

THE ABC'S OF SOVEREIGN IMMUNITY

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Chapter 4

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THE ABC'S OF SOVEREIGN IMMUNITY

I. INTRODUCTION

Sovereign immunity is a central component of any suit involving public entities. Whether suing or defending a governmental entity, attorneys must always be aware of the challenges and limitations that immunity places on not only the ability to bring suit against the entity, but also the types and amounts of damages that may be recovered.

The state of the law continues to evolve as the Texas legislature and courts redefine the scope and application of immunity both in tort and contract. The last five years in particular have seen a myriad of statutory and common law changes resulting in a dramatic shift of the immunity landscape. The long history and constant evolution of the doctrine can make governmental immunity a particularly difficult topic for beginning public law attorneys, but understanding the basics and the latest changes is essential to starting a government based practice.

Much has been written about the history, application, and procedural implications of governmental immunity. This paper breaks down the basic issues and concepts that every government law attorney should be aware of. It will, hopefully, answer the fundamentals of immunity including:

- (1) What is its purpose?
- (2) What entities have it?
- (3) What are these entities immune from?
- (4) Can that immunity be waived?

It does not, however, attempt to contain every nuance and exception to the doctrine of sovereign immunity, but references to additional secondary materials are included. To fully understand and apply sovereign immunity, it is necessary to understand its origins and purposes. Understanding the evolution of a doctrine helps to analyze its application in particular instances.

II. WHAT IS THE PURPOSE OF IMMUNITY?

In its most general sense, immunity is the concept that the government cannot be brought before the courts and have damages assessed against it without consenting. It protects the government from suits and liability. The concept goes all the way back to the King of England and the idea that the King can do no wrong. 1 WILLIAM BLACKSTONE, COMMENTARIES *238. The idea is that the King, or government, is the source of all laws and as such the laws cannot be used against him. See Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When it*

Contracts—Or Does It? 27 ST. MARY'S L.J. 679, 684 (1996).

Originally disfavored in early American jurisprudence, the United States Supreme Court accepted the doctrine of governmental immunity in 1821. Following the enactment of the Eleventh Amendment, which limits jurisdiction over the States, the Supreme Court concluded that an individual could not sue a state in federal court. See *Cohen v. Virginia*, 19 U.S. (6 Wheat) 264 (1821). From that, the concept of immunity took its place in American law.

A. History of Immunity in Texas

In 1847, the Texas Supreme Court followed the U.S. Supreme Court's lead and recognized the doctrine of sovereign immunity holding that "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. De Young*, 1 Tex. 764, 769 (1847). The Texas court did not point to any particular support for this proposition, but rather adopted as common law the principle that the government had immunity.

The common law jurisprudence evolved over time, but in the 1930s the Texas courts began to limit the broad application of immunity. The Commission of Appeals made the first distinction between a governmental and proprietary function and limited immunity to the former. See *City of Amarillo v. Ware*, 40 S.W.2d 57, 60 (Tex. 1931). The court recognized that a city was immune from liability when it performs a duty imposed by the state solely for the public benefit. *Id.* at 60. It was not, however, immune from "those acts and functions intended primarily for the benefit of those within the corporate limits of a municipality." *Id.* In *Ware*, the court concluded that construction of storm sewers were not strictly a governmental function and therefore, the city was not exempt from liability for damages to land. *Id.*

The Texas courts and legislature have followed this trend and the absolute nature of sovereign immunity has diminished over time. "Most sovereigns have long since abandoned the fiction that governments and their officials can 'do no wrong.' To varying degrees, states and the federal government have voluntarily relinquished the privilege of absolute immunity by waiving immunity in certain contexts." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003). The immunity that remains, however, is still supported by the underlying purposes of protecting the governmental entity.

B. Purpose of Immunity

Understanding the underlying policy behind sovereign immunity helps elucidate the doctrine. After

all, most people now recognize that governments can do wrong, so why keep immunity at all? Sovereign immunity does more than just let the King do what he wants. The government—of all levels—is involved in many aspects of citizens' daily lives and performs a wide range of functions. Governments operate buses, build roads, contract for waste collection, enforce fire codes, provide water treatment, and offer disaster relief. The number of contacts and interactions that governments have with citizens is staggering and possibly why their legal departments are often so big. Further, government is tasked with making complex policy decisions on a daily basis. Without sovereign immunity, the government could be subject to a constant barrage of legal actions challenging its decisions and actions.

