

## A “Local Officials: *Stronger, Together*” Podcast Publication



## “Sanitary Sewage Backups: Know Before You Go”

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(Last Updated March 2021)



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## **What is the “Local Officials: Stronger, Together” Podcast Series and why should I be listening?**

The Texas Municipal League Intergovernmental Risk Pool proudly introduces the “Local Officials: Stronger, Together Podcast Series!” The Pool is producing this regular podcast series, which we’re calling STP, to help local officials and their employees understand key legal concepts and the services we provide. After arming you with that information, each 15-minute episode will give you easy action items to help keep your citizens, employees, volunteers, and property safe, all while saving public dollars.

As part of each podcast, you’ll be directed to [www.tmlirp.org](http://www.tmlirp.org) for written materials with additional information on that episode’s topic. You can click the link on the front page to find the podcasts and materials. You can also sign up for email notification of new episodes.

The Pool provides financial strength and stability through a partnership with over 2,800 local governments, partners with over 96 percent of all local governments in Texas, provides workers’ compensation coverage to over 165,000 public servants, and protects more than \$25 billion in government property. Our success makes us Stronger, Together through our core values:

- Public Service:** Serving the public good – for the benefit of local governments and their tax-paying citizens.
- Fiscal Responsibility:** Responsibly managing our members’ pooled funds for the protection of their financial stability.
- Operational Excellence:** Delivering excellent member service in all components of our risk financing and loss prevention services.
- Integrity:** Serving with honesty, integrity, and professionalism.

Scott Houston, the Pool’s Member Liaison, is host of the Podcast. After serving the Texas Municipal League for over 20 years, the last half as general counsel, Scott now serves as member liaison for the Pool and part-time special counsel to the Texas Municipal League. He has served as an adjunct professor, been published in the Texas Tech Administrative Law Journal, and has received awards from the American Bar Association, Texas Bar, and International Municipal Lawyers Association. He graduated from Texas A&M University with a degree in political science and – after studying law in Austria and Argentina – received his law degree from St. Mary’s University School of Law.

Educating local officials has been Scott’s passion for two decades, and the STP Series is the culmination of his efforts. We hope to eventually provide analysis and written materials on dozens and dozens of topics.

Questions or comments? Visit [www.tmlirp.org](http://www.tmlirp.org), call 512-791-4158, or email [scott.houston@tmlirp.org](mailto:scott.houston@tmlirp.org).

## **What’s in this paper?**

This paper is designed for local government officials with a city, special district, or other local

government that operates a sanitary sewer system to serve their residents. Occasionally, these sanitary sewer systems malfunction and cause raw sewage to back up into homes or businesses. Backups aren't uncommon occurrences and sometimes result in significant damage. The cleanup after a building has been flooded with sewage requires, at a minimum, the replacement of floor coverings and damaged sheetrock and the thorough disinfection of the premises. Not surprisingly, property owners and their insurers frequently seek to recover these cleanup costs from the owner of the sewer system.

This paper addresses the general subject of liability for damages caused by sanitary sewer backups. It provides a general overview of common liability theories and defenses, with a more detailed discussion of negligence claims under the Tort Claims Act. It is not intended as legal advice. You can find the statutes on the [Texas Legislature Online website](#). A "cheat sheet" for local officials that summarizes the most important points is also available at [www.tmlirp.org](http://www.tmlirp.org), at the Local Officials: *Stronger, Together* Podcast Series link.

This paper was adapted and updated from a 2003 publication by John Hightower, Senior Counsel at Olson & Olson, LLP.

### **How does a sanitary sewer system generally work?**

A functioning public sanitary sewer system is one of the essential elements of a modern urban community. Without an adequate system for collecting, transporting, and treating liquid waste generated by homes and businesses, development of property at the densities found in many urban areas is not possible.

An ordinary sanitary sewer system consists of privately-owned service lines, publicly-owned sewer mains and laterals, lift stations, pump stations, force mains, and wastewater treatment plants. Private service lines are owned and maintained by the customers they serve. The remainder of the system is owned and operated by the wastewater utility. Generally, sanitary sewer systems are gravity-operated and pipes are installed with a gradual slope to provide a flow from the high end of the pipe toward the low end. However, many systems also incorporate force mains or lift stations. Force mains are pipelines in which the sewage is pumped to transport it uphill or over long, flat distances. Lift stations are special pumping facilities used to pump or lift sewage vertically from the low end of one pipe to the high end of another.

