CHAPTER 271 CONTRACT CLAIMS:

The good, the bad, and the really bad

WM. ANDREW MESSER
JANET M. SPUGNARDI

MESSER, CAMPBELL & BRADY
ATTORNEYS

6351 PRESTON ROAD, SUITE 350
FRISCO, TEXAS 75034
972.424.7200 - TELEPHONE
972.424.7244 - FACSIMILE
WWW.MCBLAWFIRM.NET

2010 TEXAS CITY ATTORNEYS ASSOCIATION ANNUAL MEETING
OCTOBER 28, 2010
CORPUS CHRISTI, TEXAS

I. Introduction

In 2005, the Texas Legislature added Sections 271.151 – 271.160 to the Local Government Code, which waives immunity against local governmental entities for certain breach of contract claims for contracts providing "goods or services" to the governmental entity. At the time of this legislative enactment, *City of Mesquite v. PKG Contracting, Inc., 197 S.W.3d 388*, was pending at the Texas Supreme Court, along with a several other breach of contract cases involving governmental entities. The Court remanded that case back to the trial court in light of the recent statutory amendment. Since that time, the PKG case and a flurry of other breach of contract cases have made their way through Texas trial courts and appellate courts trying to flesh out the extent of a governmental entity's waiver of immunity for breach of contract claims under Chapter 271. This paper is meant to address the most recent significant cases which have interpreted Chapter 271.

II. Cases of interest

A. Texas Supreme Court

***Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, 2010 WL 3366104 (Tex. 2010)**

Residential developers brought action against city water control and improvement district authority, alleging breach of contract and inverse condemnation regarding authority's continued possession of water and sewer facilities built by developer. Agreements stipulated that the developers would build water and sewer facilities according to the authority's specifications, and that the developers would lease the facilities to the authority free of charge until the authority purchased them. The authority agreed to reimburse the developers for 70% of their construction costs once it received voter-approved bond funds. The bond measures failed after repeated attempts. Trial court granted summary judgment to developers on breach of contract claim but court of appeals reversed and entered judgment for authority. Developers appealed.

In deciding whether the agreements entailed the provisions of goods and services to the authority, the Court first observed that since Chapter 271 provides no definition of "services," that the term is broad enough to encompass a wide array of activities. The Court stated that the services need not be the primary purpose of the agreement so long as it benefits the governmental entity. Because the developers contracted to construct, develop, lease, and bear all risk of loss or damage to the facilities, the Court concluded that the agreements entailed the provision of services provided directly to the authority.

The Court also rejected the authority's argument that because there is no "balance due and owed" that the contract falls outside Chapter 271. The Court found that the purpose of section 271.153 is to limit amount of liability, not to deprive a court of jurisdiction. The Court held that the authority's immunity from suit is waived by section 271.152.

***Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320 (Tex. 2006)**

Ben Bolt sued the Fund after the Fund denied a claim for benefits under its policy. The Fund asserted immunity in a plea to the jurisdiction, which the trial court denied. A divided court of appeals reversed, concluding that the Fund is immune from suit. However, after the court of appeals rendered its judgment, the Legislature enacted 271.151-271.160 of the Local Government Code providing a limited immunity waiver for breach of contract claims against governmental entities.

The Fund argued that its insurance contract with Ben Bolt was not a contract subject to Chapter 271 because, under the policy, no goods or services were provided *to* the Fund; rather, the Fund provided insurance to its contracting members in exchange for payments. The Court rejected this argument. The Court observed that the relationship between the Fund and its members differed from the ordinary consumer/seller relationship because its members elected a governing board and a board subcommittee to resolve claims disputes. The Court found that the Fund's members therefore provided services to the Fund. The Court looked at the legislative history of section 271.152 and concluded that the Legislature intended to loosen the immunity bar so 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.

The Texas Supreme Court held that the Fund's immunity had been waived under Section 271.152 by virtue of the insurance agreement with Ben Bolt.

