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## Arizona's Notice of Claim Statute: Guidance on Clearing this Procedural Hurdle and Suggestions for its Improvement

Dawinder S. Sidhu

*University of New Mexico - School of Law*

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SMALL SCHOOL.  
BIG VALUE.

ARIZONA'S NOTICE OF CLAIM STATUTE:  
GUIDANCE ON CLEARING THIS PROCEDURAL HURDLE AND  
SUGGESTIONS FOR ITS IMPROVEMENT

Dawinder S. Sidhu<sup>†</sup>

*The Arizona Constitution empowers the legislature to establish rules for how and under what circumstances the State may be sued. Pursuant to this constitutional authority, the Arizona State Legislature enacted Arizona Revised Statutes Section 12-821.01, which requires those with claims against an Arizona public entity or employee to file notice of the claims prior to the initiation of legal action.*

*This procedural prerequisite to initiate a suit may be prudent as a matter of public policy. In practice, however, the state courts have been unable to issue reliable decisions with respect to the statute's requirements. The state courts' evolving understanding of the statute has led to the federal courts delivering inconsistent opinions when faced with motions to dismiss on notice of claim grounds. As a result, claimants have not only had their claims thrown out without reaching the merits, but more critically, the courts have dismissed claims under a cloud of confusion and uncertainty as how compliance with the statute may be achieved in a state or federal forum.*

*The notice of claim statute, as currently interpreted by the courts, is broken. This article provides guidance on how the statute may be navigated in consideration of previous pronouncements from the courts, and how the statute may be fixed to facilitate compliance, while simultaneously upholding the purposes of the present statute. Accordingly, Part I provides an overview of the statute, including its historical development and the justifications for its existence. Part II*

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<sup>†</sup> J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. Dawinder S. Sidhu serves as a research fellow at the Johns Hopkins University Washington Center for the Study of American Government. He was a judicial law clerk in the United States District Court of Arizona from September 2007 through August 2008. This article was prepared afterwards, intermittently during the months between November 2008 and March 2009. The author is grateful to his mentors, colleagues, and friends at the district court; Amit Singh Aulakh for his research assistance; and his parents for their continued guidance, encouragement, and love. The views expressed herein, and any errors, are solely the author's own.

*compares the state courts' and federal courts' recent treatment of the statute's requirements, showing a divergence between the two. Part III offers litigants guideposts for satisfying the elements of the statute despite the courts' unharmonious views on the statute's content. Part IV proposes a revised statute to replace the current one, as well as an amended rule of professional conduct to curb inappropriate attorney behavior in respect of filing suits against the State.*

*The current state of the notice of claim statute is sufficiently dire that legislative action is urgently necessary. It is hoped that this article will help practitioners contend with the statute in the meantime, and will provide useful suggestions to relevant stakeholders when and if revisions to the existing statute are considered.*

\* \* \*

## INTRODUCTION

On May 20, 2005, Jasper Simmons arrived at the Navajo County Jail.<sup>1</sup> Eight days later, Jasper attempted suicide by slitting his wrists with razor blades.<sup>2</sup> Prison personnel used medical gauze to dress the resulting wounds.<sup>3</sup> On July 2, 2005, Jasper used the same gauze to successfully hang himself in his cell—while he was on suicide watch.<sup>4</sup>

Jasper's parents filed suit against Navajo County, the State of Arizona, and others, claiming, *inter alia*, that that the prison officials effectively enabled their son to commit suicide with the gauze; that their son was discovered an hour after he stopped breathing, even though the prison's suicide watch protocol required prison guards to observe Jasper every fifteen minutes; and that Jasper was given inadequate mental health evaluations—evaluations that somehow called for Jasper to be under more relaxed suicide watch procedures.<sup>5</sup> The complaint pressed six counts of state law negligence and two counts of state law disability discrimination.<sup>6</sup> The court, however,

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<sup>1</sup> Simmons v. Navajo County, No. CV-06-701, 2008 WL 343292, at \*5 (D. Ariz. Feb. 6, 2008).

<sup>2</sup> *Id.*

<sup>3</sup> Simmons v. Navajo County, No. CV-06-701, 2006 WL 1897290, at \*1 (D. Ariz. July 11, 2006).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*2.

dismissed all of these state law claims without considering the merits.<sup>7</sup> Why? Jasper's parents failed to comply with Arizona's notice of claim statute.<sup>8</sup>

This statute, simple as it sounds, requires a person with a claim against a public entity or public employee to provide notice of the claim to the public entity or public employee prior to the initiation of legal action.<sup>9</sup> But this statute, however straightforward and sensible it may seem from a public policy standpoint, has nonetheless proved lethal to plaintiffs. Its "strict" application has led to the dismissal of state law claims in a wide range of troubling cases.<sup>10</sup> For example, a man who was struck by a police officer's vehicle as he walked along a highway, suffering a broken leg and collarbone as a result, had his state claims dismissed because he did not comply with the notice of claim requirements.<sup>11</sup> For the same reason, state law claims were swiftly thrown out in cases where a plaintiff alleged that confidential information accusing him of child molestation was disclosed without authorization;<sup>12</sup> a plaintiff alleged wrongful termination in retaliation for whistle-blowing;<sup>13</sup> and a plaintiff alleged racial discrimination and wrongful accusation of being a serial killer and rapist.<sup>14</sup>

This article is focused primarily on two overlapping concerns. First, how can practitioners, specifically the plaintiffs' bar, surmount this rather ominous procedural barrier to relief?<sup>15</sup> Second, even if satisfaction of the statute's requirements is possible, are there ways in which the statute may be refined in a manner that clarifies what is

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<sup>7</sup> Simmons, 2008 WL 343292, at \*3-4.

<sup>8</sup> Ariz. Rev. Stat. Ann. § 12-821.01 (2003); *See* Simmons, at \*4 ("Because Plaintiffs' state law claims are barred, the Court will grant summary judgment on those claims.").

<sup>9</sup> Deer Valley Unified Sch. Dist. v. Houser, 152 P.3d 490, 491 (Ariz. 2007) (en banc).

<sup>10</sup> *See infra* Part II(A).

<sup>11</sup> Jones v. Cochise County, No. C20070134, 2007 WL 5734760, (Ariz. Super. Ct. June 21, 2007) (plaintiffs barred from seeking relief), *rev'd*, 187 P.3d 97 (Ariz. Ct. App. 2008).

<sup>12</sup> Perkins v. Spencer, No. 07-1963, 2008 WL 4418145 (D. Ariz. Sept. 29, 2008).

<sup>13</sup> Pitroff v. Yavapai County Bd. of Supervisors, No. 06-1184, 2008 WL 3890496 (D. Ariz. Aug. 21, 2008).

<sup>14</sup> Adams v. Shuttleport Ariz. Joint Venture, No. 07-2170, 2008 WL 3843585 (D. Ariz. Aug. 14, 2008).

<sup>15</sup> The requirement that a claimant file a notice of claim prior to commencing suit against a public entity or individual "constitutes a 'procedural rather than a jurisdictional requirement.'" Konrath v. Amphitheater Unified Sch. Dist. No. 10, No. 04-179, 2007 WL 2809026, at \*17 (D. Ariz. Sept. 26, 2007) (quoting McGrath v. Scott, 250 F.Supp.2d 1218 (D. Ariz. 2003)). This article therefore refers to the notice of claim statute as a procedural, rather than jurisdictional, issue.

required of claimants, while still remaining faithful to the statute's underlying legislative objectives? This article offers guidance on how the elements of the notice of claim statute may be met and also suggests improvements for the state's existing notice of claim regime.

Tips on how to comply with the statute are needed quite plainly because the notice of claim statute is responsible for the dispensing of multiple cases containing serious state claims and demands for significant damages.<sup>16</sup> Indeed, the situation has reached a point where courts have contemplated whether the statute exists as an "insurmountable" obstacle for claimants.<sup>17</sup>

In addition, the Arizona state courts and the Arizona federal district courts appear to possess divergent interpretations of the notice of claim requirements,<sup>18</sup> which further demonstrates the need for clarity on the subject. The court opinions that have been issued are not only difficult to reconcile, but they also have been narrowly circumscribed to the facts at hand, providing litigants with differing factual circumstances with limited information on how they can comply with the statute.<sup>19</sup> To make matters worse, the United States Court of Appeals for the Ninth Circuit, which can provide informative rulings on the statute, has been largely silent since the state and federal district courts began issuing unharmonious decisions,<sup>20</sup> leaving the legal landscape in a state of indefinite flux.

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<sup>16</sup> See Andrew Becke, Comment, *Two Steps Forward, One Step Back: Arizona's Notice of Claim Requirements and Statute of Limitations Since the Abrogation of State Sovereign Immunity*, 39 ARIZ. ST. L.J. 247, 259 (2007) ("These dismissals have no relation to the legitimacy of the claim, the conduct of the state (or its employees), or the severity of injury sustained by the party. It is simply a method by which a certain percentage of cases can be disposed of regardless of merit."); see also *id.* at 263-64 ("Indeed many of these cases are subject to dismissal [on notice of claim grounds] based not for lack of merit, but rather because the claimant failed to run to the lawyer's office as soon as the injury occurred.").

<sup>17</sup> *City of Phoenix v. Fields*, 193 P.3d 782, 789 (Ariz. Ct. App. 2008).

<sup>18</sup> See *infra* Part II (explaining the difference between Arizona district courts' and Arizona state courts' views of the statute).

<sup>19</sup> See, e.g., *Otioti v. Arizona*, No. 07-443-PHX-SRB, 2008 WL 7069009, at \*7 (D. Ariz. Aug. 19, 2008) (a watershed en banc case from the Supreme Court of Arizona "provides no guidance on what may or may not be sufficient facts beyond the one narrow circumstance of no facts at all.") (citation omitted).

<sup>20</sup> Indeed, during this time, the Ninth Circuit has not issued any published opinions. It has made one unpublished ruling of limited precedential value. See *Madrid v. County of Apache*, 289 F. App'x 155 (9th Cir. 2008) (stating that a notice of claim should have been provided to the defendant, however the plaintiff had not filed a notice of claim within the established statutory period).

As to academic literature, there only are two law review articles dedicated to the notice of claim statute.<sup>21</sup> These articles, however, were penned before critical developments in the interpretations of the statute occurred. Other relevant commentary is available, though these articles address the statute tangentially.<sup>22</sup>

There are a vast number of Arizona public entities and employees. Thus, there is great potential for plaintiffs to file state law claims against the State and for the statute to be implicated thereby. In fact, the uncertainty over the statute's requirements has led already to the courts being "flooded" – in an Arizona court's own words – with motions to dismiss on notice of claim grounds.<sup>23</sup> The universe of individuals who can benefit from some direction on the notice of claim statute is therefore considerable.

