

# Understanding Sovereign Immunity

Cooper & Scully Construction Seminar 2019

Wes Johnson  
Cooper & Scully, PC  
900 Jackson Street, Suite 100  
Dallas, Texas 75202  
[wes.johnson@cooperscully.com](mailto:wes.johnson@cooperscully.com)

# What is Sovereign Immunity?

- The concept of the “sovereign” being immune from suit extends back into the Middle Ages and the English Crown





# What is Sovereign Immunity

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- The Crown could not arbitrate or adjudicate all disputes amongst the subjects of the realm, so judges and “courts” were established to extend royal authority to the countryside
- While it was no longer the King hearing disputes, the Court was still representing royal authority

# What is Sovereign Immunity?

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- Thus, no one would ever walk into the King's Court and accuse the King of wrongdoing – that is essentially the root of immunity
- Over the centuries it took hold that the sovereign could not be held to account in its own Courts



# American and Texan Adoption

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- Hamilton spoke in favor of preserving sovereign immunity in the Federalist Papers
- The Texas Supreme Court held in 1847 that “no state can be sued in her own court without her consent and then only in the manner indicated by that consent...”

*Hosner v. De Young*, 1 Tex. 764 (Tex. 1847)

# Modern Views

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- As such, under the common law, the State of Texas is immune from all liability
- Only a statute passed by the Texas Legislature may abrogate the immunity
- Modern policy makers believe there remains a purpose in limiting litigation against the State



# Who Is The Sovereign?

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- ◉ State Agencies
- ◉ State Universities
- ◉ Political Subdivisions
  - Counties
  - Cities
  - School Districts
  - Special Use Districts
    - Ex. River Authorities, Water Boards, Utility Districts

# Who Is The Sovereign

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- Texas Courts have extended immunity very broadly
- “When performing governmental functions, political subdivisions derive governmental immunity from the State’s sovereign immunity.”

*City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011)



# Who Is The Sovereign?

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- This interpretation has lead to expansive uses of governmental immunity for various special use districts, even governmental group risk pools and self-insurance pools
- Even charter schools and quasi-public academic institutions, such as Baylor Medical School in Houston have been extended immunity

# Who Is Not

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- One of the most litigated questions has been, if a state agency such as TxDOT is immune for their function, would a contractor also be immune for performing that function on behalf of the agency?



# Brown and Gay Engineering

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- In this case the Fort Bend County Toll Road Authority contracted with B&G for design on the Westpark Tollway
- In 2007, a drunk driver entered an exit ramp on the toll road and drove on the wrong side of the roadway for eight miles before finally hitting an oncoming vehicle, killing two.

# Brown and Gay Engineering

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- Decedent's family sued the Toll Authority and B&G alleging design failures that failed to prevent the driver from entering the roadway
- Toll Authority was dismissed from suit based upon sovereign immunity considerations
- B&G argued that it should be granted derivative sovereign immunity as it was an employee of the Authority



# Brown and Gay Engineering

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- Texas Supreme Court disagreed holding that extending immunity to a contractor did not fulfill the rationale behind sovereign immunity, which is ostensibly to protect the public funds and treasury
- Court also found a private party such as B&G can manage liability exposure through insurance
- Found that B&G, while given parameters, carried out its work with independent discretion

# Mechanisms for State Liability

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- As mentioned above, the state agency can only be liable through some statutory authority that abrogates the immunity
- The most common statute associated with abrogating immunity is the Texas Tort Claims Act



# Texas Tort Claims Act

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- First, the TCA is a limited waiver of liability, not a blanket waiver – any ambiguity of intent is construed in favor of immunity
- TCA applies to state and all agencies of the state; political subdivisions; emergency services organizations; any other institution who has status from constitutional or statutory authority.

Tex. Civ. Prac. & Rem. Code 101.001

# Employees of Agencies

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- TCA extends the limited waiver of immunity to employees of covered units, whom are subject to the control of any officer, agent or elected official of the governmental unit



# Liability Under the TCA

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- A governmental unit is liable for:
  - Property damage, personal injury and death proximately caused by the wrongful act or omission or negligence of an employee acting within the scope of his employment if:
    - The injury or damage arises from the use of a motor vehicle and the employee would be personally liable under Texas law

# Liability Under the TCA

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- A governmental unit is also liable for personal injury and death so caused by a condition or use of tangible personal property or real property, such that would subject the unit to personal liability were it a private person.



# Exemptions from the TCA

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- Legislative functions
- Judicial functions
- Actions in collection of taxes
- Actions of emergency responders, EMS, Police, Fire
- Does not apply to injury or death arising from civil disobedience, riot, rebellion
- Arising from an intentional tort
- Suits involving traffic control devices

# Premises Liability and Special Defect

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- If a premises claim is made against a covered entity, the entity only owes the claimant a duty that a private person would owe a licensee on private property
- Exception is a “special defect”
- Limitation of duty does not apply to duty to warn of special defects such as excavations or obstructions on roadways



# Liability Limits

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- \$250,000 for each person
- \$500,000 for occurrence for injuries or death
- \$100,000 per occurrence for property damage

# Notice Provisions

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- A covered unit is entitled to receive notice of a claim not later than six months after the day that the incident giving rise to claim occurred
  - Notice must describe:
  - Damage claimed
  - Time and place of incident;
  - Facts of the incident



# Municipal Proprietary Functions Not Covered

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TCA applies only to “governmental functions” imposed on a city by law and given to a city by the state as part of state sovereignty.

Ex. Police, Fire, Sanitation, Parks, Zoning, etc

Proprietary functions are discretionary

- . Ex. Municipally owned utilities, amusements

# TCA Only Applies to Torts

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- For years, claimants and contractors have been frustrated by the application of immunity to contract claims against state agencies and cities



# Limited Waiver of Immunity for Contract Involving Municipalities

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- Chapter 271 of the Local Government Code provides a limited waiver against local governments, cities (not counties)
- Must have a written contract stating the essential terms of the agreement (time of performance and payment, services rendered)
- Must directly perform service for governmental entity

# Mechanisms to Sue Agency for Breach of Contract

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- In *City of New Braunfels v. Carowest Land*, the Austin Court of Appeals held that immunity extended to a claim for declaratory relief seeking an end run to establish a contractual breach

*City of New Braunfels v. Carowest Land, Ltd.*, 549 S.W.3d 163 (Tex. App. – Austin 2017)



# Cities Can Be Liable for Proprietary Functions

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- Wasson Interests, Ltd. v. Jacksonville
- 2016 Texas Supreme Court
- Much as with tort claims, cities do not enjoy immunity from suit for proprietary acts, even regarding contract breaches
- Civic action in this case involved leasing lakefront lots around a municipally owned lake

# Specific Performance

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- Chapter 271 of the Local Government Code has been held by the San Antonio Court of Appeals to not waive immunity from suit seeking specific performance.
- Surprising outcome – specific performance only seeks the contract be performed
- Court ruled that the damages limitation sets out the relief – specific performance not included

*City of San Antonio v. Hays Street Bridge Restoration Group*, 551 S.W3d 755 (Tex. App. – San Antonio 2017, pet. granted).



# Questions?

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Wes Johnson

Cooper & Scully, PC

900 Jackson Street, Suite 100

Dallas, Texas 75202

(214) 712-9500

Wes.johnson@cooperscully.com