



The Ever Changing World of Sovereign Immunity

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“Despite the frequency of opinions on the subject from this Court, the law of sovereign immunity, and the related doctrines of governmental immunity, official immunity, and qualified official immunity, is still difficult to apply, no doubt in part because of the large number of decisions on the subject. Attitudes about the propriety of immunity for the state and its subdivision, government agencies and their employees, and government-created entities have shifted back and forth over time and personnel changes on the Court.” *Ky. River Foothills Dev. Council, Inc. v. Phirman*, 504 S.W.3d 11, 16, (Ky. 2016); citing *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009).

This statement by the Kentucky Supreme Court illustrates the evolving Kentucky law regarding sovereign and governmental immunity. In *Comair* the Supreme Court attempted to clarify any confusion in the law and establish a more certain framework to resolve the question concerning the types of businesses and organizations entitled to immunity. In *Comair*, the Supreme Court set forth a two prong test. First, one must look to see who created the entity in question. *Comair*, 295 S.W.3d at 99. Second, and most importantly, does the entity provide a governmental function? *Id.* To satisfy the second prong, there are two elements that need to be addressed. Whether the entity’s function is “governmental”, and whether the matter is of a “statewide” concern. *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855, 862 (Ky. 2015). In a subsequent case the Court noted that *Comair* involved airport infrastructure which is a service that cannot be provided by a private enterprise. *Bd. of Trs., v. Pope*, 528 S.W.3d 901, 909 (Ky. 2017). If the entity seeking immunity provides a service that is easily available through private sources, it now appears that immunity may be denied on this basis alone.

Other Kentucky cases have given insight into what type of functions and concerns would qualify for immunity. Policing agencies, public schools, corrections institutes, public

highways, and airways are all entities or necessary functions that would most likely qualify. *Coppage*, 459 S.W.3d at 864. Storm water management (*Coppage*), the Kentucky School Boards Insurance Trust (*Bd. of Trs.*), and substance abuse recovery programs provided through a community action agency (*Ky. River Foothills*) cannot avail themselves of immunity.

In sum, the type of organizations entitled to immunity is still a troublesome question in many situations. As admitted by the Kentucky Supreme Court, the lack of clarity is due, in part, to personnel changes on the Court.