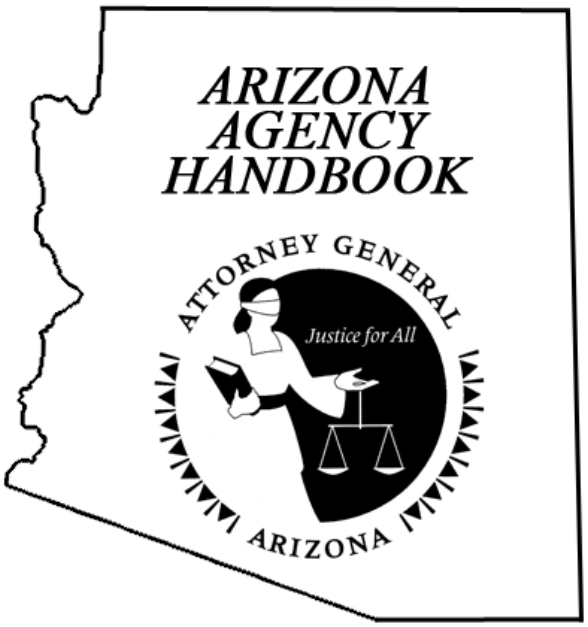
Agency Handbook

Arizona Revised Statute §41-192(A)(8) requires the Attorney General to "compile, publish and distribute to . . . persons and government entities on request, at least every ten years, the Arizona agency handbook." Due to the high cost of publishing, the current version of the Handbook is posted on the Attorney General's Web site to satisfy this statutory requirement. (Revised 2013)



PREFACE

I proudly present the 2014 edition of the Arizona Agency Handbook. This publication is intended to provide guidance to State officers and employees and to the lawyers who represent the State or appear before its boards and agencies. The Handbook does not itself create legal rights or obligations; instead it is a reference source that discusses laws otherwise created by statutes, regulations, and the state or federal constitutions.

This edition of the Handbook supersedes the 2011 edition and reflects the changes that have occurred in the laws governing state agencies since 2011. Among other things, the 2014 edition addresses the significant new or amended laws on such topics as personnel, procurement, public records, discrimination law, administrative adjudications, and rulemaking.

The 2014 edition of the Handbook is available on the website of the Attorney General's Office at www.azag.gov. Individual chapters will be updated periodically to reflect significant legal developments, and such revisions will be posted on the website as they become available. Comments and suggestions

CHAPTER 13

LITIGATION AGAINST STATE ENTITIES OR EMPLOYEES

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CHAPTER 13

LITIGATION AGAINST STATE ENTITIES AND EMPLOYEES

13.1 Scope of This Chapter. This Chapter discusses several topics related to lawsuits filed against the State or its agencies, departments, boards, or commissions ("state entities") or against state officers or employees ("state employees"). This Chapter addresses the following topics: (1) the procedures for service of a summons and complaint, notice of claim, or subpoena; (2) the liability and immunity of state entities or employees under certain state or federal laws; (3) the State's self-insurance program; (4) the procedures for tort claims against state entities or employees; and (5) the procedures for contract claims against state entities. This handbook does not address issues related to workers' compensation and employers' liability insurance. Discrimination law is discussed in Chapter 15.

Any state entity or employee faced with threatened or actual litigation should immediately consult with legal counsel. Section 1.9 discusses the Attorney General's Guidelines for representing state entities and employees.

13.2 Procedure for Receiving Service of a Notice of Claim, Summons and Complaint, or Subpoena. State entities and employees may be named as defendants or subpoenaed to produce documents or testimony in both federal and state courts. These court processes, however, cannot be pursued or enforced without proper service of the appropriate documents. State agencies and employees should recognize three types of documents that may be served in connection with court proceedings.

The Notice of Claim — Before certain lawsuits may be filed and pursued against a state entity or employee (civil suits for money damages for claims arising under state law), the claimant must file a notice of claim on the state entity or employee. *See* Section 13.5.

The Summons and Complaint — In order to initiate a lawsuit, the person making the claim (usually called "the plaintiff") must serve formal court documents upon each of the named defendants. The summons is a writ endorsed by the clerk of the court requiring the served party to appear and defend. The complaint is a formal pleading containing the plaintiff's claims.

The Subpoena — A subpoena is used to require someone to appear and testify or to produce documents relevant to a pending case. Although the subpoena must conform to specific requirements set forth in the rules, it need not be endorsed by the clerk.

To ensure proper notice, there are specific rules that direct how to serve these documents. Improper service may affect time deadlines or even the legality of certain

proceedings. A state officer or employee on whom service of any legal documents is made should immediately contact legal counsel for advice on how to proceed.

13.2.1 Filing a Notice of Claim. Before a claimant may sue for money damages against a state entity or state employee for claims arising under state law, the claimant must file a notice of claim on the entity or person to be named as a defendant in the suit. A.R.S. § 12-821.01.

For a complete discussion of the claim statute, see Section 13.5. Filing the notice of claim requires the claimant to deliver it to 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." A.R.S. § 12-821.01(A); *see Lee v. State*, 218 Ariz. 235, 239 ¶ 19, 182 P.3d 1169, 1173 (2008). These service rules are discussed in Sections 13.2.2 to 13.2.3.6.

If a notice of claim—which is often in the form of a letter—is filed on any state official or employee, the person should immediately contact the Department of Administration, Risk Management Division, in Phoenix, Arizona, to arrange delivery of the documents for proper investigation and processing. The person should then contact the Liability Management Section of the Attorney General's Office.

13.2.2 Service of a State-Court Summons and Complaint. If service of a lawsuit is attempted or accomplished, it is important to notify the Attorney General's Office immediately. The rules of procedure generally allow only twenty days after formal service before a response of some type must be filed. Ariz. R. Civ. P. 12(a). Any delay in contacting counsel may reduce the time available to investigate the case and prepare a proper response. This could lead to drastic consequences, such as the entry of a default judgment against the state entity or employee.

Normally, it is sufficient to notify the attorney assigned to represent the state entity involved. If the lawsuit involves a request for money damages, the Liability Management Section of the Attorney General's Office should also be notified immediately. If the documents served involve state-related activities, the Attorney General's Office should be contacted even if a state employee is named in his or her individual—or personal—capacity, as opposed to his or her official capacity. The Attorney General's Office will then determine whether to provide representation to the employee pursuant to A.R.S. § 41-621. *See* Sections 13.4.3 and 13.4.7.

13.2.2.1 Personal Service of Summons and Complaint on the State. Personal service on the State can be accomplished only by delivering the proper documents to the Attorney General. Ariz. R. Civ. P. 4.1(h)(1). Any person attempting personal service of a summons and complaint on the State must be directed to the receptionist at the main entrance to the Department of Law Building at 1275 West Washington Street in Phoenix or to the receptionist at the South Building at 400 West Congress, Suite 315, in Tucson.

These are the only locations authorized to receive personal service of process. The Department of Law receptionists are authorized only to *receive* (not accept) service of process for the State of Arizona.

13.2.2.2 Personal Service of Summons and Complaint upon a State Agency, Board, Commission, or Department. Personal service on any other state entity can be accomplished by delivering the proper documents to "[t]he individual designated by the entity pursuant to statute to receive service of process." Ariz. R. Civ. P. 4.1(h)(4)(A). If no such individual has been designated, then personal service can be accomplished by delivering the proper documents to "the chief executive officer(s), or, alternatively, the official secretary, clerk, or recording officer of the entity as established by law." Ariz. R. Civ. P. 4.1(h)(4)(B). Any officer or employee accepting service of documents should immediately notify the state entity's legal counsel.

The Department of Law receptionists are authorized to receive service for agencies that are represented by the Attorney General's Office unless the appeal of an administrative decision is involved. In an action to review an administrative decision, the Administrative Review Act, A.R.S. §§ 12-901 to -914, requires that service of the summons and complaint be made "as provided by the rules of civil procedure, *upon the agency at its principal office*." A.R.S. § 12-906 (emphasis added). If an attempt is made to serve the Attorney General with a suit under the Administrative Review Act, the Department of Law receptionist should refer the process server to the agency's main office.

Some agencies require service to be accomplished by delivering the necessary documents to a specified officer or employee. *See, e.g.*, Ariz. Admin. Code ("A.A.C.") § R19-1-106 (requiring that complaints for administrative review be served on the Director of the Department of Liquor).

