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GOVERNMENTAL IMMUNITY: ATTACK AND DEFEND

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Sovereign immunity refers to the state's immunity from suit and liability. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Governmental immunity protects political subdivisions of the state, including cities and districts. *See City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995). The application of sovereign and governmental immunity and the statutes waiving that immunity is a hotly contested and evolving area of the law which has been the subject of many Texas appellate cases in the last 15 years. This paper discusses immunity in several contexts that may be of interest to lawyers who deal with state agencies and local governments: (1) appeals of administrative actions; (2) declaratory judgment actions attacking statutes and government rules and actions; (3) contract disputes; and (3) land title cases.

I. APPEALS OF AGENCY DECISIONS

In general, sovereign immunity bars judicial review of agency decisions. *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet.). There are two clear exceptions to this general rule: (1) when a statute authorizes judicial review, *see Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 198 (Tex. 2004); and (2) when an administrative decision adversely affects a vested property right or otherwise violates some provision of the state or federal constitutions, *see Continental Cas. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 404 (Tex. 2000).

A. Statutory Waivers of Immunity

1. APA § 2001.171

In *Mega Child Care*, a child care provider filed suit seeking judicial review of an order of the Texas Department of Protective and Regulatory Services, that revoked the provider's license to operate a day care facility after a contested case hearing. 145 S.W.3d at 173. The Department argued that sovereign immunity barred the provider's suit because no statute authorized judicial review of these decisions. *Id.* at 173-74.

The Texas supreme court held that section 2001.171 of the Texas Administrative Procedure Act (APA) "provides an independent right to judicial review when an agency enabling statute neither specifically authorizes nor prohibits judicial review" if the section's threshold requirements are satisfied. *Id.* at 197. 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

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§ 2001.171. The court's decision in *Mega Child Care* overturned a number of Austin court of appeals' decisions holding that section 2001.171 did not create a right of judicial review, but only provided a procedure for a suit for judicial review authorized by some other statute. *See* 145 S.W.3d at 173.

The court's holding that section 2001.171 provides an independent right to judicial review was, "as a practical matter, dispositive of the sovereign immunity issue:"

> When providing an independent right to judicial review in section 2001.171 of the APA, 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. Therefore, we conclude that section 2001.171 provides a limited waiver of sovereign immunity.

Id. at 197-98.

In other words, APA section 2001.174 waives an agency's immunity from a suit seeking judicial review, under APA standards, of a final decision in a contested case. The APA defines "contested case" as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." TEX. GOV'T CODE § 2001.003(1). If there was no right to the contested case at the agency, section 2001.174 does not apply and does not waive the agency's immunity from a suit for judicial review. *See Foster v. Teacher Ret. Sys.*, 273 S.W.3d 883, 887-88 (Tex. App.—Austin 2008, no pet.).

2. Agency enabling statutes

Mega Child Care did not make the other statutes providing for judicial review of agency decisions irrelevant. The Austin court of appeals has held that section 2001.174's independent right to judicial review applies only when the agency's enabling act "is silent" as to judicial review. *Coastal Habitat Alliance v. Pub. Util. Comm'n*, 294 S.W.3d 276, 282 (Tex. App.—Austin 2009, no pet.); *West v. Texas Comm'n on Envtl. Quality*, 260 S.W.3d 256, 260-61 (Tex. App.—Austin 2008, pet. denied). If the enabling act is not silent, the judicial review provisions of the enabling act apply, and the agency's immunity from a suit for judicial review is waived only to the extent provided in the enabling statute. *Coastal Habitat Alliance*, 294 S.W.3d at 282.

Many agency enabling statutes are not silent and have provisions that authorize judicial review of a different category of agency decisions than section 2001.174. For example:

(a) Any "person affected by a ruling, order, decision, or other act" of the Texas Commission on Environmental Quality (TCEQ) "may file a petition to review, set aside, modify, or suspend the act" in a Travis County district court. TEX. WATER CODE §§ 5.351, 5.354.

(b) "Any party to a proceeding" before the Public Utility Commission "is entitled to judicial review under the substantial evidence rule." TEX. UTIL. CODE § 15.001. *But see Coastal Habitat Alliance*, 294 S.W.3d 276 at 282 (holding that plaintiff who was not party to PUC proceeding was not entitled to judicial review under § 15.001).

(c) "Any party" to a gas utility case before the Railroad Commission "is entitled to judicial review under the substantial evidence rule." TEX. UTIL. CODE § 105.001(a).

(d) "[A]ny insurance company or other party at interest who is dissatisfied" with a "decision, order, rate, rule, form, or administrative or other ruling" of the Commissioner of Insurance may file a petition for review in a Travis County district court. TEX. INS. CODE §§ 36.201, 36.202. "Judicial review of the action is under the substantial evidence rule and shall be conducted under Chapter 2001, Government Code." *Id.* § 36.203. *But see Am. Sw. Ins. Managers, Inc. v. Texas Dep't of Ins.*, No. 03-10-00073-CV, 2010 WL 4053726, *3 (Tex. App.—Austin, Oct. 15, 2010, no pet.) (examiner's report to Commissioner was not an action of Commissioner under § 36.201).

(e) "Any interested person who is affected by the conservation laws of this state or orders" of the Railroad Commission "relating to oil or gas and the waste of oil or gas, and who is dissatisfied with any of these laws or orders, may file suit against the commission or its members in a court of competent jurisdiction in Travis County to test the validity of the law or order." TEX. NAT. RES. CODE § 85.241.

Thus, the enabling statutes for each agency must be examined to determine: (i) whether and to what extent the legislature has waived the agency's immunity from suit seeking judicial review of a particular agency action through those statutes; and (ii) whether the APA section 2001.171 waiver applies.

B. Inherent Right to Judicial Review

When the legislature remains silent or denies a right of judicial review, there is an inherent right to judicial review where the agency decision adversely affects a vested property right or otherwise violates some provision of the state or federal Constitution. *Continental Casualty*, 19 S.W.3d at 404; *City of Amarillo v. Hancock*, 239 S.W.2d 788, 790 (Tex. 1951). The plaintiff in such a suit must expressly plead an inherent right to judicial review and a vested property right or constitutional violation that supports that right. *Continental Casualty*, 19 S.W.3d at 405. If it does so, immunity does not bar the suit. *KEM Texas, Ltd. v. Texas Dep't of Transp.*, No. 03-08-00468-CV, 2009 WL 1811102, *6 (Tex. App.—Austin, June 26, 2009, no pet.) (mem. op.).

1. Vested right

The Texas Supreme Court has held that a vested right "must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from the demand of another." *Nat'l*

Carloading Corp. v. Phoenix-El Paso Express, 176 S.W.2d 564, 570 (Tex. 1944) (holding that shipper had no vested right to recovery of undercharges for due process purposes).

Some of the cases analyzing whether a plaintiff has a vested right for purposes of inherent judicial review have applied the analysis used for determining whether a plaintiff has a property or liberty interest entitled to due process of law under the state and federal constitutions. *See, e.g.*, *KEM*, 2009 WL 1811102 at *6. Other cases have treated vested rights for inherent review purposes as something different than property or liberty interests entitled to due process. *See, e.g., SSC Missouri City Operating Co., LP v. Texas Dep't of Aging & Disability Servs.*, No. 03-09-00299-CV, 2009 WL 4725286, *3-6 (Tex. App.—Austin, Dec. 8, 2009, pet. denied).

The case law on vested rights for purposes of inherent judicial review demonstrates the current difficulty in alleging a vested right in an appeal from an agency order. For example, nursing homes with Medicaid bed allocations and provider agreements were held to have no inherent right to judicial review of an agency's grant of waiver of the moratorium on additional Medicaid beds to a competitor. The Austin court of appeals held that the nursing homes' bed allocations and provider agreements created a "mere expectation" of occupancy of those beds, not a vested right. *SSC Missouri City*, 2009 WL 4725286 at *6; *see also ElderCare Props., Inc. v. Texas Dep't of Human Servs.*, 63 S.W.3d 551, 556 (Tex. App.—Austin 2001, pet. denied).

