OPINION NO. 78-024

Syllabus:

The board of trustees of a state university may, with the concurrence of the attorney general, pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract to an individual who has properly asserted a claim against the university in a forum other than the Court of Claims.

To: Edward Q. Moulton, Vice Pres., Ohio State University, Columbus, Ohio
By: William J. Brown, Attorney General, May, 1, 1978

I have before me your request for my opinion which reads as follows:

> With increasing frequency, the University and its Board of Trustees find themselves defendants in lawsuits brought in the U.S. District Court or in administrative proceedings before Federal agencies such as EEOC or Department of Labor (Office of Veterans Reemployment Rights). Similarly, the Board may be the respondent in administrative proceedings before State agencies such as the Ohio Civil Rights Commission and State Personnel Board of Review. Sometimes the University or the Board is the only defendant or respondent, but often some ranking University administrators may be joined as codefendants. Occasionally, when confronted with the prospects of extensive preparation for litigation coupled with the uncertainty of the outcome, it becomes economically very attractive to settle the case with the payment of cash in order to obtain dismissal of the action. We seek your advice as to whether and by what procedures the University is able to settle these controversies by lump sum cash settlement and thus minimize its overall expense.

We therefore seek your formal opinion on the following question:

> In legal proceedings against the University pending or threatened before state and federal agencies, or in the federal courts, involving matters other than damage claims properly within the jurisdiction of the Court of Claims, is a state university authorized to pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract, to a claimant who has a right of action, other than in the Court of Claims, against the university or its board of trustees under either state or federal law.

Because of the nature of the issues raised in your request, I must express at the outset certain limitations regarding the scope of the following analysis. First, I shall assume that in mentioning suits against officers and administrators of the university, you are referring only to those actions in which the university itself may ultimately be held liable for the acts of such individuals.

Second, I shall assume that your inquiry is limited to those claims asserted against the university for which the defense of sovereign immunity is unavailable. It is well settled that state universities are mere agents or instrumentalities of the state and, as such, share in the sovereign immunity of the state. Thacker v. Board of Trustees, 35 Ohio St.2d 49 (1973). Although Ohio Const. art. I, § 16 provides that suits may be brought against the state in such manner as may be provided by law, the provision is not self-executing and it has been held consistently that suits can be brought against the state only in the manner and in accordance with the procedure provided for by the General Assembly. E.g., Wolf v. Ohio State University, 170 Ohio St. 49 (1959); State, ex rel. Williams v. Glander, 148 Ohio St. 188 (1947).

Similar in effect to the judicial doctrine of sovereign immunity is the concept of federal constitutional government embodied in the eleventh amendment. (U.S. Const. Amend. XI) Broadly speaking, operation of the eleventh amendment bars individuals from asserting claims in federal court that seek to impose financial liability upon the state without its consent. Edelman v. Georgia, 415 U.S. 651, 94 S.Ct. 1347 (1974). It should, of course, be noted that the requisite consent has been found to exist under a variety of circumstances. E.g. Fitzpatrick v. Bitzer, 427 U.S. 445, 96 Sup. Ct. 2666 (1976) (the eleventh amendment and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of the fourteenth amendment); Parden v. Terminal Ry. of Alabama, 337 U.S. 184, 84 S. Ct. 1207 (1964) (Waiver of immunity is inferred when state leaves sphere that is exclusively its own and enters into activities subject to congressional regulation.)

A detailed analysis of either sovereign immunity or the eleventh amendment is unnecessary to the disposition of the issues you raise. It is, however, important to realize that the imposition of financial liability upon the state is the prerogative of the state. Under no circumstances does an officer of the state possess the authority to waive the state's immunity from suit and subject it to financial liability of any kind. E.g., Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 65 S.Ct. 347 (1945); State, ex rel. Board of County Commissioners v. Rhodes, 177 N.E.2d 557 (1960). In discussing the power of state officers to compromise and settle claims asserted against the state, therefore, I shall assume that such claims are limited to those for which the defense of immunity is unavailable. The payment of money in settlement of a claim would otherwise constitute a waiver of the state's immunity.

