SOVEREIGN IMMUNITY AND THE UDJA: RECENT DEVELOPMENTS

SEAN D. JORDAN
Principal Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
sean.jordan@oag.state.tx.us
[Tel.] (512) 936-1823

State Bar of Texas
23rd ANNUAL
ADVANCED SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
July 21-22, 2011
Austin

CHAPTER 15

Sean D. Jordan
Principal Deputy Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548

phone: (512) 936-1823
sean.jordan@oag.state.tx.us

Sean Jordan is the Principal Deputy Solicitor General in the Office of the Attorney General. After serving as an infantryman and paratrooper in the United States Army, he earned his B.A. in History from the University of Texas at Austin, graduating *summa cum laude*. He also earned his J.D. from the University of Texas at Austin, where he graduated with honors. Prior to accepting a position with the Solicitor General's Office, he was a litigation partner with the law firm of Jackson Walker.

TABLE OF CONTENTS

Table of Authorities iii

I. The UDJA and Sovereign Immunity: General Principles 1

II. Prior Precedent: Distinguishing *Ultra Vires* Actions from Suits Attempting To Enforce Contracts Against the State 1

A. Declaratory-Judgment Actions Seeking To Impose Contractual Liability on the State Are Barred by Immunity 2

B. Declaratory-Judgment Actions Requiring State Officials to Comply with Constitutional or Statutory Provisions Are Not Suits Against the State 3

III. *Ultra Vires* Suits Must Be Brought Against State Officials: the *Heinrich* and *Reconveyance* Decisions 4

A. *City of El Paso v. Heinrich* 4

B. *Texas Department of Insurance v. Reconveyance Services, Inc* 5

IV. Challenges to the Validity of a Statute May Be Brought Against the State Under the UDJA: *Texas Lottery Commission v. First State Bank of DeQueen* 6

V. Conclusion 7

TABLE OF AUTHORITIES

Cases

Chenault v. Phillips,
914 S.W.2d 140 (Tex. 1996) (per curiam) 1

City of El Paso v. Heinrich,
284 S.W.3d 366 (Tex. 2009) 1, 2, 4-7

Cobb v. Harrington,
144 Tex. 360, 190 S.W.2d 709 (1945) 2, 3, 5

Dir. of the Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.,
600 S.W.2d 264 (Tex. 1980) 3

Fed. Sign v. Tex. S. Univ.,
951 S.W.2d 401 (Tex. 1997) 3, 4

Gen. Servs. Comm'n v. Little-Tex Insulation Co.,
39 S.W.3d 591 (Tex. 2001) 5

Herring v. Houston Nat'l Exch. Bank,
113 Tex. 264, 253 S.W. 813 (1923) 2

Reata Constr. Corp. v. City of Dallas,
197 S.W.3d 371 (Tex. 2006) 4

State v. Epperson,
121 Tex. 80, 42 S.W.2d 228 (1931) 5

State v. Lueck,
290 S.W.3d 876 (Tex. 2009) 1

Steele v. City of Houston,
603 S.W.2d 786 (Tex. 1980) 5

Tex. Dep't of Ins. v. Reconveyance Services, Inc.,
306 S.W.3d 256 (Tex. 2010) (per curiam) 5

Tex. Dep't of Parks & Wildlife v. Miranda,
133 S.W.3d 217 (Tex. 2004) 1

Tex. Educ. Agency v. Leeper,
893 S.W.2d 432 (Tex. 1994) 6, 7

Tex. Lottery Comm'n v. First State Bank of DeQueen,
325 S.W.3d 628 (Tex. 2010) 1, 6, 7

Tex. Nat. Res. Conserv. Comm'n v. IT-Davy,
74 S.W.3d 849 (Tex. 2002) 1, 3, 4, 7

Texans Uniting for Reform & Freedom v. Saenz,
319 S.W.3d 914 (Tex. App.—Austin 2010, pet. denied) 1

