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Liability of the State and Its Employees in the Mishandling of Security Interests Under Commercial Codes and Motor Vehicle Laws

DANIEL E. MURRAY*

I. INTRODUCTION

The facts of Orlando Dodge, Inc. v. First Union National Bank, a recent Florida case, provide a useful frame of reference for beginning this Article.1 In Orlando Dodge, Mr. and Mrs. Mirsky purchased a new car from a franchised dealer.2 Florida's Department of Motor Vehicles ("DMV") issued a certificate of title listing the Mirskys as owners and their bank as first lienholder.3 The couple returned the title certificate and requested that the DMV reverse their names so that Mrs. Mirsky would appear first on the new certificate.4 The DMV granted the couple's request, but, inexplicably, omitted any notation of the bank's lien on the title.5 The Mirskys took advantage of this error by selling the car to another dealership and disappearing.6 Prior to purchasing the couple's car, the dealership confirmed with the DMV that the title was clean.7 However, when the dealership sold the couple's car to a customer, the DMV revoked the couple's second title certificate and can-

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1. 661 So. 2d 322 (Fla. 5th DCA 1995).
2. See id.
3. See id. As part of their financing arrangement, the couple granted their bank a security interest in the new car.
4. See id.
5. See id.
6. See id.
7. See id.
celled the customer's title certificate. The dealership then bought the car back from its customer and informed the lienor bank of the car's location, but refused to relinquish possession. The lienor bank responded by suing the second dealer to replevy the car.

The trial court ruled in favor of the lienor bank. On appeal, the dealership argued that it ought to be protected because it relied upon the clean title certificate and its communication with the DMV. However, the court of appeal held in favor of the lienor bank based on the rule that the first-to-file lienholder prevails over a subsequent bona fide purchaser.

The decision seems correct under the first-to-perfect rule; however, both parties have suffered as a result of the negligence of the DMV. Both parties have had to pay attorney's fees for a trial and an appeal, and the dealership lost the money it paid the couple for the car, as well. It appears that two parties, acting in good faith and in strict compliance with the law, have suffered a loss because of the negligence of some faceless clerk in the DMV.

This Article analyzes and discusses the statutory provisions and case law governing a state's responsibility, or lack of responsibility, when the government negligently files security interests or fails to properly reveal the names of prior secured creditors to potential lenders or purchasers. This Article attempts to group states' views under the five headings in the table of contents, a daunting task because of the variety of approaches, wording, and indexing methods states use. To further complicate matters, some states seem to draft their legislation so as to fool their citizens into thinking that the legislature cares about them, relying on clever wording in their statutes to shield themselves, their agencies, and their employees from liability for negligence.

In 1982, the Supreme Court of Mississippi spoke with great confidence on the issue of judicially created sovereign immunity. The court found: "Research reveals that practically all of the states have abrogated and abolished the sovereign immunity doctrine. The vast majority has done so completely, some have retained certain prohibitions. There are only six [including Mississippi] which have not taken any action or have not clarified their positions." The court then abolished most of

8. See id.
9. See id.
10. See id.
11. See id.
12. See id. at 324.
13. See id. at 325.
14. See Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982).
15. Id. at 1047.
Mississippi's common law, sovereign immunity rules.

This reform and others like it were very short-lived. This Article will show that the majority of states, including Mississippi, have legislatively re-established many of their sovereign immunity rules.

II. States Which Waive Immunity for Errors in the Recording Process

The Florida Constitution provides that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

In accordance with this constitutional authority, the Legislature enacted a lengthy statute which states, in pertinent part, that "[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment."

The statute then limits liability to not more than $100,000 per person or $200,000 per incident, unless the Legislature specifically sets a higher sum in a particular case.

In an action brought under this statute, a district court of appeal held that sovereign immunity did not bar an action against a circuit court clerk who failed to carry out his statutory duty to properly index a "Notice of Claim of Interest in Land" because of computer operator error.

In reaching its holding, the court relied heavily on the Florida Supreme Court's decision in Trianon Park Condominium Ass'n v. City of Hialeah. In Trianon Park, a condominium association sued the City of Hialeah, alleging that its building inspector negligently inspected a condominium. The Florida Supreme Court reversed a finding of liability on the part of the city, holding that courts must ascertain the legislative intent, either express or implied, in order to determine whether particular individuals or classes of individuals are to benefit from a given statute. If the court finds a legislative intent to benefit the public as a whole, then no duty of care arises as to any particular individual.

18. See id.
20. See id. at 565.
21. 468 So. 2d 912 (Fla. 1985).
22. See id. at 915.
23. See id. at 914.
24. See First Am. Title Ins. Co., 603 So. 2d at 564.
However, if the court finds an intent to benefit a definable class of individuals, then a duty of care may be found.\textsuperscript{25}

The \textit{First American Title} court applied this reasoning in its own decision. It reviewed the statutory provisions defining the clerk’s duties:

By statute, the clerk is required to record, index, and maintain documents relating to real property in the public records of St. Lucie County, Florida. Indeed, the entire Florida legal scheme regarding interests in land is predicated on the recording of documents relating to claims of interests in land. Florida’s statutes provide\textsuperscript{[1]} that “[n]o conveyance, transfer, or mortgage of real property, or any interest therein . . . shall be good and effectual in law or equity against creditors or subsequent purchasers . . . unless the same be recorded according to law.” [They also] provide\textsuperscript{[2]} that the clerk of the circuit court is also the county recorder, and . . . direct\textsuperscript{[3]} the clerk to record deeds, leases, mortgages, liens, and “other instruments relating to . . . ownership . . . [of] real or personal property or any interest in it.” [One section] . . . requires the clerk to keep a register with details of the filing of instruments, in order to ensure the proper maintenance of the public records. Finally, concerning the claim involved herein, that section specifically provides that the clerk “[s]hall maintain a general alphabetical index, direct and inverse, of all instruments filed for record.”\textsuperscript{26}

In \textit{First American Title}, the clerk conceded that he had a statutory duty to properly record and index documents, and acknowledged that the recording statutes generally protect the rights of those claiming an interest in land, including bona fide purchasers of property and creditors of property owners.\textsuperscript{27} The clerk asserted, however, that this group was not the “definable class of individuals that the statute was designed to protect” contemplated by \textit{Trianon}, so as to give rise to a specific relationship and duty between the clerk and the individual at risk.\textsuperscript{28} Rather, the clerk claimed that his duty was the same as the building inspector’s in \textit{Trianon}.\textsuperscript{29} The court did not agree.\textsuperscript{30}

In a very recent Florida case, \textit{Layton v. Florida Department of Highway Safety & Motor Vehicles},\textsuperscript{31} a police officer stopped a driver for driving a car with a broken taillight. During the stop, the officer checked with the Florida Department of Highway Safety and Motor Vehicles (“DHSMV”) and discovered that the driver’s license had been

\begin{itemize}
  \item\textsuperscript{25} See id.
  \item\textsuperscript{26} Id. (citations omitted).
  \item\textsuperscript{27} See id.
  \item\textsuperscript{28} See id.
  \item\textsuperscript{29} See id.
  \item\textsuperscript{30} See id.
  \item\textsuperscript{31} 676 So. 2d 1038 (Fla. 1st DCA 1996).
\end{itemize}
suspended. Therefore, the officer arrested the driver. The driver was detained for approximately seventeen hours before being released on her own recognizance. After learning that the DHSMV's records were incorrect and that her license had not been suspended, she sued the DHSMV. The trial court and appellate court agreed that the driver had no cause of action under Florida law. The appellate court stated:

We conclude that the maintenance of DHSMV records is a function undertaken by the government for the public generally and that the duty to perform this function accurately runs to the public and not to individual licensed drivers. Accordingly, we hold that the state has no common law or statutory duty to Layton to accurately maintain motor vehicle records.

The Layton court did not cite First American Title’s holding that the clerk had a duty to keep accurate records and that this duty extended, not just to the public, but to injured individuals as well. Both the Layton and First American Title courts purportedly followed the Trianon Park case, but they reached opposite results. This is not surprising in light of the fact that Trianon Park was a four-to-three decision with one majority opinion, one concurring opinion, and two dissenting opinions. Although the majority opinion seemed to adopt cases which were decided prior to the advent of the Florida Tort Claims Statute to circumvent the plain wording of the statute, Trianon Park remains a potential stumbling block in tort claims against the State of Florida and, possibly, other states which adopt its rationale.

In response to an inquiry from a county attorney regarding filing under Florida’s commercial code, the Florida Attorney General wrote that a circuit court clerk should file “an originally signed carbon copy of a document,” rather than refuse to file it, because

32. See id. at 1039.
33. See id.
34. See id.
35. See id.
36. See id.
37. See id.
38. See id. at 1039; First Am. Title Ins. Co., 603 So. 2d at 564-65. In the latest progeny of the Trianon Park case, the Fifth District Court of Appeal has held that the Department of Highway Safety and Motor Vehicles is not liable under section 768.28 of the Florida Statutes for its acts in the allegedly negligent revocation of the plaintiff’s driver’s license for a non-existent medical condition, for failing to recognize that the plaintiff was qualified to drive during the day, and for failing to reinstate the plaintiff’s driving privileges. This result follows that “[b]ecause there has never been a common law duty of care for the discretionary governmental function of revoking and renewing drivers’ licenses and the statutory waiver of sovereign immunity did not create a new duty of care . . . .” Thompson v. Department of Highway Safety and Motor Vehicles, 692 So. 2d 272, 273 (Fla. 5th DCA 1997).
39. See Trianon Park, 468 So. 2d at 923 (Ehrlich, J., dissenting); see also id. at 926 (Shaw, J., dissenting).
the failure to accept and file it might jeopardize priority rights in the event such a document was later held to constitute a proper filing in an appropriate proceeding in a court of competent jurisdiction. In such event it may well be that a Clerk could suffer liability for any damages resulting from the loss of priority rights stemming from the refusal of the Clerk to file the previously tendered instrument.  

