SIMON SAYS … DISMISSED: EXHAUSTION OF REMEDIES IN RELATION TO SOVEREIGN IMMUNITY

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26TH ANNUAL
SUING & DEFENDING GOVERNMENTAL ENTITIES COURSE
July 31- August 1, 2014
Austin

CHAPTER 21

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- Author/Speaker: *Preventive Medicine for Viral Data: Public Information Act Practice Tips*, State Bar of Texas 25th Annual Suing and Defending Governmental Entities Course, 2013
- Author/Speaker: *Make Zeitgeist, Not Schadenfreude: Scenarios on the Representational Ethics of Government Civil Practitioners*, Texas District and County Attorneys Association Civil Law Seminar 2013
- Author/Speaker: *Dirty, Rotten Scoundrels: A Field Guide* (*Practical Issues and Ethical Concerns in Removal and Quo Warranto Litigation*), Texas District and County Attorneys Association Annual Criminal and Civil Law Update, 2012
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I. INTRODUCTION

Failing to plan is planning to fail.

Although the exact origin of this proverbial quip is cloudy, variations on it have been offered by historical greats like Benjamin Franklin and Winston Churchill. It has persisted because its premise is indisputably sound. In no venture does planning take on greater importance than contemplated litigation against the government. Suing the sovereign always has been a daunting proposition, considering the resources the government may bring to bear in its defense. Whatever the resources of a particular governmental entity, however, the greatest potential obstacle to any putative suit against the state or its subdivisions is sovereign or governmental immunity. If a plaintiff cannot navigate the prerequisite steps to suit and point to an applicable waiver of immunity, his or her lawsuit essentially is over before it begins. By the same token, a government lawyer who is unaware of those principles stands to provide, at best, an inefficient defense. The purpose here is examine the general principles of immunity and the prerequisites to suit, including exhaustion of remedies, that must be satisfied before immunity may be set aside so that all parties to a suit against the government may proceed in an informed manner.

II. SOVEREIGN IMMUNITY

It has long been the law that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013) (quoting *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). Under this "centuries-old common-law doctrine, the sovereign is immune from liability and also from lawsuits." *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006). In other words, the doctrine of sovereign immunity derives from the common law and has long been part of Texas jurisprudence. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93 (Tex. 2012).

In the past, American law sometimes associated sovereign immunity with the "feudal fiction that 'the King can do no wrong'". *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)). Modern American jurisprudence, however, has generally abandoned the fiction that the government and its officials are inerrant. *See id*. That illusion, instead, has been supplanted by significant policy justifications for the doctrine. The primary rationalization for immunity now is identified as "protecting the public fisc." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 375 (Tex. 2009). Immunity exists because lawsuits against the state hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes. *Ngakoue*, 408 S.W.3d at 353. Further, the policy favoring immunity derives from separation of powers concerns, as well as practical ones: "In a world with increasingly complex webs of governmental units, the Legislature is better suited to make the distinctions, exceptions and limitations that different situations require." *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 848 (Tex. 2009) (quoting *Nueces County v. San Patricio County*, 246 S.W.3d 651, 653 (Tex. 2008)). Viewed in this context, the doctrine—with its requirement of clear and unambiguous legislative waiver to overcome immunity—defers to the Legislature to protect not only its policy-making function but also its interest in managing state fiscal matters. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012). While these bases for the doctrine have not completely quelled doubt about its logic or compatibility with the constitutional notion of governmental subservience to the public, sovereign immunity remains the law of Texas. *See Leach v. Tex. Tech Univ.*, 335 S.W.3d 386, 390-92 (Tex. App.—Amarillo 2011, pet. denied) (discussing history of doctrine's English common-law origins; concluding "[t]he logic behind that circumstance is not ours to debate for that is the law as declared by our Supreme Court.").

A. "You Can't Get There from Here": Immunity and Waiver

Sovereign immunity bars suits against the state and its entities, and this immunity remains intact unless surrendered in express and unequivocal terms by a statute's clear and unambiguous waiver. *Chatha*, 381 S.W.3d at 512. So it is that sovereign immunity, unless waived, shields the state from lawsuits for damages. *Hearts Bluff Game Ranch v. State*, 381 S.W.3d 547, 555 (Tex. 2012). Both statutory law and common law insist that any legislative waiver of immunity be quite definite. Of prime importance in this regard is section 311.034 of the Government Code. As part of the Code Construction Act, the statute declares that "a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." Tex. Gov't Code Ann. § 311.034 (Vernon 2013); *cf. Oncor*

Elec. Delivery Co. LLC v. Dallas Area Rapid Transit, 369 S.W.3d 845, 849 (Tex. 2012) (noting convergence of statutory and common law requirements of clear and unambiguous language). Judicial analysis of a purported immunity waiver follows suit. The traditional rule in this vein requires unambiguous legislation before setting immunity aside. *City of Galveston v. State,* 217 S.W.3d 466, 474 (Tex. 2007). Waivers of immunity must be unequivocal, although they need not be models of perfect clarity. *FKM P'ship v. Bd. of Regents of the Univ. of Houston Sys.*, 255 S.W.3d 619, 635 (Tex. 2008). Regardless of clarity, when construing a statute that purportedly waives sovereign immunity, courts generally resolve ambiguities by retaining immunity. *Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 846 (Tex. 2009). Likewise, because any legislative waiver of immunity must be undertaken "by clear and unambiguous language," statutory waivers of immunity are to be construed narrowly. *Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013). Immunity, then, presumptively applies when the defendant in a civil action is a governmental entity. *See Nueces County v. San Patricio County*, 246 S.W.3d 651, 652 (Tex. 2008) (applying principle in suit by county against another county). Requiring clear and unambiguous legislative consent allows the Legislature leeway to specifically carve out particular substantive claims for which the government will consent to suit and provide the procedures a litigant must follow to obtain such waiver. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 512-13 (Tex. 2012).

Where a statute is argued to waive immunity, the Texas Supreme Court has developed several factors to consider. Of course, some statutes leave no doubt about their intent. For example, statutes providing that "sovereign immunity to suit is waived" pose little difficulty in recognizing legislative intent to waive immunity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696-97 (Tex. 2003). Where "magic words" of that sort are not used, however, it is more difficult to discern the requisite legislative consent. *Id.* at 697. In those circumstances, clear indications of legislative intent to waive immunity are required. *Southwestern Bell Tel., L.P. v. Harris County Toll Rd. Auth.*, 282 S.W.3d 59, 68 (Tex. 2009). Relevant considerations in this regard include:

- First, a statute that waives the state's immunity must do so beyond doubt, even though courts do not insist the statute be a model of "perfect clarity." For instance, waiver has been found when the provision in question would be meaningless unless immunity were waived. *Harris County Toll Rd. Auth.*, 282 S.W.3d at 68; *Taylor*, 106 S.W.3d at 697.
- Second, when construing a statute that purportedly waives sovereign immunity, courts generally resolve ambiguities by retaining immunity. *Id.*; *accord Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012) ("We have repeatedly affirmed that any purported waiver of sovereign immunity should be strictly construed in favor of retention of immunity.").
- Third, if the Legislature requires that the state be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the state's sovereign immunity. *Taylor*, 106 S.W.3d at 697-98; *see also Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (holding that authorization for declaratory judgments against state agencies to construe legislative enactments and award attorney's fees waived immunity for attorney's fee awards).
- Finally, when waiving immunity by explicit language, the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors. Hence, whether the statute at issue provides an objective limitation on the state's potential liability is pertinent. *Harris County Toll Rd. Auth.*, 282 S.W.3d at 68-69; *Taylor*, 106 S.W.2d at 698.

A telling example of the immunity-waiver issue's intricacy may be seen in fairly recent cases addressing statutes that, at first blush, might appear to plainly prescribe waiver. Specifically, a number of governmental entities are created or controlled by statutes providing that the entities may "sue and be sued," "implead and be impleaded" or the like. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 347-55 (Tex. 2006) (collecting statutes in Appendix A). Under old law, embodied in *Missouri Pac. R. Co. v. Brownsville Nav. Dist.*, 432 S.W.2d 812 (Tex. 1970), that kind of language was viewed as the requisite clear and unambiguous waiver of immunity. No longer is that necessarily the case. In *Tooke*, the Texas Supreme Court posited that the effect of a "sue and be sued" clause in an organic statute depends on the context in which it is used. 197 S.W.3d at 337. While those words may mean that immunity has been waived, the court noted they also can mean only that a governmental entity, like others, has the capacity to sue and be sued in its own name. *Id*. Finding *Missouri Pacific*'s holding that "sue and be sued" language always waives immunity to be incorrect, the court overruled *Missouri Pacific* and found that the

multifarious meanings of "sue and be sued," "plead and be impleaded" and similar phrases meant that such statutory terms are not clear and unambiguous. *Id*. at 342. So, in sum, "sue and be sued" language, standing alone, does not plainly waive a governmental entity's immunity. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth*., 320 S.W.3d 829, 837 (Tex. 2010); *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 843 (Tex. 2009); *accord City of Elsa v. M.A.L.*, 226 S.W.3d 390, 391 (Tex. 2007). More broadly, where either waiver or capacity could be the intended reach, a statute that contemplates a governmental entity's involvement in litigation does not "clearly and unambiguously" waive the entity's immunity. *Kirby Lake Dev. Co.*, 320 S.W.3d at 837. Instead, whether "sue and be sued" language reflects legislative intent to waive immunity must be determined from the statutory language's context. *Harris County Hosp. Dist.*, 283 S.W.3d at 843.

B. A Gourd by Any Other Name: Terminology

Terminology also presents a bit of a wrinkle in immunity cases. The terms "sovereign immunity" and "governmental immunity" often have been used interchangeably, but they involve "two distinct concepts." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). To be strictly correct, sovereign immunity refers to the state's immunity from suit and liability and protects the state and its divisions. *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 759 n. 4 (Tex. 2011); *Taylor*, 106 S.W.3d at 694 n.3. Governmental immunity, on the other hand, protects political subdivisions of the state, including counties, cities and school districts. *Id.*

This distinction might prompt some question about whether the two doctrines afford differing levels of protection to the respective governmental units to which they apply. But the Supreme Court's discussion of the distinction suggests that it is one of proper terminology, rather than one of substantive effect. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 n.2 (Tex. 2006) ("Though closely related and often used interchangeably, sovereign immunity and governmental immunity protect distinct entities."). Indeed, governmental immunity is said to be "appurtenant"[1] to sovereign immunity, and its protections are described identically. *See Harris County Hosp. Dist.*, 283 S.W.3d at 842. Moreover, the high court has explicitly recognized that "sovereign immunity protects the State from lawsuits for money damages" and that "political subdivisions of the state … *are entitled to such immunity*—referred to as governmental immunity—unless it has been waived." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-70 (Tex. 2009) (emphasis added) (internal punctuation added) (quoting *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006)).

C. The Trap Door: Identifying Waiver

Waiver, or the lack thereof, is crucial to the viability of a lawsuit against the government. Sovereign and governmental immunity in Texas are comprised of immunity from both suit and liability. *City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011). Immunity from liability protects governmental entities from judgments, while immunity from suit completely bars actions against those entities unless the Legislature expressly consents to suit. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). In short, sovereign immunity from suit deprives a trial court of jurisdiction over a lawsuit in which a party has sued the state or a state agency unless the Legislature has consented to suit. *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011); *accord Black*, 392 S.W.3d at 95. Governmental immunity extends the same protection to political subdivisions of the state. *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Jurisdiction in this regard is not of the variety subject to waiver, such as personal jurisdiction.[2] Absent the state's consent to suit, a trial court has no jurisdiction over claims against the state. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Hence, sovereign immunity deprives courts of subject-matter jurisdiction. *Black*, 392 S.W.3d at 95; *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Axiomatically, subject-matter jurisdiction is essential to a court's power to decide a case, and a court acting without such power commits fundamental error that may be reviewed for the first time on appeal. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013). Subject-matter jurisdiction is a power that exists by operation of law only, and cannot be conferred upon any court by the parties' consent or waiver. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000). More directly, if a governmental entity validly asserts that it is immune from a pending claim, any court decision regarding that claim is advisory to the extent it addresses issues other than immunity, and the Texas Constitution does not afford courts jurisdiction to make advisory decisions or

[1] In legal parlance, "appurtenant" means "[a]nnexed to a more important thing." *Black's Law Dictionary* 98 (7th Ed. 1999).

