Members Brief

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Sovereign Immunity

Sovereign immunity is a common law concept in which the state is immune to lawsuits. States can, and often do, waive sovereign immunity and consent to be sued. Ohio has consented to be sued in the unique Court of Claims, with conditions and exceptions. Ohio has also waived sovereign immunity for political subdivisions in certain circumstances.

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Sovereign Immunity Overview

Under the sovereign immunity doctrine, a state is immune from most lawsuits. Ohio has, by statute, waived its sovereign immunity, and has consented to be sued in the unique Court of Claims, under the same laws as applicable to private parties, except for the following:

- Neither the state nor any public official is liable for a public official's discretionary acts (see "**Ohio's Waiver of Sovereign Immunity**" below);
- The state is only liable for the actions of a public official or employee if, but for the public official's or employee's statutory grant of immunity, that public official or employee would be liable to the injured party (see "**Personal immunity of officers and employees**" below);
- The state is immune from liability in any proceeding involving the performance or nonperformance of a public duty, unless a special relationship exists (see "**Public duty exception**" below); and

- The state is not liable for injuries arising from a public official's operation of a motor vehicle, or if the officer or employee acted manifestly outside the scope of their employment or official responsibilities, or if the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. In those cases, an official or employee must be sued personally in a court of common pleas.
- The state also has waived sovereign immunity for any hospitals owned or operated by one or more political subdivisions, but those cases must be brought in the court of common pleas.[1]

Sovereign immunity and the Eleventh Amendment

Sovereign immunity is a common law concept, dating back to ancient English law, holding that the monarch can do no wrong. The idea was carried into the U.S. Constitution in the Eleventh Amendment, which states that:

> [t]he 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.[2]

By its language, the amendment prohibits out-of-state citizens from suing a state in federal court. It does not prohibit a state from suing *another* state, a type of case over which Article III of the U.S. Constitution grants the Supreme Court original jurisdiction.[3]

The U.S. Supreme Court expanded the scope of sovereign immunity beyond the Eleventh Amendment in an 1890 decision, in which the Court held that a state also was immune from suit brought by its own citizens in federal court, not merely citizens from another state.[4] A state could be sued only by waiving its own immunity, or if Congress specifically abridged state immunity.

Then, in the 1990s, the scope of sovereign immunity expanded further with the Supreme Court ruling that states also were immune from suits from their own citizens even in *state* court.[5] States, since that period, can only be sued by another state or the federal government; otherwise they must waive their immunity, or their immunity must be abridged by Congress pursuant to its Fourteenth Amendment enforcement powers.[6]

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[1] R.C. 2743.02 and 9.86.

[2] U.S. Constitution, Amendment XI.

[3] U.S. Constitution, Article III, Section 2.

[4] *Hans v. Louisiana*, 134 U.S. 1, 9-10 (1890).

[5] *Alden v. Maine*, 527 U.S. 706, 713 (1999). Additionally, in 1996, the Court ruled that Article I of the U.S. Constitution did not in fact grant Congress the power to abridge state immunity, reversing its 1890 decision in *Hans* (note 4). After 1996, Congress could only abridge state immunity under the Fourteenth Amendment. (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 64 (1996)).

[6] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

Nature and scope of sovereign immunity

What exactly is a suit against a state? The Supreme Court consistently has held that a suit to enjoin a state official from committing an allegedly unconstitutional action is *not* a suit against the "state" for sovereign immunity purposes. This doctrine allows courts to undertake constitutional review without upsetting sovereign immunity. It relies on a dual legal fiction – an official's actions done in furtherance of the official's duties is "state action" for constitutional review purposes, but enjoining an official from acting unconstitutionally does not infringe on state sovereign immunity because the state had no authority to authorize that unconstitutional act.[7]

But, a litigant cannot sidestep sovereign immunity by merely choosing the right party. Though case law is not always consistent, sovereign immunity generally applies whenever a suit "seeks to impose a liability which must be paid from public funds in the state treasury." When a state is a named party, the question of immunity is easy; a state is immune. When a state official is a named party, the line between a permissible suit against an official acting "individually", and an impermissible suit against a state official because it amounts to a suit against the state is a difficult line to draw, and the approach varies from case to case. Often, the focus is on the remedy sought (monetary damages versus an injunction).[8] Sometimes, the justices balance the interests of state sovereignty with the federal interest, if it is a case in federal court.[9]

