APPENDIX A: State Statutes and Cases on Immunity for Discretionary Decisions
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APPENDIX A—STATE STATUTES AND CASES ON IMMUNITY FOR DISCRETIONARY DECISIONS

Note: The appendix includes other state statutory provisions that are relevant to the tort liability of transportation departments. Key terms, such as defect, discretion, discretionary, public duty, and sovereign immunity, are in bold print. The reader is advised to check for any amendments to the cited statutes.

ALABAMA

Ex parte Cranman, 792 So.2d 392, 405 (Ala. 2000) (holding that a state agent is immune from liability when “formulating plans, policies or designs”).

ALASKA

Alaska Stat. § 09.50.250 (2016). Actionable claims against the state

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560–36.30.695 may not bring an action under this section except as set out in AS 36.30.685. However, an action may not be brought if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state exercising due care in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused….

…

ARIZONA


In this article, unless the context otherwise requires:

4. “Maintenance” means the establishment or continuation in existence of facilities, highways, roads, streets, bridges or rights-of-way by a public entity and does not mean or refer to ordinary repair or upkeep.
7. “Public entity” includes this state and any political subdivision of this state.

8. “State” means this state and any state agency, board, commission or department.


A. A public entity shall not be liable for acts and omissions of its employees constituting either of the following:

1. The exercise of a judicial or legislative function.

2. The exercise of an administrative function involving the determination of fundamental governmental policy.

B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for any of the following:
   
   (a) The purchase of equipment.
   
   (b) The construction or maintenance of facilities.
   
   (c) The hiring of personnel.
   
   (d) The provision of governmental services.

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.


A. This state and its departments, agencies, boards, commissions and all other political subdivisions are not liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty by any emergency worker, excepting wilful misconduct, gross negligence or bad faith of any such emergency worker, in engaging in emergency management activities or performing emergency functions pursuant to this chapter or title 36, chapter 6, article 9.
CALIFORNIA

Cal. Gov’t Code § 820.2 (2016). Exercise of discretion

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Cal. Gov’t Code § 8655 (2016). Liability for claim based upon exercise of discretionary function or duty

The state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of this chapter.

DELAWARE


(a) Except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages. …

(b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:

(1) The undertaking or failure to undertake any legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, regulation, resolution or resolve.

(2) The undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.

(3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid.

…

(6) Any defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such ways including but not limited to street signs, traffic lights and controls, parking meters and guardrails.
Paragraphs (b)(1) to (6) of this section to which immunity applies are cited as examples and shall not be interpreted to limit the general immunity provided by this section.

(c) An employee may be personally liable for acts or omissions causing property damage, bodily injury or death in instances in which the governmental entity is immune under this section, but only for those acts which were not within the scope of employment or which were performed with wanton negligence or wilful and malicious intent.


Except as otherwise provided by the Constitutions or laws of the United States or of the State of Delaware, as the same may expressly require or be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, …where the following elements are present:

(1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence…..

…

FLORIDA

Fla. Stat. § 768.28 (2016). Waiver of sovereign immunity in tort actions; recovery limits; limitations on attorney fees; statute of limitations; exclusions; indemnification; risk management programs

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its (1) agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee’s office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the
limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued. However, any such action against a state university board of trustees shall be brought in the county in which that university’s main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence for the transaction of its customary business.

See Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1020 (Fla. 1979). See also, Mercado v. City of Orlando, 407 F.3d 1152, 1162 (Fed. 11th Cir. 2005) (interpreting Fla. Sat. § 768.21(1) to waive sovereign immunity for the government's operational acts but does not waive sovereign immunity for discretionary acts).

GEORGIA


This article shall be known and may be cited as “The Georgia Tort Claims Act.”


As used in this article, the term:

(1) “Claim” means any demand against the State of Georgia for money only on account of loss caused by the tort of any state officer or employee committed while acting within the scope of his or her official duties or employment.

(2) “Discretionary function or duty” means a function or duty requiring a state officer or employee to exercise his or her policy judgment in choosing among alternate courses of action based upon a consideration of social, political, or economic factors.

…

(5) “State” means the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions, but does not include counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities.

(6) “State government entity” means a state office, agency, authority, department, commission, board, division, instrumentality, or institution.

(7) “State officer or employee” means an officer or employee of the state, elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity, whether with or without compensation, but the term does not include an independent contractor doing business with the state. …

(a) The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state’s sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from conduct on the part of state officers or employees which was not within the scope of their official duties or employment.

(b) The state waives its sovereign immunity only to the extent and in the manner provided in this article and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States.


The state shall have no liability for losses resulting from:

(1) An act or omission by a state officer or employee exercising due care in the execution of a statute, regulation, rule, or ordinance, whether or not such statute, regulation, rule, or ordinance is valid;

(2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;

…

(8) Inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

…

(10) The plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design…. 

…

HAWAII

Chapter 662 State Tort Liability Act

As used in this chapter the term “State agency” includes the executive departments, boards, and commissions of the State but does not include any contractor with the State.


The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.


This chapter shall not apply to:

1. Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused.…

**IDAHO**

**Idaho Code Ann. § 6-902 (2016). Definitions**

As used in this act:

1. “State” means the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof.

2. “Political subdivision” means any county, city, municipal corporation, …or any other political subdivision or public corporation. …

3. “Governmental entity” means and includes the state and political subdivisions as herein defined.

4. “Employee” means an officer, board member, commissioner, executive, employee, or servant of a governmental entity, …but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this act applies in the event of a claim.…

**Idaho Code Ann. § 6-904 (2016). Exceptions to governmental liability**

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or
perform a **discretionary** function or duty on the part of a governmental entity or employee thereof, whether or not the **discretion** be abused.

…

7. Arises out of a **plan** or **design** for construction or improvement to the highways, roads, streets, bridges, or other public property where such **plan** or **design** is prepared in substantial conformance with engineering or **design** standards in effect at the time of preparation of the **plan** or **design** or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

**ILLINOIS**

**745 ILCS 5/1 (2016) [Sovereign immunity]**

Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act [5 ILCS 315/1 et seq., 705 ILCS 505/1 et seq., 5 ILCS 430/1-1 et seq., and 745 ILCS 5/1.5] the State of Illinois shall not be made a defendant or party in any court.

**745 ILCS 10/1-101.1 (2016) [Purpose; application]**

(a) The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses.

(b) Any defense or immunity, common law or statutory, available to any private person shall likewise be available to local public entities and public employees.

**745 ILCS 10/1-206 (2016) [Local public entity defined]**

“Local public entity” includes a county, township, municipality, municipal corporation, …and all other local governmental bodies. …


Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of **discretion** is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such **discretion** even though abused.
**INDIANA**

**Ind. Code Ann. § 34-13-3-3 (2016). Losses for which governmental entity or employee not liable.**

A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following:

\[\ldots\]

(7) The performance of a **discretionary** function; however, the provision of medical or optical care as provided in IC 34-6-2-38 shall be considered as a ministerial act.

(8) The adoption and enforcement of or failure to adopt or enforce:

(A) a law (including rules and regulations); or

\[\ldots\]

(9) An act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid if the employee would not have been liable had the statute been valid.

\[\ldots\]

(12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

\[\ldots\]

(18) **Design** of a highway (as defined in IC 9-13-2-73), toll road project (as defined in IC 8-15-2-4(4)), tollway (as defined in IC 8-15-3-7), or project (as defined in IC 8-15.7-2-14) if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was designed or substantially redesigned; except that this subdivision shall not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

\[\ldots\]

**IOWA**

**Iowa Code § 669.1 (2016). Citation and applicability**

This chapter may be cited as the “Iowa Tort Claims Act.” Every provision of this chapter is applicable and of full force and effect notwithstanding any inconsistent provision of the Iowa administrative procedure Act, chapter 17A.

**Iowa Code § 669.2 (2016). Definitions**

As used in this chapter, unless the context otherwise requires:

\[\ldots\]
3. “Claim” means:

a. Any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee’s office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.

b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee’s office or employment.

4.

a. “Employee of the state” includes any one or more officers, agents, or employees of the state or any state agency, including members of the general assembly, and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation, but does not include a contractor doing business with the state.

…

5. “State agency” includes all executive departments, agencies, boards, bureaus, and commissions of the state of Iowa, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the state of Iowa, whether or not authorized to sue and be sued in their own names. This definition does not include a contractor with the state of Iowa. ...

Iowa Code § 669.14 (2016). Exceptions

The provisions of this chapter shall not apply with respect to any claim against the state, to:

1. Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

…

8. Any claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a highway, secondary road, or street as defined in section 321.1, subsection 78, that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing highway, secondary road, or street, to new, changed, or altered design standards. In respect to highways and roads, sealcoating, asphaltling, patching, resurfacing, ditching, draining, repairing, graveling, rocking, blading, or
maintaining an existing highway or road does not constitute reconstruction. This subsection shall not apply to claims based upon gross negligence.

9. Any claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards. This subsection shall not apply to claims based upon gross negligence. This subsection takes effect July 1, 1984, and applies to all cases tried or retried on or after July 1, 1984.

KANSAS

Kan. Stat. Ann. § 75-6101 (2016). Citation of act; claims to which act applicable; act applicable to municipalities

(a) K.S.A. 75-6101 to 75-6115, inclusive, shall be known and may be cited as the Kansas tort claims act.

(c) Municipalities may not exempt themselves from the provisions of the Kansas tort claims act by charter ordinance, charter resolution or other action.


As used in K.S.A. 75-6101 through 75-6118, and amendments thereto, unless the context clearly requires otherwise:

(a) “State” means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

(b) “Municipality” means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof.

(c) “Governmental entity” means state or municipality.

(2) “Employee” does not include: …
(B) any independent contractor under contract with a governmental entity except those contractors specifically listed in subsection (d)(1)….


(a) Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.

…


A governmental entity or an employee acting within the scope of the employee’s employment shall not be liable for damages resulting from:

…

(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved;

…

(h) the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity;

…

(k) the failure to make an inspection, or making an inadequate or negligent inspection, of any property other than the property of the governmental entity, to determine whether the property complies with or violates any law or rule and regulation or contains a hazard to public health or safety;

…

(m) the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was
prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared;

…

The enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature.

KENTUCKY


(11) Except as otherwise provided by this chapter, nothing contained herein shall be construed to be a waiver of sovereign immunity or any other immunity or privilege maintained by the Commonwealth, its cabinets, departments, bureaus, and agencies and its officers, agents, and employees.

(12) Except as otherwise specifically set forth by statute and in reference to subsection (11) of this section, no action for damages may be maintained in any court or forum against the Commonwealth, any of its cabinets, departments, bureaus, or agencies or any of its officers, agents, or employees while acting within their official capacity and scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies.

(13) The preservation of sovereign immunity referred to in subsections (11) and (12) of this section includes, but is not limited to, the following:

   (a) Discretionary acts or decisions;

   (b) Executive decisions;

   (c) Ministerial acts;

   (d) Actions in the performance of obligations running to the public as a whole;

   (e) Governmental performance of a self-imposed protective function to the public or citizens; and

   (f) Administrative acts.
LOUISIANA


A. As used in this Section, “public entity” means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.

B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

C. The provisions of Subsection B of this Section are not applicable:

(1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists….

...

MAINE


As used in this chapter, unless the context otherwise indicates, the following words shall have the following meanings.

1. EMPLOYEE. … [T]he term “employee” does not mean a person or other legal entity acting in the capacity of an independent contractor under contract to the governmental entity.

...

2. GOVERNMENTAL ENTITY. “Governmental entity” means and includes the State and political subdivisions as defined in subsection 3.

...

3. POLITICAL SUBDIVISION. “Political subdivision” means any city, town, plantation, county, administrative entity or instrumentality created pursuant to Title 30-A, chapters 115 and 119, … quasi-municipal corporation and special purpose district, including, but not limited to, … an airport authority established pursuant to Title 6, chapter 10, any volunteer fire association as defined in Title 30-A, section 3151, a transit district as defined in Title 30-A, section 3501, subsection 1, a regional transportation corporation as defined in Title 30-A, section 3501, subsection 2, a transit district or regional transportation corporation formed under the laws of another state that would qualify as a transit
district or regional transportation corporation under Title 30-A, chapter 163 if formed under the laws of this State and any emergency medical service.

4. STATE. “State” means the State of Maine or any office, department, agency, authority, commission, … and all such other state entities.


Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances.

…

4. ROAD CONSTRUCTION, STREET CLEANING OR REPAIR. A governmental entity is liable for its negligent acts or omissions arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of those ways including, but not limited to, street signs, traffic lights, parking meters and guardrails. A governmental entity is not liable for any defect, lack of repair or lack of sufficient railing in any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway or in any appurtenance thereto.


Notwithstanding section 8104-A, a governmental entity is not liable for any claim which results from:

…

3. PERFORMING DISCRETIONARY FUNCTION. Performing or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid, except that if the discretionary function involves the operation of a motor vehicle, as defined in Title 29-A, section 101, subsection 42, this section does not provide immunity for the governmental entity for an employee’s negligent operation of the motor vehicle resulting in a collision, regardless of whether the employee has immunity under this chapter;

…


1. IMMUNITY. Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:

…
C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;

...

The absolute immunity provided by paragraph C shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized by statute, charter, ordinance, order, resolution, rule or resolve and shall be available to all governmental employees, including police officers and governmental employees involved in child welfare cases, who are required to exercise judgment or discretion in performing their official duties.

...