[2] *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 379 (Tex. 2006) (Brister, J., concurring) (citing *Hilburn v. Jennings*, 698 S.W.2d 99, 100 (Tex. 1985)).

issue advisory opinions. *Black*, 392 S.W.3d at 95. Given its subject-matter jurisdiction implications, sovereign immunity is properly asserted in a plea to the jurisdiction. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004)).

Occasionally it will be argued that waiver of immunity is immaterial, because in the case at hand immunity never existed in the first place. Yet the distinction between waiving immunity and finding it nonexistent is "a fine one that yields the same effect and, 'due to the risk that the latter could become a ruse for avoiding the Legislature, courts should be very hesitant to declare immunity nonexistent in a particular case." *Nueces County v. San Patricio County*, 246 S.W.3d 651, 652 (Tex. 2008) (quoting *City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007)). Consequently, immunity presumptively applies when suit is against a governmental entity. *Nueces County*, 246 S.W.3d at 652. This dovetails with the standard requiring the plaintiff to allege facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). How a plaintiff may go about satisfying this requisite entails searching consideration of the legal basis for the claim.

Some causes of action with a constitutional basis require no statutory waiver of immunity, since the constitution itself is seen as the authorization for the suit. Commonly, claims of this nature are said to invoke a self-executing constitutional provision. A constitutional provision may be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 782 (Tex. 2005) (quoting *Mitchell County v. City Nat'l Bank of Paducah, Ky.*, 91 Tex. 361, 43 S.W. 880, 883-84 (1898)).

1. Takings

One prominent example would be the constitution's Takings Clause. That provision is recognized as self-executing in that it alone authorizes suit, regardless of whether the Legislature has statutorily provided for it. *City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012). As a result, a statutory waiver of immunity is unnecessary for a takings claim because the constitution waives governmental immunity for the taking, damaging or destruction of property for public use. *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 801 (Tex. 2013); *accord Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) (when state or state agency takes person's property for public use, state's consent to suit is not required as constitution grants consent to suit for compensation); *cf.* Tex. Const. art. I, § 17(d).

Frequently, these types of claims are raised in inverse condemnation suits, which are actions commenced by the landowner seeking compensation for the government's taking or damaging of his or her property through means other than formal condemnation. *Stewart*, 361 S.W.3d at 567. Though they are initiated by the landowner rather than the state, they are substantially similar to condemnation suits in most other ways. *Id*. To recover on an inverse condemnation claim, a property owner must establish that (1) the state intentionally performed certain acts, (2) that resulted in a "taking" of property, (3) for public use. *Southwestern Bell Tel., L.P. v. Harris County Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009). Pleading facts to show those elements is critical, as a takings claim must be properly pled or the state retains immunity. *Hearts Bluff Game Ranch v. State*, 381 S.W.3d 468, 476 (Tex. 2012). Some common roadblocks to suit arise at that juncture. For example, a person who consents to the governmental action cannot validly assert a takings claim. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth*., 320 S.W.3d 829, 844 (Tex. 2010). Also, when a private party contracts with the government, generally 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. *Id*. (quoting *General Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598-99 (Tex. 2001)). Instead, the state is acting within a color of right under the contract and not under its eminent domain powers. *Id.*

2. Article 3, Section 52e

Article 3, section 52e of the constitution[3] similarly has been held to be "self-enacting." *Frasier v. Yanes*, 9 S.W.3d 422, 426 (Tex. App.—Austin 1999, no pet.). While the court used the term "self-enacting" instead of "self-executing," the standard it applied was identical to that laid down in *Neely*. *See Frasier*, 9

[3] Article 3, section 52e provides that "[e]ach County in the State of Texas is hereby authorized to pay all medical expenses, all doctor bills, and all hospital bills for Sheriffs, Deputy Sheriffs, Constables, Deputy Constables and other county and precinct law enforcement officials who are injured in the course of their official duties; providing that while said [officer] is hospitalized or incapacitated that the county shall continue to pay his maximum salary; providing, however, that said payment of salary shall cease on the expiration of the term of office to which such official is elected or appointed." Tex. Const. art. III, § 52e.

S.W.3d at 426. Noting that section 52e is analogous to the Takings Clause, in that it confers "a narrow contextual right of compensation", the court held that officers who came within its terms may sue to enforce their constitutional entitlement to maximum pay. *Id.* at 425-26.

3. Bill of Rights

More generally, the Texas Constitution's Bill of Rights is self-executing for the limited circumstance of holding acts in violation of its enumerated rights to be void. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995). Suits for injunctive relief against governmental entities to remedy violations of the Texas Constitution, then, may be maintained. *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007). In light of the fact that equitable remedies for Bill of Rights violations are available, *see id.*, claims other than conventional injunctive actions have been countenanced under this rationale. *See*, *e.g.*, *City of Fort Worth v. Jacobs*, 382 S.W.3d 597, 600 (Tex. App.—Fort Worth 2012, pet. dism'd) (trial court had jurisdiction over claims for state constitutional violations seeking equitable remedy of reinstatement). But no implied private right of action for damages under the Texas Constitution exists. *Bouillion*, 896 S.W.2d at 149.

4. Statutory Waivers

Absent an independent constitutional basis for suit against a governmental entity, a statutory waiver of immunity will be key. Common law claims do not escape this rubric. Any tort suit against the government is considered to be "under" the Texas Tort Claims Act.[4] *Franka v. Velasquez*, 332 S.W.3d 367, 379 (Tex. 2011). This is so because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008). Where a statute is the proffered basis for liability, and the liability it creates was unknown to the common law, the statute will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview. *Southwestern Bell Tel., L.P. v. Harris County Toll Road Auth.*, 282 S.W.3d 59, 64 (Tex. 2009). Likewise, where statutes create a right of action, and waive the state's immunity from suit for that action, the courts may act only in the manner provided by the statutes which created the right. *In re Nestle USA, Inc.*, 359 S.W.3d 207, 212 (Tex. 2012) (orig. proceeding). Moreover, any conditions precedent imposed by the statute will have jurisdictional significance, as "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." Tex. Gov't Code Ann. § 311.034 (Vernon 2013). This principle accords with the Supreme Court's view that "it is the Legislature's function to determine what steps a litigant must take before the state's immunity is waived." *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012).

The sum of these parts is that the statutory steps a plaintiff must take in preparing to sue a governmental entity have taken on profound importance. For purposes of this analysis, those steps lead up to and include pleading the case. Failure to follow them properly is likely to jurisdictionally doom the putative claim. In order to better understand what those conditions may be, it is useful at this point to divide the inquiry between prerequisites to suit, including exhaustion of remedies, and elemental requirements of those statutes that waive immunity. Consideration of every statute that may evoke litigation against the government would be too voluminous to recount here, so the focus will be on statutes that commonly form the basis for suits against the state, its agencies and political subdivisions.

As noted previously, statutory prerequisites to suit are jurisdictional in suits against governmental entities. Tex. Gov't Code Ann. § 311.034 (Vernon 2013). Failure to comply with a jurisdictional requirement deprives the trial court of power to act, other than to determine that it lacks jurisdiction. *Little v. Tex. Bd. of Law Exam'rs*, 334 S.W.3d 860, 862 (Tex. App.—Austin 2011, no pet.). For these purposes, the Texas Supreme Court has pointed out that the term "statutory prerequisites" has three components:

- First, it is of obvious mention that in order to fall within the ambit of section 311.034, a prerequisite must be found in the relevant statutory language.
- Second, the prerequisite must be a requirement.
- And finally, the term "pre" indicates the requirement must be met before the lawsuit is filed.

Chatha, 381 S.W.3d at 511-12 (internal citations omitted); *accord TJFA, L.P. v. Tex. Comm'n on Envtl. Quality*, 368 S.W.3d 727, 731 (Tex. App.—Austin 2012, pet. denied) (statutory prerequisite to suit is "a step or condition that must be satisfied before the suit against the state can be filed."). By its plain language, then, Government Code section 311.034's use of "statutory prerequisites" refers to statutory provisions that are mandatory and must be accomplished prior to

[4] *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.001 et seq. (Vernon 2011 & Supp. 2013).

filing suit. *Chatha*, 381 S.W.3d at 512. Perhaps the concept is best illustrated by a negative example.

In *Roccaforte v. Jefferson County*, the Supreme Court considered whether Local Government Code section 89.0041 was a statutory prerequisite to suit, such that failure to comply with it resulted in a jurisdictional bar to a claim against a county. 341 S.W.3d 919 (Tex. 2011). That statute provides:

> (a) A person filing suit against a county or against a county official in the official's capacity as a county official shall deliver written notice to:
>
> (1) the county judge; and
> (2) the county or district attorney having jurisdiction to defend the county in a civil suit.
>
> (b) The written notice must be delivered by certified or registered mail by the 30th business day after suit is filed and contain:
>
> (1) the style and cause number of the suit;
> (2) the court in which the suit was filed;
> (3) the date on which the suit was filed; and
> (4) the name of the person filing suit.
>
> (c) If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit on a motion for dismissal made by the county or the county official.

Tex. Loc. Gov't Code Ann. § 89.0041 (Vernon 2008). As a starting point, the court averted to the presumption that the Legislature did not intend to make the provision jurisdictional, a presumption overcome only by clear legislative intent to the contrary. *See City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009). The court then noted that Government Code section 311.034 "applies to *prerequisites* to suit, not notice requirements that can be satisfied only *after* suit is filed." *Roccaforte*, 341 S.W.3d at 925 (emphasis in original). Further, seizing on the fact that dismissal for noncompliance is premised on a motion for such relief, the court observed that the motion requirement means that a case may proceed against those governmental entities that do not seek dismissal. *Id.* at 926. In other words, a county can waive a party's noncompliance. The prospect of waiver confirmed for the court that the notice requirement is not jurisdictional. *Id*. So, in sum, the *Roccaforte* court found two impediments to construing Local Government Code section 89.0041 as jurisdictional under Government Code section 311.034. First, the statute imposes a requirement that can only be satisfied after suit is filed, so logically it is not one that must be met before the lawsuit is filed. 341 S.W.3d at 925. Of seemingly greater significance, though, is the potential for waiver by not filing a dismissal motion. By refuting jurisdictional significance, the court was able to conclude that the plaintiff's "substantial compliance" by hand delivery of the notice instead of the statutorily-required mailing was sufficient to avoid dismissal. *Id.* at 926.[5] Curiously, the court asserted that section 89.0041 states "a trial court may dismiss a case for noncompliance …." *Id.* at 925-26. But, as the concurrence pointed out, the statute expressly says a court "shall" dismiss for noncompliance. *Id.* at 928 (Willett, J., concurring). Ultimately, though, the determination that the provision was non-jurisdictional, within the ambit of Government Code section 311.034, was unanimous. *Compare* 341 S.W.3d at 925-26 *with id*. at 927 (concurrence joining holding that section 89.0041's post-suit notice requirements are not jurisdictional).

a. Local Government Code § 89.004

By contrast, the relevant status of another provision in chapter 89 of the Local Government Code is not as certain. Section 89.004 provides:

> (a) Except as provided by Subsection (c), a person may not file suit on a claim against a county or an elected or appointed county official in the official's capacity as an appointed or elected official unless the person has presented the claim to the commissioners court and the commissioners court neglects or refuses to pay all or part of the claim before the 60th day after the date of the presentation of the claim.
> (b) If the plaintiff in a suit against a county does not recover more than the commissioners court offered to pay on presentation of the claim, the plaintiff shall pay the costs of the suit.

[5] *Accord Ballesteros v. Nueces County*, 286 S.W.3d 566, 571-72 (Tex. App.—Corpus Christi 2009, pet. denied) (substantial compliance with section 89.0041, such that county defendant has actual knowledge of information required to be disclosed by section 89.0041, is sufficient to avoid dismissal under section 89.0041(c)); *Dallas County v. Coskey*, 247 S.W.3d 753, 757 (Tex. App.—Dallas 2008, pet. denied) (same).

> (c) A person may file a suit for injunctive relief against a county. After the court's ruling on the application for temporary injunctive relief, any portion of the suit that seeks monetary damages shall be abated until the claim is presented to the commissioners court and the commissioners court neglects or refuses to pay all or part of the claim by the 60th day after the date of the presentation of the claim.