There are a couple of bright-line rules: for instance, a state's immunity does not extend to cases in which state officials act with negligent or willful disregard of state laws.[10] And, the state's immunity does not automatically extend to municipalities or political subdivisions, even though they enjoy a "slice" of state power.[11] Ohio has a separate waiver of immunity for political subdivisions.[12]

Ohio's waiver of sovereign immunity

Under the Ohio Constitution, "[s]uits may be brought against the state, in such courts and in such manner, as may be provided by law."[13] In 1975, the General Assembly waived sovereign immunity and consented to be sued and have its liability determined in the unique Court of Claims, generally in accordance with the same rules of law applicable to suits between private parties.[14] There's an important exception: this liability does not extend to discretionary acts.

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[7] *Ex parte Young*, 209 U.S. 123, 173-74 (1908).

[8] *Edelman v. Jordan*, 415 U.S. 651, 655 (1974); *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247 (2011) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 107).

[9] *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

[10] *Johnson v. Lankford*, 245 U.S. 541 (1918); *Martin v. Lankford*, 245 U.S. 547 (1918).

[11] *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

[12] See R.C. 2744.01 and 2744.02 for more details on political subdivision immunity.

[13] Ohio Constitution, Article I, Section 16.

[14] R.C. 2743.02(A)(1).

An act is "discretionary" if it is a legislative or judicial function, or the exercise of an executive or planning function involving the making of a basic policy decision that is characterized by the exercise of a high degree of official judgment or discretion.[15] The legislature, for instance, is not civilly liable for enacting policies that cause damage or injury in Ohio.

But, if the employee or officer acted negligently, the state may be liable if that employee or officer acted negligently in performance of a ministerial function, or the carrying out of a function once a decision has been made to engage in a certain activity or function.[16]

Once a state official has been sued in the Court of Claims, the court must determine:

1. Whether the state official is immune to suit because the alleged action is a discretionary act;
2. Whether the state official is personally immune, or if the state official must be sued individually in a common pleas court (see "**Personal immunity of officers and employees**" below);
3. If, but for the state official's personal immunity, the official would be liable to the injured party. If the official would be liable to the injured party, the state may be sued in the official's stead, and the case treated as any other type of civil case, with the exception of the public duty doctrine.
4. Whether the public duty doctrine applies to shield the state and the official from liability (see "**Public duty exception**" below).

The Court of Claims

The Court of Claims has exclusive, original jurisdiction over civil actions against the state permitted by the General Assembly's waiver of sovereign immunity, and has jurisdiction to determine whether a state officer or employee is entitled to a statutory immunity from personal tort liability, or has forfeited that immunity and may be sued in a court of common pleas.[17] The Court of Claims consists of incumbent justices or judges of the Supreme Court, courts of appeals, or courts of common pleas, or retired justices or judges eligible for active duty under the Ohio Constitution, sitting by temporary assignment of the Chief Justice of the Supreme Court. The Court of Claims is located in Franklin County, and the Chief Justice may direct the Court to sit in any county for cases on removal upon a showing of substantial hardship and whenever justice dictates.[18]

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[15] *Risner v. Ohio DOT*, 145 Ohio St.3d 55, 59 (2015).

[16] *Reynolds v. State*, 14 Ohio St.3d 68 (1984).

[17] R.C. 2743.02(F) and 2743.03(A). There are other, more specific statutory grants of jurisdiction, e.g., R.C. 3335.03(B).

[18] R.C. 2743.03(B).

Cases in the Court of Claims commonly involve contract disputes, employment discrimination, medical malpractice, personal injury, property damage, wrongful imprisonment, and public records claims.[19]

Personal immunity of officers and employees

If the suit alleges wrongdoing on the part of an officer or employee of the state, the Court of Claims first must determine whether the officer or employee is immune to suit. If the officer or employee is immune, and if, but for their immunity, the officer or employee would be liable, suit may be brought against the state.[20]

If the court finds the officer or employee is not immune, the suit must be brought against the officer or employee personally, in a court of common pleas.