B. Intermediate Appellate Courts

***Brazos River Authority v. Brazos Electric Power Cooperative, Inc.*, 2010 WL 2523438 (Tex. App. – Waco 2010, pet. filed)**

The Authority owned a hydroelectric generation facility. The Authority and Brazos Electric entered into a Power Supply Contract that provided for the sale of all hydroelectric power produced at the facility to Brazos Electric. The Authority and Brazos Electric then re-negotiated the Power Supply Contract. The parties entered into two related agreements concerning the operation and maintenance of the facility as a result of the negotiations. The Facilities Use Agreement was a long-term agreement under which Brazos Electric would possess, operate, and maintain the facility in exchange for the right to receive the power produced by the facility; it commenced upon the parties obtaining regulatory approvals. The other agreement was a Facility Cost Agreement which was a bridge agreement between the parties in which Brazos Electric agreed to be responsible for the facility's cost until the regulatory approvals were obtained and the Facilities Use Agreement commenced. The Facilities Use Agreement never commenced (in part because the approvals were not obtained) and the Facility Cost Agreement expired by its own terms. Brazos Electric sued the Authority for breach of contract. The Authority filed a plea to the jurisdiction, which the trial court denied. Authority filed an interlocutory appeal.

The Court of Appeals concluded that the Facilities Use Agreement for the possession, operation, and maintenance of the facility was in essence a lease of the facility and not a contract for the provision of goods and services to come within the waiver of section 271.152. The Court also found that because the Power Supply Contract and the Facility Cost Agreement were for the sale of hydroelectric power to Brazos Electric, and not vice versa, that the goods or services to the Authority were indirect and attenuated benefits and did not result in a waiver of immunity under section 271.152. The Court reversed and rendered judgment dismissing Brazos Electric's suit against the Authority.

***Hoppenstein Properties, Inc. v. McLennan County Appraisal Dist.*, 2010 WL 3272404 (Tex. App. – Waco 2010, no pet.)**

Hoppenstein entered into a lease for commercial property with tenant MCAD, requiring Hoppenstein to complete renovations. Hoppenstein failed to complete the renovations so MCAD abandoned the premises. Hoppenstein sued for unpaid rents. The trial court granted MCAD's partial plea to the jurisdiction on claim for anticipatory breach.

The Court of Appeals held that the lease contract involved an interest in real property, not the provision of services, that continuing repairs did not amount to a contract for goods or services, and that any services provided to MCAD for renovations was too indirect and attenuated since property owner was the direct beneficiary of renovations and maintenance of the property. The Court accordingly concluded that there was no waiver of immunity under section 271.152.

***Berkman v. Keene*, 311 S.W.3d 523 (Tex. App. – Waco 2009, pet. denied)**

Berkman alleged that the city breached an agreement to provide free water and sewage to his property if it was used as a home for children who were wards of the state. Berkam asserted that he was providing a "service" to the city and therefore, immunity was waived under Chapter 271. The trial court granted the city's summary judgment motion and the Waco Court of Appeals reversed and remanded. City filed motion for rehearing arguing that its immunity from suit had not been waived.

The Court of Appeals agreed with the city Berkman and held that any benefits Berkman was

providing to the city were at best indirect or attenuated and did not result in a waiver of immunity.

***Galveston Indep. School Dist. V. Clear Lake Rehabilitation Hospital,* 2010 WL 3632520 (Tex. App. – Houston [14th Dist.] 2010, no pet. h.)**

Hospital filed suit against ISD asserting breach of contract stemming from ISD's refusal to pay hospital for treatment of a former ISD employee after employee's health insurance was cancelled. The ISD filed a plea to the jurisdiction, which was denied by the trial court. The ISD appealed.

The ISD argued that Clear Lake did not identify any written contract between it and the ISD where Clear Lake was obligated to provide goods or services to the ISD. The Court dismissed that argument by saying that there does not have to be a contract between the ISD and Clear Lake; if there is a contract between the governmental entity and another party to which Clear Lake is a third-party beneficiary, then Clear Lake's breach of contract claim falls within the waiver of immunity authorized by section 271.152.

The Court then analyzed the pleadings and the record. The ISD did not offer evidence in its plea hearing. Thus, the Court found that there were questions of fact not conclusively answered in the record as to whether Clear Lake was a third-party beneficiary under the contract therefore waiving ISD's immunity. The Court held that Clear Lake needed an opportunity to amend its pleadings and reversed and remanded.

***City of Houston v. Estate of Jones,* 2010 WL 2998856 (Tex. App. – Houston [14th Dist.] 2010, pet. filed)**

In June 2000, Jones, now deceased, brought tort claims against the city after his neighbor, working pursuant to a city-issued demolition permit, damages his home, rendering it uninhabitable. The city and Jones entered into a settlement agreement to help include Jones in the city's federally approved home repair program. The home repair program was discontinued before Jones received any assistance. Jones amended his suit to assert a claim for breach of the settlement agreement.