Tex. Loc. Gov't Code Ann. § 89.004 (Vernon 2008). The predecessor statute to section 89.004, section 81.041 of the Local Government Code,[6] was similar to the current subsection (a), in that it stated a party was required to present the commissioners court with its claim and the commissioners court had to neglect or refuse to pay all or part of the claim before the party could file suit. Its reference to suit against a county was argued to indicate a legislative intent to waive immunity, but that argument was rejected because the provision was seen as a condition precedent to suit, not a waiver of immunity. *County of Bexar v. Garcia*, 974 S.W.2d 107, 109 (Tex. App.—San Antonio 1998, no pet.); *but cf. Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761, 769-70 (Tex. App.—Dallas 1996, writ denied) (section 81.041 provided legislative authority for contract suit against county). The San Antonio court's reasoning was consistent with the Supreme Court's determination the same year that section 81.041 was a presentment requirement, not a jurisdictional exhaustion of remedies provision. *See Essenburg v. Dallas County*, 988 S.W.2d 188, 189 (Tex. 1998); *see also Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002) (recognizing *Essenburg*'s holding and describing purpose of statute as being "intended to advise the commissioners' court of the claim and afford it an opportunity to investigate and adjust it without litigation").

After the statute was renumbered as section 89.004, two courts of appeals held that it was a simple presentment requirement and not a waiver of immunity. *Gendreau v. Med. Arts Hosp.*, 54 S.W.3d 877, 879 (Tex. App.—Eastland 2001, pet. denied); *Taub v. Harris County Flood Control Dist.*, 76 S.W.3d 406, 411 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). But the view was not unanimous. Considering a construction contract dispute, the Austin Court of Appeals held that section 89.004 conferred jurisdiction upon a trial court to hear a claim that had properly been presented to and rejected by the commissioners court. *Travis County v. Pelzel & Assocs., Inc.*, 30 S.W.3d 662, 669 (Tex. App.—Austin 2000). In 2002, however, the Texas Supreme Court reversed the Austin court's decision. *Travis County v. Pelzel & Assocs.*, 77 S.W.3d 246, 247 (Tex. 2002). In *Pelzel*, the Supreme Court characterized section 89.004(a) as "presentment language" that merely establishes a condition precedent to suit and, accordingly, held that section 89.004(a) does not clearly and unambiguously waive immunity from suit. 77 S.W.3d at 249. But the fact that section 89.004 does not in itself waive immunity from suit does not conclusively answer whether compliance with its presentment requirement is a jurisdictional "statutory prerequisite" under Government Code section 311.034. On that question, the Supreme Court has not spoken and the courts of appeals that have considered this issue are divided.

The Corpus Christi Court of Appeals has invoked earlier decisions to the effect that section 89.004 has no bearing on a county's immunity from suit and the fact that a plaintiff's noncompliance with the provision is not "a determination that his case lies outside a waiver of immunity and is therefore subject to dismissal for want of jurisdiction" to conclude that "the rationale behind" the current version of Government Code section 311.034 does not apply to section 89.004(a). *Forge v. Nueces County*, 350 S.W.3d 740, 745 (Tex. App.—Corpus Christi 2011, no pet.). Based on this reasoning, the *Forge* court held that "section 89.004(a) remains merely a mandatory, but not jurisdictional, condition precedent to suit against a county." *Id.*[7] As late as last year, the Corpus Christi court reaffirmed this view. *See Cameron County v. Tompkins*, 422 S.W.3d 789, 800 (Tex. App.—Corpus Christi 2013, pet. filed). The Dallas Court of Appeals, conversely, has concluded that section 89.004(a) does in fact impose a statutory prerequisite to suit, so that failure to comply with its presentment requirement constrains a trial court to dismiss a damages suit against a county for lack of jurisdiction. *Dallas County v. C. Green Scaping, L.P.*, 301 S.W.3d 872, 879 (Tex. App.—Dallas 2009, no pet.). The Austin Court of Appeals has noted the divide over whether the 60-day presentment requirement is a jurisdictional prerequisite to suit. *See Riley v. Comm'rs Ct. of Blanco County*, 413 S.W.3d 774, 779 n.4 (Tex. App.—Austin 2013, pet. denied). To date, the Supreme Court has not entered the fray to resolve the dispute. However, a petition for review has been filed in *Tompkins*.

[6] Renumbered as Tex. Loc. Gov't Code § 89.004 by Act of Apr. 28, 1999, 76th Leg., R.S., ch. 62, § 13.03(b), 1999 Tex. Gen. Laws 127, 340.

[7] *Compare Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 515 (Tex. 2012) ("Under section 311.034, a statutory requirement commanding action before filing suit is a statutory prerequisite.").

As may be seen from the statute's language, the presentment requirement of section 89.004 contains an exception, and that exception has been argued to constitute in itself a waiver of governmental immunity in injunctive suits against counties. In subsection (c), the statute provides "[a] person may file a suit for injunctive relief against a county." Tex. Loc. Gov't Code Ann. § 89.004(c) (Vernon 2008). However, since section 89.004(a) has been held not to be a clear and unambiguous waiver of immunity,[8] the Amarillo Court of Appeals rejected the waiver argument and construed the language merely as an exception to the presentment requirement applicable to money damages claims. *Amarillo 'Dillas Baseball Club, LLC v. Potter County*, No. 07-11-00059-CV, 2012 Tex. App. LEXIS 8539, at *7-8 (Tex. App.—Amarillo Oct. 11, 2012, no pet.) (mem op.). Often, though, the statute simply will be inapposite to asserted causes of action that do not fit within the parameters of the claims encompassed by subsection (a). In particular, section 89.004 has been held to be inapplicable when the claims asserted are non-monetary or are based on another statute that provides its own particularized notice requirement. *See*, *e.g.*, *Riley v. Comm'rs Ct. of Blanco County*, 413 S.W.3d 774, 779-80 (Tex. App.—Austin 2013, pet. denied) (section 89.004 inapplicable to injunctive and mandamus claims under Open Meetings Act); *Bates v. Randall County*, 297 S.W.3d 828, 836 (Tex. App.—Amarillo 2009, pet. denied) (section 89.004 inapplicable to Whistleblower Act claims); *Gregg County v. Farrar*, 933 S.W.3d 769, 773 (Tex. App.—Austin 1996, writ denied) (predecessor to section 89.004 inapplicable to Whistleblower Act claims); *Raymond v. Hanson*, 970 S.W.2d 175, 178 (Tex. App.—Dallas 1998, no pet.) (predecessor to section 89.004 inapplicable to Tort Claims Act claims); *Harris County v. Dowlearn*, 489 S.W.2d 140, 146 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (same); *see also Upton County v. Brown*, 960 S.W.2d 808, 820 (Tex. App.—El Paso 1997, no pet.) (predecessor to section 89.004 inapplicable to claims under 42 U.S.C. § 1983).

b. Labor Code Chapter 21

A substantive statute, with its own procedural complexities, that commonly fosters litigation against governmental entities is Chapter 21 of the Labor Code. That statute is commonly referred to as the Texas Commission on Human Rights Act ("TCHRA"),[9] although the Commission on Human Rights has been replaced by the civil rights division of the Texas Workforce Commission. *City of El Paso v. Marquez*, 380 S.W.3d 335, 341 & n.5 (Tex. App.—El Paso 2012, no pet.); *see also* Tex. Lab. Code Ann. § 21.0015 (Vernon 2008). The TCHRA is modeled after federal law with the purpose of executing policies set forth in Title VII of the Civil Rights Act of 1964.[10] *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004). Although from its inception the TCHRA was not an exact replica of Title VII, both the TCHRA and Title VII similarly define unlawful employment practice. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 504 (Tex. 2012). Much like its federal counterpart, the TCHRA was enacted to address the specific evil of discrimination and retaliation in the workplace. *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) (citing Tex. Lab. Code § 21.001(4)). Although the statute contains no explicit waiver language, its definition of "employer" and the structure of its remedial provisions have led the Supreme Court to conclude that the TCHRA clearly and unambiguously waives immunity, "provided the procedures outlined in the statute have been met." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008) ("*Garcia I*"). With that last proviso in mind, it will not be enough to simply reference the Act and proceed directly to trial. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012) ("*Garcia II*") (chapter 21 waives immunity from suit only when plaintiff actually states claim for conduct violating TCHRA); *accord State v. Lueck*, 290 S.W.3d 876, 882 (Tex. 2009) (in Whistleblower Act case, "mere reference" to Act does not establish state's consent to be sued and confer jurisdiction on trial court). The TCHRA creates a statutory cause of action with no remedy at common law. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012). As such, it does not create subject-matter jurisdiction in Texas courts; instead, a claimant can bring suit under the TCHRA against a governmental entity only after a claimant strictly satisfies the procedural requirements outlined in the TCHRA. *Id.* at 513-14. Consequently, the TCHRA's procedural and remedial strictures will tightly control a plaintiff's ability to sue a governmental entity for discrimination, retaliation or both under the statute.

By enacting the TCHRA, the Legislature created a comprehensive remedial scheme that grants extensive protections to employees in Texas, implements a comprehensive administrative regime and affords carefully constructed remedies. *Id*. at 154; *accord Zeltwanger*, 144 S.W.3d at 446 (TCHRA "establishes comprehensive administrative review system"). It is significant that the statute is construed as crafting a comprehensive administrative procedural structure for

[8] *See Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.2d 246, 249 (Tex. 2002).

[9] *See* Tex. Lab. Code Ann. §§ 21.001-.556 (Vernon 2006 & Supp. 2013).

[10] *See* 42 U.S.C. § 2000e et seq.

claims arising under its substantive provisions. Under the TCHRA, the Texas Workforce Commission civil rights division is the agency authorized to administer the statute's administrative scheme. *See* Tex. Lab. Code Ann. §§ 21.0015 (Vernon 2008) (vesting Texas Workforce Commission civil rights division with powers and duties formerly exercised by Commission on Human Rights under chapter); .201-.211 (Vernon 2008) (establishing administrative procedures conducted by civil rights division); *see also Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804-05 (Tex. 2010) (noting administrative structure of TCHRA proceeding through civil rights division). With the pertinent administrative agency identified, the question then becomes whether that agency has exclusive jurisdiction over TCHRA claims. An agency has exclusive jurisdiction when a "pervasive regulatory scheme indicates that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed." *Blue Cross Blue Shield v. Duenez*, 201 S.W.3d 674, 675-76 (Tex. 2006). Whether a regulatory scheme is an exclusive remedy depends on whether the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008). Exclusive jurisdiction also exists if the Legislature grants an administrative body the sole authority to make an initial determination in a dispute. *Thomas v. Long*, 334, 340 (Tex. 2006). In deciding whether an agency has exclusive jurisdiction, courts look to the agency's authorizing legislation for an express grant of exclusive jurisdiction, or for the aforementioned "pervasive regulatory scheme" indicating that was the Legislature's intention. *Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 908-09 (Tex. 2009). While the TCHRA has no express provision making its remedies exclusive, unlike the Workers Compensation Act, the Supreme Court has concluded that exclusivity of the statutory scheme can fairly be implied. *Williams*, 313 S.W.3d at 809. Given that the TCHRA's regulatory process is the exclusive means of remedying problems of employment discrimination and retaliation, *see Lopez*, 259 S.W.3d at 156, the logical inference is that the civil rights division has exclusive jurisdiction over the administrative processing of TCHRA claims. Where an agency has exclusive jurisdiction, a complaining party must exhaust administrative remedies before seeking review in district court. *Blue Cross Blue Shield*, 201 S.W.3d at 676. A party must exhaust administrative remedies in those circumstances before a trial court will have subject-matter jurisdiction. *O'Neal v. Ector County Indep. Sch. Dist.*, 251 S.W.3d 50, 51 (Tex. 2008). TCHRA claims, then, require exhaustion of administrative remedies. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010).

Exhaustion was uniformly seen as a jurisdictional prerequisite to all suits under the TCHRA until 2010. *See Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991) (exhaustion of remedies is mandatory prerequisite to filing civil action alleging violations of TCHRA; failure to file complaint and pursue administrative remedies creates jurisdictional bar to discrimination claim). But the Supreme Court revisited the issue in *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010) ("*USAA*"). In *USAA*, the court began its discussion by recounting "the five-step process involved in determining the jurisdiction of any particular trial court:

> Recourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases).