Sovereign immunity serves two general purposes (1) prevents the waste of tax money on lawsuits and (2) it protects the policy decisions of officials. First and foremost, immunity from suit protects the public coffers. "The exposure of governmental entities to liability may shift tax resources away from their intended purposes and toward defending lawsuits and paying judgments, thereby, hampering government functions." *Ben Bolt-Palito Blanco Consol. Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320, 326 (Tex. 2006).

Second, sovereign immunity protects the policy making process in that it (1) prevents the questioning of policy decisions via the courts and (2) prevents subsequently elected officials from being bound by previous policy makers. Legislative control over sovereign immunity protects its policymaking function. *Texas Natural Resources Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002). "[L]egislative control ensures that current policymakers are neither bound by, nor held accountable for, policies underlying their predecessors' long-term contracts." *Id.*

While this power may seem broad, it does not mean that the State can use sovereign immunity with abandon. *Id.* To the contrary, the courts and legislature, in reaction to this very perception, have slowly begun to place further limits on the immunity provided to governmental entities. Immunity, therefore, has become a bit of a jigsaw puzzle made up of varying shapes and sizes of immunity. The first piece of that puzzle is determining whether the entity in question actually has immunity.

III. WHAT ENTITIES HAVE IMMUNITY?

Technically there are two types of immunity: (1) sovereign and (2) governmental. Which applies depends upon the governmental entity at issue. The two provide essentially the same protections, but to

different types of entities. Sovereign immunity applies to the State and its agencies. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Governmental immunity protects political subdivisions of the State such as cities and counties. *See City of LaPorte v. Barfield*, 898 S.W.2d 288, 291. Although there are distinctions to these two types of immunity, the phrase "sovereign immunity" is often used to apply to both.

A. The State and its Agencies

Given that the State is the sovereign, it goes without saying that the State enjoys sovereign immunity. "It is well settled that so long as the state is engaged in making or enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen." *Green Int'l v. State*, 877 S.W.2d 428, 437 (Tex. App.—Austin 1994, writ dismissed by agr.).

Any unit of state government is subject to sovereign immunity. State agencies and state universities have sovereign immunity. *Lowe v. Tex. Tech. Univ.*, 540 S.W.2d 297 (Tex. 1976). More broadly defined the State encompasses "all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts." TEX. CIV. PRAC. & REM. CODE § 101.001(3)(A).

B. Political Subdivisions, Local Government Entities, and Governmental Units

Depending on the case or statute, other governmental entities generally fall into one or more of the above categories and are generally afforded governmental immunity. The above terms, however, are often used interchangeably and this practice can lead to some confusion. It is important to be precise—as can be possible—in using these terms.

Political Subdivision. There is no one specific definition of political subdivision found in Texas law. Rather, it is defined in numerous statutes. *See* TEX. GOV'T CODE § 2254.021(4)(M); TEX. LOC. GOV'T CODE § 172.003; TEX. LAB. CODE § 406.098(b)(4); TEX. LAB. CODE ANN. § 504.001(3). It includes a wide range of entities from cities and counties to junior colleges and special purpose districts.

The phrases local governmental entity and governmental unit are used to define the relevant entities for purposes of statutory immunity in contract and tort, respectively. Both of these phrases incorporate the word "political subdivision", but also contain additional terms and phrases.

Governmental Units. The Texas Torts Claim Act (“TCA”) applies to governmental units. A governmental unit includes the state and its agencies as well as political subdivisions. Political subdivisions, as directly recognized in the TCA include “any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority.” TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B).

A governmental unit also includes emergency service organizations and “any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.” TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D).

Local Governmental Entity. In contrast, the definition of local governmental entity under the Local Government Code regarding adjudication of contract claims is most important for what it *does not* include. A local governmental entity is a political subdivision *other than* a county or unit of state government. The included political subdivisions are (1) cities; (2) public school districts and junior college districts; and (3) special-purpose districts or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, emergency service organization, and river authority. LOC. GOVT. CODE § 271.151(3)(A-C).