In a somewhat similar vein, the Attorney General of South Dakota informed a state’s attorney that a register of deeds would be personally liable if he made errors in the certified answer to a request for information regarding the filing of financing statements. The Attorney General also noted that the register of deeds would be protected under a “combined public officers and employees” bond carried by the county.

Subsequent to this opinion, South Dakota adopted an interesting approach to claims against the State for its agents’ negligence. The State enacted legislation allowing the Commission of Administration to purchase “public liability insurance to the extent and for the purposes considered expedient by the commissioner for the purpose of insuring the liability of the state, its officers, agents or employees.” If insurance is obtained under this statute, then “[t]o the extent such liability insurance is purchased . . . and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.”

The South Dakota legislation also provided that if the Commission does not purchase insurance, “any employee, officer or agent of the state, while acting within the scope of his employment or agency, whether such acts are ministerial or discretionary, is immune from suit or liability for damages brought against him in either his individual or official capacity.”

The Supreme Court of South Dakota has held that the sections cited above did not waive sovereign immunity where a county register of deeds was sued for misfiling documents creating easements on contiguous farm lands causing an abstract company to issue an erroneous

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40. Op. Att’y Gen. of Fla., 4 U.C.C. Rep. Serv. (Callaghan) 273, 276 (Feb. 3, 1967).  But see Op. Att’y Gen. of Cal., 3 U.C.C. Rep. Serv. (Callaghan) 96, 97-98 (May 4, 1965) ("[t]he Secretary of State is required to do more than merely receive and file all statements which are presented for filing. . . . [H]e is required to ascertain whether the statement is in proper form and contains the elements required . . . ").
42. See id. at 807.
44. Id. § 21-32-16.
45. Id. § 21-32-17.
abstract of title. In the same case, the court also found that a county was immune from suit because the Legislature did not expressly waive the county's immunity in these sections. However, the sections were later amended to provide that if a public entity other than the State purchases liability insurance, then sovereign immunity has been waived to the extent of the insurance purchased.

The New York case of *ITT Diversified Credit Corp. v. State* involved an expensive comedy of errors. In that case, the lender, ITT, requested a certification from the Secretary of State listing all creditors of "All-Glass Boat Sales, Inc. d/b/a Marlin Marine." In response, the Secretary of State sent a certificate listing three creditors of "The American Felt & Filter Company." ITT wrote letters to each of these creditors. One creditor of American Felt replied to ITT that it was not a creditor of Marlin Marine. ITT did not seek clarification from the Secretary of State. When ITT suffered a loss as a result of this transaction, it sued the State of New York. The court concluded that the Secretary of State and, therefore, the State were negligent in this case. However, the court went on to hold that ITT's loss was attributable to its unreasonable reliance on the erroneous certificate, because the State's mistake was obvious upon a mere glance at the certification and one of the alleged creditors apprised ITT that it had no interest. Therefore, it denied recovery.

The *ITT* court relied upon an earlier case, *Hudleasco, Inc. v. State.* The Hudleasco court found that when the Secretary of State of New York certified the existence of creditors under section 9-407 of New York's commercial code, he was acting in a purely ministerial capacity and had a duty to issue certificates in a careful manner knowing they would be acted upon. It, therefore, held that negligent issuance of the certificate was actionable. In doing so, it relied on a previous New York case, *ITT v. State.*

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47. See id.
49. 454 N.Y.S.2d 530 (N.Y. Ct. Cl. 1982).
50. See id. at 531.
51. See id.
52. See id.
53. See id.
54. See id.
55. See id.
56. See id. at 532.
57. See id.
58. See id. at 531.
60. See id. at 1005-06.
61. See id. at 1006.
York case which imposed liability upon the Department of Motor Vehicles for issuing certificates of title without noting the foreign liens on the subject vehicles.\(^{62}\)

The same result would be reached in a case involving domestic liens. For example, when a lender's lien is properly noted on a Michigan certificate of title for a car, which is later removed to New York, and the owner surrenders the Michigan certificate to the New York Department of Motor Vehicles in exchange for a new certificate, the Michigan lien creditor is protected if the New York clerk fails to note the Michigan lien on the new title certificate and the debtors go into bankruptcy.\(^{63}\)

It appears that in Ohio the county recorder and his surety also would be liable to persons requesting written certifications regarding the filing of financing statements.

> [U]pon the tender of the fee provided, a ministerial duty is imposed upon the county recorder . . . to examine the indexes and files of his office and to issue a written certificate as to whether said public records contain any financing statements in relation to one particular debtor which are effective in that they were filed within the time period prescribed . . ., but the county recorder is not required or permitted . . . to issue his interpretation or opinion as to the legal effect of such filings; and that upon the failure of the county recorder to fully list all such financing statements he and his surety are liable to a person for damages resulting from such omission.\(^{64}\)

A somewhat similar view was expressed by an Ohio court of appeals. In Maddox v. Astro Investments,\(^{65}\) the county court clerk filed a judgment lien against real property on May 23, 1973, but did not index it until June 4, 1973.\(^{66}\) In the meantime, a party relied upon the records to determine whether there was a lien and, not finding one, closed title on the property.\(^{67}\) The Maddox court held the clerk liable for his negligence, never mentioning a waiver of sovereign immunity.\(^{68}\)

Approximately six years after Maddox, the Supreme Court of Ohio held, in accordance with a 1976 statute in which Ohio waived its sovereign immunity and consented to being sued in the Ohio Court of Claims,\(^{69}\) that claimants in Ohio could now sue the State for negligence when the Secretary of State overlooked a properly filed security interest

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\(^{62}\) See id. (citing Exchange National Bank v. State, 388 N.Y.S.2d 971 (N.Y. Ct. Cl. 1976)).


\(^{65}\) 343 N.E.2d 133 (Ohio Ct. App. 1975).

\(^{66}\) See id. at 134-35.

\(^{67}\) See id.

\(^{68}\) See id. at 136-37.

and issued a written statement incorrectly assuring the claimant that a
certain party did not have any security interests filed against it. The
court noted, however, that under the revised statute, the claimant waives
his claim against the state officer who committed the negligent act by
filing a suit against the State.

III. STATES WHICH CLAIM IMMUNITY FOR ERRORS IN THE "ISSUANCE
OF CERTIFICATES" AND FOR "MISREPRESENTATIONS"

The adoption of the Federal Tort Claims Act began the drive for
states to waive their sovereign immunity. The Federal Tort Claims Act
provides that "[t]he United States shall be liable, respecting the provi-
sions of this title relating to tort claims, in the same manner and to the
same extent as a private individual under like circumstances." It gives
the federal district courts exclusive jurisdiction over
civil actions on claims against the United States, for money damages,
... for injury or loss of property, or personal injury or death caused
by the negligent or wrongful act or omission of any employee of the
Government while acting within the scope of his office or employ-
ment, under circumstances where the United States, if a private per-
son, would be liable to the claimant in accordance with the law of the
place where the act or omission occurred.

The broad scope of this waiver, however, is drastically curtailed
by exceptions for "[a]ny claim arising out of assault, battery, false impris-
onment, false arrest, malicious prosecution, abuse of process, libel, slan-
der, misrepresentation, deceit, or interference with contract rights." In
light of the exceptions for "misrepresentation" and "deceit," it
should come as no surprise that the government is immune from suit for
negligent or intentional misrepresentations. Courts have interpreted
the term "misrepresentation" to include both acts of commission and
omission.

A problem arises when it is unclear whether the alleged wrongful
act should be labelled a "misrepresentation." For example, in Saraw
Partnership v. United States, the plaintiff, Saraw, was in the business
of acquiring foreclosed homes from the Veterans Administration

73. Id. § 1346(b).
74. Id. § 2680(h) (emphasis added).
75. See Williamson v. USDA, 815 F.2d 368, 377 (5th Cir. 1987).
76. See, e.g., McNeily v. United States, 6 F.3d 343, 347 (5th Cir. 1993).
77. 67 F.3d 567 (5th Cir. 1995).
("VA"), repairing them, and then selling them for profit. Saraw gave the VA promissory notes for nine properties. The VA assigned each property a separate loan number, but only sent coupon payment forms to Saraw for eight of the properties. Saraw continued to make payments on the ninth property, but the VA did not credit the payments to the correct account and foreclosed on the property. When Saraw sued the VA for its negligent handling of his account, the trial court held in favor of the VA on the grounds that the alleged negligence was actually a misrepresentation and that, therefore, the VA was immune from suit. The court of appeals reversed, stating that: "The erroneous keypunch for Loan #28541 was the causa sine qua non for all the problems that followed. This case is not about reliance on faulty information or on the lack of proper information; rather, the gist of this case is the government's careless handling of Saraw's loan payments." It found that "[w]here there is no detrimental reliance on an alleged miscommunication, no claim for misrepresentation is made."

