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Civil Procedure - Filing of Claims against the State: Is Almost Good Enough - Rissier & (and) McMurry Co. v. Wyoming Highway Department

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CASE NOTES

CIVIL PROCEDURE—Filing of Claims Against the State: Is "Almost" Good Enough? Rissler & McMurry Co. v. Wyoming Highway Department, 582 P.2d 583 (Wyo. 1978).

Rissler & McMurry Company, a road building contractor, filed a claim with the Wyoming Highway Department in compliance with the Department's published claims procedure.[1] The claim was based on the contention that the Department had materially changed the conditions of a construction contract after letting the bid, causing Rissler & McMurry to sustain a loss in excess of $43,000.

The parties began negotiations and a hearing was eventually held before the Wyoming Highway Commission, at which time the claim was denied. No record was made of the hearing, and no findings of fact nor conclusions of law were prepared by the Highway Commission.

Nevertheless, Rissler & McMurry appealed the adverse decision of the Highway Commission to the district court. The Highway Commission moved to dismiss on grounds that Rissler & McMurry had failed to file a claim with the State Auditor within one year of the date on which the claim arose, as required by law.[2] The district court granted the motion to dismiss without any evidence being presented except an affidavit from the State Auditor saying that he had not received a claim from Rissler & McMurry.

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1. Wyoming State Highway Department 1974 Specification Book, § 105.17. Claims for Adjustments and Disputes. If in any case the Contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered as extra work as defined herein, or that the contract time be extended, the Contractor shall notify the Engineer in writing within a reasonable time of his intention to make a claim for such additional compensation or extended time. This notification should also specify the basis for the claim. The Engineer will acknowledge receipt of said intention and advise the Contractor that consideration will be given the claim when it is submitted in a formal manner with complete and thorough justification for every item.

   Within sixty (60) days from the date of the Contractor's formal claim, the Department will render to the Contractor a judgment in writing. This judgment shall be final and binding upon both parties to the contract unless the Contractor files within thirty (30) days of the date of said judgment a written notice of appeal with the Secretary of the Highway Commission. Subsequent to the filing of the notice of appeal, the claim will be pursued according to the Contractor's Claim Procedure adopted by the Highway Commission.

   Under no circumstances will a claim be considered if submitted later than sixty (60) days after publication of first notice of advertisement that work has been accepted as complete.

   If the claim is found to be just, it will be paid on the basis of actual costs to which no percentage will be added. The justification for payment may be based upon an audit by the Department of the Contractor's project records and cost accounting system. Nothing in this subsection should be construed as establishing any claim contrary to the terms of subsection 104.02.
2. Wyo. Stat. § 9-2-332 (1977). Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within one (1) year after such claim shall accrue, and not afterward.

In a split decision, the Wyoming Supreme Court reversed the district court on the basis that Rissler & McMurry had substantially complied with the notice of claim requirements.[3] This decision adds a new wrinkle to previous rulings by the Wyoming Supreme Court on the issue of compliance with the notice of claim statute. The purpose of this note is to analyze the court's rationale and criteria for finding substantial compliance and to estimate the impact of the *Rissler & McMurry* decision on future cases.

PREVIOUS WYOMING NOTICE OF CLAIM DECISIONS

Since 1876, when the notice of claim statute first appeared in Wyoming,[4] the supreme court has had four opportunities to interpret that law prior to its decision in *Rissler & McMurry*. All four decisions barred recovery to plaintiffs who failed to file timely claims with the State Auditor.

The first, *Utah Construction Co. v. State Highway Commission*,[5] involved a contract claim similar to the one in the Rissler & McMurry case. The court held that the presentation of the claim to the State Auditor was a condition precedent to the right to sue, and Utah Construction's petition was held fatally defective because it failed to show a timely filing.[6] The court reaffirmed these holdings in *Price v. State Highway Commission*,[7] involving a tort claim against the state.

