2018 CLM Annual Conference
March 14-16, 2018
Houston, TX

The Crossroads of Coverage, Liability and Sovereign Immunity

I. What is Sovereign Immunity and How Does it Work?

To be sure, the doctrine of immunity continues to be a source of confusion and conflict. Since the formation of the country, federal and state governments alike have grappled with how to balance the need to protect government coffers with fairly compensating parties injured by government.

Broadly speaking, "government immunity" relates to various doctrines rooted in common law or statutes that provide federal, state and local governments with immunity from claims for monetary damages. A state is typically immune from such claims under the doctrine of "sovereign immunity." In turn, local governmental entities such as counties, municipalities and school districts may also enjoy sovereign immunity if the state's constitution treats them as a political subdivision of the state. In other words, the state may local governmental entities with the same "sovereign immunity" as the state.

The historical roots of sovereign immunity can be traced back to the English common law and the notion that the "king can do no wrong" (*rex non potest peccare*).[1] When the United States Constitution was drafted in 1787, Article III raised questions about this notion by exposing states to suits from citizens of other states and foreign states. U.S. Const. Art. III, § 2 ("The judicial Power shall extend ... to Controversies ... between a State and Citizens of another State ... and between a State ... and foreign States, Citizens or Subjects"). In 1793, however, the Supreme Court of the United States settled this issue by abolishing the doctrine of sovereign immunity with respect to states. *Chisolm v. Georgia*, 2 U.S. 419 (1793) ("the Constitution warrants a suit against a State, by an individual citizen of another State"). In response to *Chisholm*, the Eleventh Amendment was ratified in 1795, which reinstated the sovereign immunity of states by removing federal judicial jurisdiction from lawsuits "prosecuted against one of the United

[1] *See* George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev., 477 (1953).

States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Accordingly, a state cannot be sued in federal court unless the state has consented. This concept of consent and waiver of immunity is important in understanding the current state of sovereign immunity.

As noted by the Supreme Court, "[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." *Alden v. Maine*, 527 U.S. 706, 733 (1999). More importantly, the Court recognized the **general rule that a specific legislative enactment is required by the state to waive sovereign immunity**.

> Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.
>
> **The first of these limits is that sovereign immunity bars suits only in the absence of consent**. Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign."

Id. at 755 (emphasis added).

As noted by the Supreme Court, sovereign immunity today has been limited or eliminated by consent. In other words, states have enacted statutes to waive sovereign immunity based on its particular view of how to balance the public policy considerations of maintaining or waiving immunity on a limited basis.[2] This balance is typically reflected in a statutory framework (e.g., tort claims acts) or judicial decisions (e.g., waiver of immunity to the extent of insurance coverage). Many states, however, exclude municipalities from such protection because municipalities are treated as creatures of legislation instead of a political subdivision of the state. So, in analyzing the waiver of immunity issue for a particular state, the answer may often times turn on whether the defendant is a municipality or a political subdivision of the state.

In determining whether there has been a waiver of immunity, the starting point is always the state's constitution. The constitution, as the supreme law of the state, will dictate whether the state or any of its political subdivisions have waived immunity and, if so, to what extent. Given the historical roots of sovereign immunity, most state constitutions have retained the immunity of the state. So, the next step is to determine if there has been a waiver of immunity by legislation.

---

[2] Many commentators and scholars have argued for the complete elimination of sovereign immunity. *See, e.g.,* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev., 1201-02 (2001).

In 1946, Congress passed the Federal Tort Claims Act (28 U.S.C.§ 2674), waiving the sovereign immunity of the United States in certain types of claims. Many state legislatures followed this statutory framework by enacting statutes to define the limits of immunity for state governmental entities and employees. According to the National Conference of State Legislatures, **state tort claims acts** modeled after the FTCA are the most prevalent statutory waiver allowing tort claims against the state.[3] These acts either provide a general waiver of immunity with certain exceptions, or apply immunity with limited waivers that apply only to certain types of claims.

In a minority of states, legislatures have enacted state claims acts (as opposed to tort claims acts) that establish a procedure for claims against the state. These acts typically establish a special court, board or commission to resolve such claims within a statutory framework that may also limit damages or provide for certain exceptions to liability. Connecticut, Illinois, Kentucky, North Carolina and Ohio utilize state claims acts.