W.D. Haden Co. v. Dodgen,
158 Tex. 74, 308 S.W.2d 838 (1958) 2, 3

Wichita Falls State Hosp. v. Taylor,
106 S.W.3d 692 (Tex. 2003) 7

Constitutional Provisions, Statutes and Rules

TEX. CIV. PRAC. & REM. CODE § 37.002(b) 1

TEX. CIV. PRAC. & REM. CODE § 37.004(a) 1

TEX. CIV. PRAC. & REM. CODE § 37.006(b) 7

TEX. GOV'T CODE § 311.034 . . . . . 1, 7

I. THE UDJA AND SOVEREIGN IMMUNITY: GENERAL PRINCIPLES

The Uniform Declaratory Judgments Act (UDJA) is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations."[1] It provides: "A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."[2]

An issue that arises with some frequency in UDJA cases is whether subject-matter jurisdiction exists when such a suit is filed against the State or a state entity or official. The general rule of sovereign immunity is that the State and its agencies are not subject to a court's jurisdiction unless the Legislature has waived sovereign immunity.[3] And any such waiver must be clear and unambiguous.[4] Sovereign immunity defeats a court's subject-matter jurisdiction.[5] Thus, "[a]bsent waiver by the legislature, sovereign immunity generally deprives courts of subject-matter jurisdiction over suits against the State, its agencies, or officers or employees acting within their official capacity."[6]

A potential UDJA litigant against the State therefore must consider whether his declaratory-judgment claim is barred by sovereign immunity. In this regard, the Texas Supreme Court has made clear that the UDJA itself is only a procedural device for deciding matters already within a court's subject-matter jurisdiction.[7] And it is well established that seeking declaratory relief does not alter the underlying nature of a suit or confer jurisdiction on a court where none otherwise exists.[8] These principles have given rise to the following questions regarding UDJA claims made against the State or state officials:

1) Can a UDJA action be brought against the State or a state official to obtain a declaration imposing contractual liability on the State or otherwise enforcing the terms of a contract?

2) Can a UDJA action be brought to require the State or a state official to comply with constitutional or statutory law?

3) Can a UDJA action be brought against the State or a state official to challenge the validity of a statute?

This paper discusses both decisional law over the past century relevant to these questions, and how the answers to these questions have been clarified by two recent, important Texas Supreme Court decisions: *City of El Paso v. Heinrich*[9] and *Texas Lottery Commission v. First State Bank of DeQueen*.[10]

II. PRIOR PRECEDENT: DISTINGUISHING *ULTRA VIRES* ACTIONS FROM SUITS ATTEMPTING TO ENFORCE CONTRACTS AGAINST THE STATE

In a series of cases decided during the last century, the Texas Supreme Court has distinguished declaratory-judgment actions that seek to impose contractual liability on the State from those that seek to compel a state official to comply with statutory or constitutional provisions. In regard to the former, the Court has made clear that actions designed to impose monetary liability on the State or to otherwise control state action under the terms of a contract, whether brought against a state entity or official, are barred by sovereign immunity.

---

1. TEX. CIV. PRAC. & REM. CODE § 37.002(b).

2. *Id.* § 37.004(a).

3. *See, e.g.*, *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009).

4. TEX. GOV'T CODE § 311.034 ("In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.").

5. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004).

6. *Texans Uniting for Reform & Freedom v. Saenz*, 319 S.W.3d 914, 920 (Tex. App.—Austin 2010, pet. denied).

7. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (per curiam).

8. *See, e.g.*, *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370-71 (Tex. 2009); *Tex. Nat. Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

9. 284 S.W.3d 366.

10. 325 S.W.3d 628 (Tex. 2010).

On the other hand, lawsuits requiring state officials to comply with statutory or constitutional provisions have been held not to be barred by sovereign immunity. These suits, now known as *ultra vires* actions, are based on the principle that when a government official acts in violation of the law, he acts without legal authority and not on behalf of the State. Thus, as the Texas Supreme Court has explained, "*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control *of* the state."[11]

A. Declaratory-Judgment Actions Seeking To Impose Contractual Liability on the State Are Barred by Immunity.

The longstanding rule in Texas has been that a suit, including a declaratory-judgment suit, filed against a state agency or official seeking to enforce performance under a contract is a suit against the State, and is therefore barred by sovereign immunity. The rule was explained in *Herring v. Houston National Exchange Bank*:

> A suit against officers of a state, to require them to perform acts which constitute a performance of a contract by the state, is in effect a suit against the state itself. A suit against officers of a state, the purpose or effect of which is to establish the validity of a contract of the state, or to enforce through them the performance of a contract of the state, or to require acts to be performed by them which would impose contractual liabilities upon the state, is a suit against the state.[12]

As *Herring* and subsequent cases made clear, claims (1) seeking to establish the validity of a contract, (2) seeking specific performance of a contract, or (3) requiring the performance of acts that would impose contractual liability on the State, are all suits against the State that require legislative consent.[13]

An instructive example of the application of these principles is found in the Texas Supreme Court's decision in *W.D. Haden Company v. Dodgen.*[14] In *Dodgen*, the Court considered a declaratory-judgment action filed against the members and the Executive Secretary of the Game and Fish Commission of Texas to establish certain rights under a permit to take mudshell from Galveston Bay.[15] The Haden Company had received a permit from the Commission on April 15, 1954, with an expiration date of April 25, 1955, allowing it to take mudshell and requiring it to pay the Commission each month the sum of seven cents per cubic yard of mudshell removed. While the company was operating under this permit, the Commission adopted a resolution increasing the price to be paid by all operators taking mudshell from coastal waters. The price increase was effective January 1, 1955. The Haden Company and all others holding permits were advised of the price increase, but Haden Company contended that it had a contractual right to take mudshell at a price of seven cents until the expiration of the permit already issued. When the Commission refused to recognize its right to continue taking mudshell at the lower price, Haden Company filed a declaratory-judgment suit.[16]

The defendant state officials asserted that the suit was barred because it was a suit against the State filed without legislative consent.[17] Noting that the question presented was whether the Haden Company's declaratory-judgment action "f[ell] within the rule of the *Herring* case," the Court concluded that it did.[18] The Court explained that the declaratory-judgment action "asserted contractual obligations against the state and the prayer called upon the court to declare the permit to be a valid and binding contract of the state," entitling the Haden Company to continue taking mudshell at the lower price.[19] Based on this conclusion, the Court held that the Haden Company's declaratory-judgment action was a suit against the State. And, because legislative consent was absent, the suit was properly dismissed.[20]

---

11. *Heinrich*, 284 S.W.3d at 372.

12. 113 Tex. 264, 269, 253 S.W. 813, 814 (1923).

13. *Id.*; *see also W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 78-79, 308 S.W.2d 838, 840 (1958); *Cobb v. Harrington*, 144 Tex. 360, 365-66, 190 S.W.2d 709, 712 (1945).

14. 158 Tex. 74, 308 S.W.2d 838.

15. *Id*. at 75, 308 S.W.2d at 838.

16. *Id*. at 75-76, 308 S.W.2d at 838-39.

17. *Id*. at 75, 308 S.W.2d at 838.

18. *Id*. at 79, 308 S.W.2d at 840.

19. *Id*. at 79, 308 S.W.2d at 840-41.

20. *Id*. at 79-82, 308 S.W.2d at 840-43.

Both the *Herring* and *Haden* cases continue to be cited by the Texas Supreme Court for the rule that suits against state agencies or officials seeking to control state action or impose liability on the State through a contract are suits against the State requiring legislative consent.[21] The Court has likewise emphasized that "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages . . . as a declaratory-judgment claim."[22]

B. Declaratory-Judgment Actions Requiring State Officials to Comply with Constitutional or Statutory Provisions Are Not Suits Against the State.

