by Richard Lorenz and Doug Kincaid

# Government tort liability across state lines


Consumer-owned utilities that are also government bodies, such as PUDs and municipal utilities, enjoy special statutory protections and limitations against legal claims and liabilities arising out of their otherwise wrongful acts. For example, a plaintiff seeking compensation for an accident or for property damage caused by a PUD or municipal utility would have to jump through more procedural hoops, and would possibly recover less damages, than a plaintiff pursuing the same claims against an investor-owned utility. These statutory tort claim limitations arise out of the age-old legal doctrine of "sovereign immunity." Broadly speaking, sovereign immunity means that a governmental body (*ie*, the "sovereign") is immune from lawsuits except when it consents to them.

For the protection of its citizens, every state has enacted a statutory framework partially waiving sovereign immunity. The Oregon Torts Claims Act (OTCA), for example, allows persons to sue public bodies for torts, subject to certain conditions and limitations. The OTCA caps damages in a tort claim against the state for injury or death, however, at $2,073,600. The OTCA also generally requires that the plaintiff provides notice of the claim prior to initiating legal action, and imposes shorter time limits for certain claims. Although the State of Washington provides no statutory cap on damages, it does also require that tort claims against the state (or its subdivisions) be presented to the office of risk management 60 days before filing.

The specific question addressed in this article is what happens to statutory tort claim limitations when the utility crosses state lines? While statutes may clearly prescribe the parameters of government liability within a state's own court system, they do not (and cannot) address tort liability in another jurisdiction. Foreign states are not required to honor or enforce the statutory protections available to government bodies in their home states. A PUD or municipal utility that owns a generating facility or other equipment in a neighboring state may face substantially greater legal risk as compared to owning the same equipment in its own state. What about damage caused by a line crew offering aid to a utility in a neighboring state pursuant to a mutual aid agreement? Or utility managers and directors that drive a utility-owned vehicle to an industry conference out of state and get in a car accident?

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Supreme Court addressed whether Nevada's statutory waiver of sovereign immunity, specifically the cap on damages, applied in California. Several California residents suffered severe injuries in an automobile collision on a California highway. The driver of the other vehicle was an employee of the University of Nevada driving a car owned by the State of Nevada on official state business. Plaintiffs filed suit for damages in California court; Nevada filed a pretrial motion to limit the amount of damages pursuant to Nevada's $25,000 limit on any award in a tort action against the state.

The Supreme Court determined that the doctrine of sovereign immunity affords no support for a claim of immunity in the courts of another sovereign. Further, the Full Faith and Credit Clause of the federal Constitution does not require one state to apply another state's law in violation of its own legitimate public policy. California had a substantial interest in providing full protection to those who are injured on its highways by the negligence of residents and nonresidents, and enacted legislation to allow those injured on its

highways through the negligence of others to secure full compensation. Consequently, nothing prohibited California from adopting its policy of full compensation, and Nevada was subject to full liability for the tort committed by its employee.

Washington courts have addressed similar cross-border disputes. In *Haberman v. WPPSS*, 109 Wn.2d 107 (1987), bondholders brought claims against the Washington Public Power Supply System (WPPSS). WPPSS, as readers know, included consumer-owned utilities from Washington, Oregon, and Idaho. Government bodies from Oregon and Idaho sought protection under the tort-claim limits afforded by the laws of their home states. To determine which state law would apply, the Washington court applied the "most significant relationship test," weighing the place of injury; the place where the conduct causing the injury occurred; the residence of the parties; and the place where the relationship is centered. Noting that the Washington legislature waived sovereign immunity to discourage tortious governmental conduct, the court held that application of Washington law would further the legislature's purpose without interfering with Oregon's or Idaho's ability to govern. Therefore, the court applied Washington law and held that the Oregon and Idaho utilities were not protected by tort-claim limits enacted in their home states.

In *Williams v. State*, 76 Wn. App. 237 (Wash. Ct. App. 1994), however, a Washington court found that the Oregon statute did apply under the circumstances. There, an Oregon resident was killed when his truck collided with a structure on the Washington side of the I-5 bridge; the driver's wife filed a wrongful death action against both Washington and Oregon in Washington court. The State of Oregon argued that the plaintiff failed to comply with the OTCA notice requirement — although the plaintiff had complied with all applicable Washington requirements. The court again applied the "most significant relationship test" and found that Oregon had a justifiable expectation that its own notice statute would protect it equally in Washington. The court granted Oregon's motion to dismiss.

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The takeaway from these cases is that a consumer-owned utility that is also a governmental body cannot be certain that statutory tort claim limits applicable in its home state would also apply in a neighboring state. The legal risks of owning property in, providing services in, or even traveling to other states could dwarf the legal risks of engaging in the exact same activities at home. In such case, affected utilities would be well advised to explore legal tools, such as contractual indemnity provisions and expanded liability insurance coverage, that would help mitigate that increased risk exposure. NWPPA

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