C. Municipalities

Municipalities are generally included in the definition of political subdivision as detailed above. The governmental immunity afforded to municipalities, however, is more limited. Governmental immunity applies to municipalities only when it engages in governmental functions. *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). A municipality, however, does not have governmental immunity when it performs a proprietary function. *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589 (Tex. App.—Austin 1991, writ denied).

In determining whether an act is governmental or proprietary, the courts look to whether the act is public in nature and performed as an agent of the State or whether it is performed primarily for the benefit of

those within the corporate limits of the municipality. *City of Lubbock v. Phillips Petroleum Co.*, 41 S.W.3d 149 (Tex. App.—Amarillo 2000, no pet.). The Texas Tort Claims Act defines governmental functions as those 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” and delineates certain actions such as police and fire protection, waterworks, and traffic regulation as being included. TEX. CIV. PRAC. & REM. CODE §101.0215(a)(1-36).

When evaluating governmental immunity as it applies to cities, therefore, it is first necessary to determine the type of act the municipality has undertaken. If it is a proprietary act, then governmental immunity does not apply and will not provide any immunity from suit or liability.

D. Others

What entities qualify for immunity under Texas law is clear as mud. It is important to look specifically at the type of entity and the applicable statute. In the absence of a specific inclusion of a certain type of entity, an analysis can be conducted to help determine whether governmental immunity applies.

The courts look to whether the “governing statutory authority demonstrates legislative intent to grant an entity the ‘nature, purposes, and powers’ of an ‘arm of the State government,’ [then] that entity is a government unit unto itself.” *Ben Bolt-Palito*, 212 S.W.3d 320, 325 (Tex. 2007). “A district with [s]uch powers of government and with the authority to exercise such rights, privileges and functions’ to achieve its purpose is considered a governmental unit.” *Id.* (holding political subdivisions’ joint self-insurance fund was a distinct governmental entity entitled to assert immunity in its own right for the performance of a governmental function and enjoyed the same governmental immunity as other political subdivisions).

IV. IMMUNITY FROM SUIT

A. Generally

In Texas, sovereign immunity encompasses two features. The first of these is immunity from suit, which bars suit against a governmental entity. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332-33 (Tex. 2006). “Immunity from suit bars a suit against the State unless the State expressly gives its consent to the suit. In other words, although the claim asserted may be one on which the State acknowledges liability, this rule precludes a remedy until the Legislature consents to suit.” *Federal Sign*, 951 S.W.2d at 405.

Immunity from suit means that the trial court lacks subject matter jurisdiction over the case. “A court’s jurisdiction is conferred by the constitution and the statutes; a court without jurisdiction cannot render a valid judgment. Want of subject-matter jurisdiction arrests a cause at any stage in the proceedings.” *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied). Without the lawful authority to decide a case, the trial court must dismiss the action. *Id.* (citations omitted).

Sovereign immunity from suit defeats the jurisdiction unless the state has expressly consented to suit. *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Consent must be established by the suing party and can be done by reference to a statute or to express legislative permission. *Id.* (citations omitted). “Since as early as 1847, the law in Texas has been that absent the state’s consent to suit, a trial court lacks subject matter jurisdiction.” *Id.* (citations omitted).

Immunity from suit raises a jurisdictional bar that both plaintiffs and defendants need to be aware of. For plaintiffs, to defeat this hurdle, pleadings must specifically point to the statutory language waiving immunity from suit. For defendants, it is necessary to plead immunity from suit.

B. How Do I Claim Immunity from Suit?

There are three basic methods by which defendants can assert immunity from suit: (1) a plea to the jurisdiction; (2) summary judgment; and (3) special exceptions. See Jeffrey Boyd, *An Ace in the Hole & A Jack of All Trades: Recent Developments Affecting Sovereign Immunity & Pleas to the Jurisdiction*, 6 TEX. TECH. J. TEX. ADMIN. L. 60 (2005).

A party may contest a trial court’s subject matter jurisdiction by filing a plea to the jurisdiction. *Tex. Dep’t of Transp.*, 8 S.W.3d at 638. The Texas Rules of Civil Procedure are largely silent on pleas to the jurisdiction other than to require original answers to contain such pleas. See TEX. R. CIV. P. 85. A plea to the jurisdiction alleges that there are incurable jurisdictional defects in the plaintiff’s pleadings. *Texas State Employees Union/CWA Local 6184 v. Texas Workforce Commission*, 16 S.W.3d 61, 65 (Tex. App.—Austin 2000, no pet.).