The Texas Supreme Court has long recognized that, unlike suits attempting to impose contractual liability on the State, lawsuits filed to require government officials to comply with statutory or constitutional provisions are not suits against the State. The seminal case announcing this rule was *Cobb v. Harrington*.[23] In *Cobb*, a declaratory-judgment action was filed against the Comptroller and his deputy seeking to obtain a judgment that these state officials were acting contrary to statutory law in attempting to collect from the plaintiffs certain taxes.[24] Specifically, the Comptroller was unlawfully imposing a tax on the plaintiffs that applied only to "motor carriers" as defined by statute.[25]

The Texas Supreme Court concluded that, because plaintiffs could not be properly classified as motor carriers, the Comptroller and his deputy acted outside their legal authority in attempting to impose the disputed tax.[26] The *Cobb* Court went on to conclude that the suit against the Comptroller was not a suit against the State requiring legislative permission. The Court began by noting that, unlike *Herring*, the suit filed against the Comptroller did not seek to impose monetary liability on the State or to compel performance under a contract with the State.[27] Rather, the Court observed, the purpose of the suit was to obtain a judgment declaring that, because the plaintiff taxpayers were not motor carriers as defined by the tax statute, the Comptroller and his deputy were acting wrongfully and without legal authority in attempting to impose the tax.[28] The Court went on to explain why this type of declaratory-judgment action was not a suit against the State:

> The acts of officials which are not lawfully authorized are not acts of the State, and an action against the officials by one whose rights have been invaded or violated by such acts, for the determination and protection of his rights, is not a suit against the State within the rule of immunity of the State from suit.[29]

The Court has reiterated this principle from *Cobb* in later cases.[30] For example, in *Director of the Department of Agriculture & Environment v. Printing Industries Association of Texas*, the Court confirmed that "an entity or person whose rights have been violated by the unlawful action of a State official, may bring suit to remedy the violation or prevent its occurrence, and such suit is not a suit against the State requiring legislative or statutory authorization."[31] Notably, in the *Printing Industries* case the Court also made clear that such an *ultra vires* suit could be maintained only if the state officials' actions were in fact unauthorized by Texas law.[32] And the Court ultimately concluded in *Printing Industries* that the suit at issue was barred by immunity: "[T]he State officials have not acted outside their lawful authority under [applicable Texas constitutional and statutory provisions], and in the absence of legislative consent, we hold that the suit is not maintainable."[33]

One issue that remained unclear prior to the Court's recent decision in *Heinrich* was whether *ultra vires* suits should be brought against state officials or directly against the State. In *Federal Sign v. Texas Southern University*, for example, the Court stated that, "A private

---

21. *See, e.g.*, *IT-Davy*, 74 S.W.3d at 855-56; *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997).

22. *IT-Davy*, 74 S.W.3d at 856 (citation omitted).

23. 144 Tex. 360, 190 S.W.2d 709.

24. *Id*. at 362, 190 S.W.2d at 710.

25. *Id*. at 362-63, 190 S.W.2d at 710-11.

26. *Id*. at 364-66, 190 S.W.2d at 711-12.

27. *Id*. at 365-66, 190 S.W.2d at 712.

28. *Id*. at 366, 190 S.W.2d at 712.

29. *Id*. (citations omitted).

30. *See, e.g.*, *Dodgen*, 158 Tex. at 77-80, 308 S.W.2d at 840-41.

31. 600 S.W.2d 264, 265-66 (Tex. 1980).

32. *Id*. at 266 ("[T]he Printers may maintain this suit for injunctive relief only if the printing activities of State agencies are unauthorized.").

33. *Id*. at 270.

litigant does not need legislative permission to sue the State for a state official's violations of state law."[34] But in *Texas Natural Resources Conservation Commission v. IT-Davy*, the Court indicated that *ultra vires suits* are properly filed against state officials rather than the State itself: "Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority."[35] As explained below, the Court recently resolved that issue.

III. *ULTRA VIRES* SUITS MUST BE BROUGHT AGAINST STATE OFFICIALS: THE *HEINRICH* AND *RECONVEYANCE* DECISIONS

A. *City of El Paso v. Heinrich*

The Texas Supreme Court's recent decision in *City of El Paso v. Heinrich* both confirmed certain longstanding principles of sovereign immunity and clarified Texas law concerning immunity principles in the context of *ultra vires* lawsuits. Specifically, the Court clarified the proper parties to an *ultra vires* suit as well as the types of relief that may be awarded to a successful *ultra vires* claimant.

