The Top 10 Things an Assistant City Attorney Must Know About Liability

Municipal law and the law affecting political subdivision [i.e. local governmental entities such as cities, counties and special districts] are unlike any other area of law out there. As a result, no single paper or treatise can cover all the twists and turns associated with the different forms of liability which can befall such an entity. And since I do not have time to write a 36 volume treatise on the subject, I have taken the top 10 categories of information a local government lawyer should be aware of when representing such an entity.

1) The Rules are Different

In pretty much every area of liability that can attach to a local governmental entity, the rules are going to be different. You can pretty much forget most of what you learned in law school or, if you've practiced in the private sector, representing companies or non- profits. The rules are different when you're talking about liability of a governmental entity. The theory behind this differential treatment is that the government is an entity of the people. The Legislator would rather government resources and funds be used to pave roads, provide programs, provide police and fire protection and to provide other services than simply to line the pockets of individuals. In many instances, an individual will have to bear the brunt of consequences in order to properly balance the interests of the community as a whole. But in that same regard, because a local governmental entity is a creature of the people, the people have different rights and different types of liability attach. Examples include constitutional rights. Violations of our constitutional rights are only attributable to a government. The Bill of Rights was designed to help limit the government's power over individuals. As a result, a local company does not have to care about your First Amendment rights. However, a local city is prohibited against violating your freedom of speech.

Any time a situation comes up where you believe liability may or may not attach, your instinct should be that the rules are different. As a result, you should look up what types of rules apply to your type of entity and situation.

2) Sovereign Immunity

Sovereign immunity is an immunity given to local governmental entities which prevents it from being sued or held liable for various acts. Sovereign immunity is immunity from suit as well as immunity from liability. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) Immunity from suit is a jurisdictional bar. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638, 43 Tex. Sup. Ct. J. 143 (Tex. 1999). Immunity from liability may or may not be a jurisdictional bar. But both immunize a local government from tortious as well as other types of liability. Sovereign immunity is considered the default.

The doctrine of sovereign immunity predates the United States Constitution. *See*

Alden v. Maine, 527 U.S. 706, 711-30, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). As a matter of natural law or the law of nations, "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *Id.* at 716 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)) (emphasis in THE FEDERALIST). A "sovereign[] is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules, Inc. v. United States*, 516 U.S. 417, 422, 134 L. Ed. 2d 47, 116 S. Ct. 981 (1996). The states are sovereigns for purposes of sovereign immunity. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751-53, 152 L. Ed. 2d 962, 122 S. Ct. 1864 (2002). As the Texas Supreme Court has put it, "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent. "*Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694, 46 Tex. Sup. Ct. J. 494 (Tex. 2003)(quoting *Hosner v. De Young*, 1 Tex. 764, 769 (1847)).

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760. "More concretely," however, state sovereign immunity protects against "raids on state treasuries." *Alden*, 527 U.S. at 720. The doctrine of sovereign immunity derives from the common law and has long been part of Texas jurisprudence. *See Hosner v. De Young*, 1 Tex. 764, 769 (1847) (holding that the State could not be sued in her own courts absent her consent "and then only in the manner indicated"); *see also City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011) ("[The] boundaries [of sovereign immunity] are established by the judiciary, but we have consistently held that waivers of it are the prerogative of the Legislature.").

An example of its application would be the tort of defamation or slander. If a company makes a false statement which injures an individual's reputation, they can potentially have a defamation claim against the company. However, local governmental entities retain sovereign immunity from all defamation and slander claims. The doctrine of sovereign immunity shields the State from liability for torts, such as defamation, except to the extent the immunity was waived by the Legislature or by statute. *See City of La Porte v. Barfield*, 898 S.W.2d 288, 291, 38 Tex. Sup. Ct. J. 533 (Tex. 1995); *City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex. App.--Houston [1st Dist.] 1995, no writ). So if a city manager makes a statement at a city council meeting that he believes a particular citizen is a menace to their society and should not be trusted, that individual could not sue the City for any defamation claims.

