SOVEREIGN IMMUNITY AND CONTRACTS

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SOVEREIGN IMMUNITY AND CONTRACTS

I. INTRODUCTION

Generally, the Legislature must waive immunity to allow a suit against a governmental entity. In breach of contract claims against local governmental entities, the Legislature has provided a limited waiver of immunity in the Local Government Code. However, conflicting court opinions present challenges to practitioners in this area.

II. SOVEREIGN IMMUNITY AND CONTRACTS, GENERALLY

A. Sovereign and Governmental Immunity

Although often used interchangeably, the terms sovereign immunity and governmental immunity "involve two distinct concepts." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Sovereign immunity protects the State and divisions of state government (including agencies, boards, hospitals, and universities) from lawsuits for damages. *Id.*; *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Sovereign immunity embraces two distinct principles: immunity from suit and immunity from liability. *Fed. Sign*, 951 S.W.2d at 405.

Governmental immunity protects "political subdivisions of the State, including counties, cities, and school districts." *Taylor*, 106 S.W.3d at 694 n.3. Like sovereign immunity, it also encompasses immunity from suit and from liability. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

Immunity from *suit* bars a suit against a governmental entity without the State's consent. *Id.* Even if the State concedes liability, immunity from suit prevents a lawsuit from being maintained to seek a remedy, unless the State consents, either through a constitutional provision or legislative action. *Taylor*, 106 S.W.3d at 695; *Fed. Sign*, 951 S.W.2d at 405. The Legislature may consent by statute or by legislative resolution.[1] A statutory waiver of immunity must be "effected by clear and unambiguous language." Tex. Gov't Code Ann. § 311.034, *cited in Taylor*, 106 S.W.3d at 696.

Immunity from *liability* prevents enforcement of a judgment, even if the Legislature has given consent to sue. *Fed. Sign*, 951 S.W.2d at 405. The Legislature does not create or admit liability by granting permission to sue. *Id.*

In the contract context, a governmental entity waives immunity from liability by entering into a contract, because it "bind[s] itself like any other party to the terms of the agreement." *Tooke*, 197 S.W.3d at 332. However, entering into a contract does not, standing alone, waive immunity from suit. *Id.* Rather, the Legislature retains control over waivers of immunity because of the important policy concerns involved.[2] *See id.*; *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

Under the common law, a governmental entity has no immunity when performing a proprietary function, but retains immunity in the exercise of governmental functions. "[G]enerally speaking, a municipality's proprietary functions are those conducted 'in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government,' while its governmental functions are 'in the performance of purely governmental matters solely for the public benefit.'" *Tooke*, 197 S.W.3d at 343 (footnotes omitted) (quoting *Dilley v. City of Houston*, 148 Tex. 191, 222 S.W.2d 992, 993 (1949)).

Under the Texas Tort Claims Act, the Legislature expanded a municipality's liability under the Act to include governmental functions as well as proprietary. The Tort Claims Act defines a proprietary function as one "that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality." Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(b). Governmental functions are "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." *Id.* § 101.0215(a). In the Tort Claims Act, the Legislature has set forth non-exhaustive lists of proprietary and governmental functions. *Id.* For example, governmental functions include: police and fire protection; street construction, design, and maintenance; hospitals; sanitary and storm sewers; and parks. *Id.* Proprietary functions include "operation and maintenance of a public utility" and "amusements owned and operated by the municipality." *Id.* § 101.0215(b).

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[1] A person may seek the Legislature's permission to sue the State under Chapter 107 of the Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. §§ 107.001–.005. For a claimant seeking permission to sue for breach of certain contracts against a "unit of state government" (*see* n.4, *infra*), the alternate dispute resolutions procedures of Chapter 2260 of the Government Code are exclusive and are required to be followed prior to seeking the Legislature's permission to sue. Tex. Gov't Code Ann. §§ 2260.001–.108.

[2] Some of these policy concerns identified by the Texas Supreme Court are: the government should be allowed to respond to changing conditions in determining what is in the public's best interest; "the claims process is tied to the appropriation process," and the Legislature is in a better position to consider the interplay between the two; and the Legislature is better suited to determining what procedures and remedies to allow. *See Tooke*, 197 S.W.3d at 332.

B. *Federal Sign* and *Tooke*

The Texas Supreme Court addressed immunity in breach of contract claims in *Federal Sign v. Texas Southern University*, 951 S.W.2d 405 (Tex. 1997), and *Tooke v. City of Mexia*, 197 S.W.3d 332 (Tex. 2006).

In *Federal Sign*, the Supreme Court described the issue as "whether the sovereign immunity doctrine precludes Federal Sign, a private party, from suing Texas Southern University, a state institution, for breach of contract without legislative permission." *Fed. Sign*, 951 S.W.2d at 403. In deciding this issue, the Court considered a conflict among the courts of appeals regarding "whether the State, by entering into a contract with a private citizen, waives *immunity from suit* by the fact that it has made the contract and thus legislative consent for suit is not necessary." *Id.* at 406.

Texas Southern University (TSU) entered into a contract for Federal Sign to construct basketball scoreboards for TSU's health and physical education facility. *Id.* at 403. Federal Sign began building the scoreboards but had not yet delivered anything to TSU when TSU told Federal Sign it intended to pursue other options to acquire the scoreboards. *Id.* Federal Sign sued for breach of contract (among other causes of action) and sought lost profits and expenses. *Id.* Rather than seeking legislative permission to sue, Federal Sign argued that it did not need permission under the circumstances of that case. *Id.* at 404.

