The doctrine of sovereign immunity has taken many twists and turns through the Kentucky courts and legislature over the years. Most recently, the Kentucky Supreme Court held that the University of Kentucky did not waive sovereign immunity by the purchase of liability insurance. Will that decision apply to public elementary and secondary schools and counties? What if the entity has purchased commercial insurance rather than using a self-insured fund? These and other issues, as well as a brief explanation and history of the sovereign immunity doctrine are outlined herein.

The doctrine of sovereign immunity generally protects and exempts state and local government, agencies, and occasionally their agents, from liability in civil litigation alleging tortious conduct or breach of contract. When immunity protection is available, the governmental entity or agent is usually entitled to a complete dismissal of the litigation. Historically, this protection was premised upon the monarchial proclamation that “the King can do no wrong.” In more recent times, however, sovereign immunity continues to exist, but is now intended to prevent undue distraction in the performance of public service and to otherwise limit the extent of claims which can be asserted against public funds, public property and other public resources.1

In Kentucky, sovereign immunity originates in Section 231 of the Kentucky Constitution, which provides that the General Assembly may “direct in what manner and in what courts suit may be brought against the Commonwealth.” Unfortunately, sovereign immunity protection in Kentucky is neither automatic nor absolute. The framers of our State Constitution specifically reserved to the General Assembly the authority to alter or reduce this protection. Additionally, through the appropriate role of constitutional interpretation and construction, the judiciary has imposed certain restrictions on both the applicability and the scope of sovereign immunity. Accordingly, any attempt to assess the viability of a sovereign immunity defense in civil litigation necessarily requires a two part analysis:

1. Is the entity or agent within the class of governmental agencies generally entitled to sovereign immunity protection?
2. If so, has the General Assembly or the judiciary acted to limit or reduce the protection under the given facts or circumstances?

Who is entitled to sovereign immunity protection?

Not every quasi-governmental agency is entitled to the protection of sovereign immunity. To the contrary, the terms

continued on page 3
Recent Developments

Chase Local Government Law Center

The Chase Local Government Law Center has several projects in progress this semester. First, the Law Center is working with the Kentucky General Assembly's Task Force on Local Government Organization. This task force plans to study the organization and efficiency of local government in Kentucky. The next meeting is scheduled for October 27 in Frankfort.

Second, the Law Center's clinical program is in full swing. Approximately twelve Chase College of Law students are interning with local government attorneys across Kentucky. Guest lecturers for the program include Rep. Jim Callahan, David Jones, Executive Director, Kentucky Medical Examiner's Office, Tamra Gormley, Director, Victims' Advocacy Division, Office of the Attorney General, and Susan Blake, Special Assistant Attorney General.

Also, the Law Center is currently compiling data for the Statute Reviser, Legislative Research Commission. The Law Center is determining which local governments have adopted the Uniform Residential Landlord-Tenant Act. This information will assist communities that are considering adopting a landlord-tenant ordinance.

Finally, the Law Center has completed its Model County Administrative Code. Anyone interested in receiving a copy, please contact our office.

Kathleen Gormley Hughes
Interim Director

Additional Attorney Hired at the Department for Local Government

The Department for Local Government (DLG) would like to announce the addition of a new attorney to the DLG legal staff. Mr. Richard Ornstein was hired by the Department on June 16, 1998. You can reach Tom Troth or Rich Ornstein by calling (502) 573-2382.

Training of Newly Elected County and City Officials

COUNTY JUDGES/EXECUTIVE, MAGISTRATES, COMMISSIONERS AND COUNTY ATTORNEYS

On December 9-11, 1998, the DLG is sponsoring training for newly elected county judges/ executive, magistrates, commissioners and county attorneys. For the first time this year, the Department is holding its training sessions in conjunction with the County Attorney's Association. The training session will be held at the Holiday Inn Fern Valley Road, Louisville, Kentucky. Some of the sessions currently scheduled include: 1) Requirements for newly elected officials; 2) Personnel Administration; 3) Debt Management; 4) Budgeting and Purchasing; 5) County attorney's responsibilities to the fiscal court; 6) Disaster and Emergency Services; 7) Property Taxation; 8) County Administrative Code, and 8) Grants available to Local Governments.

Modified one day training sessions for newly elected county judges/executive, magistrates, commissioners and county attorneys are planned for:
- January 14, 1999 at Kentucky Dam Village;
- January 15, 1999 at University Plaza Hotel in Bowling Green;
- January 29, 1999 at Sheraton Suites, Richmond Road in Lexington;
- January 30, 1999 at Jenny Wiley State Park.