3) Official/ Qualified Immunity

Just as an entity retains sovereign immunity, certain types of immunity are also provided to individual employees and actors of the entity. The theory of attributing various types of immunity to governmental employees and actors is to allow them to conduct their job duties and responsibilities to service a community without fear of personal liability for such acts. Typical immunity most people have heard about is 1) judicial immunity which protects judges from their decisions in the judiciary whether it be at the district county, justice of the peace or municipal court level,

2) prosecutorial immunity, which is provided for prosecutors in all of those courts and 3) legislative immunity, which protects members of the legislative body whether it be the county commissioners court or city council or specialized board from acts committed in their legislative capacity.

In addition to those, most city employees also retain a form of individualized immunity. In state court it is commonly referred to as official immunity. In federal court, when dealing with cases such as constitution claims, it is called qualified immunity. Each is a distinctly separate type of immunity, although they act very similar in nature.

In Texas, official immunity protects public officials from suit arising from performance of their (1) discretionary duties (2) in good faith (3) within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653, 37 Tex. Sup. Ct. J. 980 (Tex. 1994) (citing *Wyse v. Dep't of Pub. Safety*, 733 S.W.2d 224, 227 (Tex. App.--Waco 1986, writ ref'd n.r.e.); *Baker v. Story*, 621 S.W.2d 639, 644 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.)).

Common law official immunity is based on the necessity of public officials to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation. *Kassen v. Hatley, 887 S.W.2d 4, 11, 38 Tex. Sup. Ct. J. 73 (Tex. 1994).* "The public would suffer if government officials, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions." *Kassen*, 887 S.W.2d at 8. Denying the affirmative defense of official immunity to public officials in such circumstances "would contribute not to principled and fearless decision-making but to intimidation." *Wood v. Strickland*, 420 U.S. 308, 319, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) (quoting *Pierson v. Ray*, 386 U.S. 547, 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967)). Certainly, public officials may err in the performance of their duties. *Id.* at 321. The existence of immunity acknowledges this fact, but recognizes that the risk of some error is preferable to intimidation from action at all. *Id*. In addition, some of the most capable candidates would be deterred from entering public service if heavy burdens on their private resources from monetary liability were a likely prospect for errors in judgment. *Ballantyne v. Champion Builders, Inc*., 144 S.W.3d 417, 424, 2004 Tex. LEXIS 655, 47 Tex. Sup. J. 852 (Tex. 2004)

In the federal system, public officials can be entitled to qualified immunity. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*v. *Fitzgerald*, 457 U.S., at 814. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Id*. The U.S. Supreme Court cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, *e. g., Malley* v. *Briggs*, 475 U.S. 335, 341

(1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *id*., at 344-345 (police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application); *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they took); *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984).

So, regardless of whether the entity may have liability for an act, be aware that individual employees may retain a different type of immunity which needs to be advanced on their behalf.

4) Waiver of Sovereign Immunity

Waiver of sovereign immunity means the entity has immunity and cannot be sued unless there is a specific clear and unambiguous waiver of that immunity. So many torts and different types of causes of action do not apply to a local governmental entity. However, there are situations where the legislator feels a certain level of responsibility and liability should be attributed. In order to alter the default of immunity, it is for the legislator, through statute, to expressly and very clearly waive sovereign immunity for a particular type of claim. Immunity from suit completely bars actions against those entities unless the Legislature expressly consents to suit. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006) ("[I]mmunity from suit . . . bars suit against [a governmental] entity altogether."); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003) ("Unlike immunity from suit, immunity from liability does not affect a court's jurisdiction to hear a case and cannot be raised in a plea to the jurisdiction."); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002) ("We again reaffirm that it is the Legislature's sole province to waive or abrogate sovereign immunity."); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam); *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93, 2012 Tex. LEXIS 731, 55 Tex. Sup. J. 1320, 2012 WL 3800218 (Tex. 2012) The waiver must be by clear and unambiguous language. Tex. Gov't Code Ann. § 311.034 (West 2013).

