Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988)

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ON FEBRUARY 3, 1988, Florida's Fourth District Court of Appeal broke new ground in the field of public contract law by reversing a Broward County Circuit Court decision involving two construction contractors and the City of Fort Lauderdale. The district court's decision in *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So. 2d 696 (Fla. 4th DCA 1988) sharply restricted the State's ability to raise the defense of sovereign immunity in contract disputes with private parties. The court held that where a suit is brought by a private party on an express, written contract entered into by a state agency under statutory authority, the defense of sovereign immunity will not protect the state agency from an action arising from a breach of either an express or an implied covenant or condition of the contract.

The Fourth District relied primarily on its interpretation of the Supreme Court of Florida's decision in *Pan-Am Tobacco Corp. v. Del.*

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1. See *Champagne-Webber, Inc., v. City of Fort Lauderdale*, 519 So. 2d 696, 698 (Fla. 4th DCA 1988). The trial court granted summary judgment in favor of the City of Fort Lauderdale after determining that each of the appellants' claims was founded upon a theory of implied contract rather than upon the express, written contract that existed between the two parties, and as such, each of the claims was barred by the defense of sovereign immunity. *Id.* at 696.

2. 519 So. 2d 696 (Fla. 4th DCA 1988).

3. A state agency may be a city, county, state department, or any other governmental entity. *Fla. Stat.* § 20.03(11) (1989).

4. In Florida, most state agencies are authorized to enter into contracts. See, e.g., *id.* § 125.01 (county commission boards); *id.* § 153.62(11) (water and sewer district boards); *id.* § 163.370 (community redevelopment agencies); *id.* § 320.011 (Florida Department of Highway Safety and Motor Vehicles); *id.* § 332.08(3) (municipalities); *id.* § 337.19(1) (Florida Department of Transportation).

5. The Second District Court of Appeal in an earlier decision stated that: Sovereign immunity is a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the vast number of citizens affected by the actions of a government. ... [S]overeign immunity, at least to the extent retained by the legislature and courts, is a positively necessary and rational safeguard of taxpayers' money.

partment of Corrections,\(^7\) where the supreme court denied the State sovereign immunity in an action arising from the State's breach of an express condition of an express, written contract.\(^8\) The Fourth District's extension of the supreme court's holding to implied conditions and covenants of express, written contracts in *Champagne-Webber* is vastly more reasonable than an earlier interpretation to the contrary by the Second District Court of Appeal in *Southern Roadbuilders v. Lee County*.\(^9\) As a result, it appears that in Florida sovereign immunity no longer will protect a state agency from an action arising from a breach of an implied covenant or condition of an express written contract with a private party.\(^10\)

The purpose of this Note is to explain the *Champagne-Webber* decision and its impact on contractual agreements between state agencies and private parties. To that end, this Note discusses the court's decision, describes the development of the sovereign immunity defense in contract cases, and explains why state courts and legislatures have restricted the availability of sovereign immunity in contract cases. It also explains why the Fourth District's extension of *Pan-Am Tobacco* to implied conditions and covenants of express, written contracts is more reasonable and legally sound than the previous construction to the contrary, particularly in light of the various alternatives to sovereign immunity.

I. THE *CHAMPAGNE-WEBBER* DECISION

In *Champagne-Webber*, two contractors entered as joint venturers into a written contract with the City of Fort Lauderdale (City) for the construction of a bridge.\(^11\) After the contractors commenced construction on the project, they realized almost immediately that the soil conditions at the site were not as represented by the City.\(^12\) In soliciting bids for the proposed project, the City had represented that the soil conditions were loose sand only.\(^13\) However, instead of the sand conditions depicted in the bidders' contract plans, rock conditions were present as well.\(^14\) This unexpected combination of sand and rock at the

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7. 471 So. 2d 4 (Fla. 1984).
8. See *Champagne-Webber*, 519 So. 2d at 697.
9. 495 So. 2d 189 (Fla 2d DCA 1986), review denied, 504 So. 2d 768 (Fla. 1987). The *Champagne-Webber* court expressly stated that its holding was in conflict with the holding in *Southern Roadbuilders*. *Champagne-Webber*, 519 So. 2d at 698 n.2.
10. See *Champagne-Webber*, 519 So. 2d at 698.
11. Id. at 696.
12. Id. at 697.
13. Id.
14. Id.
site substantially increased the quantity and scope of the work, resulting in increased costs for which the City refused to pay additional compensation.15

After the contractors completed construction of the bridge, they filed a three-count complaint against the City. The first count, for breach of contract, alleged four elements: (1) that the contractors had submitted their bid proposal in justified reliance on the City's representation that the soil condition at the proposed bridge site was sand only; (2) that the unexpected soil condition had required an alternate and more expensive method of construction; (3) that the City had breached the implied covenants of the contract by delaying and hindering the contractors' work progress by giving misleading and inaccurate information concerning the soil condition at the site; and (4) that the City had breached the express covenants of the contract by increasing the scope and quantity of work without paying for the additional costs incurred by the contractors.16 The second count, for breach of express and implied warranties, alleged that the City had expressly warranted that the soil condition at the project site was loose sand, that the City had also impliedly warranted that the plans and drawings for the project accurately depicted the soil condition at the project site, and that the breaches of both these express and implied warranties resulted in increased construction costs.17 The third count was an action in quantum meruit.18

At trial, the circuit court found that each of the contractors' claims was based upon a theory of implied contract between the parties. Therefore, the trial court determined that the contractors' claims were barred by the defense of sovereign immunity under the Second District's interpretation of Pan-Am Tobacco19 in Southern Roadbuilders.20

15. Id.
16. Id. at 696-97. The sheet pilings specified in the contractors' drawings could not be driven using the "water-jet" method originally planned for in the project on the basis of the soil conditions represented by the contract bid drawings. Instead, the contractors were forced to install cofferdams in order to excavate the newly discovered rock before the pilings could be set in place, resulting in more work and increased costs. Brief for Appellant at 4-5, Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988) (No. 4-86-2712).
17. Champagne-Webber, 519 So. 2d at 697.
18. Id. This count appears to have been included in the complaint merely as an attempt to ensure recovery of the added expenses the appellants incurred as a result of the extra work they were forced to do in order to properly fulfill their obligations under the contract with the City.17
20. Southern Roadbuilders v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1986), review denied, 504 So. 2d 768 (Fla. 1987). For a discussion of Southern Roadbuilders, see infra text accompanying notes 85-94.
On appeal, the Fourth District Court found that the trial court erred in dismissing the first two counts. The district court explained that, although counts one and two alleged breaches of implied covenants and implied warranties, both were claims arising out of the express, written contract between the parties. Therefore, the counts were premised upon a written contract rather than an implied contract and were not barred by a claim of sovereign immunity.

