LOCAL GOVERNMENTAL IMMUNITY FROM CONTRACT CLAIMS

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Tort Claims Act Exemptions Sword or Shield, Texas Municipal League Intergovernmental Risk Pool Attorney Workshop (2003)

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Discovery Stays Pending Resolution of Official Immunity Defenses, Texas Municipal League Intergovernmental Risk Pool Attorney Workshop (2000)

B. Abrams & R. Viada, *Asserting Official Immunity In Employment Related Cases: A Defense Perspective*, 30 URB. LAW. 1023 (1998).

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

Montgomery County v. Park, 51 Tex. Sup. Ct. J. 160 (Nov. 30, 2007)
(adopting modified *Burlington* standard defining "adverse personnel action" in Texas Whistleblower Act cases) (representing Texas Ass'n of School Boards as friend of the court)

Clear Lake City Water Auth. v. Salazar, 781 S.W.2d 347 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding [leave denied])
(recognizing for the first time in Texas law a local legislator's constitutional privilege to resist judicial intrusion into legislative motives).

Colson v. Grohman, 174 F.3d 498 (5th Cir. 1999) (holding that the 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 an immunity from discovery).

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, 29 S.W.3d 62 (Tex. 2000) (establishing legal standard for imputing discriminatory intent to a governmental entity under the Texas Whistleblower Act) (representing Texas Ass'n of School Boards as friend of the court).

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LOCAL GOVERNMENTAL IMMUNITY FROM CONTRACT CLAIMS

I. INTRODUCTION.

This Paper provides a general overview of local governmental immunity from suit for breach of contract claims.

Part II discusses the basic sovereign or governmental immunity principles applicable in government contract cases. Immunity consists of two components: immunity from suit (a jurisdictional bar) and immunity from liability (an affirmative defense to liability for money judgments). When a governmental entity contracts it waives the latter but not the former. Thus, contract claimants suing governmental entities generally face jurisdictional bars to their claims, unless the Legislature, by clear and unambiguous enactment, has waived the government's immunity from suit.

Part III considers the various statutory waivers of governmental immunity from suit for breach of contract. Certain types of contract claims against counties are authorized by TEX. LOC. GOV'T CODE ANN. § 262.007, and certain types of contract claims against other units of local government have been authorized by TEX. LOC. GOV'T CODE ANN. § 271.152. Recent judicial decisions construing the scope of these waiver statutes are discussed.

Part IV describes the few common law inroads into the doctrine of immunity from suit. In the ten years following Justice Hecht's suggestion in his concurring opinion in *Federal Sign Co. v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997), that governmental entities can, by conduct, waive their immunity from suit, the court has not found any set of circumstances that might justify the application of a waiver by conduct.

Part V examines whether equitable causes of action or remedies fall outside the immunity bar. In the wake of *Tooke*, they do not; and several of the courts of appeals have held that equity-based quasi-contract claims, such as promissory estoppel and *quantum meruit*, do not fit within the § 271.152 waiver; it is limited to contract claims only.

Part VI briefly considers the applicability in contract disputes of the constitutional waiver for takings without just compensation. Courts have generally rejected these claims on the theory that the State does not exercise its eminent domain powers when it withholds money or property in a contract dispute.

II. IMMUNITY FROM SUIT: BASIC PRINCIPLES.

A. Immunity From Suit/Immunity From Liability.

Unique to Texas, all governmental entities enjoy immunity from suit and liability. *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 248 (Tex. 2002); *see also Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 704 (Tex. 2003); *City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007). Immunity has two components: "immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity all together. By entering into a contract, a governmental entity necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006) (footnotes deleted); *see also Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997).

Although courts and commentators often use the terms sovereign immunity and governmental immunity interchangeably, they involve two distinct concepts: "Sovereign immunity refers to the State's immunity from suit and liability. In addition to protecting the State from liability, it also protects the various divisions of state government, including agencies, boards, hospitals, and universities. Governmental immunity, on the other hand, protects political subdivisions of the State, including counties, cities, and school districts." *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 n.11 (Tex. 2006) (internal quotes deleted).

For claims arising under Texas law, there is no practical difference between sovereign and governmental immunity; both operate as a jurisdictional bar. *See Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004) (noting governmental immunity operates like sovereign immunity and affords similar protection to subdivisions of the state including counties); *see also City of Galveston*, 217 S.W.3d at 469 (Tex. 2007). Thus, in analyzing claims of immunity from suit on contracts, caselaw construing the reach of sovereign immunity are authoritative in construing the protections of local governmental immunity.

B. Policies Supporting Immunity From Suit In Contract Cases.

As one commentator has aptly noted, "[t]he issue of sovereign immunity often involves vigorous debates concerning who is sovereign: the government or

the people, the lawmaker or the law itself."[1] In *Wichita Falls State Hospital. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003), the Texas supreme court placed sovereign immunity on the modern, constitutional footing, inherent in the very first principle of our state government, TEX. CONST. art. I, § 2, that "*all* political power is inherent *in the people*, and all free governments are founded on their authority, and instituted for their benefit." TEX. CONST. art. I, § 2 (emphasis added). Sovereign immunity is inherent in the people's sovereign power to "protect the public treasury." 106 S.W.3d at 695. "Like the power of taxation, the power to manage fiscal affairs 'is an essential and inherent attribute of sovereignty belonging as a matter of right to every independent government.'" *Perry v. Greanias*, 95 S.W.3d 683, 694 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (quoting *City of San Angelo v. Deutsch*, 126 Tex. 532, 91 S.W.2d 308, 309 (Tex. 1936)).

Immunity was not bestowed by legislative or executive act; it arose as a common-law creation of the judiciary. *City of Galveston v. State*, 217 S.W.3d at 468. "[I]t remains the judiciary's responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance." *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006). However, in Texas, the courts have come to view the Legislature as better suited institutionally to speak for the sovereign people on whether, and the extent to which, governmental entities ought to be amenable to suit and public treasuries opened to satisfy money judgments. As the supreme court noted in *Taylor*:

> Because consent is pivotal to a waiver of sovereign immunity, it is important to consider the manner in which a sovereign conveys its consent to be sued. In Texas, the people's will is expressed in the Constitution and laws of the State. Consequently, to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment.
>
> Courts in other jurisdictions have occasionally abrogated sovereign immunity by judicial decree. We have held, however, that the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity. Although we have not absolutely foreclosed the possibility that the judiciary may abrogate immunity by modifying the common law, we have no occasion to consider that possibility today.

106 S.W.3d at 695 (internal citations and footnote omitted).

In recent years, the supreme court has continued to reaffirm, and further explicate, its fiscal policy rationale for deferring to the Legislature's broader view of the societal implications of opening the treasuries of the State to tort claimants. *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002) ("It is the Legislature's sole province to waive or abrogate sovereign immunity."); *Reata*, 197 S.W.3d at 375 ("We have generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved."). In *IT- Davy*, for example, the court said:

> Subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments. Accordingly, the Legislature is better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear.

Id. at 854.

