



# Suing State and Local Government Actors in Michigan—Immunity Issues

By William Burnham

## Chart Introduction

The chart on the following page outlines the principal issues of sovereign and other forms of immunity that arise in suits by individuals in federal and state courts against state and local government actors in Michigan.

This chart is necessarily an oversimplification. Every citation or succinct phrase in it is the tip of a massive iceberg of case law. But given the complexity of the law involved, it is easy to miss the forest for the trees, especially if, as quickly happens in litigation in this area, you have your head down flailing about in the underbrush. This “zoomed out” view should also be helpful as a checklist for lawyers who handle cases in this field to make sure that issues are not missed and as an aid to foreclosing at least what are the non-issues.

The chart also raises an important issue about the law today. If anything should be simple and straightforward in this democracy of ours, it should be obtaining relief for violations of one's civil rights. As this chart indicates, even long before litigants or courts get to the merits of those claims, things are anything but simple.<sup>1</sup> ■



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## FOOTNOTE

1. It would be one thing if the complexities had some coherence and served principled purposes, but they often do not. For a romp through some of the problems with 11th Amendment sovereign immunity law at least up until the time of its publication, see Burnham, *Beam me up, there's no intelligent life here: A dialog on the Eleventh Amendment with lawyers from Mars*, 75 Neb L R 551 (1996).

