

**PRESENTED AT**  
29<sup>th</sup> Annual  
Conference on State and Federal Appeals

June 20-21, 2019  
Austin, TX

## **An Overview of Government Immunity in Texas**

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## AN OVERVIEW OF GOVERNMENTAL IMMUNITY IN TEXAS

### Introduction

The doctrine of sovereign immunity is not new. Indeed, it is not a doctrine which was invented by this country. Prior to the establishment of the United States, European countries long believed the sovereign was immune from suit. Even when monarchies gave way to more democratic forms of government, and certainly in the growth of the United States, the basic premise that the government could not be sued for its acts has held prominence for hundreds of years. Like the federal government, the states adopted similar positions in the early days of this country. Formerly its own republic, Texas has fiercely defended its right to develop the state without the interference or risk of suits for money damages based upon common law liability. Today, sovereign or governmental immunity serves an essential function of protecting the public fisc except in circumstances under which, and within defined limits, the legislature deems appropriate in balancing private claims versus the needs of the public.

Fighting “city hall” remains quite a challenge in Texas in light of well-settled Supreme Court authority that declares a “high presumption” of governmental immunity from suit. Still, there are many waivers of immunity and this presentation will discuss the status of immunity and waivers in the context of tort, contract, and statutory claims against the State and its political subdivisions.

The purpose of this paper is to survey, in a fairly general manner, immunity and waivers thereof in connection with many common law, contract, and statutory claims. In the case of all claims, additional procedural and substantive provisions relate to any waiver that may exist and the reader is

cautioned to acquaint themselves with all aspects of any particular claim.

### The “Heavy Presumption” of Governmental Immunity

The State and its political subdivisions are generally immune from suit. *See Mo. P. R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970). The “doctrine of governmental immunity ensures that the [government] cannot be sued without permission.” *Liberty Mutual Ins. Co. v. Sharp*, 874 S.W.2d 736, 738 (Tex. App.—Austin 1994, rehearing overruled). Therefore, a governmental unit must expressly waive its governmental immunity from suit before a claimant can proceed on a claim against it. *Prairie View A&M Univ. v. Brooks*, 180 S.W.3d 694, 705 (Tex. App.—Houston [14th Dist.] 2005).

A party may establish consent to bring suit against a governmental entity only by showing legislative permission to bring suit in “clear and unambiguous language.” *Little-Tex Insulation Co.*, 39 S.W.3d at 594 (Tex. 2001) (quoting *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994)). Specifically, a plaintiff must allege facts that affirmatively demonstrate a waiver of immunity, thus allowing exercise of the court’s subject matter jurisdiction to hear the cause. *See Tex. Ass’n of Bus.*, 852 S.W.2d at 446.

Thus the State and all other governmental units in Texas are entitled to a presumption that a plaintiff’s claims are barred by governmental immunity. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d, 440, 443 (Tex. 1993). The Texas Supreme Court has characterized this as a “heavy presumption.” *Nueces County v. San Patricio County*, 246 S.W.3d 651, 653 (Tex. 2008).

[T]he “heavy presumption in favor of immunity” derives not just from principles related to separation of powers but from practical concerns: “In a world with increasingly complex webs of governmental units, the Legislature is better suited to make the distinctions, exceptions, and limitations that different situations require. The extent to which any particular city, county, port, municipal utility district, school district or university should pay damages involves policy issues the Legislature is better able to balance.”

*Id.* (quoting *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007)). In light of this presumption, it is always the plaintiff’s burden to affirmatively demonstrate the lack of governmental immunity and, therefore, the existence of the court’s subject matter jurisdiction over the plaintiff’s claims. *See Texas DOT v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Liberty Mut. Ins. Co.*, 874 S.W.2d at 739.

### **Waiver of Immunity For Tort Claims**

As government consumed so many functions and played a role in the lives of so many of its citizens, its activities exposed some citizens to injury. Accordingly, it has met pressure to provide compensation mechanisms for such injuries under certain circumstances. In response, the federal government enacted the Federal Tort Claims Act. Texas has adopted an analogous statute - the Texas Tort Claims Act. It provides a limited waiver of governmental entities within defined parameters, as well as procedures for recovery of damages from the State and local governmental units for property damage,

personal injury, and death based upon allegations of negligence.

Often attorneys and claimants believe the Texas Tort Claims Act creates liability. As more fully discussed in this article, the Texas Tort Claims Act merely waives the general presumption of otherwise absolute immunity to which a governmental unit is entitled, except under the limited circumstances in which immunity has been waived by the Act. In other words, immunity is the rule; waiver of immunity, which must be proven by a claimant, is the exception.

This proposition is reflected in §101.025 of the Texas Tort Claims Act which states:

- (a) sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.
- (b) a person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Tex. Civ. Prac. & Rem. Code § 101.025. Accordingly, it is of principal importance to recognize that only those things for which the Act provides a cause of action may form the basis of a claim of liability against a governmental unit. As stated within §101.025, immunity is waived only to the extent that the Act itself creates liability, which creates liability only under certain, expressly defined circumstances.

A governmental unit in this state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

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First appeared as part of the conference materials for the  
29<sup>th</sup> Annual Conference on State and Federal Appeals session  
"Governmental Immunity Under State Law"