In 2006, the court expressly deferred to the Legislature to waive immunity from contract claims because:

> • the handling of contract claims against the government involves policy choices more complex than simply waiver of immunity, including whether to rely on administrative processes and what remedies to allow;
>
> • the government should not be kept from responding to changing conditions for the public welfare by prior policy decisions reflected in long-term or ill-considered obligations;

[1] Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 Chi. Kent L. Rev. 61, 71 (1985).

> • the claims process is tied to the appropriations process, and the priorities that guide the latter should also inform the former; and
>
> • the Legislature is able to deal not only with these policy concerns but also with individual situations in deciding whether to waive immunity by resolution, case by case, or by statute.

Tooke v. City of Mexia, 197 S.W.3d 325, 332 (Tex. 2006) (citing *Tex. A & M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 522 (Tex. 2002)) (plurality op.) (footnotes omitted).

C. Hybrid Nature of Immunity From Suit.

The government's immunity from suit is a jurisdictional bar. However, as Justice Brister wrote in his concurring opinion *Reata*, the doctrine is a unique hybrid derived from subject-matter and personal jurisdictional principles. Like subject-matter jurisdiction, sovereign immunity may be raised by the court even if the parties do not. But like personal jurisdiction, Texas law has long held that a governmental entity waives immunity by filing suit on an affirmative claim. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 380-81 (Tex. 2006) (Brister, J., concurring). As discussed below, whether the supreme court will recognize circumstances in which the State will be held to have waived its immunity from suit by virtue of its conduct in performing a contract, remains an open question.

III. LEGISLATIVE WAIVERS.

A. Breach-of-Contract Suits Against Counties.

In 2003, after *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 250-251 (Tex. 2002) held that counties were immune from suit for breach of contract, the Legislature enacted TEX. LOC. GOV'T CODE ANN. § 262.007, waiving counties' immunity from suit for breach of certain contracts with limitations on damages. Similar to Chapter 2260 proceedings against the State, the Section 262.007 waiver applies only to "written" contracts "for engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services." *Id*. at § 262.007(a). Also parallel to Chapter 2260, Section 262.007 limits a county's liability to the balance due and owed by the county under the contract (including compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration and for change orders or additional work required to carry out the contract). *Id.* at § 262.007(b)(1) & (2). However, it authorizes an award of reasonable and necessary attorney's fees and interest allowed by law. *Id*. at § 262.007(b)(3) & (4).

The Section 262.007 waiver applies only to a claim arising under a contract executed on or after September 1, 2003. If a contract was executed before that date, an automatic renewal of the contract after that date does not bring it within the waiver provision. *San Jacinto County v. Nunn*, 203 S.W.3d 905, 909-10 (Tex. App.—Beaumont 2006, no pet.).

Before suing a county for breach of contract, a claimant must first satisfy the presentment statute, TEX. LOC. GOV'T CODE ANN. § 89.004(a), which provides: "A person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court has neglected or refused to pay all or part of the claim before the 60th day after the date of the presentation of the claim." *Id.* Similar to the offer of judgment procedure provided by FED. R. CIV. P. 68, a claimant who fails to recover more than the amount offered by the commissioners' court to settle the claim must pay the costs of the suit. TEX. LOC. GOV'T CODE ANN. § 89.004(b).

B. Breach-of-Contract Suits Against Cities, School Districts, and Other Local Governmental Entities.

On May 25, 2005, the Legislature enacted a limited waiver of the immunity from breach of contract suit that protects municipalities, school districts, special districts, and local governmental entities other than counties.[2] Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 1, 2005 Tex. Gen. Laws 1548 (codified at TEX. LOC. GOV'T CODE ANN. §§ 271.151-.160). The waiver section of the Act, Section 271.152, provides as follows:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters

[2] TEX. LOC. GOV'T CODE ANN. § 271.151(3) defines "local governmental entity" to mean "a political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code, including a: (A) municipality; (B) public school district and junior college district; and (C) special-purpose district or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, emergency service organization, and river authority."

> into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

Id. at § 271.152. The term "contract subject to this subchapter" is defined to mean "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." *Id.* at § 271.151(2).

By parsing this waiver section and the definition of a "contract subject to this subchapter," one can derive the following basic elements for stating (and proving) a claim within the waiver section:

(1) a *written* contract

(2) stating its *essential terms* and

(3) providing *goods or services*

(4) *to* the local governmental entity,

(5) *properly executed* on behalf of the entity, and

(6) satisfying any other applicable *terms and conditions* of Subchapter I, such as the (a) damage limitations (§ 271.153), (b) requisite contractual adjudication procedures (§ 271.154), and (c) limitations on attorney's fees (§ 271.157).

1. Legislative Intent.

For three decades before *Tooke v. City of Mexia* was decided, the supreme court's decision in *Missouri Pacific Railroad Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812 (Tex. 1970) was generally understood to hold that a "sue and be sued" provision in the organic legislation of a governmental entity constituted a general waiver of governmental immunity from suit for breach of contract. In *Missouri Pacific*, the plaintiff railroad company sought contractual indemnity under its agreement with a water district. The court held the statute authorizing the district to "sue and be sued" "is quite plain and gives general consent for [the] District to be sued in the courts of Texas in the same manner as other defendants." *Id.* at 813.

More recently, however, a minority of the courts of appeals began limiting the reach of *Missouri Pacific*, in conformity with the supreme court's recent insistence on strict construction of all immunity waiving statutes. *See City of Carrollton v. McMahon Contracting, L.P.*, 134 S.W. 3d 925, 928 (Tex. App.—Dallas 2004) (holding that the Texas supreme court had never construed a city's capacity to "plead and implead" as an unambiguous waiver of immunity and therefore declining to apply *Missouri Pacific*), *rev'd on other grounds*, 197 S.W. 3d 387 (Tex. 2006) (per curiam); *City of Mesquite v. PKG Contracting, Inc.*, 148 S.W. 3d 209 (Tex. App.—Dallas 2004) (same), *rev'd on other grounds*, 197 S.W. 3d 388 (Tex. 2006) (per curiam); *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, 123 S.W. 3d 63, 66 (Tex. App.—Dallas 2003) (holding that "sue and be sued" in organic law of school district was ambiguous at best and resolving the ambiguity in favor of retaining immunity), *rev'd on other grounds*, 197 S.W.3d 390 (Tex. 2006) (per curiam).

House Bill 2039, which codified Local Government Code sections 271.151-.160, was enacted specifically in the response to the Dallas court's decisions in *McMahon Contracting*, *PKG Contracting*, and *Satterfield*, as well as *Tooke v. Mexia*, all then pending on petition for review to the supreme court. *See* House Comm. on Civil Practices, Bill Analysis, TEX. H.B. 2039, 79TH LEG., R.S. (2005). These decisions, the committee explained, "have ignored prior Texas case law and have disregarded the plain meaning of statutes by holding that they do not constitute a statutory waiver of immunity from suit in cases arising from breach of contract." *Id.* at p. 1. The purpose of HB 2039, the committee stated, is thus the following:

> HB 2039 is intended to clarify and reexpress the Legislature's intent that all governmental entities that have been given or are given the statutory authority to enter into contracts shall not be immune from suit arising from such contracts, subject to the limitations set forth in C.S.H.B. 2039.