Accordingly, Part I will provide an overview of the notice of claim statute and will discuss the justifications for the statute's existence. This broad survey will provide a useful backdrop for appreciating how the statute has developed over time and for formulating the contents of any newly proposed notice of claim scheme. Part II will examine the Arizona state courts' recent rulings with respect to the statute. By way of comparison, Part II will also analyze noteworthy Arizona federal district court opinions in this field. A look at these state and federal court decisions will reveal how the Arizona courts' decisions related to the notice of claim statute have made it difficult for the federal courts to track Arizona's understanding of the statute. As a result, the federal courts have issued more stringent and inconsistent orders with respect to notices of claim, their good faith efforts to follow the state courts notwithstanding.

Part III will offer ways in which plaintiffs and their counsel can still comply with the statute in light of the courts' dissimilar interpretations of the statute's requirements. In particular, this Part will address when the statute applies, how to serve notice and to whom notice is to be provided, and how to satisfy the substantive aspects of the statute.

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<sup>21</sup> See Tara Zoellner, Note, *Lee v. State: The Mailbox Rule and its Applicability to Notices of Claims Against the State*, 50 ARIZ. L. REV. 999 (2008); Becke, *supra* note 16.

<sup>22</sup> See, e.g., Gary Newson, *Civil Procedure, Service, and the Electronic Courtroom: A Discussion of the Arizona Supreme Court's 2006-2007 Decisions*, 40 ARIZ. ST. L.J. 891 (2008).

<sup>23</sup> *Backus v. State*, 204 P.3d 399, 403 (Ariz. Ct. App. 2008), *vacated*, 203 P.3d 499 (Ariz. 2009). The Arizona Supreme Court did not disturb this observation.

While compliance may be achieved through the diligent efforts of claimants, Part IV will argue that the current statute is not worth saving. It will propose a new notice of claim statute and an amended rule of professional conduct, which, if implemented, may simultaneously reduce confusion, ensure more state claims pass through to the merits stage, and further the established goals of the existing statute. Part V will conclude this article.<sup>24</sup>

A remark about what this article does not do: this article presumes that the statute is valid, and, consequently, does not suggest ways in which the statute itself may be challenged in the courts. Those interested in mounting a facial attack on the statute must turn elsewhere for relevant guidance. In any event, it is unclear whether the courts would be receptive towards a constitutional objection to the statute.<sup>25</sup>

This article also recognizes that “the Arizona Constitution specifically empowers the legislature to enact statutes of limitations and procedures that may treat lawsuits against the State differently from other lawsuits.”<sup>26</sup> As such, this article does not assert that the notice of claim statute, a requirement that applies only to those with

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<sup>24</sup> A note must be made regarding the sources for and the time within which the author wrote this article. Ethical considerations compel the author to disclose that he served as a law clerk in an Arizona federal district court and that he helped resolve cases implicating the notice of claim statute that is at the core of this piece. This article, however, reflects only the author’s thoughts on this subject and independent research that he solely performed wholly after the conclusion of his clerkship. (See FED. JUDICIAL CTR., MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 19-20 (2002) (addressing ethical rules for law clerks concerning use of government resources while serving as a clerk)). It does not contain any information of a confidential nature and is based exclusively on material that is a matter of public record. (*Id.* at 7-9 (addressing same with respect to confidentiality)).

That said, the author decided to write on this topic because of all the many federal and state legal issues that came across his desk, it is this statute that he found most problematic and in need of urgent attention. This article is the author’s modest attempt to provide assistance to those contending with the statute and to those interested in improving the statute as it is currently written, and to enrich the Arizona legal community’s broader debate regarding when and under what circumstances its public bodies and employees may be reached for purposes of liability.

<sup>25</sup> See, e.g., *Estrada v. City of San Luis*, No. CV-07-1071, 2007 WL 4025215, at \*4 (D. Ariz. Nov. 15, 2007) (rejecting arguments that the state legislature exceeded its constitutional authority in enacting the notice of claim statute and that the statute is unconstitutionally ambiguous).

<sup>26</sup> *Stulce v. SRP Agric. Improvement & Power Dist.*, 3 P.3d 1007, 1013 (Ariz. Ct. App. 1999); see ARIZ. CONST. art. IV, § 18 (providing that the state legislature shall “direct by law in what manner and in what courts suits may be brought against the state.”).

claims against the State, is inherently unfair because it is not imposed on prospective litigants with claims against non-state parties.<sup>27</sup>

## I. OVERVIEW

This Part provides background information on the development of the notice of claim statute in the state courts and legislature, and enumerates the purposes of the statute. This is not intended to serve as an exhaustive historical account of every judicial or legislative event related to the statute, but instead to give the reader a sense of how the statute has progressed over time. Additionally, this Part will examine the interplay between the state courts and the state legislature when the statute's propriety and contents have been at issue.

### A. THE ARIZONA JUDICIARY AND SOVEREIGN IMMUNITY

The “ancient” doctrine of sovereign immunity, which can be traced back to England, was based in the thought that the King could do no wrong and therefore was above legal challenges.<sup>28</sup> Sovereign immunity was later embraced in Arizona. In 1902, for example, the Supreme Court of the Territory of Arizona held that “neither a county nor its officers,” in the performance of their governmental functions, can be “made to respond for wrongs . . . unless [a] statute so declares.”<sup>29</sup> In 1920, following the entry of Arizona into formal statehood, the Arizona Supreme Court maintained the concept of sovereign immunity. The court wrote that “the state, in consequence of its sovereignty, is immune from prosecution in the courts and from liability to respond in damages for negligence, except in those cases where it has expressly waived immunity or assumed liability by constitutional or legislative enactment.”<sup>30</sup> The court noted that the

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<sup>27</sup> Cf. Becke, *supra* note 16, at 260 (criticizing an element of the notice of claim statute because it requires “significantly greater amount of [factual] detail than would be required in filing a lawsuit against a private party.”); *id.* at 263 (“The overall effect of the[] [statute’s] requirements is to make the State less susceptible to lawsuit, based not on any areas of immunity, but rather on the shortened period of time in which claimants must act.”).

<sup>28</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 142 (1984) (Stevens, J., dissenting).

<sup>29</sup> *Haupt v. Maricopa County*, 68 P. 525, 526 (Ariz. 1902).

<sup>30</sup> *State v. Sharp*, 189 P. 631, 631 (Ariz. 1920).



State was immune from suit, irrespective of the troubling facts or circumstances of a plaintiff's case.<sup>31</sup>

In subsequent decisions, the court upheld this understanding of sovereign immunity -- the State could not be sued unless a statute had directed otherwise. In a seminal 1921 case, the Arizona Supreme Court noted, consistent with its previous pronouncements, that “[t]here is no statute whereby this state has assumed a liability for the negligence or misfeasance of its officers or agents, and we find no established principle of law sustaining such liability in the absence of such statutory assumption.”<sup>32</sup>

The court's loyalty to this rule, however, began showing signs of cracking. In the same 1921 case, the court declared that it was not the role of the courts to change this established legal principle. This statement impliedly suggested that the court was not pleased with the doctrine, but remained duty-bound to apply it. The court remarked that, “[n]o consideration of hardships to be avoided would justify a court in abrogating established principles of substantive law to create a liability not so assumed. To change substantive law,” the court added, “is the province of the Legislature, not of the courts.”<sup>33</sup> Three years later, the court similarly said, “[w]hile we are very much impressed with the very splendid argument of counsel for plaintiff in behalf of the rule that would make not only the county but its officers liable for negligence . . . , this argument is one for the consideration of the legislative department and not the courts.”<sup>34</sup>

In 1963, the practical effect of sovereign immunity on litigants was too much for the Arizona Supreme Court to bear any longer. The court wrote:

We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold

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<sup>31</sup> *Id.* at 633 (“The facts of the case arouse a feeling of great sympathy upon our part for the plaintiff, but sympathy cannot be suffered to take the place of judicial decision. It is our duty to declare the law as we find it, not to make it, even in accord with our own desires or wishes.”).

<sup>32</sup> *State v. Dart*, 202 P. 237, 240 (Ariz. 1921) (internal quotes and citation omitted).

<sup>33</sup> *Id.* (internal quotes and citation omitted).

<sup>34</sup> *Larsen v. Yuma County*, 225 P. 1115, 1116 (Ariz. 1924).

that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled.<sup>35</sup>

In explaining its decision, the court observed that another traditional doctrine, liability for simple negligence, trumped the notion that any subset of tortfeasors is immune from liability. “There is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception.”<sup>36</sup> While previous court rulings on the subject expressed discomfort with sovereign immunity, but stopped short of abrogating the doctrine, the 1963 court felt it was able to overrule sovereign immunity because the doctrine itself was judicially fathered and adopted. “[W]e realize that the doctrine of sovereign immunity was originally judicially created. . . . This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process.”<sup>37</sup>

This ruling opened the door for the State to be sued in the absence of a statute or express waiver. In 1969, however, the court limited the scope of public liability for negligence, ruling that a claimant may recover against a public entity or individual only when the public entity or individual owes a specific duty to the claimant.<sup>38</sup> The court concluded, under the facts of the particular case, that liability did not attach because “[t]he duty of the defendants here is patently one owed to the general public, not to the individual plaintiffs, and no facts are pleaded which would bring this case into the realm of the exceptions to the rule.”<sup>39</sup>

In 1982, the court did away with the requirement that the sovereign was liable only when a specific duty was owed to the claimant. “We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty

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<sup>35</sup> *Stone v. Ariz. Highway Comm’n*, 381 P.2d 107, 109, 112 (Ariz. 1963) (“The substantive defense of governmental immunity is now abolished not only for the instant case, but for all other pending cases, those not yet filed which are not barred by the statute of limitations and all future causes of action. All previous decisions to the contrary are specifically overruled.”).

<sup>36</sup> 381 P.2d at 112.

<sup>37</sup> *Id.* at 113.

<sup>38</sup> *See Massengill v. Yuma County*, 456 P.2d 376, 379-81 (Ariz. 1969).

<sup>39</sup> *Id.* at 381.

which means recovery.”<sup>40</sup> The court acknowledged that “by removing the public/private duty doctrine, [it has] not solved all of the problems in this area.”<sup>41</sup> As with earlier rulings in the context of qualified immunity, the court called on the legislature to provide clarity in this area. “We do not recoil from the thought that the legislature may in its wisdom wish to intervene in some aspects of this development.”<sup>42</sup>

The legislature, as noted below, responded in kind and since has played a significant role in setting forth the contours of state liability.