Regardless of whether a state has enacted tort claims acts or state claims act, the end result is the same – the state has by consent waived its sovereign immunity. For example, Georgia is typical of many states with a requirement that any waiver must be by specific legislation. The Georgia Constitution has been construed by the Supreme Court of Georgia as extending sovereign immunity to counties and school districts, but not to cities. Cities, however, are not without some protection, as the General Assembly has provided limited immunity to them in certain instances. Under O.C.G.A. § 36-33-1(a), cities are immune unless they have purchased any policy of liability insurance, not just motor vehicle liability insurance, provided that the insurance "covers an occurrence for which the defense of sovereign immunity is available, and then only to the extent of the limits of such insurance policy." Thus, unlike counties and school districts, cities waive their immunity to the extent of any available insurance coverage.

While Georgia counties enjoy the same immunity as the state as a political subdivision of the state, the General Assembly has waived immunity for motor vehicle claims. For all other tort claims, Georgia counties retain immunity. With respect to motor vehicle claims, the statutory framework sets "maximum waiver amounts" (or sometimes referred to as "caps"), which constitutes a waiver of immunity to the "cap." However, the "cap" may be increased if (1) the governing body "voluntarily" adopts a higher waiver "by resolution or ordinance;" (2) the local government entity becomes a member of an interlocal risk management and the coverage exceeds the amount of the "caps;" or (3) the local government entity purchases commercial liability insurance in an amount in excess of the "cap." Not surprisingly, litigation over the "cap" amount is where coverage and waiver of immunity collide.

II. Insurance Coverage for Governmental Entities

[3] *See* http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx (providing a chart of the laws of all fifty states).

Everyday, governmental entities are purchasing insurance policies for the various risks they face. Some of the types of policies you will see are commercial general liability, law enforcement liability, errors and omissions, and commercial auto. These policies reflect the types of risks that different entities face. However, often times those same entities are protected by state sovereign immunity laws, and the policies are written in an effort to conform to those laws.

For example, in North Carolina, N.C. Gen. Stat. § 153A-435 provides that "[p]urchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function." In *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 596 (2008) the North Carolina Court of Appeals held that despite the purchase of an insurance policy, a county retained its sovereign immunity under North Carolina law where the following language was contained in the insurance policy issued to the county:

> This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable

The Court reasoned that the language in the policy was clear and unambiguous and thus under North Carolina rules of contract construction, the terms of the policy had to be given full effect. *Id.* Since the ruling in *Patrick*, courts in North Carolina have applied the reasoning set forth in *Patrick* to continuously hold that similar language contained in other insurance policies does not waive the governmental entity's sovereign immunity under N.C. Gen. Stat. § 153A-435.

In *Wright v. Gaston Cty.*, 205 N.C. App. 600, 607 (2010), there was no waiver of sovereign immunity where the policy stated:

> P. Governmental Liability Limitation.
>
> By accepting coverage under this policy, neither the insured nor States waive any of the insured's statutory or common law immunities and limits of liability and/or monetary damages (including what are commonly referred to as liability damages caps), and States shall not be liable for any claim or damages in excess of such immunities and/or limits. . . . .";

In addition, in Missouri, Mo. Rev. Stat. § 537.610 provides that "[s]overeign immunity for the state of Missouri and its political subdivisions is waived only to the

maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section…" In *State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368 (Mo. 2016), the Missouri Supreme Court held that despite the purchase of an insurance policy, a governmental entity retained its sovereign immunity under Missouri law where the following language was contained in the insurance policy issued to that entity and disclaims coverage for:

> **MISSOURI CHANGES – PROTECTION OF IMMUNITY**
>
> * * * *
>
> The following is added to **SECTION I – COVERAGES**
>
> * * * *
>
> We have no duty to pay "damages" on your behalf under this policy unless the defenses of sovereign and governmental immunity are inapplicable to you.
>
> The following is added to **SECTION VI -- CONDITIONS**
>
> This policy and any coverages associated therewith does not constitute, nor reflect an intent by you, to waive or forego any defenses of sovereign and governmental immunity available to any Insured, whether based upon statute(s), common law or otherwise, including Missouri Revised Statute Section 537.610 or any amendments; or Missouri Revised Statute Section 71.185 or any amendments.

The Missouri Supreme Court, held that despite the purchase of the policy, the governmental entity retained its immunity holding that:

> While the City purchased insurance coverage, the policy expressly disclaims a waiver of sovereign immunity, and provides coverage to the City only for those claims for which sovereign immunity has been statutorily waived. Therefore, the City did not waive sovereign immunity when it purchased an insurance policy that disclosed coverage for any actions that would be prohibited by sovereign immunity.
>
> *Id.* at 372.