## Suing State and Local Governments and Officials in Michigan—Immunity Issues

Defendants	Lawsuit Filed in Federal Court		Lawsuit Filed in State Court*		
	Federal Law Claim	State Law Claim	Federal Law Claim	State Constitutional Law Claim	Other State Law Claim
State Itself or State Agency	All relief barred by 11th Am, <i>Ala v Pugh</i> , 438 US 751 (1978), <i>Hans v La</i> , 134 US 1 (1890), unless abrogated by federal statute passed under §5 of 14th Am, <i>Seminole Tribe</i> , 517 US 44 (1996), <i>Atascadero</i> , 474 US 234 (1985), <i>Lane</i> , 541 US 509 (2004), <i>US v Ga</i> , 126 S Ct 867 (2006), or Art I bankruptcy clause, <i>Katz</i> , 126 S Ct 990 (2006), or if waived by state, <i>Fla Nursing Home</i> , 450 US 147 (1981); <i>Pt Auth v Feeney</i> , 495 US 299 (1990).	All relief barred by 11th Am, <i>Cory v White</i> , 457 US 85 (1982), <i>Pennhurst II</i> , 465 US 89, 121 (1984).	All relief barred by state's federal constitutional sovereign immunity, unless waived or abrogated by Congress, <i>Alden v Maine</i> , 527 US 706 (1999), just as in fed. ct. (see first box at far left in this row), also, state may not even be a suable §1983 "person" even if state waives immunity, <i>Will</i> , 491 US 58 (1989); <i>Lapides</i> , 495 US 299 (1990). Cf. <i>Bivens</i> , 403 US 388 (1971).	Injunctive, damages relief not barred by state's federal constitutional sovereign immunity or state governmental immunity, but damages are only available for official policy or custom on same basis as §1983 municipal liability, <i>Smith</i> , 410 NW2d 749, 751 (Mich 1987) (see first box, third row, below), and may not be implied in all cases. <i>Lewis v State</i> , 629 NW2d 868 (Mich 2001).	Injunctive relief not barred; damages in tort barred by state governmental immunity for all actions carrying out governmental functions, MCLA 691.1407, 691.1413, except for medical care, public roads, buildings, vehicles, MCLA 691.1402-1407; discrimination in employment, services, education, housing, etc., MCLA 37.2102, 37.2103(g).
State Official Sued in Official Capacity Under Ex Parte Young	Injunctive relief not barred by 11th Am, <i>Young</i> , 209 US 123 (1908), or other immunity except legislative, <i>Va S Ct</i> , 446 US 719, 731-3 (1980); damages and retroactive equitable relief with financial impact barred by 11th Am, <i>Edelman v Jordan</i> , 415 US 615 (1974), including claim for title to state land <i>Coeur d'Alene Tribe</i> , 521 US 261 (1987).	All relief barred by 11th Am (even prospective injunctive relief); <i>Young</i> fiction cannot be used to avoid 11th Am for state law claims, <i>Pennhurst II</i> , 465 US 89 (1984).	Injunctive relief not barred by state's federal constitutional sovereign immunity; permitted under <i>Young</i> to the same extent as in fed. ct., damages & retroactive equitable relief with financial impact barred by state's federal constitutional sovereign immunity just as in fed. ct. (see first box at far left in this row), <i>Alden</i> , 527 US 706 (1999).	<i>Young</i> fiction inapplicable to state constitutional claims; if official capacity suit, see above (suit against state); if individual capacity suit, see below (individual capacity suits for personal liability).	<i>Young</i> fiction inapplicable to state law claims; if official capacity suit, see above (suit against state); if individual capacity suit, see below (individual capacity suits for personal liability).
Local Government (city, county, township) or Local Official Sued in Official Capacity	Injunctive, damages relief not barred by 11th Am, <i>Lincoln Co v Luning</i> , 133 US 529 (1890), <i>Northern Ins</i> , 126 S Ct 1689 (2006), unless alter ego of state, <i>Doyle</i> , 429 US 274, 280 (1977), or by state gov'tal imm., <i>Houlett v Rose</i> , 496 US 356 (1990); city is §1983 "person," but liability only for official policy or custom, <i>Monell</i> , 436 US 658 (1978); no good faith imm., <i>Owen</i> , 445 US 622 (1980), but punitive damages barred, <i>FACT</i> , 453 US 247 (1981).	Injunctive, damages relief not barred by 11th Am, <i>Lincoln Co</i> , 133 US 529 (1890); cf. <i>Alden v Maine</i> , 527 US 706 (1999); relief available only as authorized by state law and permitted by state governmental immunity, 28 USC §1652 and <i>Erie</i> , 304 US 64 (1938), cf. <i>Felder v Casey</i> , 487 US 131 (1988); (see boxes on state law claims in state court).	Injunctive, damages relief not barred by state's federal constitutional sovereign immunity, <i>Alden</i> , 527 US 706 (1999) or by state governmental or other state law immunity, <i>Houlett</i> , 496 US 356 (1990); (see first box at far left in this row for extent of liability of local governments under §1983).	Injunctive, damages relief not barred by state's governmental immunity, <i>Smith</i> , 410 NW2d 749, 751 (Mich 1987), <i>Marlin</i> , 441 NW2d 45, 48 (Mich App 1989), but no cause of action exists against local government entities, only against the state, at least for state constitutional rights that are mirror images of federal constitutional rights, <i>Smith</i> , supra, as interpreted by <i>Jones</i> , 612 NW2d 423 (Mich 2000).	Injunctive relief not barred; damages in tort barred by governmental immunity for all actions carrying out governmental functions, MCLA 691.1407, 691.1413, except where exceptions provided (same as immunity of state above).
State or Local Official Sued in Individual Capacity for Personal Liability	Damages not barred by 11th Am, <i>Scheuer</i> , 416 US 232 (1974), or state gov'tal immunity, <i>Houlett</i> ; but there is good faith immunity for exec. officials, <i>Scheuer</i> , <i>Harlow</i> , 457 US 800 (1982); absolute immunity for judges, <i>Stump</i> , 435 US 349 (1976), prosecutors, <i>Buckley</i> , 509 US 259 (1993), legislators, <i>Tenney</i> , 341 US 367 (1951), witnesses, <i>Briscoe</i> , 460 US 325 (1983).	Damages not barred by 11th Am; cf. <i>Hafer</i> , 502 US 21 (1991), available only as authorized by state law and exceptions to state governmental immunity, 28 USC §1652 and <i>Erie</i> , 304 US 64 (1938), cf. <i>Felder v Casey</i> , 487 US 131 (1988); see boxes on state constitutional and other state law claims in state court, <i>Smith</i> , 256 FSupp2d 704 (ED Mich 2003).	Damages not barred by federal constitutional sovereign immunity or by state-law immunities, <i>Houlett v Rose</i> , 496 US 356 (1990); good faith and other federal-law officer immunities apply (see first box at far left in this row); defendants are suable §1983 "persons," <i>Hafer v Melo</i> , 502 US 21 (1991), <i>Will</i> , 491 US 58 (1989).	Damages not barred by state's immunities, <i>Smith</i> , 410 NW2d 749 (Mich 1987); but no cause of action exists against individual officers, only against the state itself, <i>Smith</i> , 410 NW2d 749 (Mich 1987), as interpreted by <i>Jones</i> , 612 NW2d 423 (Mich 2000).	Damages in tort barred by state governmental immunity as to negligent conduct within scope of authority, but not grossly negligent or intentional conduct, MCLA 691.1407(2), <i>Williams</i> , 73 FSupp2d 785 (ED Mich 1999); judges, legislators, and highest executive officers have absolute immunity, MCLA 691.1407(5).

\*Unless a statute gives the circuit court jurisdiction, the Michigan Court of Claims has exclusive jurisdiction over claims against the state, its departments, or its officials sued in their official capacity for damages. It has concurrent jurisdiction with the circuit court over claims for equitable and declaratory relief that are ancillary to those damages claims. MCLA 600.6419(a), .6419a. The circuit court has jurisdiction over the remaining claims against state defendants—mainly claims solely for injunctive relief—and all claims against local governmental entities or state or local officials. MCLA 600.605. However, the court of claims has exclusive jurisdiction over claims against state defendants for declaratory relief if they are founded on contract or tort theories, including "constitutional torts." *Parkwood Ltd Dividend Housing Ass'n v State Housing Development Authority*, 664 NW2d 185 (Mich 2003); *Weingard v Lampert*, 2005 WL 77100 (Mich App 2005) (unpublished).