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GOVERNMENTAL IMMUNITY, TAKINGS CLAIMS AND THE *ULTRA VIRES* DOCTRINE

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INTRODUCTION

This paper is intended to be a selected case law update in the context of a discussion of various aspects of governmental immunity and the available means to overcome that immunity, including resort to inverse condemnation claims. Because this case law update is topical, some of the cases discussed are outside the scope of the ordinary 12-month period.

Parties have been trying to find ways to get relief against the State and other governmental entities ever since the doctrine of governmental immunity was first recognized. In the last decade, the Supreme Court made two landmark decisions that had a major impact on the doctrine. In ***City of Mexia v. Tooke*, 197 S.W.3d 325 (Tex. 2006)**, the Court held that statutes authorizing governmental entities to "sue and [or] be sued" or using similar phrases such as "prosecute and defend" did not waive immunity from suit, overturning case law to the contrary and barring suits that had previously gone forward against governmental entities. The Court stated: "Because immunity is waived only by clear and unambiguous language, and because the import of these phrases cannot be ascertained apart from the context in which they occur, we hold that they do not, in and of themselves, waive immunity from suit." 197 S.W.3d at 328-29.

Three years later, in ***City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009)**, the Supreme Court held that suits against the State or other governmental agencies alleging *ultra vires* acts, or acts outside their scope of authority, may not be brought against the governmental entity itself but only against the officials in charge of the entity. *Heinrich* confirmed major limitations on the use of the Uniform Declaratory Judgments Act (UDJA) as a vehicle to circumvent sovereign immunity. The Court held that the UDJA could not be used to sue governmental entities directly, even for *ultra vires* acts. The Court reasoned that the UDJA "is a remedial statute" and "does not enlarge a trial court's jurisdiction, and a litigant's request for declaratory relief does not alter a suit's underlying nature." 284 S.W.3d at 370.

Heinrich, however, did open a window for prospective monetary and injunctive relief. The Court held that an order requiring an official, in the future, to increase the plaintiff's pension benefits would not run afoul of the sovereign immunity bar even though there would be a monetary impact on the City. The Court reasoned that allowing this relief "best balances the government's immunity with the public's right to redress in cases involving *ultra vires* actions" and "ensures that statutes specifically directing payment, like any other statute, can be judicially enforced going forward." 284 S.W.3d at 375-76.

The Supreme Court and several courts of appeal have applied and interpreted *Tooke* and *Heinrich* many times since they came down. Discussed below are some of those cases as well as several other recent cases in which the Supreme Court has been called on to apply or distinguish governmental immunity.

In addition, this paper addresses how many parties have attempted, with varying success, to avoid governmental immunity by asserting that government action constitutes a taking under Article I, Section 17 of the Texas Constitution. The paper attempts to parse through the decisions on this issue to determine when a takings claim may be a valid basis to support a suit against the government and when it may not.

I. What's Happened Since *Tooke v. Mexia* and *Heinrich*

Tooke v. Mexia was followed by a rash of Supreme Court decisions addressing numerous statutes. Discussed below are some recent, significant rulings on statutory waiver.

A. Construing Waiver Statutes

In ***Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829 (Tex. 2010)**, the Court addressed the breadth of statutory waivers for contract suits seeking to recover for good and services. In *Kirby Lake*, residential developers sued the city water control and improvement district for breach of contract and inverse condemnation regarding the authority's continued possession of water and sewer facilities built by the developers. Consistent with *Tooke v. City of Mexia*, the Supreme Court held that the Water Code provision allowing a city water control and improvement district to sue and be sued was not, on its own, an abrogation of governmental immunity. The Court further held that the Local Government Code authorizing suit on a contract "for providing goods and services to the local governmental entity" *did* waive immunity for certain claims arising under the contract between developers and authority regarding provisioning of goods and services. 320 S.W.3d at 838. The Court reasoned that the developers were required under the contract to provide for the design and construction of the facilities to be used by the authority. *Id.* at 839. This obligation was enough to trigger waiver under the statute as the provision of services. The court noted that the term "services" is broad and need not be the "primary purpose of the agreement" for immunity to apply *Id.*

In ***University of Texas at El Paso v. Herrera*, 322 S.W.3d 192 (Tex. 2010)**, the Supreme Court held that Congress had no authority to waive the State's immunity from suit in this context, placing limits on federal authority to grant consents to sue the State. A former employee sued the university complaining that he was terminated in retaliation for taking leave under the federal Family and Medical Leave Act (FMLA). The Court held that Congress exceeded its authority to abrogate states' immunity when it subjected states to private damage suits under the FMLA. 322 S.W.3d at 201-02. The decision followed several federal circuit court decisions in so holding. *See id.* at 199, n. 41. The Court also held that statements in UTEP's personnel handbook of operating procedures, which stated that an "eligible employee may also bring a civil

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