The United States Supreme Court has drawn a subtle line between "negligent misrepresentation" and "negligent inspection" which results in a "negligent misrepresentation." The Supreme Court defined "negligent misrepresentation" in United States v. Neustadt. In Neustadt, a married couple purchased a sixteen-year-old house which appeared to be in excellent condition. The Federal Housing Administration ("FHA") inspected the house and issued a favorable report. Soon after the couple moved into the house, the house developed extensive cracking in the walls and ceilings. Contractors drilled a hole through the basement floor and discovered that the house was built on clay, which became slippery when wet. The foundation shifted on this slippery clay, causing the cracking in the walls and ceiling. The U.S. Supreme Court held that the crux of the plaintiffs' claim was the FHA's negligent misrepresentation of the condition of the home and, therefore, the "misrepresentation" exception to the sovereign immunity waiver barred suit against

78. See id. at 568.
79. See id.
80. See id.
81. See id. at 568-69.
82. See id. at 569.
83. Id. at 570-71 (footnote omitted).
84. Id. at 571; see also Fitch v. United States, 513 F.2d 1013, 1016 n.2 (6th Cir. 1975) (discussing cases defining misrepresentation).
86. See id. at 698-99.
87. See id. at 698.
88. See id. at 700.
89. See id.
Years later, in *Block v. Neal*, the Supreme Court narrowed its reading of “misrepresentation.” In *Block*, the plaintiff hired a contractor to erect a prefabricated home and obtained a loan from the Farmers Home Administration (“FmHA”) to purchase the home. The construction contract required that the plans, workmanship, and materials conform to FmHA standards. The FmHA conducted three inspections prior to the plaintiff moving in and approved the home. However, after the plaintiff moved in, the FmHA made further inspections and discovered fourteen major defects. When the plaintiff sued the FmHA, the Court held that the complaint primarily alleged “negligent inspection” by the original inspector and, therefore, the negligent misrepresentation exclusion would not immunize the government from suit. Justice Marshall explained:

In this case, unlike *Neustadt*, the Government’s misstatements are not essential to plaintiff’s negligence claim. The Court of Appeals found that to prevail under the Good Samaritan doctrine, [the plaintiff] must show that FmHA officials voluntarily undertook to supervise construction of her house; that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA’s failure to use due care. FmHA’s duty to use due care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction is distinct from any duty to use due care in communicating information to respondent. And it certainly does not “appea[r] beyond doubt” that the only damages alleged in the complaint to be caused by FmHA’s conduct were those attributable to [the plaintiff’s] reliance on FmHA inspection reports. [The plaintiff’s] factual allegations would be consistent with proof at trial that Home Marketing would never have turned the house over to [the plaintiff] in its defective condition if FmHA officials had pointed out defects to the builder while construction was still underway, rejected defective materials and workmanship, or withheld final payment until the builder corrected all defects.

Justice Marshall’s words display many of the subtleties of common law pleading. These subtleties can destroy what Congress creates.

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90. *See id.* at 711.
92. *See id.* at 291.
93. *See id.*
94. *See id.* at 292.
95. *See id.*
96. *See id.* at 297.
97. *Id.* at 297-98 (citation and footnote omitted).
Because most negligent misrepresentations are preceded or accompanied by an act of negligence, every diligent pleader should focus on such negligence and disregard the misrepresentation aspect.98

In 1985, California enacted a very narrowly focused legislative response to the problem the Introduction to this Article posed about state responsibility for misinformation.99 The code provision provides:

The Department of Motor Vehicles is liable for any injury to a lienholder or good faith purchaser of a vehicle proximately caused by the department's negligent omission of the lienholder's name from an ownership certificate issued by the department. The liability of the department under this section shall not exceed the actual cash value of the vehicle.100

98. The crux of this argument is that a plaintiff's ability to sue the government turns on her ability to persuade the court that the cause of action lies in negligence, not misrepresentation. For example, where the FmHA failed to warn prospective purchasers of a house of a defective heater, and the heater caught fire, killing a child, section 2680(h)'s "misrepresentation" exclusion would not protect the government because there was no misrepresentation to the purchasers. See McNeil v. United States, 897 F. Supp. 309 (E.D. Tex. 1995). In McNeil, the plaintiffs focused on the FmHA's failure to act, not the wrongful representation. See id. at 311-12.

McNeil should be compared with Schneider v. United, States, 936 F.2d 956 (7th Cir. 1991). In Schneider, plaintiffs bought factory-built houses with financing from the FmHA and the Department of Housing and Urban Development ("HUD"). HUD did not supervise construction of these houses, but it did conduct semi-annual inspections of the manufacturer's factory. See id. at 957-58. Although the plans and specifications called for a certain type of "sheathing paper," the manufacturer used the wrong kind, causing moisture to get inside the walls and the sheathing to rot. When the plaintiffs sued the United States, the United States argued that 28 U.S.C. § 2680(h) barred actions for "misrepresentation." See id. at 958. The trial court and the court of appeals agreed that the "misrepresentation" defense barred the plaintiffs' claims. See id. at 963. The appellate court compared the Block and Neustadt cases to the case before it:

The plaintiffs in the case before us, unlike the plaintiff in Block, have alleged no claim for negligent supervision of the construction of [the] houses. Indeed, at oral argument, counsel for the plaintiff specifically stated the inspection of [the manufacturer's factory] approximately two times per year for two to three hours by a HUD official was "irrelevant" to the disposition of this case. Unlike Block, ours is a case where the government's misstatements are essential to the plaintiffs' claims: In order for [the manufacturer] to have been able to sell houses to the plaintiffs that were eligible for government financing, HUD had to issue a Regional Letter of Acceptance listing those . . . houses that had been approved. The plaintiffs relied on the misstatement in this Letter of Acceptance that the . . . houses were constructed in accordance with government standards . . . and unlike the plaintiff in Block, have not alleged separate facts which would establish a duty independent of the misrepresentation exception. Thus, the plaintiffs' reliance on Block is without merit.

Our case is like Neustadt, where plaintiffs who relied on misinformation in a government document when making their decision to purchase a home were found to have stated claims that fell within the misrepresentation exception. In our case it is clear that the plaintiffs would not have been harmed but for the misinformation that was communicated through the Regional Letter of Acceptance.

Id. at 761.


100. Id.
The historical note to this statute declares that the Legislature intended "that the provisions of Section 818.5 of the Government Code not be construed as establishing any precedent for creating state liability in any other situation or circumstance."101

It seems clear from this statement of legislative intent that the California courts should not extend the waiver statute to reach the Secretary of State in the event his office negligently misfiles a financing statement.102

Another California statute provides: "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice."103 According to the Attorney General of California, the above statute, which resembles the Federal Tort Claims Act, would protect the Secretary of State from liability for negligent or intentional misrepresentation, absent fraud, corruption, or actual malice, committed in the process of furnishing information regarding the filing of financing statements.104 In addition, he stated that even if a court held that this statute did not protect the Secretary of State, other statutes which require the State to defend any employee for acts committed within the scope of his or her employment would protect the Secretary.105

In addition to the "misrepresentation" defense, California has adopted the "issue" defense, which immunizes officials from liability for purely discretionary acts. Section 818.4 of the California Statutes provides:

A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, sus-

101. Id. at historical and statutory notes.

102. Prior to the adoption of section 818.5 above, a California appellate court held that when the Department of Motor Vehicles mistakenly certified that a stolen car was titled properly in the name of an individual, the state was not liable to an innocent purchaser because of three statutes: section 821.2, providing that a public employee was not liable for injury resulting from the issuance of items such as certificates; section 818.4, providing that a public entity was not liable for injury resulting from the issuance of items such as certificates; and section 818.8, providing that a public entity was not liable for an injury resulting from misrepresentation by an entity employee, regardless of whether such misrepresentation was negligent or intentional. See Hirsch v. Department of Motor Vehicles, 115 Cal. Rptr. 452, 455 (Cal. Ct. App. 1974).

103. CAL. GOV'T CODE § 822.2 (West 1996).


105. See id. at 95.
In light of section 818.4, what happens if the State of California fails to revoke a bus company's operating authority when the company fails to carry liability insurance as required by California law? Is the State immune from liability on the grounds that the failure to revoke is discretionary rather than mandatory? A California court of appeals has held that when the State has a mandatory duty to act, any failure to act is not protected under section 818.4.107

In a somewhat similar vein, the California Supreme Court held that the "issue" defense would not bar an injured worker from suing a county for issuing a contractor a building permit without first ensuring he had the required workmen's compensation insurance.108 It stated that the government is protected only when its duty to issue, or revoke, is discretionary.109

It is interesting to note that although New Jersey's applicable statute contains wording identical to California's section 814.4, the New Jersey Supreme Court has held that "issuance" and "revocation" trigger immunity, regardless of whether they are characterized as mandatory or discretionary acts.110

This "mandatory"/"discretionary" dichotomy should be kept in mind when reading other states' statutes in this section and predicting what these states will do when these issues arise.

Utah's statute affords both a "misrepresentation" and an "issuance" exception to the waiver of sovereign immunity. It provides, in pertinent part:

Immunity from suit of all government entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of . . .

(3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization; . . .

(6) a misrepresentation by an employee whether or not it is negligent or intentional . . . 111

Metropolitan Finance Co. v. State involved an earlier version of this statute.112 In Metropolitan Finance, a car owner obtained a title

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109. See id. at 613-14.
110. See supra notes 106 and 107 and accompanying text.
111. UTAH CODE ANN. § 63-30-10 (Supp. 1996) (emphasis added).
112. 714 P.2d 293 (Utah 1986).
certificate from the State. The State later issued a duplicate certificate of title to the same owner. A third party then presented the original title certificate to a potential lender who agreed to finance the loan after the third party somehow produced a new certificate of title in the third party’s name and listing the lender as a secured party. Of course, the third party did not repay the loan, and the lender could not recover the car or the amount of the loan from the third party. The lender then sued the State, alleging that State Tax Commission employees negligently issued the second car title in the name of the third party and conspired to defraud the lender of its funds. The Supreme Court of Utah held that the State, the State Tax Commission, and its employees were immune from suit under the statute discussed above.

Mississippi has recently adopted modified immunity provisions which contain an “issuance” exemption similar to that found in Utah. The statute provides that a governmental entity will be exempt from liability in circumstances arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature.

The Mississippi Supreme Court abolished most of the sovereign immunity rules in Pruet v. City of Rosedale, but the legislature re-established most of them. Mississippi’s Supreme Court then held the rules unconstitutional. The concept of sovereign immunity was not gone for long, however. It showed a remarkable rebirth just three years later in Robinson v. Stewart. A more recent case, Mohundro v. Alcorn

113. See id. at 293.
114. See id. at 293-94.
115. See id. at 294.
116. A subsequent Utah case held that a government employee who commits fraud in the course of her employment may be held liable even though her government employer may be immune. See DeBry v. Noble, 889 P.2d 428, 443 (Utah 1995) (citing UTAH CODE ANN. § 63-30-4(4)).
118. Id. at § 11-46-9(1)(b).
119. 421 So. 2d 1046 (Miss. 1982).
121. See Presley v. Mississippi State Highway Comm’n, 608 So. 2d 1288, 1296 (Miss. 1992).
122. 655 So. 2d 866, 868-69 (Miss. 1995).
County,' attempts to synthesize the preceeding cases, and others, into a coherent mass. It is sad to compare the jubilant demise of sovereign immunity in Presley with the now continuing rule of general sovereign immunity in Mohundro.