II. SOVEREIGN IMMUNITY AS A DEFENSE IN BREACH-OF-CONTRACT CASES

Sovereign immunity provides that neither the State nor any of its agencies may be sued without their consent. This common law doctrine was first applied in England in 1788 and in the United States in 1812. The original basis for the doctrine in English common law was that "the king or sovereign could do no wrong [and] was considered untouchable and above the law." Another consideration was that permitting suits against the State would result in the depletion of the state treasury, which was necessary for the government to operate on behalf of all its citizens. A final consideration was that because a democratic government purportedly represents the people, an action against the State is in effect a suit against oneself.

Before the turn of the century, Florida courts also recognized the application of sovereign immunity to law suits involving the State.

21. Champagne-Webber, 519 So. 2d at 697.
22. Id.
23. Id. at 698. The court did find, however, that the quantum meruit count was, in fact, a claim premised on an implied contract for which no written contract existed, and therefore was correctly barred under Pan-Am Tobacco. Id. at 697.
25. See Mower v. Leicester, 9 Mass. 247 (1812). Interestingly, courts in the United States adopted the doctrine of sovereign immunity without any analysis or reasoning as to its applicability in the United States. See Comment, A Statutory Approach to Governmental Liability in Florida, 18 U. FLA. L. REV. 653, 654 (1966) ("How this immunity of the king from the jurisdiction of the king's own courts came to be applied in the United States of America, where the royal prerogative is unknown, has been called one of the mysteries of legal evolution.") (footnotes omitted); Note, Remedies Against the United States and Its Officials, 70 HARV. L. REV. 827, 829 (1957) ("sovereign immunity had become accepted in the United States as a natural and fundamental principle of the law, seemingly without any attempt at justification.") (footnote omitted).
26. Ace Flying Serv., Inc. v. Colorado Dep't of Agric., 136 Colo. 19, 24, 314 P.2d 278, 281 (1957); Comment, supra note 25, at 653.
27. Ace Flying Serv., 136 Colo. at 24, 314 P.2d at 281; see also supra note 5.
28. Ace Flying Serv., 136 Colo. at 24, 314 P.2d at 281; Comment, supra note 25, at 653.
two early decisions, *Gay v. Southern Builders, Inc.* and *Bloxham v. Florida Central and Peninsular R.R.*, the Supreme Court of Florida determined that the State could not be sued in contract unless it expressly consented to the suit. These early decisions were strongly influenced by the concept of sovereignty. The Supreme Court of Florida reinforced these rulings in *Circuit Court of the Twelfth Judicial Circuit v. Department of Natural Resources*, where it found that article X, section 13 of the Florida Constitution provides absolute immunity for the State and its agencies absent an express waiver by statute or constitutional amendment.

Continuing this trend, the First District Court of Appeal in *Division of Administration v. Oliff* held the Florida Department of Transportation immune from a contract claim even though section 337.19(1), Florida Statutes, expressly waived the Department's sovereign immunity with respect to a "claim under contract for work done." The court found that the plaintiff's action was not a claim for work performed under a contract, but rather was a claim for breach of a drainage easement contract on the plaintiff's property. Because statutes waiving sovereign immunity must be strictly construed, the court refused to extend the statute to cover the claim, which was not premised upon a contract for work done for the Department.

These early cases illustrate the consistency with which the Florida courts permitted the State, its agencies, and its subdivisions to utilize sovereign immunity as a shield to avoid liability on contractual obligations. Even though the doctrine of sovereign immunity was developed before the establishment of any organized government on this continent, by the end of the nineteenth century American courts began to

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30. 66 So. 2d 499 (Fla. 1953).
31. 35 Fla. 625, 17 So. 902 (Fla. 1895).
32. *Gay*, 66 So. 2d at 500-01; *Bloxham*, 35 Fla. at 711-13, 17 So. at 918-19.
33. See *Gay*, 66 So. 2d at 501; *Bloxham*, 35 Fla. at 711-13, 17 So. at 918-19.
34. 339 So. 2d 1113 (Fla. 1976).
35. The pertinent language of the Florida Constitution reads as follows: "Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating." FLA. CONST. art. X, § 13.
36. *Department of Natural Resources*, 339 So. 2d at 1114-15.
37. 350 So. 2d 484 (Fla. 1st DCA 1977).
38. *Id.* at 486.
39. "[S]uits in law and in equity may be brought and maintained by and against the Department on any claim under contract for work done." FLA. STAT. § 337.19(1) (1989) (emphasis added).
40. *Oliff*, 350 So. 2d at 486 (quoting FLA. STAT. § 337.19(1)).
41. *Id.*
42. *Id.*
abolish sovereign immunity in whole or in part.\textsuperscript{44} In Florida, sovereign immunity was first curtailed by judicial decision in 1957.\textsuperscript{45} To date, all but a handful of states have abolished or severely restricted sovereign immunity with respect to contracts, either judicially or legislatively.\textsuperscript{46}

A. Rationale for Restricting Sovereign Immunity

Many states have based their restriction of sovereign immunity on the rationale that "by entering into a contract, [the State] abandons its attributes of sovereignty and binds itself . . . substantially as an individual does when he makes a contract."\textsuperscript{47} Perhaps more so in con-

\textsuperscript{44} See Carr v. State ex rel. Coetlosquet, 127 Ind. 204, 26 N.E. 778 (1891). See generally Comment, supra note 25.

\textsuperscript{45} See Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).


\textsuperscript{47} Todd v. Board of Educ. Lands and Funds, 154 Neb. 606, 610, 48 N.W.2d 706, 710 (1951); see, e.g., cases cited infra note 55.
tracts than in torts, it appears unreasonable that the State should be able to cry "sovereign immunity" when it breaches a contract. Indeed, to say that "the state may enter into a contract by which the other party is compelled to expend large sums . . . to enable it to perform its obligation, and then [to permit the State] to arbitrarily repudiate the contract . . . would be to sanction the highest type of government tyranny." The Supreme Court of Indiana recognized this notion in 1891 when it stated:

In entering into the contract [the State] laid aside its attributes as a sovereign, and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are . . . . The principle that a state, in entering into a contract, binds itself substantially as an individual does under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract. It cannot be true that a state is bound by a contract, and yet be true that it has the power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation.