The Supreme Court noted the conflict between courts of appeals and also noted that one of its own prior cases, *Fristoe v. Blum*, 92 Tex. 76, 45 S.W. 998 (1898), was cited as support by courts and parties on both sides of the conflict. The Court examined *Fristoe*, concluding, "*Fristoe* taken as a whole, says nothing about whether the State waives or retains immunity when it contracts with private citizens." *Id.* at 406. The Court then reviewed three of its prior cases involving contracts and immunity and concluded that "when the State contracts with private citizens, the State waives only *immunity from liability*" but "does not waive [its] *immunity from suit*." *Id.* at 408. The Court therefore held that sovereign immunity precluded Federal Sign's suit. *Id.* However, the Court included a footnote to this holding that stated, "There 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. The concurring opinion by then-Justice Hecht also hinted at the possibility that immunity from suit could be waived without legislative permission under the right circumstances. *Id.* at 412–13 (Hecht, J., concurring).

In *Tooke v. City of Mexia*, the Supreme Court addressed three arguments concerning immunity and a breach of contract claim. The Tookes argued that the City's governmental immunity was waived by: (1) the City's partial performance of the contract; (2) the alleged proprietary subject-matter of the contract; or (3) certain provisions in the City's charter. *Tooke*, 197 S.W.3d at 330. The Court held that the City's immunity from suit was not waived because: (1) the City's behavior was not sufficient to waive immunity; (2) even if the City was not immune for a contract concerning proprietary functions, the subject matter of the contract was a governmental function; and (3) the City's charter was not a clear and unambiguous waiver. *Id*. at 328–29.

The City entered into a contract with the Tookes to furnish labor and equipment for collecting brush and leaves along the curb within the City. *Id*. at 329. Shortly after the contract's first year, the City notified the Tookes that the City's budget for their services was exhausted. *Id*. at 330. The Tookes immediately stopped work. *Id*. at 330. Months later, the city manager notified the Tookes that the City was ending the contract due to lack of funding. *Id*. The Tookes sued the City for breach of contract. *Id*. The City contended it was immune from suit. *Id*.

First, the Tookes asserted that the City's partial performance of the contract waived immunity. *Id*. at 343. The Court acknowledged its "cautionary statement" in *Federal Sign*, but rejected the Tookes' argument. "But the Tookes were paid for all the work they performed, and they claim only lost profits on additional work they should have been given. Nothing among the circumstances of this case reflects a waiver of immunity from suit." [3] *Id.*

Second, the Tookes contended that the City was not immune from suit because the disputed contract covered a proprietary function rather than a governmental one. *Id*. The Court asserted that it had never held that the governmental-proprietary distinction determined whether immunity from suit was waived for breach of contract claims, and that it did not need to determine that issue in this case, because the contract concerned a governmental function. *Id*. The Court explained that the Legislature statutorily included "garbage and solid waste removal, collection, and disposal" among a municipality's governmental functions and that the Tookes' contract fell within that function. *Id*. at 343–44. The Court therefore concluded that that, even if the City was not immune from suit for breach of a contract that covered a proprietary function, the Tookes' contract did not qualify because its subject was a governmental function. *Id*. at 344.

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[3] The Court has rejected other attempts to claim waiver of immunity by conduct. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 414 (Tex. 2011); *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 857 (Tex. 2002).

Third, the Tookes argued that the City waived immunity from suit by a provision in its charter, which employed "implead and be impleaded" language. *Id*. The Court stated, "[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." *Id.* (footnote omitted). The Court, however, declined to address that argument, because the provision of the City charter was not a "clear and unambiguous waiver of immunity." *Id*.

III. TEXAS LOCAL GOVERNMENT CODE, CHAPTER 271, SUBCHAPTER I

A. Subchapter I waives immunity in certain circumstances.

In 2005, the Legislature enacted subchapter I of Chapter 271 of the Local Government Code to retroactively waive immunity from suit for contract disputes involving most local governmental entities under limited circumstances. Tex. Loc. Gov't Code Ann. §§271.151–.160. Section 271.152 provides: "A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters 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." Tex. Loc. Gov't Code Ann. § 271.152. For this limited waiver to apply, three elements must be met: (1) the party against whom waiver is asserted must be a local governmental entity; (2) the entity must be authorized to enter into contracts; and (3) the entity must have in fact entered into a contract subject to the subchapter. *See id*.

To meet the first element, the party against whom waiver is asserted must meet the definition of a "local governmental entity." The Code defines "local governmental entity" as "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."[4] Tex. Loc. Gov't Code Ann. § 271.151(3). The statute also list some types of "local governmental entity": (A) a municipality; (B) a public school district or junior college district; and (C) a 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. *Id*. § 271.151(3)(A)–(C).

To meet the second element, the local governmental entity must be authorized by either statute or the constitution to enter into contracts. *Dallas County Hosp. Dist. v. Hospira Worldwide, Inc.*, 400 S.W.3d 182, 185 (Tex. App.—Dallas 2013, pet. denied).

To fulfill the third element, the entity must have entered into a contract subject to the subchapter. A contract is "subject to this subchapter" if it is "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."[5] Tex. Loc. Gov't Code Ann. § 271.151 (2)(A). In other words, the contract must: (1) be a written contract stating the essential terms of the agreement; (2) provide goods or services to the local governmental entity; (3) that is properly executed on behalf of the local governmental entity. *Id*. The Texas Supreme Court has noted that essential terms of an agreement include, "the time of performance, the price to be paid, ... [and] the service to be rendered." *City of Houston v. Williams*, 353 S.W.3d 128, 138–39 (Tex. 2011) (quoting *Kirby Lake Dev. Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010)). But, generally, a contract is legally binding "if its terms are sufficiently definite to enable a court to understand the parties' obligations." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000).

Chapter 271 does not define the term "services," but given the Legislature's definition of the term in other contexts, it can be deduced that "services" encompasses a wide variety of activities. *See Kirby Lake Dev., Ltd. v. Clear Lake Water Auth.*, 320 S.W.3d 829, 839 (Tex. 2010). The Texas Supreme Court held that the phrase "providing goods or services" should be liberally interpreted by courts. *Id.* The Court also cited a prior opinion for a possible definition: a service is "generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed." *Id.* (quoting *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962)). The courts have found a variety of different activities to be "services" in different

[4] "Unit of state government" means the state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the constitution or a statute of this state, including a university system or institution of higher education. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state.