Special training sessions for newly elected county clerks and county sheriffs on:
- December 14, 1998 at Kentucky Dam Village;
- December 15, 1998 at the University Plaza Hotel in Bowling Green;
- December 16, 1998 at the Bluegrass Area Development District; and

TRAINING FOR NEWLY ELECTED CITY OFFICIALS

In addition to the training already set up for newly elected county officials the DLG will be working the Kentucky League of Cities in preparation for training for newly elected city officials. Stay tuned for further information regarding city official training.

The DLG hopes you will attend some of the many training opportunities available to local officials in the coming months. When you are in Frankfort, please stop by and see us at 1024 Capital Center Drive, or visit us at our web-site: http://www.state.ky.us/agencies/local_gov/

Thank you for your continued cooperation as we work together to advance the interests of local governments throughout the Commonwealth.

Thomas M. Troth, Counsel
Department for Local Government

Chase SBA Earns Top Honors

Chase received a very significant honor recently at the American Bar Association Law Student Division annual conference in Toronto, Canada. Chase won the SBA (Student Bar Association) of the Year Award for the Mid-west Region for the 1997-98 academic year. Accepting the award on behalf of Chase were William Roberts, incoming SBA President, and Blaine Hamilton, Chase's ABA/ Law Student Division Representative. According to Mr. Roberts, special recognition goes to Elizabeth Combs Risner, a 1998 Chase graduate, who served as SBA President for the 1997-98 school year, for her substantial contributions toward earning this award.

The Mid-west region includes all law schools in the following states: Kentucky, Ohio, Michigan, Illinois, Wisconsin, Indiana, Minnesota, South Dakota, North Dakota, Nebraska, Missouri and Iowa.

Some of the criteria used in determining the recipient of this award were: the SBA’s budget, the relationship established between the ABA Law Student Division and the SBA at the school, and public interest work performed by the SBA.

The Chase SBA made a genuine commitment to public service during the 1997-98 year. In the fall of 1997, the SBA organized students and faculty to work with ReSTOC, and organization that assists low income families. Our students and faculty worked in the Over-the-Rhine area alongside families who are now living in the buildings. Mealtimes were spent serving food in a soup kitchen. The SBA sponsored a canned food drive in November, and a holiday gift project in December.

Earlier in the school year, William Roberts was named ABA/ Law Student Division Representative of the Year for the 1997-98 year for the 6th Circuit, which includes all law schools in Kentucky, Ohio and Michigan.

“We are very proud of our student body and our student government’s commitment to service,” acknowledged Dean David C. Short. “The commitment of Chase’s students to public service should be commended. From Paducah to Pikeville and Perry County, they continue to set standards for excellence in public service,” said Dean Short.

Kelly Beers, Associate Dean for Enrollment Management
of Section 231 of the Kentucky Constitution strictly refer to suits against the Commonwealth. The Constitution provides no express protection to local and county entities.2 Despite this apparent limitation, the Courts can and often do review the specific claims filed against quasi-governmental entities to determine whether the suit may be legitimately classified as one “brought against the Commonwealth,” thereby falling within the protection of sovereign immunity.3 In this respect, the Courts have determined that an entity is entitled to immunity only if it is both under “the direction and control of the central State government,” and . . . “supported by moneys which are disbursed by authority of the Commissioner of Finance out of the State treasury.”4

Under this test, the Courts have applied sovereign immunity protection to various state and even county entities that perform “integral” functions of state government,5 local boards of education,6 and universities and university medical centers.7 On the other hand, when an entity performs proprietary functions, such as the operation of a golf course or center for performing arts, the Courts have found that such activities are not “integral” to the function of state government, and therefore are beyond the applicable scope of sovereign immunity protection.8 Furthermore, municipal corporations have been characterized as local entities created by act of the General Assembly, yet they do not perform services of central state government, and therefore do not qualify for sovereign immunity.9 In essence, an entity qualifies for sovereign immunity protection only if it can satisfy both prongs of the Bens Test.

In addition, sovereign immunity occasionally protects individual governmental agents and officers from personal liability.10 The doctrine of official immunity protects public agents from such liability only when the alleged liability results from the performance of discretionary functions within the general scope of the agent’s official authority.11 Unfortunately, the distinction between discretionary functions (which are protected under sovereign immunity), and ministerial functions (which are beyond the protection), is neither exact nor easily discernable. The Courts, however, have attempted to provide some guidance in this regard:

Commonwealth v. Frost, 295 Ky., 137, 172 S.W.2d 905 (1943), stated that . . . [t]he essence of a discretionary power is that the person or persons exercising it may choose which of several courses will be followed. The power to exercise an honest discretion necessarily includes the power to make an honest mistake of judgment. Citing Bancamerica-Blair Corp. v. State Highway Com’n, et al., 265 Ky. 100, 95 S.W.2d 1068 (1936).

Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful and where it is left to the will or judgment of the performer to determine in which way it shall be performed. However, an act is not necessarily taken out of the class styled “ministerial” because the officer performing it is vested with a discretion respecting the means or method to be employed.12

Additionally, the Courts have consistently stated that official immunity is no defense to claims grounded in constitutionally impermissible misconduct.13 Based upon these limitations, the Courts have found police officers personally liable for negligent operation of their vehicles;14 university doctors personally liable for negligent treatment of patients;15 and governmental agents personally liable for civil rights violations,16 even though their governmental employers were protected from liability under the doctrine of sovereign immunity.

In summary, governmental entities are entitled to immunity only if they are under “the direction and control of the central State government,” and . . . are “supported by moneys which are disbursed by authority of the Commissioner of Finance out of the State treasury.” Additionally, claims against individual governmental agents or employees are barred under the doctrine of qualified immunity if the alleged liability results from the performance of discretionary functions within the general scope of the agent’s official authority, and does not otherwise involve constitutionally impermissible conduct. If an allegation of civil liability falls within these stated parameters, the Court will extend sovereign immunity protection to the governmental entity or agent, unless the General Assembly has otherwise waived or limited immunity through legislative enactment.

General Assembly Waiver of Sovereign Immunity Protection under the Authority Provided by Section 231 of the Kentucky Constitution?

As noted above, Section 231 of the Kentucky Constitution accords the Commonwealth absolute immunity from suit until the General Assembly acts to reduce or limit this protection. Accordingly, to determine whether sovereign immunity protection applies to a particular claim, one must additionally determine whether the Legislature has acted to waive or limit the protection.

BOARD OF CLAIMS ACT: The Courts of this State have consistently ruled that the General Assembly partially waived the Commonwealth’s immunity through the enactment of the Board of Claims Act, KRS Chapter 44.17 Thus, to a limited extent, the Commonwealth is subject to suit and liability for the negligence of its officers and agents, as specifically set forth under the terms of the Act. This waiver, however, is limited in several respects. First, the Act waives immunity and subjects municipalities to suit for “ordinary torts,” but preserves immunity protection for claims arising from the “exercise of legislative or judicial or quasi-legislative or quasi-judicial functions.”18 Additionally, the Act only serves as a partial waiver of immunity, by specifically limiting the amount and types of damages which plaintiffs may recover. Finally, the Courts have specifically stated that the Act does not apply to claims against counties or local governments.19

STATUTES ALLOWING THE PURCHASE OF LIABILITY INSURANCE: In the recent past, the law concerning sovereign immunity waiver as it relates to the purchase of liability insurance, was seemingly fraught with inconsistency.
Over the years, the courts have increasingly concluded that statutes which authorize a governmental entity to purchase insurance are sufficient to constitute a legislative waiver of immunity, to the extent the entity ultimately purchases such insurance. Accordingly, the Courts would impose liability against governmental entities that had purchased liability insurance, but permit immunity protection if the entity simply refused or neglected to purchase such coverage.

The Taylor v. Knox County Bd. of Educ., Ky., 167 S.W.2d 700 (1942), opinion appears to be the first case to address the effect of authorized liability insurance on the doctrine of sovereign immunity. Kentucky courts had initially held that suits sounding in tort against boards of education were generally barred under the doctrine of sovereign immunity. In 1940, however, the General Assembly enacted KRS 160.310, which permitted a board of education to set aside state funds to purchase liability insurance against the negligence of the drivers or operators of school buses. Two years later, the Court in Taylor held that the enactment of KRS 160.310 effectuated a limited waiver of sovereign immunity for district school boards in regard to claims arising out of the negligent driving.

Following the Taylor line of cases, the Kentucky Supreme Court extended the immunity waiver theory to other state agencies and statutes authorizing the purchase of insurance. In Dunlap v. University of Kentucky Student Health Servs. Clinic, Ky., 716 S.W.2d 219 (1986), the Court held that any state agency which obtains liability insurance pursuant to statute, waives sovereign immunity to the extent of the insurance coverage.

In direct response to the 1986 Dunlap decision, the Kentucky General Assembly immediately amended the Board of Claims Act to overrule the Court’s holding. The amended statute reads as follows:

**Legislative intent as to sovereign immunity in negligence claims.** - The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employees while acting in the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies in all other situations except where sovereign immunity is specifically and expressly waived as set forth by statute. . . .

KRS 44.072 (effective July 15, 1986). The General Assembly then enacted a limited waiver at KRS 44.073(2), which states as follows:

The Board of Claims shall have primary and exclusive jurisdiction over all negligence claims for the negligent performance of ministerial acts against the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any officers, agents, or employees thereof while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies.

