IMMUNITIES FOR INDEPENDENT CONTRACTORS AND AGENTS

RAMON G. VIADA, III
Viada & Strayer
17 Swallow Tail Court, Suite 100
The Woodlands, Texas 77381
(281) 419-6338 – Office
(281) 419-8137 - Fax
rayviada@viadastrayer.com

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RAMON G. VIADA III
Viada & Strayer
17 Swallow Tail Court, Suite 100
The Woodlands, Texas 77381
(281) 419-6338 Office
(281) 419-8137 Fax
Website: www.viadastrayer.com
E-mail: rayviada@viadastrayer.com

BIOGRAPHICAL INFORMATION

EDUCATION:

University of Houston, B.A. (1977), M.A. (1981), J.D. *magna cum laude* (1987)
Houston Law Review, Associate Editor
Order of the Coif

PROFESSIONAL DISTINCTIONS & ACTIVITIES:

Viada & Strayer (July 1, 2008 to present)
Abrams Scott & Bickley, L.L.P. (1994 to June 30, 2008)
Sewell & Riggs, P.C. (1989-93)
Member: State Bar of Texas (since 1988), Bar of the United States Supreme Court (2002), Bar of the U.S. Court of Appeals for the Fifth Circuit (1988), Bar of the U.S. District Courts for the Southern (1989), Eastern (1992), Northern (1994), and Western (2004) Districts of Texas
Member: Planning Committee, Texas Bar CLE, Suing and Defending Governmental Entities (2007 through 2012)
Law Clerk to Hon. Jerry E. Smith,
U.S. Court of Appeals for the Fifth Circuit (1988)
Board Certified — Civil Appellate Law —
Texas Board of Legal Specialization (since 1998)
Judicial Intern to Hon. Norman W. Black,
U.S. District Court, Southern District of Texas (1987)

LAW RELATED PUBLICATIONS AND MAJOR SPEAKING ENGAGEMENTS:

Drafting the Contract With An Eye to Litigation, State Bar of Texas MCLE Course on Suing & Defending Governmental Entities (2012)
Derivative Immunity, Texas Municipal League Intergovernmental Risk Pool Attorney Workshop (2012)
Contract Update: Recent Developments, State Bar of Texas MCLE Course on Suing & Defending Governmental Entities (2011)
Use of Separation of Powers Doctrine, State Bar of Texas MCLE Course on Suing & Defending Governmental Entities (2010)
Recent Case Development In Breach of Contract Cases, State Bar of Texas MCLE Course on Suing & Defending Governmental Entities (2009)
Breach of Contract Claims Against Governmental Entities, State Bar of Texas MCLE Course on Suing & Defending Governmental Entities (2008)

Breach of Contract Claims Against Governmental Entities, State Bar of Texas MCLE Course on Suing & Defending Governmental Entities (2007)

Conflicts of Interest and Joint Representation, State Bar of Texas MCLE Course on Suing & Defending Governmental Entities (2006)

MAJOR LITIGATION:

Pearson v. Callahan, 555 U.S. 223 (2009) (overruling *Saucier v. Katz* and holding that the two-step qualified immunity inquiry) (representing Texas Association of School Boards as friend of the court).

City of Austin v. Whittington, 384 S.W.3d 766 (Tex. 2012) (addressing separation of powers implications in determining the applicability of affirmative defenses to a city's exercise of eminent domain) (representing Clear Lake City Water Authority as friend of the court).

City of Waco v. Kirwan, 298 S.W.3d 618 (Tex. 2009) (cities owe no duty under the Recreational Use Statute to warn of naturally occurring dangers in city parks) (representing Texas Municipal League as friend of the court).

City of Galveston v. State, 217 S.W.3d 466 (Tex. 2007) (immunity of Texas local governmental entities from suit by the State of Texas).

Montgomery County v. Park, 246 S.W.3d 610 (Tex. 2007) (adopting modified *Burlington* standard defining "adverse personnel action" in Texas Whistleblower Act cases) (representing Texas Association of School Boards as friend of the court).

City of Oak Ridge North v. Mendes, 339 S.W.3d 222 (Tex. App.—Beaumont 2011, no pet.) (governmental immunity bars claims for violation of the Texas Wiretap Statute, TEX. CIV. PRAC. & REM. CODE Chap. 123).

Cypress Forest Pub. Util. Dist. v. Kleinwood Mun. Util. Dist., 309 S.W.3d 667 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (contract rights are not "property" within the meaning Art. I, Sec. 17 of the Texas Constitution).

Clear Lake City Water Auth. v. Salazar, 781 S.W.2d 347 (Tex. App.–Houston [14th Dist.] 1989, orig. proceeding [leave denied]) (local legislators are privileged to resist judicial intrusion into legislative motives).

Colson v. Grohman, 174 F.3d 498 (5th Cir. 1999) (First Amendment does not protect a politician from politically-motivated defamation).

City of Galveston v. Gray, 93 S.W.3d 287 (Tex. App.–Houston [14th Dist.] 2002, pet. denied) (case of first impression recognizing that governmental immunity from suit includes immunity from merits discovery in advance of a ruling on a plea to the jurisdiction).

Gaines v. Davis, 928 F.2d 705 (5th Cir. 1991) (recognizes the right of an official to pursue an interlocutory appeal of a discovery order that violates the doctrine of qualified immunity from suit).

City of Fort Worth v. Zimlich, 99 S.W.3d 62 (Tex. 2000) (establishing legal standard for imputing discriminatory intent to a governmental entity under the Texas Whistleblower Act) (representing Texas Association of School Boards as friend of the court).

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IMMUNITIES FOR INDEPENDENT CONTRACTORS AND AGENTS

I. INTRODUCTION.

Over the last half century, governments at all levels have increasingly embraced privatization — shifting the delivery of government services to the private sector — as a strategy to lower the costs of government and achieve better performance for tax dollars spent. Privatization introduces competition into an otherwise monopolistic system of public service delivery. However, in evaluating the true level of savings from privatization, planners must take into account the increased cost of doing business through the private sector without the protections of sovereign immunity. Although there are notable exceptions to be discussed in this paper, the general rule is that private parties who contract with government do not enjoy derivative sovereign immunity, and only under certain limited circumstances will private parties be allowed to avail themselves of official immunity defenses.

The term "derivative immunity" describes the immunity that a person may receive from a sovereign entity when acting in concert with the sovereign. This immunity is said to "derive" from the sovereign's immunity because derivative immunity is not inherent in the person receiving it. It is a penumbra of sovereign immunity. It belongs to the sovereign and is extended to other persons in order to serve the sovereign's interests.

The starting point for understanding derivative immunity, therefore, is the concept of sovereign immunity. Sovereign immunity is a creature of the common law. Although the legislature may waive it, the scope of sovereign immunity is decided by the judiciary.[1] It follows that courts must ultimately determine whether and the extent to which persons other than the sovereign may derive protections from sovereign immunity.

At its core, what sovereign immunity prohibits is generally clear — a suit against an unconsenting sovereign for money damages. Sovereign immunity exists also because it is in the public interest to protect the exercise of certain governmental functions. This public interest remains intact when the government delegates that function to other persons. A suit that is against a party closely affiliated with the sovereign that aims to influence the sovereign's exercise of its traditional prerogatives may impact on precisely the interests that immunity seeks to protect. In some situations, imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of *the government*'s work. Many courts, therefore, have gone from strictly construing sovereign immunity to creating a sort of common law, 'penumbral' sovereign immunity that extends beyond what were traditionally considered its natural boundaries. As one commentator has noted in this regard, "rather than risk undue interference with a sovereign's prerogatives, courts have been inclined to create a zone of safety around the sovereign in situations where, despite a strong case that sovereign immunity does not technically apply, allowing the suit to go forward arguably may undermine sovereign immunity's policy goals."[2]

Sovereign immunity, however, does not cast broad penumbras. Simply acting for the government is not enough to confer sovereign immunity on the actor.[3] Even governmental officials who serve as common law agents and employees of the government cannot invoke the sovereign's immunity. That relationship may support the assertion of a public official immunity defense – which can be absolute or qualified, depending on the function involved; but agents of government, which may include public officials and employees, are not sovereigns entitled to raise the sovereign's immunity.[4] Predictably, where agents and

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[1] *See City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006).

[2] K. Florey, *Sovereign Immunity's Penumbras: Common Law, Accident, and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 767 (Winter 2008). See also *In re: Oil Spill by the Oil Rig "Deepwater Horizon"*, 2011 U.S. Dist. LEXIS 113424, at *23 (E.D. La. Sept. 30, 2011) ("The purpose of derivative immunity is protecting a federal interest, not the contractor").

[3] *See, e.g, Gonzalez v. Heard, Goggan, Blair and Williams*, 923 S.W.2d 764, 765 (Tex. App.—Corpus Christi 1996, writ denied) (op. on reh'g) (law firm hired as independent contractor to collect taxes for local government is not entitled to sovereign immunity); *City of Alton v. Sharyland Water Supply Corporation*, 145 S.W.3d 673, 682 (Tex. App.—Corpus Christi 2004, no pet.) (independent contractors of the city of Alton could not assert immunity for injuries caused by negligent performance of contractual duties owed to city).

[4] The Eleventh Circuit has made this same observation in rejecting the notion that the absolute immunity of federal officers from state tort liability is co-extensive with the sovereign immunity of the Government:

> [I]f a federal officer cannot claim complete derivative immunity, neither can a mere common law agent. The result urged by [the plaintiff] would mean that, in a Bivens suit, a prison guard

contractors have sought the protections of the sovereign's immunity, courts have granted that protection not to protect the contractors *per se* but to protect the government's ability to carry out its core discretionary functions.

This Paper will examine the types of relationships that qualify for derivative immunity and the policy rationales advanced by the courts in each situation to justify the extension of the sovereign's immunity to private actors. Essentially, in every situation where derivative immunity has been recognized, the defendant must prove at least the following two elements:

(1) the gravamen of the complaint is directed at a discretionary, policymaking function which is embodied in a contract or other directive of the government; and

(2) the defendant inflicted the injury in question by following the government's directives and not by deviating from them.

Part II of this Paper will examine the common law origins of the derivative immunity defense, which was first extended to public works contractors in *Yearsley v. W.A. Ross Construction Co*., 309 U.S. 18 (1940). Essentially, the Court stated that a contractor is entitled to immunity when (1) it performed acts pursuant to a valid authorization of the governments and (2) the contractor did not exceed the scope of that authority. *Id*. at 20-21. *Yearsley* has been adopted and followed by the majority of U.S. jurisdictions, including Texas. There is a split in Texas and federal authorities on whether an agency relationship is a necessary element of this defense.