Tex. Gov't Code Ann. § 2260.001(4).

[5] The statute also covers "a written contract, including a right of first refusal, regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use." Tex. Loc. Gov't Code Ann. § 271.151 (2)(B).

cases. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320, 327 (Tex. 2006) (self-insurance fund agreement was contract providing service); *Roma Indep. Sch. Dist. v. Ewing Constr. Co.*, No. 04-12-00035-CV, 2012 WL 3025927, at *6 (Tex. App.—San Antonio July 25, 2012, pet. denied) (contract for the construction of a middle school was contract providing service); *Galveston Indep. Sch. Dist. v. Clear Lake Rehab. Hosp., L.L.C.*, 324 S.W.3d 802, 810–11 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (contract for the provision of medical services was a contract providing service).

The benefit that the local governmental entity received must be a direct benefit. *See Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.—Waco 2009, pet. denied). In *Berkman*, the court found that the use of the plaintiff's property as a children's home was an indirect, attenuated benefit to the City and therefore did not constitute a contract to provide goods or services to the City. *Id*. The court reasoned that "if every contract that confers some attenuated benefit on a governmental entity constitutes a contract for a 'service,' the limitation of contracts covered by section 271.152 to contract for 'goods or services provided to the entity' loses all meaning." *Id*.

B. Court opinions applying Subchapter I

The opinions addressing Subchapter I have developed some split in authority. First, there is some conflict on whether Subchapter I's limitations on damages should be considered a jurisdictional issue or solely related to the merits. Second, some intermediate appellate courts have split on whether the distinction between proprietary and governmental functions enters into the analysis of a contract under Subchapter I.

1. Damages

In *Tooke v. City of Mexia*, in addition to addressing the Tookes' three arguments (*supra*), the Supreme Court addressed Subchapter I. The Court noted that the Legislature had passed Subchapter I of Chapter 271 of the Local Government Codes while the case was pending and that it should apply to the Tookes' claim. *Tooke*, 197 S.W.3d at 329. The Court determined, however, that Tooke's only claim for damages was for "consequential damages," which are expressly excluded from recovery under Subchapter I. *Id*. The Court therefore "conclude[d] that the City's immunity from suit on the Tooke's claim ha[d] not been waived." *Id*. at 346. Thus, the Supreme Court's language indicated that whether a plaintiff sought damages allowed under Subchapter I was an inquiry into whether the Legislature had waived immunity for the claim.

Despite the seemingly clear language in *Tooke*, some courts of appeals have rejected the argument that the damages limitations of Subchapter I can provide a proper basis for a plea to the jurisdiction. The courts that have done so rely upon the Texas Supreme Court's opinion in *Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829 (Tex. 2010).

In *Kirby Lake*, the Supreme Court was faced with a case in which the defendant argued that section 271.153 did not waive its immunity because the plaintiffs "cannot **prove** that the amount they seek is 'due and owed.'" *Kirby Lake*, 320 S.W.3d at 840 (emphasis added). Section 271.153 limits "the total amount of money awarded … in a breach of contract [claim under Subchapter I]" to "the balance due and owed by the local governmental entity under the contract." Tex. Loc. Gov't Code Ann. § 271.153(a)(1). The defendant argued that the payment to the plaintiffs under the terms of the contract was to come from bonds once the voters approved the bond issue and—because the voters had not approved the bonds—the plaintiffs "cannot prove that the amount they seek is 'due and owed.'" *Kirby Lake*, 320 S.W.3d at 840. The Supreme Court disagreed, stating:

> The purpose of section 271.153 is to limit the amount due by a governmental agency on a contract once liability has been established, not to foreclose the determination of whether liability exists. Furthermore, the Agreements do stipulate the amount of reimbursement owed upon approval of bond funds. The existence of a balance "due and owed" is thus incorporated within the contract—a balance that would come due when voters approve payment in a bond election.

Id.

Focusing on the first sentence of the above passage, some courts of appeals have held that section 271.153 is not an appropriate basis for a plea to the jurisdiction. *See, e.g.*, *City of San Antonio ex rel. San Antonio Water Sys. v. Lower Colorado River Auth.*, 369 S.W.3d 231, 237 (Tex. App.—Austin 2011, no pet.) (listing cases). Although the reasoning of the *City of San Antonio* case is persuasive, it does have flaws. For one, the court acknowledged *Tooke* but stated that, after *Tooke*, "the supreme court has suggested that section 271.153 is not a proper basis for granting a dispositive pre-trial plea to the jurisdiction like the one at issue here." *City of San Antonio*, 369 S.W.3d at 236 (discussing *Kirby Lake*, 320 S.W.3d at 840). The court then quoted only the first sentence of the Supreme Court's analysis in *Kirby Lake*, ignoring the rest of the analysis that suggests a way to reconcile the holding of *Tooke* with the holding of *Kirby Lake*. *See id.* at 236–37.

In *Kirby Lake*, the Supreme Court stated a factual basis for denying the plea—"[t]he existence of a

balance 'due and owed' is thus incorporated within the contract." *Kirby Lake*, 320 S.W.3d at 840. In other words, the Court acknowledged that the pleadings alleged damages allowed by Subchapter I. In contrast, in *Tooke*, the damages were awarded after a jury trial and were not damages allowed by Subchapter I. *Tooke*, 197 S.W.3d at 346.

That is, in a case in which no "balance due and owed" existed or possibly could exist, should a court allow a lawsuit to proceed, even though there could be no possible recovery? Opinions focusing solely on the first sentence of the quoted passage seem to suggest that is the case.