KRS 44.073(2) (effective July 15, 1986). The General Assembly also changed the statute to specifically state that “the purchase of liability insurance or the establishment of a fund for self-insurance by the Commonwealth, its cabinets, departments, bureaus, or agencies or its agents, officers, or employees thereof for a government related purpose or duty shall not be construed as a waiver of sovereign immunity or any other immunity or privilege thereof held.” KRS 44.073(14). Therefore, it appeared that through the 1986 Amendments, the General Assembly had clarified and seemingly resolved that the purchase of liability insurance by a state agency did not act as a waiver of sovereign immunity.

Unfortunately, the courts were slow to follow the legislative mandate. The first case to directly address the 1986 Amendments and their effect on the doctrine of sovereign immunity was not decided until ten years later. In Board of Educ. of Rockcastle County v. Kirby, Ky., 926 S.W.2d 455 (1996), the Kentucky Supreme Court relied upon the earlier rationale of Taylor, and ruled that a school board was still subject to liability under KRS 160.160(1), if the board had purchased a policy of general liability insurance. In so holding, the Court erroneously stated that “[t]he impact of KRS supra, is to the effect that the Board of Claims is not the only method of statutorily waiving sovereign immunity.” Kirby, 926 S.W.2d at 456. The KRS case, however, clearly failed to address the applicability of the 1986 amendments in regard to alleged waiver of immunity. “The meaning of the 1986 statutory changes remains undecided for another day when the statutory entity involved qualifies for sovereign immunity. . . .”

Finally, in 1997 the Kentucky Supreme Court attempted to resolve this apparent conflict. In Withers v. University of Kentucky the Court unambiguously and conclusively held that sovereign immunity, “. . . is not lost or diminished or affected in any manner by the purchase of liability insurance or the establishment of an indemnity fund, whether directed or authorized by statute or merely undertaken without authorization. . . .” The Court further stated as follows:

We now believe that any construction of other statutes to result in a waiver of immunity which differs from the language of the Board of Claims Act is untenable. In various places throughout the Board of Claims Act, waiver of immunity is alluded to and in every instance an express waiver is required.

As noted by the Court, the General Assembly used specific and express language where it intended to waive sovereign immunity within the context of the Board of Claims Act. Furthermore, the Court specifically advised that the construction of “other statutes” which results in a waiver of immunity contrary to the language of the Board of Claims Act is “untenable.” The Withers Court clarified that waiver of immunity could occur only through the express and unambiguous language of legislative enactment.

The general impact of this decision on the doctrine of sovereign immunity in Kentucky, and its particular effect on the status of sovereign immunity for boards of education and other governmental entities not otherwise included within the express Board of Claim waiver, was to restore immunity to such entities.

The Withers decision was recently reiterated in the Kentucky Supreme Court’s decisions in Franklin County v. Malone,
35. Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, to the extent that any governmental agency purchases motor vehicle liability insurance, sovereign immunity shall be waived to the extent of the insurance coverage.24

Although this change in the current status of immunity law would appear to have little impact on the ultimate exposure in most claims, it is difficult to fully appreciate how the Courts will interpret the provision. This new change will likely cause confusion regarding application of immunity protection in “negligent entrustment” actions against school boards and other governmental employers charged with the duty of selecting, training or supervising qualified drivers to operate vehicles on behalf of governmental entities. As a general rule, an entity or employer must exercise reasonable care while entrusting a vehicle to a qualified and experienced driver, and to the extent this duty is violated and an unqualified driver causes an accident, the employer could suffer liability under a negligent entrustment theory. Such claims are often within the coverage terms of standard automobile insurance policies.

Therefore, the recent statutory change in immunity law will likely result in the assertion that claims of negligent entrustment or vicarious liability are now outside the protection of sovereign immunity under the new law. Of course, claims of vicarious liability against governmental entities are often prohibited.25 However, with the recent change in sovereign immunity, there are now no specific prohibitions against negligent entrustment claims against such entities or governmental employers.

As an additional complicating factor, in the context of school board liability, it must be noted that KRS 160.310 in no way authorizes the Board to purchase automobile liability or indemnity insurance for the Board’s alleged negligent hiring, training or supervision of bus drivers. The statute only permits the purchase of automobile liability coverage to protect against the negligence of drivers or operators of school buses, which arguably protects the driver directly, and the Board through vicarious liability. The proper inquiry then becomes whether the new statutory waiver provision effectively waives sovereign immunity in situations where a school system or governmental entity purchases automobile insurance, which by the contractual terms of the insurance policy, extends protection for the entity’s own negligent hiring, training or supervision of drivers. KRS 160.310 does not appear to specifically authorize such coverage, as a negligent entrustment claim is a direct allegation of negligence against the Board, separate and apart from the independent negligence of drivers or operators. It is difficult to anticipate how the courts will resolve this specific issue, however, it could be argued that the purchase of “unauthorized” coverage does not act as a waiver of immunity.