Courts have relied primarily on the following rationale to limit sovereign immunity for contract actions: (1) "[t]o deny [a] party who has performed his obligation under a contract the right to sue the state when it defaults is [equivalent] to tak[ing away] his property without compensation and . . . deny[ing] him due process"; (2) "[t]o hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny"; (3) to require a citizen to "petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party"; and (4) "where the legislature has by statute authorized the

49. See Note, supra note 25, at 884-87 (discussing the remedies available against the United States in light of sovereign immunity).
53. Id.
54. Id.
state to enter into certain contracts, the state upon entering into such a contract thereby consents to be sued if it breaches the contract to the damage of the other contracting party.\textsuperscript{55}

Together, the rationale of mutuality of obligation and consent to suit offer the most compelling argument against allowing the State to use sovereign immunity as a shield in contract cases. First, a contract must include mutuality of obligation, duty, and remedy between the parties.\textsuperscript{56} Second, when the Legislature authorizes the State to enter into a contract, the general rule is that the State waives its immunity from suit for a breach of such contract.\textsuperscript{57} Based on these two principles, where the State enters into a contract with a private individual, the obligations, duties, and remedies of that contract should be mutually binding and reciprocal.\textsuperscript{58} If a State or one of its agencies enters into a contract and accepts its benefits, expressed or implied, but then refuses to perform its obligations or duties, express or implied, no mutuality or fairness exists.\textsuperscript{59} As stated by a dissenter to a decision upholding the doctrine of sovereign immunity in Georgia, "[w]e will have to wait until ... some ... state department claiming sovereign immunity sues on one of its 'contracts' and the other party asserts that the 'contract' is unenforceable for lack of mutuality."\textsuperscript{60}

Those states which have not yet waived or restricted the applicability of sovereign immunity to contract claims should do so. The Ameri-


\textsuperscript{56} 1 S. Williston, A TREATISE ON THE LAW OF CONTRACTS § 1 (3d ed. 1961).

\textsuperscript{57} 81A C.J.S. States § 172 (1977).

\textsuperscript{58} See Cig Contractors v. Mississippi State Bldg. Comm'n, 399 So. 2d 1352, 1355 (Miss. 1981).

\textsuperscript{59} See id. In the construction context, the Supreme Court of California has stated that: A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made, may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented. This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness.


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can Bar Association\textsuperscript{61} calls for a waiver of sovereign immunity for contracts. The federal government also supports such a result. Through the enactment of three different statutes—the Contract Disputes Act of 1978,\textsuperscript{62} the Federal Courts Improvement Act of 1982,\textsuperscript{63} and the Administrative Procedure Act\textsuperscript{64}—the federal government has waived its sovereign immunity in contract actions.\textsuperscript{65}

B. Florida Curtails the Use of Sovereign Immunity

On March 1, 1984, the Supreme Court of Florida judicially restricted the use of sovereign immunity in situations where a state agency breached a contract it entered into with a private party.\textsuperscript{66} The court based its decision in \textit{Pan-Am Tobacco Corp. v. Department of Corrections} on the principles discussed above.\textsuperscript{67}

Pan-Am Tobacco entered into a written contract with the Florida Department of Corrections whereby Pan-Am Tobacco was to install and maintain vending machines in six different correctional facilities.\textsuperscript{68} The contract provided that the Department could cancel the contract as long as it gave Pan-Am Tobacco sixty days written notice and thirty days to correct any alleged deficiencies.\textsuperscript{69} The Department cancelled the contract, but gave Pan-Am Tobacco only thirty days written notice and specified no deficiencies whatsoever in Pan-Am Tobacco’s performance.\textsuperscript{70}

Pan-Am Tobacco sued for breach of contract; the Department of Corrections responded by asserting the affirmative defense of sovereign immunity.\textsuperscript{71} The trial court granted summary judgment in favor of the Department.\textsuperscript{72} The First District Court of Appeal affirmed the trial court’s decision, but certified to the supreme court the following question as a matter of great public importance: “WHEN A STATE AGENCY IMPROPERLY RESCINDS AN EXPRESS EXECUTORY CONTRACT WITH A PRIVATE VENDOR WHO SUFFERS A LOSS OF PROFIT AS A CONSEQUENCE, MAY THE STATE

\textsuperscript{61} The Model Procurement Code for State and Local Governments (1979); see R. Wallace, Construction Litigation: Representing the Contractor § 4.2 (1986).
\textsuperscript{62} 41 U.S.C. §§ 601-13 (1982); see R. Wallace, supra note 61, at § 4.3.
\textsuperscript{63} 28 U.S.C. §§ 1295, 1491 (1982); see R. Wallace, supra note 61, at § 4.3.
\textsuperscript{64} 5 U.S.C. § 702 (1982); see R. Wallace, supra note 61, at § 4.3.
\textsuperscript{65} See also R. Wallace, supra note 61, at § 4.4.
\textsuperscript{66} Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984).
\textsuperscript{67} Id. at 5.
\textsuperscript{68} Id. at 4.
\textsuperscript{69} Id. at 4-5.
\textsuperscript{70} Id. at 5.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
INVOKE SOVEREIGN IMMUNITY AS A BAR TO AN ACTION ON THE BREACH OF CONTRACT?\textsuperscript{73}

The Supreme Court of Florida quashed the decision of the district court, holding that "where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from [an] action arising from the state's breach of that contract."\textsuperscript{74} The decision marked the first time that the Supreme Court of Florida was willing to recede from precedent holding that the State may not be sued on a contract without express consent to the suit.\textsuperscript{75}

Looking to legislative intent in the general law, the court reasoned that where the Legislature has "authorized entities of the state to enter into . . . contract[s], the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless."\textsuperscript{76} The court explained that as a matter of "basic hornbook law," a contract which is not mutually enforceable is an illusory contract.\textsuperscript{77} "Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound."\textsuperscript{78}

The court also found that no mutuality of remedy existed.\textsuperscript{79} Following one of its own recent decisions,\textsuperscript{80} the court rejected the Department of Corrections' contention that, despite the alleged inequality of the parties' positions, the mutuality-of-remedy requirement would be satisfied by Pan-Am Tobacco's unrestricted opportunity to bring a claims bill\textsuperscript{81} before the Legislature. The court responded that it could

\textsuperscript{73} Pan-Am Tobacco Corp. v. Department of Corrections, 425 So. 2d 1167, 1172 (Fla. 1st DCA 1983), rev'd, 471 So. 2d 4 (Fla. 1984).

\textsuperscript{74} Pan-Am Tobacco, 471 So. 2d at 5.