The owner of a billboard easement was held to have no inherent right to judicial review of a Texas Department of Transportation (TxDOT) decision denying a permit for a billboard at the easement location. The Austin court of appeals held that its rights under the billboard easement were not vested rights, but merely "expectations of a potential and contingent interest," because the right to erect a billboard at the easement's location has been expressly contingent on obtaining licenses and permits from TxDOT since 1972. *KEM*, 2009 WL 1811102 at *6.

The holder of a certificate of convenience and necessity was held to have no inherent right to judicial review of an agency order decertifying part of its service area. The Austin court of appeals held that certificate of convenience and necessity was not a "vested right" on the ground that it is a statutory right made expressly subject to continuing regulation. *Sw. Bell Tel. Co. v. Pub. Util. Comm'n*, 735 S.W.2d 663, 668 (Tex. App.—Austin 1987, no writ); *see also Creedmoor-Maha*, 307 S.W.2d at 525.

In other cases, courts have found that a vested right had been adversely affected, giving rise to an inherent right to judicial review. The Austin court of appeals has found a vested right to keep money that has been paid for services rendered. *See EduCare Cmty. Living-Normal Life of North Texas v. Dep't of Mental & Mental Retardation*, No. 03-01-00149-CV, 2001 WL 1097714 (Tex. App.—Austin, Sept. 20, 2001, no pet.) (mem. op.) (holding that provider had vested right to money paid for services rendered for purpose of appeal of order requiring repayment); *but see S.C. San Antonio, Inc. v. Texas Dep't of Human Servs.*, 891 S.W.2d 773, 778 (Tex. App.—Austin 1995) (hospital did not have vested right to additional payments for services rendered where additional payment was contingent on meeting certain criteria). The court has also held that a Medicaid contract was vested right for purposes of appeal of order terminating contract. *Texas State Dep't of Human Res. v. Silver Threads Co.*, 569 S.W.2d 49, 51 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

Much earlier Texas supreme court cases have held that other statutory and regulatory rights were vested rights for inherent judicial review purposes. *See, e.g., Bd. of Firemen's Relief & Ret. Fund Tr. of Texarkana v. Hamilton*, 386 S.W.2d 754, 755 (Tex. 1965) (claim for pension benefits as provided by statute "involves a property right"); *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 433 (Tex. 1963) (holding that banks had vested rights in state charters that created inherent right of judicial review of order granting certificate of authority to competitor); *Brazosport Sav. & Loan Ass'n. v. American*, 342 S.W.2d 747, 750 (Tex. 1961) (same).

The Austin court of appeals has sometimes characterized *Chemical Bank* and *Brazosport* as a part of a separate line of cases holding that "franchises" are vested rights that may give rise to an inherent right to judicial review. *See Eldercare*, 63 S.W.3d at 555; *SSC Missouri City*, 2009 WL 4725286 at *3. But the Austin court and other courts have held that a permit or regulatory approval does not always rise to the level of a franchise. *See SSC Missouri City Operating Co., LP*, 2009 WL 4725286 at *3 (holding that Medicaid bed allocations and provider agreements did not create franchise); *White Top Cab Co. v. City of Houston*, 440 S.W.2d 732, 734-35 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (finding that permits to operate taxicab on city streets were not franchises). A franchise involves something more than a permit or approval, although exactly what more is not clear. *Id.*

2. Scope of review when vested rights affected

If a court finds a "vested right," then the plaintiff must prove that it was deprived of due process at the agency level. *See Eldercare*, 63 S.W.3d at 555 n.4. In its opinion in *Continental Casualty Ins. Co. v. Functional Restoration Associates*, 964 S.W.2d 776 (Tex. App.—Austin 1998), which was later reversed by the Texas supreme court, the Austin court of appeals held that the inherent right of judicial review does not invoke a de novo review of the merits of the decision, but inquires into whether the plaintiff was afforded procedural and substantive due process at agency. *Id.* at 782.

The substantive due process review outlined in the court of appeal's opinion is the pre-APA judicial review. The court examines whether the agency order is arbitrary and capricious. A decision that is not supported by substantial evidence is arbitrary and capricious. *Id.* In his dissent at the supreme court, Chief Justice Phillips agreed that the trial court "should determine whether the agency decision is supported by substantial evidence, is not arbitrary and capricious, and satisfies procedural due process." *Continental Casualty*, 19 S.W.3d at 408.

These statements appear to be inconsistent with an earlier Austin court of appeals' decision in which the court stated that a party may seek judicial review, apart from any statutory authority, "on the narrow issue of whether procedural due process has been violated, but a party may not bootstrap other claims to the due-process claim." *Sw. Airlines Co. v. Texas High-Speed Rail Auth.*, 867 S.W.2d 154, 159 (Tex. App.—Austin 1993, writ denied); *see also Blair v. Texas Dep't of Human Servs.*, 837 S.W.2d 670, 672 (Tex. App.—Austin 1992, writ denied) (stating that the "Court should focus on whether the DHS fair hearing process afforded Blair her right to procedural due process under the Constitution").

3. Other constitutional violations

Although the cases say that there is an inherent right to judicial review where a vested right is adversely affected *or* other constitutional violations, the case law mainly focuses on whether there is a "vested right" entitled to due process protections. But in one recent case, the plaintiff alleged that an agency order violated the Supremacy Clause of the U.S. Constitution, because it was in conflict with a federal statute, 7 U.S.C. § 1926(b), and that the statute authorizing the agency order violated the "Open Courts" guaranty in the Texas Constitution, because it provided that the agency proceeding was not a contested case under the APA and prohibited judicial review of the order. The Austin court of appeals reached and decided the merits of each of these constitutional arguments. *See Creedmoor-Maha*, 307 S.W.3d at 518-524.

4. Ultra vires agency actions

The Austin court of appeals has held that claims that an agency's action is ultra vires of the agency's statutory authority also fall within courts' "inherent jurisdiction to protect against agency action that is … ultra vires of the agency's statutory authority," and that sovereign immunity does not bar those claims. *See, e.g., Merritt v. Cannon*, No. 03-10-00125-CV, 2010 WL 3377778, *2 (Tex. App.—Austin, Aug. 27, 2010, pet. denied) (mem. op.); *Creedmoor-Maha*, 307 S.W.3d at 514-15; *KEM*, 2009 WL 1811102 at *5.

The Austin court relies on a line of cases that hold that courts have inherent power to determine whether an agency action was ultra vires," including one case that held that immunity did not bar such a suit against the agency. *Texas Highway Comm'n v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525, 530 (Tex. 1963) (holding that immunity did not bar suit against agency claiming agency order was outside its statutory authority); *see also City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 683 (Tex. 1983) (determining that court had jurisdiction over ultra vires claim against agency, although plaintiff had not exhausted administrative remedies, with no discussion of immunity); *Sw. Bell Tel. Co. v. Pub. Util. Comm'n*, 735 S.W.2d 663, 667 (Tex. App.—Austin 1987, no writ) (stating that courts have "inherent power to hear and determine whether the agency action in controversy was ultra vires," with no discussion of immunity).

The extent to which sovereign immunity bars a declaratory judgment action claiming ultra vires conduct is discussed in Section II.B.2 below. But it should be noted that the Texas supreme court case discussed in that Section, *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009), holds that immunity does not bar a declaratory judgment suit against a governmental official, in his or her official capacity, seeking a declaration that the official has acted outside his or her constitutional or statutory authority or has failed to perform a purely ministerial action, although immunity limits the relief that may be sought in such a suit. *Id.* at 372. Immunity does, however, bar such a suit against the governmental entity itself. *Id.* at 372-73. *Merritt*, *Creedmoor-Maha*, and *KEM* do not distinguish between ultra vires suits against the agency and ultra vires suits against agency officials acting in their official capacity, although in each case the court found there was no inherent right to review.