As a final consideration, some may also question the constitutionality of the legislative attempt to waive sovereign immunity through a budget act. There is a very real possibility that the attempted partial waiver of sovereign immunity through the 1998 Executive Budget Act may violate §51 of the Kentucky Constitution. That constitutional mandate provides as follows:

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by the reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length.

This constitutional mandate contains two separate provisions. One directs that an act of the General Assembly shall only relate to one subject and requires that the subject be expressed in the title of the act.26 The other directs that no existing law shall be revised, amended or its provisions conferred or extended by referring to its title only, but rather when such action is intended, the law is required to be re-enacted at length.

Although it has been declared that the General Assembly may repeal or modify existing statutes through enactment of a budget bill, the courts have recognized that any such budgetary legislation must still comply with the mandatory requirements of §51 of the Kentucky Constitution.27 Accordingly, the first necessary inquiry is whether the title to the 1998 Executive Budget Act provides “a clue” to the General Assembly and the public at large, that the Act in-
tended to waive sovereign immunity under certain circumstances. Although a copy of the 1998 Act's title is unavailable at this time, most budget acts in the past have employed the same or similar title language, to wit:

“AN ACT relating to appropriations for the operation, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state supported activities.”

To the extent the 1998 Budget Act uses this same language, there will be a viable argument that the legislation fails to adequately provide “a clue” that it modifies the doctrine of sovereign immunity, thereby violating the subject/title provisions of §51 of the Kentucky Constitution. Additionally, it appears as though the General Assembly arguably violated the publication and re-enactment provisions of §51 of the Kentucky Constitution by failing to publish and re-enact KRS 44.073(14) which currently states:

The filing of an action in court or any other forum or the purchase of liability insurance or the establishment of a fund for self-insurance by the Commonwealth, its cabinets, departments, bureaus, or agencies or its agents, officers, or employees thereof for a government related purpose or duty shall not be construed as a waiver of sovereign immunity or any other immunity or privilege thereby held. (Emphasis added).

Based upon these constitutional deficiencies, the new statutory waiver provision should be invalidated. Unfortunately, any constitutional challenge to the provision will likely result in a mere temporary cure. Because the perceived constitutional deficiencies are procedural in nature, any successful challenge will ultimately result in a re-enactment of the waiver through constitutionally appropriate methods.

Accordingly, after numerous judicial and legislative attempts to clarify the status of immunity law, it now appears as though the purchase of automobile insurance will once again act as a limited waiver of immunity. While it is difficult to fully and accurately predict how the Courts will interpret and apply the new statutory waiver, based upon the recent legislative and judicial response to the fluctuating scope of sovereign immunity, we should only expect a continued reduction in immunity protection.

This is often referred to as the Berns Test.

3. The determination of whether an entity is entitled to protection by the constitutional principle of sovereign immunity is for the judiciary. “The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is solely the function of the judiciary to do so. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court’s view of the constitution is contrary to that of other branches, or even that of the public.” Rose v. Council for Better Education, Inc., Ky., 790 S.W.2d 186, 209 (1989).
Recent Kentucky Supreme Court Decision Simplifies Standard for Punitive Damage Awards

by
Douglas Hallock, Frost & Jacobs
1100 Vine Center
Lexington, Kentucky 40507

A recent Kentucky Supreme Court decision has partially invalidated KRS 411.184, the Kentucky punitive damage statute, thereby reducing the standard of proof necessary to support punitive damage awards at trial. As a result of the Court’s April 16, 1998 ruling in Williams v. Wilson, No. 96-SC-1122-DG, (Ky. 1998), which became final on September 3, 1998, litigants will be entitled to punitive damages upon an objective finding of gross negligence.

Prior Statutory Standard for Punitive Damages

In 1988, the Kentucky General Assembly considered a broad tort reform proposal, and from that enacted KRS 411.184, which was intended to modify the common law standard for punitive damage awards. Under that statute, a litigant is entitled to an award of punitive damages only “upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice,” defined as follows:

(a) “Oppression” means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.

(b) “Fraud” means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.