\textsuperscript{75} See Gay v. Southern Builders, Inc., 66 So. 2d 499 (Fla. 1953); Bloxham v. Florida Cent. & Peninsular R.R., 35 Fla. 625, 17 So. 902 (1895).

\textsuperscript{76} Pan-Am Tobacco, 471 So. 2d at 5. The court noted that its decision was not the first time it had relied on legislative intent to find a sovereign amenable to suit. Id. at 5-6. In Manatee County v. Town of Longboat Key, 365 So. 2d 143 (Fla. 1978), the court found that the Legislature had clearly intended for the county to participate in the resolution of a taxation dispute, and that when the county nonetheless ignored its statutory duty, the courts had jurisdiction to fashion a remedy in equity. Id. at 148.

\textsuperscript{77} Pan-Am Tobacco, 471 So. 2d at 5. (citing Howard Cole & Co. v. Williams, 157 Fla. 851, 27 So. 2d 352 (1946)).

\textsuperscript{78} Id. (citing Miami Coca-Cola Bottling Co. v. Orange-Crush Co., 291 F. 102 (S.D. Fla. 1923), aff'd, 296 F. 693 (5th Cir. 1924)).

\textsuperscript{79} Id.

\textsuperscript{80} See Stack v. Dunn, 444 So. 2d 935 (Fla. 1984).

\textsuperscript{81} A claims bill is a special bill brought by a party before the Legislature for reimbursement for a claim against the State. Pan-Am Tobacco, 471 So. 2d at 5; see also supra text accompanying note 54.
not, "in good conscience, hold that the chance to seek an act of grace from the legislature is [a] sufficient remedy to create mutuality."  

The supreme court's holding in Pan-Am Tobacco seems clear—"the defense of sovereign immunity will not protect the state from an action arising from the state's breach of [a] . . . contract." However, the court added limiting language at the end of its opinion: "our holding here is applicable only to suits on express, written contracts." This language caused confusion in the district courts as to whether the supreme court's holding was limited to express conditions of express contracts, or whether it extended to implied conditions of express contracts. The Second District Court of Appeal faced this issue in Southern Roadbuilders v. Lee County.

C. Southern Roadbuilders Interprets Pan-Am Tobacco Narrowly

Southern Roadbuilders entered into a $5.2 million written contract with Lee County for the construction of air carrier aprons, fueling systems, airfield lighting, and service roads for the Southwest Florida Regional Airport in Lee County. The written contract between the parties stipulated that the job would be completed within 158 days of commencement of the project. After Southern Roadbuilders was forty-eight days into the project, almost one-third of the way to completion, Lee County revised the plans for the project's underground drain system's inlet structures. As a result of complying with Lee County's revision to the original plans within the deadline specified by the contract, Southern Roadbuilders claimed an additional $840,729 in costs and expenses. Southern Roadbuilders subsequently filed a three-count complaint against Lee County alleging three bases of recovery: breach of contract, quantum meruit, and inaccurate job specifications. The trial court, purporting to apply Pan-Am Tobacco, dismissed all three counts, finding that sovereign immunity barred recovery as to each.

Although the Second District agreed with the trial court that Pan-Am Tobacco was controlling, it was unpersuaded that a breach of the

82. Pan-Am Tobacco, 471 So. 2d at 5.
83. Id.
84. Id.
85. 495 So. 2d 189 (Fla. 2d DCA 1986), review denied, 504 So. 2d 768 (Fla. 1987).
86. Id. at 190.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
written contract had occurred. The court rejected Southern Roadbuilders' contention that Lee County's vacillation on the plans for the underground drainage of the project, which necessitated the incurring of additional costs, amounted to a breach of an implied contractual duty of reasonable cooperation. Instead, the court found that Southern Roadbuilders was unlawfully seeking the enforcement of a new and separate oral contract regarding the payment of the extra expenses and that these additional costs were addressed neither in the original contract nor in any subsequent legally operative instrument. Consequently, the Second District held that Southern Roadbuilders' claims were not founded upon an express, written contract and therefore were barred under Pan-Am Tobacco.

The Second District's narrow interpretation of Pan-Am Tobacco led it to reject Southern Roadbuilders' argument that its action for recovery, which was based on Lee County's breach of the implied warranties of the contract—reasonable cooperation, and payment of additional expenses—was within the scope of Pan-Am Tobacco. The Second District's holding in Southern Roadbuilders stands for the proposition that an action arising from a state agency's breach of an implied covenant or condition of an express, written contract between a private party and the State can not be maintained. In other words, the Second District found that only a suit based on the State's breach of an express covenant or condition of an express, written contract will be actionable.

D. Champagne-Webber Extends Pan-Am Tobacco to Implied Covenants

Although the Fourth District Court of Appeal in Champagne-Webber was faced with an issue similar to the one in Southern Roadbuilders, it declined to follow the Second District's strict interpretation. Instead, it construed the supreme court's holding in Pan-Am Tobacco to mean that the defense of sovereign immunity is unavailable to a state agency defending against an action arising out of not only an express condition, but also an implied covenant or condition

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92. Id.
93. "Although the record contains evidence of unsigned change orders documenting this additional expense, the original contract does not provide for such additional expense and the record is devoid of any other properly executed, written instructions which would incorporate the terms of these additional expenses into the original contract." Id.
94. Id.
95. For a discussion of the facts of the case, see supra text accompanying notes 11-23.
96. Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988).
of an express contract.97 Realizing the importance of its decision, the
court recognized the direct conflict between its decision and Southern
Roadbuilders but noted its belief that its decision was not in conflict
with Pan-Am Tobacco.98

Attempting to explain the rulings of the Southern Roadbuilders
court and the lower court to the contrary, the Fourth District pointed
to the limiting language found at the end of the Pan-Am Tobacco
opinion.99 According to the Champagne-Webber court, interpreting
this language to mean that the defense of sovereign immunity is still
available to a state agency defending against a breach of an implied
covenant or condition of an express written contract is much narrower
than the supreme court intended.100 In support of this determination,
the court stated the following:

The reasoning expressed by the Supreme Court in the Pan-Am
Tobacco case was that the legislature, in authorizing a state agency
to enter into a contract, clearly intended that such contracts be valid
and binding on both parties and, thus, mutually enforceable against
both. While the Court emphasized that its holding was restricted to
suits on express, written contracts into which the state agency had
statutory authority to enter, there is no indication that the Court
intended by its decision to otherwise change established principles of
contract law.101

According to the Champagne-Webber court, "virtually every con-
tract contains implied covenants and conditions,"102 exemplified by
the fact that "every contract includes an implied covenant that the
parties will perform in good faith."103