In suits against state entities, a courtesy copy of the summons and complaint is also often served on the Attorney General. The Department of Law receptionist is authorized only to *receive* these courtesy copies, not to accept service of process.

13.2.2.3 Personal Service of Summons and Complaint on an Individual. Personal service on individual state officers or employees can be accomplished only by one of three methods: (1) by delivering the necessary documents to the named individual; (2) by leaving the documents at the individual's home with a person who both lives there and is of suitable age and discretion; or (3) by delivering the documents to an agent whom the individual has authorized to receive them. Ariz. R. Civ. P. 4.1(d). Service is not accomplished merely by leaving the documents at the individual's workplace. Moreover, the policy of the Attorney General's Office is that its employees may not authorize the Department of Law receptionist or any Attorney General employee to receive service of process on their behalf.

If the State or a state agency is sued together with a state officer or employee, the Department of Law's receptionist may receive the summons and complaint only for the State or state agency. The receptionist may not receive service for any named individuals and therefore should direct the process server to serve the individual in accordance with Arizona Rule of Civil Procedure 4.1(d).

In suits against a state officer or employee, a courtesy copy of the summons and complaint is also often served upon the Attorney General. The Department of Law receptionist is authorized to *receive* (not accept) service of process of the courtesy copies.

13.2.3 Waiver of Service. The State and state entities (such as agencies, boards, commissions, or departments), as well as individual state officers or employees may (and normally should) waive personal service of process if the plaintiff makes a proper request under Arizona Rule of Civil Procedure 4.1(c). In fact, there is "a duty to avoid unnecessary costs of serving the summons." Ariz. R. Civ. P. 4.1(c)(2).

Under Arizona Rule of Civil Procedure 4.1(c), a plaintiff must deliver, by mail or otherwise, a notice and request for waiver of service by the defendant. There are several requirements for the notice and request, including the following:

A. The request must be in writing and addressed directly to the defendant;

B. The request must be sent through first class mail or other reliable means;

C. The request must include a copy of the complaint and identify the court in which it has been filed;

D. The request must inform the defendant, using approved language, of the consequences of compliance and the failure to comply;

E. The request must set forth the date the request was sent;

F. The request must allow a reasonable time to return the waiver, which must be at least thirty days from the date the request was sent; and

G. The request must include an extra copy of the notice and request and a prepaid means of compliance (e.g., a self-addressed stamped envelope).

The rule provides that if a defendant refuses without good cause to comply with a request to waive service, thereby forcing the plaintiff to personally serve the summons and complaint, the court shall impose on the defendant the costs of formal service. If service is waived, the defendant's deadline for responding to the suit is sixty days after the request

for waiver was sent. Ariz. R. Civ. P. 4.1(c)(3). The Attorney General's Office generally encourages waiver of service upon proper request.

13.2.3.1 Receipt by Attorney General's Office of a Notice and Request for Waiver of Service upon the State. Any employee in the Phoenix office of the Attorney General who receives a summons and complaint by mail under the waiver provisions of Arizona Rule of Civil Procedure 4.1(c) shall immediately forward all documents, including the return envelope, to the Administration Division receptionist in the northeast corner of the second floor of the Department of Law Building at 1275 West Washington Street. Any employee in the Tucson office must immediately forward the documents to the receptionist in the lobby at the main entrance to the South Building at 400 West Congress Street, Suite 315. *These are the only locations authorized to receive alternative service of process by mail*.

13.2.3.2 Receipt by Attorney General's Office of a Notice and Request for Waiver of Service on a State Agency, Board, Commission, or Department. State agencies and other state entities may (and generally should) waive service when requested to do so under Arizona Rule of Civil Procedure 4.1(c). Those state entities (other than the State itself) may authorize their legal counsel to waive service. If an agency or other state entity has done so, the attorney assigned to represent the entity may accept service by mail on its behalf. Any state entity that receives a request for waiver of service of process should immediately forward it to the assigned attorney. *Do not fill out the form for waiver of service of process and do not return it to the sender*.

If a state entity chooses not to waive service, any employee of the Attorney General's Office who receives documents requesting waiver of service of process by that agency should return the entire packet to the sender. *Do not fill out the form for waiver of service of process*. The employee should include an accompanying letter, such as the following:

> You have requested a waiver of service of process by [specify the state agency], but it declines to waive service. Accordingly, I am returning all of the documents without executing the acknowledgment of receipt of service of process.

13.2.3.3 Receipt by Attorney General's Office of a Notice and Request for Waiver of Service on Individuals. The Attorney General's Office may not waive service of process for any state officer or employee unless specifically authorized to do so.

If any employee of the Attorney General's Office receives a summons and complaint and a form for waiver of service of process *that is intended to be served on an individual who is a state officer or employee* other than the employee receiving the summons and complaint, and authorization to receive service has not been granted, the employee should

return the entire packet to the sender. *Do not fill out the form for waiver of service of process.* The employee should also include an accompanying letter, such as the following:

> You have requested a waiver of service of process by [identify the individual], an officer or employee of the State of Arizona, by mailing documents to this office. The documents must be provided directly to the individual named in the summons. *See* Ariz. R. Civ. P. 4.1(c)(2).
>
> Accordingly, I am returning all of the documents without executing the acknowledgment of receipt of service of process.

13.2.3.4 Receipt by Agency of a Notice and Request for Waiver of Service upon the State. Because the Attorney General is the officer who must be served on behalf of the State, *agencies and agency personnel must not sign and return mailed documents that are to be served on the State in a manner that could constitute a waiver of service*.

If any agency receives by mail a summons and complaint and a notice and request for waiver of service of process that is intended to be served upon the State, it should return the entire packet to the sender. *Do not fill out the form for waiver of service of process.* The agency should also include an accompanying letter, such as the following:

> You have requested a waiver of service of process on the State of Arizona by mailing documents to this office.
>
> Only the Attorney General may accept service of process for the State. The address for service of process by mail is:
>
> > Administration Division
> > Office of the Attorney General
> > 1275 W. Washington
> > Phoenix, Arizona 85007
>
> Accordingly, I am returning all of the documents without executing the acknowledgment of receipt of service of process.

13.2.3.5 Receipt by Agency of a Notice and Request for Waiver of Service upon the Agency. An agency (including boards, commissions, etc.) may (and generally should) accept service of process when requested to do so under Arizona Rule of Civil Procedure 4.1(c). Additionally, an agency may authorize its legal counsel to accept service by mail on its behalf.

If an agency receives a notice and request for waiver of service and chooses to waive service, it should immediately forward all documents received to the Attorney

General, with a letter indicating the decision to waive service. *Do not fill out the form for waiver of service before forwarding the documents to the Attorney General*.

If an agency chooses not to waive service, any officer or employee who receives a summons and complaint and a form for waiver of service of process that is intended to be served on that agency should return the entire packet to the sender. *Do not fill out the form for waiver of service of process*. The agency officer or employee should include an accompanying letter, such as the following:

> You have requested a waiver of service of process on [specify the state agency], but it declines to waive service of process. The documents must be personally served on the person designated by Arizona Rule of Civil Procedure 4.1(h)(4) for service of process.
>
> Accordingly, I am returning all of the documents without executing the acknowledgment of receipt of service of process.

13.2.3.6 Receipt by a State Employee of a Notice and Request for Waiver of Service upon the Employee. If any individual state employee receives a notice and request for waiver of service together with a copy of a summons and complaint making claims related to his or her service for the State, the individual should immediately forward all documents received to the Attorney General, with a letter authorizing waiver of service. *Do not fill out the form for waiver of service before forwarding the documents to the Attorney General*. Do not return any of the documents to the sender before discussing the matter with counsel appointed to the case by the Attorney General.

13.2.4 Service of a Federal-Court Summons and Complaint. The rules concerning service of process for lawsuits in federal court are essentially the same as those used for state court. One significant difference is that federal court suits against the State may be served either upon its "chief executive officer"—the Governor—or in the manner prescribed by state law. Fed. R. Civ. P. 4(j)(2)(A), (B).

The federal rules do not provide for waiver of service by the State or other governmental organizations subject to suit. *See* Fed. R. Civ. P. 4(d). The State may choose to waive service, but any failure to do so will not subject it to payment of costs for formal service.