A settlement or compromise has been defined as an agreement or arrangement whereby a right or claim disputed in good faith or unliquidated is settled by mutual concessions of the parties. National Labor Relations Board v. Illinois Tool Works, 153 F.2d 811 (1946); In Re Lovel Building Co., Inc., 116 F.Supp. 383 (1953). In Ohio, as in most jurisdictions, settlement agreements have been

characterized as contracts and their interpretation has been governed by contract law. Hageman v. Signal L.P. Gas Inc., 486 F.2d 479 (1973); Diamond v. Davis Bakery, 8 Ohio St.2d 38 (1966); Adams Express Co. v. Beckwith, 100 Ohio St. 348 (1919).

American courts have consistently recognized both the validity and desirability of settlements or compromises in lieu of litigation. See, e.g., Williams v. First National Bank, 216 U.S. 582, 30 S.Ct. 441 (1910); St.Louis Mining and Millling Co. v. Montana Mining Co., 171 U.S. 650, 195 S.Ct. 61 (1898). The courts of Ohio have long concurred in this position. In White v. Brocaw, 14 Ohio St. 339 (1863), the Ohio Supreme Court noted at 346 as follows:

> If there is any one thing which the law favors above another it is the prevention of litigation by the compromise and settlement of controversies.

See, also, Spercel v. Sterling Industries, 31 Ohio St.2d 36 (1972); Hawgood v. Hawgood, 33Ohio Misc. 227 (19[illegible]5); In Re Paternity, 4 Ohio Misc. 193 (1965); Mesmer v. Johnson, 68 O.L.A. 408 (1954). Thus, the law clearly favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation.

Your inquiry, however, concerns the power of a state university, through its board of trustees, to settle a claim asserted against it. It is appropriate, therefore, to examine briefly the powers of a board of trustees. It is true that the board is vested with broad supervisory powers concerning the government of the university. See, Long v. Board of Trustees, 24 Ohio App. 261 (1956); R.C. 3335.02; R.C. 3335.10. Its powers, however, are not without limits. See, e.g., 1974 Op. Att'y Gen. No. 74-108; 1974 Op. Att'y Gen. No. 74-098. The power to settle a claim asserted against it though the payment of a sum of money is not expressly conferred upon the board of trustees of a state university.

Courts have frequently held, however, that the power of a governmental entity to compromise a disputed claim may be inferred from more general powers. Since a settlement agreement is a contract, the power to compromise and settle a claim has been inferred from the statutory power to contract. It has also been viewed as a corollary of the power to sue and be sued. 17 E. McQuillin, Municipal Corporations § 48.17 et seq. (3rd ed. rev. 1968). In Roop v. Byer, 84 O.L.A. 417 (1959), the court, in concluding that a board of township trustees possessed the power to settle a lawsuit against it, noted at 418 as follows:

> At the outset, there is no question of the powers of the Trustees to settle a lawsuit. R.C. 508.01, referring to townships, provides:
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> It may sue and be sued, plead and be impleaded. The conferring by statute the right of a government to sue or to be sued also confers upon such authority the right when one is sued to compromise and settle said claim. In fact, in such cases, it is the duty of the trustees to use their best judgment and effort to protect the township in such lawsuit.

The Ohio State University is, of course, a body corporate and R.C. 3335.03 specifically empowers its board of trustees to contract and to sue and be sued. It is arguable, therefore, that under the foregoing theory the board possesses the implied power to settle a disputed claim that has been asserted against it.

