The Top Areas a City Official Must Know About Liability

Municipal law and the law affecting political subdivision [i.e. local governmental entities such as cities, counties and special districts] are unlike any other area of law out there. As a result, no single paper or treatise can cover all the twists and turns associated with the different forms of liability which can befall such an entity. And since I do not have time to write a 36 volume treatise on the subject, I have taken the top categories of information a local government employee and/or official should be aware of when representing such an entity.

The Rules are Different

In pretty much every area of liability that can attach to a local governmental entity, the rules are going to be different. You can pretty much forget most of what you learned about liability representing companies or non- profits or dealing with it in other areas. The rules are different when you are talking about liability of a governmental entity. The theory behind this differential treatment is that the government is an entity of the people. The Legislature would rather government resources and funds be used to pave roads, provide programs, provide police and fire protection and to provide other services than simply to line the pockets of individuals. In many instances, an individual will have to bear the brunt of consequences in order to properly balance the interests of the community as a whole. But in that same regard, because a local governmental entity is a creature of the people, the people have different rights and different types of liability attach. Examples include constitutional rights, whistleblower protection, and procedural rights. Violations of our constitutional rights are only attributable to a government. The Bill of Rights was designed to help limit the government's power over individuals. As a result, a local company does not have to care about your First Amendment rights. However, a local city is prohibited from violating your freedom of speech.

Any time a situation comes up where you believe liability may or may not attach, your instinct should be that the rules are different. Your second instinct should be to go talk to your City Attorney. The City Attorney is more versed in the differences in the law than the non-municipal lawyer.

Sovereign/Governmental Immunity

Governmental immunity is an immunity given to local governmental entities which prevents it from being sued or held liable for various acts. Sovereign/governmental immunity is immunity from suit as well as immunity from liability. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Immunity from suit is a jurisdictional bar. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638, 43 Tex. Sup. Ct. J. 143 (Tex. 1999). That is fancy lawyer speak for "the city cannot be sued in the first place."

The doctrine of sovereign immunity predates the United States Constitution. *See Alden v. Maine*, 527 U.S. 706, 711-30, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). The easiest

explanation comes from the origins of the doctrine, which is "the King can do no wrong." This transferred into our American system of government, except is has been adjusted by the people's own tweaks. In other words, "you cannot sue the government, unless the government passes a specific law and lets you sue it." However, it is the State Legislature which passes the laws which allow suits against cities. But unless a specific law allowing a specific suit, with specific damages, was passed, an individual cannot sue a city.

An example of its application would be the tort of defamation or slander. If a company makes a false statement which injures an individual's reputation, they can potentially have a defamation claim against the company. However, local governmental entities retain sovereign immunity from all defamation and slander claims. The doctrine of sovereign immunity shields the State from liability for torts, such as defamation, except to the extent the immunity was waived by the Legislature or by statute. *See City of La Porte v. Barfield*, 898 S.W.2d 288, 291, 38 Tex. Sup. Ct. J. 533 (Tex. 1995); *City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex. App.--Houston [1st Dist.] 1995, no writ). So if a city manager makes a statement at a city council meeting that he believes a particular citizen is a menace to their society and should not be trusted, that individual could not sue the City for any defamation claims.

Official/ Qualified Immunity

Just as an entity retains sovereign/governmental immunity, certain types of immunity are also provided to individual employees and actors of the entity. The theory of attributing various types of immunity to governmental employees and actors is to allow them to conduct their job duties and responsibilities to service a community without fear of personal liability for such acts. Typical immunity most people have heard about is 1) judicial immunity which protects judges from their decisions in the judiciary whether it be at the district county, justice of the peace or municipal court level, 2) prosecutorial immunity, which is provided for prosecutors in all of those courts and 3) legislative immunity, which protects members of the legislative body whether it be the county commissioners court or city council or specialized board from acts committed in their legislative capacity.

In addition to those, most city employees also retain a form of individualized immunity. In state court it is commonly referred to as official immunity. In federal court, when dealing with cases such as constitution claims, it is called qualified immunity. Each is a distinctly separate type of immunity, although they act very similar in nature.

