STATE SOVEREIGN IMMUNITY & TORT CAPS

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ATTORNEYS AT LAW

Kirk Mylander, CIS General Counsel

Gary Wickert, Matthiesen, Wickert & Lehrer, S.C.

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STATE SOVEREIGN IMMUNITY

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SHORT HISTORY OF STATE SOVEREIGN IMMUNITY

- Sovereign Immunity: Applies to States
  - Cf. Governmental Immunity: Applies to municipalities, local government, political subdivisions.
- Common Law: The King Can Do No Wrong
- U.S. Constitution, Article III
- State Sovereign Immunity Abolished
  - *Chisolm v. Georgia*, 2 U.S. 419 (1793)
- State Sovereign Immunity Reinstated
  - 11th Amendment
- Applied Only to Federal and State Government (Not Local)
- Federal Tort Claims Act (1946)
  - Waived Immunity With Exceptions
- State Legislatures Began To Follow Suit
- Development of Ministerial vs. Discretionary Act Distinction

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CATEGORIES OF GOVERNMENT ACTION

- Governmental v. Proprietary
- Discretionary v. Ministerial

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DISCRETIONARY IMMUNITY

- State Tort Claims Act: Modeled after FTCA (2 Types)
  - General Waiver of Immunity With Exceptions
    - Discretionary Function Exception To Liability
      - DISCRETIONARY IMMUNITY
    - Ministerial (Operational) Function
      - Execution of Policies and Set Tasks
  - Establish Immunity With Limited Waivers of Immunity
  - Most States
- State Claims Act: Limit Immunity and Establish Procedure For Claims
  - Establish Court of Claims, Board, or Commission
  - Provide Exceptions to Liability and Procedure for Bringing Claims
- Connecticut, Illinois, Kentucky, North Carolina, and Ohio

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PREMISES LIABILITY (RECREATIONAL IMMUNITY)

- Many States Establish Low Standard of Care for State
- Some Create Different Standard of Care Depending On:
  - Defect: Special Defect (Unusual Danger)
  - Paid To Use Property
- Recreational Immunity Statute – Wis. Stat. § 895.52
  - Provides Property Owners (Including Municipalities) With Immunity
    - From Suit By Person Engaged In Recreational Activity
    - Owner Gets Minimal Pecuniary Benefit
  - Broad Immunity – But Not Absolute
    - No Duty To Keep Safe
    - No Duty To Inspect
    - No Duty To Warn Of Unsafe Condition
  - Exceptions:
    - Injury or Death When Admission Charged
    - Malicious Act/Failure To Warn
      - "Malicious" = Hatred, Ill Will, or Intentional
    - What is "recreational activity"?

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EXCLUSIVE REMEDY IMMUNITY

- Public Employers Sued By Employees
- Workers' Compensation Is Exclusive Remedy
  - Exceptions
    - Intentional Act
      - Kentucky: Deliberate Intention. K.R.S. § 342.610
    - Dual Capacity (*e.g.,* Employer and Health Care Provider)
    - No Intentional Act Exception
      - Alabama: An employer remains immune from suit even if it acts intentionally. Ala. Stat. § 25-5-11(a).

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OVERLAPPING IMMUNITIES

- ***Fenner v. Municipality of Anchorage*, 53 P.3d 573 (Alaska 2002).**
  - **City employee hurt when snowplow struck protruding manhole.**
  - **Received workers' comp and sued city, alleging intentional tort.**
  - **City argued exclusive remedy of workers' compensation.**
  - **Court argued about "substantial certainty."**
  - **Court ruled no specific intent to injure employee.**
  - **City argued "discretionary immunity."**
  - **Court ruled that Fenner failed to preserve claim against city.**

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OVERLAPPING IMMUNITIES

- ***Jeter v. New Jersey Transit,* 2009 WL 1118727 (N.J. Super. 2009).**
  - **Bus driver in head-on crash and suffered spinal injuries on August 1, 1999.**
  - **Driver disciplined for driving and condition of his buses after shifts.**
  - **Driver believed he was being singled out.**
  - **Driver sued Transit Authority for intentional infliction/hostile work environment.**
  - **Claim dismissed for failure to give timely notice (90 days).**
  - **On appeal, court held intentional tort exception NOT subject to notice requirement.**
  - **Loss occurred prior to *Velez v. City of Jersey City*, 850 A.2d 1238 (N.J. 2004).**
    - **Notice provisions of Tort Claims Act apply to intentional and negligent conduct.**

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OVERLAPPING IMMUNITIES

- *Schmitz v. Xenia Bd. of Education,* 2003 WL 139970 (Ohio App. 2003).
  - School custodian died after fall from ladder.
  - Wife sued Board of Education claiming intentional tort.
  - In NJ, if intentional tort, parties no longer in employer/employee relationship.
    - Skirts Exclusive Remedy Immunity
  - Plaintiff also claimed the exception to municipal immunity.
    - "Any matter that arises out of the employment relationship" creating dangerous condition.
  - Court ruled that plaintiff could NOT claim "employment" exception because it was intentional
    - It was no longer an employer/employee relationship.

