

**T. Michael Kennedy, P.C.**  
**1431 Greenway Drive**  
**Suite 800**  
**Irving, TX 75038**  
**972-281-5888**  
[www.justicefortexans.com](http://www.justicefortexans.com)

email: [tmichael@justicefortexans.com](mailto:tmichael@justicefortexans.com)

## **Screening Inmate Cases in Texas: A Brief Overview of Federal and State Inmate Litigation in the Context of Common Threshold Issues.**

### **Introduction.**

As the title implies, the purpose of this short paper is to provide you with a “down and dirty” overview of inmate litigation law in Texas in both Federal and State court, so that potential inmate cases can be quickly screened and evaluated in the context of common threshold issues and the current legal principles pertaining to those threshold issues. The paper does not address all possible claims or scenarios under Federal and State law in Texas, nor was this its intent. With very few exceptions, the Federal cases cited are confined to the Fifth Circuit Court of Appeals and the U.S. District Courts in Texas. Most, if not all, of the cases cited involve inmates who were confined to State Prison facilities or County jails. With that said, there are many types of claims (e.g. harassment, sexual assault, damage to property, equal protection, due process, etc.) that are not discussed here. There are also many areas where Federal and State claims can and do overlap, and there are many issues that have yet to be squarely addressed by the courts. Some of these issues will be apparent as you read the summary below, and some are raised at the end of the paper.

### **I. Exhaustion of Remedies in Federal Litigation in the Fifth Circuit under the PLRA.**

If a claim potentially is going to be brought under the Prison Litigation Reform Act of 1996 (PLRA), perhaps the single most important question to answer to quickly is whether the inmate has exhausted his or her remedies. Title 42 of the United States Code, § 1997e, as amended by the PLRA, provides that:

“[n]o action shall be brought with respect to prison conditions under § 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

The exhaustion requirement of §1997e “applies to all inmate suites about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Exhaustion is a prerequisite to suit even when the prisoner seeks relief not available in grievance proceedings such as money damages. *Booth v. Churner*, 532 U.S. 731, 740-41 (2001). In the Fifth Circuit, exhaustion under the PLRA is mandatory, and the requirement is strictly construed. *Days v. Johnson*, 322 F.3d 863, 866 (5<sup>th</sup> Cir. 2003); *Richardson v. Spurlock*, 260 F.3d 495, 499 (5<sup>th</sup> Cir. 2001); Moreover, the Court does not “inquire whether administrative procedures satisfy minimum acceptable standards of fairness and effectiveness”; prisoners simply “must exhaust such administrative remedies as are available, whatever they may be.” *Alexander v. Tippah County*, 351 F.3d 626, 630 (5<sup>th</sup> Cir. 2003), *cert. denied*, 124 S.Ct. 2071 (2004). Exceptions to the exhaustion requirement are rare. See, e.g., *Days*, 322 F.3d 863 (5<sup>th</sup> Cir. 2003). In one notable example, a claim of exhaustion was rejected based on the inmate’s coma because, when he recovered, he did not attempt to file a grievance even though the grievance would have been untimely. (*Parker v. Adjetey*, No. 03-40787, 2004 WL 330866 (5<sup>th</sup> Cir. Feb. 20, 2004)).

#### **A. Exhaustion of Remedies in Texas State Jails and Prisons.**

In Texas, the Texas Department of Criminal Justice-Correctional Institutions Division (TDCJ-CID) operates State Prisons and State Jails. County Jails are operated by the individual counties in which they sit. With that said, there is currently a two step process in the TDCJ-CID in order to exhaust administrative remedies. *Johnson v. Johnson*, No. 03-10455 (5<sup>th</sup> Cir., September 8, 2004); *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5<sup>th</sup> Cir. 2001). **Step 1** requires the prisoner to submit an administrative grievance at the institutional level. *Texas Department of Criminal Justice, Administrative Directive* No. AD-03.82 (rev. 1), Policy ¶ IV (Jan. 31, 1997). After an investigation, the unit grievance investigator prepares a report and makes a recommendation to the final decision maker for Step 1 of the process, which may be the warden, assistant warden, facility administrator, assistant facility administrator, or health administrator. **Step 2** permits the prisoner to submit an appeal to the division grievance investigation with the Institutional Division of the Texas Department of Criminal Justice. After an investigation, the departmental grievance investigator prepares a report and makes a recommendation to the final decision maker for Step 2 of the process, which is the director, deputy director, and regional directory of assistant director. *Id.* The grievance procedure takes about