More recently, the court said in *Awe v. University of Wyoming*,[8] that the filing of a claim was a condition precedent to *any* action filed against the State directly, or against one of its subdivisions under Section 1-35-101 of the Wyoming Statutes,[9] regardless of whether the particular subdivision had liability insurance or not. The court also continued to hold that the State Auditor was the only officer with

3. Rissler & McMurry Co. v. Wyoming Highway Department, 582 P.2d 583 (Wyo. 1978).
4. C. L. 1876, CH. 113, TITLE IV, § 7. The notice of claim statute was first passed during Wyoming's territorial days.
5. 45 Wyo. 403, 19 P.2d 951 (1933).
6. *Id.* at 955.
7. 62 Wyo. 385, 167 P.2d 309 (1946).
8. 534 P.2d 97 (Wyo. 1975).
9. WYO. STAT. § 1-35-101 (1977).

whom claims against the State could properly be filed,[10] as it had in *Utah Construction* and *Price.* Again, in *Wyoming State Highway Department v. Napolitano,*[11] the court reaffirmed the condition precedent rule, specifically with regard to inverse condemnation suits.

However, the court found a major distinction between the *Rissler & McMurry* situation and previous Wyoming cases. The court decided that it had never been presented with a case where the claim had been timely presented to a subdivision, the Wyoming Highway Department, instead of to the State Auditor. The court concluded that none of the previous Wyoming cases would help decide whether giving notice of a claim to the subdivision was substantially the same as notifying the Auditor.[12]

SUBSTANTIAL COMPLIANCE DOCTRINE

Realizing the sometimes unjustly harsh effects of rulings based upon non-compliance with the strict procedural mandates of notice of claim statutes and ordinances, some courts have used the equitable doctrine of substantial compliance to prevent such laws from becoming traps for the unwary.[13] The doctrine probably had its beginnings in contract law and the doctrine of substantial performance. The idea in contract is that when a condition precedent to a contract exists, performance which meets the substantive requirements of the condition is enough to bind the other party.[14] Substantial compliance is merely another name for the same principle as it applies to various situations, some involving conditions precedent[15] and others involving sundry types of procedural requirements.[16]

In order to apply the doctrine of substantial compliance, the court determines whether there has been "actual compliance in respect to the substance essential to every reasonable objective of the statute."[17] The effect of finding

10. Awe v. University of Wyoming, 534 P.2d 97, 106 (Wyo. 1975).
11. 578 P.2d 1342 (Wyo. 1977).
12. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 586.
13. Elias v. County of San Bernadino, 135 Cal. Rptr. 621 (1977).
14. WILLISTON, LAW OF CONTRACTS § 805 (1920).
15. St. Louis, Memphis & S. E. R. Co. v. Houck, 120 Mo. App. 634, 97 S.W. 963 (1906).
16. In re Rudd's Estate, 140 Mont. 170, 369 P.2d 526 (1962).
17. Coe v. Davidson, 43 Cal. App.3d 170, 117 Cal. Rptr. 630, 633 (1974).

Land & Water Law Review, Vol. 14 [1979], Iss. 1, Art. 9

substantial compliance with the notice of claim statute is to allow the plaintiff to maintain his right of action against the governmental unit despite his procedural error. Prior to the *Rissler & McMurry* case, the Wyoming Supreme Court did not have occasion to consider the doctrine's applicability to Wyoming's notice of claim law.

ANALYSIS OF THE COURT'S RATIONALE

A weakness of the majority opinion in *Rissler & McMurry* is the court's failure to enunciate the relevant criteria necessary for substantial compliance. A careful reading of the opinion, however, produces a fairly clear picture of the factors essential to the court's conclusion.

First, the court examined the purposes of the notice of claim statute to determine whether those purposes had been met in Rissler & McMurry's situation.[18] While all the justices agreed that the law was designed to give the State an opportunity to promptly investigate and attempt to settle meritorious claims without litigation,[19] the dissenters felt that the preclusion of an investigation by the State Auditor, according to his statutory[20] and constitutional[21] power, prevented such purposes from being achieved.[22] The majority held that since an investigation and settlement attempt had been made here, the question as to what the State Auditor might have done with the claim was inconsequential,[23] and that the statutory purpose had been met.[24]

The court then pointed out that the State was not prejudiced by Rissler & McMurry's actions in filing its claim

18. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 586, 590.
19. *Id.* at 587. *See also*, 590 (dissenting opinion).
20. WYO. STAT. § 9-2-334 (1977). The auditor, whenever he may think it necessary to the proper settlement of any account, may examine the parties, witnesses or others, on oath or affirmation, touching any matters material to be known in the settlement of such accounts, and for that purpose may issue subpoenas and compel witnesses to attend before him, and give evidence in the same manner and by the same means allowed by law to courts of record.
21. WYO. CONST. art. XVI, § 7. No money shall be paid out of the state treasury except upon appropriation by law and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state, or any county or political subdivision, shall be audited, allowed or paid until a full itemized statement in writing, certified to under penalty of perjury, shall be filed with the officer or officers whose duty it may be to audit the same. *See also*, WYO. STAT. § 9-2-331(a)(i) (1977).
22. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 590 (dissenting opinion).
23. *Id.* at 587.
24. *Id.*

with the Highway Department.[25] The claim had been investigated by the Department and settlement negotiations had begun; the court found that although the State Auditor legally could make an independent investigation,[26] he did not normally do so in Highway Department cases.[27]

In addition, the court felt that Rissler & McMurry had taken a series of steps to comply with the proper claims procedure *as the company understood it.* The contractor had, indeed, filed the claim with the Highway Department according to the Department's rules, well within the year contemplated by the statute.[28] The court apparently felt that because Rissler & McMurry did not think it had to file with the Auditor, based on past experience with Highway Department claims, its efforts were adequate to meet equitable requirements.

Since the Wyoming court was not specific about its criteria, it is instructive to look to another jurisdiction which has grappled with the substantial compliance doctrine. A recent New Jersey decision, *Bernstein v. Board of Trustees,*[29] succinctly summarizes the basic criteria developed from the body of case law for applying the doctrine of substantial compliance: (1) lack of prejudice to defendant; (2) demonstration of a series of acts to comply with the statute; (3) general compliance with the purpose of the statute; (4) reasonable notice to defendant of plaintiff's claim; (5) a reasonable explanation of why there was not strict compliance with the statute.[30] These factors must be evaluated by the court on the basis of the facts of each case.[31]

As noted above, the Wyoming court dealt with criteria one, two and three explicitly in the *Rissler & McMurry* opinion. But the court also seemed to implicitly recognize the other two *Bernstein* criteria, finding that both had been met. With reference to the issue of reasonable notice, the court found that Rissler & McMurry's filing was promptly made

25. *Id.*
26. WYO. STAT. § 9-2-331(a)(i) (1977). Audit and settle all claims against the state payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers and persons.
27. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 587-588.
28. *Id.* at 588.
29. 151 N.J. Super. 71, 376 A.2d 563 (1977).
30. *Id.* at 566.
31 Trussell v. Fish, 154 S.W.2d 587 (Ark. 1941).

to the authorities who investigated its claim.[32] It is interesting to note that the Highway Department's rules require a more prompt filing of claims than does the statute.[33] But once again, it was the fact that the Department was the *de facto* investigator of all claims against itself that allowed the court to say that the State had prompt and adequate notice.

The court also felt that Rissler & McMurry had a reasonable excuse for not strictly complying with the notice of claim statute. The majority made much of the fact that Rissler & McMurry had been induced by prior dealings with the Highway Department to believe that it did not need to file a claim with the State Auditor.[34] It appears that Rissler & McMurry had never been denied a previous claim against the State Highway Department, so the claimant never had occasion to doubt that its procedure was correct. The court was troubled by the fact that in cases where a contractor was granted a claim against the Department, the issue of whether or not a claim had been filed with the State Auditor never arose.[35] This inconsistency between the Highway Department rules and Section 9-2-332[36] seemed to the court to be a valid excuse for non-compliance with the latter. The court refused to condone a system whereby a contractor would be barred from access to the courts because he followed Highway Department claims procedure. As the majority put it, "[t]he Department . . . cannot play these kinds of games to defeat the good-faith claims of contractors.[37]"

Two vehement dissents were filed which dealt with three major issues: fulfillment of the purpose of the notice of claim statute, jurisdiction, and the timeliness of the claim. The first area was discussed earlier, but the other two were given little or no attention by the majority opinion.

The dissenters maintained that neither the district court nor the Wyoming Supreme Court had jurisdiction

32. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 586.
33. HIGHWAY DEPARTMENT RULES § 105.17, *supra* note 1, allow 60 days after publication of first notice of advertisement that work has been accepted as completed for claims to be filed.
34. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 586.
35. *Id.* at 588.
36. WYO. STAT. § 9-2-332 (1977).
37. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 586.

because of the failure of both parties to comply with the requirements of the Wyoming Administrative Procedure Act.[38] While the jurisdictional issues which the dissents addressed are beyond the scope of this note,[39] it should be emphasized that the informality of the Highway Commission hearing and the complete lack of a record of that hearing including findings of fact and conclusions of law, raised substantial questions.[40] It is difficult to see how the matter of the contractor's claim could be properly resolved on the basis of a petition for review without any more evidence than was contained in the *Rissler & McMurry* record.