Another possible flaw in the *City of San Antonio* opinion is that it rather broadly interprets some of the cases cited, particularly cases that seem to recognize a distinction between *Tooke* and *Kirby Lake*. For example, one case cited is *City of Mesquite v. PKG Contracting, Inc.,* 263 S.W.3d 444 (Tex. App.—Dallas 2008, pet. denied). The opinion cites *PKG* with the following parenthetical: "acknowledging *Tooke* but stating that 'statutory limitations on a plaintiff's recoverable damages do not deprive the trial court of subject matter jurisdiction to adjudicate the plaintiff's breach of contract claims.'" *City of San Antonio*, 369 S.W.3d at 237 (citing *PKG*, 263 S.W.3d at 448). However, in *PKG* the Dallas Court of Appeals did not make a broad, matter-of-law holding. Rather, it distinguished the facts of that case from *Tooke*. "We cannot say on this record that PKG's claim for damages is **solely for damages excluded by the statute**." *PKG Contracting, Inc.*, 263 S.W.3d at 448 (emphasis added). In other words, if the pleadings had alleged, and the record had shown, that the claim for damages was a claim not authorized under Subchapter I, the language of the court's opinion leaves open the possibility that plea to the jurisdiction may have been appropriate.

Similarly, the *City of San Antonio* opinion cites *City of Houston v. Southern Electric Services, Inc.*, 273 S.W.3d 739 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The *Southern Electric* opinion is described parenthetically as "whether balance is due under section 271.153 goes to merits of case, not to trial court's jurisdiction; at pre-trial stage, plaintiff satisfies section 271.153 by alleging facts to support claim that balance is due and owing under contract." Although an accurate description, the *City of San Antonio* opinion does not discuss the implication of that holding. If a plaintiff **does not** allege damages authorized by Subchapter I, the language used by the First Court of Appeals leaves open the possibility that a plea to the jurisdiction might be appropriate.

The *PKG* and *Southern Electric* opinions, and, possibly the *Kirby Lake* opinion as well, are perhaps best understood within a procedural framework. In a case implicating sovereign or governmental immunity, the plaintiff must affirmatively demonstrate the court's subject-matter jurisdiction by alleging a valid waiver of immunity. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). If a plea to the jurisdiction challenges the sufficiency of the pleadings, before dismissing, a trial court must grant the plaintiff an opportunity to amend its pleadings to affirmatively show the trial court's jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). But, after granting the plaintiff an opportunity to amend, a trial court must grant a plea to the jurisdiction when the amended pleadings do not contain allegations establishing the court's jurisdiction. *See Harris County v. Sykes*, 136 S.W.3d 635, 639–40 (Tex. 2004).

In other words, when a plaintiff does not (or cannot) allege damages authorized by statute, the requirements of subchapter I, as a whole, cannot be met. *See Kansas City S. v. Port of Corpus Christi Auth. of Nueces County*, 305 S.W.3d 296, 306 (Tex. App.—Corpus Christi 2009, pet. denied) ("For immunity to be waived under section 271.152, the claimant must plead damages that are recoverable under section 271.153."). Arguably, the Legislature did not intend to waive immunity from suit except for suits that meet all the requirements of Subchapter I, including limiting the waiver of immunity for suits seeking only authorized damages.

Considering 271.153 as jurisdictional does have a fairly significant drawback. In the *City of San Antonio* opinion, one reason supporting the court's determination that the limitation of liabilities in section 271.153 did not deprive the trial court of jurisdiction was the distinction between immunity from suit and immunity from liability. "Liability can be imposed on a governmental entity only if the entity's immunity from suit has been waived." *City of San Antonio*, 369 S.W.3d at 238. Also, "damages caps ... that 'insulate public resources from the reach of judgment creditors' indicate immunity from suit has been waived." *Id.* (quoting *Taylor*, 106 S.W.3d at 698); *see also Taylor*, 106 S.W.3d at 696 ("Unlike immunity from suit, immunity from liability does not affect a court's jurisdiction to hear a case and cannot be raised in a plea to the jurisdiction.").

Cogent arguments may be made for either position. Until the courts or the Legislature resolve this conflict, the practitioner must be aware of the split and cognizant of the conflicting authority.

2. Proprietary versus Governmental Functions

Another conflict has developed among the intermediate courts of appeals: whether the distinction between proprietary and governmental functions applies in a breach of contract claim under Subchapter I. Two leading cases are *City of San Antonio v. Wheelabrator, Air Pollution Control, Inc.*, 381 S.W.3d

597 (Tex. App.—San Antonio 2012, pet. denied), and *City of Georgetown v. Lower Colo. River Auth.*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. dism'd by agr.). In *Wheelabrator*, the San Antonio Court of Appeals held that the distinction does not apply to claims under Subchapter I. In *City of Georgetown*, the Austin Court of Appeals held that it does.

a. *Wheelabrator* and cases declining to apply proprietary-governmental distinction to contracts

***City of San Antonio v. Wheelabrator, Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied).**

In *Wheelabrator*, the issue before the court was whether the Texas Tort Claims Act's governmental-proprietary distinction applied in a contractual or quasi-contractual setting to determine whether a municipality was immune from suit. *Wheelabrator*, 381 S.W.3d at 599. The court held that the governmental-proprietary distinction did not apply, and concluded the City was immune from suit on the quantum meruit claim. *Id*.

Wheelabrator and Casey entered into a written contract with the City for the design and construction of two baghouses at a power station owned and operated by the City. *Id*. The contract provided that the City would withhold from Wheelabrator 10% of the total contract price as retainage. *Id*. The City fully paid Wheelabrator its contract price, except for the retainage. *Id*. In the meantime, Casey pursued a claim for $12,000,000 from the City for costs of delay allegedly caused by Wheelabrator. *Id*. When Wheelabrator pursued the retainage payment, the City informed Wheelabrator that it would withhold payment of the retainage payment pending resolution of the Casey claim. *Id*. Ultimately, both Casey and Wheelabrator sued the City. *Id*. The City filed a plea to the jurisdiction arguing that it was immune from suit for quantum meruit, which was denied by the trial court. *Id*. at 600. The City appealed. *Id*.