## B. THE ARIZONA LEGISLATURE AND NOTICE OF CLAIM STATUTES

The Arizona Constitution enables the legislature to determine the circumstances under and fora in which the State may be sued. It provides, “[t]he Legislature shall direct by law in what manner and in what courts suits may be brought against the State.”<sup>43</sup> The legislature’s attempts to fulfill this constitutional responsibility went through several fluctuations.

For example, in 1956, the legislature decided that, “[p]ersons having claims on contract or for negligence against the state, which have been disallowed, may . . . bring action thereon against the state and prosecute the action to final judgment”<sup>44</sup> within two years of the accrual of the cause of action.<sup>45</sup> After the Arizona Supreme Court invited the legislature to intervene in this area in 1982, the legislature passed the Actions Against Public Entities or Public Employees Act. Enacted in 1984, this statute declared that the State’s public policy was that “public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state.”<sup>46</sup> In contrast to the previously enacted two-year limitations period, the 1984 Act provided that, “[p]ersons who have claims against a public entity or public employee” are to “file such claims . . . within twelve months after the cause of action accrues.”<sup>47</sup>

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<sup>40</sup> Ryan v. State, 656 P.2d 597, 599 (Ariz. 1982).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> ARIZ. CONST. art. IV, § 18.

<sup>44</sup> ARIZ. REV. STAT. ANN. § 12-821 (1956).

<sup>45</sup> § 12-822 (1956).

<sup>46</sup> § 12-820 (1984).

<sup>47</sup> § 12-821(A) (1984).

While this statutory iteration constricted the time for filing such suits, it extended a helping hand to claimants: claims would not be barred where a showing of “excusable neglect” was made,<sup>48</sup> where “excusable neglect” was defined to mean “reasonable and foreseeable neglect or inadvertence.”<sup>49</sup> In addition, claimants alleging medical malpractice were completely free from having to comply with the statute’s requirements.<sup>50</sup>

In 1993, the legislature replaced the 1984 statute with a far more rigid one. Specifically, it did away with the “excusable neglect” exception. It also limited the type of claims that may be filed against the State in personal injury actions: “[a]ll personal injury actions against any public entity or public employee involving acts that are alleged to have occurred within the scope of the public employee’s employment shall be brought within one year after the cause of action accrues and not afterward.”<sup>51</sup>

One year later, however, the latter limitation was lifted. In particular, the statute was amended to expand the universe of permissible claims against the State to “all actions.” “All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward.”<sup>52</sup>

The legislative enactments currently applicable were passed in 2003. The present notice of claim statute requires “[p]ersons who have claims against a public entity or a public employee [to] file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure.”<sup>53</sup> With respect to timing, a notice of claim generally must be filed “within one hundred eighty days after the cause of action accrues.”<sup>54</sup> With respect to the consequences of failing to file within this timeframe, “[a]ny claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.”<sup>55</sup> With respect to the contents of the notice of claim, it must contain two things: first, “facts sufficient to permit the public entity or public employee to understand the basis

<sup>48</sup> *Id.*

<sup>49</sup> ARIZ. REV. STAT. ANN. § 12-821(E) (1984).

<sup>50</sup> *Id.* § 12-821(D).

<sup>51</sup> 1993 Ariz. Sess. Laws 250, 254 (amended 1994).

<sup>52</sup> ARIZ. REV. STAT. ANN. § 12-821 (1994).

<sup>53</sup> ARIZ. REV. STAT. ANN. § 12-821.01(A) (2003).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

upon which liability is claimed,” and second, “a specific amount for which the claim can be settled and the facts supporting that amount.”<sup>56</sup>

### C. PURPOSES OF THE STATUTE

The reason why liability extends to the State was made clear by the Arizona Supreme Court in 1963: tortfeasors are to answer for their wrongdoing and the State, just like any other actor is amenable to suit for his or her tortious acts.<sup>57</sup> The question is why the legislature found it necessary to require claimants to take the additional step of filing notice of claim with the State prior to the commencement of legal action. On this point, the courts have identified several justifications for the notice of claim statute. These purposes are important to consider not only in examining how to comply with the statute, but also in fashioning possible alternatives to the statute, given the problems plaintiffs have had in achieving compliance.

The first, and likely most obvious, reason for the statute is to place the State on notice of prospective legal claims.<sup>58</sup> Second, and less manifest, the notice of claim statute aims to guard against the possibility that claimants will present the State with baseless demands. An Arizona appellate court remarked that the “[t]he legislature enacted the claim statute as part of a movement to subject government to reasonable liability”<sup>59</sup> and to “protect[] the government from excess or unwarranted liability[.]”<sup>60</sup> Similarly, an en banc panel of the Arizona Supreme Court observed that the statute “ensures that claimants will not demand unfounded amounts that constitute quick unrealistic exaggerated demands.”<sup>61</sup>

Third, with knowledge of the claims and a diminished likelihood that unreasonable claims will be filed, the State possesses a meaningful opportunity to investigate the allegations and assess its possible liability.<sup>62</sup> Fourth, with an evaluation of the allegations and

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<sup>56</sup> *Id.*

<sup>57</sup> *See* *Stone v. Ariz. Highway Comm’n*, 381 P.2d 107, 112 (Ariz. 1963).

<sup>58</sup> *See* *Backus*, 204 P.3d at 403 (“the purpose of the notice of claim statute is to . . . put the governmental entity on notice of a claim . . .”).

<sup>59</sup> *Yollin v. City of Glendale*, 191 P.3d 1040, 1044-45 (Ariz. Ct. App. 2008).

<sup>60</sup> *Id.* at 1045.

<sup>61</sup> *Deer Valley*, 152 P.3d at 493 (internal quote and citation omitted).

<sup>62</sup> *See* *Yollin*, 191 P.3d at 1045 (the statute “allow[s] the government to investigate the claim[.]”); *id.* at 1048 (“The claim statute anticipates that government entities will investigate claims . . .”); *Deer Valley*, 152 P.3d at 493 (the statute fosters the ability of the State “to evaluate the amount

potential liability, the State is in position to determine whether or not it will settle with the claimant.<sup>63</sup> Settlement is preferable over contentious and costly litigation, and therefore is in the interests of the State. The Arizona Supreme Court noted over fifty years ago that, “[i]t has always been the policy of the law to favor compromise and settlement; and it is especially important to sustain that principle in this age of voluminous litigation . . . .”<sup>64</sup> This principle was reiterated recently by a lower Arizona court when it said, “sound legal policy ought to favor compromise and settlement over litigation.”<sup>65</sup>

Finally, in the event of a settlement or judgment at trial, the notice of claim statute permits the State to prepare for the financial burden of a settlement or damages award. Put another way, the statute enables the government to “budget for settlement or payment of large claims”<sup>66</sup> and “to make settlement and budgeting decisions with a reasonable estimate of its maximum exposure.”<sup>67</sup>

While the statutory language appears to be relatively straightforward and the purposes of the statute eminently understandable, a separate issue is whether the courts have been able to reliably and consistently apply the statute to different factual circumstances. The following section indicates that the judicial results have been less than satisfactory.

## II. THE COURTS’ TREATMENT OF THE NOTICE OF CLAIM STATUTE

A review of the courts’ application of the notice of claim statute to recent cases reveals where the courts are in lockstep and also where they diverge in interpreting the statute. First, the areas of congruence: both state and federal courts require “strict” compliance with each of the statute’s requirements. In addition, these courts are

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claimed.”).

<sup>63</sup> See 191 P.3d at 1045 (“[The statute] also provides government a meaningful opportunity to make a settlement decision prior to the initiation of a court proceeding.”); see also *Falcon v. Maricopa County*, 144 P.3d 1254, 1256 (Ariz. 2006); *Martineau v. Maricopa County*, 86 P.3d 912, 915-16 (Ariz. Ct. App. 2004).

<sup>64</sup> *Dansby v. Buck*, 373 P.2d 1, 8 (Ariz. 1962).

<sup>65</sup> *Myers v. Wood*, 850 P.2d 672, 673 (Ariz. Ct. App. 1992).

<sup>66</sup> *Yollin*, 191 P.3d at 1045.

<sup>67</sup> *Id.* at n.3; see also *Martineau*, 86 P.3d at 915-16 (the statute “assist[s] the public entity in financial planning and budgeting.”).

also in agreement regarding the meaning of the first substantive requirement of the statute – the need for a sufficient factual basis supporting the alleged liability. Perhaps more important than these commonalities is the disparate understanding of the statute. Specifically, the state courts have mistakenly and leniently interpreted the second substantive requirement – that the notice of claim contain a specific settlement sum along with a factual basis for that amount. At the same time, the federal courts have rightfully issued more “strict” opinions regarding this requirement. The state and federal courts have demonstrated therefore an inconsistency in applying the statute.

#### A. STRICT COMPLIANCE

Under the notice of claim statute, claims not filed within one hundred eighty days after the date of accrual are “barred and no action may be maintained thereon.”<sup>68</sup> Accordingly, the Arizona courts have noted that the statute operates as a procedural barrier to relief—a claimant’s failure to adhere to the statute means that his claims are precluded from moving forward.<sup>69</sup> For example, an Arizona court stated that compliance with the statute is a “mandatory and essential prerequisite to [a] cause of action . . . .”<sup>70</sup>

By its terms, the statute’s text addresses its preclusive effect in reference to the window within which the notice of claim must be filed.<sup>71</sup> The Arizona courts have stated, however, that a claimant “must strictly comply” with the statute without confining the strict compliance standard to any particular requirement, indicating that a claimant must carefully adhere to *each* of the requirements.<sup>72</sup>

As a result, the courts have held that “substantial compliance do[es] not excuse failure to comply with the statutory requirements of A.R.S. § 12-821.01(A),”<sup>73</sup> again linking the strict compliance standard not to any single element of the statute, but rather to the statute as a

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<sup>68</sup> ARIZ. REV. STAT. ANN. § 12-821.01(A) (2003).

<sup>69</sup> See *e.g.*, *Crum v. Superior Court*, 922 P.2d 316, 318 (Ariz. Ct. App. 1996); *Salerno v. Espinoza*, 115 P.3d 626, 628 (Ariz. Ct. App. 2005).

<sup>70</sup> *Martineau*, 86 P.3d at 914 (internal quotes omitted).

<sup>71</sup> See *Backus*, 204 P.3d at 402 (“[s]trict compliance relative to the specific settlement amount demanded is required.”) (citation omitted).

<sup>72</sup> *Jones v. Cochise County*, 187 P.3d 97, 102 (Ct. App. Ariz. 2008); see *Newson*, *supra* note 22, at 900 (“claimants have very little room for error when filing against public entities . . . . Future claimants would be well advised to read and understand the required elements and not rely on substantial compliance.”).