III. DECLARATORY JUDGMENT ACTIONS

A. APA § 2001.038 Actions

APA section 2001.038 provides that: "The validity or applicability of a rule … may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." TEX. GOV'T CODE § 2001.038(a). The declaratory judgment action must be brought in Travis County, and the agency must be made a party. *Id.* § 2001.038(b), (c).

The legislature's requirement that an agency be made a party to the declaratory judgment action waives immunity from suit for an action that properly invokes section 2001.038. *Combs v. Entm't Publ'ns, Inc.*, 292 S.W.3d 712, 720 (Tex. App.—Austin 2009, no pet.); *Texas Dep't of Human Servs. v. ARA Living Centers of Texas, Inc.*, 833 S.W.2d 689, 693 (Tex. App.—Austin 1992, writ denied).

To properly invoke section 2001.038, and its waiver of immunity, a suit must challenge the validity or application of a specific agency rule, or of an agency statement or order that falls within the APA definition of a rule. *See, e.g., Combs v. City of Webster*, 311 S.W.3d 85, 100 (Tex. App.—Austin 2009, pet. denied) (holding that § 2001.038 did not waive immunity where plaintiff failed to identify rule or other statement of general applicability under attack); *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 269 (Tex. App.—Austin 2002, no pet.) (holding that § 2001.038 did not waive immunity where plaintiff failed to identify rule being challenged).

The Austin court of appeals has recently held that section 2001.038 also waives an agency's immunity from injunctive relief enforcing a declaration under the statute. "Allowing plaintiffs to challenge the validity of an agency rule but barring injunctive relief preventing application of the challenged rule would defeat the purpose of section 2001.038, which "is to obtain a final declaration of a rule's validity before the rule is applied." *Texas Dep't of Public Safety v. Salazar*, 304 S.W.3d 896, 903 (Tex. App.—Austin 2009, no pet.), *citing Rutherford Oil Corp. v. General Land Office*, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989, no writ).

However, section 2001.038's waiver of immunity "does not extend to permitting declarations having the effect of establishing a right to retrospective monetary relief." *Texas Health & Human Servs. Comm'n v. El Paso County Hosp. Dist.*, 351 S.W.3d 460, 487 (Tex. App.—Austin, Aug. 4, 2011, pet. filed). This case is discussed in more detail in Section II.B.2(c), below.

B. UDJA Actions Against Governmental Entities

1. Immunity waiver for challenges to validity of statutes

In a 2010 case, the Texas supreme court confirmed that the Uniform Declaratory Judgment Act (UDJA), TEX. CIV. PRAC. & REM. CODE ch. 37, waives a governmental entity's immunity from a declaratory judgment action challenging the validity of a statute or ordinance. *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633-34 (Tex. 2010).

The issue in *First State Bank* was whether a provision of the UCC rendered two sections of the Texas Government Code ineffective to the extent those sections restricted or prohibited the assignment of Texas Lottery prize payments. *Id.* at 634. The court held a suit challenging the validity of a statute – not the actions of an individual under a statute – is not an ultra vires claim that may only be brought against a government official acting in his or her official capacity. *Id.* Because the UDJA "permits statutory challenges and governmental entities may be bound by those challenges," it "contemplates entities must be joined in those suits." *Id.* at 634, *citing Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994). Therefore, the UDJA necessarily waives those governmental entities' immunity. *Id.*

In *Leeper*, the court determined that governmental entities are not immune from an award of attorney's fees under the UDJA in a declaratory judgment suit that challenges the validity of a statute. *Id.* at 446.

2. Exception to immunity for challenges to ultra vires actions

In 2009, in *City of El Paso v. Heinrich*, the Texas supreme court attempted to clarify when governmental immunity bars a suit seeking a declaration that a governmental entity has acted, or is acting, in violation of a statute or constitutional provision. In *Heinrich*, the widow of a police officer sued the City claiming that the City's reduction of her pension was not authorized by the statute governing the fund. The widow sought, among other things, a declaratory judgment on her pension entitlement and an injunction enforcing the declaratory judgment.

(a) Against officials only. The 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." 284 S.W.3d at 372. The rational for this exception to immunity is that: "A state official's illegal or unauthorized actions are not acts of the State. Accordingly, an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars." *Id.* at 370, *quoting Federal Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 404 (Tex. 1997). These ultra vires suits "do not attempt to exert control over the state – they attempt to reassert the control of the state." *Heinrich*, 284 S.W.3d at 372.

However, the governmental entity – as opposed to the its officers acting in their official capacities – remains immune from these ultra vies suits. *Id.* at 372-73; *see also Univ. Interscholastic League v. Sw. Officials Ass'n, Inc.*, 319 S.W.3d 952, 965 (Tex. App.—Austin 2010, no pet.) (holding that immunity barred UDJA action claiming rule was ultra vires where plaintiffs sued agency only); *Texas Dep't of State Health Services v. Holmes*, 294 S.W.3d 328, 335-36 (Tex. App.—Austin 2009, pet. denied) (finding that immunity barred UDJA action against agency claiming that agency exceeded its statutory authority, but not against official acting in official capacity).

(b) Proper ultra vires allegations. *Heinrich* held that, to fall within the ultra vires exception to governmental immunity, "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 act." *Heinrich*, 284 S.W.3d at 372.

In several recent decisions, the Austin court of appeals has addressed the nature of the required allegations in a case attacking an agency order. *Creedmoor-Maha* involved an amendment to the Water Code, adopted in 2005, that allows the owners of 50 or more acres of land to petition the TCEQ for an "expedited release" of the land from the certificate of convenience and necessity (CCN) of a retail water or sewer utility under certain conditions. TEX. WATER CODE § 13.254(a-1)-(a-4). The TCEQ makes its decision based on the petition and any controverting information the utility files; there is no hearing. TCEQ must grant the petition unless it makes an express finding that the landowner failed to meet the statutory criteria. *Id.* § 13.254(a-3). The statute expressly states that the TCEQ's determination "may not be appealed." *Id.* § 13.254(a-4).

Creedmoor-Maha Water Supply Corporation filed a lawsuit challenging a TCEQ order releasing a 1,960-acre tract from Creedmoor-Maha's CCN. Creedmoor-Maha argued that immunity did not bar its claim because it had invoked the court's "inherent jurisdiction" by alleging ultra vires conduct by TCEQ. *Creedmoor-Maha*, 307 S.W.3d at 515. (It appears from the appellate opinion that Creedmoor-Maha sued the agency only, not its officials.)

The Austin court of appeals rejected Creedmoor-Maha's ultra vires argument. It noted that: "To assert a valid ultra vires claim, the plaintiff '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 act.'" *Id.* at 515, *quoting Heinrich*, 284 S.W.3d at 372. The court found that three of Creedmoor-Maha's four factual allegations, which claimed that the landowner's application failed to meet the statutory criteria, "plainly complain of the merits of the decision TCEQ made." *Creedmoor-Maha*, 307 S.W.2d at 517. "These are allegations that TCEQ reached an incorrect or wrong result when exercising its delegated authority, not facts that would demonstrate TCEQ exceeded that authority." *Id.* at 517-18. (The fourth allegation related to Creedmoor-Maha's claim under the federal constitution, discussed in Section 1.B.3 above.)

Thus, a suit that only alleges that a government officer made the wrong decision or took the wrong action in a matter within his or her statutory or constitutional discretion does not fall within the ultra vires exception. *Id.* at 518, *citing North Alamo Water Supply Corp. v. Texas Dep't of Health*, 839 S.W.2d 455, 459 (Tex. App.—Austin 1992, writ denied) ("The fact that the [agency] might decide 'wrongly' in the eyes of an opposing party does not vitiate the agency's jurisdiction to make [the] decision"); *see also Merritt*, 2010 WL 337777 at *3 (holding allegation that official incorrectly determined sign was legal was not allegation of ultra vires action); *KEM*, 2009 WL 1811102 at *5 (holding that allegations that official incorrectly decided that billboard permit application did not meet rules and used wrong procedure in making decision were not allegations of ultra vires action where relevant statute did not dictate procedures); *SSC Missouri City*, 2009 WL 4725286 at *7 (holding that allegation that agency "wrongly exercised its undisputed statutory authority to grant waivers" was not allegation of ultra vires action).