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OVERLAPPING IMMUNITIES

- ***Harbel v. Wintermute,* 883 P.2d 359 (Wyo. 1994).**
  - **County employee injured while operating county-owned front-end loader.**
  - **Employee sued co-employee supervising loader operation.**
  - **Alleged loader unsafe and employer took no action to make it safe.**
  - **Under Comp Act, employee can sue co-employee.**
  - **Court held that Governmental Claims Act did NOT waive immunity against supervising co-employees.**
  - **If co-employee had been operating motor vehicle, immunity would have been waived.**

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Tort Caps & Immunities

- Just a Rumor of Losing Caps Or Immunities
  - Plaintiff Attorneys Flocking
  - Actuaries Scrambling
  - Reinsurers Calling

  …The playing field is forever changed

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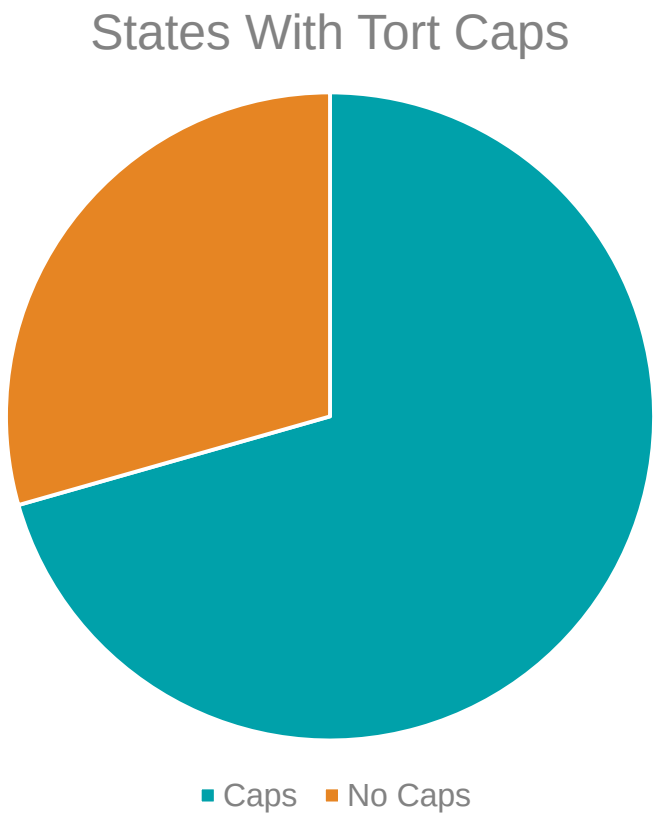
The Trend of Tort Cap Challenges

- Oregon: line of cases challenging caps
- North Dakota: facing tort cap challenge
- Utah: prospective challenge to caps
- Oklahoma: Tulsa World newspaper did a story on caps
  - Plaintiffs' firm asking, "Is it time to raise the tort claim caps?"
- Maryland raised caps in 2015

The Trend of Tort Cap Challenges

- States With Government Liability Caps: 36
- State With No Caps: 15



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The debate was about:

How caps and immunities allow government to act in the public interest

…Instead of forcing government to worry about losing program funds to large, uncapped claims

PUBLIC INTEREST PROJECTS

The debate becomes about:

How do we make every injured person whole?

vs.

Who pays?