Part III discusses the expansion of the *Yearsley* doctrine into the area of government procurement contracts. In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court held that state tort law imposing liability for design defects in military equipment is preempted when (1) the government approved reasonably precise specifications, (2) the equipment conformed to those specifications, and (3) the supplier warned the government about the dangers in the use of the equipment that were known to the supplier but not to the government. *Id*. at 512.

Part IV examines the expansion of common law derivative immunity. For example, other states such as Connecticut have adapted *Boyle*'s three-part test in fashioning a state common law derivative immunity defense and have applied it to claims against contractors performing services for governmental entities. Reasoning from the principle that the immunity exists to protect the discretionary functioning of government, some courts have extended the defense to subcontractors, holding that privity of contract with the government is unnecessary.

Part V briefly covers the serious limitations of common law derivative immunity. The immunity only protects agents (and in some jurisdictions, contractors) carrying out the sovereign's will in a non-negligent manner. The most notable limitation of the defense is that it does not protect the contractor who has negligently implemented the sovereign's contractual directives. This limitation renders the defense largely illusory.

Part VI will outline the closely related doctrine of public official immunity for governmental functions performed by private persons. These types of immunities are easier to establish because they do not require the defendant to show that (s)he was effectuating a government directive, only that (s)he was performing a governmental function. Public official immunities are much broader too, since a showing of good faith can support the defense even if the defendant has been negligent in carrying out a directive.

Part VII takes up the topic of legislatively created derivative immunity in Texas. In recent years, the Texas Legislature has expanded immunity by statute, either by defining certain technically private entities as governmental units for purposes of immunity, or by extending the immunity of government to certain private contractors who perform governmental functions. Legislative expansion of immunity rests on a thin reed, however, since the creation of immunity is a judicial function in Texas. Part VII will also address two other important potential immunity defenses for certain agents of government (but not independent contractors) – the elections-of-remedies defense of Section 101.106 of the Civil Practice & Remedies Code, and the damage caps available to "public servants" under Chapter 108 of the same Code.

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employed by the government would have only qualified immunity, while a private contractor who works in the prison but is no more than a common law agent would have absolute immunity (assuming the government has not waived it). That result cannot possibly be the law. *McMahon v. Presidential Airways, Inc*., 502 F.3d 1331, 1346 (11th Cir. 2007).

II. GOVERNMENT CONTRACTOR DEFENSE IN PUBLIC WORKS CASES.

In most jurisdictions, Texas included,[5] where a public entity has provided plans and specifications to an independent contractor, the public contractor will not be held liable for work performed in accordance with those plans and specifications.[6] This rule rests on two important principles.

First, the immunity of the governmental entity itself would become meaningless if contractors complying with the government's design were liable in tort for defects in that design. As one court has put it, "[i]f contractors never shared government immunity, their costs of doing business would be higher and those higher costs would be passed on to the government entities hiring the contractors. In respect of costs, therefore, the effect would be nearly the same as if the public entity were liable itself."[7] As the Fifth Circuit has observed, "the rationale behind the defense is an extension of sovereign immunity: in circumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable."[8]

The second principle underlying public contractor immunity concerns notions of fairness. An independent contractor bound to specifications that are provided by a public entity and over which it has no control is not responsible for defects in those specifications. It would be fundamentally unfair to hold a contractor liable in such instances for injuries caused by defective plans, at least in the absence of a blatant, obvious danger that the contractor should have brought to the attention of the public entity.[9]

The majority position appears to be that derivative immunity is not available if the contractor is negligent in performing the work.[10]

A. *Yearsley v. W.A. Ross Construction*.

Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940), is the first modern U.S. Supreme Court

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[5] *Glade v. Dietert*, 156 Tex. 382, 295 S.W.2d 642 (1956); *Swilling v. Knight*, 205 S.W.2d 421 (Tex. Civ. App.—Texarkana 1947, no writ);

[6] *See, e.g., Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940); *Burt v. Henderson*, 152 Ark. 547, 238 S.W. 626, 627 (1922); *Veterans' Welfare Board v. City of Oakland*, 74 Cal. App.2d 818, 169 P.2d 1000, 1009 (1946); *Maezes v. City of Chicago*, 316 Ill. App. 464, 45 N.E.2d 521, 526-527 (1942); *Sherman v. Miller Const. Co*., 90 Ind. App. 462, 158 N.E. 255, 257 (1927); *Newton Auto Salvage Co. v. Herrick*, 203 Iowa 424, 212 N.W. 680, 681 (1927); *Tillotson v. Fair*, 160 Kan. 81, 159 P.2d 471, 476 (1945); *Adkins v. Harlan County*, 259 Ky. 400, 82 S.W.2d 425 (1935); *Benner v. Atlantic Dredging Co.*, 134 N.Y. 156, 31 N.E. 328, 329 (1892); *Moore v. Clark*, 235 N.C. 364, 70 S.E.2d 182, 185 (1952); *Wood v. Foster & Creighton Co.*, 191 Tenn. 478, 235 S.W.2d 1, 3; *Tidewater Construction Corp. v. Manly*, 194 Va. 836, 75 S.E.2d 500, 502 (1953); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343-46, 1351 (11th Cir. 2007) (acknowledging that some form of derivative sovereign immunity may be appropriate for private contractor agents); *Butters v. Vance Int'l, Inc*., 225 F.3d 462, 466 (4th Cir. 2000) (extending derivative sovereign immunity to a private contractor for following commands of a foreign sovereign). *But see Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) ("The plaintiffs' action against [defense contractors] is not barred by sovereign immunity. Private parties are not entitled to such a defense."); *Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867, 874 (8th Cir. 1974) ("The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation, no matter how intimate its connection with the government."). The treatise formulation of the "general rule" of this line of cases has been stated as follows:

> As a general rule, a private contractor in the construction of a public improvement under a contract with duly authorized public authorities is not liable for any injury, direct or consequential, to owners of private property that may result as a necessary incident from the prosecution of the work in a proper manner, which would otherwise amount to a nuisance. The theory is that one who contracts with a public body for the performance of public work is entitled to share the immunity of the public body from liability for incidental injuries necessarily involved in the performance of the contract, where he is not guilty of negligence. In other words, when the act or failure to act which causes an injury is one which the contractor was employed to do and the injury results not from a negligent manner of doing the work, but from the performance thereof, the contractor is entitled to share the immunity from liability which the public enjoys . . . .

43 AM. JUR., *Public Works and Contracts*, § 83, pp. 827-28.

[7] *Vanchieri v. New Jersey Sports & Exposition Authority*, 104 N.J. 80, 514 A.2d 1323, 1326 (1986).

[8] *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1045 (5th Cir. 1984) (en banc), *cert. denied*, 470 U.S. 1051 (1985).

[9] *See* Comment, *The Government Contractor Defense: An Overview*, 27 HOW. L. REV. 275 (1984) (government contractor immunity "is based on public policy against forcing a government contractor to shoulder alone the entire burden of liability for an injury which occurred, not because of his own wrongdoing, but merely because of his innocent compliance with the government's specifications.").

[10] *See* fn. __, *supra*.

opinion addressing a contractor's defense from civil liability for performing a federal government contract.[11] The case involved the construction by a contractor of a dike along the Missouri River. When the construction of the dike caused a diversion of the river that washed away a portion of the plaintiff's land, the landowner sued both the government and the contractor. The Court held the contractor immune from suit based on the basic principles of agency: "if . . . authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id*. at 21.

Over the years, courts have advanced various theories to explain *Yearsley*'s holding. In *Yearsley* itself, the Court suggested that the contractor partakes of the government's immunity because it has acted as a common law agent of the government. Accordingly, some courts have limited the *Yearsley* defense to situations where there is an actual agency relationship between the contractor and the government.[12]

Other courts reason that the defense is necessary to allow the government to carry out its essential functions. The Fifth Circuit's reasoning in *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009), well exemplifies this approach. There, private entities dredged the Mississippi River Gulf Outlet ("MRGO") under a contract with the Army Corps of Engineers, and were later sued by area residents who sustained damages during Hurricane Katrina. The plaintiffs alleged that the dredging caused damage to protected wetlands, which amplified the hurricane's storm surge. *Id*. at 202-03. Plaintiffs did not allege, however, that Congress lacked authority to develop or maintain the MRGO; nor did they allege that the contractors had acted without government authority, or that they had deviated from, or exceeded their authority under the contract, or that they had committed some other separate act of negligence. Because the plaintiff's claims attacked only "Congress' policy of creating and maintaining the MRGO," the *Ackerson* court held that the case fit squarely within *Yearsley*, and thus, the defendants were immune. *Id*. at 207. Distinguishing earlier Fifth Circuit cases suggesting that an agency relationship was required for a contractor to assert derivative immunity, *Ackerson* squarely rejects any such requirement:

> The Supreme Court's decision in *Yearsley* does not require a public-works contractor defendant to establish a traditional agency relationship with the government. *Yearsley* does use the word "agent" but also uses "contractor"and "representative." Most notably, the *Yearsley* court did not examine the relationship between the contractor defendant and the government to determine whether the contractor defendant was in fact acting as an agent or whether the contractor acted within the scope of any agency relationship. Instead, the court merely noted that setting aside the plaintiffs' takings claim, "there is no contention, or basis for one, that if the contractor was acting for the Government in prosecuting its work in aid of navigation without the taking of property, the contractor would be subject to the asserted liability."

Id., at 205-06 (footnotes omitted) (quoting *Yearsley*, 309 U.S. at 21, 22, 23).

In short, under *Yearsley* and its progeny, a government contractor will not be liable when the authority to carry out the project was validly conferred and was within the constitutional power of Congress. *Yearsley*, 309 U.S. at 20-21; *Ackerson*, 589 F.3d at 206-07. A government contractor purporting to act on the government's behalf will be held liable, however, when the grounds for liability are that the contractor either exceeded his or her authority or that the authority was not validly conferred. *Yearsley*, 309 U.S. at 21. Thus, a key premise of *Yearsley*, and one that has been reiterated by the Fifth Circuit, is that the contractor was following the sovereign's directives. *Id*. at 20-21; *Ackerson*, 589 F.3d at 206-07; *see also In re: Katrina Canal Breaches Lit.*, 620 F.3d 455, 465 (5th Cir. 2010)

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[11] The Court had earlier applied the same doctrine to a tort claim against the city of Chicago based on that city's performance of road construction at the direction of the State of Illinois. *See Northern Transp. Co. v. Chicago*, 99 U.S. 635, 641-42 (1879) (reasoning that the state's immunity from suit "would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law.").

[12] *See, e.g., McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) (considering a contractor's claim of derivative sovereign immunity under *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), for damages claimed by soldiers killed in an airplane crash and citing *Yearsley* for the proposition that if derivative sovereign immunity does exist, "the entity claiming the immunity must at a bare minimum have been a common law agent of the government at the time of the conduct underlying the lawsuit").