I am, however, disinclined to so conclude. The power to sue and be sued and the power to contract relate only to the capacity of the university and its board of trustees. Wolf v. Ohio State University Hospital, 170 Ohio St. 49 (1959). Although the power to contract may well be a prerequisite to any binding contract to which the university is a party, it can scarcely be contended that a board of trustees is thereby authorized to enter into every conceivable type of contract. It has been

held repeatedly that public officers are without authority to bind the government they represent by acts outside their express authority, even though within their apparent power. E.g., Canal Fund v. Perry, 5 Ohio 56 (1831); State v. Lake Shore, 1 Ohio Nisi Prius 292 (1895). More specifically, R.C. 3.12 provides that a state officer or agent may not make binding contracts to pay any sum of money not previously appropriated for the purpose for which such contract is made unless such officer or agent has been duly authorized to make such contract. I must, therefore, conclude that the power of a university board of trustees to sue and be sued and to contract does not in and of itself authorize such board to compromise and settle a claim asserted against the university.

Of much greater significance than the abstract capacity to sue and be sued is the fact that the General Assembly has in a number of instances actually made the university amenable to suit. See, e.g., R.C. 124.34 (provides for administrative review of appointing authority's personnel decisions); R.C. 4112.02 (imposes liability upon the state for violation of civil rights statutes). The General Assembly has, thus, conferred a right of action upon individuals that could result in a money judgment against the university. It is this statutory imposition of liability that, in my opinion, carries with it the implied power to compromise and settle claims properly asserted against the university.

It is well established that public officers, in addition to those powers expressly conferred upon them by statute, possess such implied powers as are necessary for the due and efficient exercise of the power expressly granted. Thus, where an officer or a governing board is directed by the constitution or statute to perform a particular function, in the absence of specific directions covering in detail the manner and method in which it shall be done, the command carries with it the implied power and authority necessary to the performance of the duty imposed. E.g., State, ex rel. Copeland v. State Medical Board, 107 Ohio St. 20 (1923); State, ex rel. Hunt v. Hildebrant, 93 Ohio St. 1 (1915). Certainly affairs of state must be conducted on as equally intelligent lines as private business and if a master commands a servant to do a particular thing, without directing him in detail how he shall do it, it is a fair and necessary presumption that the servant is to exercise an intelligent discretion in doing the thing commanded to be done. State, ex rel. Copeland v. State Medical Board, supra, at 28; State, ex rel. Hunt v. Hildebrant, supra, at 11.

It may be persuasively argued, therefore, that the board of trustees of a state university possesses the implied power to settle a claim that has been properly asserted against it. Although Ohio Const. art. I, § 16 provides that suits may be brought against the state in such courts and in such manner as may be provided by law and the General Assembly has in a number of instances provided for suits against a university, neither the constitution nor pertinent statutes fully and specifically delimit the university's powers with respect to its liability. It is, therefore, quite reasonable to conclude that in the absence of a statutory provision to the contrary, the board of trustees of a state university possesses all the powers properly exercised by those named as a party to a legal proceeding including the power to settle the claim asserted when it is in the best interests of the university to do so.

It must be remembered that the entire civil adjudicative process is primarily designed for the settlement of disputes between parties. Once an instrumentality of the state is, by operation of statute, a proper party to such a dispute, it is reasonable to conclude that it is possessed of the implied power to settle the dispute as economically and expeditiously as possible.

It is, therefore, my opinion that the board of trustees of a state university possesses the implied power to compromise and settle a claim properly asserted against the university.

Having so concluded, I shall now discuss the circumstances under which this authority may be properly exercised.

Once a state university has been named a party to a legal proceeding the powers and duties of its board of trustees cannot be examined in a vacuum. Rather, they must be considered in conjunction with the powers of the attorney general. Unlike the governing board of a private entity, the board of trustees of a state university is not free to unilaterally determine if, and pursuant to what terms, a claim that has been asserted against it may be compromised and settled. R.C. 109.02 designates the attorney general as the chief law officer of the state and all its departments and provides that no state officer, board, or the head of a department or institution shall employ or be represented by other counsel or attorneys at law. The board of a state university, therefore, may exercise such power only with the concurrence of the attorney general.