Whether individual state employees are subject to Rule 4(d)'s waiver rule and may be ordered to pay the plaintiffs' costs of serving process if they refuse to waive service is not a settled question. Several courts have held that state officials who are sued in their official capacities are not subject to the rule. *See, e.g.*, *Moore v. Hosemann*, 591 F.3d 741, 747 & n.6 (5th Cir. 2009) (citing cases). Other courts have reached the opposite conclusion. *See, e.g.*, *Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003). The Ninth

Circuit Court of Appeals—which has jurisdiction over federal cases in Arizona—has not spoken on the matter. Some courts hold that when it is not clear from the complaint whether the defendant is being sued in his or her official or individual capacity, the uncertainty gives the defendant good cause not to have the waiver provisions of Rule 4(d) applied, thus alleviating him or her from the costs of service. *E.g.*, *Rashada v. City of Buffalo*, No. 11-CV-873A, 2013 WL 474751, at *4 (W.D.N.Y. Feb. 6, 2013) (unpublished decision).

13.2.5 Service of Subpoenas.

13.2.5.1 Service Requirements. Service of subpoenas in civil actions in state court is governed by Arizona Rule of Civil Procedure 45; in criminal actions, it is governed by Arizona Rule of Criminal Procedure 34. In federal court, the applicable rules are Federal Rule of Civil Procedure 45 and Federal Rule of Criminal Procedure 17. The subpoena should identify the court involved and the case number and caption, specify whether it requires testimony or the production of documents or things, and include specific information concerning the rights of the recipient.

Service may be accomplished by delivering a copy of the subpoena to the person named. If the subpoena requests the person's attendance, the requesting party must also tender one day's attendance fees and mileage as required by law. (In state court, the fee requirement does not apply if the requesting party is the State or an officer or employee thereof. In federal court, the fee requirement does not apply if the requesting party is the United States or an officer or agency thereof.) The rules imply that personal service is required, but it is common practice for attorneys to deliver subpoenas by mail, especially if they are requesting only the production of documents or things or the ability to inspect property.

13.2.5.2 Receipt by Attorney General's Office of Subpoenas. If the subpoena names the "custodian of records for the Attorney General's Office," the receptionist is authorized to receive it. Otherwise, the receptionists in the Phoenix and Tucson offices have no authority to accept or receive subpoenas for any state entity or employee. The receptionist should advise the person attempting to serve the subpoena to serve it personally upon the individual or agency named in the subpoena.

13.2.5.3 Receipt by State Entities or Employees of Subpoenas. Any state entity or employee that receives a subpoena should immediately contact legal counsel to obtain advice regarding the response. Time is critical because objections to the subpoena generally must be made by the earlier of the compliance date specified in the subpoena or 14 days from service.

13.3. Liability and Immunities of State Entities and Employees.

13.3.1 Liability Based on State Law. Almost any act or failure to act by a state officer or employee can become the basis for a lawsuit. Many suits against the State and state employees are based on the state's common law of negligence. Negligence is the failure to act as a reasonably prudent person would act in similar circumstances. Other possible state-law claims include gross negligence, battery, and defamation.

As a general rule, a suit based solely on negligent acts must be brought in state court. The claimant may name as a defendant the State, other state entities, such as a state agency, or individual state employees.

13.3.2 Liability Based on Federal Law. A claimant may also sue for the violation of federal rights. Suits based on federal rights may be brought in state court or federal court, subject to sovereign immunity or Eleventh Amendment defenses.[1] *See* Section 13.3.2.1; s*ee also* Chapter 15 (discussing discrimination law).

13.3.2.1 Section 1983 Liability. Federal lawsuits against state defendants most commonly are filed under 42 U.S.C. § 1983, which allows suits alleging that wrongful conduct by a state employee deprived the plaintiff of his or her federal constitutional or statutory rights. Section 1983 lawsuits for damages must be brought against the particular state employee who is alleged to have violated the plaintiff's civil rights; neither the state nor its agencies, boards, or commissions, may be sued for damages under § 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-65 (1989). A § 1983 claim for damages must also be brought against the employee in his or her individual capacity, not his or her official capacity. *Hafer v. Melo*, 502 U.S. 21, 24 (1991). Although the plaintiff sues the state employee personally, the State provides liability coverage for the employee if he or she was acting within the course and scope of his employment or authorization. A.R.S. § 41-621. *See* Section 13.4.

13.3.3 State-Law Immunities.

13.3.3.1 Absolute Immunity. In claims based on state law, if the State or a state employee has absolute immunity for a particular type of conduct, the claims must be dismissed, even if the conduct is alleged to have been outrageous or malicious. *See* A.R.S. § 12-820.01.

The State and state employees have absolute immunity for "[t]he exercise of a judicial or legislative function" and "[t]he exercise of an administrative function involving the determination of fundamental governmental policy." A.R.S. § 12-820.01(A). The Legislature has defined "the determination of fundamental governmental policy" as follows:

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[1] In *Alden v. Maine*, 527 U.S. 706, 712 (1999), the U.S. Supreme Court held that Congress may not "subject nonconsenting States to private suits for damages in state courts."

> The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:
>
> 1. A determination of whether to seek or whether to provide the resources necessary for any of the following: (a) [t]he purchase of equipment, (b) [t]he construction or maintenance of facilities, (c) [t]he hiring of personnel, or (d) [t]he provision of governmental services.
>
> 2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.
>
> 3. The licensing and regulation of any profession or occupation.
>
> 4. The establishment, implementation and enforcement of minimum safety standards for light rail transit systems.

A.R.S. § 12-820.01(B). The defense applies only to actual decisions or affirmative acts; it does not cover failures to make a decision or decision made by default. *Galati v. Lake Havasu City*, 186 Ariz. 131, 134, 920 P.2d 11, 14 (App. 1996); *Goss v. City of Globe*, 180 Ariz. 229, 231, 883 P.2d 466, 468 (App. 1994).

13.3.3.2 Qualified Immunity.

13.3.3.2.1 Statutory Qualified Immunity. If the State or a state employee has statutory qualified immunity for a particular type of conduct, the plaintiff cannot recover absent proof that the defendant was grossly negligent or intended to cause injury. A.R.S. § 12-820.02. The Legislature has granted qualified immunity for the following:

> 1. The failure to make an arrest or the failure to retain an arrested person in custody.
>
> 2. An injury caused by an escaping or escaped prisoner or a youth committed to the department of juvenile corrections.
>
> 3. An injury resulting from the probation, community supervision or discharge of a prisoner or a youth committed to the department of juvenile corrections,

from the terms and conditions of the prisoner's or youth's probation or community supervision or from the revocation of the prisoner's or youth's probation, community supervision or conditional release under the psychiatric security review board.

4. An injury caused by a prisoner to any other prisoner or an injury caused by a youth committed to the department of juvenile corrections to any other committed youth.

5. The issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization for which absolute immunity is not provided pursuant to A.R.S. § 12-820.01.

6. The failure to discover violations of any provision of law when inspections are done of property other than property owned by the public entity in question.

7. An injury to the driver of a motor vehicle that is attributable to the violation by the driver of A.R.S. §§ 28-693, 28-1381 or 28-1382 [reckless driving, driving under the influence ("DUI"), or extreme DUI].

8. The failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under any federal law or any law of this state.

9. Preventing the sale or transfer of a handgun to a person who may lawfully receive or possess a handgun.

10. The failure to detain a juvenile taken into temporary custody or arrested for a criminal offense or delinquent or incorrigible act in the appropriate detention facility, jail or lockup described in § 8-305.

A.R.S. § 12-820.02(A).

Qualified immunity may also be found in other statutes applicable to specific agencies. For example, A.R.S. §§ 9-500.02 and 48-818 provide qualified immunity to "a property owner, its officers or employees or a tenant . . . when rendering emergency

medical aid provided by [certain specified persons]." If the specified persons render emergency aid on State-owned or -leased property, the State has qualified immunity.

In addition, public entities and employees have an affirmative defense, in the nature of qualified immunity, from liability for injuries arising out of a plan or design for the maintenance or operation of highways, roads, streets, bridges or rights-of-way that were "prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design." A.R.S. § 12-820.03. This defense does not apply, however, if the public entity or employee fails to adequately warn the public of any unreasonably dangerous hazards. *Id*.

The State and its political subdivisions are similarly immune from liability for actions and inaction while "engaging in emergency management activities or performing emergency functions" in carrying out the orders of the Governor in a declared emergency. A.R.S. § 26-314(A). This immunity does not apply to wilful misconduct, gross negligence, or bad faith. *Id*.