However, other states have statues which provide for a mandatory waiver up to a set amount of insurance, which can be exceeded when there is coverage. For example, Fla. Stat. § 768.28(5) limits a governmental entity's liability for tort claims to $200,000 per person and $300,000 per occurrence, however "the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $200,000 or $300,000

waiver provided above." Thus, in Florida, a governmental entity can purchase insurance, but has no obligation to use that insurance to settle a claim.

This statute can lead in interesting results. For instance, in *Evanston Ins. Co. v. Homestead*, 563 So. 2d 755 (Fla. Dist. Ct. App. 3d Dist., 1990), a Florida city bought an excess professional liability insurance policy that provided coverage to the city for tort claims that exceeded $500,000. If the insurance company settled a claim, the policy required the city to reimburse the company for the retained limit, $500,000. The insurance company settled a medical malpractice claim against the city for $ 2,700,000 and sought reimbursement of $ 500,000. The city refused, instead agreeing to reimburse the company only for $ 200,000, the maximum waiver of sovereign immunity allowed under § 768.28. The insurance company brought suit, alleging that § 768.28 did not apply because the suit was for breach of contract. The Florida court disagreed, holding that the insurance contract could not be used to circumvent the limits of § 768.28. Evanston, 563 So. 2d at 757-58.

In Georgia, the extent of a governmental entity's waiver of sovereign immunity with regard to accidents arising from the operation of its motor vehicles is determined by a two-tier scheme:

> The first tier, established under O.C.G.A. § 36-92-1 et seq., requires local entities to waive sovereign immunity — up to [$500,000 per person and $700,000 per claim] — for incidents involving motor vehicles regardless of whether they procure automobile liability insurance. The second tier, enacted by O.C.G.A. § 33-24-51 (b), and as revised in 2002, provides for the waiver of sovereign immunity to the extent a local entity purchases liability insurance in an amount exceeding the limits prescribed in O.C.G.A. § 36-92-2. It follows that, where, … a local entity purchases automobile liability insurance in an amount greater than the prescribed limits set forth for a waiver of sovereign immunity under O.C.G.A. § 36-92-1 et seq., the entity waives sovereign immunity to the extent of its insurance coverage as required by O.C.G.A. § 33-24-51 (b)…

Gates v. Glass, 291 Ga. 350, 352-53 (2012).

Georgia courts have consistently held that the extent of the sovereign immunity waiver is determined by the coverage provided under the insurance policy at issue. Thus, if there was no coverage under the policy, then there would be no waiver of the governmental entity's sovereign immunity in excess of the automatic waiver amount set forth in the statute. *See generally Chamlee v. Henry Cty. Bd. of Educ.*, 239 Ga. App. 183, 186 (1999)("Accordingly, even if the defendant has purchased the type of insurance described in O.C.G.A. § 33-24-51 (a) and (b), if the claim does not fall within the type of coverage described in subsection (a) as limited by subsection (b), then sovereign immunity is not waived."); *Dugger v. Sprouse*, 257 Ga. 778, 779 (1988)(holding "[w]here there is no insurance coverage, there is no waiver of sovereign immunity");*Cobb Cty. v. Hunt*, 166 Ga. App. 409, 410 (1983) (holding no waiver of

sovereign immunity under O.C.G.A. § 33-24-51 because the claim was not covered under the county's insurance policy).

Thus, it is very important to look at the state specific sovereign immunity statutes and read the policy to determine if there are any issues raised by their interaction. When there is a serious coverage issue that affects the extent of a governmental entities' immunity, insurers should consider filing a declaratory judgment action to determine their rights under their policy.

Unless you are in a direct action state, insurers generally are not parties to a liability lawsuit against the governmental entity. Savvy plaintiffs may try to have the liability judge declare the extent of the coverage when the insurer is not even a direct party because they claim it determines the waiver of the sovereign immunity. However, when an insurer is not a party to the liability lawsuit then there is no one to defend the insurer's right as to meaning of the policy. Further, the governmental entity may have no incentive to fight because they may have no liability beyond any coverage provided by the policy. Thus, it is imperative to address coverage issues early on when coverage and a waiver of sovereign immunity are co-extensive.