

RMPE 352 Risk Management for Public Entities

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Chapter 4

Distinctive Liability Exposures of Public Entities

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Educational Objectives

1. Describe how differences between the legal status of public entities and that of private organizations affect public entities' liability loss exposures.
2. Describe and illustrate the distinctive liability exposures of public entities.
3. Define or describe each of the Key Words and Phrases for this chapter.

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Distinctive Liability Exposures of Public Entities

- ▶ Differences in managing liability loss exposures for public entities are due to the following:
 - The different legal status of public entities
 - The resulting difference in public entities' liability loss exposures
 - Public entities' differing opportunities to apply particular liability risk control and risk financing measures.

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The Distinctive Legal Status of Public Entities

- ▶ Public entities have the same liability exposures as private organizations, except that public entities
 - Are protected by Sovereign Immunity in some situations
 - Governmental powers are subject to some constitutional limitations that do not restrict private organizations

- ▶ Until 20th century, government entities were immune from liability and injured parties were not compensated for their losses when government committed a wrong

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The Distinctive Legal Status of Public Entities

- ▶ Sovereign Immunity
 - Over time, sovereign immunity of public entities has been eroded
 - Government Tort Claim Acts have been enacted that retain some sovereign immunity, but limit the degree of monetary liability.
 - In most cases, public entity only has to pay for injury or property damage
 - Punitive judgment awards are typically prohibited
 - Most tort claim acts also provide immunity to employees who act in good faith and in the scope of their employment

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The Distinctive Legal Status of Public Entities

Generally, governmental tort claim acts make their public entities immune from liability for certain acts arising out of the following:

- Legislative functions (rule making)
- Prosecutorial functions
- Enforcement of lawful orders
- Performance of discretionary acts
- Conditions caused by weather
- Licensing functions
- Inspections
- Acts of independent contractors
- Methods of providing police and fire protection

However, under most tort claim acts, public entities are liable for their ordinary negligence in their operations and premises. Thus, public entities can be sued for damages or injuries resulting from such causes as vehicle and premises accidents.

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The Distinctive Legal Status of Public Entities

▸ Discussion of the following

- Ferguson, MO
- BART Shooting of Oscar Grant, Tasers
 - <http://youtu.be/bmJukcFzEX4>
- Police Pursuits
- Lexipol – <http://www.lexipol.com/>

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The Distinctive Legal Status of Public Entities

▶ Section 1983

- Most federal lawsuits arise out of federal statute 42 US Code Section 1983 – Federal Civil Rights code
 - Civil Rights Act was enacted in 1871
 - Intended to protect the rights of newly freed slaves and more specifically protect individual rights from abuse by government officials.
 - Section 1983 allows personal liability suits against public officials acting under state law who deprive individuals of rights protected by constitutional or statutory law.
- Creates duties for public entities to protect individuals' rights
 - Also provides immunities for public entities and their employees in certain circumstances

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The Distinctive Legal Status of Public Entities

▶ Section 1983

- From 1920 to 1960, the law was mainly used for violation of voting rights
- Since 1961, law has been used to enforce laws against public entities.
- Under the statute, local governments may be liable for:
 - A policy statement, an ordinance, a regulation, or a decision that is officially adopted or promulgated by officials with final policymaking authority
 - Governmental “custom or usage,” even if it has not been formally approved by the governing body
 - Actions or policies made by policymakers whose edicts or acts may be construed to represent official policy.

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The Distinctive Legal Status of Public Entities

▶ Section 1983

To bring a suit against a local government under Section 1983, defendants must meet several conditions:

- They must identify a custom, practice, or policy that may be unconstitutional.
- The custom, practice, or policy must be attributable to the local government.
- The custom, practice, or policy must be persistent and widespread so that it can be shown that policymakers had actual or constructive knowledge of the policy but did nothing to end the practice.
- The defendant must be deprived of constitutional rights during the execution of the customs, practices, or policies.

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The Distinctive Legal Status of Public Entities

▶ Section 1983

- Provides for unlimited monetary damages to person whose civil rights are violated by public entities or their employees
- Civil rights is defined as “any rights, privileges, or immunities secured by the Constitution and laws”
- Most suits allege violation of rights under the Bill of Rights (first 10 Amendments) or the 14th Amendment
 - Free speech, equal protection, and due process are the most common suits

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The Distinctive Legal Status of Public Entities

- ▶ Immunity under Section 1983
 - Absolute Immunity
 - Provides unconditional defense for actions that violate constitutional rights.
 - Does not matter whether person knew or should have known that an act was unconstitutional, or intentional
 - In some cases, absolute immunity is granted to state legislators, law is unclear if it applies to city council and other board members
 - Qualified Immunity
 - If a person acts in good faith within their discretionary authority, most likely have qualified immunity shielding them from civil damages liability if actions are thought to be consistent with rights they are alleged to have violated

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The Distinctive Legal Status of Public Entities

- ▶ Section 1988 Duties
 - Allows the prevailing party in a civil rights sui to petition for the award of unlimited attorney fees.
 - Amended in 1976
 - Intended to give all persons an equal opportunity to use the courts and to make the litigation process more fair for both parties of an alleged civil rights violation

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The Distinctive Legal Status of Public Entities

▶ First Amendment Limitations on Powers

- Local government regulations are allowed to contain incidental limitations of First Amendment rights if they meet the following criteria :