Id. at p. 2.

This passage is problematic. It purports to be a restorative act, "reexpressing" the assumed intent of prior legislative assemblies to waive immunity from suit

arising out of contracts of all entities authorized to enter contracts. Yet the waiver created by HB 2039 is not a general waiver of the sort recognized by *MOPAC* ; it waives immunity "subject to the limitations set forth in C.S.H.B. 2039." The tension inherent in these cross-purposes is reflected in court opinions that have looked to the house committee report for guidance. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320, 330 (Tex. 2006) (Willett, J., dissenting) ("Even if the Legislature intended to waive broadly a local government's immunity on contracts, it expressly recognized that terms and conditions within subchapter I itself would exclude some contracts from this waiver. One such limitation is section 271.151(2): the suit must be on a contract to provide goods or services *to* a local governmental entity.") (emphasis added).

In *Tooke v. Mexia*, Justice Hecht explained the significance of the committee report as follows:

> With HB 2039, the Legislature has rejected the view that "sue and be sued" and similar phrases, standing alone in organic statutes, waive immunity from suit, and has instead adopted a more measured approach, waiving local governments' immunity from suit for certain contractual claims and damages. Its decision strikes a balance between the rights of parties that contract with local governments and the State's interest in protecting public resources from unjustified burdens. With our decision in this case, HB 2039 applies retroactively as well as prospectively. Thus, local governments now *have*, and *have had*, the limited immunity from suit on contract that the Legislature believes they *should have*. The Legislature's purpose in House Bill 2039 has been achieved completely and consistently.

197 S.W.3d at 346 (italics in original; footnote deleted)

2. Written Contract Stating Essential Terms.

The Section 271.152 waiver applies only to written contracts "stating the essential terms of the agreement." TEX. LOC. GOV'T CODE ANN. § 271.151(2). There are no reported cases construing this requirement. One would expect that since immunity-waiving statutes must be construed narrowly,[3] the essential terms of the agreement must all be "stated" within the written agreement, rather than stated orally or implied in fact or by law. *See Somerset Indep. Sch. Dist. v. Casias*, 2008 Tex. App. LEXIS 2895, at *9 (Tex. App.—San Antonio Apr. 23, 2008) ("Because an implied contract is not a written contract, immunity is not waived under section 271.152 for such a claim.")

Essential or material terms are those that parties would reasonably regard as vitally important elements of their bargain. *Neeley v. Bankers Trust Co.*, 757 F.2d 621, 628 (5th Cir. 1985). For example, the material terms in a sales contract necessarily include: (1) identification of the property being sold, (2) the consideration or price paid for the property, and (3) the parties' consent to exchange the property for the agreed price. *John Wood Group USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 20 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). *See also Miller v. Vaughn & Taylor Construction Co.*, 345 S.W.2d 852, 853-54 (Tex. Civ. App.—Fort Worth, 1961, writ ref'd n.r.e.) (where an auctioneer was sued for breach of a written contract to sell property "as per list prepared by owner," no list was ever prepared; thus, the contract was held to be unenforceable because the property to be sold was a material term left for future determination).

3. Goods.

A contract subject to the Section 271.152 waiver must be one "for providing goods or services to the local governmental entity" TEX. LOC. GOV'T CODE ANN. § 271.151(2). The statute does not sub-define "goods" or "services." However, given the Legislature's directive that "words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly" (*see* TEX. GOV'T CODE ANN. § 311.011(b)), the term "goods" will likely be construed consistently with the definition placed on that term by Article 2 of the Texas UCC — "goods" being "all things . . . movable . . . at the time of identification to the contract . . . ." TEX. BUS. & COMM. CODE ANN. § 2.105. The Houston Fourteenth Court of Appeals has so held. *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, No. 14-07-96-CV, __ S.W.3d __

[3] *See, e.g., Mission Consol. Indep. Sch. Dist. v. Garcia*, 51 Tex. Sup. Ct. J. 621, 622 (Mar. 28, 2008) ("We interpret statutory waivers of immunity narrowly, as the Legislature's intent to waive immunity must be clear and unambiguous.") (citing TEX. GOV'T CODE ANN. § 311.034); *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 248 (Tex. 2002) ("we must determine whether the Legislature has by clear and unambiguous language in section TEX. LOC. GOV'T CODE ANN. 89.004 waived immunity to [breach of contract] suits against counties").

2008 Tex. App. LEXIS 3678, at *38-39 (Tex. App. —Houston [14th Dist.] May 22, 2008, no pet. h.) (sale of water, sewer and drainage pipes affixed to the land are not movables and thus not "goods" within the meaning of Section 271.151(2)).

Accordingly, contracts for the purchase or sale of real estate are outside of the waiver statute. *See, e.g., Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 29 (Tex. App.—San Antonio 2006, pet. filed) ("[A]lthough section 271.152 of the Texas Local Government Code waives a water conservation district's immunity from suit for breach of a written contract for goods and services, the 1999 amendment to section 49.066(a) requires that these suits be founded upon written contracts approved by the district's board of directors. A water conservation district thus remains immune from a suit for breach of a contract for the sale of real estate."); *City of San Antonio v. Reed S. Lehman Grain, Ltd*., No. 04-04-00930-CV, __ S.W.3d __, 2007 Tex. App. LEXIS 7515, at *7 n.2 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (finding sections 271.151-.160 to be inapplicable to an easement dedication contract, because it conveyed only an interest in real property and was not an agreement for providing goods or services); *Valley Mun. Util. Dist. No. 2 v. Rancho Viejo, Inc*., No. 13-07-545-CV2008, Tex. App. LEXIS 1109, at *13-14 (Tex. App.—Corpus Christi Feb. 14, 2008) (mem. op.) (easement agreement held "not a document of the type of which the Legislature intended to give rise to a waiver of immunity with its enactment of section 271.152 "because, inter alia, "the Easement Agreement does not provide for any goods or services to be furnished to Valley MUD").

4. Services.

Terms not defined in a statute are given their ordinary meaning,[4] and thus it can be expected that courts will construe the term "service" in Section 271.151(2) in its commonly understood sense. *See, e.g.*, BLACK'S LAW DICTIONARY, at p. 1227 (5th ed. 1978) ("[d]uty or labor to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter.").

5. "To The Local Governmental Entity".

The Section 271.151(2) definition of a "contract subject to this chapter" also requires that the contract be one for the provision of goods or services "to" the local governmental unit, a requirement at the crux of the Supreme Court's recent decision in *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320 (Tex. 2006). There, a school district sued a joint self-insurance fund of which the plaintiff district was a member. Whether the fund's immunity was waived by Section 271.152 turned on whether the contract was one by which the district has agreed to provide services "to" the self-insurance fund within the meaning of Section 271.151(2). The court held that immunity was waived because all members of the fund actually lent a hand in operating it; and thus, as part of the contractual agreement among the members creating the fund, they had agreed to provide services "to" the fund. According to the court: "entering into 'a written contract stating the essential terms of [an] agreement for providing goods or [insurance] services to [a] local governmental entity'" fits within the definition of a "contract covered by this subchapter." *Ben Bolt, 212* S.W.3d at 327 (court's brackets) (quoting TEX. LOC. GOV'T CODE § 271.151(2)).

