Sovereign Immunity in the Midwest

I. Introduction

When evaluating subrogation claims, you may sometimes come to the conclusion that a public entity or governmental agency bears responsibility for the loss. However, suing the government is not always a readily available remedy. Specifically, the doctrine of sovereign immunity, or a progeny thereof, will likely play a significant role. The rationale for sovereign immunity stems from early English law, which provided that "the King can do no wrong." Although this doctrine has been largely limited and qualified in most jurisdictions, all states still retain at least some form of governmental immunity. In fact, the law in most jurisdictions provides that government officials still enjoy immunity from liability in connection with performance of their discretionary or governmental acts. This distinction is usually in contrast to liability that stems from the performance of a proprietary or ministerial act by a government official. Historically, the distinction and contrast between these acts has been very complicated, and subject to varying case law interpretation. In summary, the extent and degree to which different states codify their version of governmental immunity varies significantly; however, most states adopt guidelines analogous to one or more "schools of thought" on the issue.

Typically, most jurisdictions will provide government employees with immunity for negligent acts performed while carrying out governmental functions. However, gross negligence or willful and wanton activity is usually removed from the purview of immunity and is typically actionable. Remember that proving willful and wanton conduct is extremely difficult and the conduct must be egregious, if not intentional. The other widely accepted rationale implemented to protect government agencies and employees from liability is the public duty doctrine.

Generally, to prove negligence one must establish four key elements: 1) a duty; 2) a breach of that duty; 3) proximate cause between that duty and the injury; and 4) injury or damages. The public duty doctrine acts to negate the essential "duty" element, which results in a failure to establish a *prima facie* case against the government employee. The rationale behind the public duty doctrine is that the government and government employees owe a duty to the public as a whole, and not to any one individual.

Additionally, most jurisdictions have adopted various notice requirements in the event a person intends to present a claim against a government entity or official. Many times these notice requirements are strictly construed and provide only a short time frame within which to notify the entity of the existence of a potential claim and, in some cases, may even shorten the statutes of limitations periods for filing a lawsuit. The policy for the shortened time period is to provide an adequate opportunity for an investigation and for prompt settlement of meritorious claims.[1] Many jurisdictions also have a "cap" or "ceiling" on the award of damages, thereby statutorily limiting the potential exposure of a particular government entity or official. Most jurisdictions also have statutes preventing punitive damages from being awarded against the government.

This presentation is intended to assist you in exploring the rationale of government immunity by reference to the latest Illinois case law on the subject. Additionally, it will provide you with a brief summary of the status of government immunity in the surrounding jurisdictions. This presentation will also include a summary of the various statutory caps on damages and notice requirements within these jurisdictions. Because large loss subrogation often involves fires, this paper focuses on the liability of state officials and agencies in the context of fire

[1] *Panko v. Cook County,* 42 Ill.App.3d 912, 356 N.E.2d 859 (1st Dist. 1976).

protection. It is important to note that many states, cities, counties, and municipalities have enacted legislation that impact the topics discussed in this paper and may apply differently depending on the type of government entity being pursued. Therefore, it is imperative to check both local and state law specific to the target agency in order to properly protect your subrogation claims.

A. Governmental Immunity in Illinois

Illinois courts formally abolished the establishment of sovereign immunity in 1959.[2] However, in 1965 the Illinois General Assembly enacted the Local Governmental and Governmental Employees Tort Immunity Act (the "Act"), which protects specific local public entities and employees from liability arising from the operation of government.[3] Essentially, the Act provides a list of government units and functions that enjoy immunity from liability by absolving them of a "duty", thereby removing an element essential to proving negligence.[4] In that sense, the Act is almost an interweaving of the public duty doctrine and traditional government immunity. Unless an immunity provision is specifically applied to a government entity, municipalities are liable in tort to the same extent as private parties.[5] Fire departments and their employees are included in this category as an immune public entity, which likely has the most application to the practice of large loss property subrogation. [6]