(c) “Malice” means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

Ruling In Williams v. Wilson

In Williams v. Wilson, the Court addressed the constitutional validity of the “malice” requirement, and limited its decision in that regard. The Court noted that under that provision of the statute, punitive damages could only be awarded if the plaintiff could first prove, by clear and convincing evidence, that the defendant intended to cause injury, or otherwise acted with a subjective awareness that death or bodily harm would result. In contrast, the well established common law standard for awarding punitive damages prior to the enactment of KRS 411.184, was “gross negligence,” which is conduct specifically lacking in intent or actual knowledge of the result. Accordingly, the Court concluded that the “malice” provision of the statute imposes a more stringent burden on plaintiffs seeking punitive damages, thereby violating Sections 14, 54 and 241 of the Kentucky Constitution, which limit the power of the General Assembly to alter or diminish common law rights to recover for personal injury or death.

As a result of the Court’s ruling, punitive damages will now be awarded in Kentucky upon a mere showing of gross negligence, without any reference to or proof of the defendant’s actual intent or subjective knowledge. For procedural reasons, the Court declined to address the validity of the remaining aspects of the punitive damage statute in this matter. However, it is anticipated that the Court will ultimately invalidate the “clear and convincing proof” requirement as well as the “intent” element contained within the respective definitions of oppression and fraud.

New Property Tax Penalties and Fees

by
Debra Eucker

Debra Eucker is the Director of the Department of Property Valuation, Division of Local Valuation within the Kentucky Revenue Cabinet.

House Bill 568, the “Collections Bill,” has made several significant changes to the property tax collection process. Most of these changes are effective for the collection of the 1998 property tax bills. One of the most significant changes concerns the penalties and fees which are imposed when a tax bill becomes delinquent.

Prior to the passage of HB 568, there was a 2% penalty which was added to the unpaid tax bill when it became delinquent on January 1 (or 60 days after the issuance of the bill, if the tax calendar had been delayed.) For 1998, the 2% penalty has been increased to 5%.

There is also a new 10% sheriff’s fee which is added to the tax bill at the beginning of the 10% penalty period. This fee will be collected up to the date of the sheriff’s delinquent tax bill sale. After the tax claim sale, the sheriff’s 10% add-on fee is no longer collectible, however, a 10% clerk’s fee and a 20% county attorney’s fee will be imposed. These add-on fees will be paid by the delinquent taxpayer. Prior to the passage of HB 568, these fees were deducted from the taxing districts’ revenues.

Fliers which describe these new add-on fees have been made available to all sheriffs for insertion with tax bills, and the sheriffs have been instructed to include an explanation of the new fees in their newspaper advertisements.

Should you need any further information about HB 568, please contact the Kentucky Revenue Cabinet, Division of Local Valuation at (502) 564-8338.
Twelve years ago the City of Louisville and Jefferson County signed an agreement which froze the land annexation to protest the autonomy of small cities on Louisville’s out-skirts and protect revenue sources of county and city governments. That agreement, called the Louisville/ Jefferson County Compact, was renewed for 10 years in July by the county’s two largest governments. Although the compact is not “a perfect solution” to government inefficiencies and duplicated services, it has worked. Jefferson County Deputy County Judge Executive Bruce Traughber told members of the Special Task Force on Local Government in Counties Containing a City of First Class July 29.

Louisville Deputy Mayor Tina Heavrin agreed, stating that the compact has created financial equality. In the 1980s, Louisville and Jefferson County’s occupational tax revenue only grew by $1 million from 1976 to 1986. That changed from 1986 to 1997 under the compact, when city and county shared tax revenue grew by $36 million, according to the 1998 compact proposal.

Heavrin said that today, 86 percent of local tax dollars excluding school taxes are split between the city and county government, and that small cities receive 8.8 percent of total tax dollars. The county’s 21 fire districts share five percent.

“The main reason the annexation has caused a big problem for this community is because of the way the occupational tax is structured,” H eavrin said. “Now, the city and county both benefit from increased revenues in the community.” Heavrin told members.

Local government officials from Louisville and Jefferson County and state legislators sitting on the task force listened as Traughber and Heavrin discussed the renewed compact for shared services between the two governments, and how the compact affects the more than 90 small cities in Jefferson County.

Louisville and Jefferson County share funding of the metro parks system, the library and an Office of Economic Development (OED) which has benefited from shared taxes under the compact. The 1998 compact also created an Economic Growth Fund which will be funded with $2 million in city and county funds each year for the next five years. The business arm of the OED, according to the 1998 proposal, has been fused with the Louisville area Chamber of Commerce for greater efficiency.

“We wanted people to have one-stop shopping,” Traughber said.

The approximately 135,000 people who live in Jefferson County’s small cities also benefit from services offered by Louisville and Jefferson County, but the services those cities provide–policing, garbage pickup, public works such as roadwork–help alleviate the county’s financial burden.

If residents in the small cities want an “urban level of service,” Traughber said it is difficult to provide that service without small suburban governments.