However, in most cases, the waiver is very narrow, very limited and will typically have limits on the level of actual damages which can be obtained. And, in pretty much all waivers, you're going to have a prohibition against punitive damages.

One of the most common examples of legislative waiver of immunity is chapter 101 of the Texas Civil Practice and Remedies Code also known as the Texas Tort Claims Act. It waives governmental immunity in three general areas: use of publicly owned vehicles, premise defects, and injuries arising from conditions or use of property. Tex. Civ. Prac. & Rem Code Ann.101.021 (West 2012). The language of the Texas Tort Claims Act is narrowly interpreted with a default of retaining immunity. A plaintiff must specifically plead and establish an existence of a waiver. Rather, the plaintiff bears the burden of alleging facts affirmatively demonstrating the trial court's jurisdiction to hear his case. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446, 36 Tex. Sup. Ct. J. 607 (Tex. 1993).

One of the most common examples falling under the Tort Claims Act is if an employee negligently uses a motor vehicle. This covers car accidents if a city truck runs a stop sign and impacts another vehicle. However, there is a limitation on the level of damages which can be obtained. Tex. Civ. Prac. & Rem. Code § 101.023 (West 2013). For example, a City will only be liable for a maximum of $100,000 for any one incident. So immunity is not absolute. Tex. Civ. Prac. & Rem. Code § 101.023(c)(West 2013).

You must be aware that there are various statutes out there which can waive your immunity. And while not typically thought of in this regard, one of the most well-known types of waivers is the Bill of Rights found in the U.S. Constitution. A type that applies in most cities would be a "taking without due process of law", a search and seizure, a regulation restricting the freedom of speech or freedom of religion or press.

Another waiver which applies *only* to governmental entities and not private corporations is the Texas Whistle Blower Act found in §554.0035 of the Texas Government Code. Its specifically provides a cause of action for an employee who suffers a negative or adverse employment action as a consequence of reporting a violation of law to the proper law enforcement authority. There is no comparable state law providing for this type of cause of action.

5) Contracts

Many plaintiffs' attorneys believe that the breach of an agreed contract would contain an automatic waiver of immunity. However, that is not the case. By entering into a contract, an entity waives its immunity from liability. However, it retains its immunity from suit. *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). The primary waiver of immunity is Chapter 271 of the Texas Local Government Code which provides that immunity is waived for the breach of a contract that is in writing and for providing goods or services to the entity. Tex. Loc. Gov't Code Ann.§271.151 and 271.152 (West 2013). This means an entity retains immunity for all implied contracts, all oral contracts and contracts where the entity is providing goods and services or where the goods and services are not at issue such as a rental agreement. This means that liability does not attach for breaches to these types of causes of action. However, immunity is waived, to a certain extent for contracts falling under subchapter I of Chapter 271.

On a side note, you must also be aware an intentional breach that occurs on a routine basis can cause the legislator to amend the waiver statute. For many years entities were immune from even suits involving the purchase of goods and services. A line of cases in which the Texas Supreme Court held that entities could breach these contracts without liability attaching caused them to enact Chapter 271 of the Local Government Code. So be aware that, while immunity exists, it is not guaranteed for the future.

6) Vicarious Liability

Vicarious liability has been around for over a century and attaches liability to an employer for the tortious act of the employee. In certain types of waivers, vicarious liability applies to an entity such as under the Texas Tort Claims Act for the negligent operation of a motor vehicle. But again, the rules are different here too. An employee's qualified/official

immunity will prohibit a plaintiff's recovery against the governmental unit for claims that may arise under section 101.021(2) of the Texas Tort Claims Act. *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994) (org. proceeding); *Kilburn*, 849 S.W.2d at 812; *City of Houston v. Newsom*, 858 S.W.2d 14, 19 (Tex. App.--Houston [14th Dist.] 1993, no writ); *Carpenter v. Barner*, 797 S.W.2d 99, 102 (Tex. App.--Waco 1990, writ denied). The entity is only liable if the employee would be liable, but if the employee is immune, so then is the entity.