MASSACHUSETTS

Ann. L. Mass., Chapter 258 Claims and Indemnity Procedure for the Commonwealth, its Municipalities, Counties and Districts and the Officers and Employees Thereof


As used in this chapter the following words shall have the following meanings:—

...

“Executive officer of a public employer,” the secretary of an executive office of the commonwealth, or in the case of an agency not within the executive office, the attorney general; the adjutant general of the military forces of the commonwealth; the county commissioners of a county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or as designated by the charter of the town; and the board, directors, or committee of a district in the case of the public employers of a district, in the case of the Massachusetts Bay Transportation Authority, its general manager and rail and transit administrator, and, in the case of any other public employer, the nominal chief executive officer or board.

...

“Public employee,” elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated, and officers or soldiers of the military forces of the commonwealth. …

“Public employer,” the commonwealth and any county, city, town, educational collaborative, or district, including the Massachusetts Department of Transportation, the Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and the Massachusetts Turnpike Authority …,
but not a private contractor with any such public employer, the Massachusetts Port Authority, or any other independent body politic and corporate. With respect to public employees of a school committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

[...]

**Ann. L. Mass., GL ch. 258, § 2 (2016). Scope of Liability of Public Body or Officer; Remedies**

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of $100,000; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a $100,000 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. [...]

[...]


The provisions of sections one to eight, inclusive, shall not apply to:—

(a) any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or by–law, whether or not such statute, regulation, ordinance or by–law is valid;

(b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused;

[...]

(f) any claim based upon the failure to inspect, or an inadequate or negligent inspection, of any property, real or personal, to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health or safety, except as otherwise provided in clause (1) of subparagraph (j).
Nothing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities.

**MICHIGAN**

**Act 170 of 1964 Governmental Liability for Negligence**

An act to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers, employees, and volunteers and for paying damages sought or awarded against them; to provide for the legal defense of public officers, employees, and volunteers; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal acts and parts of acts.

**Mich. Comp. Laws § 691.1401 (2016). Definitions**

Sec. 1. As used in this act:

(a) “Governmental agency” means this state or a political subdivision.

... 

(c) “Highway” means a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.

(d) “Municipal corporation” means a city, village, or township or a combination of 2 or more of these when acting jointly.

(e) “Political subdivision” means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.

...
(g) “State” means this state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces. State includes a public university or college of this state, whether established as a constitutional corporation or otherwise.

... 


Sec. 3. No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

Mich. Comp. Laws § 691.1407 (2016). Immunity from tort liability; intentional torts; immunity of judge, legislator, official, and guardian ad litem; immunity of governmental agency under MISS DIG underground facility damage prevention and safety act; definitions

Sec. 7. (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency ... is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met....

...

MINNESOTA

Minn. Stat. § 3.736 (2016). Tort Claims

Subdivision 1. General rule. —The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment or a peace officer who is not acting on behalf of a private employer and who is acting in good faith under section 629.40, subdivision 4, under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. ...
Subd. 3. Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses, the legislature declares that the state and its employees are not liable for the following losses:

(a) a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule;

(b) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused …

The state will not pay punitive damages.

Subd. 4. Limits. — The total liability of the state and its employees acting within the scope of their employment on any tort claim shall not exceed:

(a) $ 300,000 when the claim is one for death by wrongful act or omission and $ 300,000 to any claimant in any other case, for claims arising before August 1, 2007;

(b) $ 400,000 when the claim is one for death by wrongful act or omission and $ 400,000 to any claimant in any other case, for claims arising on or after August 1, 2007, and before July 1, 2009;

(c) $ 500,000 when the claim is one for death by wrongful act or omission and $ 500,000 to any claimant in any other case, for claims arising on or after July 1, 2009;

(d) $ 750,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 1998, and before January 1, 2000;

(e) $ 1,000,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2000, and before January 1, 2008;

(f) $ 1,200,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2008, and before July 1, 2009;

(g) $ 1,500,000 for any number of claims arising out of a single occurrence, for claims arising on or after July 1, 2009; or

(h) $ 1,000,000 for any number of claims arising out of a single occurrence, if the claim involves a nonprofit organization engaged in or administering outdoor recreational activities funded in whole or in part by the state or operating under the authorization of a permit issued by an agency or department of the state.

If the amount awarded to or settled upon multiple claimants exceeds the applicable limit under clause (d), (e), (f), or (g), any party may apply to the district court to apportion to each claimant a proper share of the amount available under the applicable limit under clause (d), (e), (f), (g) or (h). The share
apportioned to each claimant shall be in the proportion that the ratio of the award or settlement bears to the aggregate awards and settlements for all claims arising out of the occurrence.

The limitation imposed by this subdivision on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

...

Subd. 8. Liability insurance. — A state agency, including an entity defined as a part of the state in section 3.732, subdivision 1, clause (1), may procure insurance against liability of the agency and its employees for damages resulting from the torts of the agency and its employees. Procurement of the insurance is a waiver of the limits of governmental liability under subdivisions 4 and 4a only to the extent that valid and collectible insurance, including where applicable, proceeds from the Minnesota Insurance Guaranty Association, exceeds those limits and covers the claim. Purchase of insurance has no other effect on the liability of the agency and its employees. Procurement of commercial insurance, participation in the risk management fund under section 16B.85, or provisions of an individual self-insurance plan with or without a reserve fund or reinsurance does not constitute a waiver of any governmental immunities or exclusions.

...

Minn. Stat. § 466.01 (2016). Definitions

Subdivision 1. Municipality. — For the purposes of sections 466.01 to 466.15, “municipality” means any city, whether organized under home rule charter or otherwise, any county, town, public authority, public corporation,....

Subd. 2. Governing body of a town, school district. — For the purposes of sections 466.01 to 466.15, the “governing body of a town” means the board of supervisors thereof; “school district” includes an unorganized territory as defined in Minnesota Statutes 1961, section 120.02, subdivision 17.

...

Subd. 6. Employee, officer, or agent. — For the purposes of sections 466.01 to 466.15, “employee,” “officer,” or “agent” means a present or former employee, officer, or agent of a municipality, or other person acting on behalf of the municipality in an official capacity, temporarily or permanently, with or without compensation, but does not include an independent contractor other than a nonprofit firefighting corporation that has associated with it a relief association as defined in section 424A.001, subdivision 4. “Employee” includes court administrators who are not under section 480.181, subdivision 1, paragraph (b), and their staff under chapter 485, district administration staff in the Second and Fourth Judicial Districts, and other employees within the court system whose salaries are paid by the county, other than employees who remain on the county payroll under section 480.181, subdivision 2.466.02 TORT LIABILITY
Subject to the limitations of sections 466.01 to 466.15, every municipality is subject to liability for its
torts and those of its officers, employees and agents acting within the scope of their employment or
duties whether arising out of a governmental or proprietary function.

**Minn. Stat. § 466.03 (2016). Exceptions**

Subdivision 1. Scope. — Section 466.02 does not apply to any claim enumerated in this section. As to
any such claim every municipality shall be liable only in accordance with the applicable statute and
where there is no such statute, every municipality shall be immune from liability.

…

Subd. 6. **Discretionary** acts. — Any claim based upon the performance or the failure to exercise or
perform a **discretionary** function or duty, whether or not the **discretion** is abused.

…

**MISSISSIPPI**

**CHAPTER 46. IMMUNITY OF STATE AND POLITICAL SUBDIVISIONS FROM LIABILITY
AND SUIT FOR TORTS AND TORTS OF EMPLOYEES**


As used in this chapter, the following terms shall have the meanings ascribed unless the context
otherwise requires:

…

(c) “Board” means the Mississippi Tort Claims Board.

(d) “Department” means the Department of Finance and Administration.

…

(f) …The term “employee” shall not mean a person or other legal entity while acting in the capacity of
an independent **contractor** under contract to the state or a political subdivision; and

…

(g) “Governmental entity” means the state and political subdivisions.

…

(i) “Political subdivision” means any body politic or body corporate other than the state responsible for
governmental activities only in geographic areas smaller than that of the state, including, but not limited
to, any county, municipality, … airport authority, or other instrumentality of the state, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

(j) “State” means the State of Mississippi and any office, department, agency, division, … airport authority or other instrumentality thereof, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

…


(1) Notwithstanding the immunity granted in Section 11-46-3, or the provisions of any other law to the contrary, the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions; provided, however, immunity of a governmental entity in any such case shall be waived only to the extent of the maximum amount of liability provided for in Section 11-46-15.

…


(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

…

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

…

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

…

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing
authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

…

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

…

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of Section 65-43-1 or 65-43-3, where the act or omission occurs during the term of any such contract.

…

MISSOURI

*Heins Implement Co. v. Missouri Highway & Transp. Comm’n*, 859 S.W.2d 681, 695 (Mo. 1993) (holding that “the design of a highway bypass project qualifies as a discretionary function” and therefore officials involved in the design are immune from design liability).

NEBRASKA


For purposes of the State Tort Claims Act:

(1) State agency includes all departments, agencies, boards, … and while acting as, instrumentalities or agencies of the State of Nebraska…. State agency does not include any *contractor* with the State of Nebraska;

(2) State Claims Board means the board created by section 81-8,220;

(3) … State employee does not include any … any *contractor* with the State of Nebraska;

(4) Tort claim means any claim against the State of Nebraska for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or
omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death but does not include any claim accruing before January 1, 1970, any claim against an employee of the state for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of the employee while acting within the scope of his or her employment occurring on or after August 25, 1989, and any claim allowed under the Nebraska Claims for Wrongful Conviction and Imprisonment Act.

…


The State Tort Claims Act shall not apply to:

(1) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused;

…

(7) Any claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to the state to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the state had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety;

…

(9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of any governmental entity in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the governmental entity;

…

(11) Any claim arising out of the plan or design for the construction of or an improvement to any highway as defined in such section or bridge, either in original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval;
(12) Any claim arising out of the alleged insufficiency or want of repair of any highway as defined in such section, bridge, or other public thoroughfare. Insufficiency or want of repair shall be construed to refer to the general or overall condition and shall not refer to a spot or localized defect. The state shall be deemed to waive its immunity for a claim due to a spot or localized defect only if the state has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim;

\[
\]

For purposes of the Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610, unless the context otherwise requires:

(1) Political subdivision shall include villages, cities of all classes, counties…. Political subdivision shall not be construed to include any contractor with a political subdivision;

\[
\text{…}
\]

(3) … Employee shall not be construed to include any contractor with a political subdivision; and

(4) Tort claim shall mean any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his or her office or employment, under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death but shall not include any claim accruing before January 1, 1970.

\[
\]

The Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610 shall not apply to:

\[
\text{…}
\]

(2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused;

(3) Any claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to such political subdivision to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety;
(9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of any political subdivision in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the political subdivision;

(11) Any claim arising out of the plan or design for the construction of or an improvement to any highway as defined in such section or bridge, either in original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the political subdivision or some other body or employee exercising discretionary authority to give such approval;

(12) Any claim arising out of the alleged insufficiency or want of repair of any highway as defined in such section, bridge, or other public thoroughfare. Insufficiency or want of repair shall be construed to refer to the general or overall condition and shall not refer to a spot or localized defect. A political subdivision shall be deemed to waive its immunity for a claim due to a spot or localized defect only if (a) the political subdivision has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim or (b) the claim arose during the time specified in a notice provided by the political subdivision pursuant to subsection (3) of section 39-1359 and the state or political subdivision had actual or constructive notice; or

…

NEVADA

Liability of and Actions against This State, Its Agencies and Political Subdivisions

Nev. Rev. Stat. Ann. § 41.031 (2016). Waiver applies to state and its political subdivisions; naming state as defendant; service of process; state does not waive immunity conferred by Eleventh Amendment

1. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise
provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.


Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:

…

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

NEW HAMPSHIRE


In this chapter:

I. “Agency” means all departments, boards, offices, commissions, institutions, other instrumentalities of state government, … but excluding political subdivisions of the state.

II. “Board” means the board of claims established by RSA 541-B:2.

…

VI. “Political subdivision” means any village district, school district, town, city, county or unincorporated place in the state.


I. Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter shall not apply to:

…

(c) Any claim based upon the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or a state officer, employee, or official acting within the scope of his office or employment.
NEW JERSEY


This subtitle shall be known and may be cited as the “New Jersey Tort Claims Act.”


As used in this subtitle:

…

“Public entity” includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

“State” shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued…

…


a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.


a. A public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity;

…

c. A public entity is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

d. A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.
NEW MEXICO


Sections 41-4-1 through 41-4-27 NMSA 1978 may be cited as the “Tort Claims Act.”


A. The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act [41-4-1 NMSA 1978] and in accordance with the principles established in that act.

B. The Tort Claims Act [41-4-1 NMSA 1978] shall be read as abolishing all judicially-created categories such as “governmental” or “proprietary” functions and “discretionary” or “ministerial” acts previously used to determine immunity or liability. Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty. The Tort Claims Act in no way imposes a strict liability for injuries upon governmental entities or public employees. Determination of the standard of care required in any particular instance should be made with the knowledge that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities.


As used in the Tort Claims Act:

A. “board” means the risk management advisory board;

B. “governmental entity” means the state or any local public body as defined in Subsections C and H of this section;

C. “local public body” means all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Chapter 3, Article 28 NMSA 1978;

... 

H. “state” or “state agency” means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by … Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of immunity provided in those sections does not waive immunity granted pursuant to the Governmental Immunity Act [41-13-1 NMSA 1978].