A plea to the jurisdiction is the most commonly used challenge on immunity from suit because it is subject to interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). Therefore, this issue will go up on appeal prior to any further proceedings which has the benefit of delaying discovery and trial.

The popularity of the plea to the jurisdiction has resulted in the courts expanding it from a mere challenge to the sufficiency of the pleadings to the

consideration of evidence. See *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000). This has caused some jurists to consider the plea to the jurisdiction a “white elephant of current motion practice.” *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004) (Brister, J. dissenting).

Under this analysis, the more appropriate forms of bringing immunity from suit are the special exceptions and summary judgment. In both of these the defendant can include other reasons for dismissal in addition to immunity. The special exception challenges jurisdiction based purely on the face of the plaintiff’s pleadings. The special exception informs the opposing party of the defects and requires amendment—if possible. TEX. R. CIV. P. 91. It should be filed in conjunction with a plea in abatement to stop further proceedings. The plaintiff then has the opportunity to amend, but absent statutory waiver of immunity, it should not be able to cure the defect.

A defendant may also move for summary judgment on the basis of immunity from suit. As part of a summary judgment, the court may properly consider evidence in support of the contention that an entity is or is not subject to immunity from suit. Such a motion may be a more proper way of challenging jurisdiction if there is some greater factual question regarding the allegations than can be immediately gleaned from the pleadings.

C. Can Immunity from Suit be Waived?

Yes, immunity from suit can be waived by statute and actions of the governmental entity. Waiver must be shown in order establish the trial court’s jurisdiction. The Legislature has done this on numerous occasions especially with regard to contracts and torts. A governmental entity can also waive immunity through its actions, both intentional and mistaken.

1. Waiver by Statute

a. Contract

A governmental entity does not waive immunity from suit merely by entering into a contract. *Federal Sign*, 951 S.W.2d at 408-809. *Federal Sign*, the 1997 Texas Supreme Court decision that reiterated this long held rule, helped fuel an ever changing landscape regarding immunity from suit for contract claims. Following this decision, the Legislature enacted statutes relating to contract claims against the state as well as local governments.

Government Code Chapter 2260: Contract Claims Against the State. While expressly retaining sovereign immunity to suit and liability, the Legislature enacted

Government Code Chapter 2260, which outlined a claims procedure for breach of contract against the state. TEX. GOV'T CODE § 2260.006.

The statute applies only to units of state government and details a procedure for negotiating and/or contesting the claim. TEX. GOV'T CODE §§ 2260.051-104. A claim may be brought against a unit of state government for a breach of contract for goods, services, or construction. TEX. GOV'T CODE § 2260.051. If, after following the designated negotiation and mediation procedures, the contractor is dissatisfied with the results it may file a request for a hearing before the State Office of Administrative hearings. TEX. GOV'T CODE at § 2260.102.

While this statute does not waive sovereign immunity, it does provide a mechanism by which parties that have contracted with the state may recover. It does not, however, provide a waiver of immunity from suit. Rather, it is a condition precedent to filing suit pursuant to Civil Practice & Remedies Code Chapter 107. TEX. GOV'T CODE § 2260.005.

Local Government Code Chapter 271, Subchapter I: Contract Claims Against Local Governmental Entities. Another statutory provision regarding contract claims against the government, is found in the Local Government Code and applies to local governmental entities. As discussed above, a local governmental entity expressly does not include a county or unit of state government. TEX. LOC. GOV'T CODE § 271.151(3).

The statute waives immunity to suit for breach of certain specified contracts. “A 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 the contract.” TEX. LOC. GOV'T CODE § 271.152.

Covered contracts including “any 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.” TEX. LOC. GOV'T CODE § 271.151(2).

Local Government Code § 262.007: Suits Against Counties. While counties are not included in Local Government Code Chapter 271, there is another limited statutory waiver of suit in contract against counties. A county may be sued on a written contract for “engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services.” TEX. LOC. GOV'T CODE § 262.007.