Additionally, in constitutional claims, vicarious liability does not apply. Supervisory officials and municipalities cannot be held liable on any theory of vicarious liability for the actions of subordinates. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); Estate of Davis ex rel. *McCully v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). While an individual employee may have personal liability for violating someone's constitutional rights, the entity will not be held liable unless the entity has a policy, custom or practice which caused the violation. *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611, 1978 U.S. LEXIS 100, (U.S. 1978) This distinction pops up a lot in police liability cases. A police officer may perform what later turns out to be an improper search or seizure. If the officer violated department policy and the policy was designed to prevent those types of improper searches, the City cannot be held liable for the constitutional violation. The individual officer may or may not retain qualified immunity depending on particular factual situations which led to the improper search. Depending on the type of claim and the type of waiver, vicarious liability may or may not apply. So it is always better to look it up

7) Constitutional Violations

As mentioned in several examples in this paper so far, an entity and an individual can be held liable for violating someone's constitutional rights. Keep in mind their violation of federal constitutional rights can impose financial liability while a violation of the Texas Constitution can only impose equitable relief. So you must first determine which constitutional rights and what sovereign applies.

In the federal system, not all constitutional claims have a cause of action. The text of the Bill of Rights and other constitutional guarantees does not provide a cause of action within their text. In order to sue for a violation of a constitutional right, you must bring suit under 42 U.S.C. §1983. Become familiar with this statute. It is the enabling mechanism which allows causes of action for violating any right guaranteed by a federal statute.

The seminal case to review is *Monell v. Department of Social Services*, 436 U.S. 658, 713, 98 S. Ct. 2018, 2047, 56 L. Ed. 2d 611, 649-50 (1978). In it the United States Supreme Court articulated standards for where liability can attach and the fact that vicarious liability does not come into play. The Texas Constitution has several comparable rights, but some are interpreted differently.

Suits for violation of state constitutional rights are not as common because no actual damages on a monetary level are permitted. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 38 Tex. Sup. J. 282, 287 (Tex. 1995). The only type of monetary damages which can occur is if

the plaintiff brings a takings claim as repayment for property taken by providing its value in return is considered an equitable claim.

8) Supremacy Clause

Local governmental entities typically will have the power to enact legislation on a large variety of topics. However, you must be aware the city council cannot enact an ordinance which is inconsistent with state or federal law. Tex. Const. Art. XI, § 5. Liability is not a direct issue as the only way for an individual to challenge an ordinance for being inconsistent with state or federal law is to bring a declaratory judgment action to declare it void. No monetary damages attach. However, the City could be liable for attorney's fees and its legislative plan can be dramatically affected depending on the type of inconsistency.

9) Liability for Acts of the Legislative Body v Employee

As an example was given earlier that vicarious liability applies in certain situations such as the Texas Tort Claims Act, it does not apply in situations where the final approval of a particular permit, application or request rests with the legislative body or is spelled out in an ordinance. *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 2006 Tex. LEXIS 194, 49 Tex. Sup. J. 404 (Tex. 2006). An example would be a building inspector who approves construction of a building which exceeds the height limitation set out by ordinance. After construction is completed, a neighbor complains and the city council requires the owner to reduce the size of the building. As a defense, the property owner asserts that the City consented because the building inspector granted the permit. However, the City cannot be held liable for individual employee's deviations from stated statutes. *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835, 13 Tex. Sup. Ct. J. 202 (Tex. 1970) In general, the rule derives from our structure of government, in which the interest of the individual must at times yield to the public interest and in which the responsibility for public policy must rest on decisions officially authorized by the government's representatives, rather than on mistakes committed by its agents. *See City of San Angelo v. Deutsch*, 126 Tex. 532, 91 S.W.2d 308, 310 (Tex. 1936) ("The city's public or governmental business must go forward, unimpeded by the fault, negligence or frailty of those charged with its administration."). An ordinance is a matter of public record and discoverable by the public. Citizens are charged with constructive notice of ordinances, and a "party seeking to estop city's enforcement of zoning ordinance charged with constructive knowledge of the ordinance and could therefore not rely on building permit issued by city in violation of the law." *Id*. (citing *Davis v. City of Abilene*, 250 S.W.2d 685, 688 (Tex. Civ. App.--Eastland 1952, writ ref'd)).