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TORT CAPS:

CASE #1

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Sympathetic plaintiff: Clarke v. OHSU

3 Month old baby suffers brain injury during heart surgery

- Parents seek $17 mil for lifetime care
- OHSU only proper defendant – not government ee's
- Recovery at trial court is capped $200,000 from OHSU

Tort Caps

Result of Case 1:

- Plaintiff can sue individuals without cap applying if capped recovery would not amount to “an adequate recovery.”
- Government entity still indemnifies uncapped individual defendants
- Effectively an end-run around the caps

Local Government lobbied to raise caps:

Provide “adequate” but not “unfettered”

- Two separate sets of caps
- State of Oregon / OHSU
- Local government

New caps include escalator clauses

- Ratcheted up for five years
- Now increase every year based on CPI

Local Government lobbied to raise caps:

Previous Caps:

- Property damage: $50,000
- Economic damages: $100,000
- Non-economic damages: $100,000

New Caps (adjusted annually for 2017-18):

- State & Local Property damage: $116k / $579k
- Local Personal injury/ death: $706k / $1.41 mil
- State / OHSU Personal injury/ death: $2.12 mil / $4.24 mil

TORT CAPS:

CASE #2

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Tort Caps

Case 2: Another sympathetic plaintiff:

- Horton v. OHSU:
  - 9 month boy with cancer on liver
  - Cut blood supply to liver, needed transplant
  - 7 surgeries in 3 weeks / flown to Standford / $5mil med bills
  - Verdict of $12,071,190 in damages
  - Tort Cap at $3 million

Tort Caps

Case 2: Horton v. OHSU:

- OHSU paid $3 million for its capped liability

- Jury verdict against employed doctor for $12 million (uncapped)
  - Initial $3m counts toward $12m
  - $9m in dispute

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Tort Caps

- Court entered judgment for the full $12m
- Did not limit judgment to the $3m cap
- OHSU appealed arguing that cap should apply
- Setting caps is a legitimate exercise of legislative authority
- Horton argued legislature cannot interfere with a jury verdict and/or plaintiff's right to a unfettered remedy

Possible Outcomes:

- Reestablish a hard cap for all circumstances
- Maintain the flexible cap

  (but find it does, or does not, apply in this case)
- Strike down all the caps

Local Government Allies

Who are the allies of local government on Tort Cap and Immunities cases?

1. OHSU – State of Oregon
2. CIS – pool of cities and counties*
3. SDIS - pool of special districts*
4. PACE - pool of school districts*
5. Public Universities*
6. Self-Insured Cities and Counties

*Joined municipal risk pool amicus

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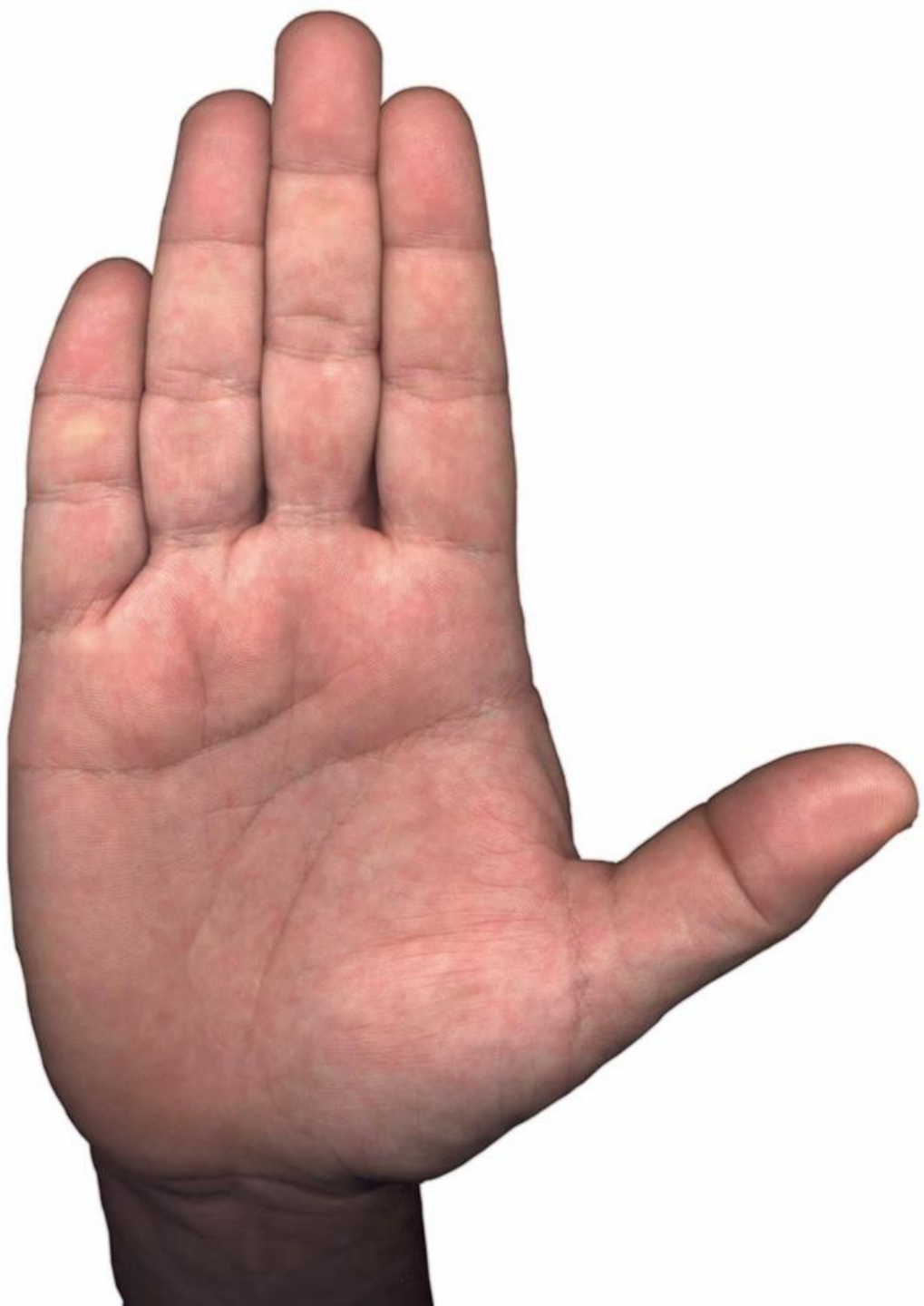
What would happen in an uncapped environment?