Although the attorney general is not expressly authorized by statute to dispose of litigation in which the state is involved through the compromise and settlement of a claim, his powers are not limited to those conferred by statute. The attorney general is a constitutional officer of the state. See, Ohio Const. art. III, §2. In addition to the powers conferred upon the attorney general by constitution and statute, he possesses all of the common law powers and duties pertaining to the office, except insofar as they have been expressly limited by statute. The courts of this state have expressly recognized that the attorney general is possessed of these common law powers. State, ex rel. Doerfler v. Price, 101 Ohio St. 50, 57 (1920); Brown v. Newport Concrete Co., Case No. 728338 (Court of Common Pleas, Hamilton County, Ohio, 1974). Aff'd 44 Ohio App.2d 121 (1975); State of Ohio v. BASF Wyandotte Corp., Case No.904571 (Court of Common Pleas, Cuyahoga County, Ohio 1974).

Among the common law powers of the attorney general is the authority to manage and control all litigation in which the state is involved. E.g., Derryberry v. Kerr-McGee Corp., Okl. 516 P.2d 813 (1973); State v. Ehrlick, 65 W.Va. 700, 64 S.E. 64 S.E. 935 (1909). It is unnecessary for the purposes of this opinion either to explore the outer limits of this control or to define it with any specificity. It is sufficient to note that it includes the power to dispose of litigation in which the state is involved through the compromise and settlement of a claim. New York v. New Jersey, 256 U.S. 296, 41 S.Ct. 492 (1921); State, ex rel. Carmichael v. Jones, 252 Ala. 479, 41 So.2d 280 (1949); People, ex el. Stead v. Spring Lake Drainage and Levee District, 253 Ill. 479, 97 N.E. 1042 (1912).

In so noting, I am fully aware that the case law on this point has generally dealt with claims of the state. I am, however, unable to discern any basis for distinguishing between claims of the state and claims asserted against it. To the contrary, it would be highly anomalous were such claims to be treated differently. The attorney general normally possesses a great deal of discretion in determining whether to institute legal proceedings and when to conclude them. State, ex rel. Peterson v. Fraser, 191 Minn. 427, 254 N.W. 776 (1934); State v. Finch, 128 Kan. 665 (1929). Such discretion in the prosecution of a case is wholly inconsistent with a position that would require legal counsel in the defense of a case to proceed, categorically with full litigation.

I am also aware that the General Assembly has in a number of instances specifically authorized the attorney general to settle claims of or against the state. See, R.C. 115.17 (attorney general and auditor are authorized to adjust any claim of the state in an equitable manner); R.C. 5733.25 (attorney general may, with the advice and consent of the tax commissioner, compromise or settle any claim for taxes); R.C. 2743.15 (agency may with the approval of the attorney general and Court of Claims settle or compromise any civil action against the state in the Court of Claims). Operation of the rule of expressio unius est exclusio alterius arguably compels the inference that the attorney general lacks the power in all instances other than those set forth by statute, to approve the compromise and settlement of a claim asserted against the state.

The argument, however, is not particularly persuasive. The rule that compels this inference is, after all, one of statutory construction. In discussing the power of the attorney general to approve the compromise and settlement of a claim against the state, one is not concerned with construing statutory powers but with

delineating common law powers. As indicated previously, the operative question in such a context is not what is permitted by statute but what is expressly prohibited. No Ohio court has ever advanced the proposition that the codification of certain common law powers permits one to infer that all other common law powers are thereby abrogated. To the contrary, courts have consistently held that the common law cannot be repealed by implication. See, In Re McWilson's Estate, 155 Ohio St. 261 (1951); State, ex rel. Morris v. Sullivan, 87 Ohio St. 79 (1909).