(stating that the Yearsley defense, "[s]tripped to its essentials, is fundamentally a claim that the Government made me do it.") (internal citations and brackets deleted). While *Yearsley* established that a contractor performing governmental functions pursuant to contractually delegated authority will not be liable in tort to third parties, it also established that an agent or officer of the government purporting to act on its behalf, but in actuality exceeding the contractor's authority, shall be liable for conduct that causes injury to another. *Yearsley*, 309 U.S. at 21. Thus, *Yearsley* makes clear that a contractor will qualify for derivative sovereign immunity only if the contractor executed the will of the government and did not exceed its authority.

B. Texas Cases Applying *Yearsley* Doctrine.

Texas courts have embraced the public contractor defense recognized in *Yearsley*. In *Glade v. Dietert*, 156 Tex. 382, 295 S.W.2d 642 (Tex. 1956), a contractor working to construct a sewer line in a residential area bulldozed three trees that were rooted on private property. Unbeknownst to the contractor, the City had neglected to extend its right-of-way to cover the area where the trees were located. The contractor was sued for trespass. The Texas Supreme Court held that the contractor was not liable because it was the City's responsibility to obtain the necessary right-of-way, not the contractor's. *Glade*, 295 S.W.2d at 645. Citing *Yearsley*, the Court reasoned:

> The decisions generally hold that under a contract with a municipality for the construction of public works the contractor is liable to third parties only for negligence in the performance of the work and not for the result of the work performed according to the contract. There would seem to be no more valid reason for imposing liability on the contractor for damages done to respondents' land than to an adjoining landowner.

Id. (citations omitted).[13]

Among the decisions cited in *Glade* is *Swilling v. Knight*, 205 S.W.2d 421 (Tex. Civ. App.—Texarkana 1947, no writ), in which derivative immunity barred a landowner's claim against a city contractor for blocked access, where the contractor had dug a ditch pursuant to a contract with the city and under direct supervision of the city's engineer. *Id.*, at 421-22. *Swilling* states the following:

> "A contractor constructing a drain or sewer or making other public improvements for a municipality under its supervision and control is not liable for injuries resulting to adjoining property, unless the work is improperly or negligently performed, nor is such contractor liable where the negligence charged consists in the method adopted under the direction of the city authorities; but for any injury due to his negligence in the performance of the work the contractor is liable."

Id., at 422 (quoting 43 C.J. § 1917, p. 1159).

Also cited in *Glade* is *Panhandle Const. Co. v. Shireman*, 80 S.W.2d 461 (Tex. Civ. App.—Lubbock 1935, no writ), another blocked access case applying the same rule. The *Panhandle* court held the contractor not liable for simply adhering to the State's policy directives embodied in the public works contract. Conversely, if the method selected for doing the excavating had injured plaintiff's property – "[f]or example, if [the contractor] had used dynamite so as to throw rock and debris upon said property, or had excavated with water, running same with mud over [the landowner's], [the contractor] would have been liable for any damages sustained, and this perhaps without any such contract." *Id*., at 464.

Derivative immunity in Texas is an immunity from liability, not suit. It must be pled and proved as a defense. *See Austin Road Co. v. Anderson*, 146 Tex. 553, 209 S.W.2d 595, 597 (1948) ("It is not to be presumed that the State by its contract with the [contractor] authorized or required it to commit the trespass, and if it is clothed with immunity from liability therefor, the burden of establishing that fact rested upon it. That is a defensive matter and not an essential element of [plaintiff's] case.").

C. Legal Effect of an Agency Relationship on Scope of Derivative Immunity.

Over the years, courts have advanced various theories to explain the holding of *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), upon which Texas and the other states have expounded their derivative immunity doctrines. In *Yearsley* itself, the

[13] Recently, the Supreme Court had occasion to interpret *Glade* in a wholly different context, where a contractor argued that the owner's acceptance of the work discharges the contractor of responsibility for defective conditions created by the contractor. *See Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 425 (Tex. 2011) (noting that "Our holding in *Glade* stands for the limited proposition that, to the extent it operates within the parameters of the governing contract, a contractor is justified in assuming that the government entity has procured the necessary right-of-way.").

U.S. Supreme Court suggested that the contractor partakes of the government's immunity because it has acted as a common law "agent" of the government. *Yearsley*'s indiscriminate use of the term "agent" has led a small minority of federal courts to limit the *Yearsley* defense to situations where there is a common law agency relationship between the contractor and the government. *See, e.g., McMahon v. Presidential Airways, Inc*., 502 F.3d 1331, 1343 (11th Cir. 2007). By contrast, the Fifth Circuit exemplifies what has emerged as the majority rule, which applies derivative immunity in favor of agents and contractors alike. *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 205 (5th Cir. 2009) ("The Supreme Court's decision in *Yearsley* does not require a public-works contractor defendant to establish a traditional agency relationship with the government.").

Similar confusion reins in Texas cases. In the tax collection context, the Corpus Christi court of appeals had stated that an agency relationship is required for derivative immunity to attach. *See, e.g, Gonzalez v. Heard, Goggan, Blair and Williams*, 923 S.W.2d 764, 765 (Tex. App.—Corpus Christi 1996, writ denied) (op. on reh'g); *City of Alton v. Sharyland Water Supply Corporation*, 145 S.W.3d 673, 682 (Tex. App.—Corpus Christi 2004, no pet.); *Zuniga v. Navarro & Assocs., P.C.*, 158 S.W.3d 663 (Tex. App.—Corpus Christi 2005, pet. denied). An agency relationship has been required in other contexts as well. *See Lyons v. Lindsey Morden Claims Mgmt., Inc*., 985 S.W.2d 86, 90 (Tex. App.—El Paso 1998, no pet.) (reversing summary judgment based on derivative immunity for a private claims adjuster of a college district, reasoning that the adjuster had failed to prove an agency relationship as a matter of law); *cf. Garza v. Blue Cross & Blue Shield of Tex.*, 1999 Tex. App. LEXIS 8950, at 7-8 & n.2 (Tex. App.—Austin Dec. 2, 1999, no pet.) (unpublished op.) (explaining that the immunity defense potentially available for a non-employee is an extension of official immunity and noting that "[i]n relation to the doctrine of sovereign immunity, it has been said numerous times that the government's immunity from suit does not extend to an independent contractor doing work for the state, but a private person contracting with government to perform services shares the government's immunity when the government directs and controls the details of his work.").

Care should be taken not to read too much into this line of Texas cases. None reject the other elements of the defense – such as the requirement that the defendant perform the contract non-negligently. As explained elsewhere, while it is true in some jurisdictions that an agency relationship is a *necessary* element of derivative immunity, that is not the same as saying that an agency relationship is a *sufficient* condition, in and of itself, to cloak common law agents of government with the full benefits of sovereign immunity. What is absent from Texas law is any case holding that a common law agent, by virtue of its agency relationship with state or local government, is entitled to sovereign immunity.[14]

All of these Texas cases requiring an agency relationship could have been decided more soundly on an alternative ground – that regardless of whether derivative immunity is available only for agents or for agents and contractors alike, the defense affords no protection where the agent (or contractor, as the case may be) has performed the contract negligently. In each of the above-cited cases requiring an agency relationship, the theory of the suit was that the contractor had negligently or wrongfully performed the contract. The courts could have decided all of those cases on the ground that the contractor's alleged fault was the issue precluding summary judgment.

In any event, no agency relationship is required for Texas state road contractors, who are protected in Texas by statute.[15]

III. GOVERNMENT CONTRACTOR DEFENSE IN GOVERNMENT PROCUREMENT CASES.

In certain circumstances, the government contractor defense immunizes contractors who supply

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[14] I would be remiss not to point out *Ross v. Linebarger, Goggan, Blair and Sampson, L.L.P*., 333 S.W.3d 736 (Tex. App. — Houston [1st Dist.] Nov. 18, 2010, no pet.), where a non-employee tax collection agent of the government was entitled to immunity from suit arising out of tax collecting functions for local taxing entities. The important fact here is that the tax collector was sued in its official capacity. Thus, the suit was effectively a claim against the taxing authorities: "Although Linebarger itself is not a governmental unit, we have already concluded that Ross sued it as a governmental agent in its official capacity, and thus it can assert the governmental immunity enjoyed by the taxing entities." If a suit is brought against the agent in its official capacity, then the real party in interest is the governmental unit itself. This is not a situation of *derived* immunity at all.

[15] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 97.002 ("A contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.").

military equipment to the Government from the duties imposed by state tort law. In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court addressed the issue of the government contractor defense in an effort to clarify the elements that contractors must show in order to invoke the defense.

Boyle arose out of the death of a Marine pilot who drowned in a helicopter crash because he could not escape from a defectively designed emergency escape hatch. *Id*. at 502. The defendant, United Technologies, was a private company that built the helicopter and designed the escape hatch pursuant to a contract with the Government. *Id*. at 503.

The Court formulated a two part test to determine when federal law will pre-empt state tort law in the context of the government contractor defense:

(i) the subject matter of the contract must involve "uniquely federal interests." *Id*.

(ii) "[A] significant conflict [must] exist between an identifiable federal policy or interest and the [operation] of state law," such that "the application of state law would frustrate specific objectives of federal legislation."

Id. at 507 (citations omitted).

Applying this two-step inquiry to the plaintiff's claim to determine whether his state law tort claims were preempted, the Supreme Court identified the "unique federal interest" as "the civil liabilities arising out of the performance of federal procurement contracts." *Boyle*, 487 U.S. at 506. In doing so, the Supreme Court cited approvingly to *Yearsley*, noting that *Yearsley* found that if a contractor's authority to carry out a project was validly conferred and the project was within the constitutional power of Congress, the contractor cannot be liable for executing the government's will. *Id*. (citing *Yearsley*, 309 U.S. at 20-21). The Court then observed that the federal interest justifying the holding in *Yearsley* — the contractor's performance of a government contract — also applies to procurement contracts like the military equipment contract in *Boyle*. *Id.* ("the procurement of equipment by the United States is an area of uniquely federal interest."). Absent immunity, the Court feared that government contractors would either cease entering into contracts with the government, or they would raise their prices as a result of liability, therefore, affecting the ability of the government to procure items through contracts. *Id*.