90 days to exhaust. Prisoners are allowed 15 calendar days to file a Step 1 grievance. The response is due within 40 days after receipt of the grievance. The prisoner has 10 days to submit an appeal. The response to the Step 2 grievance is due within forty days after receipt of the prisoner's appeal. *Wendell v. Asher*, 162 F.3d 887, 891 (5<sup>th</sup> Cir. 1998); *Jefferson v. Loftin*, No. 3:04-CV-1102-D (N.D. Tex. 2005); *Eldridge v. CCA Dawson State Jail*, No. 3:04-CV-1312-M (N.D. Tex. 2004).

## **B. The Inmate Grievance System in Texas State Jails and Prisons.**

The "Inmate Grievance System" is set forth in **Government Code Section 501.008** as follows:

- (a) The department shall develop and maintain a system for the resolution of grievances by inmates housed in facilities operated by the department or under contract with the department that qualifies for certification under **42 U.S.C. §1997e** and the department shall obtain and maintains certification under that section. A remedy provided by the grievance system is the exclusive administrative remedy available to an inmate for a claim for relief against the department that arises while the inmate is housed in a facility operated by the department or under contract with the department, other than a remedy provided by writ of habeas corpus challenging the validity of an action occurring before the delivery of the inmate to the department or to a facility operated under contract with the department.
- (b) The grievance system must provide procedures:
  - for an inmate to identify evidence to substantiate the inmate's claim; and
  - for an inmate to receive all formal written responses to the inmate's grievance.

**Tex. Gov't Code Ann. §501.008** (Vernon 1998). The grievance system can also be found in the TDCJ-Office of the General Counsel, TDCJ Statutes Reference Guide-Volume I: Government Code, § **501.008**, Inmate Grievance System (Updated Oct. 21, 2004).

Under § **501.008**, a remedy provided by the grievance system is the exclusive administrative remedy available to an inmate for a claim for relief against the department that arises in a facility operated by the department or under contract with the department (other than a remedy provided by writ of habeas corpus challenging the validity of an action occurring before the delivery of an inmate to the facility). Also under §**501.008**, an inmate may not file a claim in state court regarding operative facts for which the grievance system provides the exclusive remedy until:

- 1) the inmate receives written decision issued by the highest authority provided for in the grievance system; or
- 2) if the inmate has not received a written decision from the highest authority, the 180<sup>th</sup> day after the grievance is filed. The limitations period applicable to the claim is tolled until the earlier of either the written decision or the 180<sup>th</sup> day after the grievance was filed.

Tex. Gov't Code Ann. §501.008 (Vernon 1998).

**C. Exhaustion of Remedies and the Inmate Grievance System in Texas County Jails.**

In the State of Texas, a county is a unit of local government. As such, since counties and county jails are not typically “run by the State”, it appears that a county and county jail may implement its own “inmate grievance system,” but that the exhaustion of remedies rules still apply. See, e.g., *Allard v. Anderson*, No. 3:02-CV-1698-L (N.D. Tex. 2004) (Hunt County Jail grievance procedure did not provide a time limit for filing grievances, and Plaintiff’s §1983 claims subsequently barred by statute of limitations where he failed to exhaust administrative remedies after being transferred to TDCJ-CID facility). Moreover, *Texas Civil Practice and Remedies Code, Chapter 14, Inmate Litigation*, will likely apply, as long as the inmate files an affidavit or unsworn statement of inability to pay costs.

**II. Exhaustion of Remedies in State Court Litigation.**

Before an inmate may file a state court action on a claim that is subject to the grievance system, the inmate must file a grievance and either receives a written decision, or if no written decision is received, the inmate must wait 180 days after the grievance is filed before filing the claim in state court. *Tex. Gov't Code Ann. § 501.008(d)*. However, if the inmate files an affidavit or unsworn declaration of inability to pay costs, the *Texas Civil Practice and Remedies Code, Chapter 14, Inmate Litigation*, applies and provides that in the event the state court action is prematurely filed, i.e., before the lapse of 180 days after the grievance is filed upon which on written decision has been made, then the state court “shall stay the proceeding with respect to the claim for a period not to exceed 180 days to permit completion of the grievance system procedure.” *Tex. Civ. Prac. & Rem. Code Ann. § 14.005 (c)* (Vernon Supp. 2002). However, Chapter 14 of the Civil Practice and Remedy Code also imposes numerous other procedural requirements that complicate the inmate’s task of representing himself and there are a variety of legal pitfalls for the inmate that may ultimately result in dismissal. See, e.g., *Johns v. Johnson*, 10-03-00388-CV (Tex.App.-Waco, February 23, 2005); *Allen v. Tx. Dept. of Crim. Just.*, 80 S.W. 3d 681 (Tex.App.-Houston 2002).

