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ULTRA VIRES UPDATE

*A Review of Recent Appellate Decisions with a Plea
For Clarity in using the Phrase “Ultra Vires”*

J. Bruce Bennett

Author Contact Information:
J. Bruce Bennett
Cardwell, Hart & Bennett L.L.P
807 Brazos, Suite 1001
Austin, Texas 78701
Tel: 512-322-0011
Fax: 512-322-0808
jbb.chblaw@me.com

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*“Do judges feel that using Latin enhances their sense of belonging to a learned profession? Perhaps. But one thing is clear, their use of Latin does not enhance the clarity of their written opinions.”*¹

INTRODUCTION²

Since 2009, Texas courts have routinely used the phrase “*ultra vires*” to encompass any violation by the officials of a state agency or other governmental entity of their statutory “authority.”³ The courts hold that an official’s commission of such an *ultra vires* act allows an adversely affected person to seek immediate judicial review without first exhausting available administrative remedies, and if necessary, to obtain appropriate declaratory, injunctive, or mandamus relief.

The driving force in these *ultra vires* cases is the Texas courts’ desire to protect the immunity of the State and its political subdivisions from suit and liability.⁴ The Supreme Court of Texas has held that sovereign or governmental immunity protects only those officials who act “consistently with the law, which includes those who act within their granted discretion.”⁵ The court also has held that *ultra vires* suits “cannot be

¹ Wayne Schiess, *Avoid Unnecessary Latin*, Legalwriting.net (June 9, 2005).

² The views and comments expressed in this paper are strictly those of the author. They do not speak for any organization of which the author is a member, or for any client he or his firm represents. The author would like to thank Linda Secord and Colleen Sullivan for their valuable comments and suggestions.

³ In this paper all references to “officials” or “public officials” include anyone employed by a governmental entity unless otherwise indicated.

⁴ See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368-69 (Tex. 2009). Governmental immunity is an aspect of the State’s sovereign immunity. *City of Round Rock v. Whiteaker*, 241 S.W.3d 609, 626 (Tex. App.–Austin 2007, pet. denied). When performing governmental functions, the State’s political subdivisions, including administrative agencies and municipalities, enjoy governmental immunity. *Id.* Sovereign and governmental immunity encompasses immunity from being sued and immunity from liability. *Id.* Immunity from suit protects the state and its subdivisions from lawsuits seeking to direct or control governmental officials in the exercise of their discretionary statutory authority in performing governmental actions or functions. *Texas Natural Resources Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855-56 (Tex. 2002); *Griffin v. Hawn*, 341 S.W.2d 151, 152-53 (Tex. 1960); *Short v. W.T. Carter & Bro.*, 126 S.W.2d 953, 962 (Tex. 1939). “A lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes.” *Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 375 (Tex. 2006).

⁵ *Houston Belt & Terminal Ry. v. City of Hous.*, 487 S.W.3d 154, 164 (Tex. 2016).

brought against the state, which retains immunity, but must be brought against the state actors in their official capacity.”⁶

This paper urges the Texas courts to begin using the phrase “*ultra vires*” to describe a very narrow exception to the doctrine of sovereign or governmental immunity. The phrase should be used to include only the acts of governmental officials that are wholly outside their statutory or constitutional authority. In such a case, a person whose rights have been violated should be permitted to bring suit to remedy the violation or prevent its occurrence, and such a suit should not be considered one against the State which requires legislative or statutory consent or authorization.”⁷

Sovereign or governmental immunity does not preclude prospective injunctive or declaratory remedies in official-capacity suits against government officials who violate statutory or constitutional provisions or take actions under unconstitutional statutes. Such remedies require governmental officials to act lawfully and do not attempt to exert control over the government.⁸

However, the phrase “*ultra vires*” should *not* be used to describe an act that results from a government official’s exercise of lawfully granted discretion made in the course and scope of his official duties and within the jurisdiction of the agency the official represents—even if the exercise of that discretion is based on a misinterpretation or misconstruction of the official’s authority. The phrase should be restricted to those acts the official commits without *any* legal authority, that is, to acts wholly outside the jurisdictional authority of the government agency, and thus void.⁹ If a governmental

⁶ *Heinrich*, 284 S.W.3d at 373.

⁷ *Director of Dep’t of Agric. & Env’t v. Printing Indus. Ass’n*, 600 S.W.2d 264, 265-66 (Tex. 1980); *see also Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 404 (Tex. 1997) (“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.”); *Texas Highway Comm’n v. Texas Assoc. of Steel Imps., Inc.*, 372 S.W.2d 525, 531 (Tex. 1963) (an entity or person whose rights have been violated by the unlawful action of a state official may bring suit to remedy the violation or prevent its occurrence, and such suit is not a suit against the state requiring legislative or statutory authorization).

⁸ *Heinrich*, 284 S.W.3d at 372.

⁹ *Florida Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982); *see also Pennshurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, n. 11 (1984) (official acts *ultra vires* only when “there [is] no colorable basis for the exercise of authority at issue.”); *Grant v. Florida Power Corp.*, 186 B.R. 526, 529 (Bankr. M.D. Fla. 1995) (bankruptcy trustee loses immunity if he or she acts in the “clear absence of all jurisdiction”). In *Combs v. Texas Civil Rights Project*, 410 S.W.3d 529, 541 n.1 (Tex. App.—Austin 2013, pet. denied), Chief Justice Jones noted in a dissenting opinion that the meaning of “*ultra vires*” is “broad enough to encompass claims against officials and employees of the State in their *individual* capacities as well as in their *official* capacities.” However, doctrinal confusion in areas such as official immunity and

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