(c) Permissible relief. *Heinrich* also holds that the only permissible relief in a ultra vires suit is *prospective* declaratory and injunctive relief. *Heinrich*, 284 S.W.2d at 375-76. Thus, in *Heinrich*, immunity did not bar the widow's claim for an injunction prospectively enforcing the requested declaratory relief, although the injunction could require the governmental entity to pay additional money to her.

But immunity continues to bar any declaratory judgment action seeking retrospective relief. *Id.* at 380. Immunity is not waived for declaratory judgment suits claiming an injury that has already occurred, "leaving … only one plausible remedy – an award of money damages." *City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007). "[P]rivate parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages … as a declaratory-judgment claim." *Id., citing Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 856 (Tex. 2002).

The Austin court of appeals has very recently applied this principle in *Texas Health and Human Services Commission v. El Paso County Hospital District*, 351 S.W.3d 460 (Tex. App.—Austin, Aug. 4, 2011, pet. filed). In that case, hospitals attacked a Commission practice of excluding any Medicaid claims that were not paid within six months of the end of a "base year" from the Medicaid claims used to calculate prospective hospital reimbursement rates. This cutoff date was not mentioned in the agency rules governing the recalculation of rates based on cost data from Medicaid claims for the base year. *Id.* at 466. The Texas supreme court held that the cutoff date was an invalidly promulgated rule under the APA. It rendered judgment declaring the rule invalid and enjoining its enforcement and remanded the case to the trial court for further proceedings. *El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n*, 247 S.W.3d 709, 715-16 (Tex. 2008).

On remand, the trial court entered judgment enjoining the Commission from applying the cutoff date to its calculation of reimbursement rates for fiscal years 2002-2009 and until such time as the Commission lawfully implemented a new rate. 351 S.W.3d at 471. After determining that the supreme court's opinion and judgment did not explicitly state how the court's holding applied to reimbursement rates or payments prior to judgment, the Austin court of appeals concluded that the supreme court's decision also did not imply a remedy with respect to those rates or payments because sovereign immunity would bar any relief having the purpose or effect of establishing a right to recover underpayments of Medicaid reimbursements prior fiscal years., citing *Heinrich*. *Id.* at 486-87. "Stated another way, judicial resolution of the applicable reimbursement rates in FY 2002 through FY 2007 would amount to a constitutionally impermissible advisory opinion, because it would serve no purpose other than to declare a right to a remedy that would be barred by sovereign immunity." *Id.* at 487. Sovereign immunity did not bar any claims for reimbursement for FY 2008, because that was the current state fiscal year for which reimbursement rates and payments remained subject to adjustment under Commission rules at the date of the supreme court's judgment. *Id.* at 485.

III. GOVERNMENT CONTRACT DISPUTES

Sovereign and governmental immunity have two components: (1) immunity from liability and (2) immunity from suit. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). A

governmental entity waives immunity from liability and binds itself to the terms of a contract, just as any other party would, when it enters into the contract. But it does not waive immunity from suit. *Id.*

A. Evolution of Law on Immunity and Government Contract Disputes

Between 1997 and 2006, the Texas supreme court decided a series of cases: (i) holding that, with one limited exception and one possible exception, immunity bars a breach-of-contract suit against the state or a local government, unless and to the extent the legislature has waived that immunity in clear and unambiguous language; (ii) overruling a prior decision that "sue and be sued" and "plead and be impleaded" statutes waived immunity; and (iii) clarifying that the UDJA does not waive immunity from any suit seeking to enforce a contract against a governmental entity.

1. Limited waiver by conduct for government contract disputes

(a) No waiver by contracting. In 1997, the supreme court held that a governmental entity does not waive its immunity from a breach-of-contract suit by entering into a contract. *Federal Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). In 2002, the court held that a governmental entity's acceptance of benefits under a contract – in both cases, full performance – did not waive the entity's immunity from a breach-of-contract suit. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002); *Travis County v. Pelzel & Assoc., Inc*., 77 S.W.3d 246, 251-52 (Tex. 2002).

(b) Limited waiver by filing suit. In 2006, the supreme court acknowledged one situation in which a governmental entity's conduct may waive sovereign immunity – when the entity files an affirmative claim for relief in litigation. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375-76 (Tex. 2006). The scope of that waiver, however, is limited. The governmental entity only waives immunity from suit for claims against it that are "germane to, connected with and properly defensive to" the governmental entity's claims, and only as to the amount of any damages offsetting the governmental entity's claim. *Id.* at 377.

(**c) Waiver-by-egregious conduct?** In a footnote in *Federal Sign*, the supreme court held open the possibility that "[t]here may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts." 951 S.W.2d at 408 n.1. Five year later, in a plurality opinion joined by three other justices, Justice Baker rejected any "waiver-by-conduct exception" to sovereign immunity: "We again reaffirm that it is the Legislature's sole province to waive or abrogate sovereign immunity." *IT-Davy*, 74 S.W.3d at 857. But in a concurring opinion, also joined by three other justices, Justice Hecht stated: "I cannot absolutely foreclose the possibility that the State may waive immunity in some circumstances other than by statute." *Id.* at 862.

Only one reported case has acted on the *Federal Sign* footnote and found a waiver-by-inequitable-conduct. *See Texas S. Univ. v. State Street Bank & Trust* Co., 212 S.W.3d 893, 908 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (university waived its immunity when it "lured" the other party into the contract "with false promises that the contract would be valid and

enforceable," then took position contract was not valid). *Id.* at 908. Every other reported case that has considered a waiver-by-egregious-conduct argument has rejected it. Relying on the plurality opinion in *IT-Davy*, several courts of appeal have declined to find a waiver-by-conduct exception to immunity until the supreme court identifies the kind of conduct that would give rise to such a waiver. *See, e.g., Leach v. Texas Tech Univ.*, 335 S.W.3d 386, 400-01 (Tex. App.—Amarillo 2011, pet. filed); *Employees Ret. Sys. v. Putnam, LLC*, 294 S.W.3d 309, 327 (Tex. App.—Austin 2009, no pet.).

2. No waiver by "sue and be sued" for government contract disputes

"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 § 311.034. In 2006, the Texas supreme court overruled a 1970 supreme court decision that held that a statute providing that navigation districts could "sue and be sued in all courts of this State" clearly waived those districts' immunity from breach-of-contract suits. *Tooke v. City of Mexia*, 197 S.W.3d 325, 337 (Tex. 2006), overruling *Missouri Pac. R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970). *Tooke* held that section 51.075 of the Texas Local Government Code, which provides that a home-rule city "may plead and be impleaded in any court" does not clearly and unambiguously waive a home-rule city's immunity. *Id.* at 342-343.

Although *Tooke* left open the possibility that some statute with something more than just the words "sue and be sued" or "plead and be impleaded" could waive immunity, in fact, since *Tooke*, the courts have not found such a statute. *See, e.g., Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 837-38 (Tex. 2010) (interpreting TEX. WATER CODE § 49.066(a) – conservation and reclamation districts); *Harris County Hosp. Dist. v. Tomball Regional Hosp.*, 283 S.W.3d 838, 843 (Tex. 2009) (interpreting TEX. HEALTH & SAFETY CODE § 281.056(a) – hospital districts).

3. No waiver by UDJA for government contract disputes

A party cannot circumvent sovereign or governmental immunity from suit by characterizing a contract dispute as a declaratory judgment claim. *IT-Davy*, 74 S.W.3d at 856. The UDJA is not a general waiver of immunity. It does not enlarge a trial court's jurisdiction or alter a suit's underlying nature. *Heinrich*, 284 S.W.3d at 370.