Both sides moved for summary judgment and the city filed a plea to the jurisdiction. The trial court denied the plea on the breach of contract claim and the First Court of Appeals affirmed based upon "sue and be sued" language in the city's charter. The Texas Supreme Court reversed and remanded with instructions for the trial court to determine if the city had waived immunity under section 271.152. On remand, the city filed another plea, which Jones opposed. Jones set his previously filed summary judgment motion for submission and the trial court granted summary judgment on the contract claim, thus implicitly denying the city's plea. The city did not file an interlocutory appeal from the denial of the 2006 plea. Jones died, the case was transferred to probate court, and the city filed another plea in August 2009. The trial court construed the 2009 plea as a motion to reconsider the denial of the 2006 plea and denied the city's motion. The city filed an interlocutory appeal.

The Court only considered the new ground in the 2009 plea that section 271.152 did not apply because the settlement agreement did not state the essential terms of the agreement for providing goods and services to the city. However, the Court went on to say that even though it had jurisdiction to consider this ground, it was not a basis for reversal of the trial court's denial of the plea. The Court held that even if the city was correct that it had not waived immunity under section 271.152, the city failed to demonstrate on appeal that it is entitled to have its plea granted because the other bases of waiver, which were not properly before the Court, provided sufficient support for the trial court's order. The Court stated that the city had an opportunity to bring an interlocutory appeal of the denial of its 2006 plea but chose not to, and it is too late to do so now. The Court overruled the city's issue and affirmed the trial court's order denying the plea.

The dissent points out that the majority's ruling conflict with "a long line of appellate authority that subject-matter jurisdiction can be raised at any time whether the case is pending in a trial court, this court, or the supreme court."

***City of Houston v. Williams,* 290 S.W.3d 260 (Tex. App. – Houston [14th Dist.] 2009, pet. granted)**

Retired firefighters brought action against city, alleging that the city improperly deducted previously-paid overtime amounts from the termination pay and that termination pay should have included premium salary. Trial court denied the city's plea to the jurisdiction and granted partial summary judgment to the firefighters. City appealed and Court of Appeals affirmed. Texas Supreme Court reversed and remanded for consideration of whether firefighters' claims fall within sections 271-151 through 271.160. On remand, trial court concluded governmental immunity was waived and denied the city's plea. The city appealed.

The firefighters based their breach of contract claim on Texas statutes, City of Houston ordinances, and the Meet and Confer and Collective Bargaining Agreements between the city and the Houston Firefighters' Association. The Court held that a state statute, standing alone, cannot constitute a contract subject to Chapter 271 because it is not executed on behalf of the local governmental entity.

However, the Court found that a municipal ordinance is executed on behalf of the local governmental entity and may fall within the section 271.151(2) definition of a contract if the ordinance meets the additional elements: 1) a written contract, 2) stating the essential terms of the agreement, 3) providing for goods or services, 4) to the local governmental entity, and 5) properly executed. The Court then analyzed the major ordinance primarily relied upon by the firefighters and determined that, in the ordinance, the city promised certain benefits to its eligible employees if they performed. The Court concluded that the ordinance met the definition of a contract under section 271.151(2).

The Court rejected the firefighters' argument under the Meet and Confer and Collective Bargaining Agreements because, though the parties agree they are contracts subject to Chapter 271, the firefighters lack standing to sue for breach of the agreements.

The Court held that the city's immunity was waived under section 271.152 by virtue of the city's ordinances and affirmed the trial court's order denying the plea. The Texas Supreme Court heard oral argument in this case on October 13, 2010.

***East Houston Estate Apts., LLC v. City of Houston,* 294 S.W.3d 723 (Tex. App. – Houston [1st Dist.] 2009, no pet.)**

Former owner of apartment complex filed suit against the city, asserting that the city breached its loan agreement with former owner, under which the city provided funding to former owner to rehabilitate the complex for low-income housing. The city filed plea to the jurisdiction, which the trial court granted. The former owner appealed on the ground that the trial court erred because the city's immunity is waived by section 271.152.

The former owner argued that by its agreement with the city it was providing low-income housing as a service to the city. The city argued that the agreement was merely a loan agreement that did not require East Houston to provide anything that could be construed as a service to the city. The Court concluded that the loan agreement provided a means by which the city was a conduit of federal funds and facilitator of the project, but did not provide services directly to the city. The Court held section 271.152 did not apply to the contract where the city would receive only an indirect, attenuated benefit because otherwise the limited waiver of immunity would lose all meaning.

The decision of the trial court in granting the city's plea to the jurisdiction was affirmed.