307 S.W.3d at 303-04 (internal punctuation omitted). The court then considered jurisdiction more generally, lamenting—in the words of the United State Supreme Court—that jurisdiction "is a word of many, too many, meanings." *Id*. at 305 (quoting *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 90 (1998)). Harkening to its reasoning in *Dubai Petroleum Co. v. Kazi*, 12 S.W.71, 76 (Tex. 2000),[11] that "the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction", and that "[t]he right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it", *Id.* at 76-77, the court concluded that the two-year period for filing suit under the TCHRA is mandatory but not jurisdictional. 307 S.W.3d at 310. In doing so, the

[11] *Kazi* overruled *Mingus v. Wadley*, 115 Tex. 551, 285 S.W.1084, 1087 (1926), which had held that "[t]he general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." 12 S.W.3d at 76.

court overruled *Schroeder* to the extent it held otherwise. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010) ("*USAA*"). Notably, the court was careful to point out that "when elements of a statutory claim involve 'the jurisdictional inquiry of sovereign immunity from suit,' those elements can be relevant to both jurisdiction and liability." *Id.* at 307. Two years later, however, the TCHRA prerequisites issue re-presented itself with a governmental defendant.

In *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500 (Tex. 2012), the Supreme Court reviewed whether a plaintiff's failure to comply with section 21.202 of the Labor Code[12] jurisdictionally barred her suit against a state university. 381 S.W.3d at 505. Returning to *Kazi*, the court emphasized that case involved private litigants, creating a struggle for the courts of appeals in applying it to cases against governmental defendants based on the apparent dichotomy of *Kazi*'s holding with the basic tenets of sovereign immunity and the Supreme Court's treatment of the doctrine in statutory causes of action. *Id.* at 511. The court then noted its response to this confusion was *Univ. of Tex. SW Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004), which held that because the pre-suit notice requirement in section 101.101(a) of the Tort Claims Act was not a condition of the statute's waiver of immunity, the failure to provide such notice was not a jurisdictional defect. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 511 (Tex. 2012). As the court observed, the Legislature responded to *Loutzenhiser* in 2005, amending section 311.034 of the Government Code to make notice requirements, and all other statutory prerequisites to suit, jurisdictional as to governmental entities. *Id.* Thus, said the court, the Legislature effectively abrogated the holding in *Loutzenhiser* and reverted back to the court's broader holding in *Mingus v. Wadley*, 115 Tex. 551, 285 S.W. 1084, 1087 (1926),[13] in suits against a governmental entity. *Id.* at 512. As a result, the court held that section 21.202's administrative filing requirement is a mandatory statutory requirement that must be complied with before filing suit, and, as such, is a statutory prerequisite in a suit against a governmental entity under section 311.034, which created a jurisdictional bar to the plaintiff's claim based on her noncompliance. *Id.* at 514.

And so the circle is complete. A TCHRA action requires an exhaustion of remedies that begins by filing a complaint with the Texas Workforce Commission civil rights division ("commission"). *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010). Alternative dispute resolution "is encouraged to resolve disputes arising under" the TCHRA, and the commission must "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* at 805 (citing Tex. Lab. Code Ann. § 21.207(a) (Vernon 2008)). To comply with the requisite exhaustion of administrative remedies under Labor Code chapter 21, a plaintiff must: (1) file a complaint with the commission within 180 days of the alleged discriminatory practice; (2) permit the commission to dismiss the complaint or resolve it within 180 days before filing suit; and (3) file suit no later than two years after the complaint is filed.[14] *City of El Paso v. Marquez*, 380 S.W.3d 335, 341 (Tex. App.—El Paso 2012, no pet.) (citing Tex. Lab. Code Ann. §§ 21.201-202, .208, .246 (Vernon 2008)); *Rice v. Russell-Stanley, L.P.*, 131 S.W.3d 510, 513 (Tex. App.—Waco 2004, pet. denied) (same). Moreover, any claim that will be the basis of TCHRA litigation must be included in the administrative complaint or charge. *See Tex. Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 537 (Tex. 2012). The plaintiff's administrative remedies are exhausted by his or entitlement to a right-to-sue letter, which simultaneously ends the exclusive jurisdiction of the commission.[15] *Marquez*, 380 S.W.3d at 341. Hence, when the Supreme Court held in *City of Waco v. Lopez*, 259 S.W.3d 147, 156 (Tex. 2008), that a plaintiff's failure to plead that he had invoked the procedures of the TCHRA—and where the time for doing so had long since passed—meant that he had failed to allege a claim under the TCHRA for which the city defendant's governmental immunity had been waived, it was prescient of the settling of the law in this area from *USAA* and then to *Chatha*. As a result, the failure to exhaust administrative remedies in a TCHRA suit against a governmental defendant is a jurisdictional defect which deprives the courts of

[12] Under section 21.202, the TCHRA provides:

> (a) A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred.
>
> (b) The [TWC] shall dismiss an untimely complaint.

Tex. Lab. Code Ann. § 21.202 (Vernon 2008) (punctuation added).

[13] *See* n. 11, *supra*.

[14] Exhaustion of remedies under Title VII is a two-step process: (1) a charge must be timely filed with the Equal Employment Opportunity Commission ("EEOC"); and (2) a suit must be brought within ninety days of receiving the EEOC's right-to-sue letter. *Marquez*, 380 S.W.3d at 342 (citing 42 U.S.C. §§ 2000e-5(e)(1), e-5(f)(1)).

[15] "But, mere possession of a right-to-sue letter is not mandatory before filing suit." *Rice*, 131 S.W.3d at 513.

subject-matter jurisdiction. *Marquez*, 380 S.W.3d at 341. More particularly, when an employer is a governmental entity, the TCHRA's 180-day filing deadline is a mandatory and jurisdictional prerequisite to filing a lawsuit because it is a statutory prerequisite to suit. *Comptroller v. Landsfeld*, 352 S.W.3d 171, 176-77, 178 (Tex. App.—Fort Worth 2011, pet. denied). Similarly, the "mandatory, but otherwise non-jurisdictional" limitations period of Labor Code section 21.256 is jurisdictional when the defendant is a governmental entity, based on Government Code section 311.034 and *Chatha*. *Goss v. City of Houston*, 391 S.W.3d 168, 127-73 (Tex. App.—Houston [1st Dist.] 2012, no pet.). To hold otherwise, in the words of the court, "would draw an unfounded distinction between 'statutory prerequisites' and statutes of limitations and contravene the express intent of the Legislature, set out in Government Code section 311.034, that *all* statutory prerequisites to suit be considered jurisdictional when the defendant is a governmental entity." *Id*. (emphasis in original); *accord Chatha*, 381 S.W.3d at 510 ("The Legislature has mandated that all statutory prerequisites to suit are jurisdictional in suits against governmental entities."); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008) ("*Garcia I*") (Legislature has consented to suits against governmental entities under TCHRA, "provided the procedures outlined in the statute have been met.").

Beyond exhaustion of remedies, sovereign or governmental immunity poses yet another obstacle to potential TCHRA plaintiffs. In the absence of direct evidence of discrimination, a plaintiff under the TCHRA must generally establish a prima facie case of discrimination. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 477 (Tex. 2001). Although the precise elements of this showing will vary depending on the allegations, the plaintiff's burden at this stage of the case "is not onerous." *Id*. (quoting *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). Generally, establishing a prima facie case requires the plaintiff to show that he or she was (1) a member of the class protected by the Act, (2) qualified for his or her employment position, (3) terminated by the employer, and (4) treated less favorably than similarly situated members of the opposing class. *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008).

In a suit against a governmental employer, "the prima facie case implicates both the merits of the claim *and* the court's jurisdiction because of the doctrine of sovereign immunity." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635-36 (Tex. 2012) ("*Garcia II*") (emphasis in original). As noted in *Garcia I*, "the TCHRA clearly and unambiguously waives immunity" for suits under the TCHRA. *See* 253 S.W.3d at 660. However, the Legislature has waived immunity "only for those suits where the plaintiff actually alleges a violation of the TCHRA by pleading facts that state a claim thereunder." *Garcia II*, 372 S.W.3d at 636. Phrased a bit differently, chapter 21 of the Labor Code "waives immunity from suit only when the plaintiff actually states a claim for conduct that would violate the TCHRA." *Id.* at 637. When a plea to the jurisdiction alleges that the plaintiff's prima facie case is insufficient to invoke the TCHRA's waiver of immunity, some inquiry into the merits of the substance of the claims is necessary "because if TCHRA plaintiffs were allowed to stand on talismanic allegations alone, the constraining power of pleas to the jurisdiction would practically be eliminated." *Id*. at 638. As a result, the prima facie case is the necessary first step to bringing a discrimination claim under the TCHRA. Failure to demonstrate those elements means the plaintiff never gets the presumption of discrimination and never proves his claim. And that failure means the court has no jurisdiction and the claim should be dismissed. *Id.* at 637. What this practically means is, even after exhausting administrative remedies, the petition in court will still have to allege facts that make out a prima facie case, or a challenge by plea to the jurisdiction is likely to succeed.

c. Whistleblower Act

Some statutes are structured such that waiver of immunity from suit and liability are co-extensive, so immunity from suit is waived to the extent of liability. *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009). One such statute is the Whistleblower Act. *See* Tex. Gov't Code Ann. § 554.001 et seq. (Vernon 2012). The Whistleblower Act provides that "a state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code Ann. § 554.002(a) (Vernon 2012); *City of Elsa v. Gonzales*, 325 S.W.3d 622, 625 (Tex. 2010). It further provides that "sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter." Tex. Gov't Code § 554.0035 (Vernon 2012). Consequently, sovereign immunity is waived "when a public employee alleges a violation of the Whistleblower Act." *Univ. of Houston v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013).

Before the elements of a Whistleblower Act claim can become the central issue, however, a pre-suit procedural requirement may arise. In particular, the Whistleblower Act provides:

> (a) A public employee must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action before suing under this chapter.
> (b) The employee must invoke the applicable grievance or appeal procedure not later than the 90th day after the date on which the alleged violation of this chapter:
>
> (1) occurred; or
> (2) was discovered by the employee through reasonable diligence.
>
> (c) Time used by the employee in acting under the grievance or appeal procedures is excluded, except as provided by Subsection (d), from the period established by Section 554.005.[16]
> (d) If a final decision is not rendered before the 61st day after the date procedures are initiated under Subsection (a), the employee may elect to:
>
> (1) exhaust the applicable procedures under Subsection (a), in which event the employee must sue not later than the 30th day after the date those procedures are exhausted to obtain relief under this chapter; or
> (2) terminate procedures under Subsection (a), in which event the employee must sue within the time remaining under Section 554.005 to obtain relief under this chapter.

Tex. Gov't Code Ann. § 554.006 (Vernon 2012) (footnote added). This requirement has been described by the Supreme Court as "a relatively simple administrative exhaustion procedure requiring the employee to bring a grievance under the procedures that are provided by the public employer." *City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008). Simple though it may be, it is significant.

The objective of section 554.006 is "to afford the governmental entity with the opportunity to investigate and correct its errors and to resolve disputes before incurring the expense of litigation." *Fort Bend Indep. Sch. Dist. v. Gayle*, 371 S.W.3d 391, 395 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). The requirement is plain enough. Before suing under the Whistleblower Act, a public employee must timely initiate his employer's grievance or appeal procedures relating to employee discipline. *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632 (Tex. 2005). Recalling here that all statutory prerequisites to suit are now jurisdictional requirements as to governmental entities and are properly raised in a plea to the jurisdiction,[17] section 554.006(a)'s initiation requirement is a jurisdictional prerequisite, such that compliance is essential to the trial court's jurisdiction over a claimant's Whistleblower Act action. *Fort Worth Indep. Sch. Dist. v. Palazzolo*, No. 02-13-00006-CV, 2014 Tex. App. LEXIS 291, at *7-8 (Tex. App.—Fort Worth Jan. 9, 2014, no pet. h.); *Gayle*, 371 S.W.3d at 395. The Fort Worth Court of Appeals additionally has concluded that, as a prerequisite to bringing a Whistleblower Act claim, a government employee must provide reasonable notice that she is making a Whistleblower Act claim in the initiation of the grievance or appeal procedures relating to the suspension or termination of employment or adverse personnel action. *Tarrant County v. McQuary*, 310 S.W.3d 170, 174 (Tex. App.—Fort Worth 2010, pet. denied).