However, satisfaction of the first prong of the analysis "merely establishes a necessary, not sufficient, condition for the displacement of state tort law." *Boyle*, 487 U.S. at 507. A defendant contractor must also demonstrate that a significant conflict exists between state and federal law. *Id*. The Court determined that a significant conflict would not exist when a contractor could comply with both its obligations under the contract, and its obligations under state law. *Id*. at 509. Therefore, in order for there to be a significant conflict, the state law duty on a contractor must be "precisely contrary" to the duty imposed by the government contract. *Id*. By way of example, the Court used the following scenario "the United States contracted for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of construction." *Boyle*, 487 U.S. at 509. The Court noted that in that case "a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty to anything identical to anything promised the Government, but neither would it be contrary." *Id.* "The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context." *Id.*

Recognizing the need for a limiting principle to identify situations in which significant conflicts exist between state and federal law, the court adopted as the limiting principle the discretionary function exception to the Federal Tort Claims Act ("FTCA"). *Boyle*, 487 U.S. at 511.[16] The Court noted that "the selection of the appropriate design for military equipment . . . is assuredly a discretionary function . . . ." *Id*. The Court further noted that "permitting 'second-guessing' of these judgments, through state tort suits against contractors would produce the same effect sought to be

[16] As a general matter, the United States as a sovereign is immune from suit except under those limited circumstances in which it has waived that immunity. *See United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980). With the passage of the Federal Torts Claims Act ("FTCA"), ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.), the United States waived its immunity to tort suits under certain conditions and subject to the exceptions set forth in the FTCA. *See* 28 U.S.C. § 2674 ("The United States shall be liable [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."); *see id*. § 2680 (setting forth exceptions). One of the FTCA exceptions, the "discretionary function exception," involves any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id*. § 2680(a).

avoided by the FTCA exemption." *Id*. The Court reasoned that "it makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id*. at 512. Therefore, the Court held that state laws which hold "Government contractors liable for design defects in military equipment does in some circumstances present a significant conflict with federal policy . . . ." *Id*.

The Supreme Court stated that the decisions and conduct of the government in *Boyle* — the selection of the appropriate design for military equipment — was a discretionary function since the decision involved "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations[.]" *Boyle*, 487 U.S. at 511. Ultimately, the Supreme Court concluded that state tort law imposing liability for design defects in military equipment is preempted when:

(1) the United States approved reasonably precise specifications;

(2) the equipment conformed to those specifications; and

(3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512.

"The rationale for [the contractor defense fashioned in *Boyle*] is not to protect the contractor as a contractor, but solely as a means of protecting the government discretionary authority over areas of significant federal interest." *In re World Trade Ctr. Disaster Site Lit. (WTC)*, 521 F.3d 169, 194 (2d Cir. 2008) (quotations omitted). The first and second prongs of the test were intended to determine whether the design feature in question was within the area where the policy of discretionary function would be frustrated (as opposed to a decision made by the contractor, which would not implicate government discretion). The final prong is intended to avoid creating an incentive for manufacturers to withhold knowledge of risks. *In re: Oil Spill by the Oil Rig "Deepwater Horizon"*, 2011 U.S. Dist. LEXIS 113424, at *17 (E.D. La. Sept. 30, 2011).

The Fifth Circuit has explained that "approval" under the first prong of the *Boyle* test "requires more than a rubber stamp" from the government. *Trevino v. General Dynamics Corp*., 865 F.2d 1474, 1480 (5th Cir. 1989) ("When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government is exercising discretion."). Furthermore, "reasonably precise specifications" under *Boyle* requires that "the specifications address, in reasonable detail, the product design feature alleged to be defective." *In re: Katrina Canal Breaches Lit.*, 620 F.3d 455, 461 (5th Cir. 2010).

Two Texas courts have applied *Boyle*'s three-part preemption defense in product defect cases against federal procurement contractors. *See Feldman v. The Kohler Co.*, 918 S.W.2d 615 (Tex. App.—El Paso 1996, writ denied) (affirming summary judgment under *Boyle*); *Jorden v. The Ensign-Bickford Co.*, 20 S.W.3d 847 (Tex. App.—Dallas 2000, pet. denied) (reversing summary judgment on the ground that the contractor failed to prove conclusive that the government approved the particular product specification that caused plaintiff's injury).

IV. EXPANDING CONTOURS OF COMMON LAW DERIVATIVE IMMUNITY.

As discussed in this section, the doctrine of derivative immunity has been pushed into new areas by state and federal courts alike.

A. Contractor Consultations with Official Policymakers.

In *Chesney v. Tennessee Valley Authority*, 782 F. Supp. 2d 570 (E.D. Tenn. 2011), the district court for the Eastern District of Tennessee held that if the government is immune from suit pursuant to the 'discretionary functions' exemption of the FTCA, a private consultant that assists the government in those policy decisions is derivatively immune – even if the consultant gave allegedly negligent advice.

In *Chesney*, the plaintiffs, all residential property owners, sued the TVA and its private engineering consultants for property damages resulting from the failure of TVA's coal ash storage and disposal facility. TVA clearly had the ultimate authority to make the policy decisions at issue in the case – decisions regarding design and construction of the facility, which, if any, repairs, modifications, or changes to implement at the facility, the design and construction of such changes, what policies and procedures should govern the operation, management, and oversight of the facility, and whether to continue operating the facility. In the course of making these policy decisions, TVA drew, in part, upon the work, studies, advice, and recommendations of its private engineers.

The court dismissed all of the plaintiffs' claims

against the TVA on the ground of sovereign immunity, holding that the TVA's challenged conduct fell within the discretionary function exemption of the FTCA. The court then reasoned that derivative immunity covered the consulting activities of the TVA's engineers, even if negligent:

> While plaintiffs have couched their allegations against WorleyParsons and Geosyntec in terms of defendants' failure to exercise due care, failure to follow engineering best practices, and failure to advocate or recommend different or "safer" manners of design, redesign, modifications, fixes, and coal ash disposal methods, such allegations clearly challenge the policy decisions by TVA that are protected by the discretionary function doctrine. The selection of an appropriate design, appropriate modifications or fixes, and appropriate policies and procedures for coal ash disposal, are decisions involving not merely engineering analysis, but judgment as to the balancing of many technical, budgetary, corporate, and even social considerations, including the need for and level of electric power production, costs, safety factors, and environmental considerations and developments. While defendants' recommendations and TVA's ultimate decisions may have resulted in designs, repairs, or operational policies and procedures that were not comprehensive or were otherwise inappropriate, "[e]ven the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made." *Myslakowski v. United States*, 806 F.2d 94, 97 (6th Cir. 1986), *cert. denied*, 480 U.S. 948 (1987).

Chesney, 782 F. Supp. 2d at 586.

B. Modified *Boyle* Test.

Some state courts have adopted a less restrictive version of the three-part *Boyle* test for determining whether public works contractors are derivatively immune. For example, in *Board of Education v. W.R. Grace Corp*., 258 N.J. Super. 94, 609 A.2d 92 (1992), the court affirmed a summary judgment for a contractor that installed asbestos in a school building according to plans furnished by the school district. An interesting twist in the case is that the plaintiff was the school district itself, which sought asbestos abatement costs from the contractor. In effect, the contractor's immunity to a products liability claim was the immunity it "derived" from the school district itself.[17]

The reasoning of *W.R. Grace Corp*. is instructive. After discussing the extensive jurisprudence of contractor derivative immunity, including federal cases such as *Boyle* (which allowed immunity in a procurement context), the New Jersey court adopted a modified *Boyle* test in this construction context: "where a third-party sues a government contractor who has contracted with a public entity which contract (1) has reasonably precise specifications approved by the public entity; and (2) the contractor has performed in conformance with those specifications, then the contractor should have a government contractor's defense." 609 A.2d at 102. The court acknowledged but ultimately rejected the third element of the *Boyle* test – whether the contractor knew of the defect but failed to warn the government of it, citing "fairness" as a reason for not requiring a contractor to point out the inherent defects of a construction contract. *Id*. "An independent contractor bound to specifications that are provided by a public entity and over which it has no control is not responsible for defects in those specifications." *Id*. at 97 (quoting *Vanchieri v. New Jersey Sports & Exposition Authority*, 104 N.J. 80, 514 A.2d 1323 (1986)).

C. Service Contracts.

Courts have also adapted derivative immunity to cover claims arising out of performance of certain service contracts.

In *Rodriguez v. New Jersey Sports & Exposition Authority*, 193 N.J. Super. 39, 472 A.2d 146 (1983), the plaintiff was a patron of a horse race track owned and operated by a sporting authority, a local governmental entity. The authority contracted with a private security company, Pinkerton's, to provide security on the premises. While leaving the parking lot of the facility, the plaintiff was assaulted and robbed.

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[17] In Texas, the Supreme Court has rejected argument that a local political subdivision, which derives its immunity from the State, cannot assert that immunity as a bar to a suit brought by the State itself. *See City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007). The counter argument, which a majority of the Court accepted, is that the judiciary has bestowed the State's immunity on all political subdivisions, and it is a legislative function to waive that immunity. The governmental immunity of a local government is not waived by virtue of the Texas Attorney General's act of filing a suit against the local government on behalf of the State.

He sued the authority and Pinkerton's, alleging that the defendants had failed to (1) provide proper security and lighting, (2) warn of known dangers, and (3) take reasonable precautions to assure that no harm would come to those lawfully on the premises. The court of appeals held that the authority was immune: "This essentially is a claim that the Authority did not provide 'sufficient police protection service' and hence falls squarely within the broad immunity granted to the Authority and its employees by [the New Jersey Tort Claims Act.]." *Id*. at 149.

The court cited the applicable rule as follows:

> It is a well-settled general principle that one who contracts with a public body for the performance of public work, if not guilty of negligence or wilful tort, and if not employing ultrahazardous methods, is entitled to share the immunity of the public body from liability for incidental injuries necessarily involved in the performance of the contract.

Id. at 149 (quoting Annot., *Right of Contractor with Federal, State or Local Public Body to Latter's Immunity From Tort Liability*, 9 A.L.R.3d 382, 389 (1966)).

In ruling for the contractor, the court discussed the contractor's performance of the contract in light of the critical distinction between claims arising out of the government's *formulation* of policy and those of the contractor's *implementation* of that policy:

> A public contractor may, as pointed out in the annotation quoted above, be held liable when negligent in the execution of the contract. [citing cases]. However, plaintiffs have failed to show that Pinkerton's was independently negligent. Pinkerton's duty to "aid in the protection and security" of the Meadowland's complex was prescribed by the terms of its contract with Authority. Although the contract provided that the manner and method of operating the security function rested with Pinkerton's as it applied to its employees, all policy decisions regarding the security function, the right to determine guard posts, the number of people to be employed for security, and the type and amount of equipment to be utilized rested solely with the Authority. Additionally, although the specific number of permanent posts and hours of duty of the security force were to be fixed jointly by the Authority and Pinkerton's, the Authority reserved the right to change or transfer the Pinkerton employees from one permanent post to the other, to change the hours of specific personnel and to approve or disapprove the number of employees engaged in the performance of the contract. Here, there was no proof offered whatsoever creating a factual issue as to whether Pinkerton's failed to comply with the terms of the contract or the directions and orders issued by the Authority. There is no proof that Pinkerton's did not employ the number of security guards required by the Authority or that the Authority required a permanent security guard in or around the area in which Rodriguez was assaulted and robbed. Moreover, there is not any evidence in the record to suggest that the deployment of the roving guards after the ninth race in order to direct the egress of approximately 18,000 to 20,000 cars from the Meadowlands complex was unreasonable.