Immunity does not only bar declaratory judgment actions that seek damages for breach of contract. It bars any suit seeking "to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities" are barred by immunity because they "attempt to control state action by imposing liability on the State." *Id.* at 372, *quoting IT-Davy*, 74 S.W.3d at 855-56; *see also W. D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 840 (Tex. 1958) (holding that immunity barred suit against state agency seeking declaration that permit was binding contract providing for specific payment rate during term); *Multi-County Water Supply Corp. v. City of Hamilton*, 321 S.W.3d 905, 909 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (holding that immunity barred suit against city and district seeking declaration of rights under water supply agreement); *Texas Dep't of Transp. v. Allodial Ltd. P'ship*, 280 S.W.3d 922, 928 (Tex.

App.—Dallas 2009, pet. denied) (holding that immunity barred action against state agency seeking declaration of rights under deed covenants).

B. New Statutory Remedies and Waivers for Government Contract Disputes

In the wake of the supreme court's decisions between 1997 and 2006, the legislature adopted a number of new statutes to provide remedies for or to waive immunity for breach-of-contract disputes with a governmental entity. These new statutes have generated question of their own, which a number of appellate opinions have addressed but not fully resolved.

1. Chapter 2260 state government contract dispute resolution process

In 1999, after *Federal Sign* was decided, the legislature enacted chapter 2260 of the Texas Government Code. Chapter 2260 does not waive the State's immunity from suit in breach-of-contract cases. TEX. GOV'T CODE § 2260.006. It provides an administrative process that is the exclusive method for resolving those claims or seeking a legislative resolution granting permission to sue. *Id.* § 2260.005. This administrative scheme applies to "a written contract between a unit of state government and a contractor for goods or services" and for certain construction projects. *Id.* § 2260.001(1).

The administrative process requires notice of a claim of breach, followed by an attempt to resolve the claim through negotiation or mediation. *Id.* §§ 2260.051(b), 2260.052, 2260.056. If the claim cannot be resolved by negotiation or mediation, the contracting party may request a contested case hearing before the State Office of Administrative Hearings. *Id.* § 2260.102. If the administrative judge determines that the party has a valid claim, the State must pay the claim if the total damages are less than $250,000 or pay that part of the claim that is less than $250,000, if possible, with money previously appropriated for breach-of-contract claims. *Id.* § 2260.105. If the judge determines that the party has a valid claim for more than $250,000, the judge issues a written report recommending the legislature either appropriate funds to pay the damages or not appropriate funds and deny consent to sue under Chapter 107 of the Texas Civil Practice and Remedies. *Id.* § 2260.1055. The legislature, weighing appropriate policy concerns, may accept or reject this recommendation.

"The Legislature has expressly precluded judicial review of the administrative judge's rulings under Chapter 2260." *Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 599 (Tex. 2001), interpreting TEX. GOV'T CODE § 2260.104(f) ("Subchapter G, Chapter 2001, does not apply to a hearing under this section"). Therefore, there is no appellate case law reviewing chapter 2260's application to individual disputes. But some of the case law interpreting chapter 271, subchapter I of the Texas Local Government Code, discussed in Section II.B.3, below, can provide some guidance on the contracts to which chapter 2260 applies – "a written contract … for goods and services."

2. Section 262.007 waiver for county contract disputes

In 2003, after the decision in *Travis County v. Pelzel & Associates, Inc.*, the legislature enacted section 262.007 of the Texas Local Government Code. Section 262.007 provides that a

county that is a party to "a written contract for engineering, architectural or construction services or for goods related to engineering, architectural or construction services" executed after August 31, 2003, "may sue or be sued, plead or be impleaded, or defend or be defended" on "a claim arising under the contract." TEX. LOC. GOV'T CODE § 262.007(a).

The total amount of money recovered from a county on a breach-of-contract claim is limited to: (1) "the balance due and owed under the contract …, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration"; (2) "the amount owed for change orders or additional work required to carry out the contract"; (3) "reasonable and necessary attorney's fees as are equitable and just; and (4) "interest as allowed by law. *Id.* § 262.007(b). An award of damages may not include exemplary or consequential damages or "unabsorbed home office overheard." *Id.* § 262.007(c).

3. Chapter 271 waiver for local government contract disputes

In 2005, while *Tooke v. City of Mexia*, was on appeal, the legislature adopted chapter 271, subchapter I of the Texas Local Government Code. Section 271.152 says that a "local governmental entity … that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter." A "local governmental entity" is defined to include cities, public school districts, and any "special purpose district or authority." TEX. LOC. GOV'T CODE § 271.151(3). The waiver applies to contracts entered into before the effective date of the chapter, September 1, 2005, but only if immunity had not been waived for a claim before that date. If a claim had been waived, then the former law continues to apply to that claim.

There has been a great deal of litigation on chapter 271, subchapter I's application.

(a) "Contract subject to this subchapter" – A "contract subject to this subchapter" is defined as "a written contract stating the essential terms for providing goods and services to the local governmental entity that is properly executed on behalf of the local governmental entity." *Id.* § 271.151(2).

(1) "Providing goods or services" – Whether a contract is a contract "for providing goods and services" is probably the most litigated chapter 271 issue. The supreme court recently addressed this issue in *Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829 (Tex. 2010).

In *Kirby Lake*, developers sued for breach of an agreement that required the developers to cause the construction of water distribution lines, sanitary sewer lines, and drainage facilities necessary to provide service to their developments and required the Authority to use those facilities to provide service and to purchase the facilities with bond proceeds. The Authority argued that the agreement was a contract for the purchase of real estate, not goods and services, because the facilities became a part of the real estate when installed. The supreme court held that the developer's obligation to provide for the design and construction of the facilities to be used by the Authority was an obligation to provide "services" to the Authority, even if those services

were not the "primary purpose of the agreement"; therefore, the agreement was a "contract subject to this subchapter" under section 271.151. *Id.* at 838-39.

Kirby Lake relies in part on the court's earlier decision in *Ben Bolt-Palito Blanco Consolidated Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320 (Tex. 2006). In *Ben Bolt*, the school district brought suit against the Fund for failure to pay a claim under a property insurance policy. The school district was a member of the Fund. The Fund argued that it provided services to the school district under the policy, but that the district provided no services to the Fund. The court found that the Fund's members "elect a governing board, and a board subcommittee resolves claims disputes. To that extent, at least, the Fund's members provide services to the Fund" under section 271.151(2). *Id.* at 327.

Since *Ben Bolt* and *Kirby Lake* were decided, a number of court of appeals have attempted to apply their holdings to distinguish between contracts that provide goods or services to a local government under section 271.151 and contracts that do not. For example, several appellate opinions have found that contracts that were primarily real estate contracts also included terms for the provision of services to a local government under the statute. *See, e.g., City of North Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 909 (Tex. App.—Fort Worth 2011, no pet. h.) (holding that development agreement requiring developer to construct public improvements was contract to provide services to city); *Wight Realty Interests, Ltd. v. City of Friendswood*, 333 S.W.3d 792, 797-98 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that purchase agreement requiring seller to acquire tracts and construct improvements was contract to provide services to city); *Hoppenstein Props., Inc. v. McLennan County Appraisal Dist.*, 341 S.W.3d 16, 20 (Tex. App.—Waco 2010, pet. denied) (holding on rehearing that lease addendum requiring landlord to renovate premises created contract for services to district).

But other real-estate-related contracts did not provide for services under section 271.151, even under the reasoning in *Ben Bolt* and *Kirby Lake*. *See, e.g., Gillium v. Santa Fe Indep. Sch. Dist*., No. 01–10–00351–CV, 2011 WL 1938476, *2 (Tex. App.—Houston [1st Dist.], May 12, 2011, no pet. h.) (mem. op.) (holding that restrictive covenants are not contract to provide services); *Water Exploration Co., Ltd. v. Bexar Metro. Water Dist.*, 345 S.W.3d 492, 503 (Tex. App.—San Antonio 2011, no pet. h.) (holding that contract assigning groundwater leases to district was not contract to provide services to district).