Logically enough, since the initiation requirement is keyed to "the grievance or appeal procedure of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action", the implication is that a grievance procedure is in place. *City of Colo. City v. Ponko*, 216 S.W.3d 924, 928 (Tex. App.—Eastland 2007, no pet.). A governmental entity cannot take the benefit of the policy underlying section 554.006(b) by challenging subject-matter jurisdiction when no grievance procedure is in place. *City of Colo. City v. Ponko*, 216 S.W.3d 924, 928 (Tex. App.—Eastland 2007, no pet.). In that instance, an aggrieved public employee need only sue within the otherwise-tolled limitations period of 90 days from the alleged violation of the Act. *Id.* Moreover, section 554.006 does not require that grievance or appeal procedures be exhausted before suit can be filed; rather, it requires that such procedures be timely initiated and that the grievance or appeal

[16] Section 554.005 provides:

> Except as provided by Section 554.006, a public employee who seeks relief under this chapter must sue not later than the 90th day after the date on which the alleged violation of this chapter:
>
> (1) occurred; or
>
> (2) was discovered by the employee through reasonable diligence.

Tex. Gov't Code Ann. § 554.005 (Vernon 2012).

[17] *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 510-11 (Tex. 2012); *accord* Tex. Gov't Code Ann. § 311.034 (Vernon 2013).

authority have 60 days in which to render a final decision. *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632 (Tex. 2005). If the plaintiff prematurely files before the end of the 60-day period for rendition of a final decision, a court may properly abate the claim until the end of the 60-day period, provided that the procedures have been timely initiated and can continue for the required 60 days or until a final decision is rendered, whichever occurs first. *Id*. at 633.

If the initiation requirement is satisfied, the claim may proceed. But the Whistleblower Act cannot be invoked as a catch-all employment discrimination remedy. In light of the TCHRA's comprehensive administrative scheme for addressing workplace discrimination, plaintiffs suing for retaliation on the basis of complaints of unlawful discrimination cannot simply frame their disputes as whistleblower claims and sidestep the investigatory and conciliation scheme set forth in the TCHRA. *City of Waco v. Lopez*, 259 S.W.3d 147, 155 (Tex. 2008). Where that is the case, "the Whistleblower Act must yield to the [T]CHRA for retaliation claims arising from allegations of employment discrimination made unlawful under the [T]CHRA." *City of Waco v. Lopez*, 259 S.W.3d 147, 155 (Tex. 2008) (punctuation added).

A more vexing issue in Whistleblower Act cases concerns the adequacy of the pleadings or the underlying facts to make out an actual violation of the statute. Immunity is waived by section 554.0035 of the Government Code when a public employee alleges a violation of the Whistleblower Act. *Univ. of Houston v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013). A violation occurs when a governmental entity retaliates against a public employee for making a good-faith report of a violation of law to an appropriate law enforcement authority. *Id*.; *see also* Tex. Gov't Code Ann. § 554.002(a) (Vernon 2012). In short, for the government's immunity to be waived, the plaintiff must (1) be a public employee, and (2) allege a violation of the Whistleblower Act. *State v. Lueck*, 290 S.W.3d 876, 881 (Tex. 2009). Drawing on its earlier decision in *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001), which proclaimed that "[m]ere reference to the Tort Claims Act does not establish the state's consent to be sued and thus is not enough to confer jurisdiction on the trial court", the Supreme Court in *Lueck* held that the elements under section 554.002(a) must be considered in order to ascertain what constitutes a violation, and whether that violation has actually been alleged. 290 S.W.3d at 881. Hence, the elements of section 554.002(a) can be considered as jurisdictional facts, when it is necessary to resolve whether a plaintiff has alleged a violation under the Whistleblower Act. *Id*.

To be clear, the court noted that the analysis of the act's cause-of-action elements was not a matter addressed by section 311.034 of the Government Code "because the elements of section 554.002(a) are not statutory prerequisites to suit, but rather, elements of a statutory cause of action in a suit against a governmental entity." *Id*. at 883. Nonetheless, the court determined that the elements of a Whistleblower Act cause of action, statutory as they are, are requirements that can implicate the merits of the underlying claim but also the jurisdictional inquiry of sovereign immunity from suit. *Id*.

There is no shortage of cases construing the Whistleblower Act, so identifying each review of its elements would exceed the scope of this analysis and, likely, the reader's attention. But a frequently litigated issue under section 554.002(a) may serve to illustrate the rigors a whistleblower plaintiff can face in attempting to overcome sovereign or governmental immunity.

That recurrent issue is whether the recipient of the underlying report of unlawful conduct is, in fact, an "appropriate law enforcement authority." Under the Whistleblower Act, a report is made to an appropriate law enforcement authority "if the authority is part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law." Tex. Gov't Code Ann. § 554.002(b) (Vernon 2012). This is a "limited definition" and it does not include an entity whose power is not shown to extend beyond its ability to comply with a law by acting or refusing to act or by preventing a violation of law by acting or refusing to act. *City of Elsa v. Gonzales*, 325 S.W.3d 622, 628 (Tex. 2010). For an entity to constitute an appropriate law enforcement authority under the Whistleblower Act, "it must have authority to enforce, investigate or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties. Authority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status." *Univ. of Houston v. Barth*, 403 S.W.3d 851, 857 (Tex. 2013).

It is not enough for an employee to exhort internal entity compliance with outside regulations, nor is it enough that the entity recites anti-retaliation principles in an internal policy manual. *Univ. of Tex. SW Med. Ctr. v. Gentilello*, 398 S.W.3d 680, 689 (Tex. 2013). Neither circumstance will support the required good-faith belief of the employee that the employer, or its agent, exercised the law enforcement powers specified in section 554.002(b). *Id*. Instead, the employee must

have an objective good-faith belief that he was reporting violations of law involving the Penal Code or the law pertaining to the conduct at issue to an entity that could have enforced, investigated or prosecuted similar violations against third parties—not just an entity that can internally discipline its own employees for an alleged violation. *Barth*, 403 S.W.3d at 857. Nor can a whistleblower plaintiff who reports only to an internal supervisor who lacks section 554.002(b) powers survive a jurisdictional challenge under the Whistleblower Act's good-faith belief provision merely by pointing to anti- retaliation language in a workplace policy manual. *Gentilello*, 398 S.W.3d at 689. More to the point, lodging an internal complaint to an authority whom one understands to be only charged with internal compliance, even including investigating and punishing noncompliance, is jurisdictionally insufficient under the Whistleblower Act. *Id*. at 687. Taken together, these cases indicate that, to avail himself or herself of the Whistleblower Act's waiver of immunity and conferral of jurisdiction on a court, the plaintiff must plead, and be prepared to present evidence of, each element of section 554.002(a) and (b).

d. Tort Claims Act

Like the Whistleblower Act, the Tort Claims Act[18] makes its waiver of immunity co-extensive with its scope of liability. Specifically, it provides:

> (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.
> (b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Tex. Civ. Prac. & Rem. Code Ann. § 101.025 (Vernon 2011). Unlike the Whistleblower Act, however, the Tort Claims Act also bears a particularized notice requirement. The Act states:

> (a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:
>
> (1) the damage or injury claimed;
> (2) the time and place of the incident; and
> (3) the incident.
>
> (b) A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.
> (c) The notice requirements provided or ratified and approved by Subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged.

Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 2011). As discussed above, absent a waiver, governmental entities are generally immune from suits for damages. *Univ. of Tex. SW Med. Ctr. v. Estate of Arancibia*, 324 S.W.3d 544, 546 (Tex. 2010). The Tort Claims Act waives immunity from suit "to the extent of liability created by [the Act]." Id. (punctuation in original) (citing Tex. Civ. Prac. & Rem. Code § 101.025(a)). "To take advantage of this waiver, the plaintiff must notify the government of a claim within six months." *Id*. In 2004, the Supreme Court had concluded that the notice requirements were mandatory, rather than jurisdictional, so there was no interlocutory appellate jurisdiction over an order that denied a governmental unit's jurisdictional plea based on a claimant's failure to provide notice. See *Univ. of Tex. SW Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 365-66 (Tex. 2004). Soon after *Loutzenhiser*, the Legislature amended the Government Code to provide that "[s]tatutory prerequisites to suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." *Univ. of Tex. SW Med. Ctr. v. Estate of Arancibia*, 324 S.W.3d 544, 546 (Tex. 2010) (citing Tex. Gov't Code Ann. § 311.034)). The 2005 amendment did not change those statutory prerequisites; it merely stated the consequence of a failure to comply with them. *Id*. After the amendment, a failure to provide notice is jurisdictional, so it deprives a trial court of jurisdiction. *Id*. at 548.

Actual notice may supplant the statute's requirement of formalized notice. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.101(c) (Vernon 2011). It is not sufficient, however, that the governmental unit only has knowledge of a death, an injury, or property damage, because a defendant, like a hospital, would then have to investigate the standard of care provided to each and every patient that received treatment, eviscerating the notice requirement's purpose. *Arancibia*, 324 S.W.3d at 548. Instead, the governmental unit must know of its "alleged fault producing or contributing to the death, injury or property damage." *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). Hence, a governmental unit must

[18] *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.001 et seq. (Vernon 2011 & Supp. 2013).

have actual knowledge that amounts to the same notice to which it is entitled under section 101.101(a), including subjective awareness of its fault as ultimately alleged by the claimant in producing or contributing to the claimed injury. *Univ. of Tex. SW Med. Ctr. v. Estate of Arancibia*, 324 S.W.3d 544, 548-49 (Tex. 2010). Fault, as it pertains to actual notice, is not synonymous with liability; it implies responsibility for the injury claimed. *Id*. at 550. Whether the facts compel a conclusion that the governmental unit has actual notice should be viewed with reference to the purpose of the notice requirement: "to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." *Id*. (quoting *Cathey*, 900 S.W.2d at 341). But there is now no longer question that the Tort Claims Act's six-month notice requirement is a condition for the governmental unit's waiver of immunity from suit under the Tort Claims Act. *Colquitt v. Brazoria County*, 324 S.W.3d 539, 543 (Tex. 2010).

Yet a subtle linguistic intricacy remains. The Tort Claims Act does not require that notice be given before filing suit; it requires instead that the government obtain notice within six months of the incident. *Id*. So, as a practical matter, pre-suit notice may be required if the lawsuit is filed more than six months after the incident, but when the lawsuit is filed and served within that six-month window, and the suit provides all the requisite information, pre-suit notice is not required. *Id*. Otherwise, a claimant's failure to comply with the Tort Claims Act's notice requirement is jurisdictional, so the claim falls outside the Act's limited waiver of immunity, regardless of whether the claim is one for which immunity is otherwise waived under the Act. *City of Houston v. Esparza*, 369 S.W.3d 238, 251 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). The Act's election of remedies provision, contained in section 101.106, also is such a jurisdictional requirement. *Id*.; *accord Univ. of Tex. Health Sci. Ctr. v. Webber-Eells*, 327 S.W.3d 233, 239-40 (Tex. App.—San Antonio 2010, no pet.). This is so because the provision, as construed by the Supreme Court, is a grant of immunity. *See Franka v. Velasquez*, 332 S.W.3d 367, 371 n. 9 (Tex. 2011).

Another similarity to the Whistleblower Act is the significance attached to the facts pleaded in a Tort Claims Act case. In *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001), the Supreme Court took issue with a court of appeals decision that a plaintiff can establish waiver of sovereign immunity simply by making a claim "pursuant to the Texas Tort Claims Act". 51 S.W.3d at 586-87. Rather, the court declared, "[m]ere reference to the Tort Claims Act does not establish the state's consent to be sued and thus is not enough to confer jurisdiction on the trial court." *Id*. at 587. The proper approach in the court's view is to review the plaintiff's pleadings to decide whether sovereign immunity has been waived. *Id*. To do so, the court must "consider the facts alleged by the plaintiff, and to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties." *Id*.; *cf. State v. Lueck*, 290 S.W.3d 876, 881-82 (Tex. 2009) (applying *Miller*'s analysis to Whistleblower Act claim). Since *Miller*, it has become an established principle of Tort Claims Act law that mere reference to the Act is insufficient, and the absence of an essential element of a Tort Claims Act claim, either in the pleadings or the evidence, will support assertion of a plea to the jurisdiction based on failure to invoke the statute's waiver of sovereign or governmental immunity. *See*, *e.g.*, *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657-60 (Tex. 2007) (Recreational Use statute applied to cut off Tort Claims Act claim); *City of Grapevine v. Sipes*, 195 S.W.3d 689, 691-93 (Tex. 2006) (discretionary decision to install sign, under section 101.060(a)(2), barred claim); *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245-47 (Tex. 2004) (hospital's provision of property used by patient to commit suicide insufficient to constitute government's use of property, thereby barring Tort Claims Act claim).

