

# **SOVEREIGNTY IMMUNITY UPDATE**

## **UT LAW—CLE 21<sup>st</sup> ANNUAL LAND USE CONFERENCE April 6, 2017**

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## Recent Cases on Immunity

### 1. *Wasson Interests, Ltd., v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016)

The Supreme Court resolved the issue left hanging after *Tooke v. Mexia*, 197 S.W.3d 325 (Tex. 2006) and held that Chapter 271 applies to governmental function contract cases. Proprietary function contracts are not subject to immunity and this puts those cases back under the logic of *Gates v. City of Dallas*, 704 S.W.2d 737 (Tex. 1986). The underlying dispute here involved a land lease for residential use of lakefront property owned by the City of Jacksonville. The Court rejected the argument that all cases are now controlled by Chapter 271, as the sole waiver of immunity for contract claims, overruling the decision in *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.* 381 S.W.3d 597 (Tex. App.—San Antonio 2012).

The case was remanded for a determination of the governmental/proprietary issue, and does not really provide any new assistance in sorting out those categories. The opinion does affirm the list of governmental functions under §101.0215 of the Government Code, even though that list was adopted in the context of tort claims, rather than contract causes of action. The Court seems to be saying that the classification of the function transcends the cause of action being asserted and applies in either context. The list is not exclusive, but things on the list will be determined under the prior case law principles.

The Opinion notes that leases are usually not contracts that involve the provision of goods and services, citing the *Lubbock* case on a lease for operation of a marina. *Lubbock County Water Control v. Church and Akin, L.L.C.*, 442 S.W.3d 297 (Tex. 2014)

### 2. *Byrdson Services, LLC v. South East Tex. Reg. Planning Comm.*, 2016 WL 7421392 (Tex. 2016)

This case involved disaster recovery housing repair work, and the governmental entities claim that no “goods and services” were being provided. The TDHCA contracted with the Regional Planning Commission (RPC) to carry out the repairs under the grant terms, and that contract contemplated subcontracts to achieve the actual construction work. Although the subcontract in dispute was primarily for repair of private homes using federal grant funds, the Court held that the obligation of the RPC to carry out the grant funds meant that the subcontract by the RPC did result in “goods and services” to the RPC, namely meeting its contractual obligations to the TDHCA.

The Court cited its earlier decision in *Ben Bolt-Palito Blanco Consolidated ISD v. Texas Political Subdivisions Prop./Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320 (Tex. 2007), involving a risk pool for school district claims management, which held that goods and services has a broad meaning and encompasses any act performed for the benefit of another. The goods and services need not be the primary purpose of the contract. Goods and services must be directly provided to the government contracting under Chapter 271 for immunity of suit to be waived, and the benefit must not be indirect and attenuated.

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