Arizona follows, in part, California's concept of qualified immunity. Its statute provides:

Unless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for . . . [t]he issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization for which absolute immunity is not provided pursuant to § 12-820.01.124

Under this statute, it appears that if the Secretary of State or other state officer issued a certificate which mistakenly stated that there were no prior financing statements filed against a debtor or that there were no liens on an automobile, the State would not be liable, and the officer would only be liable if he or she intended to cause injury or was grossly negligent.

Prior to the adoption of the above statute, an Arizona appellate court held both a State inspector and the State liable, despite the inspector's lack of intent or gross negligence, where the inspector mistakenly certified that three motor homes were represented by paperwork when in fact they were stolen vehicles.125 Under the qualified immunity statute, however, it appears that only the inspector would be liable, and then only if his error was grossly negligent or intentionally injurious.

The South Carolina Tort Claims Act126 should be a model for any drafters who desire a "waiver of sovereign immunity" act which waives hardly any immunities. The extensive legislative findings section presents a rigid concept of tort liability which is, perhaps, summarized as follows: "The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter."127

Not content with this restrictive approach, the section continues: "[t]he provisions of this chapter . . . must be liberally construed in favor of limiting the liability of the State."128

123. 675 So. 2d 848, 851-53 (Miss. 1996).
127. See id. § 15-78-20(b).
128. Id. § 15-78-20(f). This is a strange use of the term "liberally construed."
Finally, the Act presents thirty-one exceptions to the waiver of immunity, including one seen in states previously discussed.

The governmental entity is not liable for a loss resulting from . . . licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.129

West Virginia law contains the “misrepresentation” concepts seen in both California and Utah. The relevant statute provides that “[a] political subdivision is immune from liability if a loss or claim results from . . . [m]isrepresentation, if unintentional.”130 It also declares that employees of a political subdivision are immune from liability unless:

1. His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
2. His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
3. Liability is expressly imposed upon the employee by a provision of this code.131

However, this employee immunity “does not affect or limit any liability of a political subdivision for an act or omission of the employee.”132

It should be noted that in West Virginia “political subdivision” means any county commission, municipality, county board of education, but the word “[s]tate’ does not include political subdivisions.”133 This statute is a subtle way of stating that West Virginia has retained the concept of sovereign immunity set forth in its constitution. Its constitution provides:

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.134

At first blush, the State of Oklahoma articulates a broad array of immunity waivers, providing that:

A. The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope

129. Id. § 15-78-60(12) (emphasis added).
131. Id. § 29-12A-5(b).
132. Id. § 29-12A-5(c).
133. Id. § 29-12A-3(c), (e).
134. W. VA. Const. art. 6, § 35.
of their employment subject to the limitations and exceptions specified in this act and only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state. The state or a political subdivision shall not be liable under the provisions of this act for any act or omission of an employee acting outside the scope of his employment.

B. The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise.135

However, a subsequent section then narrows this broad waiver by disclaiming any liability of the state or political subdivisions in claims resulting from thirty-one areas, including:

12. Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority;

17. Misrepresentation, if unintentional;

31. Any confirmation of the existence or nonexistence of any effective financing statement on file in the office of the Secretary of State made in good faith by an employee of the office of the Secretary of State as required by [law].136

The Georgia Code features the “issuance” concept found in a number of states. The concept immunizes the State from liability for losses which are the result of the State’s “[l]icensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization.”137

In 1978, Massachusetts adopted a fairly liberal waiver of immunity,138 but in 1993, it narrowed it by adding that the State would not be liable for “any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order, or similar authorization.”139 As a result of this amendment, it appears that no state officer or office will be responsible for certificates under the commercial code or the motor

136. Id. § 155 (emphasis added). In view of subsections 12 and 17, subsection 31 seems to be in the nature of overkill. It is also interesting to observe that subsection 31 does not contain a reference to motor vehicle title certificates.
139. Id. § 10 (emphasis added).
vehicle laws. Unfortunately, there appear to be no Massachusetts cases interpreting this amendment.

Tennessee’s general rule is that all governmental entities are exempt from suit, except as otherwise provided. \(^{140}\) Tennessee then waives immunity in cases in which employees, acting within the scope of their employment, proximately cause injury through their negligent acts or omissions, unless the injury:

1. Arises out of the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization.

2. Arises out of misrepresentation by an employee whether or not such is negligent or intentional. \(^{141}\)

Tennessee has thus joined other states in protecting state employees and officers from liability for misrepresentations and errors in the issuance of certificates.

Even without the aid of the above statutes, the Tennessee courts have tended to immunize government employees from liability for such errors. In *First Tennessee Bank National Ass’n v. Jones*, \(^{142}\) for example, a bank financed the purchase of a Mercedes on the strength of a Tennessee certificate of title. Later, the car was forfeited to the State on the grounds that it was stolen. The bank then sought relief from the State. The court held that the certificate of title is not a guarantee of title and that the lending bank should have been able to discern that the car was stolen. \(^{143}\)

Nebraska has adopted its own version of the “issuance” and “misrepresentation” defenses. It makes the State Tort Claims Act inapplicable to:

1. Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; ...  
2. Any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order. Such claim shall also not be filed against a state employee acting within the scope of his or her office. \(^{144}\)

In addition, the motor vehicles portion of the Nebraska statutes immunizes counties and county employees from liability for acts relat-

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141. *Id.* § 29-20-205 (1980) (emphasis added).
143. *See id.* at 282-85.
ing to motor vehicle registration.145

The above sections indicate that the State of Nebraska and its employees are not responsible for even a deliberate, deceitful misrepresentation in any certificate issued under the commercial code. In other words, the king can do no wrong.

In contrast to Nebraska, Indiana has taken a more balanced approach. It makes its employees, acting within the scope of employment, immune only for issuance pursuant to their discretionary authority and for purely unintentional misrepresentation.146 Although the issuance of a certificate under the commercial code is ministerial rather than discretionary, if the misrepresentation is unintentional, then both the State and the employee are still immune from suit.

The Indiana Legislature may have enacted the immunity statute because several court cases indicated Indiana officials were in dire need of protection. In 1978, for example, the Court of Appeals of Indiana held that the Secretary of State and the Director of the Uniform Commercial Code Division may be liable for failing to inform a prospective lender of the existence of a security interest in a mobile home dealer's inventory.147 The court noted, however, that the officials “may nevertheless be sheltered from liability because the act complained of was performed by an assistant or other subordinate employee” and remanded for a determination of whether that was in fact the case.148 Another case decided the same year held that the Commissioner of Indiana's Bureau of Motor Vehicles was liable for negligently issuing a certificate of title for a car, which failed to indicate that the vehicle was subject to a lien.149 The court held the Commissioner liable for the amount of the omitted lien.150

Idaho takes a bifurcated approach to the “misrepresentation” and “issuance” exceptions to liability. It first immunizes any “governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent” from claims

145. See id. § 60-302.04 (1993). Nebraska has taken steps to reduce errors relating to motor vehicle registration. It has mandated that counties, and the Departments of Motor Vehicles and Administration formulate a plan to computerize the state's motor vehicle registration system. See id. § 60-106(1).


150. See id. at 538-39.
arising out of misrepresentation.\textsuperscript{151} Then it immunizes these same government agencies and employees for any action arising "out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization," absent "gross negligence or reckless, willful and wanton conduct."\textsuperscript{152} When these two exceptions are read together, it appears that the State will not be liable for employees' grossly negligent oral misrepresentations, but may be liable if the same misrepresentations are in writing.

Vermont's law is consistent with that seen in other states with "misrepresentation" exceptions. Although the State may be liable for many torts,\textsuperscript{153} it cannot be liable for "[a]ny claim arising out of alleged assault, battery, abuse of process, misrepresentation, deceit, fraud, or interference with contractual rights."\textsuperscript{154} A relatively recent amendment to the Vermont statutes appears to eliminate any cause of action against a state employee who is guilty of simple negligence. The new statute provides:

(a) When the act or omission of an employee of the state acting within the scope of employment is believed to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the state of Vermont; and no such action may be maintained against the employee or the estate of the employee.

(b) This section does not apply to gross negligence or willful misconduct.\textsuperscript{155}

Prior to this amendment, a lower-level state employee may have been liable for ministerial mistakes while working, including giving misinformation.\textsuperscript{156}

Hawaii is another state with an initially broad waiver of immunity for torts. It waives "its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."\textsuperscript{157} However, a subsequent section contracts this wide waiver by making an exception for claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation..."
The "misrepresentation" notion was involved in a rather strange way in the case of Fogarty v. State. The Fogartys were guarantors of promissory notes a corporation issued to the State and County of Hawaii. A state officer cancelled the notes without authorization from the county. The county sued the Fogartys. Once a settlement was reached, the Fogartys sued the State for indemnification for the amount of the settlement. The court held that, although the Fogartys' tort claim was barred, the statutory misrepresentation defense would not bar the Fogartys' breach of warranty claim against the State. Although this sophisticated way of avoiding the statute was a just result, it should not be extended to cases in which State employees, through simple negligence, fail to reveal the existence of secured parties on a car title or security interests under Article 9 of the Uniform Commercial Code.

Because Hawaii is composed of islands, registration of car titles is done on a county-by-county basis. If a car is imported from another state or county, an application for registration must be made to the director of finance of the particular county. The law provides that:

The acceptance by the director of finance of a certificate of title or of registration issued by another state or county, as hereinabove provided, in the absence of knowledge that the certificate is forged, fraudulent, or void, shall be a sufficient determination of the genuineness and regularity of the certificate and of the truth of the recitals therein, and no liability shall be incurred by any officer or employee of the director of finance by reason of so accepting the certificate.