Finally, it is necessary to consider the impact of State, ex rel. Board of County Commissioners v. Rhodes, 177 N.E.2d 557 (1960) upon the question of the attorney general's common law powers in this respect. In concluding that the state lacked authority to pay money to a county in settlement of a claim asserted against it, the court noted at 566 as follows:

> . . . [I]n our opinion the attorney general would have no authority to agree to payment by the state to the county . . .
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> (R.C. 115.17) further provides that the 'attorney general and auditor of state may adjust any claim in such manner as is equitable.' In this respect, note first, that such adjustment requires action by both the attorney general and the auditor. Note second, that this statute is limited to adjustment of claims in favor of the state but does not contain any provision authorizing them or either of them to recognize and effectuate payment of claims against the state.

The foregoing case involved an action initiated by the Board of County Commissioners of Mahoning County to recover money damages allegedly overpaid by the county to the state for the support of inmates committed to institutions for the feebleminded. As one of the several grounds offered in support of its claim, the board of county commissioners relied on a prior agreement with the attorney general that the state would adjust the claim of Mahoning County on terms identical to those arrived at through a pending suit on the same issue involving Franklin County.

The case is different in two salient respects from the type of situation considered in the present analysis. First, the claim was one against the state without authorization therefor. In such a situation a settlement would, in effect, waive the immunity of the state. As indicated previously, no public official is possessed of the power to effect such a waiver. Second, at the time that the agreement was executed by the attorney general, there was no pending or threatened litigation of the claim involving Mahoning County. Thus, the common law powers of the attorney general regarding the control of litigation were not at issue before the court. The issue that prompted the court's comments quoted above was whether R.C. 115.17 authorizes the attorney general to settle claims against the state and it clearly does not. It is my opinion therefore, that the decision in State, ex rel. Board of County Commissioners v. Rhodes, supra, has no bearing upon the issue at hand.

Thus, it is clear that the attorney general's power to control and manage all litigation in which the state is involved includes the power to dispose of litigation through the compromise and settlement of a claim asserted against the state. Consequently, the board of trustees of a state university may settle a claim asserted against the university only with the concurrence of the attorney general.

In discussing the circumstances under which the board of trustees may properly exercise its power to settle a claim against the university, it is also necessary to consider the nature of the claim. Your request makes reference to threatened as well as pending legal proceedings against the university. I assume that by this reference you intend to distinguish between a legal proceeding in which no formal action has been taken by the complaining party and one in which a formal complaint has been filed with an adjudicatory agency or court. This distinction is not without significance.

As I indicated at the outset, a claim that seeks to impose financial liability upon the state can be maintained only with the consent of the state. The claim may be asserted only in the forum and in accordance with the procedure provided for by law. If the claimant fails to comply with the designated procedure, the state remains immune from suit. The mere suggestion of a claim against the state does not empower the officers thereof to enter into a settlement agreement. It is not until a claim has been formally filed and is currently pending in the appropriate forum that the board of trustees possesses the authority to compromise and settle such claim.

Finally, you have raised a question concerning the proper form of a settlement agreement. More specifically, you inquire whether a state university is authorized to pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract.

Except as provided by a local statute or rule of court, no particular form is required to enact a valid compromise agreement. Main Line Theatres v. Paramount Film Distrib. Corp., 298 F.2d 801 (3rd Cir., 1962) cert denied 370 U.S. 939, 82 S.Ct. 1585 (1962). Oral agreements voluntarily entered into by the parties in the presence of the court stand on equal footing with written agreements signed by the parties. See, Spercel v. Sterling Industries, 31 Ohio St.2d 36 (1972). Judicial approval is not required to make a binding settlement agreement. A settlement agreement voluntarily entered into by the parties will be summarily enforced by the court. Cummins Diesel Michigan, Inc. v. The Falcon, 305 F.2d 721 (7th Cir. 1962) cited in Spercel, supra at 39. Thus, a state university is authorized to pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract.

In conclusion, it is my opinion and you are hereby advised that

> The board of trustees of a state university may, with the concurrence of the attorney general, pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract to an individual who has properly asserted a claim against the university in a forum other than the Court of Claims.