<sup>73</sup> *Falcon*, 144 P.3d at 1256.

whole. In 2008, the Arizona Supreme Court noted that this exacting and uncompromising interpretation of the statute—namely that “strict compliance” with the statute in its entirety is required—is consistent with its previous orders.<sup>74</sup> An intermediate state court acknowledged that a literal reading of the statute’s “all-encompassing language” may have extensive reach, but that the courts were not in a position to call for something other than a strict interpretation of the statute.<sup>75</sup> To be sure, the courts have cautioned that while a strict reading of the statute’s requirements is in order, “evaluation of that compliance should not turn on a reading of . . . the notice of claim . . . that risks elevating form over substance.”<sup>76</sup>

The federal courts are in line with the state courts in that the federal bench concurs that a failure to abide by the notice of claim statute bars the underlying claims from proceeding. In fact, the federal district courts have borrowed language from an Arizona court ruling—that compliance with the statute is a “mandatory and essential prerequisite to [a] cause of action”<sup>77</sup>—in setting forth the general notice of claim standard of review.

In addition, the federal courts appear to be consistent with the state court holdings that compliance with the statute as a whole must be interpreted strictly. For example, in a 2008 case, a federal district court judge said that, “compliance with the statutory requirements of the Notice of Claim statute is strictly construed.”<sup>78</sup> The same year, a separate federal judge observed that, “[t]he state legislature has amended the statute to affirm that the statute's requirements are to be strictly applied.”<sup>79</sup> Unsurprisingly, and also in 2008, a federal district court judge specifically rejected the argument, put forth by the plaintiff, that the notice of claim statute is to be “liberally construed.”<sup>80</sup>

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<sup>74</sup> Lee v. State, 182 P.3d 1169, 1177 (Ariz. 2008) (discussing Falcon, 144 P.3d 1254; Deer Valley, 152 P.3d 490).

<sup>75</sup> Fields, 193 P.3d at 788.

<sup>76</sup> Jones, 187 P.3d at 102.

<sup>77</sup> See e.g., Perkins, 2008 WL 4418145, at \*8 (quoting Martineau, 86 P.3d at 914); Villescaz v. City of Eloy, No. 06-2686, 2008 WL 4277943, at \*7 (D. Ariz. Sept. 18, 2008) (quoting same); Nored v. City of Tempe, No. 08-00008, 2008 WL 2561905, at \*3 n.3 (D. Ariz. June 26, 2008) (quoting Salerno, 115 P.3d at 628).

<sup>78</sup> Pitroff, 2008 WL 3890496, at \*1 (quoting Deer Valley, 152 P.3d 490); see Castaneda v. City of Williams, No. 07-00129, 2007 WL 1713328, at \*3 (D. Ariz. June 12, 2007) (“the notice of claim statute must be strictly construed.”) (quoting Deer Valley, 152 P.3d at 496).

<sup>79</sup> Nored, 2008 WL 2561905, at \*4.

<sup>80</sup> Baker v. City of Tempe, No. 07-1553, 2008 WL 2277882, at \*4 (D. Ariz. May 30, 2008).



The federal courts also maintain that “substantial or reasonable compliance” with the statutory requirements is insufficient.”<sup>81</sup>

The notion that compliance with the notice of claim statute is to be strictly construed provides a necessary and useful backdrop for an examination of whether and to what extent the courts have, in practice, strictly ensured compliance with the two substantive requirements of the statute—1) providing “facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed,” and 2) “a specific amount for which the claim can be settled and the facts supporting that amount.”<sup>82</sup> The remaining sections of this Part will indicate that the courts have strictly construed compliance with the former requirement, but have not uniformly done so with respect to the latter requirement.

## B. SUBSTANTIVE REQUIREMENTS: FACTUAL BASIS FOR ALLEGED LIABILITY

The first substantive element of the notice of claim statute requires a claimant to provide “facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed . . . .”<sup>83</sup> This requirement appears to be the most clear, and is therefore seldom litigated.

This prong of the statute calls upon claimants to simply “set forth facts concerning the event or events allegedly giving rise to liability sufficient to allow the government to identify and investigate the occurrence . . . .”<sup>84</sup> Put differently, the notice “must contain enough information to allow the entity to investigate the merits of the claim and assess its potential for liability.”<sup>85</sup>

As a result, a notice of claim that lists only the claims without providing any facts in support of the claims is inadequate,<sup>86</sup> because it deprives the public defendants of the opportunity to examine the

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<sup>81</sup> Dillon v. Arizona, No. 08-0796, 2008 WL 4628475, at \*4 (D. Ariz. Oct. 17, 2008) (citation omitted).

<sup>82</sup> ARIZ. REV. STAT. ANN. § 12-821.01(A) (2003).

<sup>83</sup> *Id.*

<sup>84</sup> Backus, 204 P.3d at 402.

<sup>85</sup> Barth v. Cochise County, 138 P.3d 1186, 1189 (Ct. App. Ariz. 2006) (citation omitted); *see* Baker v. City of Tempe, No. 07-1553, 2008 WL 2277882, at \*2 (D. Ariz. May 30, 2008) (“The claim must contain facts that will sufficiently enable the public entity or public employee to appreciate the basis of liability upon which the claim is founded.”) (quoting ARIZ. REV. STAT. ANN. § 12-821.01(A)).

alleged wrongdoing. Similarly, a federal court, noting that “[t]he purpose of this statutory requirement is to allow the public entity to investigate and assess the claim,” dismissed a notice of claim because the facts did not enable the public defendant to “investigate and assess the claim.”<sup>87</sup>

Contentiousness with respect to this requirement typically arises in the context of whether a claimant should have amended or supplemented his notice of claim. A “public entity necessarily cannot understand from a notice of claim the basis of any liability that might be based on facts that are unstated in the notice.”<sup>88</sup> Accordingly, any facts which form the basis for alleged liability that occur after the notice of claim was filed necessarily cannot be investigated or examined by the public entity or employee because there is no formal notice of them. A claimant must, in that situation, amend or supplement the original notice of claim to encompass those later facts.

Given the relative plain understanding of this requirement, issues with compliance generally occur with respect to the second substantive prong of the statutory requirements for a notice of claim—whether the notice includes a specific settlement sum along with a factual basis for that amount. This more complicated element is the subject of the next section.

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<sup>86</sup> See *Smith v. Johnston*, Nos. 2007-0145, 2007-0061, 2008 WL 4292735, at \*4 (Ariz. Ct. App. Sept. 19, 2008).

<sup>87</sup> *Adams*, 2008 WL 3843585, at \*4.

<sup>88</sup> *Haab v. County of Maricopa*, 191 P.3d 1025, 1029 (Ariz. Ct. App. 2008).

C. SUBSTANTIVE REQUIREMENTS:  
SPECIFIC SETTLEMENT AMOUNT AND RELEVANT FACTS

*a. Specific Settlement Amount*

The notice of claim statute requires claimants to include “a specific amount for which the claim can be settled and the facts supporting that amount.”<sup>89</sup> Generally, the “specific amount” is understood to serve as a settlement offer, with the term “offer” to be construed as it is in hornbook contract law.

For example, an Arizona appellate court, in discussing the sufficiency of a dollar figure noted in a notice of claim, recited the established contract principle that an offer—in this context, the “specific amount” in a notice of claim—should “manifest[] [a] willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”<sup>90</sup> As put by another appellate court ruling, “to satisfy the ‘sum certain’ requirement, the claimant must be willing to let the government finally settle the claim by paying the amount demanded in the notice of claim.”<sup>91</sup> Again:

The claimant must present the government with a definite amount which he is willing to accept as full satisfaction of his claim. As long as the claimant states a definite and exact amount, and the government may completely satisfy its liability by paying that sum, the claim letter satisfies the sum certain requirement.<sup>92</sup>

As a result, a “specific amount” may not contain any qualifying or modifying language. For example, the Arizona Supreme Court determined that the use of terms such as “approximately,” “or more going forward,” and “no less than,” in connection with a settlement amount is not a “specific amount” because these terms make “it impossible to ascertain the *precise amount* for which the [public entity or employee] could have settled [the] claim.”<sup>93</sup>

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<sup>89</sup> ARIZ. REV. STAT. ANN. § 12-821.01(A) (2003).

<sup>90</sup> Jones, 187 P.3d at 101 (citations omitted).

<sup>91</sup> Yollin, 191 P.3d at 1044 (citation omitted).

<sup>92</sup> *Id.* at 1045.

<sup>93</sup> Deer Valley, 152 P.3d at 492-93 (emphasis added).

As with the state court decisions regarding a specific sum, federal courts hold that claimants must present a clear and unambiguous settlement figure. For example, one federal district court judge found that a notice of claim containing a settlement amount of “not less than \$250,000.00” was “insufficiently specific to satisfy the Notice of Claim statute.”<sup>94</sup> Similarly, the federal district court also held that a notice of claim, which noted that the claims could be “brought” for a certain amount, was inadequate because the amount that may be sought at trial “cannot be construed to constitute a specific settlement amount . . . .”<sup>95</sup>

### *b. Relevant Facts*

The state courts have, up until this point of analysis, consistently applied a “strict” interpretation of the notice of claim statute’s requirements against filed notices of claim. Recently, however, state courts have begun to adopt a more relaxed view of what is sufficient for purposes of the requirement to include facts supporting a settlement amount. This more permissive interpretation not only violates the ostensibly established rule that the statute’s requirements are to be “strictly” interpreted, but created a split between state and federal court decisions, the latter of which have more faithfully continued the “strict” application theme regarding each of the statute’s elements.

The problems appear to have commenced after the Arizona Supreme Court released a rare en banc notice of claim ruling. In *Deer Valley v. Houser*, the court stated in an important footnote that the claimant did not provide “*any* facts supporting the claimed amounts . . . .”<sup>96</sup> In the same footnote, however, the court specifically noted that “[b]ecause the claimant’s letter does not include a specific sum, we *need not reach* the [public entity’s] argument that [claimant’s] letter also fails to provide facts supporting the amount claimed.”<sup>97</sup>

The *Deer Valley* Court specifically stated that it was not making a legal conclusion on the “facts supporting” the settlement amount requirement, noting that the notice of claim did not contain any such facts. Subsequent lower Arizona courts have relied on the footnote to

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<sup>94</sup> Pitroff, 2008 WL 3890496, at \*2 (citation omitted).

<sup>95</sup> Campos v. City of Glendale, No. 06-0610, 2007 WL 3287586, at \*1 (D. Ariz. Nov. 05, 2007).

<sup>96</sup> *Deer Valley*, 152 P.3d at 494 n.3 (emphasis in original).

