In University of Maryland v. Maas, 173 Md. 554 (1938), the Court of Appeals held that "it is established that neither in contract nor tort can a suit be maintained against a governmental agency, first, where specific legislative authority has not been given, second, even though such authority is given, if there are no funds available for the satisfaction of the judgment, or no power reposed in the agency for the raising of funds necessary to satisfy a recovery against it" (emphasis supplied). This doctrine has been reaffirmed by the Court more recently in Lohr v. River Commission, 180 Md. 584 (1942) and Chas. E. Brohawn & Bros. v. Board, 269 Md. 164 (1973).

It would thus appear that, even if House Bill 5 is construed as providing the specific legislative authority to maintain an action against governmental agencies, which itself is open to some doubt, it does not satisfy the requirement of making funds available for the satisfaction of judgments, and would, therefore, not seem to accomplish its intended purpose.

In the event this objection can be overcome through some combination of judicial construction and appropriate budget provisions, a serious question arises as to whether the bill would then far exceed its intended effect.

The bill purports to provide absolute liability in "any action of contract", without limitation. Unfortunately, the distinction between actions Ex contractu and actions ex delicto has become somewhat blurred over the years, and it is possible to frame causes of action for negligence or other tort in the guise of breach of contract. I am deeply concerned, for example, whether, if this bill were to become law, normal governmental services may come to be considered as a type of contract — whether an action ex contractu may lie against the State for an alleged failure to clear roads of ice or snow which may contribute to an accident, or whether a similar action may lie against a local fire department for an alleged failure to respond to a fire promptly.

I am also concerned that, as worded, the State and local governments may be precluded from raising the defense of unauthorized contracts, or that counter-suits and set-off claims may be peremptorily disallowed.

In summary, I believe that the question of whether, how, and to what extent the historical doctrine of sovereign immunity should be modified must be given much more careful study before embarking on legislative enactments. In that regard, I note that, in 1968, a Commission to Study Sovereign Immunity and State Tort