***City of Houston v. Southern Electric Services, Inc.,* 273 S.W.3d 739 (Tex. App. – Houston [1st Dist.] 2008, pet. denied)**

General contractor and subcontractor for construction project at city airport brought action against the city for breach of contract, alleging that the city certified higher wages and failed to pay plaintiff's higher labor costs. The trial court denied the city's plea to the jurisdiction, which the city appealed.

The Court observed that it was undisputed that the contract is the type of contract that falls within section

271.152. However, the city contended that section 271.153 was jurisdictional and that since there was not a balance due and owing under the contract the contractors had not plead a claim that falls under Chapter 271. The Court disagreed with the City's position because it essentially asked the court to adjudicate the claim for damages in order to determine that the contract did not impose an obligation on the city to adjust the contract price and thus the city did not owe anything in damages. The Court concluded that section 271.153 does not retract the privilege granted in section 271.152 to adjudicate a claim for breach of contract if a plaintiff alleged facts to support such a claim and seeks only recovery of damages to the extent allowed. The Court held that because the pleadings alleged sufficient facts to qualify as a waiver of sovereign immunity under section 271.152 that the trial court's order should be affirmed.

***City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132 (Tex. App. – Corpus Christi 2009, pet. granted)**

Beginning in 1981, the city and Sharyland entered into water service agreements and water supply agreements. By the water service agreement, Sharyland agreed to sell and deliver water and/or sewer service to the city and the city agreed to purchase and receive water and/or sewer service from Sharyland. Under the water supply agreement, the city conveyed its new water distribution system to Sharyland and Sharyland agreed to provide the city with water. Subsequently, the city installed a sanitary sewer system, which was completed in 1999. In certain locations, the city's sewer main and Sharyland's water main run parallel to each other in a public right-of-way, resulting in some of the city's residential service connections crossing Sharyland's water main. Sharyland sued the city for breach of the agreements. The breach of contract claim against the city was tried to a jury, who found that the city breached its agreements with Sharyland by failing to maintain required separation distance between sewer lines. Trial court assessed monetary damages and attorney's fees against the city. All parties appealed from the judgment.

Sharyland asserted, and the city agreed, that the agreements at issue involved services. The Court concluded that the agreements fall within the provisions of Chapter 271 because they involve services and that the city's immunity to suit for the breach of contract claim had been waived. The Court affirmed the judgment on Sharyland's breach of contract claim, but reversed and rendered judgment in favor of the city that the damages and attorney's fees awarded against the city on the breach of contract claim were not recoverable. The Court held that because there was no balance due and owed by the city to Sharyland under the agreements that Sharyland could not recover damages against the city under section 271.153(a). The Court did not interpret section 271.159 (authorizing attorney's fees) because Sharyland argued it was entitled to attorney's fees under the Declaratory Judgment Act. The Court found that Sharyland could not recover attorney's fees under the Act from the city because it had not recovered damages due to the section 271.153 limitation on damages and because the city was not a corporation as required under 38.001 of the Civil Practices & Remedies Code.

The Texas Supreme Court heard oral argument in this case on March 24, 2010.

***Kansas City Southern v. Port of Corpus Christi Authority of Nueces County*, 305 S.W.3d 296 (Tex. App. – Corpus Christi 2009, pet. denied)**

County port authority filed suit against railroads seeking declaratory and injunctive relief, objecting to arbitration of dispute between parties concerning port authority's demolition of moveable road and rail bridge. Railroads counterclaimed seeking declaration that their claims were not barred by sovereign immunity, an order compelling arbitration, and attorney's fees and costs. The trial court entered judgment granting all relief sought by port authority. Railroads appealed.

On appeal, the parties arguments centered on whether the Joint Operating Agreement concerning maintenance of the road and rail bridge called for the railroads to provide goods or services to the authority such that the agreement qualified as a contract under section 271.152. The Court did not address this argument because it found that, even assuming the agreement was a contract under section 271.152, the

authority's immunity had not been waived because the damages sought by the railroads are not recoverable under the statute. Court disagreed with railroad's assertion that the authority's promise to maintain, operate, and provide free and open access to the rail bridge represented a balance due and owed by the authority to the railroads under the contract. The Court also observed that there was no monetary compensation in the form of a liquidated damages provision in the event of a breach. Court held that section 271.153 is jurisdictional such that for immunity to be waived under section 271.152, a plaintiff must plead damages that are recoverable under the statute.