Ben Bolt raises the subsidiary question whether the plaintiff's provision of goods or services to the governmental entity must be the essence of the contract or merely incidental to it. Recently, the Houston fourteenth court of appeals, applying what it viewed as "the *Ben Bolt* court's liberal construction of the applicable statute," *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, No. 14-07-96-CV, __ S.W.3d __ 2008 Tex. App. LEXIS 3678, at *40 (Tex. App. —Houston [14th Dist.] May 22, 2008, no pet. h.), held that a developer's contact to lease and sell water and sewer pipe facilities to a water district fit within Section 271.151(2)'s definition of a "contract subject to this subchapter," because the agreement conditioned the district's obligation to buy the fixtures upon the developer causing its contractors to construct them in accordance with the certain state regulatory criteria. In *Friendswood*, the court acknowledged that the developer's action in causing the facilities to be constructed "appears to be directed towards and to benefit the Subdivision and its residents, rather than the Authority." Id. at 39. Nevertheless, the court concluded, "[i]f the school district's participation in the election of the fund's governing board was sufficient to constitute the provision of services in the insurance contract in *Ben Bolt*, then we conclude that Friendswood Development's agreement to hire third parties to construct the Facilities and to build the streets, roads, and bridges is likewise sufficient to constitute the provision of services to the Authority." *Id*. at 40.

6. Proper Execution on Behalf of the Entity.

The Section 271.152 waiver applies only to contracts that are properly executed on behalf of the governmental entity. *See* TEX. LOC. GOV'T CODE ANN. § 271.151(2). It does not require that the contract be

[4] *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n.19 (Tex. 2006).

executed by the entity itself. Hence, even where a city charter provision requires the mayor's signature for a contract to be binding, Section 271.151(2)'s 'proper execution' requirement is satisfied by the signature of someone with actual or apparent authority to act on the entity's behalf and whose actions in signing the agreement were in all other respects "proper." *See City of Houston v. Clear Channel Outdoor, Inc*., 233 S.W.3d 441, 447 (Tex. App.--Houston [14th Dist.] 2007, no pet.).

7. Other Applicable Terms and Conditions of Subchapter I.

• *Damage Limitations*: Consistent with the Section 262.007 waiver applicable to contract claims against counties, the prevailing claimant under the Section 271.152 waiver may recover "the balance due and owed by the local governmental entity under the contract," including compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration or for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract. TEX. LOC. GOV'T CODE ANN. § 271.153(a). If there is no "balance due and owed" to the plaintiff, Section 271.152 does not waive the entity's immunity from suit on the contract. *See Judson Indep. Sch. Dist. v. ABC/Associated Benefit Consultants, Inc.*, 244 S.W.3d 617, 621 (Tex. App.—San Antonio 2008, no pet. h.) (mem. op.) ("section 271.153(a) does not provide an avenue for recovery as there is no balance due and owed by Judson ISD to ABC"); *City of San Antonio v. Polanco & Co.*, No. 04-07-00258-CV, 2007 Tex. App. LEXIS 8634, at *14, 2007 WL 3171360, at *5 (Tex. App.—San Antonio Oct. 31, 2007, no pet.) (mem. op.) ("We agree with the City and hold that regardless of whether the contract was for goods or services, . . . 271.153(a) does not provide an avenue for recovery as there is no balance due from the City to Polanco"). Similarly, claims for damages not permitted under the statute are barred by immunity. *Tooke v. City of Mexia*, 197 S.W.3d 325, 345-46 (Tex. 2006) (disallowing claim by contractor for lost profits).

• *Limitations on Attorney's Fees*. Attorney's fees are expressly disallowed "unless the local governmental entity has entered into a written agreement that expressly authorizes the prevailing party in the adjudication to recover its reasonable and necessary attorney's fees by specific reference to this section [TEX. LOC. GOV'T CODE ANN. § 271.159]."

• *Contractual Notice and ADR Provisions*. Section 271.154 provides that

> Adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to this subchapter or that are established by the local governmental entity and expressly incorporated into the contract or incorporated by reference are enforceable except to the extent those procedures conflict with the terms of this subchapter.

TEX. LOC. GOV'T CODE ANN. § 271.154. Accordingly, to the extent a local governmental contract conditions the right to sue thereunder on receipt of certain types of notice or engagement in ADR, the plaintiff's failure to satisfy such requirements will constitute a jurisdictional bar.

C. Other Possible Statutory Waivers To Breach-of-Contract Suits.

1. Organic Laws.

Until recently, Texas courts following *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970), had held that enabling legislation that gives governmental entities the capacity to "sue and be sued" also waived the immunity of such entities from suit.[5] However, in *City of Mexia v. Tooke*, the Supreme Court expressly overruled *Missouri Pacific* and held that the phrase "sue and be sued," by itself, in an enabling statute, does not waive immunity from contract enforcement suits, "[b]ecause the phrase means different things in different statutes, it cannot be said to be clear and unambiguous." 197 S.W.3d at 342.

Tooke itself decided that TEX. LOC. GOV'T CODE ANN. § 51.075's provision that home-rule municipalities "may plead and be impleaded in any court" was not a waiver of immunity from suit, reasoning that the prior incarnation of section 51.075 in three prior acts was intended to give cities capacity to be sued, not waive immunity: "Reasonably construed, the 1858, 1875, and 1913 statutes meant only that a municipality was the sort of entity that it was possible to sue, leaving aside whether suit was barred by immunity." *Id*. at 334.

[5] *See, e.g, Loyd v. ECO Resources, Inc*., 956 S.W.2d 110, 122 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (construing district's capacity to "sue and be sued" conferred by TEX. WATER CODE ANN. § 49.066(a) as a general waiver of immunity from suits for breach of contract).

In its opinion, the *Tooke* Court did note that the phrase "sue and be sued" is sometimes used in connection with what it characterized as a "clear waiver of immunity" (*id.* at 340), and provided three examples:

• TEX. EDUC. CODE ANN. § 76.04, providing that the Board of Regents of The University of Texas System "may sue and be sued in the name of the [University of Texas at Tyler]" and that "legislative consent to suits against the institution is granted."

• TEX. GOV'T CODE ANN. § 404.103, stating that "the state expressly waives all defenses of governmental immunity by and on behalf of the [Texas Treasury Safekeeping Trust Company], the comptroller, and the state and expressly consents to sue and be sued in federal court or in any court of competent jurisdiction."

• TEX. LOC. GOV'T CODE ANN. § 262.007(a) provides that "[a] county that is a party to a written contract for engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract", and then adds in subparagraph (d): "This section does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity." Subparagraph (e) clarifies that "[t]his section does not waive sovereign immunity to suit in federal court."