### **What causes sanitary sewer system backups?**

A backup occurs when the rate at which wastewater is being discharged to the sewer system exceeds the capacity of the system. *An Introduction to Sanitary Sewer Overflows*, 2-3, Golden, Jonathan B., National Conference on Sanitary Sewer Overflows, April 24-26, 1995. Capacity problems can be caused by undersized pipes, either because of mistakes in design or construction, or because of rapid and unexpected growth in the system's service area. Capacity problems can also be caused by constrictions in the conveyance system. Constrictions can result from obstructions in the pipes (e.g., roots, grease, sticks, rags, plastic bags, brick, rocks, sand, eggshells, and silt), broken pipes, or failure of pipe joints. Debris can enter the sewer from discharges by sewer system customers, construction activities, vandalism, and from incorrectly performed sewer

maintenance work.

The variety of causes of sewer backups is illustrated by the claims in the following cases:

1. grease and roots created clog in line and improperly-installed connection between smaller line and larger line: *Shade v. City of Dallas*, 819 S.W.2d 578, 581 (Tex. App. – Dallas 1991, no writ).
2. unplugging of one line caused grease to travel to another line and plug it: *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004).
3. broken sewer pipe obstructed the line: *Callaway v. City of Odessa*, 602 S.W.2d 330 (Tex. App. – El Paso 1980, no writ);
4. claimant’s service line was disconnected from the public sewer, *Rowe v. City of Temple*, 510 S.W.2d 173 (Tex. App. – Beaumont 1974, no writ);
5. maintenance crews failed to restart lift station after power failure: *4 DG's Corp. v. City of Lockney*, 853 S.W.2d 855 (Tex. App. – Amarillo, 1993, no writ);
6. city failed to replace undersized sewer: *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826 (Tex. App. – Waco 1993, no writ); and
7. storm water infiltrated sanitary sewer system during heavy rains: *Abilene v. Smithwick*, 721 S.W.2d 949 (Tex. App. – Eastland 1986, writ ref d n.r.e.).

### **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 do takings and nuisance claims work and are they still viable? What about premises defects or contractual liability?**

While we can “never say never,” none of those claims will typically be successful. Thus, the information in this answer is largely for historical context. (See the next question for the nuts-and-bolts of current law.)

*Takings and nuisance claims*

Courts have held that governmental entities are not protected by governmental immunity in cases alleging non-negligent nuisance or takings. *Abilene v. Downs*, 367 S.W.2d 153 (Tex. 1963); *Texarkana v. Taylor*, 490 S.W.2d at 193. But those cases shouldn't be too much cause for concern because, in *City of Dallas v. Jennings*, the Texas Supreme Court concluded that those claims against a local government won't usually succeed.<sup>1</sup> In addition, *Self v. W. Cedar Creek Mun. Util. Dist* would seem to foreclose on most premises defect or contractual liability claims as well. Those cases leave negligence under the Tort Claims Act as the main remedy.

In *Jennings*, Charlotte and James Jennings sued the City of Dallas for damages they suffered when their home was flooded with raw sewage after a city sewer line became clogged with grease. *City of Dallas v. Jennings*, 142 S.W.3d 310, 311 (Tex. 2004). The specific clog that caused the flooding of their home happened after a city crew had cleared a grease-clogged sewer pipe, only to have the same grease cause another clog further down the pipe. *Id.* at 312.

The Jennings filed suit against the city, alleging non-negligent nuisance and takings claims. The city moved for summary judgment and the trial court granted the motion on the grounds that “plaintiffs’ nuisance and constitutional takings claims are barred by *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997).” *Id.* In an unpublished opinion, the Dallas Court of Appeals reversed, holding that the Jennings had raised questions of fact as to whether they could recover under their nuisance and takings claims.

On appeal, the Texas Supreme Court held that “when a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17, if it: (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action – that is, that the damage is ‘necessarily an incident to, or necessarily a consequential result of’ the government’s action.” *Id.* at 314 (citing *Texas Highway Dep’t v. Weber*, 219 S.W.2d 70, 71 (Tex. 1949); *Tarrant Reg’l Water Dist. v. Gragg*, 43 S.W.3d 609 (Tex. App. 2001)).