Both statutes have huge limitations on recovery that are discussed further below.

b. Tort

Texas Tort Claims Act. “A Texas state agency [and other political subdivisions] may not be sued for torts of its agents in the absence of a constitutional or statutory provision that waives [their] governmental immunity for alleged wrongful acts.” *Texas Parks and Wildlife Dep't. v. Davis*, 988 S.W.2d 370, 372 (Tex. App.—Austin 1999, no pet.). Like with contracts, the Legislature waived immunity from suit for certain tort claims under the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE §§ 101 *et seq.*

In Texas, under the doctrine of sovereign immunity, a governmental entity cannot be held liable for the actions of its employees unless there is a constitutional or statutory provision waiving such immunity. *City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex. 1998); *Harrison v. Texas Bd. of Pardons & Paroles*, 895 S.W.2d 807, 809 (Tex. App.—Texarkana 1995, writ denied); *Bookman v. Bolt*, 881 S.W.2d 771, 774 (Tex. App.—Dallas 1994, writ denied). Sovereign immunity can be waived only through the use of clear and unambiguous language. *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994).

As previously discussed, the TCA applies only to governmental units and all state law claims against such a unit must proceed, if at all, through the limited waiver of sovereign immunity found in the Act. *See e.g., City of San Antonio v. Hernandez*, 53 S.W.3d 404, 408 (Tex. App.—San Antonio 2001, pet. denied). *See also State v. Rodriguez*, 985 S.W.2d 83, 85-86 (Tex. 1999) (holding that State retained sovereign immunity in wrongful death case because of explicit provisions of Texas Tort Claims Act barring suit).

The Texas Legislature enacted the TCA to waive sovereign immunity in only certain limited circumstances. *See Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 340, 343 (Tex. 1998); *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 586 (Tex. 1996); *York*, 871 S.W.2d at 177; *Harrison v. Tex. Bd. of Pardons and Paroles*, 895 S.W.2d 807, 809. Section 101.021 of the TTCA, entitled “Governmental Liability,” provides:

A governmental unit in the 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:

- (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

- (2) personal injury and death so caused by the condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021.

Section 101.022, entitled “Duty Owed: Premise and Special Defects,” provides:

- (1) If a claim arises from a premises defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
- (2) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060.

TEX. CIV. PRAC. & REM. CODE § 101.022.

The TCA waives immunity for three types of claims: (1) claims arising from the operation or use of motor-driven vehicles or equipment; (2) claims caused by a condition or use of tangible personal or real property; and (3) claims arising from premises defects. TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.022; *Kesler v. King*, 29 F. Supp. 2d 356, 375 (S.D. Tex. 1998); *Bossley*, 968 S.W.2d at 342-43; *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 33 (Tex. 1983); *Vincent v. West Tex. State Univ.*, 895 S.W.2d 469, 472 (Tex. App.—Amarillo 1995, no writ).

To hold a governmental entity liable under the TCA for the acts of its employees: (1) the claim must arise under one of three specific areas of liability; and (2) the claim must not fall within an exception to the waiver of sovereign immunity. *Alvarado v. City of Brownsville*, 865 S.W.2d 148, 155 (Tex. App.—Corpus Christi 1993), *rev'd on other grounds*, 897 S.W.2d 750 (Tex. 1995); *accord City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex. App.—Houston [1st Dist.] 1995, no writ); *McKinney v. City of Gainesville*, 814 S.W.2d 862, 865 (Tex. App.—Fort Worth 1991, no writ); *see also City of Denton v. Page*, 701 S.W.2d 831, 834 (Tex. 1986); *Salcedo*, 659 S.W.2d at 31. “The determination of a governmental entity’s negligence will be made only after a claimant has cleared these two statutory hurdles.” *Alvarado*, 865 S.W.2d at 155.

The TCA does not waive immunity for intentional torts. *See Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994); *Riggs v. City of Pearland*, 177 F.R.D. 395, 405 (S.D. Tex. 1997); *Huong v. City of Port Arthur*, 961 F. Supp. 1003, 1008-09 (E.D. Tex. 1997); *Kmiec*, 902 S.W.2d at 122; *City of San Antonio v. Dunn*, 796 S.W.2d 258, 261 (Tex. App.—San Antonio 1990, writ denied). In fact, intentional torts are specifically exempted from the coverage of the TTCA. The statute provides:

This chapter does not apply to a claim:

- (1) based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion; or
- (2) arising out of assault, battery, false imprisonments or any other intentional tort, including a tort involving disciplinary action by school authorities.