In Texas, official immunity protects public officials from suit arising from performance of their (1) discretionary duties (2) in good faith (3) within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653, 37 Tex. Sup. Ct. J. 980 (Tex. 1994) (citing *Wyse v. Dep't of Pub. Safety*, 733 S.W.2d 224, 227 (Tex. App.--Waco 1986, writ ref'd n.r.e.); *Baker v. Story*, 621 S.W.2d 639, 644 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.)).

Common law official immunity is based on the necessity of public officials to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended

litigation. *Kassen v. Hatley, 887 S.W.2d 4, 11, 38 Tex. Sup. Ct. J. 73 (Tex. 1994).* "The public would suffer if government officials, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions." *Kassen*, 887 S.W.2d at 8. Denying the affirmative defense of official immunity to public officials in such circumstances "would contribute not to principled and fearless decision-making but to intimidation." *Wood v. Strickland*, 420 U.S. 308, 319, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) (quoting *Pierson v. Ray*, 386 U.S. 547, 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967)). Certainly, public officials may err in the performance of their duties. *Id.* at 321. The existence of immunity acknowledges this fact, but recognizes that the risk of some error is preferable to intimidation from action at all. *Id*. In addition, some of the most capable candidates would be deterred from entering public service if heavy burdens on their private resources from monetary liability were a likely prospect for errors in judgment. *Ballantyne v. Champion Builders, Inc*., 144 S.W.3d 417, 424, 2004 Tex. LEXIS 655, 47 Tex. Sup. J. 852 (Tex. 2004)

In the federal system, public officials can be entitled to qualified immunity. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*v. *Fitzgerald*, 457 U.S., at 814. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Id*. The U.S. Supreme Court cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, *e. g., Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *id*., at 344-345 (police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application); *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they took); *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984).

So, regardless of whether the entity may have liability for an act, be aware that individual employees may retain a different type of immunity which needs to be advanced on their behalf. If you have specific questions about whether an official act may or may not qualify for immunity, ask your municipal attorney.

Waiver of Immunity

While I just told mentioned a city cannot normally be sued, you should not start feeling overly empowered. A city CAN be sued, if a specific statute allows it. So, a city can face liability in certain circumstances and must take those waivers of immunity into consideration when acting.

Waiver of sovereign immunity means the entity has immunity and cannot be sued unless there is a specific clear and unambiguous waiver of that immunity. So many torts and different types of causes of action do not apply

to a local governmental entity. However, there are situations where the Legislature feels a certain level of responsibility and liability should be attributed. To alter the default of immunity, it is for the Legislature, through statute, to expressly and very clearly waive immunity for a particular claim.

However, in most cases, the waiver is narrow, limited and will typically have limits on the level of actual damages which can be obtained. And, in pretty much all waivers, you're going to have a prohibition against punitive damages.

One of the most common examples of legislative waiver of immunity are found in the Texas Tort Claims Act. It waives governmental immunity in three general areas: use of publicly owned vehicles, premise defects, and injuries arising from conditions or use of property. Tex. Civ. Prac. & Rem Code Ann. §101.021 (West 2012). The language of the Texas Tort Claims Act is narrowly interpreted with a default of retaining immunity. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446, 36 Tex. Sup. Ct. J. 607 (Tex. 1993).

One of the most common examples falling under the Texas Tort Claims Act is if an employee negligently uses a motor vehicle. This covers car accidents if a city truck runs a stop sign and impacts another vehicle. However, there is a limitation on the level of damages which can be obtained. Tex. Civ. Prac. & Rem. Code §101.023 (West 2013). For example, a City will only be liable for a maximum of $100,000 for any one incident to a single person. So immunity is not absolute. Tex. Civ. Prac. & Rem. Code § 101.023(c)(West 2013).

The Texas Tort Claims Act is not the only statute which waives immunity. And while not typically thought of in this regard, one of the most well-known types of waivers is the Bill of Rights found in the U.S. Constitution. Types of claims that apply in most cities would be a "taking without due process of law", a search and seizure, a regulation restricting the freedom of speech or freedom of religion or press, etc.

Another waiver which applies *only* to governmental entities and not private corporations is the Texas Whistle Blower Act found in §554.0035 of the Texas Government Code. Its specifically provides a cause of action for an employee who suffers a negative or adverse employment action as a consequence of reporting a violation of law to the proper law enforcement authority. There is no comparable state law providing for this type of cause of action.