New Jersey enacted a Tort Claims Act which provides for "immunity with exceptions rather than liability with exceptions." This "immunity approach" is clear in the following sections:

§ 59:2-1. Immunity of public entity generally
a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
b. Any liability of a public entity established by this act is subject to

158. Id. § 662-15 (emphasis added).
160. See id. at 74.
161. See id.
162. See id. at 77.
163. HAW. REV. STAT. ANN. § 286-41(c) (Michie 1996).
any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

§ 59:2-2. Liability of public entity

a. A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

b. A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.\(^\text{166}\)

Another section of the act further strengthens New Jersey’s “immunity approach” by providing that

[a] public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.\(^\text{167}\)

Under a subsequent statute, public employees are likewise immune from suit for errors made during activities such as denial, suspension, or revocation of licenses.\(^\text{168}\) Public employees are also not liable for misrepresentation while acting within the scope of employment.\(^\text{169}\)

Malloy v. State\(^\text{170}\) applied these statutes. In Malloy, the plaintiff passed the examination for a real estate agent’s license, but due to a clerical error, the State sent him a written notice that he had failed.\(^\text{171}\) Over a year later, the State notified him of the error, and he sued the State.\(^\text{172}\) The New Jersey Supreme Court held that the State is not liable under section 59:2-5 for clerical errors regardless of whether they are ministerial or discretionary.\(^\text{173}\) The court noted that if section 59:2-5 was limited to discretionary acts, it would be surplusage, because a prior section\(^\text{174}\) immunizes the State for any injury resulting from its exercise of discretion.\(^\text{175}\)

On the other hand, in 1984, New Jersey enacted the Boat Owner-
ship Certificate Act, which provides for the issuance of title certificates (and security interests) for marine equipment. Under this act:

The director, his agents and employees of the Division of Motor Vehicles in the Department of Law and Public Safety or the agency or instrumentality of the State that may process certificates of ownership, registrations and associated functions shall not incur any personal liability in carrying out the provisions of this section or in furnishing any information provided herein from the records of the State.

In addition to responsibility for boats, New Jersey charges the Department of Motor Vehicles with the responsibility of recording and disclosing security interests in motor vehicles, but shields “[t]he director, his agents, and employees of the Division of Motor Vehicles from any personal liability” for carrying out their duties.

IV. STATES WHICH MAY HAVE WAIVED IMMUNITY FOR ERRORS IN THE RECORDING PROCESS OR IMPOSED LIABILITY ON STATE EMPLOYEES

Arkansas takes a very hard line on governmental immunity by declaring it to be

the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state shall be immune from liability and from suit for damages, except to the extent that they may be covered by liability insurance. No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

The reference to liability insurance in the above statute is explained by another statute which requires all political subdivisions to either carry liability insurance on their motor vehicles or become self-insurers. State employees covered by other insurance are not immune from suit. In the absence of insurance, public officials are immune from tort liability for negligent performance of their duties, but they are personally liable for intentional torts.

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177. The Act defines “marine equipment” as a “newly manufactured vessel, or hull greater than twelve feet in length.” Id. § 12:7A-3.o.
178. Id. § 12:7A-15.e.
183. See Battle v. Harris, 766 S.W.2d 431, 433 (Ark. 1989).
In Arkansas, state officers and employees are immune from individual liability for negligent performance of acts within the scope of their employment to the extent that these officers and employees are not covered by liability insurance.  

Minnesota has waived most claims of sovereign immunity with a "general rule" which provides that

[the state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Nothing in this section waives the defense of judicial or legislative immunity except to the extent provided in subdivision 8.]

Because the waiver exclusions do not have any express or implied connection with liability for the mishandling of security interests or misrepresentation, it appears that the State would be liable for such ministerial errors.

Montana's waiver of sovereign immunity is covered under the expansive title "Liability Exposure and Insurance Coverage." Under its Act, "[e]very governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature."

Legislative immunity from suit seems confined mainly to legislative acts and omissions inapplicable to state officers and employees. The Act provides for insurance coverage and pooling, as well as the bonding of state officers and employees for not only the defalcation of funds, but also "neglect, default, or misconduct in office of any deputy, clerk, or employee appointed or employed by such principal." Because there are no cases imposing liability for the negligent giving of information regarding security interests, it appears that the bonding provision for neglect gives recourse, to the extent of the bond, to anyone suffering losses from such negligence.

Under Nevada's waiver of sovereign immunity, the State may be liable for a clerical error in the recording and reporting of security inter-

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187. Id. § 2-9-102.
188. Id. § 2-9-111.
189. See id. §§ 2-9-201 to -212.
190. Id. § 2-9-504(1) to (2).
Unfortunately, there appear to be no cases to this effect. In Pittman v. Lower Court Counseling, however, the Nevada Supreme Court held that a municipal court clerk has a duty to properly maintain the official documents submitted to the clerk and if his failure to do so results in wrongful imprisonment of an accused, the State will be liable for damages. The court expressly followed a prior case which held that it was the district court clerk’s duty to keep an accurate record of the date he received every document, including notices of appeal.

Nevada has enacted a special statute dealing with errors made while registering motor vehicles, recording security interests, and giving information regarding these matters. It immunizes the Department of Motor Vehicles and its employees from liability for such errors.

In Connecticut, almost all claims against the state must be filed with the Office of the Claims Commissioner. The Commissioner may make awards not exceeding $7500. If the amount of the claim exceeds $7500, the Commissioner may make a recommendation to the General Assembly to pay the award. The Commissioner may also authorize suit against the State. Remarkably, there has been very little litigation since Connecticut began following this procedure in 1959.

Although there do not appear to be any Connecticut cases involving misfiling, misindexing, or misinforming, and security interests, this kind of claim would probably fall within the definition of “just Claim,” that is, “a claim which in equity and justice the state should pay, provided the state has caused damage or injury or has received a benefit.”

Alaska’s tort claims statute resembles the Federal Torts Claims Statute in that it states that a claim may not be brought if the claim is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation . . . or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.

The ministerial, negligent acts of non-filing, misfiling, or misindex-

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193. See id. at 956.
194. See id. (citing Huebner v. State, 810 P.2d 1209 (Nev. 1991)).
197. See id. § 4-158(a).
198. See id. § 4-159.
199. See id. § 4-160(a).
200. See id. § 4-141.
ing appear to be actionable under this statute. However, Alaskan municipalities are immune from suits “based upon the grant, issuance, refusal, suspension, delay, or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning.”

The Washington State Constitution succinctly states that the “legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” In accordance with that section, Washington’s Legislature enacted a statute tersely abolishing the doctrine of sovereign immunity: “The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”

A similar rule applies to all local governmental entities. A Washington appeals court applied it in Sundberg v. Evans. In Sundberg, the court held that where the county zoning office negligently misinformed a purchaser about a property’s zoning classification, the purchaser might have a cause of action against the county if the purchaser reasonably relied upon the erroneous information.

It would seem logical that the same principles should apply to misinformation regarding the filing of security interests under the commercial code. Washington, however, has chosen to favor the Director of Licensing, who is in charge of issuing car title certificates. In direct contrast to what one would logically expect from Sundberg, the Washington Legislature declared that “[n]o suit or action shall ever be commenced or prosecuted against the director of licensing or the state of Washington by reason of any act done or omitted to be done in the administration of the duties and responsibilities imposed upon the director under this chapter.”

Rhode Island’s waiver of sovereign immunity is probably the most generous in the United States. It provides:

[T]he state of Rhode Island and any political subdivision thereof, including all cities and towns, shall . . . hereby be liable in all actions of tort in the same manner as a private individual or corporation; provided, however, that any recovery in any such action shall not

202. Id. § 09.65.05.70(d)(3). This statute has been held to be an absolute bar to suit regardless of the possible bad faith of a city or its employees. See J & L Diversified Enters., Inc. v. Municipality of Anchorage, 736 P.2d 349, 353 (Alaska 1987).
203. WASH. CONST. art. 2, § 26.
204. WASH. REV. CODE ANN. § 4.92.090 (West 1988).
205. See id. § 4.96.010 (West Supp. 1997).
207. See id. at 1286-89.
exceed the monetary limitations thereof set forth in the chapter.\textsuperscript{209}

Rhode Island now limits recovery to $100,000 in any one tort action against any city or town, unless the town or city was engaged in a proprietary function during the commission of the tort, in which case this limitation is not applicable.\textsuperscript{210}

Although there do not appear to be any cases applying this act to the Secretary of State or any other government officer for acts relating to misinformation about filed security interests, there is at least one relating to wrongful arrest. In \textit{Calhoun v. City of Providence},\textsuperscript{211} police arrested a driver and impounded his car pursuant to an arrest warrant for a previous charge.\textsuperscript{212} Even though the driver vehemently insisted that the arrest was a mistake and that the previous charges had been resolved, police held him in jail until the following day, when they discovered that the driver was correct.\textsuperscript{213} The driver sued the State and two Rhode Island cities.\textsuperscript{214} The driver later dropped his claim against the cities, but continued his suit against the State.\textsuperscript{215} The State asserted that a judge was responsible for the error.\textsuperscript{216} The supreme court held that if a judge made the mistake, then the State would be protected under the rule of judicial immunity, but that the State never proved this fact.\textsuperscript{217} It found:

\begin{quote}
Despite the state’s protestations to the contrary, the evidence introduced by plaintiff clearly established a prima facie case of negligence. . . . In so viewing the evidence, there is no question that the record reasonably supports the inference that plaintiff’s arrest, the loss of his car, and his overnight incarceration all came about because somebody in the employ of the state “goofed.”\textsuperscript{218}
\end{quote}

The court concluded

that the lapse which led to this suit occurred in the clerk’s office where, because of some bookkeeping slip-up, either the issuance of the capias was never docketed or the recall order was never entered. The clerk, unlike the judge, is not immune to suit because of his failure to perform the ministerial functions imposed upon him by law.\textsuperscript{219}

If the State of Rhode Island is liable for damages to a citizen

\begin{itemize}
\item \textsuperscript{209} R.I. Gen. Laws § 9-31-1 (1985).
\item \textsuperscript{210} See id. § 9-31-3.
\item \textsuperscript{211} 390 A.2d 350 (R.I. 1978).
\item \textsuperscript{212} See id. at 351.
\item \textsuperscript{213} See id. at 351-52.
\item \textsuperscript{214} See id. at 352.
\item \textsuperscript{215} See id.
\item \textsuperscript{216} See id.
\item \textsuperscript{217} See id. at 357.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\end{itemize}
because a clerk in the judicial system "goofed" in the handling of paperwork, then a similar result should follow when a clerk in the Secretary of State's office commits a similar "goof."