…


A. The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties during the construction, and in subsequent maintenance of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

B. The liability for which immunity has been waived pursuant to Subsection A of this section shall not include liability for damages caused by:

(1) a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;

(2) the failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or

(3) a deviation from standard geometric design practices for any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area allowed on a case-by-case basis for appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical reasons, provided the deviation:

(a) is required by extraordinary circumstances;

(b) has been approved by the governing authority; and

(c) is reasonable and necessary as determined by the application of sound engineering principles taking into consideration the appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical circumstances.

NEW YORK


This act shall be known as the “Court of Claims Act.”§ 8. Waiver of immunity from liability
The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen’s compensation law.

*Santangelo v. State*, 103 Misc.2d 578, 581-582, 426 N.Y.S.2d 931 (N.Y. Ct. Cl. 1980) (holding that in some circumstances “[a]lthough the statute contains no specific exception to liability” the government is immune from liability for the exercise of discretionary functions).

**NORTH CAROLINA**

**N.C. Gen. Stat. § 143-291 (2016).** Industrial Commission constituted a court to hear and determine claims; damages; liability insurance in lieu of obligation under Article

(a) The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the … the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. …

(b) If a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State’s obligation for payment under this Article.

... 

**N.C. Gen. Stat. § 143-299.1A (2016). Limit use of public duty doctrine as an affirmative defense**

(a) Except as provided in subsection (b) of this section, the public duty doctrine is an affirmative defense on the part of the State department, institution, or agency against which a claim is asserted if and only if the injury of the claimant is the result of any of the following:

…

(b) Notwithstanding subsection (a) of this section, the affirmative defense of the public duty doctrine may not be asserted in any of the following instances:

(1) Where there is a special relationship between the claimant and the officer, employee, involuntary servant or agent of the State.
(2) When the State, through its officers, employees, involuntary servants or agents, has created a special duty owed to the claimant and the claimant’s reliance on that duty is causally related to the injury suffered by the claimant.

(3) Where the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

(c) This section does not apply to a unit of local government or its officers, employees, or agents.

…

See Hamilton v. Hamlet, 238 N.C. 741, 742 (N.C. 1953) (holding that “in the absence of some statute which subjects them to liability therefor, cities ... when acting in the exercise of police power, or judicial, discretionary, or legislative authority ... are not liable for the tortious acts of their officers or agents”).

NORTH DAKOTA

N.D. Cent. Code § 32-12.1-02 (2016). Definitions

As used in this chapter, unless the context otherwise requires:

1. “Claim” means any claim permitted by this chapter brought against a political subdivision for an injury caused by a political subdivision or an employee of the political subdivision acting within the scope of the employee’s employment or office.

2. “Commissioner” means the insurance commissioner.

3. “Employee” means any officer, employee, board member, volunteer, or servant of a political subdivision, whether elected or appointed and whether or not compensated. The term does not include an independent contractor, or any person performing tasks the details of which the political subdivision has no right to control.

4. “Injury” means personal injury, death, or property damage.

5. “Personal injury” includes bodily injury, mental injury, sickness, or disease sustained by a person, and injury to a person’s rights or reputation.

6. “Political subdivision”:

a. Includes all counties, townships, … and any other units of local government which are created either by statute or by the Constitution of North Dakota for local government or other public purposes, except no new units of government or political subdivisions are created or authorized by this chapter.
b. Does not include nor may it be construed to mean either the state of North Dakota or any of the several agencies, boards, bureaus, commissions, councils, courts, departments, institutions, or offices of government which collectively constitute the government of the state of North Dakota.

…

N.D. Cent. Code, § 32-12.1-03 (2016). Liability of political subdivisions — Limitations

1. Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee’s employment or office under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use of tangible property, real or personal, under circumstances in which the political subdivision, if a private person, would be liable to the claimant. The enactment of a law, rule, regulation, or ordinance to protect any person’s health, safety, property, or welfare does not create a duty of care on the part of the political subdivision, its employees, or its agents, if that duty would not otherwise exist.

2. The liability of political subdivisions under this chapter is limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from any single occurrence regardless of the number of political subdivisions, or employees of such political subdivisions, which are involved in that occurrence. A political subdivision may not be held liable, or be ordered to indemnify an employee held liable, for punitive or exemplary damages.

3. A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:

a. A claim based upon an act or omission of a political subdivision employee exercising due care in the execution of a valid or invalid statute or regulation.

b. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, charter, ordinance, order, regulation, resolution, or resolve.

c. The decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

…
f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a **public duty**, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.…

g. “**Public duty**” does not include action of the political subdivision or a political subdivision employee under circumstances in which a special relationship can be established between the political subdivision and the injured party. …

4. This chapter does not obligate political subdivisions for an amount that is more than the limitations upon liability imposed by this chapter. Subject to this chapter, any payments to persons constitute payment in full of any compromised claim or judgment or any final judgment under this chapter.

…

**N.D. Cent. Code, § 32-12.2-02 (2016). Liability of the state — Limitations — Statute of limitations**

1. The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee’s scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant. No claim may be brought against the state or a state employee acting within the employee’s scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly. The enactment of a law, rule, or regulation to protect any person’s health, safety, property, or welfare does not create a duty of care on the part of the state, its employees, or its agents, if that duty would not otherwise exist.

2. The liability of the state under this chapter is limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from any single occurrence. The state may not be held liable, or be ordered to indemnify a state employee held liable, for punitive or exemplary damages. …

3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:

a. A claim based upon an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule.

b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a **discretionary** function or duty on the part of the state or its employees, regardless of whether the **discretion** involved is abused or whether the statute, order, rule, or resolution under which the **discretionary** function or duty is performed is valid or invalid. **Discretionary** acts include acts, errors,
or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a **contractor** to construct a public project.

…

f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a **public duty**, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.

…

g. “**Public duty**” does not include action of the state or a state employee under circumstances in which a special relationship can be established between the state and the injured party. …

…

**OHIO**

**Ohio Rev. Code Ann. § 2743.01 (2016). Definitions.**

As used in this Chapter:

(A) “State” means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state. “State” does not include political subdivisions.

(B) “Political subdivisions” means municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the **sovereign immunity** of the state attaches.

…

(E)

(1) “**Public duty**” includes, but is not limited to, any statutory, regulatory, or assumed duty concerning any action or omission of the state involving any of the following:

(a) Permitting, certifying, licensing, inspecting, investigating, supervising, regulating, auditing, monitoring, law enforcement, or emergency response activity;
(2) “Public duty” does not include any action of the state under circumstances in which a special relationship can be established between the state and an injured party as provided in division (A)(3) of section 2743.02 of the Revised Code.

Ohio Rev. Code Ann. § 2743.02 (2016). State waiver of immunity; civil action against state officer or employee

(A)

(1) The state hereby waives its immunity from liability, … and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter ….

…

(3)

(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party. …

…

Ohio Rev. Code Ann. § 2743.03 (2016). Court of claims created

(A)

(1) There is hereby created a court of claims. …

Chapter 2744: Political Subdivision Tort Liability

Ohio Rev. Code Ann. § 2744.01 (2016)

As used in this chapter:

…

(C)

(1) “Governmental function” means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A “governmental function” includes, but is not limited to, the following:

…

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

…

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

…

(H) “Public roads” means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. “Public roads” does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) “State” means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. “State” does not include political subdivisions.

Ohio Rev. Code Ann. § 2744.02 (2016). Classification of functions of political subdivisions; liability; exceptions

(A)

(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.
(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

…

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

…

Ohio Rev. Code Ann. § 2744.03 (2016). Defenses or immunities of subdivision and employee

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

…

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

…

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

…

OKLAHOMA

51 Ok. Stat. § 151 (2016). Short title

This act shall be known and may be cited as “The Governmental Tort Claims Act.”

51 Ok. Stat. § 152 (2016). Definitions
As used in The Governmental Tort Claims Act:

…

2. “Agency” means any board, commission, committee, department or other instrumentality or entity designated to act in behalf of the state or a political subdivision;

…

7. “Employee” means any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis.

a. Employee also includes:

(1) all elected or appointed officers, members of governing bodies and other persons designated to act for an agency or political subdivision, but the term does not mean a person or other legal entity while acting in the capacity of an independent contractor or an employee of an independent contractor. …

…

13. “State” means the State of Oklahoma or any office, department, agency, authority, commission, … or other instrumentality thereof; and

…

**51 Okla. St. § 152.1 (2016). Sovereign immunity**

A. The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts.

B. The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.


A. The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in The Governmental Tort Claims Act and only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state. The state or a political subdivision shall not be liable under the provisions of The Governmental Tort Claims Act for any act or omission of an employee acting outside the scope of the employee’s employment.

…
51 Okla. Stat. § 155 (2016). Exemptions from liability

The state or a political subdivision shall not be liable if a loss or claim results from:

…

5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

…

13. Inspection powers or functions, including failure to make an inspection, review or approval, or making an inadequate or negligent inspection, review or approval of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety, or fails to conform to a recognized standard;

…

15. Absence, condition, location or malfunction of any traffic or road sign, signal or warning device unless the absence, condition, location or malfunction is not corrected by the state or political subdivision responsible within a reasonable time after actual or constructive notice or the removal or destruction of such signs, signals or warning devices by third parties, action of weather elements or as a result of traffic collision except on failure of the state or political subdivision to correct the same within a reasonable time after actual or constructive notice. Nothing herein shall give rise to liability arising from the failure of the state or any political subdivision to initially place any of the above signs, signals or warning devices. The signs, signals and warning devices referred to herein are those used in connection with hazards normally connected with the use of roadways or public ways and do not apply to the duty to warn of special defects such as excavations or roadway obstructions;

…

18. An act or omission of an independent contractor or consultant or his or her employees, agents, subcontractors or suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred;

…

27. Any claim or action based on the theory of manufacturer’s products liability or breach of warranty, either expressed or implied;

28. Any claim or action based on the theory of indemnification or subrogation;

…

30. Acts or omissions done in conformance with then current recognized standards;
31. Maintenance of the state highway system or any portion thereof unless the claimant presents evidence which establishes either that the state failed to warn of the unsafe condition or that the loss would not have occurred but for a negligent affirmative act of the state;

OREGON

Tort Actions against Public Bodies


As used in ORS 30.260 to 30.300, unless the context requires otherwise:

... (4) “Public body” means:

(a) A public body as defined in ORS 174.109;

... (5) “State” means:

(a) State government as defined in ORS 174.111;

... (6) “Local public body” means any public body other than the state.

... Or. Rev. Stat. § 30.265 (2016). Scope of liability of public body, officers, employees and agents; liability in nuclear incident

(1) Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to civil action for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598.

... (6) Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:
(a) Any claim for injury to or death of any person covered by any workers’ compensation law.

(b) Any claim in connection with the assessment and collection of taxes.

(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

…

(8) Subsection (6)(c) of this section does not apply to any discretionary act that is found to be the cause or partial cause of a nuclear incident covered by an insurance or indemnity agreement under the provisions of 42 U.S.C. 2210, including but not limited to road design and route selection.


(1) The limitations imposed by this section apply to claims that:

(a) Are subject to ORS 30.260 to 30.300;

(b) Are made against the state, or against an officer, employee or agent of the state acting within the person’s scope of employment or duties;

(c) Arise out of a single accident or occurrence; and

(d) Are not claims for damage to or destruction of property.

(2) The liability of the state, and the liability of the state’s officers, employees and agents acting within the scope of their employment or duties, to any single claimant for claims described in subsection (1) of this section may not exceed:

(a) $1.5 million, for causes of action arising on or after December 28, 2007, and before July 1, 2010.

(b) $1.6 million, for causes of action arising on or after July 1, 2010, and before July 1, 2011.

(c) $1.7 million, for causes of action arising on or after July 1, 2011, and before July 1, 2012.

(d) $1.8 million, for causes of action arising on or after July 1, 2012, and before July 1, 2013.

(e) $1.9 million, for causes of action arising on or after July 1, 2013, and before July 1, 2014.

(f) $2 million, for causes of action arising on or after July 1, 2014, and before July 1, 2015.

(g) The adjusted limitation provided by subsection (4) of this section, for causes of action arising on or after July 1, 2015.
(3) The liability of the state, and the liability of the state’s officers, employees and agents acting within the scope of their employment or duties, to all claimants for claims described in subsection (1) of this section may not exceed:

(a) $3 million, for causes of action arising on or after December 28, 2007, and before July 1, 2010.

(b) $3.2 million, for causes of action arising on or after July 1, 2010, and before July 1, 2011.

(c) $3.4 million, for causes of action arising on or after July 1, 2011, and before July 1, 2012.

(d) $3.6 million, for causes of action arising on or after July 1, 2012, and before July 1, 2013.

(e) $3.8 million, for causes of action arising on or after July 1, 2013, and before July 1, 2014.

(f) $4 million, for causes of action arising on or after July 1, 2014, and before July 1, 2015.

(g) The adjusted limitation provided by subsection (4) of this section, for causes of action arising on or after July 1, 2015.

(4) Beginning in 2015, and every year thereafter, the State Court Administrator shall determine the percentage increase or decrease in the cost of living for the previous calendar year, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor. On or before July 1 of the year in which the State Court Administrator makes the determination required by this subsection, the State Court Administrator shall adjust the limitations imposed under subsections (2) and (3) of this section for the following calendar year by multiplying the limitation amounts applicable to the calendar year in which the adjustment is made by the percentage amount determined under this subsection. The adjustment may not exceed three percent for any year. The State Court Administrator shall round the adjusted limitation amount to the nearest $100, but the unrounded amount shall be used to calculate the adjustments to the limitations in subsequent calendar years. The adjusted limitation becomes effective on July 1 of the year in which the adjustment is made, and applies to all causes of action arising on or after July 1 of that year and before July 1 of the subsequent year.