***Dallas Area Rapid Transit, v. Monroe Shop Partner, Ltd.*, 293 S.W.3d 839 (Tex. App. – Dallas 2009, pet. denied)**

Developer sued city transit agency ("DART") for breach of contract to sell historically significant real property. Trial court denied DART's plea to the jurisdiction and DART appealed.

DART argued that the contract at issue was not an agreement to provide goods or services, but was a contract for the sale of real estate and did not waive immunity under section 271.152. The Court rejected that argument because of the development services of the contract, which were related to construction on the property and which were subject to restrictions because of the historic nature of the property. DART countered that the development services Monroe contracted to perform were not for the benefit of DART, but instead for the benefit of the State of Texas because of its restrictions on the use of the historic property. The Court said that DART benefited as well because it was bound by the restrictions before the contract with Monroe assigned those responsibilities. The Court concluded that the contract includes promises by Monroe to provide services to DART and was therefore a contract that fell within the waiver of immunity under section 271.152.

DART also argued that since there was no balance due and owed that the Court did not have jurisdiction over the breach of contract claim. Court relied on its holding in *City of Mesquite v. PKG Contracting, Inc.* and held that the statutory limitations on damages in section 271.153 do not deprive a trial court of subject-matter jurisdiction to adjudicate the breach of contract claim. Trial court's order denying the plea was affirmed.

***McMahon Contracting, L.P. v. City of Carrollton*, 277 S.W.3d 458 (Tex. App. – Dallas 2009, pet. denied)**

Construction company brought action against the city, asserting claims of breach of contract and quantum meruit regarding street repairs. The trial court denied the city's plea and the Court of Appeals vacated and rendered. Upon granting petition for review, the Supreme Court reversed and remanded. On remand, the trial court granted city's summary judgment and construction company appealed.

In cross point on appeal, the city argued that based on governmental immunity the trial court lacked jurisdiction over McMahon's claims for quantum meruit and for interest and attorney's fees under the Prompt Payment Act. McMahon agreed that immunity was not waived for quantum meruit claim. As to interest and attorney's fees, the Court concluded that McMahon did not meet his burden to establish consent to suit and show the city's immunity from suit was waived by clear and unambiguous language in the Prompt Payment Act, which did not address sovereign immunity or include language indicating a waiver of immunity. The Court observed that because section 271.159 allowing the recovery of attorney's fees if expressly provided for in the contract did not apply retroactively, that section 271.152 did not establish a waiver of immunity from suit for attorney's fees by attaching Prompt Payment Act claims to it or as an express waiver of immunity in the Prompt Payment Act.

The Court reversed and rendered judgment in favor of the city granting its plea to the jurisdiction as to the Prompt Payment Act and quantum meruit claims, but remanded the breach of contract claims back to the trial court because a genuine issue of material fact existed and City was not entitled to summary judgment.

***City of Mesquite v. PKG Contracting, Inc.*, 263 S.W.3d 444, 448 (Tex. App. – Dallas, 2008, pet. filed)**

Contractor sued the city for breach of contract when the city allegedly failed to remove power lines, delaying work and costing extra time and money. The city filed a plea to the jurisdiction which the trial court overruled. The Dallas Court of Appeals vacated and rendered judgment and the Supreme Court reversed and remanded in light of the statutory amendment to Chapter 271. On remand, the city filed a second plea to the jurisdiction. The trial court denied the plea and the city filed an interlocutory appeal.

The parties did not dispute that the contract met the definition of a contract under section 271.151. The city argued that governmental immunity is only waived for claims of breach of the essential, written terms of the contract, not for implied terms. The Court disagreed with the city and held that the waiver of immunity under section 271.151-271.160 applies to any claims for breach of contract falling within the terms of the statute. The Court concluded that once the trial court determines that the contract falls within the provisions of section 271.152, the trial court need not parse further the pleadings or the contract to determine whether the legislature has waived immunity for breach of contract claims.

The city also argued that the notice provisions under section 271.154 and the damages limitations in section 271.153 were jurisdictional. The Court rejected both arguments saying that those provisions did not deprive court of subject-matter jurisdiction to adjudicate a claim under section 271.152.

The city has appealed to the Texas Supreme Court where it is currently pending.

***Judson Indep. Sch. Dist. v. ABC/Associated Benefit Consultants*, 244 S.W.3d 617 (Tex. App. – San Antonio 2008, pet. denied)**

Insurance agency brought action against school district for breach of contract, promissory estoppel, declaratory and injunctive relief, after insurer denied payment of commissions due to the insurance agency for placing school district's health insurance with insurer. The trial court denied the plea to the jurisdiction and the school district filed an interlocutory appeal.