The court noted that the contract between the City and Cham-
pagne-Webber, Inc. required the contractor to perform all work "expressly or impliedly required to be furnished and done by the
contractor under the contract."104 In light of this requirement, the

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97. Id. at 698.
98. Id. at 698 n.2.
99. Id. at 697.
100. In the first footnote to the Champagne-Webber opinion, the court explained that the
Third District Court of Appeal had expressed a somewhat similar view in Dade County v. American
Re-Insurance Co., 467 So. 2d 414, 418 (Fla. 3d DCA 1985), which involved "a contract
action against Dade County, wherein the court held that this limiting language would not pre-
clude a claim for interest, even though the contract had no express provision concerning [inter-
est], where interest on a liquidated debt is implied by law." Champagne-Webber, 519 So. 2d at
697 n.1.
101. Champagne-Webber, 519 So. 2d at 697 (citation omitted).
102. Id.
103. Id.
104. Id. at 698 (quoting the contract).
court found it illogical and unfair for a court to construe the restrictive language of *Pan-Am Tobacco*\(^\text{105}\) to abrogate the defense of sovereign immunity with respect to a breach of an *express* covenant or condition of an express, written contract, but not with respect to a breach of an *implied* covenant or condition of the same contract.\(^\text{106}\) Such an outcome would effectively place the court’s imprimatur on a contract tainted by the grossly inequitable bargaining positions of the parties to the contract.

The *Champagne-Webber* decision marked the first time that a Florida court was willing to hold a state agency accountable for its breach of an implied covenant or condition of a statutorily authorized contract. The court made it clear that sovereign immunity no longer would allow a state agency to escape liability for any type of breach of a written contract, including breaches of implied covenants and conditions.\(^\text{107}\)

### III. Why a Broader Interpretation of *Pan-Am Tobacco* Should Prevail Over a Narrower One

In *Pan-Am Tobacco* the Supreme Court of Florida held that the defense of sovereign immunity will not protect the State from an action arising from the State’s breach of an express, written contract entered into under statutory authority.\(^\text{108}\) The Second District Court of Appeal, in *Southern Roadbuilders*, interpreted the *Pan-Am Tobacco* holding to mean that a suit arising from the State’s breach of *implied* covenants and conditions of an express, written contract would be barred by sovereign immunity.\(^\text{109}\) However, in *Champagne-Webber*, the Fourth District Court of Appeal concluded that sovereign immunity would not protect the State from liability arising from its breach of *implied* covenants and conditions of a statutorily authorized express, written contract.\(^\text{110}\) The Fourth District’s logical extension of *Pan-Am Tobacco* is more reasonable than the Second District’s interpretation and should be followed.

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105. *Pan-Am Tobacco v. Department of Corrections*, 471 So. 2d 4, 5 (Fla. 1984). “Where the legislature has . . . authorized entities of the state to enter into . . . [a] contract, the legislature has clearly intended that such contracts be valid and binding on both parties.” *Id.* “It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract. Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound.” *Id.*

106. *Champagne-Webber*, 519 So. 2d at 698.

107. *Id.*


109. *Southern Roadbuilders, Inc. v. Lee County*, 495 So. 2d 189 (Fla. 2d DCA 1986), review denied, 504 So. 2d 768 (Fla. 1987).

In determining that the *Pan-Am Tobacco* decision covers *implied*, as well as express, covenants and conditions, the *Champagne-Webber* court necessarily conducted, although never expressly stating so, what amounts to a two-step analysis.¹¹¹ First, the *Champagne-Webber* court must have determined whether implied covenants necessarily are incorporated into express contracts. If so, the court must have determined next whether the implied covenants should be incorporated to the extent that *Pan-Am Tobacco* makes the defense of sovereign immunity unavailable in actions arising from the State's breach of an implied covenant to the express, written contract. The *Champagne-Webber* court concluded that certain, necessary implied covenants are incorporated into express, written contracts to the extent that sovereign immunity is unavailable under the holding of *Pan-Am Tobacco*.

A. *Implied Covenants are Crucial to Every Express Contract*

Basic principles of contract law teach that three possible types of covenants or conditions exist in any contract: express, implied in fact, or implied in law (constructive).¹¹² Express covenants or conditions are those made by agreement of the parties and expressed in definite language, oral or written, when the contract is made.¹¹³ Implied in fact covenants or conditions are those in which the intentions of the parties are not put into specific words,¹¹⁴ but rather are """"gathered from the terms of the contract as a matter of interpretation.""""¹¹⁵ Implied in law, or constructive, covenants or conditions are those supplied by the court when the parties to a contract have omitted a term essential to a determination of the parties' rights and duties under the contract.¹¹⁶ The *Southern Roadbuilders* and *Champagne-Webber* decisions were concerned with the second type— implied in fact covenants or conditions flowing from a written contract. Specifically at issue in the two cases were the implied in fact covenant of good faith and the implied in fact condition that the owner of a construction project provide rea-

¹¹¹. In *Pan-Am Tobacco*, given the facts of that case, the supreme court could only address the issue of express conditions of a written contract. See *Pan-Am Tobacco*, 471 So. 2d at 4-5; *supra* text accompanying notes 68-70. Implied covenants and conditions were not at issue in *Pan-Am Tobacco*. Thus, even if the court had addressed the effect of implied covenants and conditions, the resulting conclusions by the court would have only been dictum.


¹¹³. 3A A. Corbin, *Corbin on Contracts* § 631 (1960).

¹¹⁴. *Id.*


¹¹⁶. *Restatement (Second) of Contracts* § 226(c) (1979).
reasonably accurate plans and specifications from which the project can be constructed.\textsuperscript{117}

Because express conditions and implied in fact conditions both stem directly from the actions of the parties to the agreement, it is often difficult, especially with oral contracts, to determine whether the condition is one which has been spelled out or whether it is one which is implied in fact from the words and conduct of the parties.\textsuperscript{118} But, "[j]ust as parties can make promises without using words to do so, they can also express an intention that a fact or event shall be a condition of legal duty without putting it into words."\textsuperscript{119} Further, implied in fact conditions are often expressed by the very nature of the thing agreed upon, rather than in the usual or appropriate language.\textsuperscript{120} For example, "[a] promise to deliver goods necessarily involves the condition that the promisee will take delivery [and] a promise to repair another's house involves the condition that the promisor will be allowed access to the house."\textsuperscript{121} Thus, implied in fact conditions are generally connected to the promise of cooperation\textsuperscript{122} or good faith\textsuperscript{123}—a promise to perform a necessary, but unstated condition precedent.\textsuperscript{124} For example, X and Y enter into a written agreement for X to paint Y's house and for Y to supply the paint. X cannot perform unless Y supplies the paint. Thus, Y's supplying the paint is an implied in fact condition to X's duty to paint, even though the written agreement does not contain such a provision.\textsuperscript{125} Further, Y would have an implied obligation to supply a sufficient quantity of paint and X would likewise have an implied obligation not to waste the paint.