This is the general rule. There are exceptions which you should be aware. Essentially, there is authority for the proposition that a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions. But such doctrine is applied with caution and only in exceptional cases where the circumstances clearly demand its application to prevent manifest injustice. *Hutchins v. Prasifka*, 450 S.W.2d 829, 1970 Tex. LEXIS 254, 13 Tex. Sup. J. 202 (Tex. 1970)

10) Declaratory Judgment Claims

The Texas Uniform Declaratory Judgment Act found in Chapter 37 of the Texas Civil Practice and Remedies Code allows suits to declare rights under a contract or ordinance or other written instrument. However, sovereign immunity applies here too, except under very limited circumstances.

There is authority prior to 2009 which states a claim for declaratory relief which is not monetary in nature does not trigger sovereign immunity since it does not attack the treasury of the people. However, in 2009 the Texas Supreme Court issued its opinion in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009).

While the UDJA waives sovereign immunity for certain claims, it is not a general waiver of sovereign immunity. *See id.* § 37.006(b); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (noting that the DJA waives immunity for claims challenging the validity of ordinances or statutes); But generally, the UDJA does not alter a trial court's jurisdiction. Rather, it is "merely a procedural device for deciding cases already within a court's jurisdiction." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). And a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit. *Heinrich*, 284 S.W.3d at 370-71. Consequently, sovereign immunity will bar an otherwise proper DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity. *See City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam); Tex. Parks & Wildlife Dep't v. Sawyer Trust, 354 S.W.3d 384, 388, 2011 Tex. LEXIS 640, 54 Tex. Sup. J. 1621 (Tex. 2011).

Essentially the Heinrich line of cases holds that 1) you cannot seek a declaration against an entity if it has the effect of causing monetary damages [such as declare the city breached the contract]; 2) you can seek prospective relief against an official performing improper ultra vires acts [acts not authorized or performed outside the scope of authority]; 3) retrospective relief is not allowed; 4) the entity retains immunity, so the plaintiff must sue the official in their official capacity, and 5) you can only seek a declaratory judgment for declarations under an ordinance or statute, not other any other written instrument. *Heinrich*, 284 S.W.3d at 373 n.6 (citing Tex. Civ. Prac. & Rem. Code § 37.006(b)); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Tex. DOT v. Sefzik*, 355 S.W.3d 618, 622, 2011 Tex. LEXIS 801, 55 Tex. Sup. J. 42 (Tex. 2011)

Honorable Mention: Interlocutory Appeals

Not only are the substantive rules different when dealing with claims against a governmental entity, the procedural rules in state and federal court are different as they apply. An example is the ability for the governmental entity to file an interlocutory appeal in the middle of a case. This only applies for certain types of cases, but it is still a powerful tool to use when applicable.

Section 51.014(a) of the Texas Civil Practice and Remedies Code expands the

jurisdiction of courts of appeals. It specifies circumstances in which a litigant may immediately appeal from an order that would otherwise be unappealable because a final judgment has not been rendered in the matter. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a); *see also Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985) (orig. proceeding) (per curiam) ("Unless there is a statute specifically authorizing an interlocutory appeal, the Texas appellate courts have jurisdiction only over final judgments."). Because section 51.014(a) is a limited exception to the general rule that a party may appeal only from final judgments or orders, it is strictly construed. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95, 2012 Tex. LEXIS 731, 55 Tex. Sup. J. 1320, 2012 WL 3800218 (Tex. 2012)

As a rule of thumb, appellate courts do not have jurisdiction to hear any appeal until a final judgment in the case has been entered. This prevents the court of appeals being inundated with appeals from every order a trial court issues. A party that does not agree with a particular order has very limited options until a final judgment in a case has been rendered. However, when you are a governmental entity or a governmental employee, under certain circumstances, you have the right to this interlocutory appeal. This typically freezes all matters going on in the trial court until the court of appeals reviews a particular order. Two of the most common forms of interlocutory appeal are 1) appeal of a denial to a plea to the jurisdiction and 2) a denial of an individual official's right to qualified immunity in federal court. Both are immunity defenses.