The appellate court found that because the Legislature chose to limit the statutory waiver of immunity for contractual claims against governmental entities to suits for breach of express written contracts, the Legislature consciously excluded quasi-contractual claims based on an implied contract or quantum meruit from the waiver. *Id*. at 605. The appellate court also determined that even though the Legislature easily could have included the proprietary-governmental dichotomy used in the tort-claims context, it chose not to. *Id*. Therefore, because it is solely the Legislature's role to "clearly and unambiguously" waive governmental immunity from suit, and it did not do so for quantum meruit claims, then the Texas Tort Claims Act's governmental-proprietary distinction does not apply in a contractual or quasi-contractual setting. *Id*.

***Republic Power Partners v. The City of Lubbock*, 424 S.W.3d 184 (Tex. App.—Amarillo 2014, no pet.).**

In *Lubbock*, Republic and the City entered into "The Development Agreement" in which the two entities formed a partnership for future electric energy generation and transmission. *Id*. at 188. Republic sued the City for breach of the Development Agreement after the City failed to receive funding for the projects within the agreement. *Id*. The City filed a plea to the jurisdiction asserting immunity from the suit. *Id*.

The issue before the court was whether to incorporate the proprietary-governmental distinction from common law and the Texas Tort Claims Act into a breach of contract claim. *Id*. at 190. The court extended the *Wheelabrator* ruling to find that immunity did apply to claims arising from the breach of an express contract arising out of the performance of a proprietary function, and therefore the Tort Claims Act's governmental-proprietary distinction did not apply to breaches of express contracts. *Id*. at 193. The court presumed that the Legislature deliberately and purposefully omitted the governmental-proprietary dichotomy when it selected the words and phrases that it enacted in section 271.152. *Id*. The court concluded that the Legislature made a policy decision when it determined that immunity applied to contract claims arising from proprietary functions, subject to the specific waiver provisions in section 271.152. *Id*.

Rejecting the *City of Georgetown* decision, the court stated,

> We are aware of the Austin Court of Appeals's decision in *City of Georgetown v. Lower Colorado River Authority*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed). Because that opinion was issued before the Supreme Court denied petition in *City of San Antonio ex rel. City Public Service Board v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied), and for the reasons stated herein, we respectfully reject the reasoning expressed in that opinion.

Id. at 193 n.6.

***W. Texas Mun. Power Agency v. Republic Power Partners, L.P.*, 428 S.W.3d 299 (Tex. App.—Amarillo 2014, no pet.)**

Several cities formed West Texas Muncipal Power Agency (WTMPA) for the purpose of obtaining electric energy for its citizens. *W. Texas Mun. Power Agency*, 428 S.W.3d at 302. WTMPA entered into a Development Agreement with Republic Power to form a partnership to provide future electric energy generation and transmission in which WTMPA was required to issue bonds to finance their construction.

Id. at 302–03. After WTMPA failed to finance the construction, Republic Power sued WTMPA alleging breach of the Development Agreement. *Id*. at 304. WTMPA filed a plea to the jurisdiction asserting immunity from the suit. *Id*.

The issue before the court was whether to incorporate the proprietary-governmental distinction from common law and the Texas Tort Claims Act into a contract dispute. *Id*. at 306. The court held that the proprietary-governmental distinction employed in the Texas Tort Claims Act did not apply to contract disputes and therefore did not deny a municipal power agency governmental immunity regarding breach of contract claims asserted by an energy development partner against the agency. *Id*.

Regarding the *City of Georgetown* decision, the court included the same language as it used in *Republic Power Partners* to explain its decision to decline to follow *City of Georgetown*. *Id.* at 306 n.6.

***Lower Colo. River Auth. v. City of Boerne*, 422 S.W.3d 60 (Tex. App.—San Antonio 2014, pet. filed).**

The City and the Lower Colorado River Authority (LRCA) entered into a contract whereby the City agreed to buy all of its electric energy from the LRCA. *Id*. at 63. This contract was later amended by a Uniform Rate Clause where the LCRA agreed to offer its lowest rate at any time to the City. *Id*. The City sent a letter to the LCRA claiming the LCRA breached the amendment when it offered lower rates to other customers, but not to the City. *Id*. LCRA sought a declaratory judgment confirming that it had not breached the amendment and additionally pleaded a breach of contract claim. *Id*. The City filed a plea to the jurisdiction, asserting immunity to the breach of contract suit. *Id*.

The issue before the court was whether a city has any governmental immunity against a suit based on a contract involving a proprietary function, such as provision of electrical power to its citizens, rather than a governmental function. *Id*. at 64. The court held that the common law distinction between the proprietary and governmental functions of a city in determining a city's immunity did not apply to contractual or quasi-contractual claims. *Id*. at 67. The court found that because a city that enters into a contract waives immunity from liability by voluntarily binding itself to the contract terms, but does not waive its immunity from suit, that the City was immune from suit unless expressly waived by the Legislature. *Id*. at 64. The court also found that section 271.152 states that "a local governmental entity…that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purposes of adjudicating a claim for breach of the contract." *Id*. at 67. Therefore, the court found that the LCRA would be allowed to adjudicate the breach of contract claim further. *Id*.

b. *City of Georgetown* and cases applying proprietary-governmental distinction to contracts

***City of Georgetown v. Lower Colo. River Auth.*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed).**

In *City of Georgetown*, the issue before the court was whether the proprietary-governmental dichotomy applied to contract claims under Subchapter I. *Id*. at 808. To determine this issue, the court examined whether the proprietary-governmental dichotomy applied to contract claims under the common law and, if so, whether the Legislature abrogated the common law. *Id*. The court concluded that the proprietary-governmental dichotomy did apply to contract claims under the common law and that the Legislature did not intend section 271 to rescind the common law treatment of the proprietary-governmental dichotomy. *Id*. at 812–13.