…
PENNSYLVANIA

42 Pa. C.S. § 8521 (2016). Sovereign immunity generally

(a) General rule. — Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa. C.S. § 2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.

…

42 Pa. C.S. § 8522 (2016). Exceptions to sovereign immunity

(a) Liability imposed. — The General Assembly, pursuant to section 11 of Article I of the Constitution of Pennsylvania, does hereby waive, in the instances set forth in subsection (b) only and only to the extent set forth in this subchapter and within the limits set forth in section 8528 (relating to limitations on damages), sovereign immunity as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.

(b) Acts which may impose liability. — The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(1) Vehicle liability. — The operation of any motor vehicle in the possession or control of a Commonwealth party. As used in this paragraph, “motor vehicle” means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

…

(4) Commonwealth real estate, highways and sidewalks. — A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5).

(5) Potholes and other dangerous conditions. — A dangerous condition of highways under the jurisdiction of a Commonwealth agency created by potholes or sinkholes or other similar conditions created by natural elements, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the Commonwealth agency had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition. Property damages shall not be recoverable under this paragraph.

…
42 Pa. C.S. § 8524 (2016). Defenses

The following common law defenses are available:

…

(3) An employee of a Commonwealth agency, or a member of the General Assembly or of the judiciary may assert on his own behalf, or the Commonwealth may assert on his behalf, the defense that the act was within the discretion granted to the employee by statute or statutorily authorized regulation.

RHODE ISLAND


(a) The state of Rhode Island and any political subdivision thereof, including all cities and towns, shall, subject to the period of limitations set forth in § 9-1-25, hereby be liable in all actions of tort in the same manner as a private individual or corporation; provided, however, that any recovery in any such action shall not exceed the monetary limitations thereof set forth in this chapter.

…


In any tort action against the state of Rhode Island or any political subdivision thereof, any damages recovered therein shall not exceed the sum of one hundred thousand dollars ($ 100,000); provided, however, that in all instances in which the state was engaged in a proprietary function in the commission of the tort, or in any situation whereby the state has agreed to indemnify the federal government or any agency thereof for any tort liability, the limitation on damages set forth in this section shall not apply.

See Yankee v. LeBlanc, 819 A.2d 1277, 1279 (R.I. 2003) (holding that “municipalities have ‘immunity from tort liability arising out of their discretionary governmental actions that by their nature are not ordinarily performed by private persons’”).

SOUTH CAROLINA


This chapter may be cited as the “South Carolina Tort Claims Act”.


(a) “Agency” means the individual office, agency, authority, department, commission, board, …, which employs the employee whose act or omission gives rise to a claim under this chapter.
(c) Prior to January 1, 1989, “employee” means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation, but the term does not include an independent contractor doing business with the State or a political subdivision of the State.

On or after January 1, 1989, “employee” means any officer, employee, agent, or court appointed representative of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty including, but not limited to, technical experts whether with or without compensation, but the term does not include an independent contractor doing business with the State or a political subdivision of the State.

(d) “Governmental entity” means the State and its political subdivisions.

(e) “State” means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities.

(h) “Political subdivision” means the counties, municipalities, … a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of § 58-25-20 which provides public transportation on behalf of a regional transportation authority.


The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.


The governmental entity is not liable for a loss resulting from:

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
(13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

...

(15) absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways. Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice;

...

SOUTH DAKOTA

Chapter 21-32 Actions against the State


There is hereby created the office of commissioner of claims. The presiding circuit judge for the county in this state in which an alleged claim on contract or tort against the state has arisen shall appoint a circuit judge from the circuit for the county in which the action arose lies to act ex officio as the commissioner.

To the extent such liability insurance is purchased pursuant to § 21-32-15 and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of *sovereign immunity* and consented to suit in the same manner that any other party may be sued.

**S.D. Codified Laws § 21-32-17 (2016). Immunity of employees, officers, or agents of state**

Except as provided in § 21-32-16, any employee, officer or agent of the state, while acting within the scope of his employment or agency, whether such acts are ministerial or *discretionary*, is immune from suit or liability for damages brought against him in either his individual or official capacity.

**Chapter 21-32A Actions Against Public Entities**

**S.D. Codified Laws § 21-32A-1 (2016). Participation in risk sharing pool or purchase of insurance as waiver of sovereign immunity**

To the extent that any public entity, other than the state, participates in a risk sharing pool or purchases liability insurance and to the extent that coverage is afforded thereunder, the public entity shall be deemed to have waived the common law doctrine of *sovereign immunity* and shall be deemed to have consented to suit in the same manner that any other party may be sued. The waiver contained in this section and §§ 21-32A-2 and 21-32A-3 is subject to the provisions of § 3-22-17.

**S.D. Codified Laws § 21-32A-2 (2016). Extent of immunity and liability of employees, officers or agents of public entity**

Except insofar as a public entity, including the state, participates in a risk sharing pool or insurance is purchased pursuant to § 21-32A-1, any employee, officer or agent of the public entity, including the state, while acting within the scope of his employment or agency, whether such acts are ministerial or *discretionary*, is immune from suit or liability for damages brought against him in either his individual or official capacity. The immunity recognized herein may be raised by way of affirmative defense.

**S.D. Codified Laws § 21-32A-3 (2016). Extent of immunity of public entities.**

Except insofar as a public entity participates in a risk sharing pool or insurance is purchased pursuant to § 21-32A-1, any public entity is immune from liability for damages whether the function in which it is involved is governmental or proprietary. The immunity recognized herein may be raised by way of affirmative defense.

**TENNESSEE**

**Chapter 20 Governmental Tort Liability–Tennessee**


This chapter shall be known and cited as the “Tennessee Governmental Tort Liability Act.”

As used in this chapter, unless the context otherwise requires:

…

(3)

(A) “Governmental entity” means any political subdivision of the state of Tennessee including, but not limited to, any municipality, metropolitan government, county….

…


(a) Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.

(b)

…

(2) All members of boards, commissions, agencies, authorities, and other governing bodies of any governmental entity, created by public or private act, whether compensated or not, shall be immune from suit arising from the conduct of the affairs of such board, commission, agency, authority, or other governing body. Such immunity from suit shall be removed when such conduct amounts to willful, wanton, or gross negligence.

(c) When immunity is removed by this chapter any claim for damages must be brought in strict compliance with the terms of this chapter.

…


(a) Immunity from suit of a governmental entity is removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. “Street” or “highway” includes traffic control devices thereon.

…

Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:

(1) The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

…

(4) A failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;

…

TEXAS

Title 5 Governmental Liability


In this chapter:

…

(2) “Employee” … does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

(3) “Governmental unit” means:

(A) this state and all the several agencies of government that collectively constitute the government of this state … ;

(B) a political subdivision of this state, including any city, county …;

…

(6) “State government” means an agency, board, commission, department, or office, other than a district or authority created under Article XVI, Section 59, of the Texas Constitution, that:

(A) was created by the constitution or a statute of this state; and

(B) has statewide jurisdiction.


A governmental unit in the state is liable for:
(1) property damage, personal injury, and death 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, personal injury, or death 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; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.


(a) Except as provided in Subsection (c), if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.

(b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060.

(c) If a claim arises from a premise defect on a toll highway, road, or street, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property.


(a) Liability of the state government under this chapter is limited to money damages in a maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

(b) Except as provided by Subsection (c), liability of a unit of local government under this chapter is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

(c) Liability of a municipality under this chapter is limited to money damages in a maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

... 


(a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.
(b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.


This chapter does not apply to a claim based on:

…

(2) a governmental unit’s decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the **discretion** of the governmental unit.


(a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state’s sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

…

(3) street construction and design;

(4) bridge construction and maintenance and street maintenance;

…

(10) airports …;

…

(20) warning signals;

(21) regulation of traffic;

(22) transportation systems;

…

(25) parking facilities;

…

(30) engineering functions;

(31) maintenance of traffic signals, signs, and hazards;

…
(b) This chapter does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to:

1. the operation and maintenance of a public utility;
2. amusements owned and operated by the municipality; and
3. any activity that is abnormally dangerous or ultrahazardous.

(c) The proprietary functions of a municipality do not include those governmental activities listed under Subsection (a).

UTAH

Chapter 7 Governmental Immunity Act of Utah

Utah Code Ann. § 63G-7-101 (2016). Title — Scope of waivers and retentions of immunity

(1) This chapter is known as the “Governmental Immunity Act of Utah.”

(2) The scope of the waivers and retentions of immunity found in this comprehensive chapter:

(a) applies to all functions of government, no matter how labeled; and

(b) governs all claims against governmental entities or against their employees or agents arising out of the performance of the employee’s duties, within the scope of employment, or under color of authority.

(3) A governmental entity and an employee of a governmental entity retain immunity from suit unless that immunity has been expressly waived in this chapter.

Utah Code Ann. § 63G-7-102 (2016). Definitions

As used in this chapter:

…

(2)

…

(c) “Employee” does not include an independent contractor.

(3) “Governmental entity” means the state and its political subdivisions as both are defined in this section.

(4)
(a) “Governmental function” means each activity, undertaking, or operation of a governmental entity.

(b) “Governmental function” includes each activity, undertaking, or operation performed by a department, agency, employee, agent, or officer of a governmental entity.

(c) “Governmental function” includes a governmental entity’s failure to act.

…

(7) “Political subdivision” means any county, city, town, … or other governmental subdivision or public corporation.

…

(9) “State” means the state of Utah, and includes each office, department, division, agency, authority, … or other instrumentality of the state.

…

Utah Code Ann. § 63G-7-201 (2016). Immunity of governmental entities and employees from suit

(1) Except as otherwise provided in this chapter, each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.

…

(3) A governmental entity, its officers, and its employees are immune from suit, and immunity is not waived, for any injury if the injury arises out of or in connection with, or results from:

(a) a latent dangerous or latent defective condition of:

(i) any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, or viaduct; or

(ii) another structure located on any of the items listed in Subsection (3)(a)(i); or

(b) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement.

(4) A governmental entity, its officers, and its employees are immune from suit, and immunity is not waived, for any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment, if the injury arises out of or in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;

…
(d) a failure to make an inspection or making an inadequate or negligent inspection;

... 

Utah Code Ann. § 63G-7-301 (2016). Waivers of immunity

(1)

(a) Immunity from suit of each governmental entity is waived as to any contractual obligation.

(b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections 63G-7-401, 63G-7-402, 63G-7-403, or 63G-7-601.

...

(2) Immunity from suit of each governmental entity is waived:

...

(h) except as provided in Subsection 63G-7-201(3), as to any injury caused by:

(i) a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement; and

(i) subject to Subsection 63G-7-201(4), as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.

VERMONT


(a) The State of Vermont shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment, under the same circumstances, in the same manner and to the same extent as a private person would be liable to the claimant except that the claimant shall not have the right to levy execution on any property of the State to satisfy any judgment. ...

(b) Effective July 1, 2011, the maximum liability of the State under this section shall be $ 500,000.00 to any one person and the maximum aggregate liability shall be $ 2,000,000.00 to all persons arising out of each occurrence.

...

(e) This section shall not apply to:
(1) Any claim based upon an act or omission of an employee of the State exercising due care, in the
extension of a statute or regulation, whether or not such statute or regulation is valid, or based upon the
exercise or performance or failure to exercise or perform a discretionary function or duty on the part of
a State agency or an employee of the State, whether or not the discretion involved is abused.

…

(8) Any claim arising from the selection of or purposeful deviation from a particular set of standards for
the planning and design of highways.

…

VIRGINIA


This article shall be known and may be cited as the “Virginia Tort Claims Act.”


As used in this article:

“Agency” means any department, institution, authority, instrumentality, board or other administrative
agency of the government of the Commonwealth of Virginia and any transportation district created
pursuant to the Transportation District Act of 1964 (§ 33.2-1900 et seq.) of Title 33.2 and Chapter 630
of the 1964 Acts of Assembly.

…

“Transportation district” shall be limited to any transportation district or districts which have entered
into an agreement in which the Northern Virginia Transportation District is a party with any firm or
corporation as an agent to provide passenger rail services for such district or districts while such firm or
corporation is performing in accordance with such agreement.

Va. Code Ann. § 8.01-195.3 (2016). Commonwealth, transportation district or locality liable for
damages in certain cases

Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only
accruing on or after July 1, 1982, and any transportation district shall be liable for claims for money only
accruing on or after July 1, 1986, on account of damage to or loss of property or personal injury or death
caused by the negligent or wrongful act or omission of any employee while acting within the scope of
his employment under circumstances where the Commonwealth or transportation district, if a private
person, would be liable to the claimant for such damage, loss, injury or death. However, except to the
extent that a transportation district contracts to do so pursuant to § 33.2-1919, neither the
Commonwealth nor any transportation district shall be liable for interest prior to judgment or for
punitive damages. The amount recoverable by any claimant shall not exceed (i) $25,000 for causes of action accruing prior to July 1, 1988, $75,000 for causes of action accruing on or after July 1, 1988, or $100,000 for causes of action accruing on or after July 1, 1993, or (ii) the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of, whichever is greater, exclusive of interest and costs.

... Any recovery based on the following claims are hereby excluded from the provisions of this article....

Nothing contained herein shall operate to reduce or limit the extent to which the Commonwealth or any transportation district, agency or employee was deemed liable for negligence as of July 1, 1982, nor shall any provision of this article be applicable to any county, city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth.