Contracts

Many plaintiffs' attorneys believe that the breach of an agreed contract would contain an automatic waiver of immunity. However, that is not the case. By entering into a contract, an entity waives some of its immunities, but not all of them. *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). The primary waiver of immunity for contracts is found in Chapter 271 of the Texas Local Government Code. It provides that immunity is waived for the breach of a contract that is in writing and for providing goods or services to the entity. Tex. Loc. Gov't Code Ann.§271.151 and 271.152 (West 2013). This means an entity retains immunity for all implied contracts, all oral contracts and contracts where the entity is providing goods and services or where the goods and services are not at issue such as a

rental agreement. This means that liability does not attach for breaches to these types of causes of action. However, immunity is waived, to a certain extent for contracts falling under subchapter I of Chapter 271.

On a side note, you must also be aware an intentional breach that occurs on a routine basis can cause the Legislature to amend the waiver statute. For many years entities were immune from even suits involving the purchase of goods and services. A line of cases in which the Texas Supreme Court held that entities could breach these contracts without liability attaching caused the Legislature to enact Chapter 271 of the Local Government Code. So be aware that, while immunity exists, it is not guaranteed for the future.

Vicarious Liability

Vicarious liability has been around for over a century and attaches liability to an employer for the tortious act of the employee. In certain types of waivers, vicarious liability applies to an entity such as under the Texas Tort Claims Act for the negligent operation of a motor vehicle. But again, the rules are different here too. An employee's qualified/official immunity will prohibit a plaintiff's recovery against the governmental unit for claims that may arise under §101.021(2) of the Texas Tort Claims Act. *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994) (org. proceeding); *Kilburn*, 849 S.W.2d at 812; *City of Houston v. Newsom*, 858 S.W.2d 14, 19 (Tex. App.--Houston [14th Dist.] 1993, no writ); *Carpenter v. Barner*, 797 S.W.2d 99, 102 (Tex. App.--Waco 1990, writ denied). The entity is only liable if the employee would be liable, but if the employee is immune, so then is the entity.

Additionally, in constitutional claims, vicarious liability does not apply. Supervisory officials and municipalities cannot be held liable on any theory of vicarious liability for the actions of subordinates. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); Estate of Davis ex rel. *McCully v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). While an individual employee may have personal liability for violating someone's constitutional rights, the entity will not be held liable unless the entity has a policy, custom or practice which caused the violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611, 1978 U.S. LEXIS 100, (U.S. 1978) This distinction pops up a lot in police liability cases. A police officer may perform what later turns out to be an improper search or seizure. If the officer violated department policy and the policy was designed to prevent those types of improper searches, the City cannot be held liable for the constitutional violation. The individual officer may or may not retain qualified immunity depending on particular factual situations which led to the improper search. Depending on the type of claim and the type of waiver, vicarious liability may or may not apply. So it is always better to speak with a municipal lawyer about the situation.

Constitutional Violations

As mentioned in several examples so far, an entity and an individual can be held liable for violating someone's constitutional rights. Keep in mind their violation of federal constitutional rights can impose financial liability while a violation of the Texas Constitution can only impose equitable relief. So you must first determine which constitutional rights and what sovereign applies.

In the federal system, not all constitutional claims have a cause of action. The text of the Bill of Rights and other constitutional guarantees does not provide a cause of action within the text. In order to sue for a violation of a constitutional right, you must bring suit under 42 U.S.C. §1983.

Suits for violation of state constitutional rights are not as common because no actual damages on a monetary level are permitted. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 38 Tex. Sup. J. 282, 287 (Tex. 1995). The only type of monetary damages which can occur is if the plaintiff brings a takings claim as repayment for property taken illegally.

Supremacy Clause

Local governmental entities typically will have the power to enact legislation on a large variety of topics. However, you must be aware the city council cannot enact an ordinance which is inconsistent with state or federal law. Tex. Const. Art. XI, § 5. Liability is not a direct issue as the only way for an individual to challenge an ordinance for being inconsistent with state or federal law is to bring a declaratory judgment action to declare it void. No monetary damages attach. However, the City could be liable for attorney's fees and its legislative plan can be dramatically affected depending on the type of inconsistency.

