

A TML IRP “Local Officials: *Stronger, Together*” Podcast Cheat Sheet “Sanitary Sewage Backups: Know Before You Go”

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The TML Intergovernmental Risk Pool has prepared a detailed paper on the issues (available on www.tmlirp.org at the *Local Officials: Stronger, Together Podcast Series* link). The following is a summary of the most common ways a local government could be liable for a sanitary sewer backup into a home or business.

Is a local government liable when sewage backs up into a residence or business?

It depends on what caused the backup, but usually not. The bottom line, in most instances, is a claimant who suffers damages from the backup of a local government’s sanitary sewer system will not be able to recover damages from the local government that owns and operates the system. This is true because the operation of a sanitary sewer system is a governmental function for which a local government has immunity, and the Tort Claims Act’s waiver of immunity for property damage claims is very narrow.

That being said, a local government may be held liable under the Tort Claims Act for physical injuries or deaths arising out of the operation of their sanitary sewer systems, and for property damage if the backup was caused by the negligent use of motor-driven vehicles or motor-driven equipment. Some courts had shown a willingness to stretch the bounds of nuisance and takings laws to provide an alternative remedy for recovering property damages, but the Texas Supreme Court largely closed the door on those remedies with its opinion in *City of Dallas v. Jennings*. Those are worth mentioning for historical context, but a claimant would now typically allege negligence under the Tort Claims Act.

How does a negligence claims under the Tort Claims Act work?

Texas local governments are immune from liability for damages arising out of the performance of their governmental functions, except to the extent such immunity has been expressly waived by the legislature. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994); *Bible Baptist Church*, 848 S.W.2d at 828. The primary waiver is in the Texas Tort Claims Act. *Dallas County Mental Health & Mental Retardation v. Bossley*, 969 S.W.2d 339, 342 (Tex. 1998). The waiver is a limited one. *Id.*

Sanitary Sewer Service is a governmental function. The provision of sanitary sewer service was recognized as a governmental function at common law. *City of Houston v. Lyons Realty, Ltd.*, 710 S.W.2d 625 (Tex. App. – Houston [1st Dist.] 1986); *Gotcher v. City of Farmersville*, 137 Tex. 12,

14, 151 S.W.2d 565, 566 (Tex. 1941). In 1987, the Tort Claims Act was amended to provide statutory definitions of municipal functions as governmental or proprietary. TEX. CIV. PRAC. & REM. CODE § 101.0215. The Act now includes “sanitary and storm sewers” and “water and sewer service” in its laundry list of governmental functions. *Id.* at (a)(9) and (32).

Claims brought under the Tort Claims Act are typically in the nature of property damage claims. Regarding property damages, the Tort Claims Act provides, in pertinent part:

“A governmental unit in the state is liable for: (1) property damage...proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law...”

TEX. CIV. PRAC. & REM. CODE § 101.0215. In layperson’s terms, the above usually means that a local government typically retains immunity (i.e., it won’t be liable) for a backup that’s *not* caused by the use of some type of motor-drive equipment by a local government employee.

Some governmental entities have argued for a very narrow definition of what constitutes “motor-driven equipment” under this provision. *Schaeffer v. City of San Antonio*, 838 S.W.2d 688 (Tex. App. – San Antonio 1992, no writ) (city argued that stationary electric motor-driven pump in water system was not motor-driven equipment); *4 DG's Corp. v. City of Lockney*, 853 S.W.2d at 856 (city argued that a sewage lift station's electrically powered pumps were not motor-driven equipment); *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864 (Tex. 2001) (TNRCC, now TCEQ, argued that stationary electric pumps used to dissipate fumes from leaking underground gasoline tank were not motor-driven equipment). The Texas Supreme Court has given the term its ordinary meaning, holding that “[m]otor-driven’ means, quite simply, driven by a motor.” *White*, 46 S.W.3d at 868.

In the unlikely event a local government’s immunity is waived, the Tort Claims Act limits the damages for personal injuries against a city to \$250,000 per person and \$500,000 per single occurrence, and \$100,000/\$300,000 for other local governments. TEX. CIV. PRAC. & REM. CODE § 101.023. The Act prohibits the recovery of exemplary damages. *Id.* § 101.024.

How does the above interact with a local government’s authority to compensate a home or business owner for a sewage backup and with TML Risk Pool coverage?

Specific coverage questions should always be directed to your local government’s Risk Pool member services manager because coverage questions are notoriously difficult to answer. However, a bit of general explanation may be helpful. A local government’s liability coverage generally covers a claim for which immunity is waived. In the context of a sanitary sewer backup, that usually means the backup had to be caused using motor-driven equipment in a negligent manner. Thus, a backup into a home or business caused by any other means may not incur liability.

In fact, some have argued a political subdivision is prohibited from compensating a homeowner

or business owner for a claim for which immunity isn't waived. *See* TEXAS CONST. Art. III, Sec. 52. That issue came to a head around 2009 when several particularly messy sewage backups into homes were reported in the media. Some local governments took the position that they were prohibited from paying for the damages because they weren't legally liable for them.

Nevertheless, some governmental entities, including cities and river authorities, wanted to cover the property damage cost of sewer backups for their customers, and it seemed like the right thing to do from a reasonableness – rather than a technically legal – standpoint. In 2009, a bill was passed that allows a city or river authority to pay these damages, even if the entity is not liable under the Tort Claims Act. TEX. LOC. GOV'T CODE § 552.912. According to the House bill analysis:

When a municipality's sanitary sewer system backs up, homeowners can experience substantial damage and incur cleanup costs that can exceed \$100,000. Municipalities generally do not reimburse residents for this damage because the sewer service is a governmental function and therefore not liable for damages. Municipalities sometimes claim that an expenditure for such a reimbursement would be illegal as the municipality is not liable. H.B. 1174 allows a municipality to pay reimbursements for damages resulting from a sewer system backup.

The actual statute allows payment, but has language that allows an entity to retain its immunity:

Sec. 552.912. CERTAIN DAMAGES CAUSED BY SEWAGE BACKUP.

- (a) A municipality or a river authority, other than a river authority listed in Subsection (c), may pay actual property damages caused by the backup of the municipality's or river authority's sanitary sewer system regardless of whether the municipality or river authority would be liable for the damages under Chapter 101, Civil Practice and Remedies Code.
- (b) This section does not waive governmental immunity from suit or liability.
- (c) This section does not apply to the Trinity River Authority, the San Jacinto River Authority, the Sabine River Authority, or the Lower Neches Valley River Authority.

As authorized by the statute, the Pool now provides "Supplemental Sewage Backup Coverage" for an additional contribution. The supplemental coverage can extend coverage for property damage to structures or contents of structures caused by backup of sanitary sewage occurring at premises not owned by, rented to, or occupied by a member, where the Pool has determined the property damage was the result of a blockage in the member's line and the member is not liable for the property damage under its general liability coverage. In other words, there may be coverage for payment to a claimant even though the member's immunity is not waived.