Heinrich involved a claim that governmental action violated a statute.[36] The plaintiff was the widow of a police officer. Shortly after her husband's death, she began receiving, from a pension fund, monthly survivor benefits equal to 100% of the monthly pension her husband had earned. But years later, the pension fund's board of trustees took the position, based on the fund's bylaws, that the plaintiff should receive only two-thirds of that monthly payment.[37]

The plaintiff sued the city for which her husband had worked, the pension fund, the fund's board of trustees, and the individual board members (in their official capacities), alleging that each of those defendants violated a state statute governing the pension fund by reducing her benefits retroactively.[38] She "sought both declaratory relief and an injunction restoring [her] to the status quo from [the] date of the illegal act."[39] The defendants filed pleas to the jurisdiction based on governmental immunity (for the defendant entities) and official immunity (for the defendant officials).[40] The trial court denied the pleas, the court of appeals affirmed, and the Texas Supreme Court "granted the [governmental defendants'] petition for review in order to clarify the types of relief that may be sought without legislative consent."[41]

The Court began its analysis by identifying the plaintiff's UDJA suit as one complaining of *ultra vires* action—that is, a challenge to a government official's illegal or unauthorized act.[42] Such claims, the Court explained, fall within an exception to the general rule of immunity from suit because they seek to make state officials comply with valid statutory or constitutional provisions that leave no room for discretion.[43] As the Court succinctly stated, "*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control *of* the state. Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy."[44] Thus, the Court reaffirmed the well established principle that a proper *ultra vires* suit will not implicate sovereign immunity because unauthorized actions by government officials are not actions taken on behalf of the State.[45]

34. 951 S.W.2d at 404.

35. 74 S.W.3d at 855.

36. 284 S.W.3d at 369.

37. *Id*.

38. *Id*.

39. *Id.* (internal quotation marks omitted).

40. *Id.*

41. *Id.*

42. *Id.* at 369-70.

43. *Id.* at 371-73.

44. *Id.* at 372.

45. Because *Heinrich* involved a suit against a city and city entities, *id*. at 369, the Court appropriately framed its discussion in terms of governmental, rather than sovereign, immunity. *Id.* at 368-69; *see Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) (explaining that, whereas governmental immunity protects cities and other political subdivisions of the State, sovereign immunity protects the State itself and state entities). The common-law doctrine applicable to each of these immunities, however, is the same—as *Heinrich* reflects through its discussion of cases involving state, rather than municipal, entities. 284 S.W.3d at 370-72.

After reaffirming these established principles of law governing *ultra vires* suits,[46] the Court addressed the proper parties to such suits.[47] Acknowledging that it had been "less than clear" on this point in the past,[48] the Court reasoned that the nature of *ultra vires* actions dictated that governmental *officials* are the only proper defendants to such suits:

> [B]ecause the rule that *ultra vires* suits are not "suit[s] against the State within the rule of immunity of the State from suit" derives from the premise that the "acts of officials which are not lawfully authorized are not acts of the State," *Cobb*, [144 Tex. at 366], 190 S.W.2d at 712, it follows that these suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity. This is true even though the suit is, for all practical purposes, against the state.[49]

Heinrich thus establishes a simple rule that applies whenever a plaintiff alleges that the government has acted outside of its statutory or constitutional authority: such a suit may proceed only against a governmental official in his or her official capacity; it may *not* proceed against a governmental entity.[50]

Implementing this rule, the Court dismissed the plaintiff's claims against all the governmental entities named as defendants: the city, the pension fund, and the fund's board of trustees.[51] But the Court held that the plaintiff's claims for prospective declaratory and injunctive relief against the city's mayor and the fund's board members in their official capacities could go forward.[52]

In so doing, the Court clarified the types of permissible relief in an *ultra vires* suit. Following the general rule established in federal law, the Court held that a claimant who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief, as measured from the date of the injunction.[53] The Court made clear that an *ultra vires* claimant is not entitled to retroactive monetary relief,[54] but noted that this rule is not absolute, and specifically would not apply to a claimant who successfully proved a takings claim.[55] This limitation is consistent with *Heinrich*'s reasoning that governmental entities are generally immune from suit because the Court has construed article I, section 17 as an express waiver of that immunity for takings claims.[56]