Va. Code Ann. § 15.2-1405 (2016). Immunity of members of local governmental entities; exceptions

The members of the governing bodies of any locality or political subdivision and the members of boards, commissions, agencies and authorities thereof and other governing bodies of any local governmental entity, whether compensated or not, shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body, board, commission, agency or authority which does not involve the unauthorized appropriation or misappropriate of funds. However, the immunity granted by this section shall not apply to conduct constituting intentional or willful misconduct or gross negligence.

WASHINGTON


(1) An appointed or elected official or member of the governing body of a public agency is immune from civil liability for damages for any discretionary decision or failure to make a discretionary decision within his or her official capacity, but liability shall remain on the public agency for the tortious conduct of its officials or members of the governing body.

(2) For the purposes of this section:
(a) "Public agency" means any state agency, board, commission, department, institution of high education, school district, political subdivision, or unit of local government of this state including but not limited to municipal corporations, quasi-municipal corporations, special purpose districts, and local service districts.

(b) "Governing body" means the policy-making body of public agency.


The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.


(1) All claims against the state, or against the state’s officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct, must be presented to the office of risk management. … The standard tort claim form must be posted on the department of enterprise services’ web site.

…


(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, “local governmental entity” means a county, city, town…. 

…
WEST VIRGINIA


This article shall be known and may be cited as “The Governmental Tort Claims and Insurance Reform Act.”

Its purposes are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.

W. Va. Code § 29-12A-4 (2016). Governmental and proprietary functions of political subdivisions; liability for damages

(a) The distinction existing between governmental functions and proprietary functions of political subdivisions is not affected by the provisions of this article; however, the provisions of this article shall apply to both governmental and proprietary functions.

(b)

(1) Except as provided in subsection (c) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function: Provided, That this article shall not restrict the availability of mandamus, injunction, prohibition, and other extraordinary remedies.

…

(c) Subject to sections five [§ 29-12A-5] and six [§ 29-12A-6] of this article, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this article, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any vehicle by their employees when the employees are engaged within the scope of their employment and authority.

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.

(a) A political subdivision is immune from liability if a loss or claim results from:

(10) Inspection powers or functions, including failure to make an inspection, or making an inadequate inspection, of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety;

(15) Any claim or action based on the theory of manufacturer’s products liability or breach of warranty or merchantability or fitness for a specific purpose, either expressed or implied;

(b) An employee of a political subdivision is immune from liability unless one of the following applies:

(1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;

(2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or

(3) Liability is expressly imposed upon the employee by a provision of this code.

(c) The immunity conferred upon an employee by subsection (b) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee.

WISCONSIN

Wis. Stat. § 893.80 (2016). Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits

(1p) No action may be brought or maintained with regard to a claim to recover damages against any political corporation, governmental subdivision or agency thereof for the negligent inspection of any property, premises, place of employment or construction site for the violation of any statute, rule, ordinance or health and safety code unless the alleged negligent act or omission occurred after November 30, 1976. In any such action, the time period under sub. (1d) (a) shall be one year after
discovery of the negligent act or omission or the date on which, in the exercise of reasonable diligence the negligent act or omission should have been discovered.

…

**WYOMING**


This act shall be known and cited as the “Wyoming Governmental Claims Act.”


(a) The Wyoming legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of governmental immunity and is cognizant of the Wyoming Supreme Court decision of Oroz v. Board of County Commissioners 575 P.2d 1155 (1978). It is further recognized that the state and its political subdivisions as trustees of public revenues are constituted to serve the inhabitants of the state of Wyoming and furnish certain services not available through private parties and, in the case of the state, state revenues may only be expended upon legislative appropriation. This act is adopted by the legislature to balance the respective equities between persons injured by governmental actions and the taxpayers of the state of Wyoming whose revenues are utilized by governmental entities on behalf of those taxpayers. This act is intended to retain any common law defenses which a defendant may have by virtue of decisions from this or other jurisdictions.

(b) In the case of the state, this act abolishes all judicially created categories such as “governmental” or “proprietary” functions and “discretionary” or “ministerial” acts previously used by the courts to determine immunity or liability. This act does not impose nor allow the imposition of strict liability for acts of governmental entities or public employees.


(a) As used in this act:

(i) “Governmental entity” means the state, University of Wyoming or any local government;

(ii) “Local government” means cities and towns, counties …;

…

(iv) “Public employee”:

…

(B) Does not include an independent contractor, except as provided in subparagraphs (C) and (F) of this paragraph, or a judicial officer exercising the authority vested in him;
(vi) “State” or “state agency” means the state of Wyoming or any of its branches, agencies, departments, boards, instrumentalities or institutions….


(a) The liability imposed by W.S. 1-39-106 through 1-39-112 does not include liability for damages caused by:

(i) A defect in the plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;

(ii) The failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or

(iii) The maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.
APPENDIX B—STATE STATUTES ON PLAN OR DESIGN IMMUNITY

Note: Key terms, such as defect, design, and plan are in bold print. The reader is advised to check for any amendments to the cited statutes.

ARIZONA

Affirmative defense

Neither a public entity nor a public employee is liable for an injury arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design, provided, however, that reasonably adequate warning shall be given as to any unreasonably dangerous hazards which would allow the public to take suitable precautions.

CALIFORNIA

Cal. Gov’t Code § 830.6 (2016)
Liability of public entity or employee; Injury caused by construction plan or design or improvement

Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such
warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning.

**COLORADO**


**Short title**

This article shall be known and may be cited as the “Colorado Governmental Immunity Act.”


**Definitions**

As used in this article, unless the context otherwise requires …

(5) “Public entity” means the state, the judicial department of the state, any county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.

…


**Immunity and partial waiver**

(1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:

…

(d)

(I) A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any highway which is a part of the federal secondary highway system, or of any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon. As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof. Nothing in this subparagraph (I) shall preclude a particular dangerous accumulation of snow, ice, sand, or gravel from being found to constitute a dangerous condition in the surface of a public roadway when the entity fails to use existing means available to it for removal or mitigation of such accumulation and when the public entity had actual notice through the proper public official responsible for the roadway and had a reasonable time to act.
GEORGIA

Exceptions to state liability

The state shall have no liability for losses resulting from …

(10) The plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design….

IDAHO

Idaho Code Ann. § 6-904 (2016)
Exceptions to governmental liability

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which …

7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

ILLINOIS

Adoption of construction or improvement plan

(a) A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe.

(b) A public employee is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property.

INDIANA

Ind. Code Ann. § 34-13-3-3 (2016)
Losses for which governmental entity or employee not liable
A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following …

(18) **Design** of a highway (as defined in IC 9-13-2-73), toll road project (as defined in IC 8-15-2-4(4)), tollway (as defined in IC 8-15-3-7), or project (as defined in IC 8-15.7-2-14) if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was **designed** or substantially **redesigned**; except that this subdivision shall not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.…

**IOWA**

**Iowa Code § 669.14 (2016)**

**Exceptions**

The provisions of this chapter shall not apply with respect to any claim against the state, to …

8. Any claim based upon or arising out of a claim of negligent **design** or specification, negligent adoption of **design** or specification, or negligent construction or reconstruction of a highway, secondary road, or street as defined in section 321.1, subsection 78, that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or **design** theory in existence at the time of the construction or reconstruction. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing highway, secondary road, or street, to new, changed, or altered **design** standards. In respect to highways and roads, sealcoating, asphalting, patching, resurfacing, ditching, draining, repairing, graveling, rocking, blading, or maintaining an existing highway or road does not constitute reconstruction. This subsection shall not apply to claims based upon gross negligence.

9. Any claim based upon or arising out of a claim of negligent **design** or specification, negligent adoption of **design** or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or **design** theory in existence at the time of the construction or reconstruction.

A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards. This subsection shall not apply to claims based upon gross negligence. This subsection takes effect July 1, 1984, and applies to all cases tried or retried on or after July 1, 1984.

…

**KANSAS**


**Same; when; exceptions from liability**

A governmental entity or an employee acting within the scope of the employee’s employment shall not be liable for damages resulting from …
(m) the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared….

MISSISSIPPI

Exemption of governmental entity from liability on claims based on specified circumstances

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim …

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design….

MISSOURI

Sovereign immunity in effect — exceptions

1. Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances …

(2) Injuries caused by the condition of a public entity’s property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition. In any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.
NEBRASKA

State Tort Claims Act; claims exempt

The State Tort Claims Act shall not apply to …

(11) Any claim arising out of the plan or design for the construction of or an improvement to any highway as defined in such section or bridge, either in original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval.…

Act and sections; exemptions

The Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610 shall not apply to …

(11) Any claim arising out of the plan or design for the construction of or an improvement to any highway as defined in such section or bridge, either in original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the political subdivision or some other body or employee exercising discretionary authority to give such approval.…

NEW JERSEY

Plan or design immunity

a. Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.
NEW MEXICO

Liability; highways and streets

...

B. The liability for which immunity has been waived pursuant to Subsection A of this section shall not include liability for damages caused by:

(1) a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;

(2) the failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or

(3) a deviation from standard geometric design practices for any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area allowed on a case-by-case basis for appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical reasons, provided the deviation:

(a) is required by extraordinary circumstances;

(b) has been approved by the governing authority; and

(c) is reasonable and necessary as determined by the application of sound engineering principles taking into consideration the appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical circumstances.

NORTH DAKOTA

N.D. Cent. Code § 32-12.2-02 (2016)
Liability of the state — Limitations — Statute of limitations

...

3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims …

b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the state or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.

…
SOUTH CAROLINA


Exceptions to waiver of immunity

The governmental entity is not liable for a loss resulting from …

(15) absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. Governmental entities are not liable for the design of highways and other public ways. Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

VERMONT


Liability of State

(a) The State of Vermont shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment, under the same circumstances, in the same manner and to the same extent as a private person would be liable to the claimant except that the claimant shall not have the right to levy execution on any property of the State to satisfy any judgment. The Superior Courts of the State shall have exclusive jurisdiction of any actions brought hereunder.

…

(e) This section shall not apply to …

(8) Any claim arising from the selection of or purposeful deviation from a particular set of standards for the planning and design of highways….
WYOMING

Exclusions from waiver of immunity

a) The liability imposed by W.S. 1-39-106 through 1-39-112 does not include liability for damages caused by:

(i) A defect in the plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;

(ii) The failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or

(iii) The maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.
APPENDIX C—STATE TRANSPORTATION DEPARTMENTS RESPONDING TO THE SURVEY

1. Alabama Department of Transportation
2. Arizona Department of Transportation
3. Arkansas State Highway and Transportation Department
4. Colorado Department of Transportation
5. Florida Department of Transportation
6. Georgia Department of Transportation
7. Idaho Transportation Department
8. Indiana Department of Transportation
9. Kansas Department of Transportation
10. Kentucky Transportation Cabinet
11. Louisiana Department of Transportation and Development
12. Maine Department of Transportation
13. Missouri Department of Transportation
14. Montana Department of Transportation
15. Nebraska Department of Roads
16. New Mexico Department of Transportation
17. North Dakota Department of Transportation
18. Oklahoma Department of Transportation
19. Oregon Department of Transportation
20. Pennsylvania Department of Transportation
21. South Carolina Department of Transportation
22. Tennessee Department of Transportation
23. Texas Department of Transportation
24. Utah Department of Transportation
25. Virginia Department of Transportation
26. Wisconsin Department of Transportation
APPENDIX D—SURVEY

SURVEY QUESTIONS

If you prefer an electronic copy of the survey please contact the Thomas Law Firm by email at:

lwthomas@cox.net

NCHRP 20-06, Study Topic 22-02

Liability of State Departments of Transportation for Design Errors

Agency Name: ________________________________________________________________________

Name of Employee: ____________________________________________________________________

Job Title: ____________________________________________________________________________

Contact telephone/ cell phone number: _____________________________________________________

Email address: ________________________________________________________________________

Educational Background: ________________________________________________________________

Legal Training: YES  NO (If “yes” describe) ________________________________________________

How many years have you been with the agency? __________________________________________

Note:

For the purpose of the survey the term defective plan or design also applies to design errors or omissions. In responding please attach additional pages as necessary to complete your answers.

1. Within the past 5 years has your department and/or one of your design-consultants or contractors for a project been sued for an alleged defective plan or design of a highway or other public improvement?

(please circle) YES  NO

IF YOUR ANSWER IS “YES,” PLEASE RESPOND TO THE FOLLOWING QUESTIONS AND REQUESTS.

(If insufficient space is allotted for your responses below, please feel free to place your responses on additional sheets of paper and attach them to the survey.)
2. Within the past 5 years has your department been held liable for a defective plan or design of a highway or other public improvement?

(please circle) YES  NO

If your answer is “Yes,” please provide details and/or a citation to or a copy of any decision(s).

_____________________________________________________________________________________
_____________________________________________________________________________________

3. Is one of your department’s defenses to a claim for a defective plan or design that the department has immunity for planning-level activity or the exercise of discretion?

(please circle) YES  NO

If your answer is “Yes” is the planning-level or discretionary defense based on (a) a statute (e.g., tort claims act) or (b) the common law? (Please provide a citation to the relevant statute or decision.)

_____________________________________________________________________________________
_____________________________________________________________________________________

4. Is one of your department’s defenses to a claim for a defective plan or design that your department has immunity because of a design immunity statute?

(please circle) YES  NO

If your answer is “Yes,” please provide the citation to the statute.

_____________________________________________________________________________________
_____________________________________________________________________________________

5. If a contractor responsible for the design of a highway or other public improvement in your state is sued by a third party (e.g., an injured motorist) for a defective plan or design, is the contractor able to claim under your state’s law (e.g., by judicial decision) the benefit of your department’s sovereign or governmental immunity?