- The regulation is within the constitutional power of the local government.
- The regulation furthers an important or substantial government interest.
- The government's interest is unrelated to suppressing free speech.
- The restriction of First Amendment rights is no greater than necessary to further the government's interest.
- Examples include:
 - Permits for parades/protests

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The Distinctive Legal Status of Public Entities

The First Amendment protects commercial expression as well as social, political, and religious points of view. Until the early 1980s, courts did not consider issues such as regulation of billboards, real estate solicitation, and other commercial expressions to be within the scope of the First Amendment. However, the Supreme Court has protected advertising, promotions, and other forms of commercial speech that relate solely to the economic interests of the speakers and the audience. Governments can regulate commercial expression if the following four conditions are met:

- The commercial speech concerns unlawful activity or is misleading.
- The government's restriction seeks to advance a substantial government interest.
- The government's restriction directly advances that interest.
- The government's restriction reaches no further than necessary to accomplish its objective.

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The Distinctive Legal Status of Public Entities

▶ Fourteenth Amendment Duties

No State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- Due process of law
 - Government or agency of government is authorized to act only in accordance with predetermined laws, applied in an orderly, impartial way to all persons or other entities

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The Distinctive Legal Status of Public Entities

▶ Due Process Limitations

- Individuals and organizations have two types of due process rights guaranteed by the 14th Amendment
 - **Substantive due process** focuses on the actual substance of the law to determine whether it violates constitutional rights. Broken down into:
 - Fundamental rights are those included in the Bill of Rights
 - Rights to reasonable government regulations – which looks at whether laws are rational and reasonably related to the legitimate end of government.
 - Procedural Due Process – examines how laws are carried out
 - Liberty Interests – includes pursuit of happiness
 - Property Interests – property can include entitlements

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The Distinctive Legal Status of Public Entities

- ▶ Equal Protection Limitations
 - 14th Amendment also guarantees equal protection under the law
 - Public entities must govern impartially, but can pass laws that affects some groups differently than others
 - Example of building requirements, or zoning
 - Challenges to equal protection rights generally allege that an ordinance is discriminatory or its application is discriminatory.

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The Distinctive Liability Exposures of Public Entities

Perhaps the most striking contrast between public and private entities in their choices and applications of liability risk management techniques is the great weight that political considerations have in the public sector. Although public sector risk management professionals are themselves rarely politicians and generally do not need to win the support of the voting public, the senior officials in many public entities—mayors, governors, and members of city councils, for example—do not want to be seen as sponsoring or approving risk management measures that appear to be contrary to many voters' interests. Therefore, many public entity risk management professionals become reluctant to propose risk control or risk financing actions that these senior officials will find politically difficult to approve. These political considerations often have several subtle effects on the risk management techniques that public entities choose, including the following:

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The Distinctive Liability Exposures of Public Entities

- For public entities, exposure avoidance is not a viable option for governance activities.
- Because of the relative short public entity planning horizon and typically one-year budgeting cycle, liability risk control and risk financing measures that require only short-term resource commitments (such as safety training and one-year liability insurance) and that can show immediate results are strongly preferred in the public sector; private sector firms are more open to longer-term alternatives (such as safer heavy equipment and risk financing through substantial retentions) that are often ultimately more cost-effective.
- For public entities, sovereign immunity still offers some legal protection that is not available to private organizations.
- For political reasons, elected public officials often tend to insure against liability exposures that executives of private firms often tend, for financial reasons, to retain.
- Negotiating settlements of pending liability claims is often more difficult for public entities, largely because of political pressures, potential public scrutiny, and unclear or conflicted loyalties of public officials.
- For public entities, the resolution of each claim is more likely to be a precedent for similar future claims.

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The Distinctive Legal Status of Public Entities

- ▶ Public Education
 - Student Discipline
 - Use of Buildings
 - Volunteers
 - Transportation
 - Security
 - Alcohol and Drugs
 - Athletic Programs
 - Daycare Before and After School
 - Field Trips
 - Playgrounds
 - Special Education

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The Distinctive Legal Status of Public Entities

- ▶ Public Facilities and Activities
 - Zoos
 - Museums
 - Stadiums, Convention Centers, and Arenas
 - Special Events
 - Alcohol
 - Contracts
 - Coordination with Event Managers
 - Real versus perceived risks

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The Distinctive Legal Status of Public Entities

- ▶ Recreational Facilities and Services
 - Swimming Pools
 - Golf Courses
- ▶ Transportation
 - Streets and Roads
 - Public Transit
 - Airports

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The Distinctive Legal Status of Public Entities

- ▶ Acts of Government
 - Law Enforcement
 - Training
 - Policies and Procedures
 - Supervision
 - Discipline
 - Review and revision
 - Legal procedures

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The Distinctive Legal Status of Public Entities

- ▶ Acts of Government
 - Enforcement Ordinances
 - Issuing of Licenses and Permits
 - Zoning
 - Exercising Eminent Domain

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The Distinctive Legal Status of Public Entities

- ▶ Managing Public Funds (p 198–206)
 - Liability for Public Contracting Activities
 - Contracts for Construction Projects
 - Leases and Other Contracts for Real Property
 - Contracts of Easement
 - Contracts for Supplies
 - Service Agreements
 - Debt of Financing Contracts
 - Intergovernmental Agreements
 - Misusing Public Funds