Public entities and public employees acting within the scope of their employment are also protected from liability for punitive or exemplary damages. A.R.S. § 12-820.04. *See* Section 13.4.5. Furthermore, "[a] public entity is not liable for losses that arise out of . . . an act . . . determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employee's propensity for that action." A.R.S. § 12-820.05(B). This subsection does not apply to "acts arising out of the use of a motor vehicle." *Id*. (The State is not required to insure against employees' felonious acts, nor must it indemnify employees for their felonious acts. A.R.S. § 41-621(L)(1)).

Individual state employees have certain immunities from personal liability as well. For example, if a statute under which a state officer, agent, or employee was acting in good faith, and without wanton disregard of his or her statutory duties, is later declared to be unconstitutional, invalid, or inapplicable, the officer, agent, or employee is not personally liable for injury or damage resulting from the statute's unconstitutionality, invalidity, or inapplicability. A.R.S. § 41-621(I). Likewise, state officers, agents, and employees are not personally liable for injury or damage resulting from their official discretionary acts "if the exercise of the discretion was done in good faith and without wanton disregard of his [or her] statutory duties." A.R.S. § 41-621(J).

Immunities like those contained in A.R.S. §§ 12-820.01 to -820.05 apply only to suits for money damages, not to suits for injunctive, declaratory, or other equitable relief. *Zeigler v. Kirschner*, 162 Ariz. 77, 84, 781 P.2d 54, 61 (App. 1989).

13.3.3.1.2 Common-Law Qualified Immunity.

Arizona courts also recognize qualified immunity against claims arising under the common law. *See, e.g.*, *Chamberlain v. Mathis*, 151 Ariz. 551, 558, 729 P.2d 905, 912 (1986) (holding that agency director had qualified immunity against defamation suit filed by agency employees); *Goddard v. Fields*, 214 Ariz. 175, 150 P.3d 262 (App. 2007) (recognizing that the Attorney General had qualified immunity against a defamation counterclaim filed in response to the Attorney General's civil-enforcement action against the plaintiff). The Arizona Supreme Court specifically stated that qualified immunity applies to all torts alleged against state officials, whether based on alleged violations of statutory or constitutional law or common-law causes of action. *Chamberlain*, 151 Ariz. at 560, 729 P.2d at 914. To overcome the immunity, the plaintiff must establish objective malice on the part of the public official. *Id*. at 559, 729 P.2d at 913. That means that the official is protected "if the facts establish that a reasonable person, with the information available to the official, 'could have formed a reasonable belief that the defamatory statement in question was true and that the publication was an appropriate means for serving the interests which justified the privilege.'" *Id*.

13.3.4 Immunity Under Federal Law.

13.3.4.1 Eleventh Amendment Immunity. Under Eleventh Amendment principles, private citizens may not sue a State in federal court absent the state's consent. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). This Eleventh Amendment immunity extends to state departments, agencies, boards, and commissions, and to state employees acting in their official capacity because a suit against any of them is regarded as a suit against the state itself. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983). The immunity applies to suits filed in federal court under 42 U.S.C. § 1983. *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988).

Congress has the power to abrogate Eleventh Amendment immunity in appropriate situations to enforce the substantive provisions of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). To validly abrogate the immunity, Congress must make a "clear legislative statement" making its intent obvious. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996). But Congress's Fourteenth Amendment power to abrogate Eleventh Amendment immunity is limited. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). It has the power to enforce the Fourteenth Amendment, but not to determine the Fourteenth Amendment's substance. *Id*. To validly abrogate the immunity, it "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999); *accord City of Boerne v. Flores*, 521 U.S. 507, 520, 532 (1997).

Under its Fourteenth Amendment power, Congress has validly abrogated Eleventh Amendment immunity, for example, for violations of Title VII of the 1964 Civil Rights Act, where it authorized awards of money damages and attorney fees against the states for employment discrimination on the basis of race, color, religion, sex, or national origin. *Fitzpatrick*, 427 U.S. at 456, 96 S. Ct. at 2671. It also properly subjected States to damages suits under Title II of the Americans with Disabilities Act, which prohibits discrimination against disabled persons in governmental services, programs, and activities. *Tennessee v. Lane*, 541 U.S. 509, 530 (2004).

But the U.S. Supreme Court has struck down other Congressional efforts to abrogate Eleventh Amendment immunity. It held that the Religious Freedom Restoration Act of 1993 did not validly authorize damages suits against the States, both because there was very little evidence of a widespread problem and because the Act was a disproportionate response to the perceived problem. *City of Boerne*, 521 U.S. at 532. It reached a similar conclusion regarding the Age Discrimination in Employment Act, holding that the Act was a disproportionate response to the perceived constitutional violations. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000). It struck down a provision in Title I of the Americans with Disabilities Act—which prohibits discrimination against disabled persons in employment—that attempted to hold the States liable for damages. *Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 360 (2001).

Congress may also require the States to waive their Eleventh Amendment immunity as a condition of receiving certain grants of federal funds. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). Congress did so, for example, in the Rehabilitation Act, which prohibits discrimination in employment on the basis of a person's physical disability. *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 819 (9th Cir. 2001).

A suit against a state official challenging the constitutionality of the official's action is not considered an action against the State to the limited extent that it seeks prospective injunctive relief as to the official's conduct rather than an award of damages for past conduct. *Pennhurst*, 465 U.S. at 102-03; *Ex parte Young,* 209 U.S. 123, 160 (1908). A federal court, however, may not instruct state officials how to conform their conduct to state law. *Pennhurst*, 465 U.S. at 106.

13.3.4.2 Absolute Immunity. Absolute immunity is a complete defense to lawsuits seeking monetary damages under § 1983.[2] *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 438 U.S. 478 (1978). As a general rule, absolute *judicial* immunity does not bar an award of prospective injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). Nor does it bar an award of attorneys' fees under the Civil Rights Attorney fees Awards Act, 42 U.S.C. § 1988, to a plaintiff who has won an injunction

[2] This discussion focuses on § 1983 claims, but absolute or qualified immunity may also apply to other federal claims. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982).

against a judge. *Id*. at 544. Absolute *legislative* immunity, however, bars all forms of relief, including claims for attorneys' fees. *Supreme Court of Va. v. Consumers Union of U.S., Inc*., 446 U.S. 719, 738 (1980).

Public officials who generally receive absolute immunity include judges, *Butz*, 438 U.S. at 508-09; *Pierson v. Ray*, 386 U.S. 547, 553 (1967), prosecuting attorneys, *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976), government attorneys in civil litigation, *Fry v. Melaragno*, 939 F.2d 832, 837 (9th Cir. 1991), and government attorneys in administrative hearings, *Butz*, 438 U.S at 517. Other public officials with absolute immunity include the President, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), parole board officials, *Sellars v. Procunier*, 641 F.2d 1295, 1302-03 (9th Cir. 1981), administrative law judges, *Butz*, 438 U.S. at 513-15; legislators, *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); city council members, *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. 1981); and local officials performing legislative functions, *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). Other officials have absolute immunity when performing certain quasi-judicial or quasi-prosecutorial functions, including social workers, *Meyers v. Contra Costa Cnty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987); and probation officers, *Demoran v. Witt*, 781 F.2d 155, 156 (9th Cir. 1985). In addition, witnesses have absolute immunity for their trial testimony. *Briscoe v. LaHue*, 460 U.S. 325, 336 (1983).

The nature of the function performed, not the identity of the actor, controls whether immunity applies. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999). Thus, the immunity is limited: the mere fact that the official holds the office does not immunize the official for all of his or her acts. Courts apply a functional approach to determine whether an official is entitled to absolute immunity for the act complained of. *Fitzsimmons*, 509 U.S. at 269; *Romano*, 169 F.3d at 1186. For example, a prosecutor has absolute immunity for conduct that is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. On the other hand, "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Buckley*, 509 U.S. at 273.

13.3.4.3 Qualified Immunity. Qualified immunity in § 1983 cases is different from the statutory qualified immunity discussed in Section 13.3.3. Qualified immunity shields government officials from liability for civil damages in a § 1983 case if their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person should have known. *Harlow*, 457 U.S. at 818. Qualified immunity is an affirmative defense that must be raised by the defendant. *Id.* at 815. Once the defense is properly raised, the plaintiff then has the burden of proving that the right allegedly violated by the defendant was clearly established at the time of the alleged violation. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir. 1989).