(please circle) YES  NO

If your answer is “Yes,” please provide a citation to or a copy of any decision(s) of which you are aware holding that a contractor may or may not claim the benefit of your department’s sovereign or governmental immunity.

_____________________________________________________________________________________
_____________________________________________________________________________________

6. Within the past 5 years has your department brought a judicial or administrative proceeding against a design-consultant or contractor for reimbursement for the costs or damages caused by the design-consultant’s or contractor’s defective plan or design?
7. (a) Within the past 5 years has your department sought reimbursement from or been reimbursed by FHWA for the cost of a design-consultant’s or contractor’s defective plan or design pursuant to 23 C.F.R. part 172?

(please circle) YES NO

If your answer is “Yes,” please provide details.

_____________________________________________________________________________________
_____________________________________________________________________________________

(b) With respect to FHWA participation under 23 C.F.R. part 172 has your department adopted procedures regarding claims against design-consultants and/or contractors for a defective plan or design?

(please circle) YES NO

If your answer is “Yes,” please provide a link to or a copy of the procedures.

_____________________________________________________________________________________
_____________________________________________________________________________________

8. Within the past 5 years has a contractor brought an action or otherwise made a claim against your department for damages because your department allegedly provided the contractor with a plan or design for a highway or other public improvement that failed to disclose one or more material conditions and/or that contained one or more material misrepresentations?

(please circle) YES NO

If your answer is “Yes,” please state the number (if known) of such claims and provide information on the claim(s), including the outcome of the claim(s), and/or a citation to or a copy of any decision(s).

_____________________________________________________________________________________
_____________________________________________________________________________________

9. Does your department use the design-build (or similar) method of contracting for the construction of highways or other public improvements?

(please circle) YES NO

If your answer is “Yes,” please state whether in your department’s experience design-build contracts have resulted in fewer claims for a defective plan or design of a highway or other public improvement:
(a) By your department against contractors?  
(please circle) YES NO

(b) By contractors against your department?  
(please circle) YES NO

(c) By third parties against your department (such as by motorists for an injury caused by an allegedly defective plan or design)?

(please circle) YES NO

(d) By third parties against your contractors (such as by motorists for an injury caused by an allegedly defective plan or design)?

(please circle) YES NO

If your answer is “Yes” to questions 9(a), 9(b), 9(c), and/or 9(d), please provide details and/or a citation to or a copy of any case or decision on the claim(s).
______________________________________________________________________________
______________________________________________________________________________

10. Within the past 5 years in regard to claims by your department against a contractor for a defective plan or design, please state whether the claim(s) involved:

   (a) A contractor’s failure to comply with the applicable standard of care?
       (please circle) YES NO

   (b) A contractor’s failure to comply with design standards?
       (please circle) YES NO

   (c) The use of an allegedly defective safety appliance or other product in a plan or design of a highway or other public improvement?
       (please circle) YES NO

       If your answer is “Yes” to questions 10(a), 10(b), and/or 10(c), please provide details and/or a citation to or copy of any case or decision on the claim(s).
______________________________________________________________________________
______________________________________________________________________________

11. (a) For contracts involving a plan or design of a highway or other public improvement does your department require that a contractor have insurance that covers plan or design errors and omissions committed by the contractor, its agents, employees, and/or subcontractors?

       (please circle) YES NO
If your answer to question 11(a) is “Yes,” please state the type of policy or policies, the amount of coverage, and how your department verifies that a contractor has the required insurance. If possible, please provide a link to or a copy of a typical policy.

_____________________________________________________________________________________
_____________________________________________________________________________________

(b) If your department uses the design-build method of contracting for the construction of highways or other public improvements, please describe the type of insurance coverage required, and, if possible, provide a link to or a copy of a typical policy.

_____________________________________________________________________________________
_____________________________________________________________________________________

12. Within the past 5 years has your department had a claim(s) specifically involving:
   (a) A breach of warranty regarding the plan or design of a highway or other public improvement?
       (please circle) YES NO

   (b) A product liability claim involving, for example, an allegedly defective safety appliance or other product?
       (please circle) YES NO

   (c) A decision by your department to place a safety appliance or other product on, or to remove a safety appliance or other product from, an approved list of such appliances and products for use in the construction of highways or other public improvements?
       (please circle) YES NO

       If your answer is “Yes” to questions 12(a), 12(b), and/or 12(c), please provide details and/or a citation to or a copy of any decision(s).

_____________________________________________________________________________________
_____________________________________________________________________________________

13. To the extent not addressed by the above questions 1 through 12, please provide any other information that you have on liability of your department and/or its design-consultants or contractors for defective plans or designs for the construction of highways or other public improvements.

_____________________________________________________________________________________
_____________________________________________________________________________________


Please return your completed survey to:

The Thomas Law Firm
ATTN: Larry W. Thomas, J.D. Ph.D.
2001 L Street, N.W., Suite 500
Washington, D.C. 20036
Tel. (202) 495-3442 or (202) 465-5050

E-mail: lwthomas@cox.net
APPENDIX E—SUMMARY OF TRANSPORTATION DEPARTMENTS’ RESPONSES TO THE SURVEY

Twenty-six DOTs responded to a survey conducted for the Report. Although a copy of the survey is attached as Appendix D, the questions are repeated below followed by a summary of the respondents’ answers.

1. Within the past 5 years has your department and/or one of your design-consultants or contractors for a project been sued for an alleged defective plan or design of a highway or other public improvement?

Fifteen transportation departments answered “Yes” and reported that their department and/or one of their design-consultants or contractors for a project had been sued within the past 5 years for an alleged defective plan or design of a highway or other improvement: the Arizona DOT, Colorado DOT, Georgia DOT, Indiana DOT, Kansas DOT, Louisiana DOT, Missouri DOT, Montana DOT, New Mexico DOT, Oregon DOT, Pennsylvania DOT, South Carolina DOT, Tennessee DOT, Texas DOT, and Utah DOT.

Eleven departments answered “No:” the Alabama DOT, Arkansas State Highway and Transportation Department (Arkansas Hwy. & Trans. Dept.), Florida DOT, Idaho Transportation Department (Idaho Transp. Dept.), Kentucky Transportation Cabinet (Kentucky Transp. Cab.), Maine DOT, Nebraska Department of Roads (Nebraska Dept. of Rds.), North Dakota DOT, Oklahoma DOT, Virginia DOT, and Wisconsin DOT.

2. Within the past 5 years has your department been held liable for a defective plan or design of a highway or other public improvement?

Five DOTs answered “Yes,” whereas 15 DOTs answered “No.” Six departments did not respond to the question.

The Indiana DOT referred to a case involving an insufficient line of sight distance at an intersection and another case involving lack of paint on a curb/median. The Louisiana DOTD

683 See list of transportation departments responding to the survey in App. C.

684 The Virginia Office of the Attorney General responded to the survey for the Virginia DOT.

685 Arizona DOT, Indiana DOT, Louisiana DOTD, Pennsylvania DOT, and Texas DOT.

686 Alabama DOT, Colorado DOT, Florida DOT, Georgia DOT, Kansas DOT, Kentucky Transp. Cab., Missouri DOT, Montana DOT, New Mexico DOT, Oregon DOT, South Carolina DOT, Tennessee DOT, Utah DOT, Virginia DOT, and Wisconsin DOT.

687 Arkansas Hwy. & Transp. Dep’t, Idaho Transp. Dep’t, Maine DOT, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.

Although answering “No,” the Missouri DOT stated:

Several claims have been filed by contractors, only a few of which have resulted in suit being filed. A good many that were subject to litigation occurred outside the five-year search period [of the survey]. Most lawsuits now are in the traffic area dealing with signing, striping, surface friction, and snow removal. Design flaws during the past five years have been settled at the Resident Engineer’s level.

3. **Is one of your department’s defenses to a claim for a defective plan or design that the department has immunity for planning-level activity or the exercise of discretion?**

Twelve DOTs responded “Yes,” but six stated “No” in response to the question. Eight departments did not respond to the question.

The Florida DOT reported that it is immune with respect to its discretionary, judgmental, and planning decisions. However, the Department is exposed to liability for operational decisions. *See generally Cygler v. Presjack*, 667 So. 2d 458, 460 (Fla. 4th DCA 1996).

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689 Kentucky Transp. Cab., Louisiana DOTD, Montana DOT, Pennsylvania DOT, Tennessee DOT, and Texas DOT.

690 Alabama DOT, Arkansas Hwy. & Transp. Dep’t, Idaho Transp. Dep’t, Maine DOT, Nebraska Dep’t of Rds., North Dakota DOT, Oklahoma DOT, and Virginia DOT.
Generally, “decisions concerning the installation of traffic control devices, the initial plan and alignment of roads or the improvement or upgrading of roads or intersections” have been held to be planning-level decisions. *Dep’t. of Transp. v. Neilson*, 419 So.2d 1071, 1077 (Fla. 1982). An exception to this rule is “when a governmental entity creates a known dangerous condition which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger.” *City of St. Petersburg v. Colom*, 419 So.2d 1082, 1083 (Fla. 1982).

Over the years since *Colom*, case law has acknowledged that the exception required that before sovereign immunity will be waived there must be a “known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap.” *See Cygler*, 667 So.2d at 460-461; *Scott v. Dep’t. of Transp.*, 752 So.2d 30, 34 (Fla. 1st DCA 2000); *Dep’t of Transp. v. Stevens*, 630 So.2d 1160, 1162-1163 (Fla. 2d DCA 1993).

4. **Is one of your department’s defenses to a claim for a defective plan or design that your department has immunity because of a design immunity statute?**

Nine DOTs stated “Yes” to the question, but nine DOTs stated “No.” Eight DOTs did not respond to the question.

The South Carolina DOT stated it has design immunity for highways pursuant to S.C. Code § 15-78-60(15). *See Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). However, in *Giannini v. South Carolina Dept. of Transp.*, 378 S.C. 573, 664 S.E.2d 450 (2008), the S.C. Supreme Court said design immunity applied to SCDOT’s initial discretion as to whether to place median barriers, but after notice of an existing hazard it was a jury question whether [the] DOT breached its duty to properly maintain the road.

5. **If a contractor responsible for the design of a highway or other public improvement in your state is sued by a third party (e.g., an injured motorist) for a defective plan or**

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691 Arizona DOT (*citing ARIZ. REV. STAT. § 12-820.03*), Colorado DOT (*citing its answer to question 3*), Georgia DOT (*citing GA. CODE ANN. § 50-21-24-(10)*), Indiana DOT (*citing IND. CODE § 34-13-3-3*), Kansas DOT (*citing KAN. STAT. ANN. § 75-6104(m)*), Missouri DOT (*citing MO. REV. STAT. § 537.600(2)*), New Mexico DOT (*citing N.M. STAT. ANN. § 41-4-11*), Oregon DOT (*citing its answer to question 3*), and South Carolina DOT.


693 Alabama DOT, Arkansas Hwy. & Transp. Dep’t, Idaho Transp. Dep’t, Maine DOT, Nebraska Dep’t of Rds., North Dakota DOT, Oklahoma DOT, and Virginia DOT.
design, is the contractor able to claim under your state’s law (e.g., by judicial decision) the benefit of your department’s sovereign or governmental immunity?

One DOT answered “Yes” to the question. 694 Eighteen DOTs answered “No.” 695 Seven departments did not respond to the question. 696

If your answer is “Yes,” please provide a citation to or a copy of any decision(s) of which you are aware holding that a contractor may or may not claim the benefit of your department’s sovereign or governmental immunity.

The Colorado DOT stated that “[c]ontractors do not receive protection from liability under the [Colorado Governmental Immunity Act].” The South Carolina DOT added that “[c]ontractors are independent contractors, not agents, and therefore are not entitled to the protection of the S.C. Tort Claims Act. See S.C. Tort Claims Act, § 15-78-30(c).”

However, the Wisconsin DOT said that a “contractor may benefit from WisDOT’s sovereign immunity by: Wis. Stat. § 893.80; Estate of Lyons v. CNA Ins. Co., 207 Wis.2d 446, 558 N.W.2d 658 (Ct. App. 1997); [and] Showers Appraisal, LLC, 2013 WI 79, 350 Wis.2d 509, 835 N.W.2d 226 (2013 filed),” all of which are discussed below and in the Report.

6. Within the past 5 years has your department brought a judicial or administrative proceeding against a design-consultant or contractor for reimbursement for the costs or damages caused by the design-consultant’s or contractor’s defective plan or design?

If your answer is “Yes,” please provide details and/or a citation to or a copy of any decision(s).

Of those departments responding to the question, 5 said “Yes,” 697 and 15 answered “No.” 698 Six departments did not respond to the question. 699

[Notes]

694 Wisconsin DOT.


696 Alabama DOT, Florida DOT, Idaho Transp. Dep’t, Kansas DOT, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.

697 Indiana DOT, Louisiana DOTD, Oregon DOT, South Carolina DOT, and Utah DOT.


699 Arizona DOT, Florida DOT, Idaho Transp. Dep’t, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.
The Indiana DOT noted that its cases arose out of the design of two bridges and/or the use of defective materials, the design of a “mitigation structure,” and a design error regarding “subgrade treatment.”

The Louisiana DOTD said it has had

multiple claims … from the Picardy Avenue Interchange & I-10 Widening and Rehab. EBR Parish Project, SPN 450-10-0111 & 450-10-1024. *ABS Services, Inc. v. James Construction*, # 541-834, 19th Judicial District Court (JDC) in East Baton Rouge Parish (EBR) consolidated with *DOTD v. PSI*, # 542-671, 19th JDC. ABS sued James and James filed a third party demand against DOTD. Separately, DOTD had sued EBR and their project design team, Professional Services, Inc. (PSI) and ABMB Engineers, Inc. The matter was settled among the prime contractor, DOTD, city, and design team.