Illinois has established a Court of Claims with jurisdiction to hear "[a]ll claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit." However, it limits claims in cases not involving motor vehicles to $100,000.221

The annotations to the Court of Claims statutes indicate that the court has been a busy one. Unfortunately, no cases dealing with the subject matter of this Article were found.

Michigan has waived sovereign immunity in a limited number of areas: defective highways,222 government-owned vehicles,223 public buildings,224 and hospitals.225 After this grudging waiver, however, it re-affirms its older policy on sovereign immunity. It provides:

§ 691.1407. Governmental immunity from tort liability
Sec. 7. (1) Except as otherwise provided in this act, all government- nal agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

221. See id.
223. See id. § 691.1405.
224. See id. § 691.1406.
225. See id. § 691.1407(4).
(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. 226

Based on this statute, it appears that simple ministerial negligence in the filing, recording, or indexing of security interests in personal property would not support an action against the State and the employee or officer handling the matter. However, a subsequent statute seems, at first blush, to waive immunity for state officers, employees, and agencies.

§ 691.1409. Liability insurance; waiver of defenses
Sec. 9. The purchase of liability insurance to indemnify and protect governmental agencies against loss or to protect governmental agencies and some or all of its agents, officers, and employees against loss on account of any judgment secured against it, or them, arising out of any claim for personal injury or property damage caused by such governmental agency, its officers, or employees, is authorized, and all governmental agencies are authorized to pay premiums for the insurance out of current funds. The existence of any policy of insurance indemnifying any governmental agency against liability for damages is not a waiver of any defense otherwise available to the governmental agency in the defense of the claim. 227

The plaintiff in a case against a school district argued that the procurement of insurance ought to be a waiver of the school district's defense of sovereign immunity, in accordance with the rule in some states, 228 that if an immune defendant purchases liability insurance it constitutes a waiver of sovereign immunity. 229 However, the court held that the plain dictates of section 691.1409 provide otherwise. 230 The court expressed no opinion about the possible defense of any school district employees, because none were named in the lower court case.

To the extent that a governmental agency purchases insurance to protect its officers and employees, the statute seems to be an implicit recognition that these persons may well be subject to liability for simple negligence.

If Michigan law bars tort suits against the State for misfiling, misrepresenting, or misindexing financing statements, is it possible to sue

226. Id. § 601.1407.
227. Id. § 691.1409.
230. See id. at 150.
the State for breach of contract based upon the payment of the statutory filing fee in return for the assent of the Secretary to perform a search for financing statements? The Supreme Court of Michigan has held that once a request for a filing search has been made, the filing officer has no choice but to comply with the request and to perform acts required by statute.231 The Secretary is already bound by official duty to render a service, hence the payment of money is of no benefit to the State and is simply a nominal payment for a pre-existing duty. The statutory fee is not bargained for.232 It thus rejected "the plaintiff's claim that the obligatory payment of a nominal fee for specific and mandatory acts by governmental agents is sufficient to convert the transaction at issue ... into a contract."233

Texas requires a party seeking to sue the State to obtain a legislative resolution granting them permission to do so.234 Permission does not constitute an admission of liability, and the State and its agencies reserve the right to all factual and legal defenses.235

Texas' state-slanted approach also partially protects public servants by providing:

Except in an action arising under the constitution or laws of the United States, a public servant, other than a provider of health care . . . is not personally liable for damages in excess of $100,000 arising from personal injury, death, or deprivation of a right, privilege, or immunity if:

(1) the damages are the result of an act or omission by the public servant in the course and scope of the public servant's office, employment, or contractual performance for or service on behalf of a state agency, institution, department, or local government; and

(2) for the amount not in excess of $100,000, the public servant is covered:

(A) by the state's obligation to indemnify under Chapter 104;

(B) by a local government's authorization to indemnify under Chapter 102;

(C) by liability or errors and omissions insurance; or

(D) by liability or errors and omissions coverage under an interlocal agreement.236

In Texas, the rational person would sue state officers or employees

232. See id.
233. Id.
235. See id. § 107.002.
236. Id. § 108.002(a) (West Supp. 1996). An identical provision protects public servants against liability for property damage. See id. § 108.002(b).
personally for their acts or omissions, rather than attempt to secure the state legislature’s permission to sue the State.\textsuperscript{237}

The State of Maryland has recently adopted a broad waiver of immunity statute. The act waives all state immunity for tort claims up to $100,000 per claimant per incident and only exempts some judicial actions from the waiver.\textsuperscript{238}

North Dakota’s treatment of claims against the State appears to be quite citizen-oriented:

1. The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee’s scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant. No claim may be brought against the state or a state employee acting within the employee’s scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly.

2. The liability of the state under this chapter is limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from any single occurrence. The state may not be held liable, or be ordered to indemnify a state employee held liable, for punitive or exemplary damages. Any amount of a judgment against the state in excess of the one million dollar limit adopts an appropriation authorizing payment of all or a portion of that amount. A claimant may present proof of the judgment to the director of the office of management and budget who shall include within the proposed budget for the office of management and budget a request for payment for the portion of the judgment in excess of the limit under this section at the next regular session of the legislative assembly after the judgment is rendered.\textsuperscript{239}

This section later provides that neither the State nor its employees may be held liable for “[a] claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi judicial act, including a decision to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.”\textsuperscript{240}

This subsection should not immunize the State for mere negligent filing.

\textsuperscript{237} For a current review of the Texas cases against government employees, see Jolly v. Klein, 923 F. Supp. 931 (S.D. Tex. 1996).


\textsuperscript{239} H.B. 1153, 55th Leg. (N.D. 1997) (enacted) (amending N.D. Cent. Code § 32-12.2-02(1)-(2)).

\textsuperscript{240} Id. (amending N.D. Cent. Code § 32-12.2-02(3)(d)).
misindexing, or misinforming about any filing under the commercial code or motor vehicle laws, because these acts are merely ministerial and have no connection with any judicial or quasi-judicial activity.

Wisconsin has not waived sovereign immunity in a direct way. Instead, it has bound itself to indemnify public officers and employees who are sued as individuals for acts committed within the scope of their employment. Section (1)(a) of this statute deserves close reading.

(1)(a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. The duty of a governmental unit to provide or pay for the provision of legal representation does not apply to the extent that applicable insurance provides that representation. If the employing state agency or the attorney general denies that the state officer, employee or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state’s sovereign immunity to suit. Failure by the officer or employee to give notice to his or her department head of an action or special proceeding commenced against the defendant officer or employee as soon as reasonably possible is a bar to recovery by the officer or employee from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employee legal counsel and the offer is refused by the defendant officer or employee. If the officer, employee or agent of the state refuses to cooperate in the defense of the litigation, the officer, employee or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.
Wisconsin courts have held that even though the State or its agencies may be immune from suit, state officers or employees may not be immune.

The general rule in Wisconsin is that a state officer or employee "is immune from personal liability for injuries resulting from acts performed within the scope of the individual's public office. There are three exceptions to the rule of state-officer/employee immunity: (1) where the conduct causing the injury is malicious, willful or intentional; (2) where the injury results from the negligent performance of a "ministerial" duty; and (3) where the officer or employee is aware of a danger of such quality or magnitude that he or she has an "absolute, certain and imperative" duty to act and does not.243

Alabama's constitution succinctly provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity."244 The Supreme Court of Alabama has held that state officers and employees, in their official capacities and individually, are absolutely immune from suit when the action is, in effect, one against the State.245

On the other hand, no state officer or employee can escape individual tort liability by asserting that his mere status as a state official cloaks him with the State's constitutional immunity. The individual official is immune only from liability for negligent discretionary, rather than ministerial, acts.246 In Williams v. Madison County Board of Health,247 for example, the court held that the county Board of Health, as a state agency, was immune from suit, but that an employee, who incorrectly reported that a new house's septic tank system had been approved, would be liable for his alleged negligence, even though he had since retired, because his was a ministerial, not a discretionary, act.248

The same result should follow if an employee, not an officer, of the State incorrectly reports an absence of automobile liens or security interests under Article 9 of the commercial code.

Virginia is another state which seems to have a relatively broad

243. Walker v. University of Wis. Hosps., 542 N.W.2d 207, 212 (Wis. Ct. App. 1995) (citation omitted). The Wisconsin Supreme Court has defined "ministerial" to mean "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for [the exercise of] judgment or discretion." Id. (quoting K.L. v. Hinickle, 423 N.W.2d 528, 530 (Wis. 1988)).

244. ALA. CONST. art. 1, § 14.

245. See Ex parte Franklin County Dep't of Human Resources, 674 So. 2d 1277 (Ala. 1996); Shoals Community College v. Colagross, 674 So. 2d 1311 (Ala. Civ. App. 1996) (discussing application of Alabama's sovereign immunity laws to agencies and individuals).


248. See id. at 455.
waiver of sovereign immunity. Its Tort Claims Act allows claims for damages caused by "the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, if a private person, would be liable to the claimant for such damage, loss, injury or death." The Act also limits the amount recoverable by any claimant depending on when the cause of action accrued and the state employee's maximum liability coverage.

The Supreme Court of Virginia, without the aid of a statutory waiver of sovereign immunity, held that a circuit court clerk would be liable for negligent ministerial acts. In First Virginia Bank-Colonial v. Baker, a clerk's office employee misfiled a mortgage, leading a creditor to believe it was giving the property owners a second mortgage, when, in fact, it was their third. The court stressed that the circuit court clerk was bonded and that the bond extended to the clerk's employees.