III. EXHAUSTION OF REMEDIES

One of the more commonly encountered prerequisites to suit is the well-recognized doctrine of exhaustion of administrative remedies. Its moniker alone indicates that the doctrine functions in the realm of administrative agency activity. A quick search of the state's central website, texas.gov, will reveal that there are some 174 administrative agencies listed. *See* http://www.texas.gov/en/Discover/Pages/agency-finder.aspx (accessed June 12, 2014).[19] As any practitioner of administrative law knows almost instinctively, administrative agencies generally are creations of the Legislature. *State v. Pub. Util Comm'n*, 883 S.W.2d 190, 194 (Tex. 1994). Based on their legislative genesis, it also is the rule that the Legislature establishes the jurisdiction of administrative agencies. *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 83 (Tex. 2008). That being so, agencies may only exercise those powers granted by statute, together with those necessarily implied from the statutory authority conferred or duties imposed. *Tex. Workers' Comp. Comm'n v. Patient*

[19] The website actually lists 190 agencies in its listing, but 16 of those are courts, comprising the Supreme Court, the Court of Criminal Appeals and the 14 Courts of Appeals. *See* http://www.texas.gov/en/Discover/Pages/agency-finder.aspx. It is established law in Texas that a court is not an administrative agency. *Lone Star Gas Co. v. State,* 137 Tex. 279, 153 S.W.2d 681, 696 (1941).

Advocates, 136 S.W.3d 643, 652 (Tex. 2004); *Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 686 (Tex. 1983). For present purposes, that means there are at least 174 different statutory schemes establishing, authorizing and directing those sundry agencies. Review of each of those constructs would be very lengthy, and would offer more than a little duplication since overarching principles often will apply concerning exhaustion and its significance. In the interest of efficiency, then, those principles will be reviewed generally.

A. Who's in Charge? Primary vs. Exclusive Jurisdiction

Common sense and experience teach that administrative agencies deal with a vast array of facts, issues and disputes. When a dispute arises that may concern an agency, an initial question will be the agency's jurisdiction over the controversy. *See Igal*, 250 S.W.3d at 83 (Legislature establishes administrative jurisdiction). In turn, two related jurisdictional principles may then become relevant. One is primary jurisdiction. Primary jurisdiction is an administrative law doctrine that arises when a court and an agency have concurrent original jurisdiction over a dispute. *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000). In such a case, courts must ask whether the policies underlying the primary jurisdiction doctrine require the court to defer to the agency's expertise and responsibility to develop regulatory policy. *Id*. The primary jurisdiction doctrine requires courts to defer to the administrative agency only when the claim's enforcement requires the resolution of issues that are "within the special competence of an administrative agency." *Id*. (quoting *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 735 S.W.2d 663, 669-70 n.3 (Tex. App.—Austin 1987, no writ)). In making this determination, courts should ask "whether the reasons for the existence of the primary jurisdiction doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Bennett*, 35 S.W.3d at 18. Those purposes include ensuring that administrative agencies decide, at least initially, questions that require "the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact." *Id*. Primary jurisdiction also comes into play when "uniformity of ruling is essential to comply with the purposes of the regulatory statute administered." *Id*. Primary jurisdiction is a judicially-created doctrine. *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). It should be invoked by a court when: (1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations. *Id*. The doctrine is prudential. *Id*. at 220. Hence, if the primary jurisdiction doctrine requires a trial court to defer to an agency to make an initial determination, the court should abate the lawsuit and suspend finally adjudicating the claim until the agency has an opportunity to act on the matter. *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). Since a court applying the doctrine will abate, thereby maintaining jurisdiction, in an effort essentially to secure expert guidance from an agency, the doctrine does not bear the "hallmark" of jurisdictional import. *See Essenburg v. Dallas County*, 988 S.W.2d 188, 189 (Tex. 1998) (assurance that appropriate body adjudicates dispute is "hallmark of … jurisdictional statute").

On the other hand, under the exclusive jurisdiction doctrine, the Legislature grants an administrative agency the sole authority to make an initial determination in a dispute. *Houston Mun. Emp. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157 (Tex. 2007); *Subaru of Am.*, 84 S.W.3d at 221; *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000). The Texas Constitution expressly allows the Legislature to bestow exclusive jurisdiction on administrative bodies. Tex. Const. art. V, § 8; *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006). An agency has exclusive jurisdiction "when a pervasive regulatory scheme indicates that [the Legislature] intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed." *Subaru of Am.*, 84 S.W.3d at 221 (internal citation omitted; punctuation added). Exclusive jurisdiction is a question of statutory interpretation under which the court must consider the operative statute and whether it grants sole determination authority to the agency. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013). Unlike the primary jurisdiction doctrine, exclusive jurisdiction may cut off a trial court's power to act in a case.

The doctrine of exclusive jurisdiction concerns a trial court's original jurisdiction and is relevant when the plaintiff has not exhausted his administrative remedies. *Ferrell*, 248 S.W.3d at 157. Established law provides that exhaustion of administrative remedies is a prerequisite to judicial review. *Springfield v. Aetna Cas. & Sur. Ins. Co.*, 620 S.W.2d 557, 559 (Tex. 1981). If an agency has exclusive jurisdiction to resolve a dispute, a party must first exhaust administrative remedies before a trial court has subject-matter jurisdiction. *O'Neal v. Ector County Indep. Sch. Dist.*, 251 S.W.3d 50, 52 (Tex. 2008); *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006); *see also Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 908 (Tex. 2009). On the other hand, when the

Legislature has not expressed an intent to grant exclusive authority to adjudicate an issue, there is no jurisdictional issue barring a court from adjudicating the issue. *Larsen v. Santa Fe Indep. Sch. Dist.*, 296 S.W.3d 118, 126 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Requiring exhaustion of administrative remedies is not meant to deprive an aggrieved party of any legal rights, but rather to provide an orderly procedure by which aggrieved parties may enforce those rights. *Rhule*, 417 S.W.3d at 442; *Ollie v. Plano Indep. Sch. Dist.*, 383 S.W.3d 783, 792 (Tex. App.—Dallas 2012, pet. denied), *cert. denied*, ___ U.S. ___, 133 S.Ct. 2812 (2013). The exhaustion requirement and its associated jurisdictional preclusion extend to claims governed by the relevant statute. *State v. Fid. & Deposit Co.*, 223 S.W.3d 309, 311 (Tex. 2007). That is, if the statute's administrative remedies do not cover the dispute at hand, a trial court generally will have jurisdiction. *Id*. at 312. Otherwise, until the party has satisfied the exhaustion requirement, the trial court must dismiss those claims without prejudice to refiling for lack of subject-matter jurisdiction. *Thomas*, 207 S.W.3d at 340. In this way, the doctrine—as a prerequisite to suit—creates some tension with conventional sovereign immunity law.

B. With or Without Prejudice?

Ordinarily, where immunity is asserted in a plea to the jurisdiction and the plaintiff has been afforded a reasonable opportunity to amend but still does not allege facts that would constitute a waiver of immunity, the trial court should dismiss the plaintiff's action with prejudice, because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined. *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). It is true that where a plaintiff's pleadings do not affirmatively demonstrate an incurable jurisdictional defect, the plaintiff should be afforded the opportunity to replead. *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004)). But one court has noted that the Legislature amended section 311.034 of the Government Code "to prevent courts from abating cases to allow plaintiffs to comply with statutory prerequisites to suits against governmental entities." *Dallas County v. C. Green Scaping, L.P.*, 301 S.W.3d 872, 879 (Tex. App.—Dallas 2009, no pet.). This will be particularly true in administrative matters. Unlike common-law claims, over which a trial court has jurisdiction by way of its general statutory and constitutional powers, a trial court may hear an administrative matter only if allowed by statute. *Marble Falls Indep. Sch. Dist. v. Sco*tt, 275 S.W.3d 558, 566 (Tex. App.—Austin 2008, pet. denied). Where the relevant statutes in an administrative case—with no appurtenant common-law claims—require as jurisdictional prerequisites to seeking judicial review that the plaintiff exhaust its administrative remedies, a trial court never has jurisdiction over the case until exhaustion occurs and cannot, therefore, abate the case to allow time to cure. *Id*. Consequently, until the Supreme Court addresses and resolves this issue—which it has not yet done—a prudent practitioner seeking to sue a governmental entity under a statute granting an agency exclusive jurisdiction over the underlying dispute would be well advised to ensure that administrative remedies are properly exhausted before filing suit. Failing to do so may give rise to a permanent jurisdictional bar.

C. Keep Your Hands off My Stack: Takings Claims

Exhaustion may stand as a significant impediment even to claims that otherwise are not subject to sovereign or governmental immunity. A prime example would be claims under the constitution's Takings Clause. As a basic matter, sovereign immunity from suit does not protect the state from a claim under the Takings Clause. *State v. Brownlow*, 319 S.W.3d 649, 652 (Tex. 2010). No statutory waiver of immunity is necessary in such a case because the Texas Constitution waives immunity for the taking, damaging or destruction of property for public use. *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 801 (Tex. 2013); *accord Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011). However, the run-up to a takings case may implicate exhaustion.

Cities often are on the receiving end of takings suits. Frequently, these claims arise from zoning decisions or code enforcement actions. In the former case, it is noteworthy that chapter 211 of the Local Government Code provides that a person aggrieved by a decision of a zoning officials may appeal to the city's board of adjustment. *See* Tex. Loc. Gov't Code Ann. § 211.010(a)(1) (Vernon 2008). Where a statute provides that a party "may" appeal, such language has been interpreted to mean that "an aggrieved party may appeal, but if an appeal is taken, it *must* be taken to the administrative agency." *City of Paris v. Abbott,* 360 S.W.3d 567, 573 (Tex. App.—Texarkana 2011, pet. denied) (emphasis in original). Judicial review under chapter 211 is available by filing a petition "within 10 days after the date the decision [of the board of adjustment] is filed in the board's office." Tex. Loc. Gov't Code Ann. § 211.011(b) (Vernon 2008) (punctuation and language added). As a result, administrative remedies available under chapter 211 of the Local Government Code must be exhausted before a party may seek judicial review of a determination made by an administrative official. *Lazarides v.*

Farris, 367 S.W.3d 788, 798 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Failure to comply with this requirement before seeking judicial review deprives a court of jurisdiction to decide the case. *Id*.

Similarly, Texas law permits cities to establish commissions to consider violations of ordinances related to public safety. *See City of Dallas v. Stewart*, 361 S.W.3d 562, 565 (Tex. 2012) (collecting statutes). Under sections 54.039(f) and 214.0012(f), the Local Government Code authorizes substantial evidence review of standards commissions' decisions. *Id*. at 566; *see also* Tex. Loc. Gov't Code Ann. §§ 54.039(f), 214.0012(f) (Vernon 2008). Concurrently, a city may not take a person's property without first paying just compensation. Tex. Const. art. I, § 17(d); *Stewart*, 361 S.W.3d at 566. In *Stewart*, the Supreme Court considered the intersection between administrative review in municipal standards cases and assertion of inverse condemnation claims. The court concluded that takings suits are fundamentally constitutional suits that must ultimately be decided by a court, since agencies lack the ultimate power of constitutional construction. *Id*. at 568. But it also observed the principle that "all property is held subject to the valid exercise of the police power," which indicates that the government commits no taking when it abates what is, in fact, a public nuisance. *Id*. at 569. Like fundamental constitutional questions, though, the court asserted that nuisance determinations must ultimately be made by a court, not an administrative body, when the property owner contests the administrative finding. *Id*. The court was given pause to consider arguments that permitting judicial review of nuisance determinations would open the door to scores of lawsuits challenging long-concluded nuisance decisions and that the prospective burden upon cities of going to court to abate every nuisance would be excessively burdensome. It responded with three counterpoints:

- First, takings claims must be asserted on appeal from the administrative determination. Although agencies have no power to preempt a court's constitutional construction, a party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit. … [I]f a remedial procedure might have obviated the need for a takings suit, then the property simply had not, prior to the procedure's use, been taken *without just compensation*. Explaining further, the court stated, "even though a constitutional claim may be asserted for the first time in the district court upon appeal of an agency order, a failure to comply with the appeal deadlines and/or the failure to so assert the constitutional claim at that time, precludes a party from raising the issue in a separate proceeding." A party cannot attack collaterally what she chooses not to challenge directly. Cities are not, therefore, subject to new takings suits for long-concluded nuisance abatements.
- Second, property owners rarely invoke the right to appeal. This may be due to the correctness of the nuisance finding, to the time and expense involved, or to the Local Government Code's narrow thirty day window for seeking review.
- Third, and perhaps most importantly, de novo review is required only when a nuisance determination is appealed. Thus, the City need not institute court proceedings to abate every nuisance. Rather, the City must defend appeals of nuisance determinations and takings claims asserted in court by property owners who lost before the agency.