**A. Sovereign Immunity and lawsuits in State Court.**

Lawsuits in State Court against county jails, the County Sheriff, or the Sheriff’s deputies frequently allege theories of negligence, medical malpractice, and civil rights violations. As such, the issue of sovereign immunity is almost always implicated and frequently bars the inmate’s state law claims. See generally, the *Texas Tort Claims Act, Texas Civil Practice and Remedies Code, Chapter*

**101.** The government, its agencies, and its officials are protected from suit under the doctrine of sovereign immunity. A governmental unit is clothed with sovereign immunity unless that immunity has been waived by the legislature. An employee of a governmental unit is also entitled to a claim of sovereign immunity in claims against him in his official capacity. The doctrine of Sovereign immunity also implicates jurisdictional considerations. The instances in which the legislature has provided for waiver of immunity, as relevant to inmate claims, are set forth in *Tex. Civ. Prac. & Rem. Code Ann. § 101.021 of the Texas Tort Claims Act (TTCA)*, which provides:

A governmental unit in the state is liable for:

(2)...personal injury, and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. (emphasis supplied).

In Texas, a governmental entity's limited liability is derivative of the employee's official immunity. The Texas Tort Claims Act leaves an employee's common law official immunity intact, and other chapters of the *Civil Practice & Remedies Code* provide for indemnification of the employee only for actual damages, court costs, and attorney's fees adjudged against the employee. Official immunity in Texas is an affirmative defense to negligence claims against state employees that applies when employees exercise discretion in good faith while acting within the scope of their official authority. Thus, Texas is vicariously liable for the acts of its employees only to the extent its employees are not entitled to official immunity. *City of La Joya v. Herr*, 41 S.W.3d 755, 759 (Tex.App.-Corpus Christi 2001, no pet.).

In performing the initial analysis for sovereign immunity issues, one must consider both "condition of property" and "use of property" thresholds. In *McBride v. TDCJ-ID*, 964 S.W.2d 18, (Tex.App.-Tyler 1997, no writ), the inmate Plaintiff satisfied the "condition of property" requirement under the TTCA where he alleged that a TDCJ-ID employee ordered him to carry a 50 gallon handleless barrel up the stairs, which slipped from his grasp and caused him to fall and suffer an injury. He alleged that the TDCJ-ID was negligent in furnishing him with a barrel without handles, and that the defect caused him to lose his balance and was the proximate cause of the injuries. 964 S.W.2d at 22. In *TDCJ v. Miller*, 51 S.W.3d 583 (Tex. 2001), an inmate's wife sought damages in state court following her husband's death from meningitis while incarcerated in a TDCJ facility. The Texas Supreme Court reversed the lower appellate court, and stated that "TDCJ did 'bring into service' and 'employ' various drugs and medical equipment while treating [inmate], but that some property is involved is not enough. Using that property must have actually caused the injury. The property 'used' on [inmate] did not." 51 S.W.3d at 588. Said another way,

“to state a claim under the TTCA based upon the use or misuse of non-defective tangible personal property, a plaintiff must allege (1) that the property was used or misused by a governmental employee acting within the scope of his or her employment and (2) that the use or misuse of the property was a contributing factor to the injury. The negligence of the government employee must be the proximate cause of the injury and must involve a condition or use of tangible personal property under circumstances where there would be private liability. The property itself need not be the instrumentality of the alleged harm, but it must have been a contributing factor to the harm. The TTCA does not provide for liability based upon a nonuse of property.” *Gonzales v. City of El Paso*, 978 S.W.2d 619, 623 (Tex.App.-El Paso 1998, no pet.).

Moreover, “a governmental unit does not waive its immunity by using, misusing, or not using information.” *Cherry v. TDCJ*, 978 S.W.2d 240 (Tex.App.-Texarkana 1998, no pet.).