The Court also noted that in other organic laws, the Legislature has used the phrase but has expressly retained immunity:

• TEX. EDUC. CODE ANN. § 111.33, which provides that the Board of Regents of the University of Houston "has the power to sue and be sued in the name of the University of Houston" but adds: "Nothing in this section shall be construed as granting legislative consent for suits against the board, the University of Houston System, or its component institutions and entities except as authorized by law."

• TEX. HEALTH & SAFETY CODE ANN. § 403.006, which creates the Texas Low-Level Radioactive Waste Disposal Compact Commission, provides that it "may ...[s]ue and be sued," but also states that it "has governmental immunity."

Following *Tooke*'s rationale that a waiver must be "clear and unambiguous," the Supreme Court has in two other cases disallowed contract claims asserted pursuant to the organic laws of the contracting entity. *See Columbus Indep. Sch. Dist. v. Five Oaks Achievement Ctr.*, 197 S.W.3d 384 (Tex. 2006) (holding that TEX. EDUC. CODE ANN. § 11.151(a) does not waive a school district's immunity from contract suits); *Metro. Transit Auth. v. M.E.B. Eng'g, Inc.*, 201 S.W.3d 692, 693-94 (Tex. 2006) (holding that TEX. TRANS. CODE ANN. § 451.054(c)'s provision that a transportation authority may "sue and be sued" does not waive immunity from suit for breach of contract).

Following *Tooke*, the courts of appeals have held other organic statutes do not waive immunity:

• *Muenster Hosp. Dist. v. Carter*, 216 S.W.3d 500 (Tex. App.—Fort Worth 2007, no pet. hist.) (TEX. HEALTH & SAFETY CODE ANN. § 286.086, providing that the hospital board may "sue and be sued", held not to waive immunity).

• *Bexar Metro. Water Dist. v. Educ. & Econ. Development Joint Venture*, 220 S.W.3d 25, 32 (Tex. App.—San Antonio 2006, pet. filed) (TEX. WATER CODE ANN. § 49.066(a), giving water districts capacity "to sue and be sued", held not to waive immunity from suit).[6] *See also Valley Mun. Util. Dist. No. 2 v. Rancho Viejo, Inc.*, No. 13-07-545-CV2008, Tex. App. LEXIS 1109, at *13-14 (Tex. App.—Corpus Christi Feb. 14, 2008, no pet. h.) (mem. op.); *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, No. 14-07-96-CV, __ S.W.3d __ 2008 Tex. App. LEXIS 3678, at *40 (Tex. App.—Houston [14th Dist.] May 22, 2008, no pet. h.); *Boyer, Inc. v. Trinity River Auth.*, __ S.W.3d __, 2008 Tex. App. LEXIS 456, *8, 2008 WL 163560, at *3 (Tex. App.—Fort Worth Jan. 17, 2008, no pet. h.).

2. Declaratory Judgment Act.

"'[P]rivate parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim.'" *City of Houston v. Williams*, 216 S.W.3d 827, 826 (Tex. 2007) (per curiam) (quoting *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002)).

3. City Charters.

In *Tooke v. City of Mexia*, the supreme court held that a charter provision giving the city the capacity

[6] The supreme court has shown some interest in this issue, The plaintiff's petition for review in *Bexar Met* has been pending since March 5, 2007, and full briefing on the merits was requested by the court. Briefing was complete in January 2008. Apparently, the issue will remain in suspense for the time being, because on June 6, 2008 the parties filed a joint motion to dismiss the petition.

to enter contracts and sue and be sued is no different than a statute giving the city power to sue and be sued. "All it *clearly* says is that the City can be sued and impleaded in court *when* suit is permitted, not that immunity is waived for all suits." 197 S.W.3d at 344. In dicta, the court questioned whether a city, by charter, has the power to waive its own immunity from suit: "As already noted, a waiver of governmental immunity involves policies best considered by the Legislature, and thus it could be argued that a city lacks authority to waive its own immunity from suit by ordinance or charter. But we need not address that argument here because the quoted provision is not a clear and unambiguous waiver of immunity." *Id*. (footnote omitted). To the same effect *see also Sisk Utils., Inc. v. City of Greenville*, 197 S.W.3d 389, 389-90 (Tex. 2006); *PKG Contracting, Inc. v. City of Mesquite*, 197 S.W.3d 388, 389 (Tex. 2006) ("We do not reach the question whether a municipality *may* waive immunity from suit; we hold only that the charter text is not such a waiver."); *City of Houston v. Boyer, Inc.*, 197 S.W.3d 393, 393 (Tex. 2006) (charter provision authorizing city to "sue and be sued, . . . contract and be contracted with, implead and be impleaded in all courts and places and in all matters whatever" held not to waive immunity. Court also notes "We do not reach the question whether a municipality *may* waive immunity from suit; we hold only that the charter text is not such a waiver.").

IV. COMMON LAW WAIVERS.

A. Waiver-By-Conduct Doctrine.

1. *Federal Sign*'s Unlocked Door.

In *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997), the supreme court, while recognizing that sovereign immunity bars breach-of-contract claims against the State unless the claimant has obtained legislative consent to sue, observed that "[t]here may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts." *Id.* at 408 n.1. Justice Hecht, writing for a plurality of four justices (Phillips, CJ, Owens, Cornyn, JJ), concurred in the result and stressed the significance of the court's allusion to equitable circumstances that might provoke the court to waive immunity: "today's decision does not hold that the State is always immune from suit for breach of contract absent legislative consent; it holds only that the mere execution of a contract for goods and services, without more, does not waive immunity from suit." *Id*. at 413 (Hecht, J., concurring). Justice Hecht advanced a series of hypotheticals that might supply grounds for recognizing a *judicial* waiver of sovereign immunity:

> • We do not address whether the State is immune from suit on debt obligations, such as bonds.
>
> • Would the result be different if Federal Sign had already installed the scoreboards and TSU refused to pay the agreed price?
>
> • Or if TSU had accepted the scoreboards, acknowledged that Federal Sign had fully complied with the contract, but refused to pay the agreed price?
>
> • Or if TSU refused to pay in order to force Federal Sign to make a concession on another contract?

Id. at 412 (Hecht, J., concurring). As Justice Hecht recognized, his concurring opinion only alludes to possible circumstances to support a judicial waiver; he did "not attempt to decide such hypotheticals today." *Id*. (Hecht, J., concurring).

2. Door Re-locked? Post-*Federal Sign* Waiver-By-Conduct Cases.

In four subsequent pronouncements on the theory of waiver-by-conduct, the Supreme Court has deferred to the Legislature to create waivers of immunity.

In *General Services Commission v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001), the Court held that the State does not waive immunity merely by accepting benefits under a contract. *Id*. at 595-98. *Little-Tex* case involved two companion cases: one, a construction dispute in which the construction had been completed, and the State, after paying the full contract price, refused to pay a claim for adjustments (*id*. at 599); the other, an asbestos abatement contract terminated by the State, mid-way through performance, based on disputes about the contractor's performance. *Id*. at 594. In neither case had the contractor fully performed and the State refused to pay anything. After determining that the cases fell within the newly-enacted administrative procedure found in Chapter 2260 of the Government Code, the Court concluded that "there is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature." *Id*. at 597.