The insurance company argued that the city's request for proposal of health insurance agent and minutes from the school district's board of trustee meeting where the board accepted ABC as its insurance agent amounted to a written contract subject to Chapter 271. The Court did not address that issue and instead found that even if there was a written contract that met the statutory definition, ABC would only be entitled to amount due and owed under the contract. The Court looked at plaintiff's pleadings and focused on the balance allegedly due and owed was owed not by the school district but by Humana.

Thus, the Court concluded that because ABC did not claim any damages within the limitations of Chapter 271, that its claims for breach of contract were not subject to the terms and conditions of Chapter 271 and the school district's immunity was not waived. The Court reversed and rendered judgment dismissing the claims.

***City of Corinth v. NuRock Development, Inc.*, 293 S.W.3d 360 (Tex. App. – Fort Worth 2009, no pet.)**

City filed suit against developer of affordable apartment complex asserting breach of settlement agreement that the parties had reached in developer's prior suit in federal court against the city. Developer counterclaimed for breach and other causes of action. City filed a plea to the jurisdiction. The trial court denied the plea and the city appealed.

The Court cited *Texas A&M University-Kingsville v. Lawson,* 87 S.W.3d 518 (Tex. 2002) for the proposition that when a governmental entity settles a claim for which its immunity from suit has been waived, immunity from suit is also waived for a breach of the settlement agreement. The Court affirmed the trial court's order denying the plea on the breach of contract claim.

The concurring opinion observed that the majority failed to discuss Chapter 271 in its broad statement regarding lack of immunity from suit in breach of

contract claims and stated that the case should be remanded to the trial court to determine the applicability of this statute on the city's waiver of immunity from suit.

AUTHORS' BIOGRAPHIES

Wm. Andrew Messer

Andy specializes in governmental law, defense litigation and appeals. He has over 20 years experience fighting for local governmental entities. He has obtained hundreds of dismissals for local governments involving all types of claims, both federal and state, including police liability, civil rights, discrimination, land use, annexation, employment, competitive bidding, city ordinance defense, contract, and tort claims of personal injury and wrongful death. Among his appellate decisions are: *Diaz v. Ellis County*, 10-09-327-CV (Tex. App. – Waco 2010, n.p.h.); *City of Celina v. City of Pilot Point*, 2009 WL 2750978 (Tex. App. – Fort Worth 2009, pet. denied); *Sadeghian v. Town of Little Elm*, 2008 WL 46153424 (E.D. Tex. 2008); *City of Mesquite v. PKG Contracting,* 263 S.W. 3d 444 (Tex. App. – Dallas 2008, pet. pending); *Winegarner v. City of Coppell,* 2007 WL 1040877 (N. D. Tex. 2007); *Kuhl v. City of Frisco*, 2007 WL 1051760 (E.D. Tex. 2007); *Cunningham v. Chappel Hill ISD*, 438 F. Supp.2d 718 (E.D. Tex. 2006); *City of Irving v. Inform Construction*, 201 S.W.3d 693 (Tex. 2006); *DeSoto Wildwood Development v. City of Lewisville*, 184 S.W.3d 814 (Tex. App. - Fort Worth 2005, no pet.); *Davis v. City of Grapevine*, 188 S.W.3d 748 (Tex. App. – Fort Worth 2005, pet. denied); *Allen v. City of Mesquite and Mesquite Board of Adjustment*, 2004 WL 612798 (Tex. App. – Texarkana 2004, no pet.); *Satterfield & Pontikes Construction v. Irving ISD*, 123 S.W.3d 63 (Tex. App. – Dallas 2003), *reversed and remanded*, 197 S.W.3d 390 (Tex. 2006); *In re Jobe*, 42 S.W.3d 174 (Tex. App. – Amarillo 2001, orig. proceeding); *City of Cleburne v. Trussell*, 10 S.W.2d 407 (Tex. App. – Waco 1999, no pet.); *Perez v. Murff*, 972 S.W.2d 78 (Tex. App. – Texarkana 1998, writ denied); *Robinett v. Carlisle*, 928 S.W.2d 623 (Tex. App. – Fort Worth 1996), *cert. denied*, 118 S. Ct. 74 (1997); and *Lawrence v. City of Wichita Falls*, 906 S.W.2d 113 (Tex. App. – Fort Worth 1995, writ denied). He recently defended a Texas county against double death claims where two teenagers drove off an old bridge into a creek on their way to church. Both teenagers drowned. The jury, 8 women and 4 men, found that the county was not negligent. Andy recently defended an annexation dispute involving a 3500+ acre mixed-use planned development on the Dallas North Tollway. He also recently defended a federal due process and taking case involving a $1.2M property, where the plaintiff as part of the negotiated dismissal signed a letter of apology to the mayor and each city councilmember for bringing the suit. He has served on the District 14A Grievance Committee of the State Bar of Texas, and also as the course director for the State Bar of Texas *Suing and Defending Governmental Entitles* course.