Rodriguez, 472 A.2d at 149-50.

Similarly, in *Ornes v. Daniels*, 278 N.J. Super. 536, 651 A.2d 1040 (1995), there was no contractor negligence alleged in the performance of the contract. The State of New Jersey contracted with a bakery to place a prison inmate with the bakery through a state-sponsored work-release program. The bakery's only duty in connection with the supervision of the inmate was to notify the prison if the inmate escaped. The inmate escaped and assaulted the plaintiff. The bakery properly notified the state of the inmate's escape. The plaintiff, however, sued both the State and the bakery. The court of appeals recognized immunity for both. The State was absolutely immune from suit for the actions of the inmate. The court of appeals also concluded that the bakery should share in the State's immunity, based largely upon the limited nature of the bakery's undertaking:

> Marine was not even in the business of contracting with the State to sell its products or services for a profit. Its sole function, as we see it, from the standpoint of public cost, sound public policy and fairness, was to provide inmates designated by the prison with a normal job in a normal work environment.
>
> It would be ironic, and surely unfair, to insulate from liability the institution charged

> with supervision of prisoners, while exposing a bakery to liability for violent conduct of a prisoner whom it has done no more than to employ in accordance with an agreement with the State which has not been shown to impose upon the employer additional supervisory obligations.
>
> Absent specific agreement with the State, employers of work-release programs should not have the responsibility for security. It is apparent that routinely placing liability upon the employer would represent a cost passed on to the State. . . . As to the fairness principle, Marine is a bakery, not a warder. Its undertaking of the role of employer should not . . . be interpreted to render meaningless the State's immunity or to expose Marine as a work-site employer to the costly burden of fulfilling a function not within the limited scope of its undertaking.

651 A.2d 1044-45.

D. Subcontractor Derivative Immunity.

On the theory that derivative immunity defeats liabilities arising out of governmental policy decisions regardless of who carries them out, one federal circuit court has extended derivative immunity to subcontractors of a government contractor; privity of contract with the government was held not required.

In re World Trade Ctr. Disaster Site Lit. (WTC), 521 F.3d 169, 194 (2d Cir. 2008), the court examined whether immunity derived from the federal government could extend not only to a municipality carrying out federal mandates, but also to contractors hired by that municipality to do some of the work. The Second Circuit began its analysis from the premise that derivative immunity exists "not to protect the contractor as a contractor, but solely as a means of protecting the government discretionary authority over areas of significant federal interest." *Id.* (quotations omitted); *see also In re: Oil Spill by the Oil Rig "Deepwater Horizon"*, 2011 U.S. Dist. LEXIS 113424, at *24-26 (E.D. La. Sept. 30, 2011) (noting that "contractual privity with the government is not a pre-requisite to derivative immunity" and holding that private entities can derive immunity from the federal government under the Clean Water Act, irrespective of contractual privity with the government).

Notably, in *WTC*, the Second Circuit applied this reasoning when it determined whether local government and private entities could derive immunity from the Stafford Act, which provides immunity to the federal government for discretionary functions (similar to the FTCA). *See WTC*, 521 F.3d at 195-97. The court explained that the purpose of the Stafford Act implicated a unique federal interest — coordinating federal disaster assistance and streamlining the management of large scale disaster recovery projects — which would be directly affected if a private or local government entity, out of fear of state tort liability, shied from following federal directives. *Id*. at 197. The court concluded derivative immunity was available to the defendants, including entities contracted by the city, and not merely to the entities with contracts with the federal government.

V. LIMITATIONS OF COMMON LAW DERIVATIVE IMMUNITY.

There are three substantial limitations on the applicability of derivative immunity: (1) lack of government approval, (2) deviation from the government's specifications, and (3) contractor negligence in the performance of the contract.

A. Lack of Government Approval.

Derivative immunity under *Yearsley* and *Boyle* require that the contractor perform acts pursuant to a valid authorization of the government. *See Yearsley*, 309 U.S. at 20-21; *Boyle*, 487 U.S. at 512 (government contract for goods provided reasonably precise specifications). Contractors that exceed the scope of the government contract directives cannot claim derivative immunity. *See, e.g., In re: Oil Spill by the Oil Rig "Deepwater Horizon"*, 2011 U.S. Dist. LEXIS 113424, at *24-26 (E.D. La. Sept. 30, 2011) (defendants not entitled to derivative immunity on the pleadings, since the plaintiffs alleged that the government had not approved defendants to use the oil slick dispersants that injured the plaintiffs and their property); Annot., *Right of Contractor with Federal, State or Local Public Body to Latter's Immunity From Tort Liability*, 9 A.L.R.3d 382 (1966) ("rule of non-liability does not apply when the act complained of was performed for the convenience of the contractor only").

B. Deviating from Contractual Specifications.

"The problem confronting the courts in many cases is whether, under the fact situation, the damage resulted necessarily, or incidentally, from the carrying out of the contract according to its terms or according to the directions of the contractee, or whether the damage resulted from activity over which the contractor had a choice, either as to its adoption or the method of carrying it out, thus providing a basis for a finding of negligence." Annot., *Right of Contractor with Federal, State or Local Public Body to Latter's*

Immunity from Tort Liability, 9 A.L.R.3d 382, at § 2a (1966) ("rule of non-liability does not apply when the act complained of was performed for the convenience of the contractor only").

C. Negligent Implementation.

"According to the great weight of authority, a contractor with a public body is not entitled to avail himself of the immunity of the latter from liability for injuries resulting from wilful tort or negligence in the performance of public work." Annot., *Right of Contractor with Federal, State or Local Public Body to Latter's Immunity From Tort Liability*, 9 A.L.R.3d 382, 389 (1966).[18] In other words, the defense protects the agent or contractor who is "following orders" that where the orders implicate some negligent decision on the part of the government; it offers no protection where the agent's own negligence is also implicated. Texas cases are in accord.[19]

Because contractors enjoy no derivative immunity for negligent implementation of a government contract, some commentators have correctly observed that the defense is largely illusory:

> It may be noted that many of the cases holding the public contractor not liable on the theory of immunity shared with the public body appear to be cases which could have been decided without reference to that theory. In many of the cases it appears that the public contractor would not have been liable in any event, even had the contractor been a private contractor, or even had the public-body contractee not been entitled to immunity, as, for example, when a contractor carefully carries out the plans, specifications, and directions given him by the employer, at least when such plans are not obviously defective or dangerous. It is submitted that in those cases in which the nonnegligent public contractor would not have been held liable even in the absence of sovereign immunity in the contractee (for example, in jurisdictions in which such immunity has been removed), the decisions may arguably be subject to the theoretical criticism that they are placed on the too narrow ground of shared immunity rather than of nonliability under general principles of law.

Annot., *Right of Contractor with Federal, State or Local Public Body to Latter's Immunity From Tort Liability*, 9 A.L.R.3d 382 (1966) (footnotes deleted).

VI. Official Immunity for Private Sector Agents and Government Contractors.

Official immunity for private sector agents and contractors is closely related to derivative immunity. Both advance the same principal policy concern – to ensure that government (and the people who serve it either as employees or as contractors) carry out essential functions of the government without the fear, distraction, and financial burden of certain types of civil lawsuits.[20]

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[18] *See also Schrader v. Hercules, Inc.*, 489 F. Supp. 159 (W.D. Va. 1980), where the plaintiff sued a contractor, Hercules, for injuries alleged to have resulted from an explosion caused by Hercules' negligence at the Radford Army Arsenal. *Id.* at 160. Rejecting derivative sovereign immunity, the court acknowledged that "an individual is not liable for carrying out the sovereign's will." *Id.* at 161. "If the government has a right to have certain work performed then 'it has the right to employ servants to do the work, and those servants cannot be sued where they act strictly in the line of their employment executing the orders of the United States.'" *Id.* (citation omitted). A "non-governmental party's negligence," however, "is not subject to the defense." *Id.* Instead, the court held, derivative sovereign immunity is available "when the incidental injury is the necessary and unavoidable consequence of doing the work [or] . . . when the work cannot be done without inflicting the injury.'" *Id.*

[19] *See, e.g., Alton v. Sharyland Water Supply Corporation*, 145 S.W.3d 673, 682 (Tex. App.—Corpus Christi 2004, no pet.) (independent contractors of the city of Alton could not assert immunity for injuries caused by negligent performance of contractual duties owed to city); *Overstreet v. McClelland*, 13 S.W.2d 990, 992 (Tex. Civ. App.—Dallas 1928, writ dism'd w.o.j.) ("a contractor doing construction work and improvement upon a public highway under a contract such as alleged by appellant in this case is required to exercise ordinary care to protect travelers who are using the highway and are exercising the proper care for their own safety"); *T. J. Mansfield Const. Co. v. Gorsline*, 278 S.W. 485 (Tex. Civ. App.—Dallas 1925) (affirming negligence findings against county road contractor and "overrul[ing] the contention that, even if appellants were independent contractors, they would not be liable, because the county would not have been liable"), *rev'd on other grounds*, 288 S.W. 1067 (Tex. Comm'n App. 1926); *Bay, Inc. v. Ramos*, 139 S.W.3d 322, 329 (Tex. App.—San Antonio 2004, pet. denied) (en banc) ("a contractor performing construction work on a public highway has a duty to exercise ordinary care to protect travelers who are rightfully using the highway"); *Wedegartner v. Skoruppa*, 236 S.W.2d 216, 218 (Tex. Civ. App.—San Antonio 1951, no writ) (same).

[20] *See also Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205, 211 (4th Cir. 2012) ("The difference between derivative sovereign immunity and derivative absolute official

A. The Public Employment Analogy.

Perhaps to best understand the scope of common law immunities available to non-employee agents of government, it is instructive to look at the immunities available to public employees. The employer-employee relationship is, after all, a common law agency relationship. *See National Plan Adm'rs, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007); *see also* RESTATEMENT (3D) AGENCY § 1.01, comment c ("The elements of common-law agency are present in the relationships between employer and employee.").

The analogy starts from the premise that all public employees are common law agents of their governmental employer. And yet, as agent-employees, they are only entitled to assert official immunity where it is justified by the facts, not sovereign immunity. It stands to reason that *non*-employee agents would be entitled to no greater immunity protection than employee agents.