An officer or employee is immune to suit for the performance of any official duty, unless the suit arose from the operation of a motor vehicle, or if the officer or employee acted manifestly outside the scope of their employment or official responsibilities, or if the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. If any of these apply, the officer or employee must be sued personally.[21]

If none of these apply – for instance, if the officer or employee acted negligently – the officer or employee is immune. If the court determines that the officer or employee would be liable if not for their statutory grant of immunity – for instance, again, if they acted negligently – then suit may be brought against the state.[22]

Under this first step, a claimant has established jurisdiction in the Court of Claims, but has yet to establish whether the state is liable.

Public duty exception

Under the second step, the state's liability is determined in accordance with the same rules of law that apply to suits between private parties (contract law, property law, etc.), except that the state is not liable in any civil action or proceeding involving the **performance or nonperformance of a public duty**, except under circumstances in which a **special relationship** can be established between the state and an injured party.[23] The state also has waived sovereign immunity for any hospital owned by one or more political subdivisions, but those cases must be brought in the court of common pleas.[24]

The public duty doctrine is an old English common law doctrine protecting public officials from personal liability for negligence.[25] The Ohio Supreme Court has stated that "a duty which

[19] See the Court of Claims's website available at ohiocourtofclaims.gov.

[20] R.C. 2743.02(A)(2).

[21] R.C. 9.86.

[22] R.C. 2743.02 and 9.86.

[23] R.C. 2743.02(A)(1) and (A)(3).

[24] R.C. 2743.029(B).

[25] See, e.g., *South v. Maryland*, 59 U.S. (18 How.) 396 (1856).

the law imposes upon a public official is a duty to the public," and therefore "a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution."[26] Public duties include firefighting, police protection, driver licensing, securities registration, inspections, and other governmental functions.[27] The types of cases that would not fall under the public duty exception may include property damage or seizure, personal injury, breach of contract, false imprisonment, and other common torts (but generally not intentional torts such as assault and battery, as these are usually outside the scope of official duties).[28]

An exception exists – meaning an individual may successfully sue the government for negligence in performing a public duty – when there is a "special relationship" between the government entity and the injured individual. The Ohio Supreme Court has stated that "if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages."[29]

A special relationship exists if the following four elements are met:

- An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;
- Knowledge on the part of the state's agents that inaction of the state could lead to harm;
- Some form of direct contact between the state's agents and the injured party;
- The injured party's justifiable reliance on the state's affirmative undertaking.[30]

Once these elements are established, the injured party may sue the state for negligence even if the state entity was performing a public duty. There are very few cases in which a special relationship is shown. The public duty exception is very broad, but the special relationship exception to the exception is very narrow. In one case, however, the court permitted a suit against the Child Services Board (CSB) for failing to investigate complaints of child abuse against a particular child, finding that the public duty doctrine did not apply, as CSB had a special relationship with the abused child.[31]

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[26] *Sawicki v. Ottawa Hills*, 37 Ohio St.3d 222, 230 (1988), citing Cooley, *Law of Torts* (4 Ed. 1932) 385-386, Section 300 (internal citations omitted).

[27] *Commerce & Industry Ins. Co. v. Toledo,* 45 Ohio St.3d 96 (1989) (firefighting); *Sawicki*, infra (police protection); *Cain v. State*, 14 Ohio App.3d 105 (1984) (driver licensing); *Devoe v. State* (1975), 48 Ohio App.2d 311 (securities registration); *Delman v. Cleveland Heights,* 41 Ohio St.3d 1 (1989) (property inspections); *Shelton v. Indus. Comm.*, 51 Ohio App.2d 125 (1976) (workplace inspections). Cases compiled by *Jones v. Dep't of Health, Div. of Pub. Health & Labs.*, 69 Ohio App.3d 480, 488 (1990).

[28] E.g., *Kirk Williams Co. v. Ohio Dept. of Adm. Servs.*, 61 Ohio Misc.2d 745, 584 (Ct. of Cl.1989); *Wilcox Industries, Inc. v. State*, 79 Ohio App.3d 403, (1st Dist.1992).

[29] R.C. 2743.02 and 9.86.

[30] R.C. 2743.02(A)(3).

[31] *Brodie v. Summit Cty.*, 51 Ohio St.3d 112, 119 (1990).

Does the case belong in the Court of Claims?