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[2] *Molitor v. Kaneland Community Unit District,* 18 Ill.2d 11, 163 N.E.2d 89 (1959).
[3] 745 ILCS 10/5-201.
[4] *Barnett v. Zion Park District,* 171 Ill.2d 378, 665 N.E.2d 808 (1996).
[5] *Id.*
[6] 745 ILCS 10/5-102. Failure to Supress or contain fire; 745 ILCS 10/5-103. Condition of fire protection or fire fighting equipment or facilities; acts or omissions

1. A Case Study of Government Immunity Applied to Fire Departments and Personnel

Illinois specifically grants government immunity to a "public entity" that fails to establish a fire department or provide any fire protection whatsoever.[7] Therefore, if a government entity chooses not to establish a fire department, for whatever reason, it cannot be held liable for any harm that results from that decision.[8] However, if a public entity chooses to undertake the obligation and establish a fire department, two (2) immunity provisions apply.[9] These provisions dichotomize the scope of government immunity and the circumstances under which it applies.

First, 745 ILCS 10/5-102 appears to apply to provide blanket immunity to the fire department if it fails to extinguish a fire. Conversely, 745 ILCS 10/5-103(b) provides an exception to blanket immunity under certain circumstances. Specifically, this section provides that a public employee acting within the scope of their employment in fighting a fire may be liable for injuries if the conduct giving rise to the injury is willful and wanton. On its face, it appears that an injured party can recover for the willful and wanton conduct of fire departments and their personnel. However, Illinois courts have been reluctant to deem such actions as willful and wanton, no matter how egregious, and have consistently failed to apply 5-103(b) to fire departments in general.

In one case, a union of firefighters were on a labor strike but were ordered by a court to tend to fires in their area.[10] Despite the court injunction, the firefighters refused to attend to a

[7] 745 ILCS 10/5-101.
[8] *Pierce v. Village of Divernon,* 17 F.3d 1074, 1077 (7th Cir. 1994).
[9] 745 ILCS 10/5-102; 745 ILCS 10/5-103.
[10] *Jackson v. Chicago Firefighters Union, Local No. 2,* 160 Ill.App.3d 975, 513 N.W.2d 1002 (1st Dist. 1987).

fire and, as a result, the plaintiffs suffered damages and sued.[11] The Illinois Appellate Court refused to apply a general willful and wanton exception to the immunity provision and held that fire departments enjoy blanket immunity under 5-102.[12] This case provides fire departments with a strong argument for not applying the willful and wanton exception to their statutory immunity. Interestingly, however, is the fact that this case did not directly address the willful and wanton exception articulated in 745 ILCS 10/5-103(b).

The willful and wanton exception of 745 ILCS 10/5-103(b) was recently considered by a federal court applying Illinois law in a property subrogation claim.[13] In *Atlantic Mutual,* a fire occurred in relation to work performed at the insured's home by Chicago Diversified Products ("Diversified"). The City of Winnetka Fire Department responded and extinguished the fire. Approximately two (2) days later, the fire rekindled and caused considerably more damage. The second fire was caused by smoldering insulation that the firefighters failed to extinguish and/or remove. The insurer, Atlantic Mutual, pursued a subrogation lawsuit against Diversified for recovery of monies paid in connection with the fire and resulting damages. Diversified, in turn, brought a third-party action for contribution against the Winnetka Fire Department, claiming negligence and willful and wanton conduct in connection with its failure to adequately extinguish the fire.