Indeed, the Eleventh Circuit made precisely this observation in rejecting the argument that a common law agent of the U.S. Government enjoys an immunity from state tort liability that is co-extensive with the sovereign immunity enjoyed by the U.S. Government. *See McMahon v. Presidential Airways, Inc*., 502 F.3d 1331, 1344-46 (11th Cir. 2007). Non-employee agents – like employee agents – must show that their official immunity is justified by the facts; whereas the Government enjoys sovereign immunity "by default" – the sovereign's immunity is inherent in the Government and bars any suit regardless of the facts unless immunity has been waived by the legislative branch. I will quote liberally from the *McMahon* opinion because it well explains the analogy between employees and non-employees in this connection and how the immunity of all agents generally differs fundamentally from sovereign immunity:

> Status as a common law agent is not a sufficient condition for derivative sovereign immunity. If it were, then the law of federal officer immunity would be different in certain respects. A federal officer is simply a specialized common law agent, a servant or employee. If [the defendant's] theory were true then, because the United States is immune from suit by default (absent its consent), federal officers would share in the government's sovereign immunity whenever it has not been waived.
>
> But it is simply not the case that federal officers share in the sovereign's immunity whenever it has not been waived. Federal officers receive immunity in many situations. But unlike the immunity possessed by the government, that immunity must be affirmatively justified, and does not flow automatically from the government's retained sovereign immunity. [citing cases on qualified immunity].
>
> . . .
>
> Because the government has immunity by default while an officer's immunity must be affirmatively justified, there are, unsurprisingly, cases where the government is immune but the federal officer is not. An example from current law demonstrates that official immunity and sovereign immunity are not coextensive. Federal officers generally receive only qualified immunity in a *Bivens* action. This means that federal officers are not immune if they violate clearly established constitutional rights and are sued under *Bivens*. The government itself, on the other hand, remains immune, even if the right allegedly violated by the officer is clearly established. As a result, the government may be immune from liability for damages for violating a person's constitutional rights, even though the officer-agent is not.
>
> If [the defendant's] position were correct, then this result would not be possible, because the federal officer, as a special kind of common law agent, would be derivatively entitled to the same immunity the government possesses. [The defendant's] premise of total derivative immunity for common law agents therefore cannot be correct.
>
> Moreover, it is clear that if a federal officer cannot claim complete derivative immunity, neither can a mere common law agent. The result urged by [the defendant] would mean that, in a *Bivens* suit, a prison guard employed by the government would have only qualified immunity, while a private contractor who works in the prison but is no

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immunity (including any offshoots thereof) appears to be a fine one that may depend on the degree of discretion afforded the contractor by the government. . . .").

> more than a common law agent would have absolute immunity (assuming the government has not waived it). That result cannot possibly be the law.
>
> Instead, it must be that, just as in the area of official immunity, the immunity of a common law agent must be affirmatively justified. Just as with a federal officer, the immunity of a private party, even if a common law agent, must be carefully tailored to protect the governmental functions the private party is exercising. Predictably, courts have been just as vigilant about tailoring the immunity of a private party to its perceived justification as they have been in tailoring the immunity of federal officers. We must exercise the same vigilance in the instant case.
>
> It is thus not enough for [the defendant] to point to its (alleged) status as a common law agent and the government's (alleged) *Feres* immunity. For [the defendant] to show that it is entitled to the government's *Feres* immunity, it must also show that the policies underlying the *Feres* bar extend to private contractor agents. This conclusion is not contrary to any derivative sovereign immunity case. None of these cases say that status as a common law agent is a sufficient condition for the agent to have the government's immunity, only that it is a necessary condition. Nor could status as a common law agent be a sufficient condition; otherwise, as discussed above, aspects of the law of official immunity would make little sense.

McMahon, 502 F.3d 1331, 1344-46 (11th Cir. 2007) (citations deleted).

The Texas Supreme Court has made essentially the same observation in reverse. The Court has noted that since all agents are liable individually for their torts, it follows that public employees, who are agents of the government, are personally liable when sued individually:

> Under Texas law, a suit against a government employee in his official capacity is a suit against his government employer with one exception: an action alleging that the employee acted ultra vires. With that exception, an employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer. But public employees (**like agents generally** have always been individually liable for their own torts, even when committed in the course of employment, and suit may be brought against a government employee in his individual capacity.

Franka v. Velasquez, 332 S.W.3d 367, 382-83 (Tex. 2011) (emphasis added; footnotes deleted).

B. Immunity for Private Attorneys Serving Government – *Filarsky v. Delia*.

Filarsky v. Delia, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (April 17, 2012), held that a private attorney retained by a municipality to investigate a personnel matter is eligible for qualified immunity in a § 1983 suit arising out of the investigation. To decide this issue, the Court looked to the contours of the common law as it existed when Section 1983 was passed in 1871. *Id*. at 1660.

The Court noted that in 1871, when the common law did not draw a distinction between public servants and private individuals engaged in public service, the function of conducting an internal investigation of the city's business was protected by immunity at common law. The Court further reasoned that making such a distinction today made little sense either:

> Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to ensure that talented candidates are not deterred by the threat of damages suits from entering public service. The government's need to attract talented individuals is not limited to full-time public employees. Indeed, it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals. This case is a good example: Filarsky had 29 years of specialized experience as an attorney in labor, employment, and personnel matters, with particular expertise in conducting internal affairs investigations. The City of Rialto certainly had no permanent employee with anything approaching those qualifications. To the extent such private individuals do not depend on the government for their livelihood, they have freedom to select other work – work that will not expose them to

> liability for government actions. This makes it more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts.
>
> Sometimes, as in this case, private individuals will work in close coordination with public employees, and face threatened legal action for the same conduct. Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag — facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.
> The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties. Not only will such individuals' performance of any ongoing government responsibilities suffer from the distraction of lawsuits, but such distractions will also often affect any public employees with whom they work by embroiling those employees in litigation. . . . . Allowing suit under § 1983 against private individuals assisting the government will substantially undermine an important reason immunity is accorded public employees in the first place.

Id. at 1664-65 (internal citations and quotations omitted).

The *Filarsky* Court distinguished two important decisions that previously stood in the path of contractor immunity – *Wyatt v. Cole*, 504 U.S. 158 (1992), and *Richardson v. McKnight*, 521 U.S. 399 (1997).

In *Wyatt*, the Court had held that private individuals who had used a state replevin law to compel the local sheriff to seize disputed property from a former business partner were not entitled to seek qualified immunity. According to *Filarsky*, these individuals "had no connection to government and pursued purely private ends." *Filarsky*, 132 S. Ct. at 1667. "Unlike the defendants in *Wyatt*, who were using the mechanisms of government to achieve their own ends, individuals working for the government in pursuit of government objectives are 'principally concerned with enhancing the public good.'" *Id*. (quoting *Wyatt*, 504 U.S. at 168).

Richardson denied qualified immunity to prison guards who were privately employed, despite their quintessentially public function. Although the Court had previously determined that public-employee prison guards were entitled to qualified immunity, it determined that prison guards employed by a private company and working in a privately-run prison facility did not enjoy the same protection. The *Richardson* Court explained that the various incentives characteristic of the private market in that case ensured that the guards would not perform their public duties with unwarranted timidity or be deterred from entering that line of work. 521 U.S. at 410-411. According to the *Filarsky*:

> *Richardson* was a self-consciously "narrow[ ]" decision. *Id*., at 413, 117, S. Ct. 2100, 138 L. Ed. 2d 540 ("[W]e have answered the immunity question narrowly, in the context in which it arose"). The Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals. *Ibid*. Instead, the Court emphasized that the particular circumstances of that case – "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"– combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. *Ibid*. Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work.

Filarsky, 132 S. Ct. at 1667.

C. *Westfall* Immunity for Federal Government Contractors.

In *Westfall v. Erwin*, 484 U.S. 292, 295-97 (1988), the Supreme Court recognized an absolute immunity from state law tort liability for federal officials exercising discretion while acting within the scope of their employment. In such situations, federal common law displaces state tort law and governs the scope of civil liability for federal officials performing their duties. *See Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74, 78 (4th Cir.1993).

In *Boyle*, the Supreme Court noted that the applicability of *Westfall* immunity to private contractors was not raised by the parties, so the question remains open. *See Boyle*, 487 U.S. 505 n.1. However, the lower federal courts have extended *Westfall* immunity to federal government contractors "in the narrow circumstances where the public interest in efficient government outweighs the costs of granting such immunity." *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447 (4th Cir. 1996). "Even though private persons under contract with the government act only partly in the public sphere, the public interest may demand that immunity protect them to the same extent that it protects government employees." *Mangold*, 77 F.3d at 1447.[21]

As the Fifth Circuit has noted,

> Our extension of official immunity to contractors and other private parties is an application of the presumption that immunity attaches to particular official functions, not to particular offices. We recognize that if absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions, and that those functions are no less important simply because they are exercised by officers of lower rank in the executive hierarchy.

Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc., 481 F.3d 265, 268 (5th Cir. 2007) (internal quotations, brackets and footnotes deleted).

However, non-governmental entities that seek the protection afforded by the *Westfall* defense are subject to the requirement that their acts be discretionary. *Martin v. Halliburton*, 618 F.3d 476, 484 (5th Cir. 2010); *Houston Cmty. Hosp.*, 481 F.3d at 269. As the Fifth Circuit has held:

> [B]y 'discretionary,' it is evident in context that the [Supreme] Court meant activities that involve 'policy-making work for the United States Government.'" *NF Indus., Inc. v. Exp.-Imp. Bank of U.S.*, 846 F.2d 998, 1001 (5th Cir. 1988) (per curiam) (quoting *Westfall*, 484 U.S. at 299). Therefore, to establish our appellate jurisdiction over the denial of their asserted *Westfall* defense, Defendants must make a substantial showing that their allegedly tortious conduct was within the scope of their official duties and was discretionary in the sense that it involved governmental policy-making activities.

Martin, 618 F.3d at 484.

Westfall-type absolute immunity is most commonly recognized in cases where government contractors have been sued for carrying out reporting functions under the government program they have been hired to administer.[22]

D. Official Immunity for Texas Contractors.

Official immunity is a common-law defense that protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority. "The purpose of official

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[21] Congress superseded the *Westfall* test by passing the Federal Employees Liability Reform and Tort Compensation Act, also known as the Westfall Act, which eliminated the requirement that the acts of federal employees be discretionary. *See* 28 U.S.C. § 2679(d). "However, the *Westfall* test remains the framework for determining when nongovernmental persons or entities are entitled to the same immunity." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998) (citing *Mangold*, 77 F.3d at 1446-50).

