

Having it both ways

Plaintiffs' lawyers say letting municipal governments buy insurance policies and claim sovereign immunity is wasteful and unfair

By: Phillip Bantz October 19, 2012

Trial lawyers throughout North Carolina are calling for legislators to close a loophole in the state law that lets counties, towns, cities and school boards buy liability insurance without losing the protection of governmental or sovereign immunity.

The law says municipalities give up immunity when they purchase insurance. But the N.C. Court of Appeals has consistently ruled that the waiver does not apply to policies containing exclusion provisions for claims that can be defended by immunity.

"They giveth then they taketh away," said Wilmington personal injury lawyer Gary K. Shipman of Shipman & Wright. "They waive sovereign immunity by purchasing insurance but then there's an exclusion saying you have no insurance for anything under sovereign immunity. Virtually everything a government does is going to be covered by sovereign immunity so why even bother to have insurance?"

Immunity exclusions are becoming ubiquitous and for obvious reason: Municipalities get to have insurance coverage and also retain their immunity shields while insurers collect big premiums and face little risk of ever having to pay claims.

"When you look at the amount that counties pay for insurance, they're pissing that money away. It's just enriching the insurance company," said James K. Dorsett III, a tort and insurance litigator at Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan in Raleigh.

Many plaintiffs' attorneys argue that municipalities are wasting taxpayer money on liability insurance that is essentially worthless and makes it difficult or impossible for taxpayers to recover damages when they're injured by the negligence of their local government.

"It's very frustrating and I think it's totally against public policy to allow them to do this," said Bree A. Lorant of the Lorant Law Firm in Chapel Hill. "This kind of trickery allows them to get out of their responsibilities to members of the public who are entitled to compensation."

Counties purchase liability insurance from the N.C. Association of County Commissioners' Risk Management Pools, meaning that counties are selling these policies to themselves. The policies and immunity exclusions are approved by the N.C. Department of Insurance, which deferred comment to the commissioners' association.

The association's risk pool underwriting manager, Richard Barnes, referred an interview request to the in-house attorney, Amy Y. Bason, who did not return phone messages.

Meanwhile, a common complaint among insurance defense attorneys is that the personal injury bar is more concerned with collecting fees than protecting residents. Policies with immunity exclusions benefit the municipalities because insurers still have to provide attorneys to defend against claims, even when immunity is invoked, and immunity isn't always a valid defense.

In Orange County, assistant manager and chief financial officer Clarence Grier said the liability policies with immunity exclusions are also more affordable than those without the provisions, though he could not provide a cost difference.

"Not everything can be waived off by sovereign immunity," he added. "And, politically, that's not the way we'd want to approach things. It would send the wrong message if every time there was a case we'd throw out sovereign immunity."

Raleigh personal injury lawyer Donald R. Strickland of Twiggs, Strickland & Rabenau ran up against a sovereign immunity exclusion when he tried to file a wrongful death suit against the Orange County Office of Emergency Medical Services, alleging that a paramedic had left a young man to die.

"We found out that the county paid almost \$120,000 for an annual premium for a policy that did not provide any coverage whatsoever for any county employee who was acting in his or her official capacity or for any county negligence," he said.

Strickland ultimately sued the paramedic in his individual capacity, which usually happens in these cases. The Court of Appeals ruled last December in the suit, *Fraleigh v. Griffin*, that the medic could be held personally liable because he was a public employee and not a public official, which means the county's insurance policy would provide coverage for him.

The court determined that immunity extends to public officials who serve in positions created by the constitution or statutes and exercises a sovereign power. Law enforcement officers qualify as public officials, for instance, but proving whether other types of government workers are officials or employees can be complicated, Lorant said.

"It's not really all that clear cut, which is why these cases end up going to the Court of Appeals continuously because each job gets scrutiny," she said. "The appellate court certainly is hearing more and more of these issues and I think it's going to be coming up on the radar of the legislature because it's being thrust out there more often."

Noting that the language in the law and the exclusion clauses in insurance contracts is clear, the Court of Appeals has concluded that it will be up to the legislature to enact any policy changes that would address the apparent loophole.

During the 2009 legislative session, the N.C. Advocates for Justice backed a proposal to enact a local government tort claims act modeled after the state tort claims act, which partially waives sovereign immunity by setting a \$1 million liability cap.

But the effort stalled after receiving strong opposition from municipalities and school boards – the N.C. School Boards Association warned that "any weakening of the governmental immunity law would cripple school boards financially, and devastate their ability to provide sound basic education opportunities to every student."

Now, as lawmakers prepare to reconvene in January, Advocates for Justice legal affairs counsel Burton Craige, a partner at Patterson Harkavy in Raleigh, said there has been serious talk about renewing the three-year-old effort to change the law.

"We've had some discussion of trying again in the 2013 session with another bill to enact a local government tort claims act," he said. "We're hoping that legislators have become more aware of the inequities in the current system."