In *Jennings*, there was no evidence the city knew, when it unclogged the sewer line, any flooding damage would occur. Nor is there evidence the act of unclogging was substantially certain to lead to such damage; the record reflects that unclogging backups does not ordinarily cause residential flooding, and the plaintiffs themselves alleged only that unclogging “sometimes” results in such damage. Because there was no evidence the city possessed the knowledge required to establish an intentional taking, the Court held that immunity wasn't waived. *Id.* at 315. Moreover, nothing in the state law nuisance abatement statute indicates a legislative intent to waive governmental immunity for nuisance claims. Rather, the statute merely allows local governments to summarily abate such conditions. Therefore, the court held that “we need not decide whether the provisions

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<sup>1</sup> The following are cases prior to Jennings that also rejected nuisance and takings claims: *Steele v. City of El Paso*, 417 S.W.2d at 923; *City of Texarkana v. Taylor*, 490 S.W.2d 191 (Tex. App. – Texarkana 1973, writ ref'd n.r.e.); *Rowe v. City of Temple*, 510 S.W.2d 173; *Callaway v. City of Odessa*, 602 S.W.2d at 330; *Abilene v. Smithwick*, 721 S.W.2d at 949; *City of Tyler v. Likes*, 962 S.W.2d 489. Two appellate cases that were overturned by Texas Supreme Court in Jennings did recognize nuisance and takings claims: *Shade v. City of Dallas*, 819 S.W.2d 578; *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d at 828.

of this statute apply to the city's maintenance and operation of its sewer system. For the purpose of governmental immunity, it makes no difference whether the condition is characterized as a nuisance in fact or a nuisance per se. In either event, the city cannot be held liable in the absence of a clear and unambiguous waiver of immunity." *Id.* at 316.

#### *Premises defects and contractual liability claims*

Despite the Texas Supreme Court's definitive rejection of takings and nuisance claims in *Jennings*, claimants sometimes still try those remedies. For example, in the 2006 opinion of *Banda v. City of Galveston*, No. 01-05-00331-CV, 2006 WL 2640959, at \*1 (Tex. App. Sept. 14, 2006), Banda and Worthen lived together in the upstairs apartment of Banda's home and used the downstairs apartment for storage. In March 2000, while cleaning a sewer line, the city blew sewage into Banda's home. A few days later, the homeowners noticed that sewage had backed up through the downstairs toilet and had covered the floor and walls of the downstairs area. They contacted the city and requested it send someone to investigate the problem. The city hired a company to remove the sewage from Banda's home and to remove, inventory, and discard damaged items. The company informed the homeowners none of their belongings downstairs could be salvaged, and then inventoried, photographed, and discarded all of them.

The homeowners sued the city for damage to their personal and real property. As the owner of the home, Banda filed an inverse condemnation claim, and the homeowners both filed a non-negligent nuisance claim. The trial court granted the city's motion as to the inverse condemnation claim but denied the motion as it related to the non-negligence nuisance claim. The City filed traditional and no-evidence motions for summary judgment asserting there was no evidence of negligence. Specifically, it contended there was: (1) no evidence it negligently failed to maintain the sewer; and (2) no evidence such alleged negligent failure to maintain caused the damages in question; (3) no evidence of a duty to warn the homeowners; (4) no evidence the alleged failure to warn was negligent; (5) no evidence the alleged failure to warn caused the damages; (6) no evidence it owed a duty not to perform the operation; (7) no evidence it was negligent in deciding to perform the operation; and (8) no evidence any such decision caused the sewage backup. Because none of the evidence referenced in the homeowners' summary judgment response asserts the City's employees negligently used the motorized equipment, immunity wasn't waived.

A second example is the 2021 opinion in *Self v. W. Cedar Creek Mun. Util. Dist.*, No. 12-20-00082-CV, 2021 WL 56213, at \*1 (Tex. App. Jan. 6, 2021). In that case, Self and his wife Kimberly entered a contract with the district in 2012 for provision of water and sewer services. After sewage backed up into their home in April 2015, the district made some repairs to the vault system used by the district to provide sewer service. In September 2016, a considerable amount of sewage backed up into the Self's home. They filed suit against the district, alleging negligent use of motor-driven equipment, premises defect, unconstitutional taking, non-negligent nuisance, and breach of contract.

