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## **Government Immunity Update**

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## TABLE OF CONTENTS

Government Immunity Update .....	1
I. INTRODUCTION .....	1
II. BREACH OF CONTRACT .....	1
a. Is an Employment Contract a Contract for “Services?” .....	1
b. How Closely Will Courts Construe the Terms of a Contract to Determine a Waiver? .....	2
c. Are the Limits on Damages Jurisdictional? .....	3
d. Does a City have Immunity from a Breach of Contract Claim if it Engaged in a Proprietary Function? .....	4
III. TORT & RECREATIONAL USE .....	5
a. Intentional Torts .....	4
b. An Injury “Arising From” the Use of a Vehicle .....	5
c. Election of Remedies .....	6
d. Is Spectating Recreation? .....	7
IV. TCHRA & THE WHISTLEBLOWER ACT .....	8
a. Review of a Plaintiff’s Retaliation Verdict .....	8
b. Report to an “Appropriate Law Enforcement Authority” .....	9
V. DECLARATORY JUDGMENT ACT/ULTRA VIRES .....	10
VI. PUBLIC INFORMATION ACT .....	12
a. Public Information in Private Email Accounts .....	12
b. Does the PIA have an Exhaustion of Remedies Requirement? .....	13
VII. TAKINGS/INVERSE CONDEMNATION .....	13
VIII. DERIVATIVE IMMUNITY .....	14

## INDEX OF AUTHORITIES

### Cases

<i>Brown &amp; Gay Engineering, Inc. v. Olivares</i> , __S.W.3d__, 2015 WL 1897646 (Tex. Apr. 24, 2015) .....	14,15
<i>City of Abilene v. Burk Royalty Co.</i> , 470 S.W.2d 643 (Tex. 1971).....	13
<i>City of Dallas v. Trammell</i> , 101 S.W.2d 1009 (Tex. 1937).....	11
<i>City of Dallas v. VSC, LLC</i> , 347 S.W.3d 231 (Tex. 2011).....	13
<i>City of El Paso v. Abbott</i> , 444 S.W.3d 315 (Tex. App. —Austin 2014, pet. filed).....	12
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009).....	10
<i>City of El Paso v. High Ridge Construction Inc.</i> , 442 S.W.3d 660 (Tex. App. —El Paso 2014, pet. filed) .....	3
<i>City of Georgetown v. Lower Colorado River Auth.</i> , 413 S.W.3d 803 (Tex. App. —Austin 2013, pet. dismiss'd) .....	4
<i>City of Houston v. Carlson</i> , 451 S.W.3d 828 (Tex. 2015).....	13,14
<i>City of Houston v. Kallinen</i> , __S.W.3d__, 2015 WL 1275385 (Tex. 2015) .....	13
<i>City of Houston v. Williams</i> , 53 S.W.3d 128 (Tex. 2011).....	1, 2
<i>City of San Antonio ex rel. City Public Service Bd. v. Wheelabrator Air Pollution Control, Inc.</i> , 381 S.W.3d 597 (Tex. App. —San Antonio 2012, pet. denied) .....	4
<i>City of San Antonio v. Lower Colorado River Auth.</i> , 369 S.W.3d 231 (Tex. App. —Austin 2011, no pet.) .....	3
<i>City of Watauga v. Gordon</i> , 434 S.W.3d 586 (Tex. 2014).....	5

<i>Damuth v. Trinity Valley Community College</i> , 450 S.W.3d 903 (Tex. 2014).....	1,2
<i>Filarsky v. Delia</i> , ___ U.S. ___, 132 S.Ct. 1657 (2012).....	15
<i>Hearts Bluff Game Ranch Inc. v. State</i> , 381 S.W.3d 468 (Tex. 2012).....	13
<i>Houston Municipal Employees Pension System v. Ferrell</i> , 248 S.W.3d 151 (Tex. 2007).....	11
<i>Killingsworth v. Housing Authority of the City of Dallas</i> , 447 S.W.3d 480 (Tex. App. —Dallas 2014) (pet. denied) .....	2
<i>Klumb v. Houston Municipal Employees Pension System</i> , ___ S.W.3d ___, 2015 WL 1276557 (Tex. 2015) .....	10
<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528 (2005).....	13
<i>Lower Colorado River Authority v. City of Boerne</i> , 422 S.W.3d 60 (Tex. App. —San Antonio 2014, pet. dismiss'd).....	4
<i>Mission Consol. Indep. Sch. Dist. v. Garcia</i> , 372 S.W.3d 629 (Tex. 2012).....	8
<i>Mission Consol. Indep. Sch. Dist. v. Garcia</i> , 253 S.W.3d 653 (Tex. 2008).....	6
<i>Republic Power Partners, L.P. v. City of Lubbock</i> , 424 S.W.3d 184 (Tex. App. —Amarillo 2014, no pet.) .....	4
<i>Ryder Integrated Logistics, Inc. v. Fayette County</i> , 453 S.W.3d 922 (Tex. 2015).....	5
<i>San Antonio Water Sys. v. Nicholas</i> , ___ S.W.3d ___, 2015 WL 1873217 (Tex. April 24, 2015).....	8
<i>South East Texas Regional Planning Commission v. Byrdson Services, LLC</i> , ___ S.W.3d ___, 2015 WL 269053 (Tex. App. —Beaumont 2015, no pet. hist.) .....	3
<i>Southwestern Bell Telephone, L.P. v. Emmett</i> , ___ S.W.3d ___, 2015 WL 1285326 (Tex. 2015) .....	10