The Federal Court for the Northern District of Illinois, interpreting and applying Illinois law, dismissed the Winnetka Fire Department as a party defendant.[14] The Court concluded that the Winnetka Fire Department was immune from liability for its failure to adequately extinguish

[11] *Id.*
[12] *Id.*
[13] *Atlantic Mutual Insurance Co. v. Chicago Diversified Products, Inc.*, 2002 U.S. Dist LEXIS 5391.
[14] *Atlantic Mutual,* 2002 U.S. Dist. LEXIS 5391.

the fire pursuant to 745 ILCS 10/5-102, even if it could be established that the fire department's actions were willful and wanton.[15] Furthermore, the Court discussed the willful and wanton exception of 5-103(b), and held that it does not apply as a blanket exception to the fire department as a whole.[16] Rather, the Court stated that 5-103(b) "permits a suit when the firefighter, while attempting to put out a fire, willfully and wantonly causes an injury," whereas 5-102 "precludes a suit no matter what the level of the firefighter's or fire department's intent."[17] The Court shed light on the distinction by citing to a case where a firefighter lost control of the hose, which struck a bystander, and placing that situation within the context and scope of 5-103(b).[18] Although this decision is not binding on Illinois State Courts, it presents an extremely persuasive precedent.

In Illinois, fire departments are granted wide latitude and general immunity in the performance of their firefighting duties. For subrogation purposes, pursuing the fire department for failing to respond to a fire, failing to extinguish a fire, causing excessive damage, among others, is generally not a feasible avenue to recovery. Even if the facts suggest that the injury was caused by a single employee while engaged in firefighting duties, proving that he or she acted in a willful and wanton manner presents an extremely high standard as a prelude to recovery. Please remember that certain Illinois governments and their employees are protected by this governmental immunity doctrine, unless they specifically consent to be sued. Also

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[15] *Id.* 2002 U.S. Dist LEXIS at 8.
[16] *Id.*
[17] *Id.*
[18] *Stubblefield v. City of Chicago,* 48 Ill.2d 267, 269 N.E.2d 504 (1971).

included among the protected class are the State of Illinois and its employees,[19] police departments,[20] and any official acting with discretion or in making policy determinations.[21]

2. Notice Requirements and Liability Caps

In Illinois, proper and timely notice of a potential lawsuit must be given to a government entity before filing a lawsuit. The notice requirement is strictly adhered to and is intended to ensure that the governmental entity is given an adequate opportunity to investigate and review potential lawsuits within a reasonable time of their occurrence.[22] In Illinois, the statute of limitations for filing a civil lawsuit for property damage based in tort is five (5) years.[23] However, when filing a property damage lawsuit against a government agency, the action must be brought within one (1) year of the date the injury or damage occurred or the cause of action accrued.[24] Illinois does not have a statutory liability cap limiting the amount that can be recovered against a government entity.

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[19] 745 ILCS 5/1
[20] 745 ILCS 10/2-202
[21] 745 ILCS 10/2-201.
[22] *Panko v. Cook County,* 42 Ill.App.3d 912, 356 N.E.2d 859 (1st Dist. 1976).
[23] 735 ILCS 5/13-205.
[24] 745 ILCS 10/8-101.

II. Sovereign Immunity throughout the Midwest

A. Indiana

1. Governmental Immunity

The Indiana Tort Claims Act ("ITCA") applies to all "political subdivisions," which include virtually every local government entity, i.e., towns, cities, counties, townships, municipal corporations, etc.[25] The ITCA acts to shield government entities and government employees from liability if a loss occurs while acting within the scope of their employment.[26] Among the particular functions listed by the ITCA as immune from liability, the most notable functions involve the performance of any administrative proceeding, discretionary functions, and negligent building inspections.[27] How a fire department fights a fire is a discretionary function that entitles the department to immunity for losses related to the particular strategies it used.[28] An example of a strategy under the discretionary function includes the decision of when to leave the scene of the fire. The question of whether the fire department may be held liable for losses not related to the strategies it employed while fighting the fire is decided on a case by case basis.[29]

Indiana also recognizes the public duty doctrine and will not impose liability upon a fire department if the duty to the injured party is "in no way different from its duty to any other citizen."[30] A fire department's attempt to extinguish a fire is "made in response to its general