Self contended the trial court erred in granting the district's plea to the jurisdiction regarding his first cause of action, negligent use of motor driven equipment. He alleged the district utilized a plastic coupler, which broke and caused the sewage backup. He argued the coupler is "part and parcel" of the motor driven pump. Alternatively, he asserted evidence was presented that the motor

driven pump was itself responsible for the failure of the plastic coupler. Because of those things, Self claimed the waiver of immunity found in the Tort Claims Act for property damage arising from the district's negligent operation or use of motor-driven equipment. *Id.* at \*3.

After an extremely detailed discussion of how the system uses a pump and other equipment (including a "sewage vault" – essentially a tank where the sewage from the home is first collected) to move the Self's sewage from their home, which focused mostly on whether the coupler was a part of the pump, the court concluded Self did not meet his burden to establish a fact issue as to whether the flooding of his home with sewage "arose from" the use of motor-driven equipment. *Id.* at \*9.

In a somewhat novel allegation of a premises liability claim, Self alleged he is an invitee because he pays the district for use of the sewage vault. (An invitee is owed a higher standard of care than others, such as a licensee.) Additionally, Self asserted the only disputed elements of the premises defect claim are whether the district: (1) knew the plastic coupler could blow apart and cause flooding; and (2) took action to mitigate that harm to others through warning or corrective action. *Id.*

Under the Tort Claims Act, governmental immunity is waived for personal injury and death caused by a condition or use of tangible personal property or real property if the governmental unit would be liable to the claimant according to Texas law if it were a private person. TEX. CIV. PRAC. & REM. CODE § 101.021(2). A premises defect claim is a common instance of a claim for "injury and death caused by a condition of ... real property." *Tarrant Reg'l Water Dist. v. Johnson*, 572 S.W.3d 658, 664 (Tex. 2019). In a premises defect suit against a governmental unit under Section 101.021, liability is not based on the actions of the governmental unit's employees. *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 612 (Sup. 2000). With premises defects, liability is predicated by reference to the duty of care owed by the governmental unit to the claimant for premise and special defects as specified in Section 101.022. *See* TEX. CIV. PRAC. & REM. CODE § 101.022; *Able*, 35 S.W.3d at 612. Ordinarily, the governmental unit owes to the claimant only the duty a private person owes to a licensee on private property. TEX. CIV. PRAC. & REM. CODE § 101.022(a). However, if the claimant pays for the use of the governmental unit's premises, the governmental entity owes the claimant the duty owed to an invitee. *See id.*; *City of Fort Worth v. Posey*, 593 S.W.3d 924, 927 (Tex. App. – Fort Worth 2020, no pet.). *Id.* at \*9-10.

The coupler that broke had been in place since 1995. District employees worked on Self's system in April 2015. A district employee testified the coupler was not replaced then because it was working at that time. The district had been using brass couplers to replace broken couplers for at least seven years. However, the employee testified he never told his employees to replace plastic couplers or that they need to be "thrown out," unless they are broken. *Id.* at \*11. The mere fact that a dangerous condition may tend to develop over time does not support an inference of actual knowledge that the dangerous condition existed at the time of the injury. *Id.* The court held Self did not present evidence raising a fact question as to whether the district knew or should have known of a dangerous condition of the premises that created an unreasonable risk of harm to Self. *See Austin*, 465 S.W.3d at 203. Therefore, the district's immunity was not waived for Self's premises liability claim. *Id.* at \*12.



The court also rejected Self's takings claim because the district employees had no intent to damage his property. *Id.* Additionally, the court rejected his nuisance claim in the wake of the holding in *City of Dallas v. Jennings*.

Self's final claim was also a novel one. He alleged he and the district entered a contract by which the district provided goods and services to Self, and the district breached that contract by failing to properly maintain and operate the sanitary sewer and water system. Local Government Code Section 271.152 provides for a limited waiver of immunity to suit for the purpose of adjudicating a claim for breach of a "contract subject to this subchapter." TEX. LOC. GOV'T CODE § 271.152. "Contract subject to this subchapter" means, in part, a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity. *Id.* § 271.151(2)(A). Self argued the contract requires him to provide a service cleanout, a backflow prevention device, a vacuum breaker, and a cutoff valve, thus satisfying the statute's requirement that the plaintiff provide goods to the local governmental entity. The district employee testified that customers are required to provide those devices before the district will install a meter or a tank. The term "goods and services" includes generally any act performed for the benefit of another under some agreement. *See JNC Land Co. v. City of El Paso*, 479 S.W.3d 903, 910 (Tex. App. – El Paso 2015, pet. denied). Here, the provision of those devices was for Self's benefit and required before he could obtain sewage services. Any benefit the district received was indirect which is insufficient to satisfy the statute. *Id.* Accordingly, the court held the district did not waive its immunity to Self's breach of contract claim. *Id.* at \*13.