TEX. CIV. PRAC. & REM. CODE § 101.057. “This limitation provides that claims ‘arising out of assault, battery, false imprisonment, or any other intentional tort’ are not actionable” under the TCA. *McCord v. Memorial Med. Ctr. Hosp.*, 750 S.W.2d 362, 363 (Tex. App.—Corpus Christi 1988, no writ.).

c. Others

In the absence of language such as that discussed above, the courts are often asked to determine whether a statute has waived immunity. The courts “require[] the Legislature to express its intent beyond doubt and . . . construe ambiguities in a manner that retains the state’s sovereign immunity.” *Wichita Falls State Hosp.*, 106 S.W.3d at 700.

Commentators have identified several statutes that have been found to waive immunity from suit. These have included the Texas Commission on Human Rights Act; Anti-Retaliation Act; Whistleblower Act; the Education Code; and the Water Code. *See* Michael Shaunessy and Kristofer Monson, *Sovereign Immunity: Uneasy Rests the Head that Wears the Crown*, Address Before Suing and Defending Governmental Entities (July 24, 2008).

d. Sue and be Sued Language

Much has been written about whether sue and be sued language in a statute or charter constitutes a waiver of immunity. *See e.g.*, A. Craig Carter, *Is Sue and be Sued Language a Clear and Unambiguous waiver of Immunity?*, 35 St. Mary’s L.J. 275 (2003-2004). The Texas Supreme Court in June 2006 resolved any conflict and held that “sue and be sued”

and “plead and be impleaded” do not clearly and unambiguously waive immunity from suit. *Tooke*, 197 S.W.3d at 325. It held that many times, such phrases deal with grants of capacity and therefore merely mean that a governmental entity “can be sued and impleaded in court when suit is permitted, not that immunity is waived for all suits.” *Id.* at 344. Courts in reviewing such language should look to the context of the phrases’ usage to determine whether immunity is waived.

2. *Waiver by Actions*
 a. Filing Suit or Claim

A governmental entity has been found to waive immunity from suit when it files a suit, intervenes, or asserts non-compulsive counter-claims. The Texas Supreme Court in *Reata* followed an arduous road to come to this final determination. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The Court issued its first *Reata* opinion in 2004 and held that when a governmental entity intervenes in a suit or files a counterclaim it waives its immunity from suit. *Reata Constr. Corp. v. City of Dallas*, 2004 WL 726906 (Tex., Apr. 2, 2004, op. withdrawn). The Court reasoned that “where a state voluntarily files a suit and submits its rights for judicial determination it will be bound thereby and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy.” *Id.* (citations omitted).

The Court later withdrew this opinion and replaced it with a new holding and rationale. In the 2006 *Reata* opinion, the Court held that when a governmental entity intervenes in a suit, it waives its immunity for claims against it that are germane to, connected with, and properly defensive—but only to the extent that those claims offset those of the governmental entity. *Reata*, 197 S.W.3d at 371.

The Court emphasized that a “lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes.” *Id.* at 375. However, “if the governmental entity chooses to interject itself into or chooses to engage in litigation to assert affirmative claims for monetary damages, the entity will presumably have made a decision to expend resources to pay litigation costs.” *Id.* at 375. “[I]f [however] the opposing party’s claims can operate only as an offset to reduce the government’s recovery, no tax resources will be called upon to pay a judgment, and the fiscal planning of the governmental entity should not be disrupted.” *Id.*

A balance, therefore, has been struck with regards to waiver by filing suit. To the extent that a

governmental entity waives immunity to suit by availing itself of the courts, recovery is allowed only to the amount of offsetting the government’s recovery.

b. Failure to Plead

Immunity from suit is a defect in the court’s jurisdiction and not an affirmative defense. Therefore it cannot be waived. Because immunity from suit is a bar it can be raised at any time, including on appeal or *sua sponte* by the courts. *See Jones*, 8 S.W.3d at 638.

V. CAN LIABILITY BE ASSESSED?

Immunity from liability protects the State from judgments even if the Legislature has expressly given consent to the suit. In other words, even if the Legislature authorizes suit against the State, the question remains whether the claim is one for which the State acknowledges liability. *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423, 425 (1936); *see also, Governmental Immunity From Suit and Liability in Texas*, 27 TEX. L. REV. 337, 342 (1949). The State neither creates nor admits liability by granting permission to be sued. TEX. CIV. PRAC. & REM. CODE § 107.002 (“A resolution granting permission to sue does not waive to any extent immunity from liability”); *Isbell*, 94 S.W.2d at 424-25.