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[25] Ind. Code § 34-13-3-22; Ind. Code § 34-6-2-110.
[26] Ind. Code § 34-13-3-3.
[27] Ind. Code § 34-13-3-3(6), (7), and (12), respectively.
[28] *City of Hammond v. Cataldi,* 449 N.E.2d 1184 (Ind.Ct.App. 1983).
[29] *Willis v. Warren Township Fire Department,* 650 N.E.2d 321 (Ind.Ct.App. 1995).
[30] *Willis v. Warren Township Fire Department,* 672 N.E.2d 484, 486 (Ind.Ct.App. 1997).

duty to protect the safety and welfare of the public," and therefore falls under the protection of the public duty doctrine.[31]

2. Notice Requirements and Liability Caps

The ITCA requires that notice of a claim be filed with the governing body of the particular political subdivision, as well as the Indiana political subdivision risk management commission within 180 days after the loss occurs.[32] The time period for filing notice is extended to 270 days from the date of loss when pursuing the state or a state agency.[33] The notice must include a brief statement of facts and circumstances giving rise to the claim, the extent of the loss, the time and place, name of parties involved, amount of the claim, and residence of the claimant both at the time of the loss and at the time of filing the notice.[34] Within 90 days of receiving notice, the proper authorities must either accept or deny the claim.[35] A claim must be officially denied before a lawsuit can commence against a government agency.[36]

Indiana has a liability cap of $300,000 if the claim accrued before January 1, 2006; $500,000 if accrued after January 1, 2006; and $700,000 if accrued after January 1, 2008.[37] Additionally, there is a $5 million cap for all causes of action arising from a single occurrence.[38] Punitive damages are not recoverable against the State of Indiana or any local government agency.[39]

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[31] *City of Hammond v. Cataldi,* 449 N.E.2d 1184, 1188 (Ind.Ct.App. 1983).
[32] Ind. Code § 34-13-3-8.
[33] Ind. Code § 34-13-3-6(a).
[34] Ind. Code § 34-13-3-10.
[35] Ind. Code § 34-13-3-11.
[36] Ind. Code § 34-13-3-13.
[37] Ind. Code § 34-13-3-4(a)(1).
[38] Ind. Code § 34-13-3-4(a)(2).
[39] Ind. Code § 34-13-3-4(b).

B. Iowa

1. Governmental Immunity

In 1964 Iowa eliminated the blanket defense of sovereign immunity by adopting the Iowa Tort Claims Act ("ITCA").[40] The ITCA retains government immunity for particularly designated government bodies only. Therefore, the presumption in Iowa is of liability; immunity is the exception.[41] Notable exceptions are emergency response services, failure to discover a latent defect during a building inspection, and performance of discretionary functions.[42] Iowa courts have held that city fire departments are immune under the "emergency response" exception for injuries that occurred while responding to fires.[43] It should be noted that in one case decided by the Iowa Supreme Court, the negligence of firefighters in allowing a fire to rekindle was specifically excluded from this immunity and deemed actionable under a traditional negligence theory.[44]

2. Notice Requirements and Liability Caps

The typical statute of limitations in Iowa for property damage tort claims is five (5) years.[45] However, when pursuing a lawsuit against a government agency, the action must be filed within six (6) months.[46] However, if written notice, identifying the time, place, circumstances and amount sought, is given within 60 days of the incident, the statute of

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[40] Iowa Code § 669.4.
[41] *Graber v. City of Ankney,* 656 N.W.2d 157 (2003).
[42] Iowa Code § 670.4(3), (6), (11).
[43] *Adams v. City of Des Moines,* 629 N.W.2d 367 (2001); *Kershner v. City of Burlington,* 618 N.W.2d 340 (2000).
[44] *Menke Hardware, Inc. v. City of Carroll,* 474 N.W.2d 579 (1991).
[45] Iowa Code § 614.1(4).
[46] Iowa Code § 670.5.