As when Rissler & McMurry's claim arose, the dissenters argued that during the period that Rissler & McMurry was involved in negotiations with the Highway Department, it had no claim against the State.[41] One dissent then cited a dozen cases[42] holding that a claim does not accrue for filing limitation purposes until contractual procedures have been completed. The dissenters felt that the proceedings between Rissler and McMurry and the Highway Department were such contractual procedures and nothing more. The majority assumed that there was a valid claim that accrued at the date of the completion of the project, and failed to deal with the dissents' analysis at all.[43]

IMPACT OF THE DECISION

The *Rissler & McMurry* decision opens new doors in Wyoming law. As the dissenters pointed out, the judge-made condition precedent rule that has governed Wyoming notice of claim cases since *Utah Construction,*[44] loses some of its punch once substantial compliance is recognized.[45] But it may be a little extreme to assert, as the dissenters did, that the doctrine of substantial compliance will be the last nail in the coffin of sovereign immunity.[46]

38. WYO. STAT. §§ 9-4-101 to 9-4-115 (1977).
39. It is suggested that the reader closely read the dissenting opinions of Justices Thomas and Raper.
40. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 589 and 591-592 (dissenting opinion).
41. *Id.* at 589 (dissenting opinion).
42. *Id.* at 589-590 (dissenting opinion).
43. *Id.* at 586.
44. Utah Construction Co. v. State Highway Commission, *supra* note 5.
45. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 590 (dissenting opinion).
46. *Id.* at 590.

While the *Rissler & McMurry* court did recognize substantial compliance for the first time, it is not likely that the doctrine will be applied indiscriminately in the future. Indeed, the peculiarly compelling nature of the equities involved in the *Rissler & McMurry* case will not likely be equalled often. Armed with the relevant criteria for substantial compliance, the court must bear the responsibility of applying the doctrine, if at all, only where justice cannot otherwise be attained.

The court has not stricken down the State's sovereign immunity,[47] and until such a specific decision is made, *Rissler & McMurry* probably will not materially alter the State's protection because the doctrine of substantial compliance gives the claimant only the right to sue, not to automatically recover. In fact, there is no reason why a claim could not be rejected on the basis of sovereign immunity after it was momentarily saved by the doctrine of substantial compliance with the notice of claim statute.

The current status of the notice of claims statute after *Rissler & McMurry* is clouded by equivocal language in the opinion itself. After discussing the Highway Department's procedures, the court said, "By its own actions, then, we conclude that the filing of a claim by the contractor in compliance with the Department's published procedures has the effect of substantially complying with the claims statute."[48] The temptation is to interpret this sentence as condoning the procedure followed by Rissler & McMurry. But the court went on to say, "We hold, therefore, that while the claim must be submitted as required by our interpretation of the requirements of § 9-2-332 in (the four previous notice of claims cases), under the facts of this appeal the statute was substantially complied with."[49] Certainly it can be argued that the court was reaffirming the rule that claims must properly be filed with the Auditor, but that the *Rissler & McMurry* facts were uniquely deserving of an equitable remedy.

47. *See*, Oroz v. Board of County Commissioners of Carbon County, 575 P.2d 1155, 1161 (Wyo. 1978) (concurring opinion).
48. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 588.
49. *Id.* at 588.

On one hand, it appears that the court may have gone as far as to functionally abolish the requirement of filing with the Auditor in Highway Department cases, so long as the Department's procedure is followed. On the other hand, it may be that the court will require strict compliance with the statute now that the ambiguity surrounding claims procedures has been ruled upon, thus rendering such ambiguity inadequate as an excuse for non-compliance.

Clearly the safest procedure in a notice of claim situation after *Rissler & McMurry* is to file with the Auditor immediately[50] after a claim arises. The court's seeming reliance on the uniqueness of the independent auditing power of the Highway Department,[51] indicates that strict compliance seems especially advisable in cases against the State not involving the Highway Department. Because substantial compliance is an equitable doctrine, theoretically reserved for unusual cases where justice demands its application, and because the Wyoming Supreme Court has evinced a sharp split of opinion on the issue, the wisest course is to avoid ever having to make the argument of substantial compliance.

