



Sovereign Immunity

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Since America's formation, the country has operated under the assumption of sovereign immunity—this means that historically citizens have not been permitted to bring a suit against the Government, as written in the Eleventh Amendment of the United States Constitution. However, the Federal Tort Claims Act of 1946 (FTCA) opened up the door for making a claim against the federal government for certain scenarios. State and local governments enjoyed the same privilege of sovereign immunity, but when the FTCA made it possible for claims to be brought against the government, tort reform was officially under way.

Today, most states have passed their own legislation capping liability and restricting monetary relief to claimants when suits involve one of their government employees or agencies. The caps vary significantly by state and are intended to limit the amount of exposure to public entities. However, the significant increase in excessive settlements and the emergence of nuclear verdicts have been cause for great concern as to whether these caps will continue. In fact, there have been various lawsuits across the country where the courts disregarded the caps entirely, which is very concerning for public entities.

In states where legislation has passed allowing caps, one of the benefits, besides the overall protection, is that they give public entities a significant framework around how much liability insurance they should buy. They also give insurance carriers comfort that their liability would be limited to the amount of the caps in the event of a claim. If these caps continue being ignored by the courts or go away completely, there could be a significant impact on an entity's ability to purchase insurance—this would ultimately leave the tax payer unprotected against large unexpected verdicts or settlements.

Primarily, tort cap availability is changing in response to legal changes. Entities across the country are looking to understand how tort caps and immunities are going to be treated going forward. Below are some examples of pressure to change the caps from jurisdictions across the country:

- New Jersey law signed into effect in December 2019 was a “clean-up” bill to amend New Jersey's Tort Claims Act (TCA), settling liability standards in sexual abuse lawsuits filed against public entities and public employees. Under the new law, public entities/employees cannot claim immunity under the TCA in lawsuits that allege “a willful, wanton or grossly negligent act of a public entity or public employee resulted in a sexual assault, any other crime of sexual nature...”
- Ohio representatives introduced reforms in February 2020 to remove non-economic damages tort caps on damages sexual assault victims can seek in lawsuits. Lawyers are arguing the cap is unconstitutional for child sex-abuse victims because it deprives them of compensation for a lifetime of mental trauma. House Bill 518 remains in Ohio's House Committee for further review.

When a State doesn't carry tort caps, some public entities are quick to settle to simply keep a case out of court. The City of Seattle awarded a high-powered attorney and her family a \$65.75M settlement in January 2019 for a traumatic brain injury incident. Large settlements of this nature, especially in non-tort protected environments, quickly grab the insurance community's attention with potentially unfavorable outcomes for the public entities involved.

Separate but related, when considering tort caps and tort reform, is the functionality of Joint and Several Liability in some states. The rule of Joint and Several Liability makes each of the multiple defendants liable for the entirety of the plaintiff's loss, regardless of each defendant's degree of fault. Legal commentators have noted that Joint and Several Liability can benefit society by effectively placing the economic burden on those who can afford it most (e.g., corporations, governmental entities, insurance companies, etc.) while at the same time protecting the innocent victim who has been harmed. The perception that governmental entities have "deep pockets" makes it challenging to underwrite and price risks such as general liability and automobile liability exposures, which are most vulnerable to this phenomenon. Even if a State is found to share only a small percentage of fault, the financial impact could still be detrimental. The question remains, if tort reform is of value to state agencies as a way to maximize immunities, would reforming Joint and Several Liability laws serve a similar purpose?

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