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An uncapped environment?

We wanted the court to understand the legislature weighed the cost of providing unfettered remedies to plaintiffs against the cost of providing stable government services to public.

The legislature reset the caps, the court should not legislate another reset

Tort Caps… or not

County	Population	Retro/Agg or Per Occ Deductible	Premium
Coos (OR)	62,890	$97,608	$137,920
Walla Walla (WA)	59,100	$50,000	$369,104
Polk (OR)	76,625	$80,162	$111,225
Chelan (WA)	73,200	$100,000	$505,012

Tort Caps… or not

Cities	Population	Liability Premium
Fairview (OR)	9,153	$43,127
Snohomish (WA)	9,098	$168,291
Junction City (OR)	5,552	$47,795
Ocean Shores (WA)	5,569	$110,851

Tort Caps

Based on premium differences between capped and uncapped states…

…If we lose our tort caps, impact on public budgets will be an amount equal to…

227 to 487 teaching positions

Tort Caps & Immunities

…If we lose our tort caps, impact on public budgets will be an amount equal to…

…**1,330 to 2,852 full time city or county workers**

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Tort Caps & Immunities

…If we lose our tort caps, impact on public budgets will be an amount equal to…

141 to 274 full time special district employees

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Tort Caps & Immunities

830-1,778 full time university students' tuition and fees.

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"The Amicus Brief… projects future insurance premium increases for local public bodies. This information would be suitable for such a legislative forum. Amicus presumably attempts to show that affirming plaintiff's constitutional rights in this case will lead inevitably to financially devastating outcomes for local public bodies. This is by no means clear. **It is certainly beyond the scope of a court to test the validity of data, weigh options, or preempt policy choices the legislature may make in the future**."

Exactly! And the Legislature's past choices, too!

Horton v. OHSU: What Happened?

- Reestablish a hard cap for all circumstances
- Maintain the flexible cap

  (but find it does, or does not, apply in this case)
- Strike down all the caps

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Horton v. OHSU: What Happened?

Victory!

- Court held the tort caps did not violate:
  - Right to Jury Trial – It's procedural, not substantive
  - Right to a Remedy – Legislature can limit government liability as a partial waiver of sovereign immunity
    - Cap actually ensures a solvent defendant will be available to pay
  - Two underlying cases overruled; caps now stable

Warning Signs

- Tort caps have not been revised since the 80’s
- No conversations of any kind about tort caps in your state
- A high damage case injuring a highly sympathetic person
- Similar states are facing tort cap challenges

Conclusion:

1. Keep your caps updated
   - ❑ Minimize the highly sympathetic plaintiff / bad facts make bad law
2. Share group data: strength in numbers
3. Demonstrate losing caps and immunities will result in unstable tax rates or unstable service levels – or both
   - ❑ And, at least on solvent defendant
4. Legislature's role to weigh plaintiffs' need for meaningful recovery vs. government's ability to provide necessary services at predicable rates

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CONTACT INFORMATION:

Kirk Mylander,
CIS General Counsel
kmylander@cisoregon.org

Gary Wickert
Matthiesen, Wickert & Lehrer, S.C.
gwickert@mwl-law.com

MWL
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