In *Texas Natural Resource Conservation Commission v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002),

another partial performance case, the State had paid a contractor the full contract price under the original terms, but it paid only a small percentage of a claim for additional expenses and lost profits asserted under an "equitable adjustment" clause. *Id*. at 851. Eight justices agreed that the facts did not support a waiver-by-conduct exception, but divided 4-to-4 on the reasoning. Justice Baker's plurality opinion urged a bright-line approach barring a waiver-by-conduct exception under any circumstances. *Id*. at 857. Justice Hecht's plurality opinion expressly reserved the possibility of a claim of waiver-by-conduct in some circumstances (*id*. at 860, 862), but explained why the facts in *IT-Davy* did not justify a common law waiver:

> My hypothetical supposed a government agency that chiseled a contractor just because it could get away with doing so. Here, TNRCC and IT-Davy have a legitimate disagreement over what price should be paid for the extra work. . . . This is nothing more than an ordinary contract dispute.

Id. at 861.

In *Travis County v. Pelzel & Associates*, 77 S.W.3d 246 (Tex. 2002), the Supreme Court rejected another waiver-by-conduct claim where, again, the dispute was essentially over a portion of the price agreed to in a construction contract. After the building was completed, Travis County paid virtually the entire contract price of $414,164.80, but withheld $5,500 because the performance was not timely, relying on a liquidated damages clause. *Id*. at 247. The Court reasoned that "[w]hen a governmental unit adjusts a contract price according to the contract's express terms, it does not, by its conduct, waive immunity from suit, even if the propriety of that adjustment is disputed." *Id*.

In *Texas A&M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), the Court held that when the State settles a claim from which it is not immune, sovereign immunity does not protect it from a breach-of-contract action to enforce the settlement agreement. Lawson had settled his Whistleblower Act case against the University, but later sued the University alleging that it violated the terms of the settlement. *Id*. at 519. The Court held that "enforcement of a settlement of a liability for which immunity is waived should not be barred by immunity." *Id*. at 521. In so holding, however, the Court rejected the court of appeals' reliance on the broader waiver-by-conduct doctrine, under which the lower court had recognized a waiver based on the State's acceptance of the benefit of the settlement contract.

In *Catalina Development, Inc. v. County of El Paso*, 121 S.W.3d 704 (Tex. 2003), a county solicited bids for purchasing a parcel of land, accepted the highest bid, deposited the tendered earnest money, and sent the purported buyer a warranty deed and affidavit to be used to close the transaction. The county delayed authorization to sign the deed, and a newly-elected commissioner's court refused to approve the sale. *Id*. While repeatedly stating that the State may waive its immunity by conduct, the court held "the equitable basis for such a waiver simply does not exist under this set of facts." *Id*. at 705-06.

It should be noted that in *Catalina*, the seller fully performed under the contract — a situation which merited potential eligibility for a judicial waiver according to Justice Hecht's list of hypotheticals in *Federal Sign*. The Court, however, stressed as a distinguishing circumstance the fact that the plaintiff here had sought to force the county to sell county owned real estate:

> [T]he facts presented here illustrate a fundamental reason why immunity exists - to prevent governmental entities from being bound by the policy decisions of their predecessors. In this case, the County, upon an electoral change in the commissioners court, determined that selling the property to Collins was a poor decision. Rather than lock El Paso County residents into a contract not in their best interest, the court acted within its discretion to protect the perceived interests of the public by rejecting the contract. In doing so, the County did not profit unfairly at Collins's expense.

Id. at 706 (internal citations deleted).

With one recent exception to be discussed below, the courts of appeals have consistently rejected waiver-by-conduct claims. *See, e.g., Lamesa Indep. Sch. Dist. v. Booe*, 251 S.W.3d 831, __ (Tex. App.—Eastland 2008, no pet.) (no waiver-by-conduct recognized where school district refused to pay for substantial roof repairs made by contractor on oral contact); *My-Tech Inc. v. Univ. of N. Tex. Health Sci. Ctr.*, 166 S.W.3d 880, 883 (Tex. App.—Dallas 2005, pet. denied) (plaintiff alleged that university breached the contract by misusing funds that the plaintiff had provided for the university, refusing to provide intellectual rights that plaintiff allegedly paid for, and wrongfully assigning research to other companies; court reasoned that "the supreme court has not provided such an exception, and we decline to create

one in this case. We instead follow the supreme court precedence that it is the legislature's sole province to waive sovereign immunity."); *Channelview Indep. Sch. Dist. v. A.R.C.I., Ltd.*, 199 S.W.3d 556, 559 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (waiver-by-conduct not applicable to compensation for repair work performed beyond the scope of the original contract); *Smith v. Lutz*, 149 S.W.3d 752 (Tex. App.—Austin 2004, no pet.) ("Since *IT-Davy*, this Court has only recognized a waiver of immunity in contract cases when the State has first sued the contracting party. . . .We await further guidance from the supreme court on what additional conduct might be sufficiently egregious to waive the State's immunity from suit.").

3. A Magic Key?: *TSU v. State Bank & Trust*.

On January 11, 2007, in *Texas Southern Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893 (Tex. App.—Houston [1st Dist.] 2007, pet. denied), the Houston first court of appeals recognized a common law waiver-by-conduct exception to sovereign immunity on facts the court considered "extraordinary." In 1998, the plaintiff had agreed to provide services and equipment to TSU under a lease-purchase agreement. After the plaintiff provided approximately $13 million in equipment and services, TSU declared the agreements in question invalid and refused to make payments due. In short, this case raises one of the hypothetical situations which Justice Hecht, in his *Federal Sign* concurrence, suggested as a basis for a waiver-by-conduct: where the State has refused to pay anything for services or goods it has accepted in full. In recognizing a waiver in such circumstances, the court was also moved by allegations of inequitable conduct by the State: government officials had "lured" the plaintiff into the agreement "with false promises that the contract would be valid and enforceable, then disclaimed any obligation on the contract by taking the position that the contract was not valid after all." *Id.* at 908.

It is unclear whether *TSU v. State Bank* will stand as precedent for a common law exception to immunity in all cases where the State has accepted, but refused to pay anything for, the full benefit of a goods or service contract. As noted, in *Little-Tex*, the supreme sourt determined that because claims based upon the plaintiff's *partial* performance fell within the newly-enacted administrative procedure of Chapter 2260 of the Government Code, the waiver-by-conduct exception did not apply. In *TSU v. State Bank*, Chapter 2260 was held not to apply (212 S.W.3d at 906), apparently because the contracts in issue (1998) pre-dated the statute's effective date.[7] Thus, the question left open by *TSU v. State Bank* is whether the State's acceptance without pay of the plaintiff's *full* performance will support the application of a waiver-by-acceptance exception to sovereign immunity in cases where Chapter 2260 *does* apply.

B. *Reata* Doctrine.

Reata Construction Corp. v. City of Dallas, 197 S.W.3d 371 (Tex. 2006), recognized a special class of waiver-by-conduct arising out of the State's act of instituting litigation. *Reata* concludes that a governmental entity is not immune from suit to party's claims which are "germane to, connected with, and properly defensive" to the entity's claims, to the extent the party's claims offset those asserted by the entity. Absent the Legislature's waiver of immunity from suit, however, a trial court does not acquire jurisdiction over a claim for damages against a governmental entity in excess of damages sufficient to offset that entity's recovery, if any. *Id.* at 373, 376-77.

