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## **Contractual Sovereign Immunity in the State of Texas: Can the King Really Do No Wrong?**

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# **CONTRACTUAL SOVEREIGN IMMUNITY IN THE STATE OF TEXAS:**

## **CAN THE KING REALLY DO NO WRONG?<sup>1</sup>**

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### **I. Introduction**

Contractual sovereign immunity is an important issue to the construction sector because the government is the largest single purchaser of construction related services.<sup>2</sup> Needless to say, the government is a major source of business for the construction industry. To that end, it is important for contractors, subcontractors, and design professionals to compete for government contracts while being careful to not expose themselves to the difficulties of sovereign immunity. Accordingly, the following is a case note regarding the doctrine of sovereign immunity in the State of Texas.

### **II. Contractual Sovereign Immunity**

Contractual sovereign immunity is a shield that protects the State of Texas from lawsuits that arise out of breach of contract claims between a private party and the State. It is distinct from sovereign immunity defenses in tort cases, declaratory actions, and injunctions. This paper

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<sup>2</sup> Drew Bracken, *In Depth: Construction Development & Design*, Business First of Columbus, at <http://columbus.bizjournals.com/columbus/stories/2002/02/04/focus2.html?page=2>.

will only address the issue of sovereign immunity as it pertains to breach of contract claims between the State of Texas and private parties.

**A. The Purpose of Sovereign Immunity in Texas.**

The Texas Supreme Court has long recognized that sovereign immunity protects the State of Texas, its agencies, and officials from lawsuits for damages, unless waived by the Legislature.<sup>3</sup> The policy behind sovereign immunity is to allow the State of Texas to perform its appropriations and governance functions free from lawsuits.<sup>4</sup> It is derived from the common law courts of England and it used to be based on the idea that “the king could do no wrong.”<sup>5</sup> Today however, state sovereign immunity is a policy choice that is regulated through a combination of common law principles and statutory regulation.<sup>6</sup> It is an attempt to balance public policy interests against the rights of private parties seeking a remedy from governmental breaches of contract.<sup>7</sup>

Over time the doctrine of sovereign immunity has evolved from a general blanket of government immunity to specific statutory protection schemes with different standards for different areas of the law.<sup>8</sup> Thus the sovereign immunity rules that apply to a breach of contract

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<sup>3</sup> *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847) (holding that a state cannot be sued in its own courts without its consent); *see also*, *Thomson v. Baker*, 38 S.W. 21 (Tex. 1896).

<sup>4</sup> *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-99 (Tex. 2003).

<sup>5</sup> *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 417 (Tex. 1997) (Justice Enoch dissenting) (discussing the concept of “the King can do no wrong” and sovereign immunity as originating in the common law and is now statutorily regulated by the state).

<sup>6</sup> *See* TEX. GOV’T. CODE ANN. § 2260 (Vernon 2003); TEX. EDUC. CODE ANN. § 11.151(a); *Missouri Pacific Railroad Company v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970).

<sup>7</sup> *See* TEX. GOV’T CODE ANN. § 2260 (Vernon 2003).

<sup>8</sup> *Satterfield & Pontikes Construction, Inc. v. Irving Indep. School Dist.*, 123 S.W.3d 63, 69 (Tex. App.—Dallas 2003, pet. denied) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon Supp.2003) regarding immunity as it exclusively relates to tort claims; *see also*, TEX. CIV. PRAC. & REM. CODE ANN. § 101.022 (Vernon Supp.2003) (regarding immunity as it pertains to premises liability); *Shade v. City of Dallas*, 819 S.W.2d 578, 582 (Tex. App.—Dallas 1991, no writ) (stating government enjoys sovereign immunity for its negligent acts except to

do not apply to other areas of the law or enforcement mechanisms such as torts or declaratory actions.

The relationship between sovereign immunity and breach of contract is somewhat controversial and complex. On the one hand, there is fear that allowing the State to be sued for contractual claims would harm the public by depleting the State's financial resources. By way of example, the Texas Supreme Court explained in *Texas Natural Resource Conservation Commission v. IT-Davy* that the policy reasons for sovereign immunity revolve around the legislature's interest in "managing state fiscal matters through the appropriations process;" allowing the legislature to protect its policy making function free from lawsuits; and protecting tax resources from being squandered from their intended purpose for defending lawsuits.<sup>9</sup> In other words, because the State represents the interests of the public, it should be protected from lawsuits. However, on the other hand, there is concern that sovereign immunity may permit the government to breach its contractual duties while withholding the right to seek a judicial remedy. Because both of the concerns are compelling, it is important to find an equitable and predictable way of resolving breach of contract suits with the State.

## **B. Breach of Contract and The Contemporary Sovereign Immunity Rule.**

Sovereign immunity is comprised of two separate and distinct principles, and unless waived, it defeats a trial courts subject-matter jurisdiction over a lawsuit.<sup>10</sup> The first, *immunity from suit*, bars a lawsuit against the State unless the Legislature has expressly given its consent to

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the extent the Tort Claims Act waives that immunity); *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945) (explaining the doctrine of immunity as it relates to injunctive and equitable relief).

<sup>9</sup> TEX. GOV'T. CODE ANN. § 311.034 (Vernon 2003); *see also*, *Texas Natural Resource Conservation Commission v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

<sup>10</sup> *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638-39 (Tex. 1999) (per curiam).

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