The Lower Colorado River Authority (LCRA) and the City entered into a "Wholesale Power Agreement" where the City purchased all of its electricity from the LCRA and then resold it to the City's customers through its municipal utility. *Id*. at 805. Years later, the City sent a letter to the LCRA in which it stated that the LCRA breached the agreement. *Id*. at 806. The City then terminated the contract. *Id*. The LCRA sought declaratory relief concerning the parties' rights and obligations under the contract, and the City filed a plea to the jurisdiction, asserting that the LCRA failed to establish a valid waiver of governmental immunity. *Id*. The LCRA argued that when the City contracted to purchase power as a municipal utility, the City performed a proprietary function rather than a governmental function. *Id*. The City argued that "the proprietary-governmental function dichotomy is a creature of tort law" that does not apply to contract claims. *Id*. at 807.

The court did not find any principled reason why the proprietary-governmental dichotomy should apply to tort claims but not contract claims under the common law, especially in light of long-standing precedent in which the distinction was applied in such a manner. *Id*. at 811. The court noted that when a municipality does not act on behalf of the State, such action is not instilled with the State's immunity. *Id.* Therefore, the underlying rationale for the governmental-proprietary dichotomy is the relationship between the municipality and the State, not the relationship between the municipality and the party bringing suit. *Id*.

The court also determined that because section 271 does not mention the proprietary-governmental dichotomy, there is no plain statutory text from which it can be determined whether the Legislature intended

to abandon the dichotomy for contract claims. *Id*. at 813. The court also concluded that the *Wheelabrator* analysis inappropriately placed the responsibility to affirmatively adopt the common-law rule on the Legislature. *Id*. at 812–13.

The court further noted that the Legislature was well aware when adopting Subchapter I that appellate courts unanimously applied the proprietary-governmental dichotomy to contract claims. *Id*. at 813. Therefore because the Legislature did not state any disagreement with that precedent, it did not intend to abrogate the common law. *Id*. Abrogating common-law claims requires clear repugnance between the common law and statutory causes of action. *Id*. The court also reasoned that it was likely that the Legislature concluded that repeating the list of proprietary and governmental functions from the Tort Claims Act again in Subchapter I was unnecessary. *Id*.

The court then concluded that the proprietary-governmental dichotomy addressed whether governmental immunity exists in the first place, not whether it has been waived. *Id*. Therefore, the statutory provision that waives governmental immunity in Subchapter I did not invoke the proprietary-governmental dichotomy, which applies before consideration of waiver. *Id*.

***City of Seguin v. Lower Colorado River Auth.*, 03-13-00165-CV, 2014 WL 258847 (Tex. App.—Austin Jan. 15, 2014, pet. filed)**

In this case arising out of the same agreement as in the *City of Georgetown* case, the court followed its prior opinion in *City of Georgetown*.

***The City of Austin v. MET Ctr. NYCTEX, Phase II, Ltd.*, No. 03-11-00662-CV, 2014 WL 538697 (Tex. App.—Austin Feb. 6, 2014, pet. filed) (mem. op.).**

MET Center and the City entered into a contract for MET Center to construct an underground duct bank system to carry high levels of electric service. *Id*. at *1–2. After disputing the use of the bank system, MET Center sued the City for breach of contract and declaratory relief regarding the parties' rights and obligations under the contract. *Id*. at *2. The City filed a plea to the jurisdiction and asserted immunity from the suit. *Id*.

The issue before the court was whether the governmental-proprietary distinction from common law and the Tort Claims Act applied to contract disputes. *Id*. at *4–5. Following the *City of Georgetown* ruling, the court held that the governmental-proprietary dichotomy applied to contract disputes and that the City was acting in its proprietary capacity when it entered into its contract with Met Center and therefore had no immunity from the suit. *Id*. at *5–6.

***City of Weslaco v. Borne*, 210 S.W.3d 782 (Tex. App.—Corpus Christi 2006, pet. denied).**

The City operated a mobile home park for senior citizens where Borne resided. *Id*. at 786. The City decided to discontinue operating the mobile home park and transfer the land to the Texas Parks and Wildlife Department for the development of a birding center. *Id.* Borne sued the City for breach of contract. *Id*. The City asserted a plea to the jurisdiction, claiming governmental immunity to the suit. *Id*.

The issue before the court was whether the City was immune from a breach of contract claim in which the City ended several lease contracts prematurely in order to transfer land to a governmental agency for a birding center. *Id*. at 789. The court held that the governmental-proprietary distinction extended to breach of contract claims because of the Supreme Court holding in *Gates*, where the Court held that a city that contracts in its proprietary role is given the same authority and is subject to the same liabilities as a private citizen. *Id.* at 794 (citing *Gates v. Dallas*, 704 S.W.2d 737, 738–39 (Tex. 1986)). The court then concluded that operating a mobile home park including community areas and recreational facilities related to community, neighborhood, or senior citizen centers, recreational facilities, parking facilities, parks and zoos, and zoning, planning, and plat approval were governmental functions immune from suit under Tex. Civ. Prac. & Rem. Code § 101.0215. *Id*. at 793.

***City of Deer Park v. Ibarra*, No. 01-10-00490-CV, 2011 WL 3820798 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.) (mem. op.).**

The City contracted with Bay Utilities to build a parking lot and a road. *Id*. at *2–3. Bay Utilities hired Evenflow as a subcontractor. Evenflow failed to give their workers the full amount of pay agreed upon. *Id*. at *3. When the workers hired an attorney and sent a letter demanding the deficit to all parties involved except the City, the workers were fired by Evenflow. *Id*. at *2–3. The workers then filed suit against all parties including the City for breach of contract. *Id*. at *4. The City asserted a plea to the jurisdiction, claiming governmental immunity to the suit. *Id*.