The Oregon DOT reported that it had filed suit against a design-consultant that agreed to settle.

The South Carolina DOT reported that it

has several pending cases arising out of the Georgetown Drainage Project in which SCDOT, along with the contractor and engineer of record (who also served as the consulting engineer), were sued by third parties for negligence in planning and overseeing the Project. In the third party cases, SCDOT has crossclaimed against the contractor and engineer for indemnity.

The Utah DOT noted that the slope above a highway failed but that the design consultant settled for $15 million.

7. (a) Within the past 5 years has your department sought reimbursement from or been reimbursed by FHWA for the cost of a design-consultant’s or contractor’s defective plan or design pursuant to 23 C.F.R. part 172?

The Pennsylvania DOT answered “Yes” to the question. The DOT stated that “[i]f a work order is issued to a construction contract relating to a consultant designer’s error the Department pursues reimbursement from the consultant designer and reimburses FHWA for its portion of funds of the extra work cost. The Department does not keep records of the number of times that this has occurred.”
Nineteen DOTs stated “No” in response to the question. Six departments did not respond to the question.

The Louisiana DOTD stated that the DOTD usually seeks recovery from the designer for the amount of the change orders attributed to design error.

The South Carolina DOT explained that in the Georgetown Drainage Project, noted above, the DOT has sought reimbursement from FHWA for the cost of the design-consultant’s or contractor’s defective plan or design. Because the litigation is ongoing, it has not yet been determined whether the plan or design was defective.”

(b) With respect to FHWA participation under 23 C.F.R. part 172 has your department adopted procedures regarding claims against design-consultants and/or contractors for a defective plan or design?

Nine DOTs responded “Yes” to question 7(b), and nine responded “No.” Eight departments did not respond to the question.

If your answer is “Yes,” please provide a link to or a copy of the procedures.

The Colorado DOT did not respond to the question but stated that “CDOT incorporates FHWS regulations and procedures by contract if federal funding is provided.” The Indiana DOT referred to its procedure for change orders in its Standard Specifications and/or its Errors and Omission procedure in its consultant’s manual. The Kansas DOT provided a copy of its consultant standard of care policy, a copy of which is included in Appendix F, item 5, that addresses defective plans or designs from design-consultants. The department stated that “[w]hile this [policy] satisfies 23 C.F.R. part 172, it was not adopted because of 23 C.F.R. part 172.” The Louisiana DOT attached a copy of its “Change Order Reason(s) Code Chart and “Errors & Omissions Policy and Procedure,” both of which are included in Appendix F, items 7 and 8, respectively.

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701 Florida DOT, Idaho Transp. Dep’t, Nevada Dep’t of Rds., North Dakota DOT, Oklahoma DOT, and South Carolina DOT.

702 Georgia DOT, Indiana DOT, Kansas DOT, Louisiana DOTD, Pennsylvania DOT, South Carolina DOT, Texas DOT, Utah DOT, and Wisconsin DOT.

703 Alabama DOT, Arizona DOT, Kentucky Transp. Cab., Missouri DOT, Montana DOT, New Mexico DOT, Oregon DOT, Tennessee DOT, and Virginia DOT.

704 Arkansas Hwy. & Transp. Dep’t, Colorado DOT, Florida DOT, Idaho Transp. Dep’t, Maine DOT, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.
The Pennsylvania DOT referred to Chapter 5.7 of its Publication 93, http://www.dot.state.pa.us/public/PubsForms/Publications/PUB%2093.pdf. The South Carolina DOT said that SCDOT’s procedures for handling independent engineer’s plan errors and omissions are set forth in an internal “Engineering Directive Memorandum,” a copy of which is included in Appendix F, item 15. The department’s response stated also that “[i]n regard to the Georgetown Drainage Project [discussed above], this claim is ongoing and has not been resolved.”

The Tennessee DOT provided a copy of “TDOT Policy No. 380-02, Errors & Omissions in Consultant Prepared Plans,” a copy of which is included in Appendix F, item 21. The Utah DOT provided a copy of “UDOT Policy 08-07, Errors and Omissions on Projects” that is included in Appendix F, item 24.


8. Within the past 5 years has a contractor brought an action or otherwise made a claim against your department for damages because your department allegedly provided the contractor with a plan or design for a highway or other public improvement that failed to disclose one or more material conditions and/or that contained one or more material misrepresentations?

Eleven agencies responded “Yes,” whereas nine departments said “No.” Six departments did not respond to the question.

If your answer is “Yes,” please state the number (if known) of such claims and provide information on the claim(s), including the outcome of the claim(s), and/or a citation to or a copy of any decision(s).

For the Arkansas Hwy. & Trans. Dept. there was an “earthwork quantity error.” The Colorado DOT said that there was a claim for utility disruption but that the claim was resolved through dispute resolution/settlement. The Indiana DOT said that the exact number is unknown but there had been numerous claims for changed conditions.


706 Alabama DOT, Arizona DOT, Georgia DOT, Maine DOT, South Carolina DOT, Texas DOT, Utah DOT, Virginia DOT, and Wisconsin DOT.

707 Florida DOT, Idaho Transp. Dep’t, Nebraska DOT, New Mexico DOT, North Dakota DOT, and Oklahoma DOT.
The Kansas DOT noted its experience with nine claims as follows:

- Missing geology information on plans – settled;
- Errors in waterline at railroad crossing designs – settled;
- Ambiguity and mill-to-bear and structural steel member dimensions and tolerances – settled;
- Storm sewer pipe omitted from plans – settled;
- Insufficient bridge deck design thickness and constructability – settled;
- Ambiguity in plans regarding structures to be removed – settled;
- Discrepancy among bid item quantities, plan summary of quantities, and plan notes for flyash manipulation – settled; and
- Omission from plans of curb and gutter removal; denied. Errors in embankment stability leading to bridge and ramp failures - pending.

The Louisiana DOTD provided the following additional information:

In the Gilchrist case, cited in [response to question number 2], the quantity of embankment was under-estimated. In Austin Bridge & Road, L.P. v. State of Louisiana, DOTD, # 608,481, 19th JDC, the plaintiff was the original contractor who was disqualified after defaulting on the I-10/I-12 widening project (SPN 450-10-0108). Austin Bridge experienced delays caused by design errors. The case was settled with Austin Bridge and its surety after the FHWA approved the terms of the settlement. DOTD reserved its rights to recover the increased cost of the Project caused by design errors in plans provided by URS Corp. (now part of AECOM).

The Missouri DOT advised that two claims came to mind.

The most recent example is a claim by prime contractor on Route 65, Greene County (Springfield) where a quantity for excavation for a Mechanically Stabilized Earth (MSA) wall was left out of the quantities sheet. Dispute developed over the classification of excavated material and ergo the unit price to be applied. Settlement was arrived at before our claims committee was due to hear evidence. No suit was filed as Missouri's contractual claim procedure is a condition precedent to filing suit. No reimbursement was sought. This occurred in 2015.

Also in 2015, a drilling subcontractor filed a claim against a prime contractor on a design build. The claim was for a Differing Site Condition at Bent 3 Route 69, Missouri River bridge at Fairfax, Missouri (Kansas City). This was denied. The
Missouri DOT did pay $450,000 as an equitable adjustment to the prime contractor for a number of issues that included subsurface conditions, so it could be argued that any difference between the drilling logs and the actual conditions encountered were compensated for in that Change Order.

The Oregon DOT stated: “Almost every construction contract claim assert some type of differing site condition or other omission in the design on which base their claims. A small percentage of the design error claims actually lead to contractor recovery. No such claim has been the subject of a judgment.”

The Pennsylvania DOT stated that “[t]here are 5-10 such claims currently pending either in the Pennsylvania Board of Claims or in the pre-litigation administrative claims procedure provided for by the Commonwealth Procurement Code. To date there have been no decisions in any such claims.”

The Tennessee DOT reported on three claims:

**Wright Brothers Construction Company, Inc. v. State of Tennessee,** Tennessee Claims Commission, filed 6/25/2013. Contractor claims that TDOT breached contract by allegedly failing to disclose separate state agency’s reclassification of a water course from a wet weather conveyance to a stream on an off-right-of-way location that contractor intended to use as a waste area. TDOT filed motion to dismiss for lack of subject matter jurisdiction on ground that claim was based on separate state agency’s performance of a regulatory function. Claims Commission granted the motion to dismiss, but the Tennessee Court of Appeals reversed, holding that contractor could state a breach of contract claim against TDOT independent of regulatory agency’s action. There has been no decision on the merits of the claim.

**Wright Brothers Construction Company, Inc. v. Tennessee Department of Transportation,** Tennessee Claims Commission, filed 4/28/2014. Contractor on major highway improvement project involving numerous large retaining walls claimed breach of contract (on behalf of subcontractor) based on alleged differing site conditions and misrepresentation of subsurface conditions on the project plans. The parties settled the case.

**InfraSource Construction Services, LLC f/k/a Trans Tech Electric, L.P., v. State of Tennessee,** Tennessee Claims Commission, filed 12/19/2014. Contractor on intelligent transportation system construction project claimed breach of contract based on alleged deficient design of radar detection system because length of some cable loops allegedly exceeded equipment design standards. The parties settled the case, and the design consultant participated in the settlement via collateral agreement with TDOT.
9. Does your department use the design-build (or similar) method of contracting for the construction of highways or other public improvements?

Seventeen DOTs answered “Yes” to question 9. Only four DOTs said “No.” Five departments did not respond to the question.

The Kansas DOT stated that it “has only one design-build contract; it is a current project that has not yet been completed and is the only project for which KDOT has legislative authority. Thus, KDOT has insufficient information to answer the remaining subparts of Question 9.” The Oregon DOT stated that it “has only had 5 design build contracts in the past 5 years” and therefore was unable to respond to questions 9(a)-(d). The South Carolina DOT also stated that it had insufficient information to answer the remaining questions.

If your answer is “Yes,” please state whether in your department’s experience design-build contracts have resulted in fewer claims for a defective plan or design of a highway or other public improvement:

(a) By your department against contractors?

Only two DOTs responded “Yes.” Twelve agencies responded “No.” Twelve departments did not respond to the question.

(b) By contractors against your department?

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708 Arizona DOT, Colorado DOT, Georgia DOT, Indiana DOT, Kansas DOT, Kentucky Transp. Cab., Louisiana DOTD, Maine DOT, Missouri DOT, Montana DOT, New Mexico DOT, Oregon DOT, Pennsylvania DOT, South Carolina DOT, Texas DOT, Utah DOT, and Virginia DOT.

709 Alabama DOT, Arkansas State Hwy. & Transp. Dep’t, Tennessee DOT, and Wisconsin DOT.

710 Florida DOT, Idaho Transp. Dep’t, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.

711 Missouri DOT and Virginia DOT.


713 Arkansas Hwy. & Transp. Dep’t, Colorado DOT, Florida DOT, Idaho Transp. Dep’t, Kansas DOT, Nebraska Dep’t of Rds., New Mexico DOT, North Dakota DOT, Oklahoma DOT, Oregon DOT, South Carolina DOT, and Wisconsin DOT.
Three DOTs stated “Yes”, nine stated “No.” Fourteen departments did not respond to the question.

(c) By third parties against your department (such as by motorists for an injury caused by an allegedly defective plan or design)?

One DOT responding to the survey stated “Yes.” Thirteen departments stated “No.” Twelve departments did not respond to the question.

(d) By third parties against your contractors (such as by motorists for an injury caused by an allegedly defective plan or design)?

One DOT answered “Yes” to the question. Twelve agencies answered “No.” Thirteen departments did not respond to the question.

If your answer is “Yes” to questions 9(a), 9(b), 9(c), and/or 9(d), please provide details and/or a citation to or a copy of any case or decision on the claim(s).

The Colorado DOT said that there are very few claims and that design-build has not made a difference in the number of claims.

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714 Missouri DOT, Utah DOT, and Virginia DOT.


716 Arkansas Hwy. & Transp. Dep’t, Colorado DOT, Florida DOT, Idaho Transp. Dep’t, Kansas DOT, Montana DOT, Nebraska Dep’t of Rds., New Mexico DOT, North Dakota DOT, Oklahoma DOT, Oregon DOT, South Carolina DOT, Tennessee DOT, and Wisconsin DOT.

717 Virginia DOT.


719 Arkansas Hwy. & Transp. Dep’t, Colorado DOT, Florida DOT, Idaho Transp. Dep’t, Indiana DOT, Kansas DOT, Nebraska Dep’t of Rds., North Dakota DOT, New Mexico DOT, Oklahoma DOT, Oregon DOT, and South Carolina DOT.

720 Virginia DOT.


722 Arkansas Hwy. & Transp. Dep’t, Colorado DOT, Florida DOT, Idaho DOT, Indiana DOT, Kansas DOT, Nebraska Dep’t of Rds., New Mexico DOT, North Dakota DOT, Oklahoma DOT, Oregon DOT, South Carolina DOT, and Wisconsin DOT.
In further response to question (a) and (b), the Missouri DOT stated that its “Construction/Materials Division has a sense that fewer requests are being made but none have reached formal claim and/or lawsuit levels.”

Regarding question 9(b) the Utah DOT stated that “contractors do not have a defective design claim against the department with design-build because the contractor is responsible for the design.” The department said that no cases were available as examples.