Recently, the court has held that there is no material difference between a compulsory counterclaim and a counterclaim which is not compulsory insofar as whether the *Reata* waiver applies. *City of Irving v. Inform Constr., Inc*., 201 S.W.3d 693, 694 (Tex. 2006).

For the *Reata* doctrine to apply, however, the governmental entity must file its own claim for affirmative relief. The governmental entity's pleading must allege a cause of action, independent of the other party's claim, on which the governmental entity could recover benefits, compensation, or relief, even if the other party were to non-suit his claim against the governmental entity. Thus, the following proceedings have been held not to waive immunity under *Reata*:

- a general pleading in an answer for judgment and costs, filing of a plea in abatement claiming a defect in parties, or obtaining a continuance and an order abating the case to pursue mediation. *Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 32 (Tex. App.—San Antonio 2006, pet. filed).

- prayer in the city's answer for costs and attorney's fees. *City of Dallas v. VRC LLC*, __ S.W.3d ___ No. 05-06-01056-CV, 2008 Tex. App. LEXIS 3601, at *5 (Tex. App.—Dallas

[7] See TEX. GOV'T CODE ANN. § 2260.002(2) (Chap. 2260 does not apply to contracts entered before August 6, 1999).

> May 19, 2008) ("We cannot characterize VRC's constitutional takings claims as an offset to the City's derivative request for attorney's fees in defending the suit."); *but see Powell v. Tex. Dep't of Criminal Justice*, 251 S.W.3d 783, __ (Tex. App.—Corpus Christi 2008, pet. filed) (State's counterclaim for attorney's fees under UDJA, TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 held "a counterclaim for relief, and therefore, TDCJ has waived immunity").
>
> • school district's claim in its answer for attorney's fees under TEX. EDUC. CODE ANN. § 11.161. *Lamesa Indep. Sch. Dist. v. Booe*, 251 S.W.3d 831, __ (Tex. App.—Eastland 2008, no pet.) ("The *Reata* court was clear that its holding applied when a governmental unit filed suit or otherwise intervened and sought affirmative relief and that it applied only to the extent necessary to offset the governmental entity's claims. LISD did not file suit against Booe; Booe sued LISD. LISD did not assert any affirmative claims for relief; it merely responded to Booe's allegedly frivolous suit by requesting attorney's fees.") (citation deleted).

A framework for analyzing whether tort counterclaims are "germane to, connected with, and properly defensive" to a governmental entity's primary claims for breach of contract was established in *Sweeny Cmty. Hosp. v. Mendez*, No. 01-06-00069-CV, 2007 Tex. App. LEXIS 757 (Tex. App.—Houston [1st Dist.] Feb. 1, 2007, no pet. h.). The court there rejected a common legal elements test in favor of a common factual transaction test:

> Sweeny's claim and Mendez's claims arise from the same transaction: the breach of the contract and the fulfillment or non-fulfillment of obligations by the parties under that contract. Resolution of the rights of the parties depends on facts pertinent to Sweeny's conduct regarding that breach, and the added claims are thus germane to the matter in controversy.

Id. at *21. *See also Tex. DOT v. Crockett*, No. 13-07-640-CV2008, __ S.W.3d __, Tex. App. LEXIS 4102 (Tex. App.—Corpus Christi June 5, 2008, no pet. h.) (following *Sweeny Community Hosp.* and holding that counterclaim for underpayment on contracts not germane to, connected with, and properly defensive to State's suit for conversion of checks mistakenly issued to contractor); *City of Dallas v. Bargman*, 207 S.W.3d 926, 931 (Tex. App.—Dallas 2006, no pet. h.) (trust estate's claim for abandonment of an easement is germane to, connected with, and properly defensive to the City's claim for actual damages in its causes of action for quiet title and breach of warranty); *State v. Langley*, 232 S.W.3d 363, 367 (Tex. App.—Tyler 2007, no pet.) (Langleys asserted a counterclaim for beach of contract and fraud, based on allegations that the State had contracted with them for relocation expenses in response to an eminent domain action filed by the governmental entity; court of appeals held that the Langleys' claims were not germane to, connected with, and properly defensive to the State's eminent domain claims); *but see Muenster Hosp. Dist. v. Carter*, 216 S.W.3d 500 (Tex. App.—Fort Worth 2007, no pet.) (holding that doctors' retaliatory discharge claims were germane to, connected with, and properly defensive to the hospital district's breach of contract counterclaims, since the element of just cause for termination necessary to support district's claim for breach was negated by retaliation element of doctors' claims).

To the extent the State may have waived its immunity from suit by filing claims for affirmative relief, one court of appeals has recently held that immunity from suit is reinstated when the State dismisses those claims. *City of Dallas v. Albert*, 214 S.W.3d 631, 635 (Tex. App.—Dallas 2006, no pet. hist.).

C. Settlement Contracts.

As noted above, *Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), holds that "when a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued." *Id.* at 521.

D. Proprietary Functions.

"Municipalities are different from all other governmental units in Texas because they are the only governmental units recognized to perform private, as opposed to governmental, functions." G. Kraehe, *"There's Something About Cities": Understanding Proprietary Functions of Texas Municipalities and Governmental Immunity*, 32 Tex. Tech L. Rev. 1, 2 (2000). It is well established that cities have no immunity from suit or liability for torts they commit while acting in a proprietary capacity. *Id*.

However, it is not yet clear whether cities lack immunity from suit for breach-of-contract claims arising out of a city's agreement to perform proprietary functions. In *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), the Court left that question unanswered. *Id.* at 343 (concerning governmental-proprietary distinction applicable to tort claims, "we have never held that this same distinction determines whether immunity from suit is waived for breach of contract claims, and we need not determine that issue here") (footnote omitted). *But cf. Gates v. City of Dallas*, 704 S.W.2d 737, 738-739 (Tex. 1986) (stating that "[c]ontracts made by municipal corporations in their proprietary capacity have been held to be governed by the same rules as contracts between individuals", and that a city that contracts in its proprietary role is 'clothed with the same authority and subject to the same liabilities as a private citizen'") (quoting *Boiles v. City of Abilene*, 276 S.W.2d 922, 925 (Tex. Civ. App.—Eastland 1955, writ ref'd)).

Lower courts which have confronted this issue have held that immunity from suit poses no bar to breach-of-contract claims which arise out of the municipality's proprietary functions. *See, e.g., Temple v. City of Houston*, 189 S.W.3d 816 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (reversing grant of city's plea to the jurisdiction and holding that "[b]ecause the City was performing a proprietary function in providing insurance for its employees, the City does not have sovereign immunity").