limitations is extended to two (2) years.[47] The only damages cap relates to punitive damages, which are not allowed under the ITCA.[48]

C. Michigan

1. Governmental Immunity

Michigan government agencies and employees enjoy blanket tort immunity for losses incurred while engaged in the discharge of a government function.[49] Although not specifically delineated by statute, immunity has been applied to fire departments carrying out their necessary functions.[50] There is, however, a gross negligence exception to the general rule giving immunity to government employees.[51] Specifically, the Michigan Supreme Court abolished application of the public duty doctrine to all government agencies *except* for police officers carrying out police functions.[52] The Court noted that the traditional government immunity statute already provides "government employees with significant protections from liability" and to apply the additional protection of the public duty doctrine would be unwarranted.[53]

2. Notice Requirements and Liability Caps

Michigan's statute of limitations for a typical property damage claim is three (3) years.[54] However, the notice of claim or the filing of an action against a government agency or employee for personal injury or property damage must take place within six (6) months of the date of the

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[47] *Id.*
[48] Iowa Code § 670.4(5).
[49] Mich. Comp. Laws § 691.1407.
[50] *Omelenchuk v. City of Warren,* 466 Mich. 524, 647 N.W.2d 493 (2002).
[51] Mich. Comp. Laws § 691.1407(2)(c).
[52] *Beaudrie v. Henderson,* 465 Mich. 124, 631 N.W.2d 308 (2001).
[53] *Id.* at 134, 631 N.W.2d at 312.
[54] Mich. Comp. Laws § 600.5805(10).

occurrence.[55] For all other claims the claimant is required to give notice within one (1) year of accrual.[56] The notice must set forth the time, place and detailed account of the occurrence, and must be signed by the claimant.[57] Michigan does not have any statutory liability caps when suing a government agency.

D. Missouri

1. Governmental Immunity

Missouri recognizes both a statutory government immunity privilege and the public duty doctrine.[58] Generally, municipalities are not liable in tort for damages arising from the performance of government functions.[59] Specifically, municipalities bear no responsibility for injuries that occur as a result of acts or omissions during the performance of firefighting services.[60] The public duty doctrine applies to fire departments in Missouri, and the fire department and its firefighters owe no particular duty to private parties.[61] The policy driving the broad protection of government entities and employees via the application of sovereign immunity and the public duty doctrine is to promote "effective administration of public affairs by removing the threat of personal liability from those officials who must exercise their best judgment in conducting the public's business" and to "protect officials from second guessing."[62]

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[55] Mich. Comp. Laws § 600.6431(3).
[56] Mich. Comp. Laws § 600.6431(1).
[57] Mich. Comp. Laws § 600.6431.
[58] *Pace v. Pacific Fire Protection District,* 345 S.W.2d 7 (Mo.App. 1997).
[59] Mo. Rev. Stat. § 537.600; *Theodoro v. City of Herculaneum,* 879 S.W.2d 755 (Mo.App. 1994).
[60] *Claxton v. City of Rolla,* 900 S.W.2d 635 (Mo.App. 1995).
[61] *Id.* at 636.
[62] *Pace v. Pacific Fire Protection District,* 945 S.W.2d 7, 10 (Mo.App. 1997).

2. Notice Requirements and Liability Caps

Missouri does not have any specific notice requirements that govern suing a government agency. The statute of limitations for filing any claim based in tort for property damage is five (5) years.[63] Missouri does have a damages cap of $2 million for all claims arising out of the same occurrence and a $300,000 limit for any single individual from a single occurrence.[64] Additionally, Missouri does not allow punitive or exemplary damages to be awarded against a government entity.[65]

