

## A PLAINTIFF'S GUIDE TO CIVIL IMMUNITY

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Immunity from the civil liability that ordinarily attaches to personal or financial injuries comes in many shapes. This is a general overview of several expressly named categories of immunity: sovereign, qualified and state agent immunity.

### **1. SOVEREIGN IMMUNITY OR “IT’S GOOD TO BE THE KING”<sup>1</sup>**

The 11<sup>th</sup> Amendment of the United States Constitution and Article 1 Section 14 of the Alabama Constitution expressly provide some degree of immunity to states, their agencies and officials from ordinary forms of civil liability:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

That the State of Alabama shall never be made a defendant in any court of law or equity. Ala. Const. art. I, § 14. Even though neither constitution describes these protections as “sovereign immunity,” these two provisions have been the starting place for the evolution of the immunity doctrine in both federal and state law.

Although there are notable exceptions, the fact remains that public agencies and their officials enjoy a remarkable degree of legal protections from the consequences of their tortious conduct.

#### **a. FEDERAL CLAIMS**

The 11<sup>th</sup> Amendment is a limitation on the jurisdiction of federal courts to hear certain suits against states, their agencies and officers. In the absence of a state’s waiver or Congress’s abrogation, it is an effective protection for states in federal courts and in state courts exercising concurrent jurisdiction over federal claims. Waiver and abrogation, however, are two significant exceptions.

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<sup>1</sup> Mel Brooks (as King Louis XVI), *History of the World: Part I*

An otherwise immunized state agency can waive its 11<sup>th</sup> Amendment protection as a condition to the receipt of federal funds. Under its spending power Congress can attach conditions, including waiver of sovereign immunity, to appropriations. Recipients of these federal funds must accept such a waiver of immunity as a precondition to getting the money.

Most federal appropriations are conditioned on an agreement to obey federal non-discrimination mandates and to be subject to suit for compliance failures. Often individuals who are injured by violations of the federal requirements have a private cause of action against the governmental agency at fault. Examples of these “spending power” waivers are Title IX of the Education Amendments of 1973 and Section 504 of the Rehabilitation Act of 1973. Both of these statutes have been used as the basis for civil actions against state agencies for injuries that would be otherwise barred by the 11<sup>th</sup> Amendment.

Even in the absence of waiver, Congress also has the authority to abrogate a state’s 11<sup>th</sup> Amendment immunity when it acts to implement 14<sup>th</sup> Amendment protections. A common example of this abrogation is Title VII of the Civil Rights Act of 1964 prohibiting certain forms of employment discrimination. The issue of whether Congress has the authority to abrogate state immunity can sometimes be complicated. In recent years, the Supreme Court has tried to limit congressional abrogation authority with confounding results. For instance, the Court has held that the employment discrimination prohibitions of the Americans With Disabilities Act do not abrogate state immunity, but the public access/facilities suitability requirements of the same statute do successfully abrogate immunity. Thus, a disabled person who was fired from her state job because of her disability could not bring an individual damage claim under the ADA. That same person, however, could sue her employer if there was a failure to remove architectural barriers to a state building.

**b. STATE CLAIMS**

The sovereign immunity provided by § 14 of the Alabama Constitution is more straightforward and has fewer exceptions than its federal counterpart. Alabama state departments and

agencies cannot waive their state immunity, and the state legislature cannot abrogate it. Alabama courts (and federal courts applying Alabama law) have routinely described it as a very powerful legal protection. “The wall of ‘governmental immunity’ is almost invincible...” Hutchinson v. Bd. of Trs. of Univ. of Ala., 256 So. 2d 281 (Ala. Civ. App. 1971). “The wall of immunity erected by § 14 is nearly impregnable.” Sanders Lead Co. v. Levine, 370 F. Supp. 1115, 1117 (M.D. Ala. 1973).

If this is the case, then it begs the question of why, with all of their invincibility and impregnability, state agencies find it prudent to carry liability insurance in anticipation of lawsuits? In fact, the Alabama legislature enacted legislation requiring liability insurance on state employees for wrongful act.<sup>2</sup>

The answer is that “almost” and “nearly” are not absolute and both allow for exceptions to the general rule. Most of those exceptions come from the often confusing and largely fictional distinctions between governmental agencies and the people who operate them. Hence have arisen the doctrines of qualified immunity in federal claims and state agent immunity in state law claims.