The cities and the county are currently discussing creation of a merged police force, merged inspection service and shared responsibility for licenses and permits. The small cities will present their view of merged services at future task force meetings.

Traughber said although the compact streamlines government, both cities and the county provide important services to their residents. Jefferson County provides jail service, youth detention, animal and air pollution control, public works and human services while funding emergency services and financing county administration. The City of Louisville’s operational costs include safety and emergency services, sanitation, capital building projects, the zoological gardens, housing and urban development.

“The goal of the compact was to have the city and county get more tax revenue,” Heavrin told the task force. “The only way to do that was to share the occupational taxes.”

The task force was created by the 1998 General Assembly to address issues in Louisville-Jefferson County.

OAG Opinions

Opinions of the Attorney General are legal opinions that the Attorney General’s Office provides to public officials. These opinions clarify Kentucky law for public officials, and represent the official position of the Attorney General’s Office. Although these opinions do not have the force of law, they are persuasive and may be cited in court.

OAGs are called formal opinions. The Attorney General’s Office may also issue letters to public officials providing informal advice or information. These letters do not receive the same review as OAGs, and are not considered legal authority. Therefore, this newsletter will not publish informal opinion letters.

Following is an overview of selected formal OAGs issued from July 1, 1998 to September 30, 1998, which discuss local government issues. Portions are reprinted directly from the OAGs. If you would like a copy of a complete OAG, please contact our office.

OAG 98-10: Vehicles transporting primary forest products

Issue: Whether the 10% weight tolerance limits for vehicles transporting primary forest products is available to all commercial vehicles transporting primary forest products or only those registered exclusively for transporting such products; KRS 189.222; KRS 186.050.

Requested by: Sen. Richard Sanders

Date: July 27, 1998

Synopsis: KRS 189.222 sets forth height, length and weight
limits for motor vehicles, including limits for vehicles registered pursuant to KRS 186.050 and engaged in transportation of primary forest products. This statute allows a 10% weight tolerance for any vehicle registered for transporting primary forest products. KRS 186.050 allows a 25% discount in annual registration fees for commercial vehicles exclusively used for transporting primary forest products.

The Attorney General stated that the statutes are clear and unambiguous. To receive the reduction in annual fees, the vehicle must be exclusively used for transporting primary forest products. To receive the 10% weight tolerance, the vehicle must be properly registered for transporting primary forest products.

**O AG 98-11: Public disclosure of bid documents**

**Issue:** Whether documents tendered as part of a competitive sealed bidding become public record if the bids are rejected; KRS 45A.080; KRS 45A.085; KRS 45A.090; O AG 85-68.

**Requested by:** Rep. Robert R. Damron

**Date:** July 27, 1998

**Synopsis:** Pursuant to KRS 45A.080(4) bid documents submitted to the Commonwealth through competitive sealed bidding become public record when bids are opened. Bid documents submitted through competitive negotiations become public record at the time the contract is awarded. KRS 45A.085(6); O AG 85-68; 200 KAR 5:307 Section 4.

When sealed bids are rejected, competitive negotiations may occur. Therefore, the following questions are raised:

1) Can public disclosure of bid documents associated with a competitive sealed bid be delayed until a determination is made as to whether the contracting agency will move to competitive negotiation?

2) If a decision is made to move to a competitive negotiation, can the original documents be considered part of the negotiation process and remain closed until a contract is awarded or negotiations are canceled?

The Attorney General answered no to both questions. The competitive sealed bidding process and the competitive negotiation process are two successive processes, not simultaneous processes.

**O AG 98-12: Concealed deadly weapons**

**Issue:** Whether employers may prohibit duly licensed employees from keeping concealed deadly weapons in personally owned vehicles parked on employer’s premises; KRS 237.110 (13)

**Requested by:** Rep. Bob Heleringer

**Date:** September 9, 1998

**Synopsis:** KRS 237.110 allows employers to prohibit employees from carrying concealed weapons on the employer’s property. An employer may not prohibit an employee from carrying a concealed weapon in the employee’s vehicle. This opinion addresses the issue of employee-owned vehicles parked on the employer’s property.

The Attorney General, using canons of statutory construction, stated that, generally, an employer may prohibit weapons on the premises. However, the statute provides an exception for weapons located in employee-owned vehicles parked on the premises.

**Executive Branch Ethics Commission Advisory Opinion**

The Commission issued the following opinion on its own initiative:

**Issue:** Whether a County Detention Center employee’s volunteer activity for the Sheriff’s Office presents a conflict of interest.

**Date:** September 3, 1998

**Synopsis:** A youth worker trainee at the Breathitt County Detention Center requested approval to volunteer at the Breathitt County Sheriff’s Office. The Ethics Commission addressed whether a conflict of interest existed because of the Sheriff’s Office possibly becoming involved with juveniles also served through the Detention Center.