In contrast, cases decided under the Tort Claims Act seem to take a very narrow view of the extent of State and state employee liability for acts of simple negligence. For example, a federal court has held that a local school board and the teachers in that district were exempt from liability for their alleged failure to protect a female student from sexual attack by a fellow student. Similarly, another court held that a state-employed doctor was covered by sovereign immunity where state rules dictated most of his treatment methods, limiting his discretion.

Oregon has nicely articulated a general waiver of sovereign immunity, which contemporaneously immunizes state employees from liability for acts within the scope of their employment or duties. It provides that:

subject to the limitations of [Oregon law], every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ride sharing arrangement.

The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or

250. Id. § 8.01-195.3 (Michie Supp. 1996).
251. See id.
253. See id. at 10.
254. See id. at 13.
duties and eligible for representation and indemnification under [Oregon law] shall be an action against the public body only.\textsuperscript{258}

The statute then enumerates six areas of immunity, but none of them touch upon the subject matter of this Article.\textsuperscript{259} Therefore, it appears that the State would be liable for negligent mistakes in the recording of liens and security interests.

Interestingly, an Oregon appellate court held that a building inspector and the State would be liable to an applicant for a building permit when the inspector allegedly negligently issued the permit and then another inspector revoked it. The inspector argued that the Uniform Building Code relieves those enforcing the code of personal liability for acts and omissions in discharging their duties, but the court held that an earlier version of the tort claims act superseded the Uniform Building Code immunity provision and that the State and the inspector were liable.\textsuperscript{260}

The State of Missouri has chosen to give its waiver of sovereign immunity statute a very narrow scope.\textsuperscript{261} In a recent case, police arrested a Missouri motorist after a computer erroneously indicated that his driver's license had been revoked.\textsuperscript{262} When the motorist sued the Department of Revenue employees responsible for processing his records, the court held that "[t]he State of Missouri enjoys sovereign immunity as existed at common law except for tort claims arising from the negligent operation of motor vehicles by public employees and from the dangerous condition of public entity's property if and to the extent that the public entity has acquired liability insurance."\textsuperscript{263} According to the court, when state employees are sued in their official capacity, they enjoy the same immunity.\textsuperscript{264}

The Kansas Tort Claims Act\textsuperscript{265} covers employees' negligent acts or omissions. It provides that "each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."\textsuperscript{266} There are nineteen exceptions to the above immunity rule, one of which is the exercise of "judicial

\textsuperscript{258} Id. § 30-265(1). The statute also provides that public bodies are immune from liability when the officers, employees or agents who caused the injury are immune. See id. § 30-265(2).
\textsuperscript{259} See id. § 30-265(3).
\textsuperscript{263} Id. at 682.
\textsuperscript{264} See id.
\textsuperscript{266} Id. § 75-6103(a).
function."\textsuperscript{267} However, if the court determines that the "function" at issue is "ministerial" rather than "judicial," a finding of liability is still possible.\textsuperscript{268} In \textit{Cook v. City of Topeka}, for example, the court held a clerk liable because failure to recall a stale arrest warrant was a ministerial function, not a judicial one.\textsuperscript{269}

In 1991, the Kansas Court of Appeals held that a county treasurer and the state Department of Revenue could be liable for negligence for failing to record a lien on an automobile title certificate.\textsuperscript{270} The court noted that there is liability at common law for land transfer recorders who make recording or indexing mistakes, and that this liability extends to transfers of personal property.\textsuperscript{271}

In 1977, North Carolina amended its tort claims act, making the State liable for both acts and omissions of its employees in a fashion similar to Kansas' approach. The act creates the Industrial Commission to hear all claims against State departments and agencies to determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of one hundred thousand dollars ($100,000) cumulatively to all claimants on account of injury and damage to any one person.\textsuperscript{272}

The Court of Appeals of North Carolina has interpreted this statute to mean that the State of North Carolina and its agencies can plead sovereign immunity in a tort suit unless the State has consented to be sued

\textsuperscript{267. Id. § 75-6104(b).} \textsuperscript{268. See Cook v. City of Topeka, 654 P.2d 953, 962 (Kan. 1982).} \textsuperscript{269. See id.} \textsuperscript{270. Mid Am. Credit Union v. Board of County Comm'rs, 806 P.2d 479, 483-84 (Kan. Ct. App. 1991).} \textsuperscript{271. See id.} \textsuperscript{272. N.C. GEN. STAT. § 143-291 (1993).}
or waived its right to plead sovereign immunity by the purchase of liability insurance. 273 The court of appeals has also construed this statute as imposing liability upon the State regardless of whether the claim arose out of a governmental, proprietary, or discretionary function. 274

Unlike most of the acts this Article surveys, North Carolina’s act excludes no particular state functions from liability. Therefore, the State probably would be liable for negligence in furnishing information under the commercial code.

Although North Carolina state officers are immune from personal liability for mere negligence, their negligence may subject the State to liability as determined by the state’s Industrial Commission or the court system through a third-party complaint for contribution or indemnification. 275 In Columbus County Auto Auction, Inc. v. Aycock Auction Co., for example, the defendants relied on the third-party approach. 276 In that case, the Department of Motor Vehicles was allegedly negligent in issuing title certificates, causing losses to car dealerships. 277 The court allowed the defendant dealerships to bring the Department of Motor Vehicles in through a claim for indemnification. 278

The Maine Tort Claim Act’s 279 “Exceptions to immunity” 280 and “Immunity notwithstanding waiver” 281 provisions are so narrow that there does not appear to be any state liability for the Secretary of State’s simple negligence in the filing, indexing, or reporting of financing statements under the commercial code. On the other hand, another section indicates that the Secretary or his clerks might be personally liable for a limited amount. 282 It provides that a governmental entity’s personal liability “for negligent acts or omissions within the course and scope of employment shall be subject to a limit of $10,000 for any such claims arising out of a single occurrence and the employee is not liable for any amount in excess of that limit on any such claims.” 283

The terseness of Washington’s waiver of sovereign immunity 284 is

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276. See id. at 889.
277. See id.
278. See id. at 890.
281. See id. § 8104-B.
282. See id. § 8104-D.
283. Id.
284. See supra notes 204-08 and accompanying text.
rivaled only by the Louisiana Constitution, which declares that "[n]either the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property." A 1995 amendment narrowed the wide scope of this constitutional provision by giving the Legislature the power to "limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages." There does not appear to be any legislation governing recording errors.

New Hampshire defines a claim as "any request for monetary relief" for:

[b]odily injury, personal injury, death or property damages caused by the failure of the state or state officers, trustees, officials, employees, or members of the general court to follow the appropriate standard of care when that duty was owed to the person making the claim, including any right of action for money damages which either expressly or by implication arises from any law, unless another remedy for such claim is expressly provided by law.

Relatively small claims under New Hampshire's tort claims act must be submitted to the state's five-person Board of Claims. The Board consists of two persons appointed by the Governor, a chairperson appointed by the chief justice of the supreme court, one person appointed by the president of the senate, and one person appointed by the speaker of the house. The Board has original and exclusive jurisdiction over claims in excess of $5000. It has concurrent jurisdiction with the superior court over claims in excess of $5000, but not exceeding $50,000. The superior court has original and exclusive jurisdiction over all claims in excess of $50,000.

The State of Illinois, like New York and Ohio, has established a Court of Claims which has jurisdiction to hear "[a]ll claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit." An award under this act may not exceed $100,000, except in cases involving

285. LA. CONST. art. 12, § 10(A).
286. Id. art. 12, § 10(C).
287. N.H. REV. STAT. ANN. § 541-B:1(II-a)(a) (Supp. 1996). A state employee or official's "request for monetary relief" for property damage incurred "on state business" also constitutes a claim. See id. § 541-B:1(II-a)(b).
288. See id. § 541-B:9(I).
289. See id. § 541-B:3.
290. See id. § 541-B:9(II).
291. See id. § 541-B:9(III).
292. See id. § 541-B:9(IV).
293. 705 ILL. COMP. STAT. ANN. 505/8(d) (West Supp. 1997).
the operation of state-owned, leased or controlled vehicles.

There appear to be no cases in Illinois dealing with misfiling, mis-indexing, or misinforming, and vehicle liens or article nine security interests under the commercial code. However, the Legislature has sought to protect local public entities from liability for injuries caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Additionally, it exempts local public entities from liability for injuries "caused by an oral promise or misrepresentation of [their] employees, whether or not such promise or misrepresentation was negligent or intentional."

These provisions seem to discourage the issuance of written statements. Under the first provision, it appears that if the certificate issuance is mandatory, the issuing entity would be liable for any mistakes a certificate contained. The second provision, however, indicates that public entities would not be liable for oral mistakes.

V. STATES WHICH HAVE AMENDED THEIR COMMERCIAL CODES AND MOTOR VEHICLE LAWS TO DEFEAT LIABILITY

*Borg Warner Acceptance Corp. v. Secretary of State* is a classic case of negligence. In *Borg Warner*, a lender requested that the Secretary's office search for financing statements listing certain debtors on seven separate occasions. The Secretary's office repeatedly reported no filed security interests when, in fact, there were. Two officers of the Secretary of State's office admitted that had they gone to the cross references, they would have discovered the long-standing financing statement. The Supreme Court of Kansas affirmed the judgment against the Secretary of State.

Two cases suggest that if a recording office used a computer to conduct searches and a minor misspelling led to searcher error, it would

294. See id.
295. 745 ILL. COMP. STAT. ANN. 10/2-104 (West 1993).
296. Id. 10/2-106.
297. 731 P.2d 301 (Kan. 1987).
298. See id. at 303-04.
299. See id.
300. See id. at 305.
301. See id. at 306.
not be negligence. However, the question remains: if the recording office uses computers and does not have a cross-indexing system, would not this, in itself, constitute negligence?