[22] *See, e.g., Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998) (upholding official immunity for a Medicare insurance carrier that reported possible Medicare fraud to the Department of Health and Human Services, concluding that "investigation and reporting of possible Medicare fraud is precisely the type of delegated discretionary function that the public interest requires to be protected by immunity"); Murray v, *Northrop Grumman Information Technology, Inc.*, 444 F.3d 169, 176 (2d Cir. 2006) (stating that "when a private contractor, hired to perform a quintessential governmental function, in the course of its official duties conveys information with possible national security implications to the agency charged with its oversight, that contractor is absolutely immune from state tort liability for claims resulting from that information-sharing"); *Slotten v. Hoffman*, 999 F.2d 333, 337 (8th Cir. 1993) (official immunity for private party's transmission of information pursuant to obligations to government agencies); *Becker v. Philco Corp.*, 372 F.2d 771, 774 (4th Cir. 1967) (official immunity from libel action where employer reported information to the Defense Department); *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985) (official immunity from a defamation action based on a report submitted by a private Medicare consultant); *Gulati v. Zuckerman*, 723 F. Supp. 353 (E.D. Pa. 1989)(official immunity from state tort liability to defense contractor based on all information conveyed to the Defense Department).

immunity is to insulate the functioning of government from the harassment of litigation, not to protect erring officials." *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994) (citing *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)).

The *Kassen* Court's citation to *Westfall* should not go unnoticed, given that the federal courts have extended *Westfall* immunity to private parties carrying out discretionary functions of government. Moreover, in *Putthoff v. Ancrum*, 934 S.W.2d 164 (Tex. App.—Fort Worth 1996, writ denied), the court recognized the availability of Texas official immunity for a contractor hired by Tarrant County to serve as the county medical examiner, the court noted the close relationship between federal and state official immunities and cited to some of the extensive federal case law in which "[i]t is generally recognized that official immunity extends to private parties under contract to provide governmental duties." *Id*. at 169-70 & n.7. This principle is currently gaining recognition in the Texas courts of appeals.[23] The availability of immunity in such cases may turn on whether the contractor is performing a core governmental function.[24]

VII. LEGISLATIVE EXPANSION OF DERIVATIVE IMMUNITY IN TEXAS.

A. Separation of Powers Limitations on Legislative Power to Expand Immunity.

Sovereign immunity is a common law construct. It is a judicial function to decide the reach of immunity. Thus, statutes that purport to expand immunity are on thin constitutional ice. Most recently, in *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 78 n.44 (Tex. 2011), the Supreme Court held that a charter school is a "governmental unit" under Section 101.001(3)(D) of the TTCA, but noted that the school's status as a governmental unit did not control whether the school could assert sovereign immunity from suit:

> We leave undecided the separate issue of whether Universal Academy is immune from suit. . . . [W]e reserve judgment on: (1) whether Universal Academy, while entitled to take an interlocutory appeal, also has immunity from suit; and more fundamentally (2) whether the Legislature in fact has the authority to confer (as opposed to waive) immunity, a common-law creature traditionally delimited by the judiciary.

Id. at 78 n.44. Earlier, the Supreme Court had struck down a state statute which purported to classify city airport functions as governmental (to which immunity attaches) as opposed to proprietary (to which no immunity attaches). *See City of Corsicana v. Wren*, 159 Tex. 202, 317 S.W.2d 516 (1958) (holding that courts were not bound by legislative acts purporting to expand immunity but were only obligated to accord such statutes "great weight" in determining whether to expand immunity to the area covered. *Id*. at 521-22 (plurality opinion) & 522 (Calvert, J., concurring) (1958).[25]

B. Statutes That Define Certain Private Entities as Governmental Units.

One approach to expanding immunity legislatively has been to declare certain private entities as "governmental units" for purposes of immunity. *See,*

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[23] *See, e.g., Titus Reg'l Med. Ctr. v. Tretta*, 180 S.W.3d 271, 274 (Tex. App.—Texarkana 2005, no pet.) (recognizing official immunity for contractor hired to serve as CEO for regional medical center and noting that "[t]he majority rule, and we think the better rule, is that official immunity does extend to a private party acting pursuant to a contract with a governmental entity as an official fulfilling statutorily mandated functions."); *Knowles v. City of Granbury*, 953 S.W.2d 19, 24-24 (Tex. App.—Fort Worth 1997, pet. denied) (recognizing official immunity for contractor hired as city airport manager and holding that "[a]lthough some caselaw states that independent contractors do not enjoy official immunity, [citing *Gonzalez v. Heard, Goggan, Blair & Williams*, 923 S.W.2d 764, 766 (Tex. App.— Corpus Christi 1996, writ denied) (op. on reh'g), this court has recently pointed out that, as a general rule, official immunity does extend to private parties who contract to undertake governmental duties."); *Bates v. McLaughlin*, 1999 Tex. App. LEXIS 7584, No. 04-98-00933-CV, 1999 WL 816149, at *4 (Tex. App.—San Antonio Oct. 13, 1999) (not designated for publication) (granting official immunity to independent contractor psychologist); *Guajardo v. Linebarger Goggan Blair & Sampson, L.L.P.*, No. 04-04-00211-CV, 2005 Tex. App. LEXIS 3133 (Tex. App. San Antonio Apr. 27, 2005, pet. denied) (tax collector).

[24] *See, e.g., GAB Bus. Servs. v. Moore*, 829 S.W.2d 345 (Tex. App.—Texarkana 1992, no writ) (rejecting immunity on multiple grounds for GAB, a private company providing insurance adjusting services to the State Risk Pool, the court noting that GAB was not the agent of the Risk Pool; GAB was not performing uniquely governmental services, but was merely acting as a private adjuster would; and GAB did not act in good faith).

[25] The specific holding of *Wren* has been overruled by constitutional amendment ratified in 1987, which has authorized the Legislature to define municipal functions as governmental or proprietary (*see* TEX. CONST. art. XI, § 13).

e.g., Klein v. Hernandez, 315 S.W.3d 1 (Tex. 2010) (holding that Chapter 312 of the Health and Safety Code, which classifies Baylor Medical School, as a "governmental unit of state government" and a "state agency" for certain purposes and which deems Baylor's resident medical students as state employees for the same purposes, authorized resident students to assert Tort Claims Act protections such as § 101.106).

Another approach has been to broaden the Tort Claims Act's *waiver* of governmental immunity to cover certain private entities that perform governmental functions.[26] For example, the Tort Claims Act sweeps within the definition of "governmental unit" all non-profit volunteer fire departments and emergency medical service providers.[27] The few courts that have considered the immunity of these entities have treated immunity as *fait accompli*, without inquiry into the source of the immunity. *See Cypress Creek Emer. Med. Servs. v. Cosby*, No. 09-06-00399-CV, 2007 Tex. App. LEXIS 1734 (Tex. App.—Beaumont Mar. 8, 2007, pet. denied) (no waiver of immunity of private non-profit VFD under TTCA waiver).

C. Statutes That Confer Derivative Immunity Directly.

Another legislative approach has been to confer immunity directly on certain contractors, such as the contractors of regional transportation authorities. *See* TEX. TRANSP. CODE § 452.0561 ("[a]n independent contractor of a transportation entity performing a function of the entity or an authority is liable for damages only to the extent that the entity or authority would be liable if the entity or authority itself were performing the function"). An independent contractor performing any of the authority's statutory functions thus stands in the transit authority's shoes for purposes of liability. *See, e.g., GLF Construction Corp. v. LAN/STV*, 414 F.3d 553 (5th Cir. 2005) (claim for misrepresentation barred by statutory derivative immunity, since claim would be barred against DART); *Castro v. Cammerino*, 186 S.W.3d 671, 678 (Tex. App.—Dallas 2006, pet. denied) (independent contractor of government entity entitled to protection of statutory tort damage cap pursuant to (now superceded) section 452.056(d) of Transportation Code); *Reunion Hotel/Tower Joint Venture v. Dallas Area Rapid Transit*, 250 S.W.3d 203 (Tex. App.—Dallas 2008, no pet.) (immunity derived from DART bars claims against construction contractor). Conversely, if the claim is one for which the transit authority would have no immunity under the TTCA, its contractor cannot assert immunity from such claim. *See Martin K. Eby Constr. Co. v. LAN/STV*, 205 S.W.3d 16 (Tex. App.—Dallas 2006, pet. denied) (holding that no immunity existed in claim for breach of contract by DART's construction contractor against DART's engineering contractor, since plaintiff's contract claims for defective plans could have been brought against DART).

Statutory derivative immunities have applied only so far as the statute granting it allows. These immunities do not have any current common law underpinning, and thus, the courts have been unwilling to expand their reach of the statute beyond its literal terms. This can lead to anomalous situations that do not harmonize with common law. For example, since the statutory derivative immunity of transit authority contractors does not cover the contractors' employees, the contractors' employees cannot assert Section 101.106 to bar claims against them. *See Castro v. Cammerino, supra*, where the court rejected the application of Section 101.106 immunity for the employee of a contractor sued for negligence in the operation of a bus:

> Pivotal in this case is that the employees of independent contractors are not included in former section 101.106, and they are specifically excluded from the definition of an "employee" under the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2). Accordingly, the statutory framework providing the "damage caps" and the "bar" does not include the employees of independent contractors of governmental units. The Texas Legislature could have included language in [superceded] section 452.056(d) of the Texas Transportation Code, article 6550d of the Texas Revised Civil Statutes, or some other provision of the Texas Tort Claims Act to extend the "bar" under former section 101.106 or the statutory damage cap to the employees of an independent contractor of a regional transportation authority. It did not do so.

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[26] The waiver applies to "governmental units," *see* TEX. CIV. PRAC. & REM. CODE § 101.021 (a "governmental unit" in the state is liable for . . ."), and the Act defines "governmental unit" broadly, to encompass a variety of private entities that perform governmental functions. *See id.*, at § 101.001(3) (defining "governmental unit").

[27] *See* TEX. CIV. PRAC. & REM. CODE § 101.001(1)(A) (defining "emergency service organization" to include non-profit, tax-exempt VFDs and MSPs); *id.* at § 101.001(3)(C) defining "governmental unit" to include "emergency service organizations.

> There is no "loophole," nor is the Texas Tort Claims Act mechanism "eviscerated." We will not stray from the plain language of the statutes, nor insert meaning where there are no words to support such meaning. . . .
>
> Castro's position that he will be held to a greater degree of liability than his independent contractor employer is an argument best made to the legislature.

186 S.W.3d at 679 (bracketed language added).

Inconsistencies can also arise out of the legislature's piecemeal solution. For example, whereas contractors of regional transportation authorities operating under Chapter 452 of the Transportation Code have full derivative immunity from liability, there is no statutory immunity for contractors of metropolitan rapid transit authorities operating under Chapter 451. Presumably, contractors without statutory protection must either fall back on the less generous immunities afforded by common law derivative immunity, as discussed above, or they must run the gauntlet of arguing that the common law must expand to provide similar protections in these analogous situations. As we have seen, however, this argument would find no support in the common law underpinnings of derivative immunity, which serves to protect only the policymaking functions of government and not the negligence of contractors in implementing the government's policies.

D. Application of Section 101.106 Immunity to Private Sector Agent and Subagents.

The TTCA does define the term "employee" to include paid common law agents; however, it excludes independent contractors. Section 101.001(2) of the Act provides: "'Employee' means a person, including an officer **or agent**, who is in the **paid service of a governmental unit** by competent authority, **but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.**" TEX. CIV. PRAC. & REM. CODE § 101.001(2) (emphasis added).