<sup>97</sup> *Id.* (emphasis added).

fashion an exceedingly relaxed standard for what is sufficient for the “facts supporting” requirement. In 2008, for example, an intermediate Arizona court stated in a wrongful death action that “[i]f the notices of claim . . . contain *any* facts to support the proposed settlement amounts, *regardless of how meager*, then such notices met not only the literal language of the statute but also any requirement that may be implied from *Deer Valley*.”<sup>98</sup> Again, “*any* facts in support of the claimed amount constitute the *minimal compliance* necessary to satisfy the statute as written.”<sup>99</sup> In a separate action, a court cited *Deer Valley* for the proposition that “the supporting facts requirement is intended to be a *relatively light* burden on claimants . . . .”<sup>100</sup> In addition, a state court remarked, “[i]f the State in good faith truly wanted further information about the [facts supporting the claim], it certainly could have asked for it . . . .”<sup>101</sup>

These courts’ soft view of the “factual support” requirement seems to be incorrect. To be sure, for a claimant to factually support an amount in a wrongful death action is a grim and unfortunate endeavor. As the appeals court noted, it is “unreasonable . . . to expect surviving family members to provide some level of factual detail to justify and value their intangible grief over the loss of a loved one.”<sup>102</sup> A goal of the notice of claim statute, however, is to ensure that a claimant does not present the State with exaggerated and unreasonably high demands for monetary damages.<sup>103</sup> This goal exists regardless of the nature of the claim and in circumstances in which the calculation of damages would be difficult or unpleasant, such as the loss of a limb, loss of consortium, or lost wages, or where the theories for relief are relatively difficult to quantify, such as pain and suffering or emotional distress. Thus, necessary facts to support the settlement demand should be provided irrespective of the nature of the claim, but those facts undoubtedly can be examined in consideration of the specific context at hand, such as if the claims concern a loss of a loved one.<sup>104</sup>

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<sup>98</sup> Backus, 204 P.3d at 406 (first emphasis in original; second added).

<sup>99</sup> *Id.* at \*8 (first emphasis in original; second added).

<sup>100</sup> Yollin, 191 P.3d at 1048 (emphasis added).

<sup>101</sup> Backus, 204 P.3d at 406.

<sup>102</sup> *Id.* at \*8.

<sup>103</sup> See *Deer Valley*, 152 P.3d at 493 (internal quote and citation omitted).

<sup>104</sup> See *Jones*, 187 P.2d at 103 (“The factual-basis requirement of § 12-821.01 must be viewed in light of the inherent uncertainty in damages for pain and suffering and future lost wages. And it must be viewed in the context of the relatively compressed time period-180 days-within which the

Moreover, the notion that a claimant's notice is sufficient because the State subsequently may ask for further factual information stands in stark contrast to other statutory requirements. The statute's requirements do not contemplate a flexible back-and-forth exchange; instead, it obligates the claimant to fully fulfill the mandates of the statute regardless of the knowledge present on the public's side. For example, with respect to filing, the State having actual notice of a claim does not relieve the claimant of his independent responsibility to fulfill the statutory mandate to provide the State with notice of the claim.<sup>105</sup>

Further, the notion that a "meager" factual foundation<sup>106</sup> or that "minimal compliance"<sup>107</sup> is sufficient for a statutory requirement, or that the requirement itself is "relatively light,"<sup>108</sup> is inconsistent with the instruction from the Arizona courts, which consistently held that each of the requirements is to be "strictly" construed. The lax treatment of the "supporting facts" requirement is, quite clearly, an anomaly.<sup>109</sup>

By contrast, the federal courts' response to the uncertainty following the Arizona's Supreme Court ruling in *Deer Valley* generally has been one of adherence to the principle that the statute's requirements are to be strictly construed.<sup>110</sup> Indeed, in the case of

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notice of claim must be filed, and the factual information supporting it marshaled, after the cause of action accrues.").

<sup>105</sup> See *Falcon*, 144 P.3d at 1256.

<sup>106</sup> *Backus*, 204 P.3d at 406.

<sup>107</sup> *Id.* at \*8.

<sup>108</sup> *Yollin*, 191 P.3d at 1048.

<sup>109</sup> Before printing, the Arizona Supreme Court issued an opinion that also falls short. In *Backus v. State*, the Court stated that, "[A] claimant complies with the supporting-facts requirement of § 12-821.01.A by providing the factual foundation that *the claimant regards* as adequate to permit the public entity to evaluate the specific amount claimed. . . . [A] public entity can request more facts if needed to evaluate a claim." 203 P.3d 499, 504-05 (Ariz. 2009) (emphasis added). While this decision correctly suggests that the onus is on the claimant to furnish a factual foundation, it seems to leave to the discretion of the claimant what counts as "adequate," which in turn begs the question what is the courts' independent role in determining that the statute is "sufficient" to enable the public defendant(s) to examine the prospective claims. It further repeats the mistake of indicating that a defendant requesting more information is a cure for the claimant's own responsibility to satisfy the statute. In this respect, the federal courts are correctly focusing on whether the notice allows for the defendant to properly evaluate the claims.

<sup>110</sup> To be sure, not all federal courts have adopted a uniform approach to this element of the statute. For example, one court, operating in the vacuum created by *Deer Valley*, noted that "sparse" information provided by the claimant "satisfies the literal requirements of the statute[.]" *Castaneda*, 2007 WL 1713328 at \*4. This ruling is problematic for the same reasons identified

Jasper Simmons which opened our discussion of the statute, a federal district court stated flatly that the supporting facts requirement “is not mere window dressing,” instead it is a “mandate that ensures that government entities will be able to realistically consider a claim”<sup>111</sup> and that “ensures that claimants will not demand unfounded amounts that constitute quick unrealistic exaggerated demands.”<sup>112</sup> Accordingly, as was noted in another federal case, “[i]n order to satisfy this requirement, the description of facts supporting the settlement amount must be such that a public entity can discern the relationship between the facts and the settlement amount.”<sup>113</sup> In other words, the notice of claim must explain how the claimant reached the settlement demand, “as opposed to any other conceivable settlement value.”<sup>114</sup>

In the *Simmons* case, the standard played out this way: the factual foundation for the settlement amount was found to be inadequate because the public defendants “could not properly evaluate Plaintiffs’ claim.”<sup>115</sup> Similarly, in a separate action, the factual foundation was held to be insufficient because “Plaintiff’s notice provides no insight as to how Plaintiff arrived at the \$750,000 [settlement] figure.”<sup>116</sup>

These federal decisions seem to have it right. They suggest that there must be a discernable relationship between the settlement amount and the facts which allow the public defendants to understand why the settlement amount was chosen, and to ensure that the amount itself is grounded in the facts and is not an exaggerated, unfounded demand. The federal courts’ emphasis on a link between the settlement figure and the facts appears to fulfill the statutory purposes of the overall statute, specifically allowing the public entities or individuals to properly evaluate the settlement option and to safeguard against unreasonable settlement amounts.

To illustrate the difference between the state and federal courts’ examination of the supporting facts requirement, consider this conclusion from a recent Arizona appellate court ruling:

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with respect to the forgiving state court decisions.

<sup>111</sup> *Simmons*, 2008 WL 343292, at \*4 (alterations removed; internal quotes and citation omitted).

<sup>112</sup> *Id.* at \*3 (citation omitted).

<sup>113</sup> *Campos*, 2007 WL 3287586, at \*2.

<sup>114</sup> *Bamonte v. City of Mesa*, No. 06-1860, 2007 WL 2022011, at \*6 (D. Ariz. July 10, 2007)

<sup>115</sup> *Simmons*, 2008 WL 343292, at \*4 (citations omitted).

<sup>116</sup> *Campos*, 2007 WL 3287586, at \*3.

[The public defendant] argues that A.R.S. § 12-821.01 requires a claimant to set forth facts “sufficient to support” its settlement demand. We cannot construe the statute in such fashion. The legislature specifically provided that a claim notice must contain “facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed.” A.R.S. § 12-821.01(A). We infer that, by contrast, because the legislature omitted a requirement that the “facts supporting” the settlement demand must be “sufficient,” it did not intend that a notice would fail without “facts sufficient to support” the settlement demand.<sup>117</sup>

While the state court’s literal construction of the statute appears to be well-reasoned, it has committed the error of divorcing the statutory command regarding the “facts supporting” requirement from the statutory purposes of the statute. As the federal courts have noted, the facts in support of the settlement amount must be such that the State can understand how the settlement amount was determined and to ensure that unreasonable claims for liability are not pressed. Though the legislature may not have included the word “sufficient” with respect to the “facts supporting” element, the elements themselves must be viewed in light of the overall purposes of the statute; otherwise, the courts run the risk of elevating form over substance and thereby contravening the objectives of the statute itself. The federal courts, instead, appropriately ensure that the claims are tied to the purposes and are not just empty demands placed on claimants. More specifically, even without the term’s explicit presence in the statute, the federal courts have looked into whether the supporting facts are sufficient to allow the public defendants to understand the link between the facts and the settlement amount.

To summarize, first, in state and federal courts, each of the statute’s requirements is to be strictly complied with and claims that do not comply are to be barred. Second, in both state and federal courts, a claimant is to provide facts sufficient to permit public defendants with the opportunity to investigate the claims and understand the factual basis for alleged liability. Third, the sum

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<sup>117</sup> *Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents*, 204 P.3d 1063, 1063, 1074 (Ariz. App. 2008).



certain to be provided in a notice of claim is to be construed as a settlement offer.

For state courts, the attendant factual foundation requirement means that any facts that the claimant believes supports the settlement amount are sufficient. The federal courts, by contrast, look to whether a nexus between the offer and facts has been established. In other words, state courts appear to ask whether there are some facts that support the settlement figure in the claimant's view, while federal courts inquire as to whether the facts put public defendants in a position to understand the basis for the settlement amount—a more demanding standard. Accordingly, it would be fair to observe that the federal courts' holdings generally are more faithful to the "strict" construction of the notice of claim requirements. The federal courts, to their credit, also did not adopt the "you can ask more if you want to" doctrine that the state courts curiously created for purposes of this requirement.

Despite the apparent divergence regarding the treatment of the notice of claim requirements by state and federal courts, it is possible to extract from these rulings some suggestions on how to comply with the statute. In other words, while the courts overall do not seem to be in lockstep with respect to the standards applicable to the statute's requirements, the absence of such coherence renders compliance more problematic, but not impossible.<sup>118</sup> The following section offers some guidance on how claimants can comply with the procedural and substantive aspects of the statute.