<i>State v. Lueck</i> , 290 S.W.3d 876 (Tex. 2009).....	9
<i>Texas Adjutant General’s Office v. Ngakoue</i> , 408 S.W.3d 350 (Tex. 2014).....	6
<i>Texas Dep’t of Aging and Disability Services v. Cannon</i> , 453 S.W.3d 411 (Tex. 2015).....	7
<i>Texas Dep’t of Human Services v. Okoli</i> , 440 S.W.3d 611 (Tex. 2014).....	9,10
<i>University of Texas at Arlington v. Williams</i> , __S.W.3d__, 2015 WL 1285317 (Tex. 2015) .....	8
<i>Wasson Interests, Ltd. v. City of Jacksonville, Texas</i> , 2014 WL 3368413 (Tex. App. —Tyler 2014, pet. filed).....	4
<i>Wichita Falls State Hospital v. Taylor</i> , 106 S.W.3d 692 (Tex. 2003).....	1
<i>Zachry Const. Corp. v. Port of Houston Auth. of Harris County</i> , 449 S.W.3d 98 (Tex. 2014).....	3
<b>STATUTES</b>	
42 U.S.C. § 1983 .....	7
TEX. CONST. ART. 1, § 7 .....	13
TEX. CONST. ART. 14, § 66 .....	11
TEX. CIV. PRAC. & REM. CODE § 75.001 .....	4,7
TEX. CIV. PRAC. & REM. CODE § 75.002 .....	7
TEX. CIV. PRAC. & REM. CODE § 101.001 .....	4
TEX. CIV. PRAC. & REM. CODE § 101.106 .....	6,7
TEX. CIV. PRAC. & REM. CODE § 101.021 .....	5
TEX. GOV’T CODE § 552.002 .....	12
TEX. GOV’T CODE § 552.301 .....	12

TEX. GOV'T CODE § 552.321 .....	12
TEX. GOV'T CODE § 552.324 .....	12
TEX. GOV'T CODE § 554.002 .....	9
TEX. LAB. CODE § 21.051 .....	8
TEX. LOC. GOV'T CODE § 271.151 .....	1
TEX. LOC. GOV'T CODE § 271.153 .....	1,3,4
TEX. REV. CIV. STAT. ANN. ART. 6243h §§ 1-28 .....	11
TEX. WATER CODE § 49.223 .....	10

# Government Immunity Update

## I. INTRODUCTION

This paper will provide an update on recent cases implicating the sovereign or governmental immunity\* of the State and its political subdivisions (e.g., cities and counties). This paper will cover one or more cases concerning waivers of sovereign or governmental immunity for the following broad categories of claims: (1) Breach of Contract; (2) Tort/Recreational Use; (3) TCHRA/Whistleblower; (4) Declaratory Relief/Ultra Vires; (5) the Public Information Act; (6) Takings/Inverse Condemnation; and (7) Derivative Immunity. Obviously, not every case decided by every appellate court will be mentioned or catalogued. Instead, I have attempted to focus on Texas Supreme Court cases that answer important questions, or on appellate decisions that represent departures from the status quo.