The issue facing the court was whether the City was immune for breach of contract claim in which the City entered into a contract for the construction of a road and a parking lot. *Id*. at *9–10. The court applied the governmental-proprietary distinction to the contract dispute, and held the City was performing a governmental function when it entered in its contract for the road and the parking lot. *Id*. at *12.

***Galveston Indep. Sch. Dist. v. Clear Lake Rehab. Hosp.*, 324 S.W.3d 802 (Tex. App.—Houston [14th Dist.] 2010, no pet.).**

After a District employee failed to pay his healthcare premiums, the District cancelled his healthcare plan. *Id*. at 805–06. After failing to receive payment for the employee's care, the hospital demanded payment from the District. *Id*. at 806. The District refused this demand. *Id*. The hospital then filed suit against the District for breach of contract. *Id*. The District asserted a plea to the jurisdiction, claiming governmental immunity to the suit. *Id*.

The issue facing the court was whether the District was immune from a breach of contract claim, in which the District provided medical care to its employee. *Id*. at 807. The court applied the governmental-proprietary distinction to the contract dispute, and held because the District was performing a function mandated by the State, the District's act of providing medical coverage to employees was a governmental function. *Id*. at 809.

***City of Emory v. Lusk*, 278 S.W.3d 77 (Tex. App.—Tyler 2009, no pet.).**

The City and Lusk agreed that the City could lay an east-west sewer line through Lusk's trailer park, and Lusk granted the City an easement. *Id*. at 82. The City first laid the east-west sewer line, and then laid a north-south sewer line, which was not part of the initial agreement. *Id*. In response to the laying of the unauthorized north-south sewer line, Lusk filed suit against the City for breach of contract. *Id*. The City asserted a plea to the jurisdiction, claiming governmental immunity to the suit. *Id*.

The issue before the court was whether the City was immune from a breach of contract claim, in which the City laid a sewer line. *Id*. The court applied the governmental-proprietary distinction to the contract dispute, and held that providing sewer and water service was a governmental function under Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a), and therefore the City was immune. *Id*. at 83.

IV. POTENTIAL ISSUES

Perhaps the biggest potential challenge facing practitioners in this area is the issue of whether the distinction between proprietary versus governmental functions applies and, if so, how it applies. If a plaintiff brings a claim for a breach of contract under Subchapter I, then, for the time being, the parties will either apply the proprietary-governmental distinction or not, depending upon the court of appeals district in which the suit is brought. But, what if a plaintiff alleges a "mixed bag" of causes of action, such as a breach of contract and claims of common-law fraud and negligent misrepresentation? This hypothetical can illustrate the complex and, at time, conflicting interplay of different immunity issues.

Let us define our hypothetical a little more clearly. The defendant is a municipality (the "City"). The contract is for technical support for all of the City's computers, servers, email, printers, etc., for a term of two years. Under the terms of the contract, plaintiff invoices the City monthly, with payment due on receipt of the invoice. When the City receives the invoice, it begins the process of authorizing and issuing payment. By the time the process is finished, the City typically pays the amount due under each invoice almost a month later.

The City becomes unhappy with the plaintiff's services and terminates the contract. The plaintiff sues the City for breach alleging that the city breached the contract by terminating it. The plaintiff also alleges that the City committed fraud or negligent misrepresentation in promising a two year term and in promising to pay upon receipt of invoices.

Under the *City of Georgetown* line of cases, the first inquiry is whether the contract covers a proprietary or governmental function. If the function is proprietary, no immunity exists in the first instance. If it is governmental, then immunity exists but may be waived under Subchapter I. In this hypothetical, the breach of contract claim appears to fall squarely within the scope of Subchapter I: it is a contract for services with a local governmental entity that the entity was authorized to enter. Therefore, a court could conceivably avoid the proprietary-governmental function inquiry because, either immunity does not exist or it is waived. Either way the trial court would have jurisdiction.

However, Subchapter I contains strict limitations on liability; therefore, whether those limitations apply or not could significantly change the potential liability of the City. For example, under section 271.153, the plaintiff could recover only any unpaid invoices—that is, amounts that were "due and owed." Tex. Loc. Gov't Code Ann. § 271.153(a)(1). The plaintiff could not recover lost profits because lost profits are consequential damages, and Subchapter I bars recovery of consequential damages. *Id.* § 271.153(b)(1); *Tooke*, 197 S.W.3d at 346. But lost profits for the remaining term of the contract could be recovered if the contract involved a proprietary function.

In the hypothetical contract, what function was the City performing and was it proprietary or governmental? In making that determination, should the court apply the common law or the proprietary versus governmental provisions of the Texas Tort Claims Act? Following *City of Georgetown*, the court would apply the Tort Claims Act. Under the Tort Claims Act, a proprietary function is one "that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality." Tex.

Civ. Prac. & Rem. Code Ann. § 101.0215(b). Governmental functions are "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." *Id.* § 101.0215(a). In our hypothetical, the contract covers all of the City's computers and related equipment. The City potentially uses this equipment in every aspect of its work, including both governmental and proprietary functions. Some courts have determined that when considering whether the City was engaged in a governmental or proprietary function, a plaintiff may not "split various aspects of [a City's] operation into discrete functions and recharacterize certain of those functions as proprietary." *City of Plano v. Homoky*, 294 S.W.3d 809, 815 (Tex. App.—Dallas 2009, no pet.) (quoting *City of San Antonio v. Butler*, 131 S.W.3d 170, 178 (Tex. App.—San Antonio 2004, pet. denied)). It therefore seems probable that the City's function in this hypothetical would be considered governmental.

Assuming the function is governmental and that the immunity is waived under Subchapter I, we conclude that the trial court would have jurisdiction over the breach of contract claims. But what of the tort claims? Under the Tort Claims Act there is no waiver of immunity for intentional torts. Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2). Fraud is an intentional tort. Concerning the negligent misrepresentation claim, the Tort Claims Act only waives the City's immunity for property damage, personal injury, and death from the use of a motor-driven vehicle or personal injury or death caused by a condition or use of tangible personal or real property. *Id.* § 101.021. The plaintiffs negligent misrepresentation claim does not fit within this waiver.