E. Wisconsin

1. Governmental Immunity

Wisconsin acknowledges government immunity for both state and local agencies and its employees.[66] The general rule is that a public employee is immune from liability for acts performed within the scope of their employment or official duties.[67] Furthermore, a public officer or employee is immune for discretionary acts.[68] Three exceptions exist to the general rule of immunity: 1) willful and wanton activity; 2) negligent performance of a ministerial task; and 3) if the employee or official is aware of a known and compelling danger that creates a duty to act.[69] Although these exceptions appear to allow a relatively broad based application for liability, the courts remain reluctant to qualify a public officer's actions under any of the

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[63] Mo. Rev. Stat. § 516.120.
[64] Mo. Rev. Stat. § 537.610(2).
[65] Mo. Rev. Stat. § 537.610(3).
[66] Wis. Stat. § 893.80; Wis. Stat. § 893.82.
[67] *Mellenthin v. Berger,* 265 Wis.2d 575, 666 N.W.2d 120 (2003).
[68] *Barillari v. City of Wilwaukee,* 194 Wis.2d 247, 533 N.W.2d 759 (1995).
[69] *Id.*

available exceptions to immunity. This trend is explained by the underlying public policy to protect officials on the premise that they should be "free to perform their responsibilities, using their experience, training, and good judgment, without also fearing that they or their employer could be held liable for damages from their [conduct]."[70] Therefore, Wisconsin Courts will use virtually any excuse to find that these exceptions do not apply.

2. Notice Requirements and Liability Caps

Wisconsin requires that notice of a claim be made within 120 days of the date of the occurrence or event giving rise to the potential claim.[71] The statute requires written notice of the circumstances to be served on the proper agency within the prescribed time frame. Strict adherence is required, otherwise the claim is barred.[72] However, an exception does exist if the agency had actual notice of the claim and the claimant can prove to a court that the government agency was not prejudiced by the lack of formal notice.[73] Typically, the statute of limitations for civil property damage claims in Wisconsin is six (6) years.[74] However, when suing a government agency, suit must be filed within three (3) years, calculated from the date notice is given to the particular agency.[75] In theory, if proper notice was given on the last possible day, suit can be filed within three (3) years and 120 days from the date the cause of action accrues.[76]

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[70] *Id.* at 262, 533 N.W.2d at 765.
[71] Wis. Stat. § 893.80(1)(a).
[72] *Inx International Ink Co. v. Delphi Energy & Engine Management Systems,* 943 F.Supp. 993 (E.D. Wis. 1996).
[73] Wis. Stat. § 893.80(1)(a).
[74] Wis. Stat. § 893.52.
[75] Wis. Stat. § 893.70.
[76] *Colby v. Columbia County,* 202 Wis.2d 342, 550 N.W.2d 124 (1996).

Wisconsin observes two (2) different liability caps when suing a fire department or other public entity. Generally, the cap is $50,000; however, if the fire department is organized under a different statutory scheme (specifically Wis. Stat. ch. 213), the cap is $25,000.[77]

F. Federal Government

1. Government Immunity

Tort claims against the federal government are governed by the Federal Tort Claims Act ("FTCA"), 28 USC §§ 1346, 2671-2680. The FTCA broadly states that the United States shall be liable for torts to the same extent as a private individual under similar circumstances. However, 28 USC § 2680 grants the federal government immunity for discretionary acts, and for acts based on the execution of statutes or regulations. The statute also grants immunity in a number other situations.

2. Notice Requirements and Liability Caps

28 USC § 2401 governs both notice requirements and the statute of limitations for tort actions against the federal government. Specifically, this statute requires that written notice of a claim be presented to the appropriate federal agency within two (2) years after the claim originates. The claimant must thereafter file suit within six (6) months from the date of mailing of the notice of final denial of the claim by the agency to which it was presented. If no formal denial is issued by the federal agency within six (6) months following service of the notice of claim, the claimant may deem the lack of a response as a denial for purposes of this section and commence with suit. The federal government has no statutory liability caps for tort actions.

[77] Wis. Stat. § 893.80(3).