In addition to shielding the official from liability, qualified immunity—like other immunities—also provides a shield from the lawsuit itself. *Pearson v. Callahan*, 555 U.S. 223, 235 (2009). The Supreme Court has stressed the importance of raising questions of immunity as early as possible in the litigation. *Id.*; *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). "Until this threshold immunity question is resolved, discovery [on issues other than qualified immunity] should not be allowed." *Harlow*, 457 U.S. at 818.

Whether a legal right was clearly established when the conduct occurred is a question of law for the court to decide; it is to be determined objectively without examining the subjective intent of the defendant official. *Harlow*, 457 U.S. at 815-20; *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627-28 (9th Cir. 1991). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). It is not necessary that the "very action in question has previously been held unlawful," but "in the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). As the Supreme Court further explained:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Harlow, 457 U.S. at 818-19.

Under its self-insurance program, the State will indemnify state officials and employees for liability in § 1983 actions, including liability for punitive damages, as long as the official or employee was acting in the course and scope of his or her employment or authorization. A.R.S. § 41-621(A)(3). *See* Section 13.4. If there is a question whether the employee was acting in the course and scope of employment, the State may reserve the right to refuse to pay any judgment. In that case, the State will hire outside counsel to defend the state employee and will pay all costs of defense until the issue of coverage is resolved.

13.3.4.4 State-Action Immunity Under the Antitrust Laws. For a discussion of the immunity of the State, other state entities, and state employees from federal antitrust laws, see Sections 5.9.6 and 5.9.6.1.

13.4 Liability Coverage.

13.4.1 Indemnification of State Employees. To protect state officers and employees from potential liability and to promote productivity, the Arizona Legislature has provided mandatory indemnification of state officials, employees, and agents who are sued for acts performed in the course and scope of their employment or authorization. A.R.S. § 41-621(A)(3). Thus, state officials, employees, and agents receive the same coverage that the State itself receives. *See id.* Coverage includes litigation costs and attorney fees, as well as payment of any settlement or judgment. A.R.S. § 41-622(A). All coverage provided by self-insurance is excess over any valid and collectible insurance available from other sources. A.R.S. § 41-621(E).

13.4.2 Course of Employment. With few exceptions, employees of the State are protected if their conduct occurs within the course and scope of their employment or authorization. A.R.S. § 41-621(A)(3). According to A.R.S. § 41-621(R) acts or omissions of a state officer, agent, or employee are within the course and scope of employment or authorization if:

1. They occur while performing duties or functions that the state officer, agent or employee is employed or authorized to perform.

2. They occur substantially within the authorized time and space limits of the person's state employment.

3. They are done (or not done) at least in part to serve the State or its departments, agencies, boards or commissions.

"[A]n employee is acting within the scope of . . . employment while he is doing any reasonable thing which his employment expressly or impliedly authorizes him to do or which may reasonably be said to have been contemplated by that employment as necessarily or probably incidental to the employment." *McCloud v. Kimbro*, 224 Ariz. 121, 123 ¶ 8, 228 P.3d 113, 115 (App. 2010), *disapproved in part on other grounds by Engler v. Gulf Interstate Eng'g*, 230 Ariz. 55, 280 P.3d 599 (2012).

13.4.3 Extent of Coverage. If the employee's conduct falls within the terms of A.R.S. § 41-621(A)(3), the Attorney General's Office will defend the employee or will hire outside legal counsel to do so. A.R.S. § 41-621(M). All attorneys' fees, court costs, and litigation expenses will be paid from the Department of Administration's Risk Management revolving fund. A.R.S. § 41-622(A). A settlement or judgment will also be paid from this fund. *Id*.

The state entity and the employee involved must cooperate fully with the Attorney General in the defense of the claim. A.R.S. § 41-621(M); A.A.C. § R2-10-102(C).

13.4.4 Automobile Coverage. Insurance coverage, within the limitations of A.R.S. §§ 41-621 to -625, is available for officers, agents, and employees ("employees") acting within the course and scope of employment while driving either state-owned or non-state-owned vehicles. A.A.C. § R2-10-107(A)(1); *see* Section 13.4.2 (discussing course and scope of employment). Coverage for non-state-owned vehicles is excess coverage; that is, the State will cover only amounts over and above the limits of the employee's own policy. A.A.C. § R2-10-107(A)(1). Coverage for state-owned vehicles, on the other hand, is on a primary basis. *Id*.

Employees driving a state-owned vehicle are deemed to be acting within the course and scope of employment:

1. While driving on authorized state business,
2. While driving to and from work,
3. While driving to and from lunch on a working day,
4. While driving to and from meals while on out-of-town travel.

A.A.C. § R2-10-107(A)(2).

Employees are not deemed to be acting within the course and scope of employment while driving a non-state-owned vehicle:

1. While driving to and from work,
2. While driving to and from lunch in the area of employment and not on officially authorized state business,
3. While driving on other than state-authorized business.

A.A.C. § R2-10-107(A)(3).

There is no coverage for an employee while driving a state-owned or non-state-owned vehicle outside the course and scope of employment. A.A.C. § R2-10-107 (A)(1).

13.4.5 Punitive Damages. Courts generally award punitive damages (also called "exemplary damages") to punish an individual defendant for outrageous conduct, to publicize wrongful acts, and to deter others from engaging in similar conduct. Under Arizona law, punitive damages may be awarded only when the acts reflect an "evil mind." *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986).

The Legislature has immunized the State from liability for punitive damages for state-law claims. A.R.S. § 12-820.04; *see also State v. Sanchez*, 119 Ariz. 64, 69, 579 P.2d 568, 573 (App. 1978) (holding the State immune from punitive damages even in the absence of statutory immunity). The immunity from punitive damages also applies to state employees acting within the scope of their employment. A.R.S. § 12-820.04. Statutes providing for treble damages (three times the actual damages) and for minimum damages without proof of actual damages are considered to be punitive in nature. *Wyatt v. Wehmueller*, 167 Ariz. 281, 285-86, 806 P.2d 870, 874-75 (1991). See Section 13.3.4.3 regarding punitive damages for claims based on federal law.

The State will defend state employees against claims for punitive damages based on acts within the course and scope of state employment or authorization, as long as the conduct has not been determined by a court to constitute a felony. A.R.S. § 41-621(A)(3), (L). If there is a question whether the employee's acts were within the course and scope of employment, the State may reserve the right to refuse to pay any judgment and, in that event, will hire outside counsel to represent the employee.

13.4.6 Property Coverage. Under A.R.S. § 41-621(A)(1), the State's risk-management program provides coverage against loss or damage to all state-owned buildings in which the director of the Department of Administration has determined that the State has an insurable interest (except for community colleges' buildings). Also covered against loss or damage are the contents of those buildings. A.R.S. § 41-621(A)(2). All personal property that is reported to the Department of Administration that is either State-owned or is under the State's clear responsibility because of written leases or other agreements is covered against loss or damage. A.R.S. § 41-621(A)(4). Excluded from this coverage is loss of property "due to mechanical or electrical breakdown, ordinary wear and tear or obsolescence, nonserviceability, mysterious disappearance or inventory shortage." A.R.S. § 41-622(B).

13.4.7 Acts Excluded from Coverage.

13.4.7.1 Acts Constituting Felonies. A loss caused by an act or omission determined by a court to be a felony is not covered by Risk Management unless the State knew of the employee's propensity for the particular act. A.R.S. § 41-621(L)(1). This exclusion from coverage does not apply to acts arising out of the operation or use of a motor vehicle. *Id*.

13.4.7.2 Acts Outside the Course and Scope of Employment or Authorization. If a state employee is sued based on conduct outside the course and scope of his or her employment, *see* Sections 13.4.2 and 13.4.3, the State is not obligated to provide self-insurance coverage for that conduct. *See* A.R.S. § 41-621(A)(3), (R). If the conduct is clearly outside the course and scope, the State will deny coverage. If there is a question whether the employee's acts were within the course and scope of employment, the State

may reserve the right to refuse to pay any judgment; if it does, it will hire outside counsel to represent the employee.

13.5 Procedures for Tort Claims. The procedures for bringing tort claims against state entities or political subdivisions of the State are generally governed by A.R.S. §§ 12-820 to -823. Different procedures apply to contract claims against state entities. *See* Section 13.6.