Liability for Acts of the Legislative Body v Employee

As an example was given earlier that vicarious liability applies in certain situations such as a car accident, it does not apply in situations where the final approval of a particular permit, application or request rests with the legislative body or is spelled out in an ordinance. *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 2006 Tex. LEXIS 194, 49 Tex. Sup. J. 404 (Tex. 2006).

An example would be a building inspector who approves construction of a building which exceeds the height limitation set out by ordinance. After construction is completed, a neighbor complains and the city council requires the owner to reduce the size of the building. As a defense, the property owner asserts that the City consented because the building inspector granted the permit. However, the City cannot be held liable for individual employee's deviations from laws. *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835, 13 Tex. Sup. Ct. J. 202 (Tex. 1970) In general, the rule derives from our structure of government, in which the interest of the individual must at times yield to the public interest and in which the responsibility for public policy must rest on decisions officially authorized by the government's representatives, rather than on mistakes committed by its agents. *See City of San Angelo v. Deutsch*, 126 Tex. 532, 91 S.W.2d 308, 310 (Tex. 1936) ("The city's public or governmental business must go forward, unimpeded by the fault, negligence or frailty of those charged with its administration."). An ordinance is a matter of public record and discoverable by the public. Citizens are charged with constructive notice of ordinances, and a "party seeking to estop city's enforcement of zoning ordinance charged with constructive knowledge of the ordinance and could therefore not rely on building permit issued by city in violation of the law." *Id.* (citing *Davis v. City of Abilene*, 250 S.W.2d 685, 688 (Tex. Civ. App.--Eastland 1952, writ ref'd)).

This is the general rule. There are exceptions which you should be aware. Essentially, there is authority for the proposition that a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions. But such doctrine is applied with caution and only in exceptional cases where the circumstances clearly demand its application to prevent manifest injustice. *Hutchins v. Prasifka*, 450 S.W.2d 829, 1970 Tex. LEXIS 254, 13 Tex. Sup. J. 202 (Tex. 1970)

Declaratory Judgment Claims

The Texas Uniform Declaratory Judgment Act found in Chapter 37 of the Texas Civil Practice and Remedies Code allows suits to declare rights under a contract or ordinance or other written instrument. For example, if a properly lease agreement said rent was due on the 30th of each month, but February has no such date, either party would ask a court to declare what the proper due date was for February under the law. However, sovereign immunity applies here too, except under very limited circumstances.

There is authority prior to 2009 which states a claim for declaratory relief which is not monetary in nature does not trigger sovereign immunity since it does not attack the treasury of the people. However, in 2009 the Texas Supreme Court issued its opinion in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009).

What *Heinrich* basically said in relation to an entity is that plaintiffs cannot sue for declaratory judgment unless they are seeking to invalidate some city ordinance. The City is immune from any suit to try and declare the due date in a property lease, or to declare an amount owed under a contract. And unless another statute out there waives immunity for a declaratory claim, the City retains immunity even from these claims.

Essentially the *Heinrich* line of cases holds that 1) you cannot seek a declaration against an entity if it has the effect of causing monetary damages [such as declare the city breached the contract]; 2) you <u>can</u> seek prospective relief against an official performing improper *ultra vires* acts [acts not authorized or performed outside the scope of authority]; 3) retrospective relief is not allowed; 4) the entity retains immunity, so the plaintiff must sue the official in their official capacity, and 5) you can only seek a declaratory judgment for declarations under an ordinance or statute, not other any other written instrument.

The big thing employees and officials need to understand about *Heinrich*, is it says a public official can be sued in their official capacity in order to prevent them from violating the law in the future. This is called an *ultra vires* claim. This is a suit, not against the individual official, but a suit against his/her office. So, while the City may maintain some immunity from a declaratory judgment action, the office of several officials may be subject to *ultra vires* claims by people asserting the City is violating the law somehow. If you receive one of these claims, consult your municipal attorney right away.

When dealing with a governmental entity, you need to understand that the rules are different. Given the wide variety and complexity associated with the different rules, it is important to look up the intricacies of any particular claim. If you take just one thing away

from this paper, remember that the rules are almost always different. So consult your municipal or entity lawyer if you have any specific questions.