City of Dallas v. Stewart, 361 S.W.3d 562, 579-80 (Tex. 2012) (emphasis in original) (internal citations omitted). Both *Lazarides* and *Stewart*, then, indicate that exhaustion of remedies is required in an administrative dispute even if the ultimate defensive issue is constitutional in nature. Absent the requisite exhaustion, the otherwise-applicable constitutional elimination of immunity is never invoked to bestow jurisdiction on the trial court. *See Stewart*, 361 S.W.3d at 579. In the context of a takings case, a final decision is a minimum requirement for ripeness. A decision by an agency is final if it is (1) definitive, (2) promulgated in a formal manner; and (3) one with which the agency expects compliance. *Garrett Operators, Inc. v. City of Houston*, 360 S.W.3d 36, 42 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Otherwise, administrative orders are generally final and appealable if they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. *Id*. All of these requirements must come together, for if a plaintiff does not allege a valid inverse condemnation claim, governmental immunity applies and the trial court should grant a plea to the jurisdiction. *Id.* at 43.

D. The Catch-All: APA Review Authorization

Whether judicial review of an administrative action is available at all generally is a question of statutory authorization. Usually, there is no right to judicial review of an administrative order unless a statute explicitly provides that right or the order adversely affects a vested property right or otherwise violates a constitutional right. *Houston Mun. Emp. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157 (Tex.

2007); *Tex. Dep't of Protective & Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172 (Tex. 2004). At least where agencies of political subdivisions are concerned, when an act is either silent on the question of appeal or expressly denies a right to appeal, a party may appeal only where the administrative action complained of violates a constitutional provision. *Ferrell*, 248 S.W.3d at 157. Preclusion of judicial review may exist, for example, when the words "final and binding" are used in the relevant statute to describe an administrative decision. *Id*. at 158. In the absence of express statutory language prohibiting judicial review, a legislative intent to prohibit judicial review must be established by specific legislative history or other reliable evidence of intent. *Mega Child Care*, 145 S.W.3d at 199. Hence, these limitations may not be quite as sweeping as they seem.

Unless otherwise provided, the contested-case and judicial-review procedures of the Administrative Procedure Act ("APA")[20] apply to state agency-governed proceedings. *Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 563 (Tex. App.—Austin 2008, pet. denied). The APA includes, in section 2001.171, the phrase "is entitled to judicial review," which the Supreme Court has held to be unambiguous and indicative of an independent right to judicial review for those who satisfy the section's threshold requirements.[21] *Mega Child Care*, 145 S.W.3d at 196. Specific exemptions from the APA's procedures are provided in section 2001.221 through .226. *See* Tex. Gov't Code Ann. §§ 2001.221-.226 (Vernon 2008 & Supp. 2013). If a state agency is not within the listed exemptions, and if its enabling statute neither specifically authorizes nor prohibits judicial review, section 2001.171 provides an independent right to judicial review. *Tex. Dep't of Protective & Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 197 (Tex. 2004). By providing an independent right to judicial review in section 2001.171, the Legislature necessarily understood that state agencies would be sued in court by persons exercising that right, that contested-case decisions of those agencies would be judicially reviewed under the standards set forth in section 2001.174, and that the challenged administrative decisions would be either affirmed, reversed, or remanded as provided by section 2001.174. *Id*. at 198. Consequently, the Supreme Court determined, section 2001.171 provides a limited waiver of sovereign immunity. *Id*. With that said, section 2001.171 itself explicitly requires exhaustion of "all administrative remedies available," so exhaustion remains a jurisdictional prerequisite to suit. *See* Tex. Gov't Code Ann. § 2001.171 (Vernon 2008); *cf*. Tex. Gov't Code Ann. § 311.034 (Vernon 2013).

Under section 2001.174 of the APA, a reviewing court acts in an appellate capacity and may not substitute its judgment for that of the agency. *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 17 (Tex. 2000). A court may reverse the agency's decision only if the decision (1) violates a constitution or a statute, (2) exceeds the agency's statutory authority, (3) was made through unlawful procedure, (4) is affected by an error of law, (5) is not supported by substantial evidence, or (6) is arbitrary and capricious or an abuse of discretion. Tex. Gov't Code Ann. § 2001.174(2) (Vernon 2008); *Bennett*, 35 S.W.3d at 17. Even if relying on one of the enumerated bases for reversal, however, parties must complete the agency process before seeking a judicial determination of whether the agency's scope of review was procedurally defective, contrary to statutory provisions or beyond its authority. *See Tex. Educ. Agency v. Cypress-Fairbanks I.S.D.*, 830 S.W.2d 88, 90 (Tex. 1992) (applying statutory predecessor to APA). The agency process is not exhausted without the filing and overruling of a motion for rehearing, and that final step is a jurisdictional prerequisite to judicial review by the district court and cannot be waived by action of the parties. *See Lindsay v. Sterling*, 690 S.W.2d 560, 563 (Tex. 2985) (applying statutory predecessor to APA);[22] *see also Gonzales County Underground Water Conservation Dist. v. Water Prot. Ass'n*, No. 13-11-00319-CV, 2012 Tex. App. LEXIS 4382, at *8-9 (Tex. App.—Corpus Christi May 31, 2012, no pet.) (mem. op.) (applying rule to current version of APA). Ultimately, a decision in a contested case is final: when the time to file a motion for rehearing expires without a motion being filed; on the date an order overruling a timely motion for rehearing is rendered; on the date a timely motion for rehearing is overruled by operation of law; when a state agency finds that a decisions must have immediate effect to avoid imminent public peril; or on a date agreed upon by the parties. *Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 565 (Tex. App.—Austin 2008, pet. denied). Several cases have afforded an abatement to allow a curing opportunity to parties seeking judicial review of an agency's administrative determination, but that procedure has applied in cases

[20] *See* Tex. Gov't Code Ann. § 2001.001 et seq. (Vernon 2008 & Supp. 2013).

[21] Section 2001.171 provides:

> A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.

Tex. Gov't Code Ann. § 2001.171 (Vernon 2008).

[22] *See now* Tex. Gov't Code Ann. §§ 2001.145-146 (Vernon 2008).

where the appealing parties were attempting to bring common-law claims in addition to seeking judicial review of an administrative decision. *Id*. at 566; *accord O'Neal v. Ector County Indep. Sch. Dist.*, 251 S.W.3d 50, 52 (Tex. 2008) (if agency has exclusive jurisdiction of some claims but no jurisdiction of others, trial court may abate its case until administrative proceedings are concluded). If that is not the case, as a jurisdictional prerequisite to seeking judicial review under the APA, a party must both file a motion for rehearing and wait for a final decision on the motion to bestow jurisdiction upon the trial court over the case, even for the limited purpose of abating the case to allow time to cure. *Scott*, 275 S.W.3d at 566.

Timing may be trickier than may appear in the first instance. Where the statute at issue in an APA contested case provides a judicial filing deadline keyed to finality of the agency order, no conflict is likely to be found between the statute and the APA. *See Simmons v. Tex. State Bd. of Dental Exam'rs*, 925 S.W.2d 652, 653 (Tex. 1996).[23] But if the statute sets a deadline based on another occurrence, such as service of notice of a decision, a conflict may exist which requires judicial filing before expiration of the motion for rehearing provision of the APA. In that case, an aggrieved party may file a petition for judicial review within the enabling statute's deadline, then file a motion to reinstate the case once the APA's rehearing requirement is satisfied. *See id*. at 653-54.

E. Finish What You Started: Complete Exhaustion

As noted previously, exhaustion of remedies requires a party in an administrative proceeding to await that proceeding's completion, thereby securing all available administrative relief before seeking judicial review of the agency's action. *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000). Review of whether administrative remedies have been exhausted, as an issue of subject-matter jurisdiction, is a matter of law which will be reviewed on appeal de novo. *Thomas v. Am. Home Assur. Co.*, 403 S.W.3d 512, 517 (Tex. App.—Dallas 2013, no pet.). When a statute requires exhaustion of administrative remedies before a plaintiff may file suit, the plaintiff bears the burden to show he has met the prerequisite to suit. *Pruitt v. Int'l Ass'n of Fire Fighters*, 366 S.W.3d 740, 743 (Tex. App.—Texarkana 2012, no pet.); *Dworschak v. Transocean Offshore Deepwater Drilling, Inc.*, 352 S.W.3d 191, 200 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Based on that burden, a plaintiff's failure to exhaust may be raised by plea to the jurisdiction or by a no-evidence motion for summary judgment. *See In re Tex. Mut. Ins. Co.*, 321 S.W.3d 655, 660 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding); *Dworschak*, 352 S.W.3d at 200. Nor is creative pleading a fruitful evasive strategy. A party cannot circumvent an agency's exclusive jurisdiction by filing a declaratory judgment action if the subject matter of the action is one "over which the Legislature intended the administrative agency to exercise exclusive jurisdiction." *Blue Cross Blue Shield v. Duenez*, 201 S.W.3d 674, 676 (Tex. 2006). Similarly, exhaustion cannot be properly bypassed through filing a class action lawsuit. *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006).

As should be apparent by the term itself, exhaustion of administrative remedies generally requires concluding all steps of the administrative process. As a general rule, judicial review of administrative orders is not available unless all administrative remedies have been pursued to the fullest extent. *Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 683 (Tex. 1983). Concern for efficient administrative procedure "requires consideration of the validity of interim orders only upon appeal from final orders." *Id*. And while waiver of the process may sometimes be established by conduct, that conduct must be unequivocally inconsistent with claiming a known right. *Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 353 (Tex. 2005). An agency's hearing of the merits of a party's complaint while reserving a ruling on its timeliness, for example, is not unequivocally inconsistent with later denying the complaint on the latter ground. *Id*. In other words, informality in exhaustion generally is insufficient. While a complainant's letter, phone call, or chance conversation with an agency official might give the agency the first chance to consider his grievance, "exhaustion of administrative remedies generally requires compliance rather than avoidance." *Id*. at 354. Workers' compensation cases often provide germane illustrations of these concepts in practice.

1. Workers' Compensation Cases

The Workers' Compensation Act vests the power to award compensation benefits solely in the division of workers' compensation of the Texas Department of Insurance, subject to judicial review. *In re Liberty*

[23] As an example, the court referred to its decision in *Lindsay v. Sterling*, 690 S.W.2d 560 (Tex. 1985), and noted that the proffered conflict in that case was no real conflict at all, since the Alcoholic Beverage Code prescribed a thirty-day filing period that ran from the date the agency order became final. Thus, the thirty-day period did not commence until the motion for rehearing was overruled. By contrast, the Dental Practice Act required an aggrieved dentist to seek judicial review in district court within thirty days of the date of the license revocation notice, which was in conflict with the APA's rehearing requirement timeline. 925 S.W.2d at 653.

Mut. Fire Ins. Co., 295 S.W.3d 327, 328 (Tex. 2009); *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 612 (Tex. 1996).[24] Thus, a court cannot award compensation benefits except on appeal from a division ruling, nor can it award damages for a denial in payment of compensation benefits without a determination by the division that such benefits were due. *Am Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001). A claim for damages from denied medical treatment, therefore, is made no more viable simply by restating it under theories of negligence, fraud and statutory violations. *Id*. No due process violation is made out by requiring adherence to the prescribed administrative review procedures, either. The exhaustion process "provides automatic access to the Commission's dispute resolution procedures and subsequent access to the courts if the Commission determines that a claimant is entitled to a disputed benefit." *Pickett v. Tex. Mut. Ins. Co.*, 239 S.W.3d 826, 835 (Tex. App.—Austin 2007, no pet.). Whether school district employees were required to exhaust administrative remedies before suing for workers' compensation retaliation was subject to some question in years past. *Larsen v. Santa Fe Indep. Sch. Dist.*, 296 S.W.3d 118, 124 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (collecting cases). That question was largely mooted by the Supreme Court's holding in *Travis Cent. Appraisal Dist. v. Norman* that the current statutory scheme under the Labor Code is too internally inconsistent to satisfy the requirement that a waiver of governmental immunity be clear and unambiguous, meaning that immunity for retaliatory discharge claims under Labor Code chapter 451 is no longer waived. 342 S.W.3d 54, 58-59 (Tex. 2011). Additionally, the exclusive-remedy bar provided by the Workers' Compensation Act, where applicable, cuts off the Tort Claims Act's waiver of immunity, since in adopting the two statutory schemes, the state retained its immunity and provided its employees an alternative remedy through workers' compensation coverage. *City of Bellaire v. Johnson*, 400 S.w.3d 922, 924 (Tex. 2013) (citing *Duhart v. State*, 610 S.W.2d 740, 743 (Tex. 1980)). Consequently, exhaustion of administrative remedies becomes all the more crucial in such cases, since realistically they are the only remedies available with respect to a governmental employer.

