WHERE IS THE GOVERNMENT WHEN YOU NEED THEM?

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Federal and state constitutions contemplate and honor the doctrine of sovereign immunity, which broadly states that a governmental entity cannot be sued in federal and/or state court without its consent. Notably, in its own state court, a state can invoke immunity even when sued under an otherwise valid federal law. Additionally, the state has full authority to define the scope of its immunity from suits based on its own state law and statutes. The purpose of this doctrine is to protect taxpayer-funded government entities from the time and resources caused by lawsuits and prevent governments from being exploited by fraudulent or frivolous lawsuits that otherwise may arise because of the perceived "deep pockets" of various government agencies.

Thus, these protections are strong and broadly construed by the legislature in almost all instances. For example, immunity under these statutes is jurisdictional, meaning that an entity asserting immunity under one of these provisions may file a pleading with the court arguing that the court has no subject matter jurisdiction over the claim itself, and, as a result, cannot even hear the plaintiff's claims.

For the most part, identifying whether state immunity might be an issue in a case involving your client is simple: ask yourself, is my client a branch, department, commission or authority of the government? If yes, move forward and avail yourself of whatever protections your particular state statute provides. But what if that identification of whether immunity or its protections might apply to your client is more difficult? What if, as a practicing attorney who represents an entity seemingly unaffiliated with state or local government, you fail to identify the fact that your state statute permits your client additional protections and rights under the law?

This is an issue that impacts attorneys dealing with the Texas state statute, the Texas Tort Claims Act ("TTCA"), but may also impact other attorneys in separate jurisdictions as well. Remarkably, many attorneys and judges are unfamiliar with the application of the TTCA and its benefits to qualified governmental entities. I have seen initial pleadings where the plaintiff's counsel is unaware that the case has no value due to the TTCA. Conversely, I have seen responsive pleadings that do not assert the protection of the TTCA where it may be applicable.

So, as counsel with a new client, how do you identify whether this issue is relevant to your case and whether you should assert the protections of the TTCA (or a similar statute in another jurisdiction)? The first step in any analysis of the application of the doctrine is: does my client qualify for immunity or other protections under the TTCA?

DO YOU QUALIFY?

In Texas, the issue of immunity and whether it applies to a civil lawsuit is largely governed by the TTCA. The TTCA was passed in 1969 to define who benefits from the immunity granted government agencies from civil litigation. The statute also seeks to define under what circumstances a governmental entity may waive their immunity, such that a private citizen or corporation may sue them in state court. Most often, this doctrine is utilized in cases of officer assault or misconduct; however, it can play a more important role in a litigator's life depending on the client. The scope of the waiver and the benefits afforded to a governmental entity are specifically defined by the statute. In particular, the TTCA defines qualified entities as "governmental units," which also include non-profit emergency services organizations as well as public hospitals. That section specifically states that immunity is only waived "to the extent of liability created by this chapter."

Thus, unless under a specifically enumerated reason outlined in the TTCA, a person may not sue a governmental unit for civil damages in state court. Interestingly, the list of covered entities expands more than simple government offices, such as the police department or improvement commissions. In addition, seemingly non-governmental entities that perform

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government functions, such as some EMS providers, also qualify if they are operated by their members and exempt from state taxes. By mere virtue of operating in a typically governmental space (providing emergency care/transportation), these entities may be provided similar protections.

Additionally, public hospitals may qualify as long as they are a hospital district given authority by the municipality under the Texas Constitution. For example, if you represented Ward Memorial Hospital, you would not, necessarily from its name, identify it as a public hospital or know that it is publicly funded by the municipality. Similarly, you might not also know that this hospital is afforded the protection of governmental units under the statute. However, if you did fail to recognize this affiliation, you would prevent your client from being afforded the multiple protections that the statute provides.

WHAT PROTECTIONS EXIST?

On the one hand, we have identified that, in certain circumstances, total immunity from civil suits can exist. However, the TTCA also provides other protections where immunity does not exist, such as caps to damages, immediate elections as to whether to sue the individual or the entity (not both) and notice deadlines. The main shield of the TTCA is a cap on damages in the amount of $100,000, which acts as an offset to any verdict against a qualifying entity. In this scenario, the Plaintiff could present an amazing claim against the qualifying governmental unit and obtain a verdict in the amount of $1,000,000. Unfortunately for the litigant, the court would be statutorily obligated to offset the $900,000 in excess of the cap and enter a fashioned award of $100,000 in damages. A plaintiff unaware of these protections could seriously overvalue their case and set unreasonable expectations for their client.

Similarly, many plaintiffs seek to sue both the entity and its employees under a theory of vicarious liability. The TTCA does not allow this. Rather, a plaintiff must, at the time of pleading, elect whether they are suing the entity for the acts of its employees or the individual for its independent actions outside the scope of their employment (not both). This election must be made at the time of pleading. If you sue the entity, you can no longer assert a claim later against the employee for any conduct outside the scope of their employment. If you sue the individual, you can no longer sue the entity under a theory of vicarious liability.

Lastly, a claimant must provide notice to a governmental unit within 180 days of the date of the alleged occurrence, giving rise to the claim, or the right to suit may be waived. That notice must also describe the suit with particularity, including (1) the damage, (2) the time and place of the incident, and (3) a description of the incident. The proper compliance with these notice provisions is jurisdictional, and thus could prevent a court from even hearing your claims if not followed.

These secondary protections are significant and important to identify and address at the very beginning of a litigation. It is extremely important that an attorney reduces the litigation costs of their client by identifying these issues at the outset of litigation or even beforehand.

SO, WHAT DO YOU DO?

If you are representing a new client in Texas, make sure that you familiarize yourself with the TTCA and whether your client might be afforded the protections therein. Your clients will thank you, and the potential cost savings can be significant.

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