The Code Construction Act defines "person" to include a "corporation," a "partnership, association, and any other legal entity." TEX. GOV'T CODE § 311.005. Accordingly, the word "person" within the TTCA's definition of "employee" should be read to include corporate persons and well as individuals. Presumably, this construction will allow common law agents in the paid service of government to avail themselves of the Act's election-of-remedies protections of TEX. CIV. PRAC & REM. CODE ANN. § 101.106(f), provided that they can show themselves to be "employees" in the paid service of a governmental unit. *See El Paso County v. Solorzano*, 351 S.W.3d 577, 581 (Tex. App.—El Paso 2011, no pet.) ("The statutory definition requires "control *and* paid employment to invoke the Tort Claim Act's waiver of immunity.") (emphasis original) (quoting *Adkins v. Furey*, 2 S.W.3d 346, 348 (Tex. App.—San Antonio 1999, no pet.)).

1. *Agency Relationship*.

It is well established that the legal label used by the parties to define the relationship is not controlling. RESTATEMENT (3d) OF AGENCY § 1.02.[28] "As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent." RESTATEMENT (3d) OF AGENCY § 1.01, comment c (elements of agency). "A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts." *Id*.

The right of control is indispensable to the TTCA definition of "employee". *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2) (excluding from definition of "employee" "a person who performs tasks the details of which the governmental unit does not have the power to control").

Accordingly, to constitute a agency agreement, the contract must not only grant the agent the power to act for or on behalf of the principal; it must also leave power with the principal to control the details of the work by the agent.

The Restatement of Agency discusses the principal's right to control in general, as follows:

> An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any

[28] I cite to the Third Restatement of Agency because Texas courts frequently resort to the restatement to set forth the basic rules in this area. *See Arvizu v. Estate of Puckett*, 377 S.W.3d 63 (Tex. March 30, 2012) (per curiam) (adopting Third Restatement's definition of subagent).

> relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established.

RESTATEMENT (3d) OF AGENCY § 1.01, comment f.

In practice, the principal must have the right on an interim basis to create incentives or disincentives for compliance. This could mean the power to discipline or reward. The right of control does not require, however, that the principal control every action of the agent:

> A principal's control over an agent will as a practical matter be incomplete because no agent is an automaton who mindlessly but perfectly executes commands.

RESTATEMENT (3D) OF AGENCY § 1.01, comment f. This notion has been imported into the TTCA. As the Supreme Court has noted:

> The Act's definition of "employee" does not require that a governmental unit control every detail of a person's work. The operator of a motor vehicle, for example, must exercise independent judgment, but this does not mean that he or she cannot be considered an employee under the Act. If it did, a governmental unit could never be "liable for . . . injury . . . proximately caused by . . . the negligence of an employee . . . arising from the operation or use of a motor-driven vehicle", even though section 101.021(1) of the Act provides for such liability. TEX. CIV. PRAC. & REM. CODE § 101.021(1)(A). Similarly, a physician whose practice is controlled by a governmental unit is not precluded from being an "employee" within the meaning of the Act simply because he or she must exercise some independent medical judgment.

Murk v. Scheele, 120 S.W.3d 865, 866 (Tex. 2003).

2. *Subagents*.

Subagents are agents (*see* RESTATEMENT (3D) OF AGENCY § 3.15(1)); and thus, a subagent of government can also be an agent of government. This opens the way to the argument that the election-of-remedies defense of Section 101.106(f) could in theory be asserted by paid subagents of the government. That is employees of private agents are potentially beneficiaries of Section 101.106(f).

3. *Paid Service*.

In addition to the common law requirements of establishing an agency between the government and its service providers and the service providers' employees, the TTCA also requires that the agents be paid by the government. *See* TEX. CIV. PRAC. & REM. CODE § 101.001(2) (term "employee" includes an "agent" "who is in the paid service of a governmental entity").

The "paid service" requirement is not a problem for corporate agents that contract to provide services for government. However, it could pose a serious problem for creating a paid subagency between the governmental entity and the employees of its private, common law agent. There is only one case that casts any light on what it takes to be in the "paid service" for purposes of Section 101.001(2) – *Murk v. Scheele*, 120 S.W.3d 865 (Tex. 2003). In that case, a University of Texas faculty physician, and Flanagas, a resident physician, argued that they were entitled to summary judgment under section 101.106 of the Act after Scheele brought a medical malpractice action against them. *Id*. at 866. With regard to Flanagas, the Texas Supreme Court determined that because he was not in the "paid service" of the University of Texas for the purposes of the Act, he was not entitled to summary judgment as an employee of the University of Texas. *Id*. at 867. As the Court reasoned:

> The only monetary benefit UT provided [Flangas] was medical professional liability insurance coverage, and the [employer] reimbursed UT for the cost of that coverage. Thus, **no part of** Flangas's compensation was ultimately paid by UT, and he therefore cannot be said to have been in UT's "paid service".

Id. (emphasis added).

The phrase "no part of" the compensation was paid to Flangas by UT has been emphasized, to highlight the Supreme Court's suggestion here that the government need not pay all of the employee's compensation for the services rendered; a portion of it may suffice. The practical difficulties of setting up a payment scheme of this nature is beyond the scope of this analysis.

E. Chapter 108 Damage Caps to Private Sector Agents and Contractors.

Chapter 108 of the Civil Practice and Remedies Code limits the liability of "public servants" who serve

local government. Essentially, Section 108.002 states that a "public servant" is not personally liable for damages in excess of $100,000 arising from personal injury, death, or deprivation of a right, privilege, or immunity, if the damages are a result of an act or omission by the public servant in the course and scope of the public servant's duties and if there is indemnity coverage for the servant's initial $100,000 of liability. *See* TEX. CIV. PRAC. & REM. CODE § 108.002.

There are no cases deciding whether a non-employee common law agent can qualify as a "public servant" within the meaning of Chapter 108. Arguments can be made either way.

> Section 108.001 defines a "public servant" in relevant part as follows:
>
> (1) "Public servant means a person who **is**:
>
> (A) a public official elected or appointed to serve a governmental unit and acting in that capacity when the act or omission on which the damages were based occurred; or
>
> (B) covered by Section 104.001 or **Section 102.001**.
>
> (2) "Public servant" does not include an independent contractor, an agent or employee of an independent contractor, **or another person who performs a contract for a unit of government**.

TEX. CIV. PRAC. & REM. CODE § 108.001(1) & (2) (emphasis added).

The bold-faced portion of the exclusion (108.001(2)) can be read to exclude a non-employee agent as "another person who **performs a contract** for a unit of government." However, this argument would also sweep in all public employees who have a contract with their governmental employers. So the counter argument to the construing "another person" broadly is the rule of *ejusdem generis* – that "when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation." *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003). The key distinction is between persons who perform subject to the government's control and those who do not. The details of the performance of agents and employees are subject to the government's control; contractors and other persons who simply "perform a contract" are not.

The portion of the definition defining what "is" a "public servant" — is mostly unhelpful to the issue of whether or not agents are included. *See, e.g.*, definitions of "official" or "officer" in *Kimbrough v. Barnett*, 93 Tex. 301, 310, 55 S.W. 120, 122 (1900) ("Public office is the right, authority, and duty created and conferred by law by which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public.") (again quoted in *Commissioners' Court of Limestone County v. Garrett*, 236 S.W. 970, 972 (Tex. Comm'n App.1922, judgmt adopted), and *Tarrant County v. Ashmore*, 635 S.W.2d 417, 420 (Tex. 1982)).

Section 104.001 is clearly inapplicable. It is part of Chapter 104 of the Civil Practice and Remedies Code, which addresses the State's liabilities and indemnity obligations for the conduct of the State's public servants.

Section 102.001, however, is potentially helpful. It is part of Chapter 102 of the Civil Practice and Remedies Code, which limits the indemnity obligations of local government for the conduct of their "employees". Section 102.001(1) provides as follows:

> "Employee" **includes** an officer, volunteer, or employee, a former officer, volunteer, or employee, and the estate of an officer, volunteer, or employee or former officer, volunteer, or employee of a local government. The term includes a member of a governing board. The term does not include a county extension agent.

TEX. CIV. PRAC. & REM. CODE § 102.001(1) (emphasis added).

What is immediately apparent is the incongruity between this definition and the TTCA (Chapter 101) definition of "employee", which expressly includes paid "agents" of governmental units (§ 101.101(2)). By contrast, Chapter 102 defines "employee" to include volunteers, who are unpaid. The Supreme Court has ruled that these different definitions require different consequences. *See Harris Cnty. v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994) (despite § 102.001(1) inclusion of volunteers, TTCA exclusion of volunteers in § 101.001(2) means that governmental immunity is not waived for acts of a volunteer).

Nevertheless, there is another word in Section 102.001(1)'s definition of "employee" that allows the courts to give that word an expansive construction. In reciting the text of Section 102.001(1), the verb "includes" makes the list that follows it illustrative rather than exclusive. As one court of appeals has noted in rejecting the argument that the statutory term "including" is a word of limitation:

> we disagree that the legislature used the word "including" to imply an exhaustive list of rights. As a leading authority on legal usage has observed:
>
> Including is sometimes misused for *namely*. But it should not be used to introduce an exhaustive list, for it implies that the list is only partial. In the words of one federal court, "It is hornbook law that the use of the word including indicates that the specified list . . . is illustrative, not exclusive." *Puerto Rico Maritime Shipping Auth. v. I.C.C.*, 207 U.S. App. D.C. 177, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981).

Texas Property & Cas. Ins. Guar. Ass'n v. Southwest Aggregates, Inc., 982 S.W.2d 600, 609 (Tex. App.—Austin 1998, no pet.) (quoting Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 431-32 (2d ed. 1995)); *see also* Code Construction Act, TEX. GOV'T CODE § 311.005(13) ("'Includes' and 'including' are **terms of enlargement and not of limitation or exclusive enumeration**, and use of the terms does not create a presumption that components not expressed are excluded.") (emphasis added).

The argument suggested here is that the express term "employee" in Section 101.102(1) is illustrative and can be read broadly to encompass all agents of government. This argument can be advanced in connection with the obvious purpose of Chapter 102 of the Civil Practice and Remedies Code, which is to limit the power and responsibility of local governments to indemnify their *employees*, who are always the agents of those entities. Arguably, those same limitations should also apply to the power of local government to indemnify its non-employee agents too. Otherwise, governments would have potentially limitless statutory power to indemnify non-employee agents through Chapter 2259 of the Government Code, which, without limitation, authorizes local governments to provide self-insurance coverage for their "officers, employees, **and agents** from any insurable risk or hazard." TEX. GOV'T CODE § 2259.031(a) (emphasis added).