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Recent Texas Supreme Court Opinions Change the Landscape of Governmental Immunity: Andrews Kurth

On April 1, 2016, the Texas Supreme Court issued opinions in *Houston Belt & Terminal Railway Co. v. City of Houston* and *Wasson Interests, Ltd. v. City of Jacksonville*, in which the Court further constrained the application of governmental immunity.

Houston Belt & Terminal Railway Co. v. City of Houston, No. 14-0459, Texas Supreme Court, April 1, 2016

The *ultra vires* doctrine is a narrow exception to governmental immunity, under which a claimant may sue a government official for injunctive relief if the official has either acted without legal authority or failed to perform a ministerial duty. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Following *Heinrich's* establishment of the framework for evaluating whether a claim properly alleges *ultra vires* conduct, the general consensus has been that where government officials are vested with discretion, suits involving the exercise of that discretion do not properly present *ultra vires* claims and are therefore barred by governmental immunity.

In *Houston Belt*, the Texas Supreme Court considered this issue in the context of limited official discretion (as opposed to instances of absolute discretion) and found that an *ultra vires* claim may be premised on allegations asserting that an official exceeded his discretion. The Court reviewed the ordinance underlying the plaintiffs' claims and evidence regarding the manner in which it had been applied. Based on that review, the Court concluded that the plaintiffs' allegation that the official responsible for implementing the ordinance had exceeded the discretion granted him was sufficient to avoid dismissal on immunity grounds. The Court reasoned that where only limited discretion exists, governmental immunity does not bar a suit to enjoin an official's actions taken without reference to or in conflict with the constraints of the law authorizing the official to act.

The decision in *Houston Belt* alters the analysis of an *ultra vires* claim when the basis for an immunity defense is that the claim is premised on a government official's exercise of discretion. In order to determine the applicability of governmental immunity in such suits, courts will have to analyze the limits of the official's discretion and then resolve any fact issues concerning whether the official acted within those limits. As a part of that analysis, courts should consider the statutes or regulations applicable to the government action or inaction at issue. *Sw. Bell Tel. Co. v. Emmett*, 459 S.W.3d 578, 583 (Tex. 2015). Courts also can consider evidence necessary to resolve jurisdictional fact issues. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004). It is clear, however, that merely alleging an official's discretion is limited will not be sufficient to avoid dismissal. As the Court noted in *Houston Belt*, "many legislative grants of authority, although not absolute, will be broad enough to bar most, if not all, allegedly *ultra vires* claims."

Wasson Interests, Ltd. v. City of Jacksonville, No. 14-0645, Texas Supreme Court, April 1, 2016

In 2006, *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) established that a city is not immune

from suit for torts committed in its proprietary capacity. Since that time, there has been disagreement in the courts of appeals as to whether this governmental/proprietary dichotomy also applies to contract actions against cities. Compare *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied) (holding that there is a presumption of immunity and immunity was not "waived" in breach of contract cases where the contract was entered into in a city's proprietary capacity); *Republic Power Partners, L.P. v. City of Lubbock*, 424 S.W.3d 184, 193 (Tex. App.—Amarillo 2014, no pet.) (same) with *City of Georgetown v. Lower Colo. River Auth.*, 413 S.W.3d 803, 812 (Tex. App.—Austin 2013, pet. dism'd) (determining that the governmental/proprietary dichotomy applies to contract actions).

The Texas Supreme Court resolved the circuit split in *Wasson Interests*, holding that when cities enter into contracts in their proprietary capacity, they are not shielded by immunity from lawsuits related to those contracts. The Court reasoned that the governmental immunity afforded to political subdivisions of the State is not inherent in the political subdivision, but rather is derived from the State's immunity. That is, for cities, there is no "default immunity." Within that framework, the Court held immunity only attaches to actions performed by a municipality in its governmental capacity, because those actions are the only ones that are performed by a city as an agent of the State. Accordingly, the Court concluded that when a city contracts in its proprietary capacity, immunity never attaches.

Until now, the general understanding has been that the only instance in which immunity did not apply to bar a contract action was when the contract came within the scope of Subchapter I of Chapter 271 of the Texas Local Government Code, which waives immunity from suit and provides the process for adjudicating disputes involving contracts for goods or services. Tex. Loc. Gov't Code Ann. §§ 271.151-.160 (West 2005 & Supp. 2015). In *Wasson Interests*, the City of Jacksonville argued that these provisions abrogated the common law governmental/proprietary dichotomy with respect to contracts. The Court disagreed, reiterating that when a contract is entered into by a municipality in its proprietary capacity, no immunity exists and, thus, there is no immunity to waive.

Notably, the Court resolved another question that had been left open after *Tooke*, and confirmed in a footnote that the governmental/proprietary dichotomy applies only to municipalities, because they are the only political subdivisions that can act in a proprietary capacity.

Following *Wasson Interests*, in order to invoke the protections of governmental immunity in breach of contract actions, cities will have to show that they were acting in a governmental capacity. The practical reality is that there will be increased litigation over what is governmental and what is proprietary in breach of contract cases. As guidance, the Court noted that the Legislature is empowered to delineate the functions of a municipality that are governmental and those that are proprietary, as it has done in the Texas Tort Claims Act (the "TTCA"), see Tex. Civ. Prac. & Rem. Code Ann. § 101.0215. The Court directed trial judges to look to the TTCA for guidance when resolving the governmental/proprietary question in contract actions, just as they do in tort cases. It is important to note, however, that the TTCA does not establish an exclusive list of proprietary functions and, thus, is simply a jumping off point for courts considering whether a contract was entered into in a proprietary or governmental capacity.

As overarching takeaways from *Houston Belt* and *Wasson Interests*, municipalities need to be mindful of the fact that they do not have "default immunity." Municipalities should therefore consider establishing limitations on their liability within the terms of any contracts they enter into in their proprietary capacity. Likewise, to the extent municipalities intend to imbue their officials with absolute discretion sufficient to invoke governmental immunity, they should take care to ensure that municipal ordinances clearly effectuate that goal.

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Last Updated: April 26 2016

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