B. *Texas Department of Insurance v. Reconveyance Services, Inc.*

In *Texas Department of Insurance v. Reconveyance Services, Inc.*, a case decided shortly after *Heinrich*, the Texas Supreme Court reaffirmed the principle announced in *Heinrich* that an *ultra vires* suit must be brought against a state official acting in his official capacity, and that state agencies retain their immunity from such suits.[57]

Reconveyance wanted to offer what it described as "post-closing mortgage release services" to Texas homebuyers, but the Texas Department of Insurance (TDI) determined that these services are already among the costs that must be borne by Texas title agents when closing real estate transactions.[58] Reconveyance sued TDI under the UDJA, seeking a judicial declaration that its mortgage services are not part of closing the transaction and that TDI acted beyond its statutory

46. *Id.* at 370-72.

47. 284 S.W.3d at 372-73.

48. *Id.* at 373.

49. *Id.*

50. *Id.*; *see also id.* at 369, 371, 372, 374 (applying this *ultra vires* framework to both statutory and constitutional violations).

51. *Id.* at 377 & n.10, 380.

52. *Id.* at 380.

53. *Id*. at 376.

54. *Id*. This holding overruled in part the Court's prior decision in *State v. Epperson*, which had held that a suit against a tax collector for the retroactive recovery of money alleged to be due under a contract and unlawfully withheld was not barred by immunity. 121 Tex. 80, 42 S.W.2d 228 (1931).

55. 284 S.W.3d at 376 (citing *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001)).

56. *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

57. 306 S.W.3d 256, 257-59 (Tex. 2010) (per curiam).

58. *Id*. at 257-58.

authority in attempting to prohibit Reconveyance from offering its services through title agencies.[59]

TDI filed a plea to the jurisdiction arguing that Reconveyance's suit was an *ultra vires* action improperly brought against a state agency. The lower court, in a decision issued prior to *Heinrich*, determined that the trial court had jurisdiction because Reconveyance sufficiently pled an *ultra vires* action against TDI for acting beyond its statutory authority.[60]

The Texas Supreme Court noted that its decision in *Heinrich* established that "suits complaining of *ultra vires* action may not be brought against a governmental unit possessed of sovereign immunity, but must be brought against the allegedly responsible government actor in his official capacity."[61] Although Reconveyance's pleadings did not use the words "*ultra vires*," the Court nonetheless concluded that the substance of its allegations and the requested declaration amounted to *ultra vires* claims.[62] Because Reconveyance had sued only TDI and not any state officials acting in their official capacities, and TDI retained its sovereign immunity from suit, the Court held that Texas courts lacked subject-matter jurisdiction to consider Reconveyance's suit as pleaded.[63]

IV. Challenges to the Validity of a Statute May Be Brought Against the State Under the UDJA: *Texas Lottery Commission v. First State Bank of DeQueen*

In *Texas Lottery Commission v. First State Bank of DeQueen*,[64] the Court addressed the question whether a challenge to the validity of a statute could be brought against the State under the UDJA. The case arose from a conflict between provisions of the Texas Uniform Commercial Code (UCC) and the Texas Lottery Act regarding the assignment of lottery prize installment payments.[65] A Texas Lottery prizewinner agreed to assign his final two installment payments as part of a financial arrangement to pay a bank debt.[66] The Lottery Commission refused to recognize the assignment because the Lottery Act prohibits assignments of installment payments during the last two years of a prize payment schedule.[67]

The prizewinner and other interested parties filed a UDJA action seeking a declaratory judgment that the UCC allows such assignments and renders the Lottery Act's conflicting provisions ineffective. The lower courts agreed with the prizewinner, holding that the UCC prevailed over the Lottery Act and the assignments were permitted.[68]

When the case reached the Texas Supreme Court, the first question to be resolved was whether the suit should be dismissed for lack of subject-matter jurisdiction. The Commission argued that, because the declaratory-judgment action turned on the allegation that the Commission had acted outside its lawful authority in prohibiting the assignment of the installment payments, it was an *ultra vires* suit properly brought against a state official.[69]

The Court disagreed, explaining that claims seeking declaratory relief in an *ultra vires* suit are distinguishable from suits challenging the validity of an ordinance or statute. The Court noted that (1) the UDJA "'expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified,'" (2) governmental entities joined in such suits may be bound by the court's declaration regarding the ordinance or statute at issue, and (3) "'the [UDJA] . . . contemplates that governmental entities may be—indeed must be—joined in suits to construe their legislative pronouncements.'"[70] Because the Court interpreted the UDJA to require the State to be joined in UDJA suits challenging the validity of a statute, it concluded that the State's immunity was

59. *Id*. at 258.