When an entity believes it retains immunity for particular cause of action it challenges the courts jurisdiction over the entity for those claims most commonly referred to as plea to the jurisdiction. A plea to the jurisdiction is the vehicle by which a party contests the trial court's authority to determine the subject matter of the cause of action. *State v. Benavides*, 772 S.W.2d 271, 273 (Tex. App.-Corpus Christi 1989, writ denied). The plaintiff bears the burden of alleging facts affirmatively demonstrating the trial court's jurisdiction to hear a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446, 36 Tex. Sup. Ct. J. 607 (Tex. 1993); *Mission Consol. Indep. Sch. Dist. v. Flores*, 39 S.W.3d 674, 676 (Tex. App.-Corpus Christi 2001, no pet.). Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226, 47 Tex. Sup. Ct. J. 386 (Tex. 2004). Likewise, whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction is also a question of law. *Id*. To determine whether the plaintiff has affirmatively demonstrated the court's jurisdiction to hear the case, courts consider the facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties. *Texas Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868, 44 Tex. Sup. Ct. J. 667 (Tex. 2001). If a plaintiff pleads facts that affirmatively demonstrate an absence of jurisdiction and such defect is incurable, immediate dismissal of the case is proper. *Peek v. Equipment Service Co.*, 779 S.W.2d 802, 804-05, 33 Tex. Sup. Ct. J. 77 (Tex. 1989); *City of Austin v. L.S. Ranch*, 970 S.W.2d 750, 753 (Tex. App.-Austin 1998, no pet.). However, the mere failure of a petition to state a cause of action does not show a want of jurisdiction in the

court. *Bybee v. Fireman's Fund Ins. Co.*, 160 Tex. 429, 331 S.W.2d 910, 917, 3 Tex. Sup. Ct. J. 157 (1960). If the plaintiff's pleadings are insufficient to demonstrate the court's jurisdiction, but do not affirmatively show incurable defects in jurisdiction, the proper remedy is to allow the plaintiff an opportunity to amend before dismissing. *County of Cameron v. Brown*, 80 S.W.3d 549, 554-55, 45 Tex. Sup. Ct. J. 680 (Tex. 2002); *Peek*, 779 S.W.2d at 804-05.

If trial court denies the plea, Civil Practice and Remedies Code §51.0014 allows the entity to freeze all matters going on at the trial court level and appeal that denial directly to the court of appeals. If there is no jurisdiction over a claim, there is no need to waste judicial resources only to have a final judgment overturned. This is one of the primary reasons this type of interlocutory appeal is permitted.

In federal court, if an employee is denied their qualified immunity on an individual basis, the federal system allows that individual to take an interlocutory appeal in order to determine their immunity. A decision of a federal district court is appealable if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Benefit Indus. Loan Corp., 337 U.S. 541, 546 (U.S. 1949)*; *Mitchell v. Forsyth*, 472 U.S. 511, 524-525, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 1985 U.S. LEXIS 113, 53 U.S.L.W. 4798, 2 Fed. R. Serv. 3d (Callaghan) 221 (U.S. 1985)

The conception animating the qualified immunity doctrine as set forth in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" Id., at 819, quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

The "consequences" with which courts are concerned are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S., at 816. Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[inquiries] of this kind can be peculiarly disruptive of effective government." *Id.*, at 817. As a result, while no federal procedural rule allows for an interlocutory appeal, courts have created a permissible means of allowing one when appealing the denial of a qualified immunity defense.

Interlocutory appeals are special and can be strategically beneficial for the overall resolution of a matter.

Rule #1 Applies to All 10 (…11)

When dealing with a governmental entity, you need to understand that the rules are different. Given the wide variety and complexity associated with the different rules, it is important to look up the intricacies of any particular claim. If you take just one thing away from this paper, remember that the rules are almost always different.