Basics of Public Official Liability:
Can Community Service Make Me Liable?

By Andrew Johnson

[Note: This is the first in a series of articles on the potential liability of individuals who serve their communities – as elected public officials or appointed volunteers – for acts and omissions in the ordinary course of business, as well as in connection with the issuance of public securities.]

Whether public officials are liable for their actions is an important issue at every level of government service, from the President of the United States to the directors of a water board. From President Nixon (the Pentagon Papers) and President Clinton (Paula Jones) to a local water board terminating service to delinquent customers, the issues are very similar.

In each case, the guiding principle is the same: The public interest in shielding officials from litigation and personal financial liability, for damages caused by their actions while carrying out public business, outweighs the potential harm of those actions.
When faced with potential claims, public officials enjoy two types of immunity: "absolute" and "qualified."

Certain officials have been given absolute immunity due to the importance of their function in government. These include legislators, judges, public officials on the witness stand (but not as complainting witnesses), some administrative review boards and panels, and prosecutors.

The general tests for whether the office qualifies for absolute immunity are: (1) whether a common law basis for immunity exists, (2) whether, without the immunity, and unreasonable risk of litigation exists, and (3) whether alternatives to damage suits exist to control wrongful conduct by the official.

The Supreme Court of the United States recognizes the value of protecting government officials from *liability from suit* in addition to being a mere defense to liability. The Texas Supreme Court has also dealt with this issue on several occasions in what is known as qualified immunity.

Positions that have qualified immunity are school board trustees, city council members, water board directors and elected county officials. Some appointed officials, such as directors of non-profit corporations, industrial development corporations and housing finance corporations, do not, however, have the same statutory and common law immunities from suit.

Tests of Good Faith

In Texas, there are two tests of good faith the public official must pass before qualified immunity is earned: "objective" and "subjective."

The first test of objective good faith is failed if an official knew or should have reasonably known that the action he/she took within the sphere of official responsibility would violate an individual's statutory or constitutional rights. In other words, if an official knows (or should have known) what the rules are and collates them to damage of another, he/she may not have immunity from litigation.

A public official can fail the test of subjective good faith is he/she acts with malicious intent to cause the deprivation of an individual's clearly established statutory or constitutional rights.

Cases in Texas show that as long as public official act in good faith, damages will not be awarded against them. In 1994, the Court of Appeals found that a water board had exercised good faith in terminating service to a customer and found no personal liability.

On the other hand, in 1991, an appeals court upheld a ruling holding water board directors personally liable for damages in denying a developer utility capacity. The evidence showed that, not only had the directors spoken with contempt regarding the developer's project, but the board also had failed to live up to its previous commitments regarding the projects. The developer was treated in a discriminatory manner, as well.
Here the court found the directors to be acting in bad faith and with a willful and malicious intent. The court assessed punitive damages, not only against the water authority, but also against the directors individually. (Incidentally, much of the evidence of this conduct was obtained from recordings of the discussions of the directors at public meetings!)

Spending Public Money

Another area that causes concern is the expenditure of public funds. Are there limits, and if so, what are they?

There are constitutional prohibitions against spending public money for non-public purposes, and court decisions, as well as attorney general opinions, have given some direction.

For the expenditure of funds to be valid, three general criteria must be met: (1) advancement of public purpose, (2) receipt of adequate consideration; and (3) retention of sufficient control to ensure accomplishment of the public purpose.

While these guides are not precise, they are clearly structured to give public officials some latitude in determining what goals are beneficial to the constituents of the body and how that benefit will be received by the constituents.

Examples cover a broad range, from sending Metro buses to the Olympics to city funding of Presidential libraries. Another possibility includes the use of funds by a special district to ensure the delivery of municipal services at the levels required by law after annexation by a municipality, whether by negotiation or litigation.

Texas law allows taxpayers to file suit to prevent improper expenditures of public funds. However, if the money is already spent, a taxpayer does not have standing to bring suit to recover such public funds.

In summary, public officials enjoy some protection from litigation, even if their actions cause damage to another, so long as they act fairly and without malice toward others in their sphere of power.

However, as two presidents of the United States have learned, the immunity they and others enjoy extends only to actions in the discharge of official duties and not to political or personal pursuits. This is so even if they are in office at the time.