

Municipal Liability- 5 Minute University (and 1 Minute of Law School)

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Sovereign Immunity & Torts

Texas Tort Claims Act Resources

- The Texas Tort Claims Act: “The Chamber of Secrets,” Michael A. Shauneny, July 22, 2015
- Political Subdivision Liability Under the Texas Tort Claims Act, William M. McKamie, February 22, 2013
- Liability Under the Texas Tort Claims Act, Richard Evans

Background

- Governmental entities that enjoy Sovereign Immunity are not liable for the torts of employees, absent a waiver of that immunity.
- Where the law does not specifically waive governmental immunity, common law sovereign immunity remains intact.
- TTCA is a waiver of Sovereign Immunity by the Texas Legislature in select circumstances.

Background

- Sovereign Immunity was first recognized by the Texas Supreme Court in 1847.
- Not based on a statute or constitutional provision, but on a basic understanding of sovereignty. (Ancient Notion: King Can Do No Wrong.)
- Rooted in precluding second guessing of employees in certain governmental actions and decisions.
- Sovereign Immunity protects the government's treasury.

Background

- State agencies and political subdivisions enjoy Sovereign Immunity:
 - Municipalities
 - State Agencies
 - State Universities
 - Counties
 - School Districts
 - Hospital Districts

Texas Tort Claims Act (TTCA)

- TTCA creates a limited waiver of Sovereign Immunity for certain torts.
- TTCA limited waiver:
 - Injury caused by an employee's use of a motor-driven vehicle/equipment;
 - Injury caused by a condition or use of personal or real property;
 - Claims arising from premise defects.
- It is the Plaintiff's burden to allege and prove facts affirmatively showing the waiver and that court has jurisdiction.

Municipalities

- Sovereign Immunity related to tort claims for Cities turns on whether Cities are acting in a governmental or proprietary capacity.
- Governmental Functions: imposed by law or assigned by the State. (police, fire, water)
- Proprietary Functions: municipality may, in its discretion, perform in the interests of its citizens. (amusement park, shooting range)

Liability of a Municipality

§ 101.0215 of the TTCA:

a) A municipality is liable under this chapter for damages arising from its ***governmental functions***, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

-See chart on next slide.

Activities defined as *governmental*:

| | |
|--|---|
| Police and fire protection and control | Tax collection |
| Cemeteries and cemetery care | Firework displays |
| Health and sanitation services | Dams and reservoirs |
| Hospitals, including operation of emergency ambulance service | Establishment and maintenances of jails |
| Parks and zoos, museums, libraries and their upkeep | Animal control |
| Waterworks, sanitary and storm sewers, water and sewer service | Airports, including when used for space flight |
| Garbage and solid waste removal, collection, and disposal | Recreational facilities, including pools, beaches, and marinas |
| Street construction and design, regulation of traffic, transportation system, parking facilities | Repair garages, vehicle and motor driven equipment maintenance |
| Civic, convention centers, or coliseums, Community, neighborhood, or senior citizen centers | Bridge construction and maintenance ,street maintenance, warning signals, maintenance of traffic signals, signs and hazards |
| Building codes and inspection, zoning, planning, and plat approval, engineering functions, enforcement of land use restrictions under Subchapter E, Chapter 212, Local Government Code | |
| Latchkey programs conducted exclusively on a school campus under an interlocal agreement with the school district in which the school campus is located | |
| Community development or urban renewal activities undertaken by municipalities and authorized under Chapter 373 and 374 (Local Govt. Code) | |

Liability of a Municipality

§ 101.0215 of the TTCA:

b) This chapter does not apply to the liability of a municipality for damages arising from its ***proprietary functions***, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to:

Listed proprietary functions:

Operation and maintenance of a public utility

Amusements owned and operated by a city

Proprietary vs. Governmental

- When a City acts in a proprietary capacity, it is not acting as a governmental entity.
- When acting in a proprietary capacity, a City does not have Sovereign Immunity and can be held liable for its employee's torts.
- When a city acts in its governmental capacity, it will enjoy Sovereign Immunity.
- Or, where Sovereign Immunity is waived, the damages are limited \$250,000 / \$500,000 / \$100,000.