13.5.1 Mandatory Presentation of the Notice of Claim. Before a party may file a tort lawsuit against any public entity or employee, the party must file a notice of the claim in compliance with the provisions of A.R.S. § 12-821.01.

The purposes of the statutory notice-of-claim requirement are: (1) to provide prior notice to allow public entities to investigate and assess potential liability, (2) to facilitate settlement, and (3) to assist in financial planning and budgeting. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295 ¶ 6,152 P.3d 490, 492 (2007); *Falcon ex rel. Sandoval v. Maricopa Cnty.,* 213 Ariz. 525, 527 ¶ 9, 144 P.3d 1254, 1256 (2006).

13.5.1.1 Contents of the Notice of Claim. The notice of claim must contain:

1. "[F]acts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed"

2. "[A] specific amount for which the claim can be settled" and

3. "[T]he facts supporting that amount."

A.R.S. § 12-821.01(A). No Arizona decision has specifically decided whether the requirement to provide facts concerning the claimed basis of liability includes the need to identify legal theories. *Mutschler v. City of Phoenix*, 212 Ariz. 160, 162 n.4, 129 P.3d 71, 73 n.4 (App. 2006). But the court of appeals has held that the requirement to provide facts supporting the amount demanded for settlement does not require identification of legal theories, reasoning that that portion of the statute calls for facts, not theories. *Yollin v. City of Glendale*, 219 Ariz. 24, 32 ¶ 26, 191 P.3d 1040, 1048 (App. 2008). The requirement for a specific settlement amount mandates "a particular and certain amount of money that, if agreed to by the government entity, will settle the claim." *Deer Valley Unified Sch. Dist. No. 97*, 214 Ariz. at 296 ¶ 9, 152 P.3d at 493. Thus, a claim that tempers the settlement demand with ambiguous expressions like "approximately" and "no less than" is noncompliant. *Id*. But the requirement to provide "the facts supporting that amount" leaves it to the claimant to decide how much information to provide: the notice of claim need only "provid[e] the factual foundation that the claimant regards as adequate to permit the public

entity to evaluate the specific amount claimed." *Backus v. State*, 220 Ariz. 101, 107 ¶ 23, 203 P.3d 499, 505 (2009).

13.5.1.2 Filing the Notice of Claim. The notice-of-claim statute requires that the notice of claim be filed, A.R.S. § 12-821.01(A), which means that it must be actually delivered to the proper recipient, *Lee*, 218 Ariz. at 237 ¶ 7, 182 P.3d at 1171; *id* at 239 ¶ 19, 182 P.3d at 1173. The proper recipient is determined by Arizona Rule of Civil Procedure 4.1. A.R.S. § 12-821.01(A). Notices of claim against the State must be filed with the Attorney General. Ariz. R. Civ. P. 4.1(h)(1). If the claimant desires to proceed against a public employee, a separate notice of claim must be filed with that employee. *Crum v. Superior Court*, 186 Ariz. 351, 352, 922 P.2d 316, 317 (App. 1996). This notice of claim must be delivered to the individual employee. Ariz. R. Civ. P. 4.1(d). Notices of claim against state agencies that have the power to sue and be sued on their own must be delivered to:

> (A) The individual designated by the entity pursuant to statute to receive service of process; or
>
> (B) If the entity has not designated a person to receive service of process, then the chief executive officer(s), or, alternatively, the official secretary, clerk, or recording officer of the entity as established by law.

Ariz. R. Civ. P. 4.1(h)(4). See Section 13.2.2 for a further discussion of service.

13.5.1.3 Time for Filing the Notice of Claim. A claim must be filed within 180 days "after the cause of action accrues." A.R.S. § 12-821.01(A). Under the statute, "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." A.R.S. § 12-821.01(B). In other words, a cause of action accrues "when the plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by a particular defendant's negligent conduct." *Young v. City of Scottsdale*, 193 Ariz. 110, 114, 970 P.2d 942, 946 (App. 1998). "The relevant inquiry is when did a plaintiff's knowledge, understanding, and acceptance in the aggregate provide [ ] sufficient facts to constitute a cause of action." *Little v. State*, 225 Ariz. 466, 469, ¶ 9, 240 P.3d 861, 864 (App. 2010) (alteration in original) (internal citation and quotation marks omitted).

13.5.1.3.1 Legal Disability. Minors must file their notices of claim within 180 days after their eighteenth birthday. A.R.S. § 12-821.01(D). Insane or incompetent persons must file their notices of claim within 180 days after their disability ceases. A.R.S. § 12-821.01(D). *See* Section 13.2.5.2.1.1.

13.5.1.4 Disallowance of Claim. Claims are deemed denied sixty days after filing, unless the claimant is advised of the denial in writing before sixty days pass. A.R.S. § 12-821.01(E).

13.5.1.5 Claims Arising Under Federal Law. A notice of claim is not required for claims arising under federal law, whether suit is to be filed in federal or state court. *Felder v. Casey*, 487 U.S. 131, 138 (1988).

13.5.2 Lawsuits Involving Tort Claims.

13.5.2.1 Time for Filing the Lawsuit (Statute of Limitations). "All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." A.R.S. § 12-821. Arizona follows the discovery rule in determining when a cause of action accrues. A cause of action accrues when the plaintiff "discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct." *Anson v. Am. Motors Corp.,* 155 Ariz. 420, 423, 747 P.2d 581, 584 (App. 1987).

13.5.2.1.1 Tolling. The statute of limitations is tolled for persons with certain legal disabilities. That means that the statute of limitations does not run during the period of that disability. Thus, the statute of limitations does not begin to run against a minor until his or her eighteenth birthday, and it does not run against a plaintiff while that person is of unsound mind. A.R.S. § 12-502. Not every condition affecting mental ability results in an unsound mind; it applies only to persons who cannot manage their daily affairs or cannot comprehend their legal rights. *Florez v. Sargeant*, 185 Ariz. 521, 917 P.2d 250 (1996). Determining whether a person is or was of unsound mind is a fact-intensive question that the jury must decide. *Doe v. Roe*, 191 Ariz. 313, 327-28, 955 P.2d 951, 965-66 (1998).

The statute of limitations is not tolled while the claimant is complying with the notice-of-claim statute. *Stulce v Salt River Project Agric. Improvement & Power Dist.*, 197 Ariz. 87, 89 ¶ 1, 3 P.3d 1007, 1009 (App. 1999).

13.5.2.2 Jurisdiction and Venue. The Arizona Constitution provides that the superior court has original jurisdiction for matters involving claims of $1,000 or more. Ariz. Const. art. 6, § 14. In A.R.S. § 22-201(B), the Legislature purported to give justice courts exclusive original jurisdiction for all matters involving claims of $5,000 or less. In *State ex rel. Neely v. Brown*, 177 Ariz. 6, 8, 846 P.2d 1038, 1040 (1993), the Arizona Supreme Court harmonized the conflict between those provisions, concluding that the superior court had concurrent jurisdiction with the justice court for matters involving claims between $1,000 and $5,000.

Under A.R.S. § 12-401, the general venue statute, actions against the State may be brought in any county where venue is otherwise proper. *Dunn v. Carruth*, 162 Ariz. 478,

480, 748 P.2d 684, 686 (1989). Actions against public officers may be brought in any county in which any of the defendant officers hold office. A.R.S. § 12-401(16).

Although a lawsuit against the State may be brought in any county, the Attorney General's Office may move the case to Maricopa County pursuant to A.R.S. § 12-822(B). The statute requires that demands for change of venue be filed before, or concurrent with, the answer. In addition to the Attorney General's Office, private counsel appointed by the Attorney General to represent the governmental defendant may also demand a venue change under A.R.S. § 12-822(B). *State Dep't of Corr. v. Fenton*, 163 Ariz. 174, 175, 768 P.2d 1025, 1026 (App. 1989). Moreover, the court of appeals has stated—but has not conclusively held—that counsel representing an agency that is exempt from representation by the Attorney General may also require that venue be changed to Maricopa County. *Cochise Cnty. v. Borowiec*, 162 Ariz. 192, 194, 781 P.2d 1379, 1381 (App. 1989). Cases moved to Maricopa County under A.R.S. § 12-822(B) are subject to further motions for change of venue under A.R.S. § 12-406. *Dunn*, 162 Ariz. at 480, 784 P.2d at 686. However, a party moving for a second venue change bears the burden of demonstrating that a change is necessary: "The burden of proof is on the moving party, who must show 'a balance of interests favoring transfer.'" *Id*. at 481, 784 P.2d at 687 (quoting *Cohen v. Superior Court*, 14 Ariz. App. 406, 408, 484 P.2d 18, 20 (1971)).