But in this case, the operative facts of the fraud claim and misrepresentation claim are intertwined with the contract claim. Could the plaintiff argue that, because immunity is waived for this set of facts under Subchapter I, the related claims based on those same facts should also be allowed to proceed? Because the Texas Supreme Court has repeatedly stated the Legislature must clearly and unambiguously waive immunity and also "has "repeatedly affirmed that any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity," the most likely answer is "no." *See Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012) (citing *Taylor*, 106 S.W.3d at 696).

Changing the facts of the hypothetical lawsuit, the plaintiff brings claims for breach of contract and for declaratory judgment, seeking a declaration of the rights and obligations under the contract. Subchapter I waives immunity for the breach of contract claim, but what about the declaratory judgment?

The Declaratory Judgment Act does not "extend a trial court's jurisdiction" or "change a suit's underlying nature." *IT–Davy*, 74 S.W.3d at 855. "[P]rivate parties cannot circumvent the State's sovereign immunity from suit by characterizing ... a contract dispute, as a declaratory-judgment claim." *Id.* at 856. Because Subchapter I is limited to breach of contract claims, it should not provide an avenue for the plaintiff to bring a declaratory judgment claim. *But see Dallas County Hosp. Dist. v. Hospira Worldwide, Inc.*, 400 S.W.3d 182, 186–87 (Tex. App.—Dallas 2013, no pet.) ("In light of our conclusion that section 271.152 waives the District's immunity from suit for Hospira's breach of contract claims, we summarily dispose of the District's argument that Hospira cannot circumvent the District's governmental immunity from suit by characterizing its suit for money damages as a declaratory judgment claim. … Section 271.152, therefore, does not provide the District with immunity from suit from Hospira's declaratory judgment claim.").

In the same hypothetical, the addition of a proprietary versus governmental distinction potentially adds another issue to be litigated, adding to the time and expense of litigation. That is, if the contract underlying the plaintiff's claims can be characterized as proprietary, then the City has no immunity, and the plaintiff can seek additional damages under the contract claim and declaratory relief, as well as pursuing a claim for attorney's fees under the Declaratory Judgment Act. Thus, both the City and the plaintiff will have strong motivation to contest the issue of whether the contract involves a proprietary or a governmental function.

As a final hypothetical, let us change the contract at issue to the City purchasing real property. Absent some component of the seller providing services to the City, the contract conveying an interest in real property does not fall within Subchapter I's waiver of immunity. *See Wight Realty Interests, Ltd. v. City of Friendswood*, 333 S.W.3d 792, 798 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Dallas Area Rapid Transit v. Monroe Shop Partners, Ltd.*, 293 S.W.3d 839, 841 (Tex. App.—Dallas 2009, pet. denied); *City of San Antonio v. Reed S. Lehman Grain, Ltd.*, No. 04-04-00930-CV, 2007 WL 752197, at *2 n.2 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (mem. op.). If the proprietary and governmental distinction must be made in a contract suit, the suit would not be barred, although not within the Legislature's waiver of immunity, if the City was performing a proprietary function. What is proper evidence to resolve that inquiry? Does the City's intent for the real property determine the nature of the function? For example if the City purchased the property intending to place a park on it, would that make it a governmental function? *See* Tex. Civ. Prac. & Rem. Code Ann.

§ 101.0215(a)(13). Or if the City wanted to build an amusement park on the property, is it then a proprietary function? *Id.* § 101.0215(b)(2). If, after consummating the purchase for a particular purpose, the City changes its plans due to a change in leadership or other circumstances, would that either extinguish an existing lawsuit or create jurisdiction over a cause of action that was previously barred?

The proprietary-governmental issue is before the Texas Supreme Court. *City of Austin v. MET Ctr. NYCTEX, Phase II, Ltd.*, discussed above, is pending in cause number 14-0162, on the City's petition for review. In its petition for review, the City argues that the proprietary-governmental distinction does not apply to contract-related claims.[6] On June 13, 2014, the Supreme Court requested briefing on the merits. The City's brief is due July 14, 2014.

The issue is also raised in the *City of Seguin v. Lower Colorado River Auth.*, No. 14-0158.[7] As stated above, the Austin Court of Appeals chose to follow *City of Georgetown* in this case arising out of the same underlying agreement and presenting similar facts and arguments to Georgetown. The Supreme Court also requested briefing on the merits in this case. The City's brief is due July 14, 2014.

The issue is also pending in at least two intermediate courts of appeals. In *Wasson Interests, Ltd. v. City of Jacksonville*, No. 12-13-00262-CV, the appellant expressly argues that the Tyler Court of Appeals should apply the proprietary-governmental dichotomy to breach of contract cases.[8] The *Jacksonville* case involves 99-year lease agreements between the City, owner and lessor of tracts on Lake Jacksonville, and appellant, the successor in interests to those leases. In *Gay v. City of Wichita Falls*, No. 08-13-00028-CV, a case transferred to the El Paso Court of Appeals from the Fort Worth Court of Appeals, appellants expressly argue that the proprietary-governmental dichotomy applies to contract and quasi-contract claims.[9] The underlying claim in that case concerns the denial of disability benefits.

Until the courts or the Legislature provide additional guidance, practitioners should be aware of these potential issues. The need to litigate whether a particular contract or claim involves a proprietary or governmental function could add another issue to a case, resulting in delay or increased expenses.

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[6] Petition for review accessible through the Supreme Court's website: http://www.search.txcourts.gov/Case.aspx?cn=14-0162.

[7] http://www.search.txcourts.gov/Case.aspx?cn=14-0158.

[8] http://www.search.txcourts.gov/Case.aspx?cn=12-13-00262-CV.

[9] http://www.search.txcourts.gov/Case.aspx?cn=08-13-00028-CV.