As the above examples illustrate, express conditions and implied in fact conditions both depend completely upon the manifested inten-\textsuperscript{117} Southern Roadbuilders' third count against Lee County was for deficient plans and specifications as they related to the underground drainage system. Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d 189, 190 (Fla. 2d DCA 1986), review denied, 504 So. 2d 768 (Fla. 1987). Further, the record indicates that Lee County, by refusing to sign the necessary change orders, did not act in good faith. \textit{Id.} Similarly, in Champagne-Webber, the plans were defective as to the subsurface soil conditions, for which the City refused to provide additional compensation. Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988).

\textsuperscript{118} J. CALAMARI & J. PERILLO, supra note 115, at § 11-6.

\textsuperscript{119} A. CORBIN, supra note 113, at § 631.

\textsuperscript{120} S. WILLISTON, supra note 56, at § 668.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} J. CALAMARI & J. PERILLO, supra note 115, at § 11-12.


\textsuperscript{124} See, e.g., Mainieri v. Magnuson, 126 Cal. App. 2d 426, 272 P.2d 557 (1954); \textsc{Restatement of Contracts} § 262 (1932).

\textsuperscript{125} J. CALAMARI & J. PERILLO, supra note 115, at § 11-12.
tions of the parties and have the same sanctity as the promise itself.\textsuperscript{126} Indeed, just as with express covenants, a contract becomes meaningless without the implied in fact covenants. Thus, legal scholars profess that implied in fact conditions are to be treated the same as express conditions.\textsuperscript{127} The Supreme Court of Florida also has recognized that unwritten terms will be implied as part of the contract if: (1) they are so necessarily involved in the contractual relationship that the parties must have intended them; and (2) the parties failed to express them only because they were too obvious to need expression.\textsuperscript{128}

The two implied covenants at issue in \textit{Southern Roadbuilders} and \textit{Champagne-Webber} are not trivial concerns; rather, they are critical conditions that transcend the very effectiveness of the contractual agreement. A contract in which either party may act in bad faith or do anything it likes, even if such action hinders, delays, obstructs, or misleads the other party, is really no contract at all. According to Williston, "[t]he underlying principle is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract."\textsuperscript{129} Implied covenants such as those in \textit{Champagne-Webber} and \textit{Southern Roadbuilders} are necessary to ensure the mutuality of an agreement. If the parties had decided to incorporate these covenants into the written agreement, however, there would have been little dispute over their application. No party would agree to the addition of a good faith clause that would apply to one of the contracting parties, but not the other. The only reason such covenants are not formally included in the contract is because they are too obvious to require expression.

An implied covenant of good faith and fair dealing, such as the one in \textit{Champagne-Webber}, undoubtedly should be incorporated into an express contract; it is so material to the contract that had the parties discussed it prior to entering into their agreement, they would have recognized it as being necessary. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."\textsuperscript{130} Many jurisdictions have followed this reasoning to

\begin{itemize}
\item \textsuperscript{126} S. Williston, \textit{supra} note 56, at § 669.
\item \textsuperscript{127} J. Calamari \& J. Perillo, \textit{supra} note 115, at § 11-6; A. Corbin, \textit{supra} note 113, at § 631; S. Williston, \textit{supra} note 56, at §§ 668-69.
\item \textsuperscript{128} Bromer v. Florida Power \& Light Co., 45 So. 2d 658 (Fla. 1950).
\item \textsuperscript{129} S. Williston, \textit{supra} note 56, at § 670; see Kirke La Shelle Co. v. Paul Armstrong Co., 262 N.Y. 79, 87, 188 N.E. 163, 167 (1933).
\item \textsuperscript{130} \textit{Restatement (Second) of Contracts} § 205 (1979).
\end{itemize}
find an implied covenant of good faith and fair dealing in all contracts, including those for construction of public works.\textsuperscript{131}

The importance and necessity of implied in fact covenants and conditions have been recognized in Florida. In construction cases alone, Florida courts have developed a myriad of implied covenants that, unless expressly provided otherwise in the contract, will control. These include: an implied covenant that the contractor will perform the job with the skill and care commensurate with that in the industry;\textsuperscript{132} an implied covenant that the project can be built from certain plans and specifications, where the contractor is bound to build according to plans and specifications provided by the owner, relieving the contractor from responsibility for project defects resulting from any deficiency in the plans or specifications;\textsuperscript{133} an implied obligation not to do


In addition to those jurisdictions which have found an implied covenant of good faith and fair dealing to exist in express contracts, several jurisdictions have found many other types of implied covenants and conditions to exist in express contracts. Examples include: an implied covenant not to do anything which would deprive other parties to the contract of the benefits of the contract, Zurn Eng'rs, 69 Cal. App. 3d at 833, 138 Cal. Rptr. at 500; People ex rel. Dep't of Parks & Recreation v. West-A-Rama, Inc., 35 Cal. App. 3d 786, 790, 111 Cal Rptr. 197, 199 (Cl. App. 1974), an implied covenant not to hinder the performance of the other parties to a contract, Buckley & Co. v. State, 140 N.J. Super. 289, 296, 356 A.2d 56, 68 (Super. Ct. Law Div. 1975), an implied condition that compliance with plans and specifications will result in a timely completion of the project, id., an implied covenant by a landlord to assure the quiet enjoyment of leased premises, Wausau Underwriters Ins. Co. v. Dane County, 142 Wis. 2d 315, 323, 417 N.W. 2d 914, 917 (Cl. App. 1987); Q C Corp. v. Maryland Port Admin., 68 Md. App. 181, 198, 510 A.2d 1101, 1110 (Cl. Spec. App. 1986); Kane v. New Hampshire State Liquor Comm'n, 118 N.H. 706, 709, 393 A.2d 555, 557 (1978) (citing 3 G. THOMPSON, MODERN LAW OF REAL PROPERTY \S 1112 (rev. 1959); 2 R. POWELL, REAL PROPERTY \S 225[3] (rev. 1977)), an implied covenant by a tenant not to commit waste on the premises, San Nicolas v. United States, 617 F.2d 246, 249 (Cl. Ct. 1980); Kane, 118 N.H. at 709, 393 A.2d at 557 (citing United States v. Bostwick, 94 U.S. 53 (1876); R. POWELL, supra, at \S 636 n.3), and an implied covenant by a landlord to furnish a tenant with a habitable dwelling, Kane, 118 N.H. at 706, 393 A.2d at 555 (citing Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)).