13.5.2.3 Defendants. Although the State of Arizona is usually a named defendant, an agency and individual employees are often also named as defendants. A state agency is not a proper party unless the Legislature has given it authority to sue and to be sued in its own right. *Kimball v. Shofstall*, 17 Ariz. App. 11, 13, 494 P.2d 1357, 1359 (1972).

13.5.2.4 Pleadings and Service of Process. "Service of a summons in an action against any public entity or public employee involving acts that are alleged to have occurred within the scope of the public employee's employment" must be made pursuant to the Arizona Rules of Civil Procedure. A.R.S. § 12-822(A). See Section 13.2 for a discussion of service of a summons on state entities or employees.

13.5.2.5 Judgment, Punitive Damages, Interest, Costs, and Attorneys' Fees. "If judgment is rendered for the plaintiff, it shall be for the amount actually due from the public entity to the plaintiff, with legal interest thereon from the time the obligation accrued and with court costs." A.R.S. § 12-823. Prejudgment interest will be awarded if the substantive law allows it. *Fleming v. Pima Cnty.*, 141 Ariz. 149, 155, 685 P.2d 1301, 1307 (1984). Unless a different interest rate is contracted for in writing, the annual rate on the judgment is the lesser of ten percent or one percent over the Federal Reserve's prime interest rate. A.R.S. § 44-1201(B). However, if an appeal is taken from a judgment against the State that is to be paid from the Risk Management's revolving fund, a special interest rate applies. "During the course of the appeal," interest "shall accrue at the average yield offered by United States treasury bills." A.R.S. § 12-622(F). If the State loses the appeal, "the judgment amount plus interest at the rate prescribed in this subsection shall be paid." *Id*.

The judgment's language need not specifically anticipate the application of this statutory rate. *Minjares v. State*, 223 Ariz. 54, 59 ¶ 19, 219 P.3d 264, 269 (App. 2009). Nevertheless, to avoid the problems that arose in *Minjares*, the better practice is to ensure that the actual language in the judgment reflects the possibility of applying this statutory rate should an appeal be taken.

Punitive damages should not be awarded for claims arising under state law because public entities and public employees acting within the scope of their employment are immune from punitive damages for state-law claims. A.R.S. § 12-820.04; *see also* Section 13.4.5.

Attorney fees are not addressed in the statutory provisions in A.R.S. §§ 12-820 to -826 concerning actions against public entities. Under A.R.S. § 12-348, fees may be awarded against governmental entities for specific types of actions, including civil actions brought by the governmental entity, judicial review of agency decisions, special actions challenging a state action, actions challenging assessment, collection of taxes, and other listed actions.

Arizona law generally does not provide for fee awards in tort actions, even if the issues center on a state agency's decisions. *See generally New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 106-10, 696 P.2d 185, 196-200 (1985). However, in one case, the Arizona Court of Appeals held that a statute that grants attorneys' fees to the successful petitioner in a mandamus action applied even though the suit was a civil action for damages, not a mandamus action. In *Bilke v. State*, 221 Ariz. 60, 209 P.3d 1056 (App. 2009), prison inmates won damages based on the Department of Corrections' failure to pay them the federal minimum wage for labor that they had performed for private companies. The court applied A.R.S. § 12-2030(A), which allows fees for the successful litigant "in a civil action . . . to compel a state officer or any officer of any political subdivision of this state to perform an act imposed by law as a duty on the officer." *Id.* at 62 ¶ 6, 209 P.3d at 1058. The court held that the damages suit requested "mandamus-type relief," as envisioned by the statute. *Id.* The court stated that "[t]his was not an ordinary action to recover damages for breach of contract or personal injuries. The State's statutory obligation to make sure inmates were paid minimum wage was mandatory, and the director has no discretion to choose whether to pay the required compensation." *Id*. at 63 ¶ 12, 209 P.3d at 1059. The Arizona Supreme Court later issued an opinion that casts some doubt on *Bilke*'s expansive reading of A.R.S. § 12-2030(A). *See Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370-71 ¶¶ 18-24, 295 P.3d 943, 947-48 (2013). Nevertheless, *Bilke* has not been overruled.

Fee awards in contract actions are generally authorized by A.R.S. § 12-341.01.

13.5.2.6 Satisfaction of Judgment. Judgments are satisfied from the permanent liability loss revolving fund as provided in A.R.S. § 41-622. A three-step process for paying

each judgment is established in A.R.S. § 12-826. The Governor must report the judgment to the Legislature. A.R.S. § 12-826(A). The Legislature must make an appropriation. A.R.S. § 12-826(C). After the appropriation has been made, the Director of the Department of Administration must draw a warrant after being presented with an authenticated copy of the judgment and the Attorney General's approval. A.R.S. § 12-826(B).

13.5.3 Settlements. Upon receipt of a notice of claim or a summons and complaint, the Department of Administration will, with the aid of the Attorney General's Office, investigate and, where appropriate, attempt to settle the claim directly with the claimant. Claims or lawsuits involving a settlement sum of $100,000 or less may be settled with the approval of the Director of the Department of Administration. When the settlement payment is from $100,000 to $250,000, approval by the Director of the Department of Administration and the Attorney General is required. A.R.S. § 41-621(N); Joint Legislative Budget Committee Rules and Regulations, Rule 14.1(A). When the settlement sum exceeds $250,000, the Director of the Department of Administration, the Attorney General, and the Joint Legislative Budget Committee must approve it. A.R.S. § 41-621(N); Joint Legislative Budget Committee Rules and Regulations, Rule 14.1(A).

13.6 Procedures for Contract Claims.

13.6.1 Applicability of Procurement Code. The Procurement Code and associated rules adopted by the Director of the Department of Administration provide "the exclusive procedure for asserting a claim against this state or any agency of this state arising in relation to any procurement conducted under this chapter." A.R.S. § 41-2615. The statute explicitly excludes the notice-of-claim process established in A.R.S. § 12-821.01, as well as arbitration under the Uniform Arbitration Act. *Id*. With limited exceptions, the Procurement Code "applies to every expenditure of public monies, including federal assistance monies . . . by this state, acting through a state governmental unit [which includes all executive branch agencies and the corporation commission] . . . under any contract . . . ." A.R.S. § 41-2501(B). "Contract" is defined in A.R.S. § 41-2503(7) as "all types of state agreements, regardless of what they may be called, for the procurement of materials, services, construction, construction services or the disposal of materials." "Procurement" is defined in A.R.S. § 41-2503(32)(A) to include "buying, purchasing, renting, leasing or otherwise acquiring any materials, services, construction or construction services." But the definition of "materials" excludes from the Procurement Code's purview acquisitions of land, permanent interests in land or real property, and leasing space. A.R.S. § 41-2503(27)(b). A general discussion of the Procurement Code, including its scope, appears in Chapter 5.

13.6.2 Procedures for Making Contract Claims.

13.6.2.1 Procedures Under Title 35. Under A.R.S. § 35-181.01(A), all claims against the State arising from contracts "shall be paid in accordance with procedures

prescribed by the director of the department of administration." In most cases, the State will make payment when the prescribed procedures have been followed and the claim is valid. If a dispute regarding a claim's payment arises, the dispute-resolution procedures of the Procurement Code come into play. *See* Section 5.6 for a more extensive discussion of the claim procedures.

13.6.2.2 Dispute-Resolution Procedures of the Procurement Code. The Director of the Department of Administration "may adopt rules of procedure providing for the expeditious administrative review of all contract claims or controversies both before the purchasing agency and through an appeal heard before the director in accordance with" the provisions of the Administrative Procedures Act applicable to contested cases, A.R.S. § 41-1092. *See* A.R.S. § 41-2611(A). The Director has promulgated the required rules. *See* A.A.C. § R2-7-A901 to -A911.