### **III. GUIDANCE ON COMPLYING WITH THE NOTICE OF CLAIM STATUTE**

Based on the discussion of the courts' treatment of cases implicating the notice of claim statute, it is possible to glean several recommendations for practitioners to comply with the statute. Such guidance takes into account the fact that the courts themselves have fluctuated in terms of how the statute's requirements are to be interpreted and applied to specific claims, and should be helpful irrespective of whether a claimant is appearing in a federal or state forum. To facilitate the use of this guidance and its comprehension by

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<sup>118</sup> See, e.g., Fields, 193 P.3d at 789 (referring to compliance with the statute as an "insurmountable" hurdle).

attorneys and *pro se* litigants alike, these points are presented in bullet form. Please note that this guidance is non-exhaustive, but should be useful in ensuring compliance with the statute's requirements.

#### A. THE SCOPE OF THE STATUTE

- It is important to recognize when one has to worry about or contend with the notice of claim statute. While the statutory language makes plain that notice is to be provided when a public entity or individual is to be sued,<sup>119</sup> the statute applies only to claims for damages—conversely, it does not come into play for purposes of claims for declaratory or injunctive relief.<sup>120</sup> That the statute does not apply to claims for equitable relief is supported by the fact that the statute is designed to inform the government of possible money damages and allow it to budget for such damages.<sup>121</sup>
- Though a claimant seeking a declaratory judgment or injunction does not have to concern himself with the notice of claim statute, claimants seeking money damages as part of a class action suit do—a court clearly noted that “the notice of claim requirements . . . apply to all claims against public entities, including class action claims.”<sup>122</sup>
- This may seem obvious to most, but the statute requires claimants to file a notice of claim prior to initiating suit against a public entity *or* a public employee. In one case, a plaintiff unsuccessfully argued that the statute applied only when a public entity was the subject of the suit. The court noted quite

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<sup>119</sup> See ARIZ. REV. STAT. ANN. § 12-821.01(A) (2003) (“[p]ersons who have claims against a public entity or a public employee [to] file claims with the person or persons authorized to accept service for the public entity or public employee.”).

<sup>120</sup> Home Builders Ass'n of Cent. Ariz. v. Kard, 199 P.3d 629, 636 (Ariz. Ct. App. July 08, 2008) (“The notice of claim statute applies to a request for damages, rather than to a request for declaratory or injunctive relief.”) (citations omitted); see Deer Valley, 152 P.3d 490, 491 (“Before initiating an *action for damages* against a public entity, a claimant must provide a notice of claim to the entity”) (emphasis added).

<sup>121</sup> See Martineau, 86 P.3d at 915-16.

see *supra* Part I (D) for more information on the purposes of the statute.

<sup>122</sup> Fields, 193 P.3d at 785; see State v. Mabery Ranch, Co., *L.L.C.*, 165 P.3d 211, 245 (Ariz. Ct. App. 2007) (“Because such claims for injunctive relief by definition seek no money damages, it would be nonsensical for the statute to command such a claimant to state a ‘specific amount for which the claim can be settled.’” (quoting ARIZ. REV. STAT. ANN. § 12-821.01(A) (2003))).

simply that the statute applies to “[p]ersons who have claims against a public entity or a public employee.”<sup>123</sup>

- A public employee is defined broadly by the statute to mean “an officer, director, employee or servant, whether or not compensated or part time, who is authorized to perform any act or service.”<sup>124</sup>
- The statute applies to a claim against a public employee regardless of whether the employee in question is sued in his individual or official capacity.<sup>125</sup> The relevant inquiry for purposes of the statute is not whether the employee is sued on an individual or official basis, but whether the underlying cause of action arises out of the scope of the employee’s employment.<sup>126</sup> The scope of employment is construed expansively—it constitutes any conduct that “is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer’s business even if the employer has expressly forbidden it.”<sup>127</sup> Indeed, a public employee’s actions, “even those serving personal desires, will be deemed motivated to serve the employer if those actions are incidental to the employee’s legitimate work activity.”<sup>128</sup> Thus, even sexual harassment that takes place while a public employee is performing authorized duties may be considered within the scope of employment and consequently trigger the notice of claim requirements.<sup>129</sup>
- Similarly, with respect to acts of discrimination, a notice of claim must cover ongoing discriminatory conduct.<sup>130</sup> In other words, allegations of discrimination that post-date a notice of

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<sup>123</sup> Currie v. Maricopa County Cmty. Coll. Dist., No. 07-2093, 2008 WL 2512841, at \*1 (D. Ariz. June 20, 2008) (quoting ARIZ. REV. STAT. ANN. § 12-821.01(A); emphasis in original).

<sup>124</sup> ARIZ. REV. STAT. ANN. § 12-820(1).

<sup>125</sup> See Perkins, 2008 WL 4418145, at \*8; Currie, 2008 WL 2512841, at \*1.

<sup>126</sup> See McCloud v. State, 170 P.3d 691, 699-700 (Ariz. Ct. App. 2007) (“The notice of claim statute has consistently been applied only to claims arising out of acts by public employees in the scope of their employment. To interpret [the notice of claim statute] to encompass acts outside an employee’s scope of employment would be inconsistent with those decisions.”) (citations omitted).

<sup>127</sup> Baker *ex rel.* Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc., 5 P.3d 249, 254 (Ariz. Ct. App. 2000); see Love v. Liberty Mut. Ins. Co., 760 P.2d 1085, 1088 (Ariz. Ct. App. 1988) (“The conduct of a servant is within the scope of employment if it is of the kind the employee is employed to perform, it occurs substantially within the authorized time and space limit, and it is actuated at least in part by a purpose to serve the master.”) (citations omitted).

<sup>128</sup> Dube v. Desai, 186 P.3d 587, 590 (Ariz. Ct. App. 2008).

<sup>129</sup> See *id.* at 591 (discussing State v. Schallock, 941 P.2d 1275, 1283 (Ariz. 1997) (en banc)).

claim are not included in the notice of claim and are barred as a result.<sup>131</sup> By contrast, a passive tortious conduct, such as failing to repair a sewer line, does not require a subsequent notice of claim.<sup>132</sup> The distinction between affirmative conduct (e.g., discrimination) and a continuing commission (e.g., not performing a repair) may be useful in ascertaining when a particular notice of claim is sufficient. It appears an amended notice or multiple notices are required for the former, while a single notice may be adequate for the latter.<sup>133</sup>

## B. SERVICE OF A NOTICE OF CLAIM

- The notice of claim must be filed “within one hundred eighty days after the cause of action accrues.”<sup>134</sup> The statute clarifies that “a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.”<sup>135</sup> An exception to the one hundred eighty day window is carved out for those claims that “must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental rule or regulation, or contractual term[.]”<sup>136</sup> These claims do not accrue for purposes of the statute “until all such procedures, processes or remedies have been exhausted” and the accrual date begins to “run from the date on which a final decision or notice of disposition is issued in an alternative dispute resolution procedure, administrative claim or review process.”<sup>137</sup> Where the dispute

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<sup>130</sup> See *Konrath v. Amphitheater Unified Sch. Dist. No. 10*, No. Civ 04-179-TUC-CKJ, 2007 WL 2809026, at \*17 (D. Ariz. Sep. 26, 2007).

<sup>131</sup> See *id.*; see also *Haab v. County of Maricopa*, 191 P.3d 1025, 1029-30 (Ariz. Ct. App. 2008) (holding that a notice of claim was insufficient and should have been amended, where additional facts supporting the allegations of liability were not included in the original notice, as the notice did not provide the public entity with the facts upon which liability was based).

<sup>132</sup> See *Graber v. City of Peoria*, 753 P.2d 1209, 1212 (Ariz. Ct. App. 1988).

<sup>133</sup> See *Konrath*, 2007 WL 2809026, at \*17 (distinguishing *Graber*).

<sup>134</sup> ARIZ. REV. STAT. ANN. § 12-821.01(A) (2003).

<sup>135</sup> § 12-821.01(B).

<sup>136</sup> § 12-821.01(C).

<sup>137</sup> *Id.*

resolution, administrative claims, or review process is mandated by contract, however, the parties may “agree[] to extend the time for filing such notice of claim.”<sup>138</sup>

- The notice of claim statute’s requirements are strictly interpreted.<sup>139</sup> This rule applies particularly with respect to service. Specifically, “actual notice” of a claim is insufficient to satisfy the service requirements of the statute.<sup>140</sup> In other words, that a public entity or employee may have information that it or he will be subject to suit by a claimant does not absolve the claimant from having to fulfill his own responsibilities regarding service on the public entity or employee.<sup>141</sup>
- Generally, to properly file a notice of claim, a claimant may actually deliver or send the notice by way of the regular mail, however in the latter case proof of mailing should be retained as it is “evidence that the governmental entity actually received the notice.”<sup>142</sup> More specifically, if the public entity or individual disputes that notice was sent by mail, a claimant may present proof of mailing “showing that [the notice] was timely sent, correctly addressed, and postage paid . . . .”<sup>143</sup> A factfinder, armed with this evidence, may properly “determine if the claim was in fact received within the statutory deadline.”<sup>144</sup>
- If a claimant sues a public entity and a public employee, the claimant “must give [prior] notice of the claim to *both* the employee individually and to his employer.”<sup>145</sup> Put another way, the statute “requires that service be made on public employees, in addition to the entities that employ them, as a prerequisite to any lawsuit against such employees.”<sup>146</sup> For example, in a case where claimants sent notice to a public agency but not to a public employee also named in the suit, the state claims against the public employee were dismissed.<sup>147</sup> Similarly, in a suit against the City of Tucson and two individual Tucson Police

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<sup>138</sup> *Id.*

<sup>139</sup> *See supra* Part II(A).

<sup>140</sup> *See Falcon ex rel. Sandoval v. Maricopa County*, 144 P.3d 1254, 1256 (Ariz. 2006) (en banc).

<sup>141</sup> *See, e.g., Nored*, 2008 WL 2561905, at \*5-6.

<sup>142</sup> *Lee*, 182 P.3d at 1173.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*; *see generally Zoellner, supra* note 21.

<sup>145</sup> *Crum v. Super. Ct.*, 922 P.2d at 317 (emphasis in original).

<sup>146</sup> *DeBinder v. Albertson's, Inc.*, No. 06-1804, 2008 WL 828789, at \*3 (D. Ariz. Mar. 26, 2008).

<sup>147</sup> *See Harris v. Cochise Health Sys.*, 160 P.3d 223, 230-31 (Ariz. Ct. App. 2007).

Department officers, notice was owed,, but not presented,, to the officers.<sup>148</sup> The claims against the officers were dismissed accordingly.

