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Governmental Immunity: Implications of the *Wasson* and *Wheelabrator* Cases

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I. *Background on Governmental Immunity in Texas*

Sovereign immunity was first recognized in Texas by the Texas Supreme Court in 1847, and was based on the common law in England; the king could do no wrong. Sovereignty is rooted in precluding second guessing of employees in certain governmental actions and decisions. Sovereign immunity also protects the government's treasury from frivolous law suits.

Cities enjoy governmental immunity, which is derived from the sovereign immunity of the State. In 1847, the Supreme Court of Texas held that "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. De Young*, 1 Tex. 764, 769 (1847). Almost 25 years earlier, in 1821, the U.S. Supreme Court recognized the common-law doctrine without citing any legislative or constitutional enactment. *See Cohens v. Virginia*, 19 U.S. 264, 293 (1821). Immunity appears to be rooted in an early understanding of sovereignty:

> It is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.
>
> THE FEDERALIST No. 81, at 487 (Alexander Hamilton) C. Rossiter ed 1961.

Related is the concept that the sovereign is above the law. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES, *242 ("Hence it is, that no suit or action can be brought against the king . . . because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without any authority of redress; and the sentence of a court would be contemptible, unless that court had the power to command the execution of it: but who . . . shall command the king?"). Sovereign immunity is thus associated with the principle that the "King can do no wrong…" *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003). Over 150 years ago, it was recognized to be "an established principle of jurisprudence in all civilized nations." *Beers v. Arkansas*, 61 U.S. 527, 529 (1857). This principle has been affirmed through the years. *See, e.g., State v. Isbell*, 127 Tex. 399, 401, 94 S.W.2d 423, 424 (Tex. Comm. App. 1936) (a state cannot be sued without its consent, and then only in the manner, place and court or courts designated). Immunity is not bestowed by legislative or executive act; it arose as a common-law creation. *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 375 (Tex. 2006).

The Supreme Court of Texas was asked to revisit the issue of governmental immunity in 2004 in *Tooke v. City of Mexia*. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). The *Tooke* case involved a contract between the City of Mexia and Tooke to furnish labor and equipment for clean up work in the city. The city notified Tooke that the city budget no longer allowed for the services, at which time Tooke sued the city for breach of contract. The city asserted governmental immunity. Tooke argued that section

51.075 of the Local Government Code waives immunity by providing that cities "may plead and be impleaded in any court." Additionally, Tooke argued that the city was not immune from suit for breach of a contract covering a proprietary function, rather than a governmental one.

The Supreme Court of Texas noted that governmental immunity has two components: immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. Immunity from liability is waived when a city enters into a contract and voluntarily binds itself to the terms of that contract. *Id.* However, immunity from suit can only be waived by the Texas Legislature. *See Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997) ("[I]t is the Legislature's sole province to waive or abrogate sovereign immunity.") Courts in Texas have consistently deferred to the Texas Legislature to waive immunity from suit. *Texas Natural Res. Conservation Com'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

While *Tooke* was still pending in the Texas Supreme Court, the Texas legislature attempted to address the contractual governmental immunity issue. In 2005, the 79th legislature passed H.B. 2039. In the bill analysis, the bill author described a split in Texas courts of appeal in decisions on waiver of immunity in breach of contract cases arising from the "sue and be sued" language in statute. House Comm. on Civ. Practices, Bill Analysis, Tex. H.B. 2039, 79th Leg., R.S. (2005). The bill was intended to "clarify and re-express the Legislature's intent that all local governmental entities that have been given or are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts, subject to the limitations" of the bill. *Id*. H.B. 2039 was codified as subchapter I of chapter 271 of the Local Government Code.

The limited waiver of immunity found in chapter 271 applies only to a contract that is: (1) written; (2) states the essential terms of the agreement; (3) provides goods or services to the local governmental entity; and (4) is properly executed on behalf of the local governmental entity. TEX. LOC. GOV'T CODE § 271.151. For a contract that satisfies these requirements, damages for a breach of contract claim are limited to the balance due and owed by the local governmental entity under the contract. TEX. LOC. GOV'T CODE § 271.153.

After the enactment of Subchapter I of chapter 271, the Supreme Court of Texas decided *Tooke* in 2006. The court noted that immunity is waived only by clear and unambiguous language and the legislature enacted a limited waiver of immunity for breach of contract while the case was pending. The court concluded that even though the waiver was partially retroactive and would apply Tooke's claim, the claim was for lost profits, which are consequential damages excluded from recovery under chapter 271.

The problem was, though, the Supreme Court of Texas did not provide a clear answer to the question of whether the proprietary-governmental dichotomy applies to breach of contract claims. In their analysis, the court states that the court has never held that the proprietary-governmental dichotomy determines whether immunity from suit is waived

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