Courts have held that an agreement with a local governmental entity that provides some benefit to the public, but only "indirect, attenuated" benefits to the local government, is not necessarily an agreement to provide goods or services to the public entity. *Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.—Waco 2009, pet. denied) (holding that city's contract to provide free utility service to tract used for children's home was not contract to provide services to city); *East Houston Estate Apartments, L.L.C. v. City of Houst*on, 294 S.W.3d 723, 736 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that city's agreement to disburse federal loan funds to build low-income housing was not contract to provide services to city).

Relying in part on these cases, the Waco court of appeals has held that river authority's contract to supply the power from hydroelectric power generation facilities, which provided that the value of power consumed at the facilities would be credited against the coop's bills, but did not obligate the coop to supply the facilities with power, was not a contract to provide goods and services to the authority. *Brazos River Auth. v. Brazos Elec. Power Co-op., Inc.*, No. 10-09-00403-CV, 2010 WL 2523438, *3-4 (Tex. App.—Waco 2010, pet. denied).

On the other hand, the Austin court of appeals has very recently interpreted an agreement that provided that "the Parties shall identify and pursue" feasibility studies, obligated the Lower Colorado River Authority (LCRA) to identify, initiate, develop, and implement those studies, in consultation with the San Antonio Water System (SAWS), and obligated SAWS to pay for the studies, which LCRA would own but SAWS would have a license to use. The court held that this agreement was a contract that "obligated SAWS to identify, pursue, and fund feasibility studies that subsequently became LCRA's exclusive property," which "clearly qualifies as providing goods [and] services to LCRA." *City of San Antonio v. Lower Colorado River Auth.*, --- S.W.3d ---, 2011 WL 3307509, *3 (Tex. App.—Austin, July 29, 2011, no pet. h.).

(2) "To the local governmental entity" – There is a split of opinion on whether section 271.152 only waives the immunity of a local government that contracts to receive goods or services or also waives the immunity of a local governmental entity that contracts to provide goods or services. Relying on the language of the statute that says that a local government waives immunity for breaches of contracts "to provide goods or services to *the* local governmental entity," some courts have held that it only waives the immunity of a local government that receives goods or services. *See Jonah Water Special Utility Dist. v. White*, No. 03-06-00626-CV, 2009 WL 2837649, *3 (Tex. App.—Austin 2009, pet. denied) (mem. op.).

Other courts have held that section 271.152 waives the immunity of a local government that contracts to provide goods or services where the recipient of the goods or services is a local government. *See San Patricio Mun. Water Dist. v. City of Corpus Christi*, No. 13-10-00272-CV, 2011 WL 193112, *9 (Tex. App.—Corpus Christi, Jan. 13, 2011, pet. filed) (mem. op.); *Texas Ass'n of Sch. Bds. Risk Mgmt. Fund v. Benavides Indep. Sch. Dist.*, 221 S.W.3d 732, 739 (Tex. App.—San Antonio 2007, no pet.).

(3) "Written contract stating the essential terms" – Multiple documents and even ordinances may constitute a "written contract" under section 271.151(2), but only if the document or documents provide the basic terms of the agreement. *See, e.g., City of Houston v. Williams*, 353 S.W.3d 128, 137-39 (Tex. 2011) (holding that city ordinance and agreements between union and city stated essential terms because they provided firefighters' duties, compensation, and timing of compensation and performance); *ICI Const., Inc. v. Orangefield Indep. Sch. Dist.*, 339 S.W.3d 235, 239-40 (Tex. App.—Beaumont 2011, no pet. h.) (16 documents did not state essential terms because they did not fully describe properties contractor would repair or provide basis for compensation for work).

(4) "Properly executed" – A written contract is "properly executed" for purposes of section 271.151(2) when it is duly enacted. "We have noted that to 'execute' means to 'finish' or to 'complete,' and that it is not necessary to sign an instrument in order to execute it, unless

the parties agree that a signature is required." *City of Houston v. Williams*, 353 S.W.3d at 139; *see also City of Houston v. Petroleum Traders Corp.*, 261 S.W.3d 350, 358 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that contract was properly executed when approved by city council, although not signed by mayor and controller as required by city charter); *cf. Tara Partners, Ltd. v. City of South Houston*, 282 S.W.3d 564 (Tex. App.—Houston [14 Dist.] 2009, pet. denied) (finding that contract was not properly executed where no evidence that city council approved resolution signed by its lawyer).

One court of appeals has held that "properly executed" means approved in accordance with the statutes, rules, and ordinances that authorize the local government to enter into the contract. *Housing Auth. v. Killingsworth*, 331 S.W.3d 806, 811-12 (Tex. App.—Dallas 2011, pet. denied). Thus, an allegation that a contract was approved in violation of the Texas Open Meetings Act did not mean the contract was not "properly executed", because the Act "is not directed to a governmental entity's authority to enter into contracts." *Id.* at 812.

(b) "Adjudicating a claim for breach of contract" – Section 271.152 waives immunity "for the purpose of adjudicating a claim for breach of the contract." Citing this language, courts have held that section 271.152 does not waive immunity from quantum meruit claims, s*ee, e.g., Harris County Flood Control Dist. v. Great Am. Ins. Co*., 309 S.W.3d 614, 617 (Tex. App.—Houston [14th Dist.] 2010, no pet.), from a declaratory judgment suit on the validity of a contract, *see Olympic Waste Serv. v. City of Grand Saline*, 204 S.W.3d 496, 500 (Tex. App.—Tyler 2006, no pet.), or from claims based on the equitable doctrines of estoppels, waiver, and detrimental reliance, *see H & H Sand & Gravel, Inc. v. City of Corpus Christi*, No. 13-06-00677-CV, 2007 WL 3293628, *3 (Tex. App.—Corpus Christi, Nov. 8, 2007, pet. denied) (mem. op.).

(c) "Money awarded" – Chapter 271, subchapter I provides that total amount of money awarded in an adjudication of a claim for a breach of a contract subject to this subchapter is limited to: (1) "the balance due and owed under the contract …, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration"; (2) "the amount owed for change orders or additional work required to carry out the contract"; (3) "reasonable and necessary attorney's fees as are equitable and just"; and (4) "interest as allowed by law. *Id.* § 271.153(a). An award of damages may not include exemplary or consequential damages or "unabsorbed home office overheard." *Id.* § 271.153(b).

In *Tooke v. City of Mexia*, the supreme court held that section 271.153 limits the waiver in section 271.152. 197 S.W.3d at 344-46. The plaintiffs in that case claimed the City had breached a contract to pay them for services, but sought only lost profits damages. The court held that lost profits are consequential damages, which are excluded from allowable damages under section 271.153(b)(1), and therefore "the City's immunity from suit on the Tookes' claim has not been waived" by Section 271.152. *Id.* at 345-46.

(1) "Balance due and owed" – In *Kirby Lake*, the developers claimed that the Authority had breached their contracts when it failed to include bonds, whose purpose was to purchase the water, wastewater and drainage facilities that they had constructed, in every Authority bond election until those bonds were approved. The contract between the developers

and the Authority authorized the Authority to purchase the facilities from the developers with any available funds, but only required the Authority to purchase the facilities with the proceeds of approved bonds. The contracts provided a purchase price for the facilities. *Id.* at 832-34.

The Authority argued that there was no "balance due and owed" under section 271.153 because there were no approved bonds. The supreme court found that: "At least within the context of these Agreements, we disagree. The purpose of section 271.153 is to limit the amount due by a governmental agency on a contract once liability has been established, not to foreclose the determination of whether liability exists. Furthermore, the Agreements do stipulate the amount of reimbursement owed upon approval of bond funds." *Id.* at 840.