## **2. INDIVIDUAL CAPACITY IMMUNITY**

Both federal and Alabama courts have permitted some avoidance of the fundamentally anti-democratic and potentially cruel effect of allowing public agencies and their employees to walk away from their own tortious conduct without consequence, thus denying any remedy to those injured by it. Both federal and Alabama courts have developed related but quite distinct immunity exceptions. Each is premised on a distinction between claims brought against the state itself and those brought against officials or employees of the state as individuals.

### **a. FEDERAL QUALIFIED IMMUNITY**

State or local public officials or employees *as individuals* are not protected by sovereign immunity. In its place as a defense to federal law claims they have “qualified immunity,” which is a product of case precedent. It is not an express constitutional or statutory provision. It is a protection for public officers, as individual people, from liability for conduct that is “not contrary to clearly

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<sup>2</sup> Ala. Code § 36-1.6.1 (1975).

established law.” The theory is that those who are charged with carrying out governmental functions should not be constantly worried about their personal liability or interrupted by threats of litigation. When they are acting in a good faith attempt to execute their civic duties, under a bona fide belief that their conduct is lawful, they can assert the defense of qualified immunity.

Resolution of qualified immunity defenses consumes a great portion of immunity litigation. Almost every 42 U.S.C.A. § 1983 suit (claiming a violation of a federal right by someone acting “under color of law”) is met with a qualified immunity defense. Because the liability formula is based on a constantly changing body of law - what is “clearly established” one day might have been an unknown concept the day before - these cases are often fact intensive and heavily dependent on previous articulations of the law in earlier cases with similar factual allegations.

**b. ALABAMA STATE AGENT IMMUNITY**

Alabama state law complaints against state or local employees *in their individual capacities* often confront the defense of state agent immunity. Although, like federal qualified immunity, it protects individual government employees, the terms of its application are quite different. Every few years the Alabama Supreme Court redefines the scope of state agent immunity, even listing specific types of public functions that are immunized and other types of conduct that are not.

The general governing principle of state agent immunity is that the more genuine professional discretion that is required by a public employee’s job, the more immunity protections apply. Lower level employees who are assigned basic jobs that do not require much exercise of judgment or permit variance from routine checklists or regulations have the least immunity protection. In some cases, however, the courts have denied state agent immunity to highly trained professionals, including medical doctors. The reality is that every person’s job, even those requiring professional training and special expertise, has certain non-discretionary requirements. A failure to follow a set of rules, to comply with a mandatory checklist, to obey the rules of the road, or even to perform complex medical tasks when the profession has a clear protocol, can remove the protection of state agent

immunity. State agent immunity is also not available to public employees who have acted contrary to the law, fraudulently, or outside the scope of their authority.

### **3. FEDERAL TORT CLAIMS ACT:**

The Federal Tort Claims Act allows for suits against the United States for injuries caused by the negligent or wrongful conduct of a federal employee. There are three major exceptions: the Feres Doctrine<sup>3</sup>, discretionary function immunity and intentional torts.

There are also limitations. No punitive damages are allowed unless it is in a venue that only allows punitive damages for wrongful death. A significant limitation, although seemingly benign, is the administrative exhaustion requirement. Before suit is filed, the claimant must file a Standard Form 95 with the federal agency responsible for the government employee that caused the injury. The government agency has six months to act on the claim or it is deemed denied. Suit may not commence until six months following the filing of the SF 95 form. The form itself is a dangerous trap for the unwary, particularly the requirement to list a sum certain. Whatever amount listed on the form as the monetary damage is the cap on damages at trial. Litigants should proceed with great caution when completing this form.

### **4. CONCLUSION**

The barriers to civil liability for state and federal agencies are formidable but not impossible. Recognizing these exceptions, and tailoring discovery to find them, are the keys to successful resolution for the plaintiff.

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<sup>3</sup> Military personnel cannot sue for injuries incident to service.