

# public domain

Information and Risk Management Ideas for Public Entities

## WHEN CAN YOU BE SUED?

### Public Entities Have Some Immunities, But You Must Understand the Fine Print

**WHEN** can you be sued? If you're a public entity, it turns out the answer can be pretty complicated.

While state and local jurisdictions once enjoyed near-sovereign immunity, those days have long since been replaced with a patchwork of immunities, exemptions, and caps on damages for injuries and property losses. The net result is that not only do state laws vary, but different rules may also apply whether you're a school district, a local government, a municipality, or some other public entity.

Not complicated enough? You may also be looking at different rules depending on what governmental function you're undertaking. You'll also have to learn which immunities apply (or do not apply) to your employees.

To help understand what's happening out there, *Public Domain* talked with Rodney Lynch, vice president, Genesis, about this landscape. He started with the easy piece: alleged violations of federal law (e.g., anti-discrimination laws) or federal constitutional rights (e.g., failure to grant a permit for a religious festival or another alleged first amendment violation).

"Rarely is there immunity from federal causes of action," said Lynch. "Most lawsuits seek compensatory damages, attorney fees, and punitive damages. Caps on damages a plaintiff may be awarded in these types of lawsuits can be high, if there are caps at all, so federal cases are typically expensive and involve many hours of legal work."

#### Six Scenarios that Illustrate the Risks

While the federal risks are relatively simple to quantify, the state and local jurisdictional risks are not. Lynch highlighted six scenarios designed to illustrate some of the challenges faced by public officials tasked with trying to mitigate risk.

**1) Out-of-State Travel**—If an employee is traveling for work out of state, that person becomes subject to the laws in

that state (much as a person might be subject to Mexico's or Germany's laws if traveling abroad). If your employee is in an auto accident while at a convention in Las Vegas, for example, you can be sued in Nevada and lose whatever immunity may or may not have applied in your home state.

**2) Some Immunity, Some Caps**—Some states have left in place immunities for some governmental functions while capping immunities for others. In New Hampshire, for example, public entities have total immunity for snow, ice, weather hazards, maintenance of roadways, and certain law enforcement functions. For some other risks, however, the state has imposed caps of \$275,000 (one person) and \$925,000 (for all persons in the aggregate) per occurrence.

**3) Tort Caps in Lieu of Immunity**—While some states deploy both immunities and caps, other states have replaced

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immunity protection with tort limits. Alabama, for example, has a law that says no governmental entity shall pay a judgment or settlement in excess of the caps. Those caps limit recovery of damages to \$100,000 for bodily injury (one person) and \$300,000 (for all persons in the aggregate) per occurrence, and property damage to \$100,000.

**4) Waiving Some Immunity**—Texas offers a good case study of the complexity of the challenges facing state and local jurisdictions, as it seems to have in place a little bit of everything. The Texas Tort Claims Act waives immunity for governmental entities when they perform certain

functions, such as operating a motor vehicle in non-emergency situations. (See also #5 and #6 below.)

**5) Establishing Immunity and Tort Caps Based on Type of Activity**—The Texas Tort Claims Act spells out 36 separate municipal governmental functions covering everything from jails to hospitals to airports. It then establishes tort caps for governmental activities, but not proprietary ones. "Most states define proprietary activities as activities that a governmental entity undertakes that are not standard," explained Lynch. "An example might be an electric power company that is run by a city or a state. Unlike law enforcement duties, which are standard, this isn't something that a jurisdiction typically undertakes." In Texas, for example, proprietary activities include operation of a public utility and amusement (e.g., county fairground, local amusement park).

**6) Establishing Immunity and Tort Caps Based on Type of Entity**—Texas not only defines the type of activity, it also establishes different tort caps depending on the type of governmental unit. For example, liability for emergency services organizations and for local governments is capped at \$100,000 (one person) and \$300,000 (for all persons in the aggregate) per occurrence, and \$100,000 for property damage. But if you are a municipality or the state government, the caps are higher (\$250,000 and \$500,000, and \$100,000 for property damage).

#### Where to Learn More

With so much at stake, it's important

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for every public entity to get a handle on your specific risk profile. As a first step, that means:

- Identifying what state immunities or tort caps apply to you;
- Understanding the limitations and exceptions;
- Identifying those functions for which no state immunity applies; and
- Identifying those functions for which the potential exists for federal claims.

The good news is that you don't have to do all the research alone. Lynch

points out that trade associations, including the Public Risk Management Association (PRIMA, [www.primacentral.org](http://www.primacentral.org)) and the Association of Governmental Risk Pools (AGRiP, [www.agrip.org](http://www.agrip.org)), can be great resources for many public entities. You might also talk to your pool administrator (if your entity is a member of an insurance pool) and your city or county attorney.

Finally, it's important to work with your insurance advisors—agent, broker, company representative, or claims administrator—to identify your coverage, limits, and what your self-

insured retention (comparable to a deductible for other types of insurance) should be. A good insurance professional should be up-to-date on the constantly evolving landscape for public entities and both help you understand what's happening in your state and guide you to the right package to mitigate your risk.

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