60. *Id*.

61. *Id*. (citing *Heinrich*, 284 S.W.3d at 373).

62. *Id*. at 258-59.

63. *Id*. at 259.

64. 325 S.W.3d 628.

65. *Id*. at 632.

66. *Id*. at 631.

67. *Id*.

68. *Id*.

69. *Id*. at 633.

70. *Id*. at 634 (quoting *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994)).

necessarily waived and the State was a proper party in these declaratory-judgment actions.[71]

The Court's decision reflected its rejection of the Commission's argument that, although the UDJA waives governmental immunity, it does not waive sovereign immunity.[72] Pointing to section 37.006(b) of the UDJA, the Commission had maintained that the Act expressly contemplates that two distinct sets of principles will govern challenges to municipal ordinances, on the one hand, and challenges to state statutes, on the other hand:

> In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.[73]

The Commission noted that this provision states that a "municipality" must be "made a party" in any case involving the constitutional validity of "a municipal ordinance or franchise," but contains no such language respecting suits of any sort against the State. Given this distinction reflected in the statutory language, the Commission contended that section 37.006(b) could not reasonably be construed to waive the sovereign immunity of a state agency—as opposed to the governmental immunity of a municipality.[74]

The Court disagreed. It observed that, in *Texas Education Agency v. Leeper* it had already held that, because the UDJA allows statutory challenges and provides that governmental entities may be bound by those challenges, the Act necessarily contemplates that state entities as well as municipal entities must be joined in such suits.[75] The Court further explained that it had subsequently applied the *Leeper* holding to different governmental entities, and therefore disagreed with the Commission that the UDJA waives the immunity only of municipalities.[76]

V. CONCLUSION

The Court's recent decisions in the *Heinrich* and *DeQueen* cases both reaffirmed certain longstanding principles regarding declaratory judgment actions and clarified Texas law on *ultra vires* suits and challenges to the validity of state statutes. Practitioners should take away the following points from these cases:

• A UDJA action brought against a state agency or official to obtain a declaration imposing contractual liability on the State or otherwise enforcing the terms of a contract with the State will be considered a suit against the State and will be barred by immunity absent legislative consent.

• A proper *ultra vires* suit may include a request for declaratory relief, but such suits may only be brought against a state official in his official capacity, and may not be brought against the State itself. In addition, the relief available in an *ultra vires* action will typically be limited to prospective injunctive relief, and cannot include retroactive monetary compensation.

• A UDJA action may be brought against the State to challenge the validity of a state statute.

---

71. *Id*. at 634-35.

72. The distinction between sovereign immunity and governmental immunity was explained by the Court in *Wichita Falls State Hospital v. Taylor*: "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 . . . . Governmental immunity, on the other hand, protects political subdivisions of the State, including counties, cities, and school districts." 106 S.W.3d 692, 694 n.3 (Tex. 2003) (citation omitted).

73. TEX. CIV. PRAC. & REM. CODE § 37.006(b); *see Leeper*, 893 S.W.2d at 446 (observing that UDJA section 37.006(b) provides that "governmental entities must be joined or notified").

74. The Commission further contended that the language of the UDJA did not announce a waiver of sovereign immunity by "clear and unambiguous language," as required by Texas law. TEX. GOV'T CODE § 311.034.

75. *DeQueen*, 325 S.W.3d at 634 (citing *Leeper*, 893 S.W.2d at 446).

76. *Id.* (citing *Heinrich*, 284 S.W.3d at 373 n.6; *Wichita Falls State Hosp.*, 106 S.W.3d at 697-98; *IT-Davy*, 74 S.W.3d at 859-60).