10. Within the past 5 years in regard to claims by your department against a contractor for a defective plan or design, please state whether the claim(s) involved:

(a) A contractor’s failure to comply with the applicable standard of care?

Four DOTs answered “Yes,” whereas 14 departments stated “No” in response to the question. Eight departments did not respond to the question.

(b) A contractor’s failure to comply with design standards?

Two DOTs answered “Yes,” but 15 departments said “No.” Nine departments did not respond to the question.

(c) The use of an allegedly defective safety appliance or other product in a plan or design of a highway or other public improvement?

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723 Indiana DOT, Louisiana DOTD, Montana DOT, and South Carolina DOT.


725 Colorado DOT, Florida DOT, Georgia DOT, Idaho Transp. Dep’t, Nebraska Dep’t of Rds., New Mexico DOT, North Dakota DOT, and Oklahoma DOT.

726 Indiana DOT and South Carolina DOT.


728 Colorado DOT, Florida DOT, Georgia DOT, Idaho Transp. Dep’t, Nebraska Dep’t of Rds., New Mexico DOT, North Dakota DOT, Oklahoma DOT, and Wisconsin DOT.
No DOT replied “Yes” to the question. Nine DOTs replied “No” to the question. Sixteen departments did not respond to the question.  

If your answer is “Yes” to questions 10(a), 10(b), and/or 10(c), please provide details and/or a citation to or copy of any case or decision on the claim(s).

The Colorado DOT reported that there had been no claims by CDOT against contractors for violations of the standard of care or for failure to comply with design standards. The Indiana DOT referred to its response to question 6 but referred also to a case involving a design of panel signs that did not comply with design standards. The Louisiana DOTD referred to DOTD v. PSI, # 542-671, 19th JDC discussed in its response to question number 6. The Wisconsin DOT stated that the department had brought one claim against a contractor, but for breach of contract, not for defective design. A copy of the complaint is included in Appendix F, item 28.

11. (a) For contracts involving a plan or design of a highway or other public improvement does your department require that a contractor have insurance that covers plan or design errors and omissions committed by the contractor, its agents, employees, and/or subcontractors?

Seventeen agencies responded “Yes,” whereas two departments stated “No.” Seven departments did not respond to the question.

If your answer to question 11(a) is “Yes,” please state the type of policy or policies, the amount of coverage, and how your department verifies that a contractor has the required insurance. If possible, please provide a link to or a copy of a typical policy.

Regardless of how they responded to the question, the DOTs provided additional information.

Arizona, although not responding to the question, provided an attachment setting forth consultants’ and sub-consultants’ insurance requirements. See Appendix F, item 2. The Colorado DOT reported that policies are dictated by the size of the project and may include errors and

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729 Colorado DOT, Indiana DOT, Missouri DOT, Montana DOT, Oregon DOT, South Carolina DOT, Tennessee DOT, Texas DOT, and Utah DOT.


731 Colorado DOT, Georgia DOT, Indiana DOT, Kansas DOT, Kentucky Transp. Cab., Louisiana DOTD, Maine DOT, Missouri DOT, Montana DOT, New Mexico DOT, Oregon DOT, Pennsylvania DOT, South Carolina DOT, Tennessee DOT, Texas DOT, Utah DOT, and Wisconsin DOT.

732 Alabama DOT and Arkansas Hwy. & Transp. Dep’t.

733 Arizona DOT, Florida DOT, Idaho Transp. Dep’t, Nebraska Dep’t of Rds., North Dakota DOT, Oklahoma DOT, and Virginia DOT.
omissions, commercial general liability, and pollution insurance. The Kansas DOT stated that its answer was based upon the question’s use of the word “contactor” as distinguished from design-consultants. The only contractor required to obtain design errors and omissions insurance is a design-build contractor. The Louisiana DOTD requires $1 million in professional liability insurance. A copy of the department’s “Consultant Contract Services Manual” is included in Appendix F, item 9.

The Missouri DOT requires

[li]ability insurance that meets Missouri Sovereign Immunity Limits. Often contractors will purchase higher limits but that is for their own protection not MoDOT’s. The Sovereign Immunity limits change annually due to a Consumer Index elevation. For 2016 it is $410,185 per person. MoDOT will also often require the contractor’s insurance to cover not only their negligence but also MoDOT’s. That issue is currently on appeal in Laurie Holesapple v. Missouri Highways and Transportation Commission, SD34122. In Holesapple, the jury found a dangerous condition in MoDot signing with a multi-million-dollar verdict. The prime contractor settled out for $800,000 prior to trial but failed to get a release for MoDot. MHTC is a contractually required “additional insured.” The circuit court has ruled MHTC is liable for its $409,000 Sovereign Immunity waiver cap only. The contractor had $6,000,000 in coverage. Plaintiffs contend that MHTC’s requiring the contractor to insure MHTC constitutes a waiver of all Sovereign Immunity up to the policy limits. If the Court of Appeals adopts such an interpretation, both designers and builders would have more exposure. The prime contractor bought far more insurance coverage than MHTC required for its own protection, not ours.

Please note the Missouri Highways and Transportation Commission (MHTC) is the legal entity capable of suing and being sued. MoDOT is the popular brand name of the Missouri Department of Transportation, which is the operating arm of MHTC.

The Oregon DOT provided detailed information:

Policy provisions, definition, insuring agreements and exclusions vary among insurance companies. The amount of coverage for professional liability insurance depends on factors such as the size of the project and whether particularly challenging project/design elements exist. There are typical coverages that are an inclusive part of the professional liability policy that are specified below. The procurement specialist indicated the required coverage amounts and will require a Certificate of Insurance to be submitted and received prior to execution of the purchase agreement or contract. If there are current Certificates of Insurance on file with the agency, the procurement specialist can choose to not require to have it resubmitted prior to execution:
**Professional Liability** – If the Design-Builder self-performs or provides in-house Design Services for this Project, the Design-Builder shall obtain and maintain at its own expense during the term of this Contract, Project-specific Professional Liability Insurance covering any damages caused by any error, omission or negligent acts of the Design-Builder, its subcontractors, agents, officers or employees performing Design Services for the Project, in the dollar amount indicated above. The policy must be endorsed to state that the Professional Liability Insurance annual aggregate limit will apply separately to the Contract.

If the Design-Builder subcontracts Design Services for the Project, the Design-Builder shall obtain and maintain at its own expense during the term of this Contract, Project-specific Professional Liability Insurance covering any damages caused by any error, omission or any negligent acts of the Design-Builder, its subcontractors, agents, officers, or employees performing Design Services for the Project, in the dollar amount indicated above. The Design-Builder shall require its subcontractors that provide Design Services for the Project to obtain and maintain during the term of this Contract, at the Design-Builder's expense or its subcontractor’s expense, Professional Liability Insurance covering any damages caused by any error, omission or any negligent acts of the Subcontractors, their subcontractors, agents, officers, or employees performing Design Services for the Project. The policy must be endorsed to state that the Professional Liability Insurance annual aggregate limit will apply separately to the Contract.

The Pennsylvania DOT stated:

The coverages and amounts are in the Pub 408 specs, as with 11(b), or the Pub 442 specs for design consultants. Compliance is initially confirmed during the contract execution process by review of insurance certificates and policy endorsements, as appropriate. The project managers then ensure compliance throughout the project.

The South Carolina DOT stated that it “requires its design consultants to obtain Liability and Professional Errors and Omissions insurance.” See Appendix F.

The Tennessee DOT reported that TDOT’s design consultant contracts contain the following provision:

**STANDARD OF CARE.** The ENGINEER shall assume full responsibility for the quality of the ENGINEER’S work and its conformance with all applicable laws, rules, regulations and orders governing said work. The ENGINEER shall hold harmless and indemnify the STATE for all claims and damages which result from
the failure of the ENGINEER to perform its duties in conformance with the reasonable standard of care as applicable to design professionals within the State of Tennessee. Said indemnification shall include, but not be limited to, costs for the redesign of plans and the preparations of new specifications as well as the costs for repairs to the construction work itself. The ENGINEER, being an independent contractor, agrees to maintain errors and omissions insurance in such an amount ($1,000,000.00 minimum) and form as are agreeable to the STATE.

The Tennessee DOT reported that it requires annual submittals by the consultant to verify errors and omissions insurance coverage.

The Utah DOT referred to section 5, liability insurance, from the department’s “Consultant Services Manual,” a copy of which is included in Appendix F, item 23. The Wisconsin DOT said that it requires its contractor to have $1.0 million insurance. The department provided a copy of its insurance table that is included in Appendix F, item 29.

(b) If your department uses the design-build method of contracting for the construction of highways or other public improvements, please describe the type of insurance coverage required, and, if possible, provide a link to or a copy of a typical policy.

The Arizona DOT, although not responding to the question, provided a document entitled “Design-Build Package,” a copy of which is included in Appendix F, item 1. The Kansas DOT provided a copy of its “Consultant Standard of Care Policy” that is included in Appendix F, item 5. The Indiana DOT referred to its Standard Specification and noted that the “requirements vary by contract/special provisions.” The Louisiana DOT requires that a design-build contractor provide a Proposal and Retainage bonds each in the amount of 5% of the cost of the Project and Performance and Payment Bonds each in the amount of 100% of the cost of the Project.

The Maine DOT reported that the department’s standard specifications for highway projects require insurance coverages. A copy of the department’s standard specifications is included in Appendix F. The South Carolina DOT said that it “requires its design consultants to obtain Liability and Professional Errors and Omissions Insurance.” See Appendix F. The Utah DOT stated that “the design-builder or contractor provides the insurance for projects under $75 million. Over $75 million for a project, the project is covered by OCIP.” See Appendix F.

The Pennsylvania DOT reported that the requirements regarding insurance coverage are found in Sections 103.05 and 107.14 of its Publication 408 Specifications, http://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/408_2016/408_2016_IE/408_2016_IE.pdf.

12. Within the past 5 years has your department had a claim(s) specifically involving:

(a) A breach of warranty regarding the plan or design of a highway or other public improvement?
Four DOTs stated “Yes,” but 17 agencies responding to the question answered “No.” Five departments did not respond to the question.

The Montana DOT provided a list of claims involving breach of warranty. See Appendix F.

(b) A product liability claim involving, for example, an allegedly defective safety appliance or other product?

Two DOT’s responding to the survey answered “Yes.” Nineteen departments answered “No” to the question. Five departments did not respond to the question.

Although the Missouri DOT and the Wisconsin DOT answered “No” to the question, the Missouri DOT stated that “[w]hile litigation concerning Trinity Industries ET-Plus guardrail end treatment cannot be ruled out, nothing to date has been filed by or against MoDOT. Litigation in Missouri by other product users is also possible.” The Wisconsin DOT reported that a case possibly of interest is LaCrosse County v. Trinity Industries, case number 15CV117 (W.D. Wis.).

(c) A decision by your department to place a safety appliance or other product on, or to remove a safety appliance or other product from, an approved list of such appliances and products for use in the construction of highways or other public improvements?

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734 Montana DOT, Oregon DOT, Pennsylvania DOT, and South Carolina DOT.


736 Florida DOT, Idaho Transp. Dep’t, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.

737 Indiana DOT and Virginia DOT.


739 Florida DOT, Idaho Transp. Dep’t, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.
Six DOTs answered “Yes,” but fourteen agencies said “No.” Six departments did not respond to the question.

If your answer is “Yes” to questions 12(a), 12(b), and/or 12(c), please provide details and/or a citation to or a copy of any decision(s).

The Indiana DOT noted a choice by a contractor of a bad cable rail system that is now “off INDOT’s approved list.”

The Kansas DOT reported that it has removed certain aggregate sources from its prequalified list for on-grade concrete pavement and that one supplier of such aggregate challenged KDOT in federal court for removing some of its aggregate sources from being used in on-grade concrete pavement lanes. Martin Marietta Materials, Inc. v. Kansas DOT, 810 F.3d 1161 (10th Cir. 2016). The department stated that it also had removed certain pavement markings epoxy from its prequalified list for pavement markings.

The Oregon DOT stated that its breach of warranty claim was not based on a plan or design but a failure to perform under a warranty.

The Pennsylvania DOT’s response stated that several contractors have asserted claims against the DOT “to the effect that the Department has breached a warranty regarding the completeness and/or accuracy of the design of a highway project. There have been no decisions regarding any such claims in the past five years.”

The Tennessee DOT provided a copy of a letter, dated October 28, 2014, from the TDOT Materials and Tests Division to Trinity Highway Products, a copy of which is included in Appendix F, item 22. The Virginia DOT also referred to the Trinity Industries’ G-9 guardrail.

The Wisconsin DOT reported that the “department has removed and added safety products to its approved list within the last 5 years. However, the addition or removal of products from our approved product list was not a result of any specific claim against the state.”

740 Indiana DOT, Kansas DOT, Tennessee DOT, Texas DOT, Virginia DOT, and Wisconsin DOT.


742 Florida DOT, Idaho Transp. Dep’t, Louisiana DOTD, Nebraska Dep’t of Rds., North Dakota DOT, and Oklahoma DOT.
13. To the extent not addressed by the above questions 1 through 12, please provide any other information that you have on liability of your department and/or its design-consultants or contractors for defective plans or designs for the construction of highways or other public improvements.

The Colorado DOT added that most design and engineering are done in-house; therefore, the Colorado Governmental Immunity Act would protect CDOT if claims are made.

The Missouri DOT stated that it “has, by negotiation, received compensation from design consultants for plan errors,” including contribution on settlements, i.e., a bridge designer to a prime contractor on the Emerson Bridge in Cape Girardeau across the Mississippi River.