### **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 property damage claims, personal injury claims, and mental anguish claims, which are all discussed below. The Tort Claims Act conditionally waives immunity to both property damage and personal injury claims, but the scope of the waiver for property damage is much narrower than the waiver for personal injury claims.

#### *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 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 money amount recoverable for property damage arising from a single occurrence to \$100,000. TEX. CIV. PRAC. & REM. CODE § 101.023. The Act prohibits the recovery of exemplary damages. *Id.* § 101.024.

### *Personal Injury Claims*

The waiver of immunity under the Tort Claims Act for personal injury claims is substantially broader than the waiver for property damages. In addition to waiving immunity from claims arising out of the “use of a motor-driven vehicle or motor-driven equipment,” the personal injury waiver includes claims for “personal injury and death so caused by a condition or use of tangible personal property or real property.” *Id.* § 101.021. It would be unusual for a sewer backup to be the cause of a personal injury.

Damages for mental anguish are recoverable as an element of personal injury damages in a case involving serious bodily injury. *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997); *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex. 1995). A question in the context of sewer backup cases is whether mental anguish damages can be recovered where the claimant has suffered no bodily injury. The answer to this question is significant in those cases where the claimant is precluded from recovery of any property damages because the backup was not caused by use of a motor-driven vehicle or motor-driven equipment.

In *Callaway*, 602 S.W.2d at 334, the plaintiff sought damages for mental anguish on the basis that, “she became very nervous as a result of the sewer backup, and was so upset she had to move from her house.” In *Parr Golf, Inc. v. City of Cedar Hill*, 718 S.W.2d 46 (Tex. App. – Dallas 1986, no writ), the plaintiff alleged he “suffered shock, emotional distress, and nausea when he was ‘confronted with the overwhelming sight and odor of raw sewage’ flooding his property.” In *Shade*, 819 S.W.2d at 580, the plaintiff claimed “he experienced frustration and mental anguish” because he had to deal with the effects of a sewer backup into his home.

The Texas Supreme Court addressed the mental anguish issue in *Likes*, 962 S.W.2d 489. Ms. Likes’ property was damaged by floodwaters when a nearby storm sewer overflowed. She brought takings and nuisance claims against the City of Tyler seeking to recover \$100,000 in property damages and an additional \$150,000 in mental anguish damages. *Id.* at 493. She suffered no physical injuries from the flooding but allegedly suffered mental anguish from “the loss of many personal and irreplaceable items.” *Id.* at 494. The city argued that “mental anguish derived from property damage, unaccompanied by physical injury,” was not a “personal injury” within the meaning of the Tort Claims Act.

Rather than address the issue presented by the city, the court reviewed Texas cases recognizing the right to recover mental anguish damages in personal injury cases, in general, and in cases involving the breach of duties arising out of certain special relationships. Based on that review, the court concluded “mental anguish based solely on negligent property damage is not compensable as a matter of law.” *Id.* at 497. In doing so, the Court rejected the court of appeals conclusion that Likes’ mental anguish was “self-evident in the nature of [her] experience.” *Id.* at 496.

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 homeowner 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.

**What steps can private property owners take to protect themselves from sanitary sewer backups?**

Sanitary sewer customers should be made aware of "pop-off" or "backwater" valves as one way to mitigate the damage from sewage backups into their home or business. The devices are valves that are placed in the lateral or that replace standard sanitary sewer cleanout caps. When pressure from backed-up sewage threatens to send sewage up the cleanout and into a home, the pop-off or backwater valve lifts, which allows sewage to flow out on to the ground rather than into the home. A pop-off valve is a cheap, easy way for a homeowner to prevent raw sewage from backing up into his or her home. In some instances, such as when pumps and vaults are used, building codes require them.