V. EQUITABLE ALTERNATIVES.

Suits for unjust enrichment are also barred by immunity from suit. The State's sovereign immunity has always been a bar to such claims. *See, e.g., Firemen's Ins. Co. of Newark, N.J. v. Bd. of Regents of Univ. of Tex. System*, 909 S.W.2d 540, 542 (Tex. App.—Austin 1995, writ denied) ("Absent an allegation that the state has consented to be sued, the trial court lacks jurisdiction over breach of contract and *quantum meruit* claims."). Before *Tooke v. City of Mexia*, such claims against local governments could be brought under enabling statutes that permitted the entity to "sue or be sued." That avenue, however, appears to have been closed by *Tooke*. *See, e.g., McMahon Contracting, L.P. v. City of Carrollton*, 197 S.W.3d 387, 387 (Tex. 2006) (suit for breach of contract or, alternatively, *quantum meruit* remanded for determination whether claims permitted by Section 271.152 of the Local Government Code); *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390, 391 (Tex. 2006) (same).

The courts of appeals that have addressed the issue are unanimous in holding that the Section 271.152 waiver of immunity for breach of contract claims does not waive factually related claims sounding in equity. *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 13 (Tex. App.—Houston [1st Dist.] June 21, 2007, no pet.) (*quantum meruit* claim barred); *Lamesa Indep. Sch. Dist. v. Booe*, 251 S.W.3d 831, __ (Tex. App.—Eastland 2008, no pet.) ("even when an equitable remedy such as estoppel or *quantum meruit* is asserted, the doctrine of sovereign immunity from suit applies as long as monetary damages are sought"); *Somerset Indep. Sch. Dist. v. Casias*, No. 04-07-00829-CV, 2008 Tex. App. LEXIS 2895 (Tex. App.—San Antonio Apr. 23, 2008, pet. filed) (mem. op.) ("Casias' promissory estoppel and *quantum meruit* claims sound in equity and are simply not included in section 271.152's limited waiver of governmental immunity."); *H & H Sand & Gravel, Inc. v. City of Corpus Christi*, No. 13-06-00677-CV, 2007 Tex. App. LEXIS 8878, at *7, 2007 WL 3293628, *3 (Tex. App.—Corpus Christi Nov. 8, 2007, no pet.) (mem. op.) ("H&H Sand's estoppel, waiver, and detrimental reliance claims sound in equity and are not included in section 271.152's limited waiver of governmental immunity.")

The same is true for suits to enforce contract rights through equitable remedies. *See, e.g., Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003) (holding that county was immune from suit for specific performance of real estate contract); *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 840 (Tex. 1958) (holding that suit for declaratory and injunctive relief that sought to "compel performance of or to enforce rights arising out of a contract with a state agency made on behalf of the State in its sovereign capacity" was barred by sovereign immunity); *Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture*, 220 S.W.3d 25 (Tex. App.—San Antonio 2006, pet. filed) (water district immune from suit to compel district to purchase real estate pursuant to contract). The relevant distinction is not whether the suit seeks damages or equity, but whether the effect of the suit is to compel the governmental unit to exercise its discretion without legislative consent.

VI. BREACH OF CONTRACT AS UNCONSTITUTIONAL TAKING.

Texas courts have resisted attempts by contract claimants to circumvent immunity by recasting contract claims into claims for a taking without just compensation under TEX. CONST. art. I, § 17. As the Supreme Court has held, "the State does not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute." *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598-99 (Tex. 2001). In *Little-Tex*, the Court further noted that:

> Texas courts have long recognized that the State wears two hats: the State as a party to the contract and the State as sovereign. The State, in acting within a color of right to take or withhold property in a contractual situation, is acting akin to a private citizen and not under any sovereign powers. In this situation, the State does not have the intent to take under its eminent domain powers; the State only has an intent to act within the scope of the contract.

39 S.W.3d at 599 (internal citations deleted). *See also State v. Holland*, 221 S.W.3d 639 (Tex. 2007) (State is immune from taking claim of patent holder who voluntarily delivered his patented technology to the State, despite the existence of a fact issue whether or not the patent holder and the state were in privity of contract).

Based on this same principle, the courts of appeals have consistently rejected takings claims where the plaintiff has voluntarily delivered property to the State pursuant to a contract. *See, e.g., Clear Lake City Water Auth. v. Kirby Lake Dev. Co*., 123 S.W.3d 735, 755 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("Here, the Authority disputed appellees' contention that it was obligated under the contracts to pay appellees for their facilities as soon as possible with any available funds; therefore, it lacks the requisite intent."); *Green Int'l, Inc. v. State*, 877 S.W.2d 428, 434 (Tex. App.—Austin 1994, writ dism'd) ("Even if the government were to withhold property or payment it believed to be due the other party, the government would still be acting within the color of right to the extent it had a good faith belief that its actions were justified due to disagreements over payment due or performance under the contract."); *Tex. S. Univ. v. State Street Bank & Trust Co*., 212 S.W.3d 893 (Tex. App.—Houston [1st Dist.] 2007, pet. filed) ("It is clear that the equipment was delivered to TSU, and its possession of the equipment was by virtue of the Master Lease and not by virtue of a taking within the meaning of article I, section 17 of the Texas Constitution. TEX. CONST. art. I, § 17."); *Freedman v. Univ. of Hous.*, 110 S.W.3d 504, 506, 509 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("when the State enters into a contract, it lacks the intent to take property under its eminent domain powers and thus does not commit a 'taking.'"); *Kaufman Cty. v. Crow*, 176 S.W.3d 921, 927 (Tex. App.—Dallas 2005, pet. denied) (when the County Auditor refused to pay and the Commissioners Court voted not to pay, they acted with the intent to avoid payment of illegal claims for jobs that had not gone through a bidding process rather than the intent to act under the power of eminent domain.); *Taub v. Harris County*, No. 01-93-00007-CV, 1996 Tex. App. LEXIS 1216, at *12 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (not designated for publication) (holding that because "the District was acting under color of contract," "its refusal to perform its obligations under the agreement does not constitute a taking, though it may give rise to a breach of contract"); *Imagents, Inc. v. Univ. of Tex. Health Science Ctr*., No. 14-94-00781-CV, 1995 Tex. App. LEXIS 2463, at *8-10 (Tex. App.—Houston [14th Dist.] Oct. 12, 1995 no writ) (not designated for publication) (rejecting claim that State's failure to pay for the use of plaintiff's equipment was a taking, reasoning that "Imagents chose to perform under the contract and deliver its materials to UTHSC for cyclotron services. Thus, Imagents' allegations establish that it voluntarily consented to the actions of UTHSC under the contract").

A taking claim may be available, however, where a governmental entity, in breaching a contract, also deprives the plaintiff of extra-contractual property rights. For example, in *Texas Parks & Wildlife Department v. Callaway*, 971 S.W.2d 145, 152 (Tex. App.—Austin 1998, no pet.), the Department had opened a canal over Callaway's property to public use in contravention of the terms of an easement. *Id.*, at 147-48. The Austin court of appeals recognized the validity of Callaway's inverse condemnation because, as the court noted, the Department had done more than merely breach the easement agreement; it had acted affirmatively to open the property to public boating. *Id*., at 150-51. That is, the Department had affirmatively appropriated extra-contractual property rights of the plaintiff.