Under the TTCA, liability of a unit of local government is limited to money damages in the amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. Liability of a municipality under the TTCA is limited to money damages in a maximum amount of \$250,000 for each person and \$500,00 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

### **B. Qualified Immunity in State Court actions involving Federal Claims.**

The doctrine of qualified immunity serves to shield a government official from civil liability for damages based upon the performance of discretionary functions if the official’s acts were objectively reasonable in light of the then clearly established law. See *Madox v. Thomas*, 11-02-00042-CV (Tex.App.-Eastland, July 31 2003), citing *Thompson v Upshur County, TX*, 245 F.3d 447, 456 (5<sup>th</sup> Cir. 2001).

In *Madox*, an unpublished decision, the plaintiff claimed that he was denied necessary medical care, and he asserted claims of negligence, medical malpractice, and civil rights violations. The sheriff asserted the doctrine of qualified immunity on motion for summary judgment, which was affirmed. In its opinion, the *Madox* court noted that when a defendant in a § 1983 action pleads qualified immunity, the plaintiff has a burden to rebut this defense by establishing that the official’s wrongful conduct violated clearly established law. *Thompson*, at 456. The first step in the qualified immunity analysis is to determine whether the plaintiff has alleged the violation of a clearly established federal constitutional or federal statutory right. *Thompson*, at 457. If the plaintiff does so, the court must then assess whether the defendant’s conduct was objectively reasonable in light of clearly established law.

*Id.*

The *Madox* court, again citing *Thompson* as authority, also included analysis of plaintiff's claim that the confining officials were deliberately indifferent to his serious medical needs. In the context of an episodic failure to provide necessary medical treatment to an inmate, deliberate indifference means that:

- 1) the official was aware of facts from which an inference of substantial risk of serious harm could be drawn;
- 2) the official actually drew that inference; and
- 3) the official's response indicates the official subjectively intended that harm occur.

*Madox*, citing *Thompson*, at 458-59. The court went on to write that deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm. In the *Madox* case, Sheriff Thomas established that he was not personally involved in the acts which allegedly deprived Madox of his constitutional rights, and Madox failed to establish that the Sheriff promulgated any policies that denied or impeded the prompt provision of medical care to Madox. As such, supervisory officials are not liable under § 1983 for the actions of subordinates on any theory of vicarious liability. See, *Madox*, and *Thompson* at 459.

### **C. Medical Negligence Claims under Texas State law.**

The newest revisions to the Civil Practice and Remedies Code that pertain to medical liability in tort implemented sweeping changes with respect to medical malpractice claims. These legislative changes have effectively reduced the filing of medical malpractice cases in the State of Texas to virtually nothing since the effective date of the changes, September 1, 2003. The previously existing Medical Liability and Insurance Improvement Act was repealed. An in depth analysis of the changes is far too complex and lengthy for purposes of this summary. However, with that preface, any potential inmate claims that raise the specter of medical malpractice will have to stand up to the rigors of an onerous procedural quagmire, conditions precedent to filing suit, numerous technical requirements, plaintiff unfriendly caps and limitations, and a two year statute of limitations that does not include a discovery rule.

### **D. Operational Standards for State run Facilities.**

Operational Standards for State Jails is found in the *Texas Administrative Code (TAC), Title 37 Public Safety and Corrections, Part 6 Texas Department of Criminal Justice, Chapter 157 State Jail*

***Felony Facilities.*** 37 TAC § 157.39 pertains to Offender Rights; § 157.47 to sanitation and hygiene, § 157.49 to health care, and § 157.51 to health screenings and examinations.

**ISSUES:**

**Issue:** Whether the guidelines set forth in **§ 501.008, Inmate Grievance System** (Updated Oct. 21, 2004), are now the applicable prescribed time periods for inmates incarcerated in the Texas State Prison system to follow if they hope to preserve their federal or state causes of action

**Issue:** Even though federal courts borrow state statutes of limitations and tolling provisions to govern claims brought under Section 1983, they look to federal law to determine when a civil rights action “accrues”, which is “when a plaintiff knows or has reason to know of the injury which is the basis of the action.” As such, to the extent that state statutes of limitations provisions are in conflict with the federal accrual provision, which rule controls since both affect the timeliness of when a claim is brought?

**Issue:** Whether counties and county jails must implement an inmate grievance system that comports with the requirements set forth in **Government Code Section 501.008** or ***Texas Civil Practice and Remedies Code, Chapter 14, Inmate Litigation***, since there appears to be no uniform grievance system that applies to both State and County correctional facilities?