A. Contract

The long standing rule in Texas is that when a governmental entity enters into a contract it waives its immunity from liability. *Federal Sign*, 951 S.W.2d at 408-09. By entering into a contract, therefore, a governmental entity can be held liable for damages and as stated above, there is some statutory waiver of immunity from suit. Taken together, it means that most governmental entities that enter into a contract have some exposure to lawsuits and damages. The amount, however, is still restricted.

Even when the governmental entity is subject to liability the amounts and types of damages available to collect against it can be limited. The amounts awarded from an adjudication under chapter 271 of the Local Government Code are limited to the following:

- (1) the balance due and owed by the local governmental entity under the contract, including amounts owed for increased costs to perform the work as a result of owner-caused delays or acceleration;
- (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and

(3) interest.

TEX. LOC. GOV'T CODE § 271.153(a)(1-3). Further damages against a local governmental entity may not include:

- (1) consequential damages;
- (2) exemplary damages; or
- (3) damages for unabsorbed home office overhead.

TEX. LOC. GOV'T CODE § 271.153(b)(1-3).

Damages against counties for certain types of contracts—as previously discussed—are also limited. The amounts recoverable against a county are identical to those under Chapter 260 with the exception that reasonable and necessary attorney's fees may be awarded if properly asserted. TEX. LOC. GOV'T CODE § 262.007(a-c).

Similar restrictions are placed on damages arising out of contract against a unit of state government. TEX. GOV'T CODE § 2260.003. Deducting amounts owed for work not yet performed, a contractor may recover an amount not to exceed the sum of:

- (1) the balance due and owing on the contract;
- (2) the amount or fair market value of orders or requests for additional work;
- (3) any delay or labor-related expense incurred by the contractor as the result of the acts of the unit of state government.

Damages that are expressly excluded include:

- (1) consequential damages;
- (2) exemplary damages;
- (3) damages based on unjust enrichment;
- (4) attorney's fees; or
- (5) home office overhead.

TEX. GOV'T CODE § 2260.003(a)-(c).

Even with the waiver of immunity from suit and liability, plaintiffs are still limited as to the total amount of damages that they may recover for contract claims.

B. Tort

Like contracts, the amount of liability that can be assessed against a particular governmental entity is also limited by statute. TEX. CIV. PRAC. & REM. CODE § 101.023. “[T]he Legislature has agreed to hold the government liable up to a specified dollar amount.” *Edinburg Hosp. v. Trevino*, 941 S.W.2d 76, 81-81 (Tex. 1997). Depending on the entity type, maximum liability limits are capped by the TCA.

State Government. Money damages against a state government are limited to a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. TEX. CIV. PRAC. & REM. CODE § 101.023(a).

Local Governmental Unit. Money damages against a local government unit are limited to the maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. TEX. CIV. PRAC. & REM. CODE § 101.023(b).

Municipalities. Money damages against a municipality are limited to a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. TEX. CIV. PRAC. & REM. CODE § 101.023(c).

Emergency Service Organizations. Money damages against an emergency service organization are limited to a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. TEX. CIV. PRAC. & REM. CODE § 101.023(d).

C. Waiver

1. Failure to Plead

Failure to plead immunity from liability by a governmental defendant can result in the defense being waived. Immunity from liability does not affect a court's jurisdiction to hear a case. *Jones*, 8 S.W.3d at 638. Immunity from liability is an affirmative defense and not a jurisdictional challenge. *Id.* As such, “it must be pleaded or else it is waived.” *Id.*

VI. CONCLUSION

As this article hopefully makes clear, it is an extremely difficult process to bring suit against a governmental immunity. The State, counties, municipalities, and other special districts enjoy broad immunity. This immunity is two fold and both aspects must be overcome by plaintiffs prior to recovery. Governmental entities are not generally subject to the jurisdiction of the courts. This immunity from suit must be expressly waived. Second, these entities are also immune from liability even if they are brought into court. Even if both steps of immunity are overcome, the damages that can be assessed against these entities are limited by statute. Counsel must be aware of these basic hurdles when considering suing or defending a governmental entity.