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Governmental Immunity Update

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I. Overview of Governmental Immunity in Texas.

Under common law stretching back centuries, sovereign immunity, as it developed in England, deprives the judiciary of power to adjudicate disputes against the government, the original theory resting on the premise that the sovereign was above the courts and, thus, not susceptible to being sued in his or her own courts. The doctrine of sovereign immunity was first recognized by the Texas Supreme Court in 1847 in *Hosner v. DeYoung*, where the Texas Supreme Court stated, without citation to authority, that “no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”¹ Rooted in the feudal fiction that the “king can do no wrong,”² modern justifications for sovereign immunity are political, pecuniary, and pragmatic.³ In fact, the justification for the continued existence of sovereign immunity in Texas rests on separation of powers principles.⁴ Specifically, sovereign immunity now exists in order to preserve the Legislature’s control over the public fisc.⁵

¹ *Hosner v. De Young*, 1 Tex. 764, 769 (Tex. 1846),

² *Wasson Interests, Ltd. v. City of Jacksonville (Wasson I)*, 489 S.W.3d 427, 431 (Tex. 2016) (observing rationales for sovereign immunity originated from the English legal fiction that “[t]he King can do no wrong” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 246)).

³ *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex.2008).

⁴ *Hall v. McRaven*, 508 S.W.3d 232, 253 (Tex. 2017) (Brown, J. & Green, J., concurring) (explaining that sovereign immunity serves separation of powers principles).

⁵ *Brown & Gay Eng’g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015) (explaining that the modern justification for immunity is to protect the public fisc); *see also Hall*, 508 S.W.3d at 244 (Willett, J., concurring) (explaining that sovereign immunity not only protects the public fisc, but insulates imprudence).

a. Sovereign Immunity v. Governmental Immunity.

Although often used interchangeably, the terms sovereign immunity and governmental immunity involve two distinct concepts.⁶ Sovereign immunity protects the State and divisions of state government (including agencies, boards, hospitals, and universities) from lawsuits for damages.⁷ Governmental immunity protects political subdivisions of the State, including counties, cities, and school districts.⁸ However, this appears to be a distinction without a substantive difference, and Texas case law recognizes that the two concepts function identically, albeit for different entities.⁹ For purposes of this paper, governmental immunity and sovereign immunity will be used interchangeably.

b. Immunity from suit and immunity from liability.

Governmental immunity embraces two distinct types of immunity: immunity from suit and immunity from liability. Immunity from suit bars a suit against a governmental entity without the State's consent. Even if the State concedes liability, immunity from suit prevents a lawsuit from being maintained to seek a remedy by depriving the court of subject matter jurisdiction, unless the State consents, either through a constitutional provision or legislative action.¹⁰

⁶ *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

⁷ *Id.*; *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997).

⁸ *Wichita Falls State Hosp.*, 106 S.W.3d at 694 n.3.

⁹ *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 n.2 (Tex. 2006).

¹⁰ *Fed. Sign*, 951 S.W.2d at 405.

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