\textsuperscript{132} See Manufacturers Casualty Ins. Co. v. Intrusion-Prepekt, Inc., 264 F.2d 758 (5th Cir. 1959).

\textsuperscript{133} Bradford Builders, Inc. v. Sears, Roebuck & Co., 270 F.2d 649 (5th Cir. 1959); see Miami-Dade Water & Sewer Auth. v. Inman, Inc., 402 So. 2d 1277 (Fla. 3d DCA 1981), cert. denied, 412 So. 2d 466 (Fla. 1982); City of Miami v. Nat Harrison Assocs., 313 So. 2d 99 (Fla. 3d DCA 1975), cert. denied, 330 So. 2d 15 (Fla. 1976); City of Orlando v. H.L. Coble Constr. Co., 282 So. 2d 25 (Fla. 4th DCA), cert. denied, 288 So. 2d 505 (Fla. 1973); Shore Drive Apartments, Inc. v. Frank J. Rooney, Inc., 253 So. 2d 478 (Fla. 4th DCA 1971).
anything to hinder, obstruct, or delay the performance of the other party;\textsuperscript{134} an implied obligation on the owner's part not to furnish information which would tend to mislead prospective bidders;\textsuperscript{135} an implied covenant that the owner will pay additional compensation for requiring performance of additional work not within the scope of the written contract;\textsuperscript{136} and an implied covenant that a no-damages-for-delay clause is invalid where the owner is responsible for willful delay.\textsuperscript{137}

Thus, courts in Florida and other jurisdictions regularly incorporate various types of implied in fact covenants into express contracts. In particular, these courts have recognized the significance of the implied in fact covenants of good faith and fair dealing, and accordingly have incorporated them into express contracts such as those for public works construction.\textsuperscript{138} Using basic principles of contract law and sound logical reasoning, these courts, as well as the \textit{Champagne-Webber} court, have concluded that implied in fact covenants should be incorporated into express contracts.

\textbf{B. Pan-Am Tobacco's Abrogation of Sovereign Immunity Should Extend to Implied Covenants of Express Contracts}

A primary rationale of the \textit{Pan-Am Tobacco} decision was to prevent contracts between the State and private parties from being illusory, that is, to ensure that such contracts are mutually enforceable.\textsuperscript{139} If the State is not required to abide by the implied covenants and conditions of its contracts while opposing private parties are, a clear lack of mutuality of obligation exists.\textsuperscript{140} If no mutuality of obligation exists, the contract is void.\textsuperscript{141} Because implied in fact conditions are as necessary to the express, written contract as are express conditions,

\begin{itemize}
\item \textsuperscript{134} See Cement Roofing Indus. \textit{v.} Morgan Constr. Co., 276 So. 2d 57 (Fla. 2d DCA 1973); Gulf American Land Corp. \textit{v.} Wain, 166 So. 2d 763 (Fla. 3d DCA 1964).
\item \textsuperscript{135} See Jacksonville Port Auth. \textit{v.} Parkhill-Goodloe Co., 362 So. 2d 1009 (Fla. 1st DCA 1978).
\item \textsuperscript{136} See Southern Bell Tel. \& Tel. Co. \textit{v.} Acme Elec. Contractors, Inc., 418 So. 2d 1187 (Fla. 4th DCA 1982).
\item \textsuperscript{137} See Southern Gulf Utils. \textit{v.} Boca Ciega Sanitary Dist., 238 So. 2d 458 (Fla. 2d DCA), cert. denied, 240 So. 2d 813 (Fla. 1970).
\item \textsuperscript{139} Pan-Am Tobacco Corp. \textit{v.} Department of Corrections, 471 So. 2d 4, 5 (1984).
\item \textsuperscript{140} A. Corbin, \textit{supra} note 113, at § 152.
\item \textsuperscript{141} \textit{Id}.
\end{itemize}
their incorporation into the *Pan-Am Tobacco* decision must trump any archaic, fading purpose remaining for sovereign immunity.

Several public policy arguments support an extension of *Pan-Am Tobacco* to implied covenants and conditions of express contracts. First, the State, as represented by its various agencies, already enjoys an advantageous bargaining position as compared to the various private parties with whom it contracts. Regardless of how large the private contracting party may be, the State will always have the advantageous bargaining position.¹⁴²

Second, given its inherent bargaining advantage, the State should not be allowed the further luxury of acting in bad faith with respect to its contracts with private parties and then shielding itself with sovereign immunity. Here, more than ever, the State should be required to "‘turn square corners’ rather than exploit litigation or bargaining advantages that might otherwise not be available to private citizens."¹⁴³ "To hold otherwise would suggest that a governmental entity has a right to refrain from cooperation in a contract, or that a governmental entity could act in bad faith, calculated to destroy the benefit of that contract to the other contracting party."¹⁴⁴

Third, allowing the State to invoke sovereign immunity as a defense against claims arising from the State’s breach of an implied covenant or condition adversely affects the public at large as well as the contractor. Inherent in all construction projects is the need for “flexibility to make changes to the scope of the work and deal with job contingencies without having to stop the job in the middle to negotiate with a contractor over what extra money will be involved.”¹⁴⁵ This flexibility is lost under the *Southern Roadbuilders* interpretation because a contractor who performs additional work before acquiring a signed change order runs the risk of the state agency not paying for the additional work and then invoking the defense of sovereign immunity.¹⁴⁶ As a result, the cost of public contracts would increase because contractors, “knowing that they would have to bear the cost of each and every deficiency that might arise, would have to include in their original bids sufficient sums to protect against this risk.”¹⁴⁷ Ironically, although a main purpose of sovereign immunity is to protect the pub-

¹⁴⁶. *Id.*
¹⁴⁷. *Id.* at 12-13.
lic treasury, allowing the State to invoke it with respect to implied covenants and conditions of express contracts thus would have a detrimental effect on the public treasury as well.

The Supreme Court of Florida in *Pan-Am Tobacco* expressed its desire that statutorily authorized state contracts be valid and binding on both parties to the contract. Given this desire, it makes sense to afford either party the opportunity to sue for the other's breach of any and all covenants and conditions, express and implied, which bind the parties. Basic contract principles and public policy considerations support such a result, which allows private parties who enter into statutorily authorized contracts to stand on equal footing with the State when entering into and performing under state contracts.