Relying on the second sentence in this quote, several post-*Kirby Lake* court of appeals cases have concluded that, if the plaintiff pleads that a balance is due and owed under a contract, whether the amount pled is or could be a balance due and owed under the contract is a merits issue, not a jurisdictional issue. *See City of San Antonio v. Lower Colorado River Auth.*, --- S.W.3d ---, 2011 WL 3307509, *5-6 (Tex. App.—Austin, July 29, 2011, no pet.) (holding that § 271.153 "is not a proper basis for granting a plea to the jurisdiction"); *City of North Richland Hills*, 340 S.W.3d at 910 (declining to apply § 271.153 "within the procedural context of the City's pleas to the jurisdiction").

City of San Antonio appears to distinguish *Tooke* on the ground that *Tooke* only applies "if the plaintiff seeks damages precluded by section 271.153." 2011 WL 33075 at *4. *City of North Richland Hills* expressly distinguishes *Tooke* on the ground that *Tooke* was an appeal from a judgment on the merits, not an interlocutory appeal from a ruling on a plea to the jurisdiction. 340 S.W.3d at 910 n.8. Both cases appear to recognize that it is unlikely that the supreme court intended a single sentence in *Kirby Lake* to overrule *Tooke*, when *Kirby Lake* does not explicitly overrule *Tooke* and there was a balance due and owed under the contract in *Kirby Lake*.

Earlier cases have held that a plaintiff has alleged a "balance due and owed" for purposes of section 271.153 where the plaintiff seeks an amount that the contract requires the defendant to pay the plaintiff in a certain circumstances, even if the amount is not expressed as a specific dollar amount. *See, e.g., Jones v. City of Dallas*, 310 S.W.3d 523, 527-28 (Tex. App.—Dallas 2010, pet. denied) (seeking amount due under contract paragraph that provided that city "shall equitably compensate" contractor for services performed before city notice of termination); *McKinney & Moore, Inc. v. City of Longview*, No. 14-08-00628-CV, 2009 WL 4577348, *6 (Tex. App.—Houston [14th Dist.], Dec. 8, 2009, pet. denied) (mem. op.) (seeking amounts due under provision of contract that required city to pay additional costs caused by other city contractors' mistakes).

Conversely, earlier cases have held that plaintiffs have failed to plead a "balance due and owed" under section 271.153(a) where the contract does not provide for any payments to the plaintiff or the plaintiff has failed to point to any contract provisions that require the defendant to pay the plaintiff. *See, e.g., Kansas City Southern v. Port of Corpus Christi Auth.*, 305 S.W.3d 296, 306-08 (Tex. App. – Corpus Christi 2009, pet. denied); *Judson Indep. Sch. Dist. v. ABC/Associated Benefit Consultants, Inc.*, 244 S.W.3d 617, 621 (Tex. App.—San Antonio 2008,

no pet.); *City of San Antonio v. Polanco & Co., L.L.C.*, No. 04-07-00258-CV, 2007 WL 3171360, *5 (Tex. App. – San Antonio, Oct. 31, 2007, pet. denied).

(2) Attorney's fees – In 2009, the legislature deleted section 271.159 and added section 271.153(a)(3), which allows a plaintiff to recover "reasonable and necessary attorney's fees that are equitable and just." The amendment to section 271.153(a) took effect on June 19, 2009 and only applies to contracts executed after that date. Contracts executed before June 29, 2009 are governed by prior law. *See Harris County Flood Control Dist.*, 309 S.W.3d at 618.

C. Government Settlement Agreement Disputes

In a plurality opinion in *Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), the Texas supreme court held that, when a governmental entity enters into an agreement to settle a suit for which immunity has been waived, it cannot claim that immunity bars a suit claiming a breach of the settlement agreement. *Id.* at 521. In *Lawson*, the university settled a whistleblower lawsuit, for which immunity had been waived, and the employee later sued for breach of the agreement settling the whistleblower suit.

Applying *Lawson*, a court has held that immunity did not bar a suit against a City for breach of an agreement settling a workers' compensation claim, a claim for which the City's immunity has been waived. *City of Houston v. Rhule*, --- S.W.3d ---, 2011 WL 2936351, *3 (Tex. App.—Houston [1st Dist.], July 21, 2011, no pet. h.). Similarly, another court has held that, under *Lawson*, immunity did not bar a suit against a City for breach of an agreement settling a federal Fair Housing Act claim. *City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 367 (Tex. App.—Fort Worth 2009, no pet.). Other courts have held that *Lawson* applies so that immunity does not bar a claim for breach of an agreement settling a condemnation suit or a threatened condemnation suit. *See State v. Chapman Children's Trust I*, No. 07-09-00222-CV, 2010 WL 892182, *3 (Tex. App.—Amarillo, Mar. 12, 2010, no pet.) (mem. op.) (holding that immunity did not bar suit for breach of agreed judgment in condemnation suit); *City of Carrollton v. Singer*, 232 S.W.3d 790, 796 (Tex. App.—Fort Worth 2007, pet. denied) (holding that immunity did not bar suit for breach of purchase contract executed in lieu of condemnation suit); *but see City of Midlothian v. ECOM Real Estate Mgmt., Inc.*, No. 10-09-00039-CV, 2010 WL 311433 (Tex. App.—Waco, Jan. 27, 2010, pet. granted) (mem. op.) (holding that immunity barred suit for breach of easement agreement where no condemnation suit filed and nothing in easement indicated it was a settlement agreement).

But *Lawson* does not apply from suit for a breach of a settlement agreement where immunity had not been waived for underlying suit. *See, e.g., Univ. of N. Tex. v. City of Denton*, --- S.W.3d ---, 2011 WL 1434918, *9 (Tex. App.—Fort Worth, Apr. 14, 2011, no pet. h.). In particular, it has been held that *Lawson* does not apply when, at the time the underlying suit was settled, immunity had not been waived because the plaintiff had failed to meet the statutory prerequisites to suit, including exhaustion of administrative remedies. *See Donna Indep. Sch. Dist. v. Gracia*, 286 S.W.3d 392, 395 (Tex. App.—Corpus Christi 2008, no pet.); *Texas Dep't of Health v. Neal*, No. 03–09–00574–CV, 2011 WL 1744966, *4 (Tex. App.—Austin, May 6, 2011, no pet. h.) (mem. op.); *Leach v. Texas Tech Univ.*, 335 S.W.3d at 396-97.

D. Government Contract Disputes and Inverse Condemnation

Governmental immunity does not shield a governmental entity from an action for compensation under Article I, section 17 of the Texas Constitution. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007). But a plaintiff may not recast a breach of contract claim against a governmental entity as an inverse condemnation suit to avoid immunity. To establish a takings claim under Article I, section 17, the claimant must show that a governmental actor acted intentionally to take or damage property for a public use. *Id.* "When the government acts pursuant to colorable contract rights, it lacks the necessary intent to take under its eminent-domain powers and thus retains its immunity from suit." *Id.* Thus, to establish a valid takings claim, a plaintiff must plead something more than a breach of contract. *See, e.g., City of North Richland Hills*, 340 S.W.3d at 916.

IV. TRESPASS-TO-TRY TITLE SUITS

A. Against Officials Only

Governmental immunity bars trespass-to-try title suits against government entities. *State v. Lain*, 349 S.W.2d 579, 582 (Tex. 1961) ("When in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained in limine"); *Koch v. Tex. Gen. Land Office*, 273 S.W.3d 451, 455 (Tex. App.—Austin 2008, pet. filed).

Some recent courts of appeals cases have held that immunity does not bar a trespass-to-try-title action against a governmental official acting in his official capacity, even where the plaintiff does not claim that the official is acting outside his statutory or constitutional authority. *See, e.g., Porretto v. Patterson*, 251 S.W.3d 701, 712 (Tex. App.—Houston [1st Dist.] 2007, no pet.)[2]; *State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 359 (Tex. App.—Austin 2009, pet. filed).