Undoubtedly, cases will arise wherein a claimant has not strictly complied with a notice requirement, for one reason or another. In such cases, the *Rissler & McMurry* decision will aid in asking the court for an equitable remedy. So long as the crucial elements of substantial compliance are met, it seems that an attorney with no other solution should try to persuade the court to apply the doctrine.

Now that the Wyoming Supreme Court has decided that filing with a State entity other than the Auditor may be substantial compliance, the question arises whether this opens the door to other procedural errors. The *Rissler & McMurry* decision, at least, gives Wyoming attorneys some precedent for such an argument. The factors of substantial compliance must be met, with each new situation being judged on its own merits. The authority is split on many specific types of notice of claim filing errors, but one thing is clear: substan-

50. The reader is reminded that two justices did not agree that the Rissler & McMurry claim arose immediately.
51. Rissler & McMurry Co. v. Wyoming Highway Department, *supra* note 3, at 587-588.

tial compliance cannot be predicated upon no compliance.[52] Failure to file a timely notice of claim is still as fatal as it was after *Utah Construction*, so *Rissler & McMurry* does nothing to help an attorney whose client approaches him about filing a claim against the State after the one-year limitation has run.

Another matter of concern is the possible application of the substantial compliance doctrine to other areas of the law. In other jurisdictions, the doctrine has been applied to types of cases wholly unrelated to notice of claim statutes, such as election procedure laws,[53] contracts,[54] military regulations,[55] insurance,[56] court rules,[57] settlement agreements,[58] Uniform Limited Partnership Act formation requirements,[59] retirement fund rules,[60] and various statutes prescribing the duties of public officials.[61] Thus, it is apparent that the doctrine has represented a viable equitable remedy in a number of situations for some time. The Wyoming Supreme Court, however, had only dealt with substantial performance in contract situations prior to the *Rissler & McMurry* decision.[62] Because the doctrine is equitable in nature, it is up to the courts to decide when the facts of a particular case call for application of the rule. The five *Bernstein* criteria would serve just as well in other types of cases, however, and would appear to be a good starting point for attorneys seeking to expand the Wyoming court's recognition of the substantial compliance doctrine.

CONCLUSIONS

Rissler & McMurry presented the Wyoming Supreme Court with an opportunity to exercise its equitable powers to right an apparent injustice. But the future of the doctrine of substantial compliance in Wyoming is unclear. The court's

52. Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13 (1941).
53. Opinion of the Justices, 275 A.2d 558 (Del. 1971).
54. Wentworth v. Medellin, 529 S.W.2d 125 (Tex. Civ. 1975).
55. Ex Parte McCollam, 45 F. Supp. 759 (D.N.J. 1972).
56. Allen v. Abrahamson, 12 Wash. App. 103, 529 P.2d 469 (1974).
57. Nelson v. McLean's Estate, 236 Mo. App. 718, 161 S.W.2d 676 (1942).
58. Ross v. Seip, 154 S.W.2d 958 (Tex. Civ. 1941).
59. Tiburon National Bank v. Wagner, 265 Cal. App.2d 991, 71 Cal. Rptr. 832 (1968).
60. Bernstein v. Board of Trustees, 151 N.J. Super. 71, 376 A.2d 563 (1977).
61. City of Kansas City v. Board of County Commissioners of Wyandotte County, 213 Kan. 777, 518 P.2d 403 (1974).
62. Pacific-Wyoming Oil Co. v. Carter Oil Co., 31 Wyo. 314, 226 P. 193 (1924); Leitner v. Lonabaugh, 402 P.2d 713 (Wyo. 1965).

Dyekman: Civil Procedure - Filing of Claims against the State: Is Almost G

opinion is, unfortunately, short of specific guidelines for the future administration of the doctrine. Compounding the problem is the fact that the necessarily subjective nature of the remedy makes it nearly impossible to predict how the court will view future cases. *Each* judge must decide whether the facts of *each* case warrant adoption of an equitable holding of substantial compliance. This unpredictability, more than anything else, should convince attorneys to do everything in their powers to avoid reliance on the *Rissler & McMurry* decision unless absolutely necessary.

The doctrine of substantial compliance should be viewed in its proper role, as an equitable saving-grace, not as a license to take legal shortcuts. It is a doctrine better avoided than exploited.

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