Subsequent to Borg Warner, Kansas amended its commercial code to provide that “[e]xcept with respect to willful misconduct, the state, counties and filing officers, and their employees and agents, are immune from liability for damages resulting from errors or omissions in information supplied pursuant to this section.” Of course, this amendment essentially overturns Borg Warner.

Section 554.9407 of the Iowa Code provides that: “Except with respect to willful misconduct, the state of Iowa, the secretary of state, a county, county recorder and their employees and agents are immune from liability as a result of errors or omissions in information supplied pursuant to this subsection.”

In addition, section 554.10105 reads:

The secretary of state, the secretary’s employees or agents, are hereby exempted from all personal liability as a result of errors or omissions in the performance of any duty required by the Uniform Commercial Code, chapter 554, except in cases of willful negligence.

In the event of such error or omission the state of Iowa shall be liable in respect to such claims in the same manner, and to the same extent as a private individual under like circumstances.

Immunity of the state from suit and liability in such case is waived to the extent provided in chapter 669 and said chapter shall govern the extent of liability and the practice and procedure necessary to establish any liability of the state.

Interestingly, section 554.9407 is narrowly drawn to protect state employees from liability for errors in the supplying of information, while section 554.10105 covers “errors or omissions in the performance of any duty required by the Uniform Commercial Code,” such as errors in filing and indexing, as well as errors in furnishing information.

Kentucky follows the latter approach, but uses different language. Its act provides that “[n]either the filing officer nor any employee of the filing officer shall be personally liable for any damages which may arise due to information furnished pursuant to this section which is subse-

305. IOWA CODE ANN. § 554.9407 (West 1995).
306. Id. § 554.10105.
307. Id.
ently shown to be inaccurate.”

It should be noted that the Kentucky statute does not purport to immunize the State from liability as the former Iowa statute did. Moreover, it appears that Kentucky grants a broader immunity to its local governments than most other states. For example, one section provides that “a local government shall not be liable for injuries or losses resulting from . . . [t]he issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.”

Wisconsin also follows this narrow approach. Its statutes provide that “[n]o filing officer nor any of the filing officer’s employees [sic] or agents shall be subject to personal liability by reason of any error or omission in the performance of any duty under [this chapter] except in case of misconduct.”

The State of Delaware seems to be very concerned about liability for filing errors. For example, it amended section 9-401 of its commercial code by adding a subsection which states:

Notwithstanding that any writing authorized to be filed with the Secretary of State under this title is when filed inaccurately, defectively or erroneously executed, or otherwise defective in any respect, neither the Secretary of State nor any filing officer shall have any liability to any person for the acceptance for filing or the filing and indexing of such writing by the Secretary of State.

In addition, section 9-407 of Delaware’s commercial code imposes new duties on filing officers, but simultaneously takes away any outside sanction for failure to perform these duties:

At the time of the presentation for filing of an original financing statement or a continuation statement, the person presenting such statement may request the filing officer to mail to the secured party of record at its address of record or to any other specified person a notice setting forth the date that the effectiveness of such original financing statement or continuation statement, as the case may be, shall lapse. Such notice shall be deposited in the mail by a filing officer not earlier than six months, nor later than four months prior to the date such effectiveness shall lapse. Notwithstanding the foregoing, neither the Secretary of State nor any filing officer shall have any liability to any person for any failure by a filing officer to mail timely or properly the notice described in this subsection . . . .

312. Id. § 9-407(6).
Under Delaware's Tort Claims Act,\textsuperscript{313} certain public officials are absolutely immune from suit, while others, such as public defenders and the Secretary of State, are immune so long as they perform "without gross or wanton negligence."\textsuperscript{314} Of course, under this approach, a simple act of misfiling, misindexing, or misinforming would not be sufficient to allow recovery from a recording office, whether state or local.

\section*{VI. States Which Appear to Have Retained Sovereign Immunity for Recording Errors}

At first glance, New Mexico's Tort Claims Act\textsuperscript{315} seems to provide one of the most liberal waivers of sovereign immunity in the United States.\textsuperscript{316} In addition, it limits recovery to a maximum of $100,000 for property damage arising out of a single occurrence; $400,000 per person for all damages, other than property damage or medical expenses, arising out of a single occurrence; and $750,000 for all claims, other than medical expenses, arising out of a single occurrence.\textsuperscript{317} The Act requires governmental entities to insure themselves to cover the full extent of their potential liability.\textsuperscript{318}

Unfortunately, the New Mexico Tort Claims Act, after articulating what appears to be a broad waiver of immunity, then provides that "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by [this Act]."\textsuperscript{319} No section of the Act seems to waive sovereign immunity for negligent acts of the Secretary of State or others committed while filing, indexing, or reporting financing statements.

In Wyoming, a governmental entity is liable for bodily injury, wrongful death, or property damage caused by the negligence of public employees acting within the scope of their duties operating motor vehicles, aircraft, watercraft,\textsuperscript{320} buildings, recreation areas, public parks,\textsuperscript{321} airports,\textsuperscript{322} and public utilities,\textsuperscript{323} and providing health care.\textsuperscript{324} Governmental entities are also liable for the tortious conduct of peace

\begin{footnotes}
\textsuperscript{313} Id. at tit. 10, §§ 4001-4013 (Supp. 1996).
\textsuperscript{314} See id. § 4001(3); see also Vick v. Haller, 512 A.2d 249, 252 (Del. Super. Ct.), aff'd, 514 A.2d 482 (Del. 1986).
\textsuperscript{315} N.M. STAT. ANN. §§ 41-4-1 to -27 (Michie Supp. 1996).
\textsuperscript{316} Id. § 41-4-2.
\textsuperscript{317} See id. § 41-4-19.
\textsuperscript{318} See id. § 41-4-20.
\textsuperscript{319} Id. § 41-4-4.A.
\textsuperscript{320} See Wyo. STAT. ANN. § 1-39-105 (Michie 1996).
\textsuperscript{321} See id. § 1-39-106.
\textsuperscript{322} See id. § 1-39-107.
\textsuperscript{323} See id. § 1-39-108.
\textsuperscript{324} See id. §§ 1-39-109 to -110.
\end{footnotes}
officers. With the exception of the foregoing activities, governmental immunity is still in effect.

Pennsylvania has grudgingly given a very narrow waiver of sovereign immunity, which indicates that the State would not be liable for the Secretary of State’s negligent handling of UCC records and motor vehicle title certificates. It waives immunity for negligence involving motor vehicles, health care, care of personal property, state property, handling of animals, liquor store sales, National Guard activities, toxoids, and vaccines.

The Colorado Governmental Immunity Act provides that “[a] public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant.” Olsen and Brown v. City of Englewood is an example of how Colorado courts interpret this clause. In Olsen, a law firm sued a city for termination without cause of an attorney-client relationship, alleging that it had relied upon a misrepresentation by the city. The court held that such a claim sounded in either negligent or intentional misrepresentation—torts—and, therefore, the city was immune under the Act.

Lehman v. City of Louisville also applied section 24-10-106 of the Governmental Immunity Act. In Lehman, the plaintiffs alleged that they had told the Director of Community Development about their intended use of an existing building, that the Director told them that their proposed use was in conformity with the existing building code, and that they had relied upon this statement and purchased and renovated the building. Later, the Director stated that their intended use violated the building code, and the purchasers sued the city. As in Olsen, the court held that the plaintiff’s claim was based upon negligent or intentional misrepresentations—torts—and that their claims were barred by the city’s sovereign immunity.

Based upon these two cases, it appears that any claim of misrepre-

325. See id. § 1-39-112.
327. See id.
329. Id. § 24-10-106(1) (West Supp. 1996).
331. See id. at 97, 100.
332. See id. at 100.
334. See id. at 456.
335. See id.
336. See id. at 457.
sentation against the Secretary of State or other officer regarding the filing of prior security interests would be barred.

VII. Conclusion

Now, with the renaissance of the "king can do no wrong" concept, what can citizens do to protect themselves from the king's servants' "misrepresentations," "deceits," and just plain, simple negligent handling of financing statements and lien notices?

A few suggestions may be helpful:

1. Lenders who file financing statements by mail should keep a "tickler" file to remind themselves to examine returned financing statements for proper filing. If filing papers fail to return within a reasonable time, the filers should examine their cancelled checks to see if the state has deposited the filing fee.

2. State and local law permitting, lenders should enlist private corporations to file and examine records for them, as a check on the state's civil servants. This would be particularly important when the filing office is located at a distance from the filer.

3. Lenders should file by fax, which is permitted in over twenty percent of the states. However, filers must prove that the state received their filing.

4. If the economics of the transaction warrant it, it might be prudent to conduct a search a week or so after filing of the financing statement or car title application to make sure that filing has, in fact, been made and that the government office has properly indexed the financing statement. If the volume of motor vehicle cases is any indication of a nationwide problem, a search would seem particularly appropriate.

5. Some states have provided for electronic filing of commercial documents. The federal Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified in scattered sections of titles 15, 18, 19, & 42 U.S.C.), directed the United States Transportation Department to establish an electronic information system to enable state authorities to check to determine if a motor vehicle had been stolen before the state issued a new title certificate. See id. § 202. The system was scheduled to begin operating by January, 1996. See id. § 202(a)(1).


(f) Immunity.—Any person performing any activity under this section or sections 30503 or 30504 in good faith and with the reasonable belief that such activity was in accordance with this section or section 30503 or 30504, as the case may be, shall be immune from any civil action respecting such activity which is
relatively new method. Of course, human error, on the part of the filer and the receiver, have to be reckoned with in this area also.

seeking money damages or equitable relief in any court of the United States or a State.

Id. § 30502. It amends section 33109 of title 49, U.S.C., by adding the following:

(d) Immunity.—Any person performing any activity under this section or section 33110 or 33111 in good faith and with the reasonable belief that such activity was in accordance with such section shall be immune from any civil action respecting such activity which is seeking money damages or equitable relief in any court of the United States or a State.

Id. § 33109.