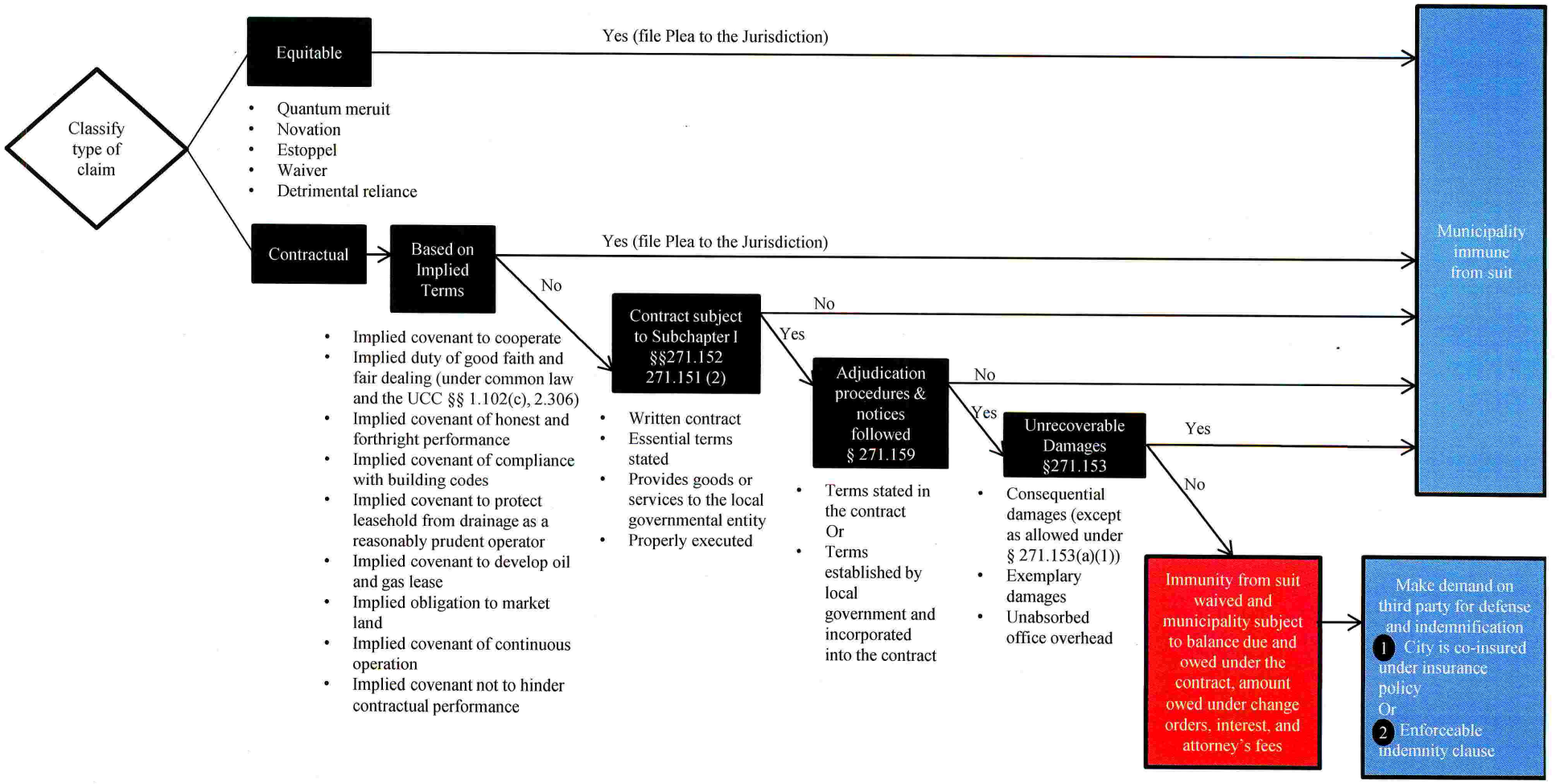
Janet M. Spugnardi

Janet joined the firm of Messer, Campbell & Brady in 2009, where her practice focuses on municipal law, litigation and appellate work on matters involving civil rights, land use, zoning, employment, and tort claims of personal injury, property damage and wrongful death. She recently obtained a victory on a plea to the jurisdiction for a town in a motorcycle accident case where the town's police officer placed his vehicle in a moving lane of traffic on the highway in order to effect a traffic stop and two motorcycle riders collided with each other when they were trying to avoid hitting the officer's stopped vehicle in the road. The video from the officer's vehicle on the night of the accident showed the officer accelerating to speeds over 115 miles per hour on the entrance ramp to the highway and showed that the officer failed to activate his emergency lights until a few seconds prior to abruptly stopping on the freeway. Janet successfully argued that the accident was not caused by the use or operation of the police

vehicle; the trial court agreed and dismissed the lawsuit on the basis of sovereign immunity. Prior to joining Andy Messer's office, Janet worked at the City of Dallas as an Assistant City Attorney for almost six years where she engaged in extensive affirmative civil litigation involving land use, zoning, property code violations, fair housing, and nuisance abatement. Janet won an interlocutory appeal at the Dallas Court of Appeals on a $13 million inverse condemnation claim against the City involving the demolition of a historic structure in the City's West End Historic District. The decision is published at: *TCI West End, Inc. v. City of Dallas and Texas Historical Commission*, 274 S.W.3d 913 (Tex. App. – Dallas 2008, no pet.). Janet has successfully litigated the repair and/or demolition of over one thousand dilapidated structures in Texas courts and has experience representing cities before quasi-judicial boards on issues involving historic properties and substandard building enforcement. Janet currently advises cities on various municipal legal matters, including employment/civil service issues, contracts and contract disputes, open records, ordinances, resolutions, and code compliance/building standards.

CONTRACT CLAIMS ACT FLOWCHART

Andy Messer



2009 AMENDMENTS TO THE LOCAL GOVERNMENT CODE, §§271.151-.160

Local Government Code
Title 8. Acquisition, Sale, or Lease of Property
Subtitle C. Acquisition, Sale, or Lease Provisions Applying to More Than One Type of Local Government
Chapter 271. Purchasing and Contracting Authority of Municipalities, Counties, and Certain Other Local Governments
Subchapter I. Adjudication of Claims Arising Under Written Contracts with Local Governmental Entities