Waiver of Immunity

- Texas Courts have consistently held that waiver of immunity rests with the Legislature.
- Courts continue to struggle with question of whether Legislature can empower agencies to waive immunity.
- Fastest way to waive its own immunity is to bring a claim against an opposing party.

Waiver of Immunity

- A governmental entity can waive common law immunity from liability.
- A governmental entity cannot waive immunity from suit. (jurisdictional)
- Party suing must establish the governmental entity's consent to suit. Otherwise there is no subject matter jurisdiction.

Waiver of Immunity

- By filing suit, a governmental entity waives its immunity from suit.
- Nonsuiting claims does not impact court's jurisdiction.

Sovereign Immunity & Contracts

Immunity and Contracts Resources

- Sovereign Immunity in Texas- You Breach, You [Don't] Pay, Adam P. Simmons
- Immunity in Contract Cases – Muddy Waters, Jose E. de la Fuente, July 23, 2015
- Brief of Amicus Curiae, Texas Municipal League, No. 14-0645, *Wasson Interests Ltd. vs. City of Jacksonville*, January 11, 2016

Immunity From Suit

- By entering into a contract, a governmental entity necessarily waives immunity from liability, but does not waive immunity from suit.
- Suit is barred unless the legislature expressly gives consent to the suit.
- A governmental entity does not waive immunity from suit simply by contracting.

Legislature's Immunity Waiver

- §271.152 of Local Government Code:
 - local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a ***contract subject to this subchapter*** waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of contract, subject to the terms and conditions of this subchapter. (emph. added)

Legislature's Immunity Waiver

- §271.151(2) defines “contract subject to this subchapter”:
 - “a written contract stating the essential terms of the agreement for providing *goods or services* to the local governmental entity that is *properly executed* on behalf of the local governmental entity.”

Chapter 271 Requirements

- What types of contracts meet the Chapter 271 waiver requirements?
 - Must require that the claimant perform services.
 - Services must be provided by the claimant to the governmental entity.

Binding Contracts

- A city or county may contract only upon express authorization of the city council or commissioners court by vote of that body reflected in the minutes.
- Statements or acts of the mayor or other officers or governing body members are ineffectual.
- Persons or entities contracting with the governmental unit are charged by law with notice of the limits of their authority and are bound at their peril to ascertain if the contemplated contract is properly authorized.

Binding Contracts

- Proof of the governing body's acts may only be supplied by the authenticated minutes of the meeting at which the action occurred, unless the minutes have been lost or destroyed.
- A Plaintiff suing to establish a contract with a city has the burden to both plead and prove that the minutes show the council's act in authorizing or ratifying the contract.

Proprietary vs. Governmental

- The Proprietary vs. Governmental dichotomy has long been used in tort cases.
- Does the Proprietary vs. Governmental distinction apply to contract claims?
 - Multiple pending petitions for review
 - Direct split between courts of appeals

Court of Appeals Split

Whether Governmental vs. Proprietary Distinction Applies to Contract Claims

| | |
|----------------------|----------------|
| Third (Austin) | Applies |
| Fourth (San Antonio) | Does not apply |
| Seventh (Amarillo) | Does not apply |
| Eighth (El Paso) | Does not apply |
| Twelfth (Tyler) | Does not apply |

Immunity from Suit

- However, the Texas Supreme Court has never blessed the same distinction on whether immunity from suit is waived for breach of contract claims.

Proprietary vs. Governmental

- Why is this important?
 - If the distinction applies, cities will not have immunity for contract related claims arising out of proprietary functions.
 - If distinction does not apply, cities will be immune from contract related claims unless such immunity has been waived by legislature.

Governmental vs. Proprietary

- Would governmental functions set out in TTCA apply to contract claim?
- Common law classifies such activities as proprietary.

Contractual Limitations

- Insist on no liability for consequential damages.
- Use merger clause.
- Require written authorized amendments.

THANK YOU!

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