The Workers' Compensation Act provides that recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance for a work-related injury. Tex. Lab. Code Ann. § 408.001(a) (Vernon 2006); *Thomas v. Am. Home Assur. Co.*, 403 S.W.3d 512, 517 (Tex. App.—Dallas 2013, no pet.). The Act provides a dispute resolution process consisting of four possible steps. *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 437 (Tex. 2012). Those steps are a benefit review conference, a contested case hearing, review by an administrative appeals panel and judicial review. *See* Tex. Lab. Code Ann. §§ 410.021, .151, .202, .251 (Vernon 2006); *Ruttiger*, 381 S.W.3d at 437. A claimant is not required to continue through every step if the dispute is resolved at any particular level. *Ruttiger*, 381 S.W.3d at 437. But if a dispute persists or is unresolved, the process must be exhausted. *Thomas*, 403 S.W.3d at 520. To illustrate, where no factual dispute remains for the division to resolve after a benefit review conference and the division approves the parties' agreement, it is unnecessary for the claimant to continue through the administrative process before the trial court will have jurisdiction. *Ruttiger*, 381 S.W.3d at 436-37. If the party remains aggrieved by a factual determination, however, the party must timely invoke each administrative remedy available in the process until exhaustion occurs. *See Cont'l Cas. Co. v. Rivera*, 124 S.W.3d 705, 712 (Tex. App.—Austin 2003, pet. denied). In that instance, neither declaratory nor mandamus relief will be available in the absence of exhaustion. *See id*. at 712-13.

2. Civil Service Cases

Exhaustion also may become relevant in the governmental litigation environment in civil service cases. Chapter 143 of the Local Government Code, known as the Fire Fighter and Police Officer Civil Service Act,[25] outlines the disciplinary process by which a municipality may suspend an officer and how that officer may appeal the suspension. *City of Desoto v. White*, 288 S.W.3d 389, 392 (Tex. 2009). Under that statute, a police department or fire department may suspend a covered employee for a violation of civil service rules. *Id*. The officer may then appeal the suspension to either the Fire Fighters' and Police Officers' Civil Service Commission, or an independent third-party hearing examiner. *City of Desoto v. White*, 288 S.W. 3d 389, 392 (Tex. 2009). If the officer appeals to the Commission, the officer may seek review of the Commission's decision with a district court, which conducts a de novo review. *Id*. But if the officer appeals to a hearing examiner, the officer waives subsequent review by a district court, except on the grounds that the hearing examiner was without

[24] At the time of *Saenz*, the agency was known as the Texas Workers' Compensation Commission. References to the Workers' Compensation Commission no mean the division of worker's compensation of the Texas Department of Insurance. *See* Tex. Lab. Code Ann. § 401.025 (Vernon 2006); *see also id.* § 401.011(13-a), (16-a) (Vernon Supp. 2013).

[25] *See* Tex. Loc. Gov't Code Ann. §§ 143.001 et seq. (Vernon 2008 & Supp. 2013).

jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion or other unlawful means. *Id.* The statute then provides how the officer makes the appellate election. Within 120 hours of the suspension, the department head shall file a written statement with the Commission giving the reasons for the suspension and also immediately deliver a copy of the statement to the suspended officer. *Id*. The statement, also referred to as a letter of disciplinary action, must point out each civil service rule alleged to have been violated and must describe the alleged acts of the person that the department head contends are in violation of the civil service rules. *Id*. at 392-93. It must inform the suspended officer that if he chooses to appeal, he must file a written appeal within ten days of receiving the letter and that he may elect to appeal to an independent third party hearing examiner instead of to the Commission. *Id* at 393. Importantly, the letter must also inform he officer that if he elects to appeal to a hearing examiner, he waives all rights to appeal to a district court except on grounds that "the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means." *Id*. At issue in *White* was whether omission from the letter of the required waiver language constituted a jurisdictional defect.

The court determined that, because the notice protects the officer's appellate rights, it is mandatory. *White*, 288 S.W.3d at 395. But the court was quick to point out that "just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional." *Id*. (quoting *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999)). Of central important in *White* was the fact that the notice language was not a statutory prerequisite to suit, as the statute requires the notice but does not specifically mandate it as a prerequisite to suit or appeal. *White*, 288 S.W.3d at 396. Also significant in the court's view was the fact that, under chapter 143, only a police officer or fire fighter may invoke the appeals process. *Id*. at 397. Thus, said the court, when it comes to invoking the jurisdiction of the Commission or hearing examiner, the focus must always be on the officer's actions. *Id*. As such, the city's letter did not invoke the appeals process. *Id*. Considering the appropriate remedy for the notice omission, the court observed that the city is restricted to its original letter in proceedings before the Commission, while the appealing officer must strictly adhere to the appeal invocation requirements. *Id*. at 400. If the officer has knowledge of the appeal limitation, the purpose of the notice provision is satisfied. *Id*. Accordingly, the court held that when the officer fails to appeal within the ten-day deadline and the failure is attributable to the officer, the appeal is jurisdictionally barred. *Id*. If, conversely, the officer's failure to appeal within the deadline is not attributable to the officer, the statute permits a reasonable extension of time for the officer to change his election and appeal to the Commission, thereby permitting judicial review. *Id*. The takeaway in this context is that the jurisdictional onus of exhaustion will fall on the aggrieved party seeking appeal, but that compliance may not be unfairly prejudiced by the other party's failure to comply with a mandatory statutory obligation.

F. Is You Is or Is You Ain't? Exceptions and Ultra Vires

As is true with many other legal doctrines, exhaustion of remedies is susceptible to exceptions. One such exception holds that a trial court may intercede before administrative remedies are exhausted where the administrative agency lacks jurisdiction. *Tex. Educ. Agency v. Cypress-Fairbanks I.S.D.*, 830 S.W.2d 88, 90 (Tex. 1992); *Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 683 (Tex. 1983). Another exception provides that a party need not exhaust administrative remedies when irreparable harm will be suffered and the agency is unable to provide relief. *Blue Cross Blue Shield v. Duenez*, 201 S.W.3d 674, 676-77 (Tex. 2006). In the absence of a showing that the agency could not provide relief, though, this exception will be inapplicable. *Id*. at 677. The doctrine of exhaustion of administrative remedies generally does not apply when there are purely questions of law involved. *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 892 (Tex. 1986), *overruled on other grounds*, *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000). However, interpretations of rights under contracts, where interpretation of those rights is statutorily assigned to the agency, do not constitute such pure questions of law. *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 892 (Tex. 1986). Exhaustion may not be required where a party availing itself of the statute's provisions is precluded from challenging the constitutionality of the statute. *See General Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991) (recognizing arguable basis of assertion that one who obtains benefit under Tax Code cannot later challenge constitutionality of Tax Code). In sum, the recognized exceptions include: (1) when an injunction is sought and irreparable harm would result; (2) when the administrative agency cannot grant the requested relief; (3) when the issue presented is purely a question of law; (4) when certain constitutional issues are involved; and (5) when an administrative agency purports to act outside its statutory powers. *Brennan v. City of Willow Park*, 376 S.W.3d 910, 916 (Tex. App.—Fort Worth 2012, pet. denied). Furthermore, futility is a recognized exception to the exhaustion

doctrine, but the claimant must show that it is certain that the claim will be denied on administrative appeal. *Ogletree v. Glen Rose Indep. Sch. Dist.*, 314 S.W.3d 450, 454 (Tex. App.—Waco 2010, pet. denied). Finally, exhaustion of administrative remedies is no required for *ultra vires* claims. *Lazarides v. Farris*, 367 S.W.3d 788, 798 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

A suit against a state official for acting outside his authority is not barred by sovereign immunity. *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 393 (Tex. 2011). Such a suit generally is referred to as an *ultra vires* suit. An *ultra vires* suit is one to require a state official to comply with statutory or constitutional provisions, and may be maintained as a declaratory judgment action. *Tex. Lottery Comm'n v. First State Bank of Dequeen*, 325 S.W.3d 628, 633-34 (Tex. 2010). Such a suit is to be distinguished from a suit challenging the validity of an ordinance or statute. *Id*. at 633. The landmark case on *ultra vires* suits is *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

In *Heinrich*, the Supreme Court held that suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Yet there are definite limits on such claims. Because the rule that *ultra vires* suits are not suits 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, it follows that these suits cannot be brought against the state, which retains its immunity, but must be brought against the state actors in their official capacity. *Id*. at 373.

Where a plaintiff sues only the governmental entity rather than its officials acting in their official capacities, the entity retains its sovereign immunity and courts are without subject-matter jurisdiction to entertain the claim. *Tex. Dep't of Ins. v. Reconveyance Servs.*, 306 S.W.3d 256, 259 (Tex. 2010). To fall within the *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial task. *Heinrich*, 284 S.W.3d at 372. Allegations that an agency official failed to fully comply with all of the intricacies of the governing statutes and rules are insufficient to confer jurisdiction. *Sanadco Inc. v. Office of the Comptroller of Pub. Accounts of Tex.*, No. 03-11-00462-CV, 2013 Tex. App. LEXIS 12013, at *26 (Tex. App.—Austin Sept. 26, 2013, no pet.) (mem. op.). Moreover, a claimant who successfully proves an ultra vires claim is entitled to prospective injunctive relief, as measured from the date of the injunction. *Id*. at 376.

By way of contrasting examples, a suit to recover possession of property unlawfully claimed by a state official is essentially a suit to compel a state official to act within the officer's statutory or constitutional authority, and the remedy of compelling return of land illegally held is prospective in nature. *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 393 (Tex. 2011). Similarly, prospective claims to require officials to comply with employee benefit provisions are proper, though they may require payment of money in the future. *Heinrich*, 284 S.W.3d at 377. But, to the extent retroactive relief, including past due fees, penalties, costs or other monetary damages are sought, sovereign immunity will bar the requested relief. *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 760 (Tex. 2011).

Returning to the central premise of this analysis, full exhaustion or invocation of a recognized exception will be critical if a statutory claim is to be maintained against a governmental entity. Exhaustion of administrative remedies is necessary in order to waive sovereign immunity, which otherwise typically forecloses suits against the government. *Sanadco Inc.*, 2013 Tex. App. LEXIS 12013, at *24. This is so because exhaustion is a prerequisite to suit, which is jurisdictional in a suit against a governmental entity. Tex. Gov't Code Ann. § 311.034 (Vernon 2013); *see also Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 515 (Tex. 2012); *Springfield v. Aetna Cas. & Sur. Ins. Co.*, 620 S.W.2d 557, 559 (Tex. 1981) (exhaustion of administrative remedies is prerequisite to judicial review). Additionally, a statutory basis for review of administrative action must be invoked, as no right to judicial review from the action of an administrative agency exists unless a statute provides for such review, the order adversely affects a vested property right or a constitutional violation is alleged. *Helton v. R.R. Comm'n*, 126 S.W.3d 111, 116 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Although the reasoning behind this general rule is usually unstated, the rule is a necessary corollary to the doctrine of sovereign immunity. *Dep't of Protective & Reg. Servs. v. Shutz*, 101 S.W.3d 512, 522 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *accord Helton v. R.R. Comm'n*, 126 S.W.3d 111, 116 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

IV. CONCLUSION

In the end, the line between the doctrine of exhaustion of remedies and other statutory prerequisites to suit is not always a distinct one. Nor is the distinction between true prerequisites to suit and statutory elements, which also may be considered in a jurisdictional challenge, always cut-and-dried. The

essential lesson, though, is that they need not be. All of these requisites may give rise to a successful jurisdictional challenge by a governmental defendant, and they should all be carefully considered and strategically accounted for if a claim against the government is to get much further than filing. Failing to plan accordingly is, as the saying goes, planning to fail.