13.6.3 Judicial Review of Decisions of the Director of the Department of Administration in Contract Claims Disputes. The Director's decisions under the Procurement Code may be reviewed under the Administrative Review Act, A.R.S. §§ 12-901 to -914. *See* A.R.S. § 41-2614. This remedy is exclusive. A.R.S. § 41-2615. Any action seeking review under the Administrative Review Act must be filed in Maricopa County Superior Court. A.R.S. § 41-2614. The action must be filed "within thirty-five days from the date when a copy of the decision sought to be reviewed is served upon the party affected." A.R.S. § 12-904(A).

13.6.4 Contract Claims Not Covered by the Procurement Code. Only the Board of Regents, the Legislature, and the courts are generally excluded from coverage under the Procurement Code. A.R.S. § 41-2501(E). However, the Board of Regents and the judicial branch must establish their own procurement rules. A.R.S. § 41-2501(F). Other limited exemptions for particular contracts of specified agencies are set forth at A.R.S. § 41-2501(F) through (EE).

In other cases involving particular exempt contracts, the affected agency has the same authority to adopt rules as does the Director of the Department of Administration. A.R.S. § 41-2501(O). Any such rules may provide some sort of administrative dispute-resolution procedure in compliance with the provisions of the Uniform Administrative Hearing Procedures Act, A.R.S. §§ 41-1092 to -1092.12.

Thus, when a contract dispute arises, one should first determine if the Procurement Code's dispute-resolution procedures apply. If they do not, the next step is to see if the rules of the contracting agency provide a procedure for adjudicating contract disputes. If so, that procedure should be followed.

If the Procurement Code and accompanying rules do not apply to a contract claim and if the contracting agency has no applicable rules, the procedures regarding appealable

agency actions may apply. See Section 10.2.2.2 for a discussion of appealable agency actions.

13.6.5 Exclusivity of Procurement Code Procedures to Claims Related to Procurement Contracts. The procedures afforded by the Procurement Code for "asserting a claim against this state or any agency of this state arising in relation to any procurement conducted under this chapter" are exclusive. A.R.S. § 41-2615. Therefore, other statutes, specifically including A.R.S. §§ 12-821 (establishing a statute of limitations for claims against the government) and 12-821.01 (requiring service of a notice of claim before filing suit), probably do not apply to resolving contract disputes arising from a Title 41 procurement. This issue has not been definitively settled in Arizona, although there is published authority supporting it. The court of appeals has held that the notice-of-claim statute, A.R.S. § 12-821.01, does not apply to Procurement Code cases. *Ry-Tan Constr., Inc. v. Wash. Elementary Sch. Dist. No. 6*, 208 Ariz. 379, 392 ¶ 42, 93 P.3d 1095, 1108 (App. 2004), *vacated*, 210 Ariz. 419, 111 P.3d 1019 (2005); *accord Howland v. State*, 169 Ariz. 293, 300 n.5, 818 P.2d 1169, 1176 n.5 (App. 1991) (dictum). However, the Arizona Supreme Court vacated the court of appeals' *Ry-Tan Construction* opinion without reaching the notice-of-claim issue. *Ry-Tan Constr., Inc. v. Wash. Elementary Sch. Dist. No. 6*, 210 Ariz. 419, 111 P.3d 1019 (2005).

13.6.6 Attorneys' Fees. Under A.R.S. § 41-1007, a hearing officer or administrative law judge shall award fees and other costs to a prevailing party if the agency's action was not substantially justified. A.R.S. § 41-1007(A)(1), (2).

Under A.R.S. § 12-348(A)(2) attorneys' fees must be awarded to the prevailing claimant in "[a] court proceeding to review a state agency decision pursuant to" the Administrative Review Act, A.R.S. §§ 12-901 to -914. An award under this statute applies to judicial actions challenging an agency's administrative ruling. *See New Pueblo Constructors, Inc.*, 144 Ariz. at 109, 696 P.2d at 199. The statute thus would allow fee awards in judicial-review proceedings in Procurement Code cases. Unlike A.R.S. § 41-1007, awards under A.R.S. § 12-348 are mandatory, whether or not the agency's action was substantially justified. Note, however, that because fee awards under A.R.S. § 12-348 are limited to "court proceeding[s]," the statute does not apply to fees incurred in administrative proceedings before the Director of the Department of Administration.

Under A.R.S. § 12-341.01(A), the prevailing party may recover attorneys' fees in an "action arising out of a contract." Although contract disputes may arise between a contractor and the State under a contract awarded pursuant to the Procurement Code, A.R.S. § 12-341.01 might not apply if A.R.S. § 12-348(A)(2) is applicable. The language of A.R.S. § 12-341.01 providing that the statute shall not be construed as "altering, prohibiting or restricting present or future contracts or statutes that may provided for attorney fees" means that A.R.S. § 12-341.01 is subordinate to other statutes which may provide for fees. *Lange v. Lotzer*, 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986) (citing the quoted

language in support of its holding that a more specific attorney-fees statute trumped A.R.S. § 12-341.01(A)). Whether A.R.S. § 12-348(A)(2) would be considered a more specific statute than, and therefore trump, A.R.S. § 12-341.01(A) is an open question. In one case, the court of appeals upheld the trial court's award of fees under A.R.S. § 12-348(A) and at the same time awarded attorneys' fees on appeal under A.R.S. § 12-341.01(A). *Indus. Comm'n v. Old Republic Ins. Co.*, 223 Ariz. 75, 81 ¶¶ 22-24, 219 P.3d 285, 291 (App. 2009). In that decision, however, the court did not recognize, let alone analyze, the possibility that A.R.S. § 12-341.01(A) is subordinate to A.R.S. § 12-348(A)(2) or that the latter is more specific than the former.

One appellate decision has upheld an award of fees under A.R.S. § 12-341.01(A) in a special action brought by an unsuccessful bidder challenging an award. *ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 673 P.2d 934 (App. 1983). Whether that decision would support an award under A.R.S. § 12-341.01(A) to an unsuccessful bidder in a challenge brought under the Procurement Code is questionable, and indeed, its holding that the statute supported fees for the special action has become suspect. The court there held that the action arose out of contract—as A.R.S. § 12-341.01(A) requires—because the "contract was a factor causing the dispute." *Id*. at 192, 673 P.2d at 936. The Arizona Supreme Court subsequently limited the application of A.R.S. § 12-341.01(A) to matters in which the gist of the plaintiff's claim is an alleged breach of contract. In *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987), the court vacated the award of fees granted to the plaintiffs in a legal-malpractice suit, holding that the claim did not arise out of the contract that created the attorney–client relationship, but rather from general tort-law principles that inhere in the attorney–client relationship: "[W]here the . . . contract does no more than place the parties in a relationship in which the law then imposes certain duties recognized by public policy, the gravamen of the subsequent action for breach is tort, not contract." *Id*. at 523, 747 P.2d at 1222. In a case illustrating that principle, the court of appeals held that an action under the so-called "Lemon Law" does not arise out of contract for purposes of A.R.S. § 12-341.01(A) because the statute, not the contract, was the gist of the action. According to the court, the underlying contract was "only a factual predicate to the action but not the essential basis of it." *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325, 856 P.2d 1201, 1203 (App. 1993). The court added that "[i]f a cause of action is purely statutory, section 12-341.01(A) does not apply." *Id*. Because—by definition—the unsuccessful bidder has no contract, its claim against the government logically must rest on duties created elsewhere and the action therefore does not arise out of contract. Furthermore, in a bid protest premised on such things as constitutional rights, the Procurement Code's requirements, or the procedures established in the invitation for bids, the gist of the action would be *those* requirements, not the resulting contract. Consequently, A.R.S. § 12-341.01(A) should not apply. And if, as is suggested above, a *successful* bidder cannot rely on A.R.S. § 12-341.01(A) in an action for judicial review of an administrative procurement decision—even though it actually has a contract—then *a fortiori* an unsuccessful bidder, which lacks a contract on which to base its claim, should not be able to rely on that section. Nevertheless, while *ASH, Inc.* has been

criticized, *see Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986), it has not been overruled.

In any event, any award of attorneys' fees under A.R.S. § 12-341.01(A) is limited to work done in court proceedings; the statute does not permit an award of attorneys' fees for work done in administrative proceedings. *Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611, 838 P.2d 1369, 1372 (App. 1992).

Finally, in civil actions, A.R.S. § 12-349 requires the court to award attorney fees and other expenses against an attorney or party (including the State) if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

This provision would also apply to court proceedings brought under the Procurement Code.

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