- If a claimant sues a public board with multiple members, service upon a single member may not suffice for purposes of placing the entire board on notice of the claim. For example, service to a single board member of a county board of supervisors, where the board itself was a defendant, did not satisfy the notice of claim’s filing requirements.<sup>149</sup>
- Where the notice of claim is to be transmitted to individual public employees, the notice should expressly state that the individuals will be defendants in a subsequent action. For example, sending a notice of claim to a police department and simply addressing it to the attention of an individual officer does not satisfy the statutory service requirements.<sup>150</sup> Claimants would be prudent to file the claim with each named individual public defendant—an additional postage stamp or two is worth it, considering that a failure to comply with this requirement may lead to dismissal of all state law claims.

### C. SUBSTANTIVE REQUIREMENTS

- The notice of claim requires a claimant to “set forth facts concerning the event or events allegedly giving rise to liability sufficient to allow the government to identify and investigate the occurrence . . . .”<sup>151</sup> To be sufficient, the notice “must contain enough information to allow the entity to investigate the merits of the claim and assess its potential for liability.”<sup>152</sup>
- Generally, if liability is predicated on facts that took place after the notice was filed, a claimant should amend the original notice of claim or file a supplemental one. This is because a “public entity necessarily cannot understand from a notice of claim the

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<sup>148</sup> Johnson v. Super. Ct., 763 P.2d 1382, 1384 (Ariz. Ct. App. 1988).

<sup>149</sup> See Falcon, 144 P.3d at 1256.

<sup>150</sup> See DeBinder, 2008 WL 828789, at \*3.

<sup>151</sup> Backus, 204 P.3d at 402

<sup>152</sup> Barth v. Cochise County, 138 P.3d 1186, 1189 (Ct. App. Ariz. 2006) (citation omitted); see also, Baker v. City of Tempe, No. CV 07-1553-PHX-MHM, 2008 WL 2277882, at \*2 (D. Ariz. May 30, 2008) (“The claim must contain facts that will sufficiently enable the public entity or public employee to appreciate the basis of liability upon which the claim is founded.”) (quoting ARIZ. REV. STAT. ANN. § 12-821.01(A)).

basis of any liability that might be based on facts that are unstated in the notice . . . .”<sup>153</sup> Please note the discussion of affirmative acts versus commissions above for further guidance on when amended or supplementary notices are in order.

- The notice should contain a clear unequivocal amount for which the claimant agrees to settle his claims. The settlement amount should be considered to be a settlement offer. It should state, for example, “I will settle all claims against [the public entity or public employee] for [x dollar amount],” “I hereby agree to discharge all claims against [the public entity or public employee] for [x dollar amount],” or “I hereby offer to settle all claims [the public entity or public employee] for [x dollar amount].”
- The “specific amount” should not contain any qualifying or modifying language.<sup>154</sup>
- The “specific amount” need only include a single, total sum; it need not be itemized.<sup>155</sup>
- When filing in state court, a claimant should include in his notice of claim facts the claimant thinks is adequate to “support” the settlement amount.<sup>156</sup> In the context of wrongful death actions, the facts needed to pass muster are relatively minimal.<sup>157</sup>
- When filing in federal court, by contrast, a claimant should provide “a description of facts . . . such that a public entity can discern the relationship between the facts and the settlement amount.”<sup>158</sup> This description should explain how the settlement amount was arrived at.
- Due to the possibility of removal of an action filed in state court,<sup>159</sup> it is advisable to comply with the more stringent federal court treatment of this requirement.

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<sup>153</sup> Haab, 191 P.3d at 1029.

<sup>154</sup> See Deer Valley, 152 P.3d at 492-93.

<sup>155</sup> See Yollin v. City of Glendale, 191 P.3d 1040, 1050 (“the statute does not require the notice to provide a specific calculation of each element of damage but only a total amount.”).

<sup>156</sup> See Backus, 204 P.3d at 406.

<sup>157</sup> See *id.* at \*7-8.

<sup>158</sup> Campos v. City of Glendale, No. CV-06-610-Phx-DGC, 2007 WL 3287586, at \*2 (D. Ariz. Nov. 5, 2007).

<sup>159</sup> See 28 U.S.C. § 1446 (specifying the procedure for removing a civil action from state court to a federal district court) (2006).

To simplify the statute's substantive requirements and to ensure proper compliance, it would be useful to develop a standard, boilerplate form that claimants could use when filing a notice of claim with a public defendant, much in the same way that individuals alleging discrimination against their employers generally use the an Equal Employment Opportunity Commission "charge of discrimination" form to put the employer on notice of the nature and circumstances surrounding the allegations of discrimination. A possible notice of claim form could include the following:

- Each claimant's name, address, and phone number.
- The name of each public defendant, including entities and individuals, their addresses and phone numbers. (It would be prudent to send the notice of claim to each person listed; for the public entities, a claimant must ensure that the recipient is empowered to receive service on behalf of the entity.)
- The date on which, or the dates during which, the alleged liability took place (if ongoing, indicate as such).
- Whether and, if so, on what date(s) the claim went through a mandatory grievance or other prior proceeding.
- The date on which the notice is being filed (compare this date and the previous dates to ensure the claim is within the applicable statutory timeframes).
- The facts giving rise to the alleged disability, using names, dates, and a description of the relevant events. These facts must be such that the public defendants can investigate the claim and understand the factual basis for the alleged disability. There should be a nexus between the facts and the theories of liability.
- An unequivocal, clear settlement offer, which may be written in the following terms: "I hereby offer to settle these claims for \$ [amount]."
- The facts such that the public defendants can discern the relationship between the settlement amount and the facts of the case, and thereby assess their potential liability. The description should indicate to the public defendants that the settlement offer is directly tied to the facts and is not an arbitrary or inflated number.

While compliance with the notice of claim statute may be possible, as a descriptive matter the statute has operated to bar a



number of claims despite its relatively straightforward language and purposes. If a statute continues to lead to the dismissal of state law claims, years after its enactment and with a growing number of relevant court pronouncements, the inevitable conclusions are that the statute itself has confounded litigants and that existing guidance from the courts has been insufficient, as a whole, to bring claimants within the limits of the statute's mandate.

Accordingly, it is in the interests of the Arizona justice system to implement a notice of claim statute that satisfies the legislative goals of the original statute, while giving its citizens a meaningful opportunity to comply and to press their claims to the merits stage. This new statute must reflect not only each of the statutory purposes of the original statute, but also reflect the political situation within which the notice operates, and the courts' treatment of the existing requirements. This new statute must contain clear language that will render compliance easier and less subject to ambiguity, uncertainty, and interpretive battles in motions to dismiss.

Crafting a suitable replacement for the statute is the purpose of Part IV.

#### **IV. REPLACING THE NOTICE OF CLAIM STATUTE**

The current notice of claim statute may be sensible as a matter of public policy and compliance may be achieved, especially with guidance from the points outlined above.<sup>160</sup> It is also the case, however, that the statute, straightforward as it is, has resulted in the dismissal of a number of state-law claims. What is worse, the courts themselves have issued evolving opinions on the notice of claim requirements. As a result, the claimants are in the difficult position of trying to comply with the statute in reliance on previous, inconsistent court orders as indications of what their particular notices of claim must contain. Put another way, they are faced with a moving target that the courts have been unable to render stationary.

Though compliance with the statute is possible, the statute may still not be worth saving. Due to the uncertain nature of the current statute's requirements and the devastating consequences to claimants of having their state-law claims dismissed without consideration on

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<sup>160</sup> See *supra* Part III.

the merits,<sup>161</sup> the statute should be replaced.<sup>162</sup> This Part argues for ways in which the legislature can dispense the present statute and implement other measures to further the same legislative purposes that were purportedly advanced with the current notice of claim statute.

### A. PREVIOUSLY SUGGESTED ALTERNATIVES

The notice of claim statute has been roundly criticized and alternatives to its use have been offered in local scholarship. These suggestions, however, are inadequate.

For example, in the *Arizona State Law Journal*, Andrew Becke proposes two remedies for dealing with the problems associated with the notice of claim statute.<sup>163</sup> First, he suggests that the statute should be eliminated for three reasons: the public entity or employee can receive notice of the complaint through ordinary service and can request additional information by way of the discovery process that applies to normal litigants; opportunities to settle the claims may still be present following the filing of a complaint; and the proper planning and preparation for a suit can still be achieved when a public entity or employee is served with a complaint.<sup>164</sup>

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<sup>161</sup> See *supra* notes 8, 11-14, and accompanying text.

<sup>162</sup> One commentator challenges the statute and argues that it should be corrected for three additional reasons:

First, the time limit has become so short that the courthouse doors are closed to many who do not quickly retain counsel. Second, the higher burden of detailed facts required for a notice of claim creates difficulties for plaintiffs under time pressure. Third, the requirement of a dollar figure for which the plaintiff will settle forces injured parties to make assessments of damages with an incomplete set of facts.

Becke, *supra* note 16, at 259; see *id.* at 263 (“A litigant ‘under the gun’ of the notice of claim deadline may offer to settle for an amount, have the State accept the claim and pay the amount, and then later realize that he/she is much more seriously injured than previously thought.”); see *id.* at 264 (“There is no practical reason for this [notice] process to occur so quickly, as both sides will be conducting discovery well into the foreseeable future. . . . [T]he notice of claim requirement makes a settlement less likely[.] . . . It is improbable to think that the legislature has the time or the inclination to take action on every claim the State is presented with in so short a period of time.”).

<sup>163</sup> See *id.* at 266-68.

<sup>164</sup> See *id.* at 266-67; see also *id.* at 267 (“abolishing the notice requirement would do very little to change the overall liability of the State. The State would retain its absolute and qualified immunity areas, and still reap the benefits of a statute of limitations fifty per cent shorter than the one for

While there may be benefits to repealing the statute entirely and relying on the general complaint process instead, at least two considerations indicate that doing so would likely be unfeasible. First, the Arizona Constitution expressly permits the state legislature to establish how the State may be sued; the Arizona Constitution thus enables the state legislature to make it more difficult for litigants to reach state defendants for the purposes of bringing a legal action.<sup>165</sup> Second, state legislators are not only empowered to implement roadblocks to state liability, but they have done so in an increasingly rigorous ways.<sup>166</sup> Accordingly, a recommendation that the legislature eliminate the statute defies political realities and the legislative history of the statute; these factors have indicated a willingness of the legislature to protect to a greater degree state entities and actors from suit.<sup>167</sup>

Second, and perhaps as a result of the likelihood that the Arizona State Legislature will continue to exhibit that willingness, Becke offers an additional suggestion: to implement a modified version of the current notice of claim statute modeled after Maine's notice of claim statute.<sup>168</sup> According to Becke, the Maine statute requires a claimant to file a notice of claim within 180 days of a claim's accrual, though it allows a claimant to file a notice of claim anytime within the generally applicable statute of limitations upon a showing of "good cause."<sup>169</sup> The statute holds notices to a less stringent substantial compliance standard; it excuses inaccuracies in notices unless the government shows that it was prejudiced as a result of the inaccuracies; and it prevents notices from being deemed inadequate where a claim based on the same facts filed under a different statutory procedure was disallowed.<sup>170</sup>

The Maine statute, examined on its own, may be an excellent piece of legislation. Viewed in the context of Arizona's historical and increasingly rigid conception of notice of claim statutes, however, the Maine statute appears too radical a shift in Arizona's political climate.