The Ethics Commission ruled that volunteer activities are not prohibited unless the volunteer activity conflicts with official duties. No conflict exists in this situation because the employee’s responsibilities at the Detention Center do not involve the Sheriff’s Office. However, the Detention Center’s in-house policies may preclude the volunteer activities.

**Open Meeting Decisions and Open Records Decisions**

The Office of the Attorney General issues opinions on open meeting complaints and open records complaints. These opinions review citizens’ complaints that a public agency improperly denied review of public documents or access to an open meeting. These opinions are legally binding. Pursuant to KRS 61.880, if these opinions are not appealed within thirty (30) days, the opinions have the effect and force of law.

**98-O MD-125**

In re: Georgia Williams/ Hardin County Planning and Development Commission

**Date:** August 10, 1998

**Issue:** Whether the Commission violated the Open Meetings Act at its December 10, 1996 regular meeting when a proposed map amendment was approved to permit a two-lot mobile home park on rural residential property.

**Synopsis:** The complainant alleged that she received notice of an earlier meeting, at which time a vote on a map amendment ended in a tie. The Commission did not individually notify her of a second meeting, at which time the Commission voted and passed the amendment. The Attorney General ruled that although the Commission did not follow procedural requirements, the Commission did not violate the Open Meetings Act by not sending individual notice of its December 10 meeting.

The Commission procedurally violated the Open Meetings Act by issuing a response on the fourth day following receipt of the complaint. This violation is mitigated by the fact that the complainant addressed the complaint to the wrong individual. Also, the Commission did not include the requisite statement stating its position or how the statute applies.

However, substantively, the Commission’s failure to individually notify Ms. Williams of the December 10 meeting did not violate the Open Meetings Act. The Act does not require individual notice of regular or special meetings, but does require public notice. The December 10 meeting was
Recent Change of Address or a New Local Official? Please keep us informed.

If you have a new local official in your city, county, or special district, or if you have recently changed your address, please let us know. Simply complete this form and mail it to us at Chase Local Government Law Center, Chase College of Law, 406 Nunn Hall, Highland Heights, Kentucky 41099. Thank you for helping us keep our records up to date.

Name _______________________________________________ Position ________________________________________

Address _______________________________________________________________________________________________

City ________________________________________________ County _________________________________________

State ________________________________________________ Zip Code _______________________________________

Telephone___________________________________________ FAX ___________________________________________

e-mail _______________________________________________ web site ________________________________________

Suggestions ____________________________________________________________________________________________

______________________________________________________________________________________________________

98-O MD-147
In re: The Sebree Banner/ City of Sebree
Date: September 3, 1998
Issue: Whether Sebree City Council violated the Open Meetings Act when it went into closed session at its August 6, 1998 meeting to discuss proposed or pending litigation and the future acquisition or sale of real property.
Synopsis: Although the City’s response to the complaint was procedurally deficient, its position was legally correct.
CSX Railroad offered to purchase a strip of land on the east side of the railroad. The City Council went into closed session to discuss proposed litigation against the City of Sebree by CSX and the sale of property. The City Council determined that public discussion of the property would affect its price. The Attorney General agreed that the City Council properly went into closed session.
The City of Sebree procedurally violated the Open Meetings Act by failing to respond to the complaint in writing within three business days.

98-O RD-140
In re: The Kentucky Post/ City of Covington
Date: August 31, 1998
Issue: Whether the City properly denied a reporter’s request for the U.S. Dept. of Housing and Urban Development’s report on the Covington housing department, and all written responses by the City of Covington.
Synopsis: The City properly denied the request because the HUD report is a draft which is excluded from the Open Records Act by KRS 61.878(1)(i) and (j). All responses are exempt because the city “has not determined what action, if any, will be taken based on that report . . . .” The responses are not final action, and are preliminary reports which set forth opinions and formulate policies.

98-O RD-147
In re: Randy Skaggs/ Boone County Animal Shelter
Date: September 3, 1998
Issue: Whether the animal shelter properly denied access to copies of all of the shelter’s dog licensee’s to be included in Mr. Skaggs’ mailing database.
Synopsis: Mr. Skaggs sought the names and addresses of the shelter’s Kentucky dog licensees. He wanted to include them in his mailing database. The Attorney General reaffirmed 95-ORD-153 and held “that the privacy interest of dog license holders in their names and home addresses outweighs the non-Open Records Act related public interest in disclosure which [Mr. Skaggs] articulates.” The information sought revealed nothing about the operation of the shelter, and great weight is given to the right of privacy in one’s address.