C. Alternatives to Champagne-Webber

Under the *Champagne-Webber* interpretation of *Pan-Am Tobacco*, the State will be unable to invoke the defense of sovereign immunity when faced with a claim arising from the State's breach of an implied covenant or condition of a contract. Although this result appears to be the most desirable for parties contracting with the State, alternatives to the *Champagne-Webber* result exist. These alternatives include following the *Southern Roadbuilders'* interpretation and requiring the aggrieved party to seek redress through a claims bill, instituting a special court of claims to handle suits brought against the State, and establishing an arbitration board for the same purpose.

First, Florida could follow the line of reasoning established by the *Southern Roadbuilders* court and refuse to extend the abrogation of sovereign immunity to implied covenants and conditions of express, written contracts. The result of this option, as discussed above, is patently unfair, as the State would be enhancing its already advantageous bargaining position by not being required to adhere to the implied covenants and conditions of its express, written contracts while opposing private parties would be so required. Following the *Southern Roadbuilders'* interpretation would require an aggrieved party seeking redress to submit a claims bill to the Legislature. This option, however, cannot be considered a viable one. As the supreme court recognized in *Pan-Am Tobacco*, the very small rate of success enjoyed by claimants renders the procedure a clearly insufficient remedy.

148. See supra note 5.
151. Id.
The second alternative is to institute a court of claims to exclusively handle lawsuits brought against the State. Florida could base its court of claims on one existing in another state such as Illinois.\(^{152}\) The Illinois Court of Claims consists of three judges appointed for terms of six years\(^ {153}\) by the Governor with the advice and consent of the Senate.\(^ {154}\) The Secretary of State serves as the \textit{ex officio} clerk of the court.\(^ {155}\) Determinations of the Illinois Court of Claims are binding upon the parties;\(^ {156}\) however, a new trial may be granted if a claimant can show sufficient grounds for a new trial under the rules of common law or equity.\(^ {157}\) Illinois law sets forth a two-year statute of limitations for most cases.\(^ {158}\) Florida also could consider the model used by the United States Claims Court,\(^ {159}\) which, since 1885, has heard a myriad of grievances and claims including contract actions.\(^ {160}\) The court of claims alternative is a viable one which deserves serious consideration.

A third and final alternative is the establishment of an arbitration board to hear contract claims, similar to the existing Florida State Road Arbitration Board.\(^ {161}\) A "Florida State Contract Arbitration Board" could exclusively hear claims based on contractual disputes between state agencies and the various private contractors with whom they contract. Florida's State Road Arbitration Board\(^ {162}\) was established "[t]o facilitate the prompt settlement of claims for additional compensation arising out of construction contracts between the department [of transportation] and the various contractors with whom it transacts business."\(^ {163}\) The State Contracts Arbitration Board would be established to hear \textit{all} state contract claims not already covered by an arbitration statute. Unlike the State Road Arbitration Board, which hears only contractual claims that amount to no more than $100,000 per contract,\(^ {164}\) the Contract Arbitration Board should not have a monetary limitation, as many claims for contractual damages

\(^{154}\) Id. para. 439.1.
\(^{155}\) Id. para. 439.7.
\(^{156}\) Id. para. 439.17.
\(^{157}\) Id. para. 439.15.
\(^{158}\) Id. para. 439.22.
\(^{160}\) 10 Stat. 612, § 1 (1855).
\(^{162}\) Id.
\(^{163}\) Id. § 337.185(1).
\(^{164}\) Id.
can be inflated or deflated, using well-drafted delay damage provisions and the like, to suit a party's desire to submit, or not submit, its claim to arbitration.

This final alternative, establishing an arbitration board, appears to be the most desirable. In addition to providing, as a court of claims would, a specific forum for the resolution of contractual claims against the State, it would provide the additional benefit of having the claim heard by board members qualified and experienced in the area. As is done for the State Road Arbitration Board, one member could be chosen by the state agency, one by the private contracting party, and the third by agreement of the two appointed members.165 Having adjudicators with specific contractual experience, rather than just contract experience generally, makes the establishment of an arbitration board the preferred alternative.

IV. CONCLUSION

Sovereign immunity has an "historical basis steeped in antiquity and antedating the establishment of any organized government on the continent."166 Nevertheless, in 1984 the Supreme Court of Florida joined other states by ruling in Pan-Am Tobacco Corp. v. Department of Corrections167 that the doctrine no longer would be available to the State as a defense to actions arising from the State's breach of an express contract. Because that case involved the breach of an express condition of an express contract, and because the court added limiting language at the end of its opinion, it was unclear whether the court's abrogation of sovereign immunity extended to situations where the claim arose from the State's breach of an implied covenant or condition.

Two district courts deciding subsequent cases controlled by Pan-Am Tobacco came to contrary conclusions. In Southern Roadbuilders v. Lee County,168 the Second District Court of Appeal essentially held that the supreme court's decision was limited to express conditions of express contracts.169 In Champagne Webber, Inc. v. City of Fort Lauderdale,170 the Fourth District Court of Appeal disagreed by holding that the supreme court's abrogation of sovereign immunity necessarily

165. Id. § 337.185(2).
167. 471 So. 2d 4 (Fla. 1984).
168. 495 So. 2d 189 (Fla. 2d DCA 1986), review denied, 504 So. 2d 768 (Fla. 1987).
169. Id. at 190.
170. 519 So. 2d 696 (Fla. 4th DCA 1988).
extends to claims arising from the State’s breach of implied covenants and conditions of express contracts. 171

Basic principles of contract law, as well as public policy, support the Fourth District’s interpretation. Without implied covenants, such as one to deal in good faith, contracts are not mutually enforceable. Florida courts, recognizing this significance, have found implied covenants to exist in a variety of contexts. Moreover, although the doctrine of sovereign immunity was developed to protect the state treasury, allowing suits arising from the State’s breach of an implied covenant or condition may actually result in a net loss to the state treasury: absent an ability to sue on such breaches, private contractors are forced to regularly overbid on state contracts to protect themselves.

Alternatives to an outright extension of the Pan-Am Tobacco decision exist. In place of, or as a refinement to, the Champagne Webber decision, the Florida Legislature could establish a court of claims or arbitration board to exclusively hear contract claims against the State. The latter alternative, comprised of members having specific expertise, is preferable to the former one. However, to ensure the realization of the supreme court’s goal in Pan-Am Tobacco—to make contracts between the State and private parties mutually enforceable—the Supreme Court of Florida should make it clear, however possible, that the Champagne Webber decision represents a sound and logical extension of its 1984 abrogation of the doctrine of sovereign immunity.

171. *Id.* at 698.