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private parties.”).

<sup>165</sup> ARIZ. CONST. art. 4, pt. 2, § 18.

<sup>166</sup> See *supra* Part I(B).

<sup>167</sup> See *Nored v. City of Tempe*, No. 08-00008, 2008 WL 2561905, at \*4 (D. Ariz. June 26, 2008) (“The trajectory of the Arizona legislature's position on this statute has been to strengthen and specify the requirements of the statute.”).

<sup>168</sup> Becke, *supra* note 16, at 267-68.

<sup>169</sup> *Id.* (citing ME. REV. STAT. ANN. tit. 14, §§ 8107(1), (4) (2003)).

<sup>170</sup> *Id.* (.

Moreover, and perhaps more importantly, the Maine statute, as described by Becke, does not seem to address some of the goals of the Arizona statute, including the goal of ensuring that claimants do not seek exaggerated monetary damages.<sup>171</sup> Accordingly, the possibility that a claimant may demand an inflated damages amount, and, consequently, the possibility that the State will lack a meaningful opportunity to settle the claims remains with the Maine statute.<sup>172</sup>

In light of this analysis, other proposals will need to be offered that take into account the legislature's apparent interest in making State liability more difficult by way of enacting the notice of claim procedural hurdle and that meets each of the legislative purposes of the current statute.

## B. PROPOSED ALTERNATIVE

The author's proposal to fulfill the statutory objectives of the current statute within the Arizona political environment while ensuring that compliance is achieved with greater regularity, consists of two parts: rewriting the notice of claim statute to make clearer what is expected of claimants, and amending a rule of professional conduct to curb overzealous attorney behavior with respect to demands from the State.

As to the former, this author suggests that the notice of claim statute be replaced with the following:

A. *General*: Persons who have claims under the Arizona Revised Statutes for money damages against a public entity or a public employee shall file notice of the claims with the respective public entity and/or public employee prior to the initiation of legal action. Notice shall be filed irrespective of whether the public entity or public employee has actual or constructive notice of the claims.

B. *Timing of Service*: Notice shall be served within one-hundred-eighty days after the cause of action accrues, except as provided by this subsection. A cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality, or condition which caused or contributed to the damage.

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<sup>171</sup> See *Deer Valley Unified Sch. Dist. v. Houser*, 152 P.3d 490, 493 (Ariz. 2007) (en banc).

<sup>172</sup> See *id.*; *Yollin v. City of Glendale*, 191 P.3d 1040, 1048 (Ariz. Ct. App. 2008).

1. Any claim which must be submitted to a binding or nonbinding dispute resolution process, an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental rule or regulation, or contractual term shall not accrue for the purposes of this subsection until all such procedures, processes, or remedies have been exhausted. The time in which to give notice of a potential claim and to sue on the claim shall run from the date on which a final decision or notice of disposition is issued in an alternative dispute resolution procedure, administrative claim, or review process. This provision shall not be construed to prevent the parties to any contract from agreeing to extend the time for filing such notice of claim.

2. A minor or an insane or incompetent person may file a claim within one-hundred-eighty days after the disability ceases.

*C. Recipients of Service:* Notice shall be served, pursuant to the Arizona Rules of Civil Procedure, upon each public entity and each public employee from which money damages are sought.

*D. Substance of Notice:* The notice shall contain:

1. A description of the facts giving rise to the claims such that the public entity or public employee can discern the relationship between the facts and the claims;
2. A settlement offer; and
3. An explanation of how the settlement figure was arrived at such that the public entity or public employee can discern the relationship between the facts and the settlement offer.

*E. Effect of Non-Compliance:* Any A.R.S. claim which is not filed in accordance with this section is barred and no action may be maintained thereon.

*F. Ripeness:* A claim against a public entity or public employee filed in accordance with this section may be pursued in a court of competent jurisdiction once denied. A claim is denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

*G. Application:* This section shall apply to all causes of action which accrue on or after the effective date of this section.

This proposal addresses all but one of the purposes of the existing notice of claim statute. First, the requirement that a claimant provide notice to the public entity or employee ensures that the State has notice of the claims, even if it has actual or constructive notice of the claims.<sup>173</sup> Second, the substantive requirements enable the State to properly investigate the claims and assess its potential liability.<sup>174</sup> Third, it provides the State with a meaningful opportunity to determine whether it should accept the claimant's settlement offer.<sup>175</sup> Fourth, in evaluating the offer and any possible liability at trial, the State is in a position to make financial preparations for a settlement or damages award at trial.<sup>176</sup>

The proposed statute does not ease the service or substantive requirements of the statute. The proposed statute, however, has the added important advantage of providing clarity to the requirements of the existing statute; thus, the statute helps to ensure compliance from claimants who, up until this point, have encountered significant difficulty in surpassing this procedural hurdle. This proposed statute will also clean the slate of the legal landscape, in both the state and federal realms, where rulings on the current notice of claim statute have not resulted in reliable, predictable, or consistent treatment of notices of claim. Accordingly, this proposed statute would increase the possibility that the numerous people who have claims against public entities or employees can have their allegations—which may be weighty, as was the case of those brought by Jasper Simmons' parents—judged on the merits rather than be dismissed out of hand.

There is one statutory purpose that the proposed statute does not adequately address: the prevention of claimants from asking for unrealistic or exaggerated settlement demands.<sup>177</sup> As a result, the second part of my proposal is to amend an existing rule of professional conduct to ensure that attorneys practicing in Arizona do not seek to subject the State to baseless settlement demands in a notice of claim. Specifically, Arizona Rule of Professional Conduct 3.1, entitled “Meritorious Claims and Contentions,” presently provides, in relevant part:

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<sup>173</sup> See Backus 204 P.3d at 402 .

<sup>174</sup> See Yollin, 191 P.3d at 1045 & 1048; Deer Valley, 152 P.3d at 493.

<sup>175</sup> See Falcon v. Maricopa County, 144 P.3d 1254, 1256 (Ariz. 2006); (citing Martineau v. Maricopa County, 86 P.3d 912, 915-16 (Ariz. Ct. App. 2004)).

<sup>176</sup> See Yollin, 191 P.3d at 1045; (citing Martineau, 86 P.3d at 915-16).

<sup>177</sup> See *id.* 1044-45; Deer Valley, 152 P.3d at 493.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.<sup>178</sup>

The proposed amendment to this rule would add a clause related to notices of claim and would read:

A lawyer shall not bring or defend a proceeding, assert or controvert an issue therein, *or seek an unfounded settlement demand from any public entity or employee*, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.

While the notice of claim statute permits the State to ascertain whether a claimant's settlement offer is reasonable, there is no statutory constraint on claimants from demanding an unreasonable amount from the State in a notice of claim. A statutory requirement that a settlement offer be reasonable is unwise because it would undoubtedly lead to legal disputes between a claimant and the State regarding what is "reasonable." Rather than provoke such "satellite litigation," a rule of professional conduct would provide an incentive for attorneys to make certain that their clients' settlement demands are reasonable. If the State, through its own assessment of a settlement offer and the factual basis for the offer, suspects that a represented claimant has sought an unreasonable demand from the State, it may, in a separate proceeding, seek to sanction the Arizona counsel.

Granted, this rule would not reach *pro se* claimants.<sup>179</sup> It at least, however touches those claimants with representation, whereas the existing apparatus does not incentivize any claimants from

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<sup>178</sup> Ariz. R. Sup.Ct. 42, ER 3.1.

<sup>179</sup> Readers may take some solace in the knowledge that courts are to "liberally construe" the filings of *pro se* litigants, though *pro se* litigants are "nonetheless bound by the same rules of procedure that govern other litigants[.]" *Buckman v. MCI World Com*, No. 06-2005, 2008 WL 928000, at \*2 (D. Ariz. Apr. 04, 2008) (internal quotes and citations omitted).

demanding an unreasonable settlement sum from a public entity or employee.

## V. CONCLUSION

This discussion has aimed to explore two specific questions. First, how can claimants comply with the existing notice of claim statute?; Second, are there ways in which the statute may be improved? It appears that compliance with the statute has proven exceedingly difficult for claimants and that the courts have dismissed a number of claims as a result. While the state and federal courts are in agreement that notices are to be “strictly” construed, the courts’ application of this “strict” standard has not yielded consistent or predictable results. In particular, the state courts have imposed a relaxed standard with respect to the “facts-supporting” element of the statute. As a consequence, and unsurprisingly, federal courts attempting to follow the state’s understanding of its own statute have issued more rigid, and therefore unharmonious opinions.

This article has formulated a series of recommendations that, if followed, should help claimants satisfy the notice of claim statute even with the courts’ diverging views on the requirements of the statute and the fact that other claimants have regrettably fallen short of the statute’s demands. Though compliance may be made easier with these suggestions, the notice of claim scheme itself is flawed, as demonstrated by the courts’ failure to provide litigants with a coherent understanding of what is required of them, and by the claimants’ inability to meet the statute’s commands even with counsel. Accordingly, this article has proposed an amended statute that makes clearer what each requirement means, such that claimants will be able to achieve compliance with greater felicity, while simultaneously upholding the statute’s underlying purposes. This amended statute can be enacted despite the legislature’s attachment to the present notice of claim framework.

The author recognizes that the guidance contained herein is not exhaustive and does not include all of the solutions for issues with the notice of claim statute. At a minimum, however, the author hopes that the issues will be significant enough to provoke remedial action by those in a position to ensure a prompt and comprehensive



reexamination of the statute. In examining the history of the statute, this article also has shown that the Arizona courts have repeatedly invited the legislature to enter the thicket of sovereign immunity and notices of claim.<sup>180</sup> Given the identified problems with the statute, the courts should again reach out to the legislature, this time urging their colleagues to amend the problematic statute. Arizona's own citizens are struggling to obtain relief for wrongs allegedly committed by the State. Their judicial counterparts similarly are plugging away case by case, without much success, to figure out the meaning of the relevant statutory terms.

This is the courts' moment to acknowledge the statute's deficiencies and for the legislature to step in. Arizona litigants can turn to this article for guidance in the meantime and relevant stakeholders may consider the suggestions contained herein when and if they decide to revisit the current statutory scheme.

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<sup>180</sup> See, e.g., *Larsen v. Yuma County*, 225 P. 1115, 1116 (Ariz. 1924).