legislative Assembly has excluded the state and political subdivisions from liability for various claims.

There is a presumption that laws enacted by the Legislative Assembly are constitutional (*Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979)). Furthermore, agreement of at least four of the justices of the North Dakota Supreme Court is required to declare a legislative enactment unconstitutional under the Constitution of North Dakota Article VI, Section 4. Thus, if the Legislative Assembly were to enact exclusions from liability for the state and political subdivisions for claims resulting from year 2000 computer problems, the legislation would carry a presumption of constitutionality.