\* Generally, courts use these two terms interchangeably. But as the Supreme Court of Texas has pointed out, the state enjoys “sovereign immunity,” while its political subdivisions, such as cities, counties, and school districts, have “governmental immunity.” *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

## II. BREACH OF CONTRACT

In 2005, the Legislature enacted the Local Government Contract Claims Act. TEX. LOC. GOV'T CODE §§ 271.151, *et seq.* (“Chapter 271”). Chapter 271 effects a limited waiver of governmental immunity for most political subdivisions (excepting counties) that enter into certain contracts that meet the statute’s definition of a “written contract.” Since that time, courts have attempted to apply the various definitional

provisions of Chapter 271; typically determining whether there is a (1) written contract, (2) stating the essential terms of the agreement, (3) for providing goods or services to the local governmental entity, (4) that is properly executed on behalf of the entity. TEX. LOC. GOV'T CODE § 271.151(2)(A). In addition, Chapter 271 places certain limitations on damages, providing that the total amount of money available is limited to: (1) the balance due and owed under the contract, including increased amounts owed due to owner-caused delays; (2) the amount owed for change orders; (3) attorney’s fees; and (4) interest. Damages may not include: (1) consequential damages; (2) exemplary damages; or (3) damages for unabsorbed home office overhead. *Id.* at § 271.153.

### a. Is an Employment Contract a Contract for “Services?”

On several occasions the question has arisen whether employment contracts with local government employees constitute a written contract for goods or services. In *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011), the court held that firefighters’ employment contracts with the city—which themselves were composed of multiple documents—fell within Chapter 271’s ambit. Nonetheless, the question remained whether that principle could be applied beyond *Williams*’ facts.

In *Damuth v. Trinity Valley Community College*, 450 S.W.3d 903 (Tex. 2014) (per curiam) the Texas Supreme Court answered that question definitively. *Damuth*, who had a one-year employment contract to act as the College’s women’s basketball coach, filed suit for breach of contract after the College terminated him five months into the deal. The *Damuth* case came before the Texas Supreme Court on appeal from the Twelfth Court of Appeals, after the trial court granted the College’s “plea of immunity,” in

which the College argued that Damuth's employment contract was not a contract for "goods or services." *Id.* at 904. The court of appeals upheld the trial court, and Damuth filed a petition for review.

The Texas Supreme Court soundly rejected each of three reasons the court of appeals cited to support its opinion. First, the court held that although the Act does not mention employment agreements specifically, the term "services" clearly includes the employment services that a governmental employee provides to his employer. *Id.*

Second, the court rejected the argument that heading or title of a statute should limit its application when the plain statutory language suggests otherwise. Here, the petitioner argued that because Chapter 271 is part of Title 8 of the Texas Local Government Code, which is entitled "Acquisition, Sale, or Lease of Property," it should apply in only when third-parties were doing business with the governmental entity. Citing to the rule of construction that a heading or title of a statute should not expand or limit its application (TEX. GOV'T CODE § 311.024), the court found that the term "services" had broad application, and included employment services provided by government employees.

Finally, the court dismissed, as a *non sequitur*, the argument *Williams* applied only in the civil service context. Nothing in Chapter 271 suggests that the term "services" is limited to employment services provided by police or firefighters. Accordingly, the court overturned the court of appeals and found that Chapter 271 applied to waive immunity for local government employment contracts.

**b. How Closely Will Courts Construe the Terms of a Contract to Determine a Waiver?**

If two recent cases out of the court of appeals are any indication, the answer is: quite closely.

First, in *Killingsworth v. Housing Authority of the City of Dallas*, 447 S.W.3d 480 (Tex. App. — Dallas 2014) (pet. denied), Killingsworth sued for breach of contract, arguing that the Housing Authority (DHA) backed out of a deal to hire him as its president. *Id.* at 482. Killingsworth's claim was hardly surprising; he had a letter agreement, signed by the DHA Board Chairman, setting out the terms of his employment, and including a start date. Crucially, however, the letter stated that it was not binding unless signed by the Board Chairman and duly approved by the entire DHA Board of Commissioners. *Id.* at 483. At the subsequent meeting where the Board was set to vote to approve the agreement a local political tempest ensued, the Board Commissioner was later replaced, and the Board eventually decided to negotiate an extension of the employment of the current president. *Id.* at 483-84.

Killingsworth argued that he had a valid agreement that waived immunity because the Board Chairman told him in conversation that, before he signed the letter, the Board had approved the agreement in executive session. *Id.* at 487-88.

The court, however, found that Killingsworth's argument could not represent the true intent of the parties. The court reasoned that the key provision—requiring both signature and approval by the Board—necessarily implied that Board approval would be required sometime *after* the Board Chairman signed and presented the letter to Killingsworth. In essence, the court carefully read the terms of the contract and held that one of its essential provisions would be rendered meaningless if it adopted Killingsworth's theory. *Id.* at 488. The court held that the Board never took that necessary subsequent vote to approve the contract. Therefore, the court found that



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