Both court of appeals' decisions rely on the Texas supreme court's 1961 opinion in *State v. Lain*. In *Lain*, the plaintiff established a prima facie right of title to the property in dispute through a regular chain of conveyances. The defendants, who were state officials, "did not question plaintiff's title" to the disputed property, and failed to submit any evidence demonstrating governmental title to that property. *Lain*, 349 S.W.2d at 581.

The court held that, at least under these facts, sovereign immunity did not bar a trespass-to-try-title action against a state official "simply because he asserts a good faith but overzealous claim that title or right of possession is in the state and that he is acting for or on behalf of the state." *Id.* Rather, in a trespass-to-try title action against state officials, "it is the duty of the court to hear evidence on the issue of title and right of possession and to delay action on the plea until the evidence is in." *Id.* at 582.

[2] In an appeal from the trial court decision on remand, the court of appeals held that the state's evidence proved state ownership of the disputed property as a matter of law and the trial court erred in failing to grant the state's plea to the jurisdiction. *Texas General Land Office v. Poretto*, --- S.W.3d ---, 2011 WL 6282354 (Tex. App.—Houston [1st Dist.], Dec. 15, 2011, no pet. h.).

"If the plaintiff fails to establish his title and right of possession, a take nothing judgment should be entered against him as in other trespass to try title cases. If the evidence establishes superior title and right of possession in the sovereign, the officials are rightfully in possession of the sovereign's land as agents of the sovereign and their plea to the jurisdiction based on sovereign immunity should be sustained. If, on the other hand, the evidence establishes superior title and right of possession in the plaintiff, possession by officials of the sovereign is wrongful and the plaintiff is entitled to relief. In that event the plea to the jurisdiction based on sovereign immunity should be overruled and appropriate relief should be awarded against those in possession." *Id.*

As the Austin court of appeals has said: "Some of the conceptual underpinnings of *Lain* are not easily reconciled with contemporary Texas sovereign immunity jurisprudence." *BP America*, 290 S.W.3d at 356. Among other things, it is difficult to reconcile the idea that a plea to the jurisdiction may only be granted after a trial on the merits with recent cases stating that pleas to the jurisdiction should be decided as early as possible and allowing summary-judgment-style evidence to be introduced at the plea to the jurisdiction phase. *See Texas Dep't of Parks &Wildlife v. Miranda*, 133 S.W.3d 217, 233 (Tex. 2004); *Bland Indep. Sch. District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The Austin court attempted to harmonize *Lain* and *Miranda* and *Blue* in its opinion in *BP America* by suggesting that, at least in some cases, jurisdiction over trespass-to-try-title cases may be determined early "through the summary judgment-like procedures the supreme court has since authorized in *Miranda*," rather than after a trial on the merits. *BP America*, 290 S.W.3d at 358.

It is also difficult to reconcile *Lain* with the supreme court's recent decision in *Heinrich*. In *Heinrich*, the court held that the immunity of a governmental official, acting in his or her official capacity, is waived when the official is acting outside his or her constitutional or statutory authority or fails to perform a purely ministerial act because the suit attempts to reassert the control of the state, not to control the state. But *Lain* reasons that immunity does not bar a suit against a governmental official who is acting within his statutory authority or failed to perform a purely ministerial duty.

B. No Trespass-to-Try-Title Waiver by UDJA

Several recent courts of appeals cases have held that governmental entities are immune from declaratory judgment actions to determine title to land. These cases reason that a trespass-to-try-title suit is the exclusive method in Texas for adjudicating disputed claims of title to real property, and a plaintiff cannot circumvent a governmental entity's immunity by characterizing a trespass-to-try-title claim as a declaratory judgment suit. *See, e.g.*, *BP America*, 290 S.W.3d at 361; *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 626-27 (Tex. App.—Eastland 2009, pet. granted); *Koch v. Tex. Gen. Land Office*, 273 S.W.3d 451, 455-56 (Tex. App.—Austin 2008, pet. filed).

The Austin court of appeals has also held that governmental officials are immune from declaratory judgment lawsuits seeking to determine title to land, although, under *Lain*, immunity would not bar a trespass-to-try-title claim against the same governmental official unless and until the plaintiff lost on the merits. The Austin court reasoned that *Lain*'s determination that a

trespass-to-try-title action against governmental official, acting in his or her official capacity, does not implicate sovereign immunity was based, at least in part, on its conclusion that the governmental entity would not be bound by the decision in a trespass-to-try-title case. A UDJA claim against a government official in his official capacity, on the other hand, seeks a declaration on the title to property to which a governmental entity, through its agent, is bound. Therefore, *Lain* distinction between governmental entities and governmental officials did not apply to a declaratory judgment action. *BP America*, 290 S.W.3d at 361.

C. Cases Pending at Supreme Court

The Texas supreme court has a number of cases pending before it that would allow it to clarify the application of *Lain* and the distinction between trespass-to-try-title cases and inverse condemnation in a post-*Miranda, Blue* and *Heinrich* world. *See, e.g., City of Dallas v. Turley*, 316 S.W.3d 762 (Tex. App.—Dallas 2010, pet. filed); *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010, pet. filed); *State v. BP Am. Prod. Co.*, 290 S.W.3d 345 (Tex. App.—Austin 2009, pet. filed); *Koch v. Tex. Gen. Land Office*, 273 S.W.3d 451 (Tex. App.—Austin 2008, pet. filed); *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602 (Tex. App.—Eastland 2009, pet. granted).[3]

D. Trespass-To-Try-Title and Inverse Condemnation

In several recent cases, a governmental entity has argued that a plaintiff's takings claim is really a trespass-to-try-title claim barred by sovereign immunity. In those cases, the courts of appeals have distinguished inverse condemnation claims from trespass-to-try-title claims that would be barred by governmental immunity based on the remedy sought. If a plaintiff seeks compensation for property that it claims has been taken, the claim is an inverse condemnation claim. If, on the other hand, a plaintiff seeks possession of or title to the property, then the claim is a trespass-to-try-title action. *See City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82, 92-93 (Tex. App.—Corpus Christi 2010, pet. filed); *Porretto v. Patterson*, 251 S.W.3d 701, 708 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Thus, an inverse condemnation claim can be a valid alternative to a trespass-to-try title claim if the plaintiff can meet the pleading requirements of the inverse condemnation case and pleads for compensation rather than an award of title.

[3] On August 26, 2011, the day after this paper was presented, the Texas Supreme Court decided *Texas Parks & Wildlife Department v. Sawyer Trust*, 354 S.W.2d 384 (Tex. 2011). In that case, the plaintiff had challenged the Department's assertion that the Salt Fork of the Red River was navigable, and thus the State owned the riverbed, on their property. The court held that the Department was immune from suit, but that sovereign immunity did not bar a suit against Department employees acting in their official capacities. The Court distinguished Heinrich on the ground that navigability "is not a question left to the discretion and judgment of ministerial officers," but "a question for judicial determination." *Id.* at 390, *quoting State v. Bradford*, 50 S.W.2d 1065, 1070 (Tex. 1932). The court quotes with approval the passage in *Lain* that says that, in a suit against officials only, the court must hear evidence on the issue of title and right of possession before it decides a plea to the jurisdiction based on sovereign immunity. 354 S.W.3d at 394. On the same day, the court held that sovereign immunity barred plaintiffs suit against the Veterans Land Board in *Veterans Land Board v. Lesley*, and denied the petition for review in *City of Dallas v. Turley*, *State v. BP America*, and *Koch v. General Land Office*.

V. CONCLUSION

The law on sovereign and governmental immunity has changed greatly in the last 15 years. It continues to develop as the Texas supreme court and courts of appeals continue to rule on the application of immunity and statutory waivers. These new developments affect the practice of lawyers who challenge state agency or local government actions and lawyers who draft contracts between private parties and the state or local governments, between the state and local governments, and between local governments.