§ 271.151. Definitions

In this subchapter:

(1) "Adjudication" of a claim means the bringing of a civil suit and prosecution to final judgment in county or state court and includes the bringing of an authorized arbitration proceeding and prosecution to final resolution in accordance with any mandatory procedures established in the contract subject to this subchapter for the arbitration proceedings.

(2) "Contract subject to this subchapter" means a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity.

(3) "Local governmental entity" means a political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code, including a:

(A) municipality;

(B) public school district and junior college district; and

(C) special-purpose district or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, emergency service organization, and river authority.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

§ 271.152. Waiver of Immunity to Suit for Certain Claims

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

§ 271.153. Limitations on Adjudication Awards

(a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

(1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; ~~and~~

(3) reasonable and necessary attorney's fees that are equitable and just; and

(4~~3~~) interest as allowed by law.

(b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

(1) consequential damages, except as expressly allowed under Subsection (a)(1);

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

Amended by Acts 2009, 81st Leg., R.S., Ch. 1266, Sec. 8, eff. June 19, 2009.

2009 AMENDMENTS TO THE LOCAL GOVERNMENT CODE, §§271.151-.160

§ 271.154. Contractual Adjudication Procedures Enforceable

Adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to this subchapter or that are established by the local governmental entity and expressly incorporated into the contract or incorporated by reference are enforceable except to the extent those procedures conflict with the terms of this subchapter.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

§ 271.155. No Waiver of Other Defenses

This subchapter does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

§ 271.156. No Waiver of Immunity to Suit in Federal Court

This subchapter does not waive sovereign immunity to suit in federal court.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

§ 271.157. No Waiver of Immunity to Suit for Tort Liability

This subchapter does not waive sovereign immunity to suit for a cause of action for a negligent or intentional tort.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

§ 271.158. No Grant of Immunity to Suit

Nothing in this subchapter shall constitute a grant of immunity to suit to a local governmental entity.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

~~**§ 271.159. No Recovery of Attorney's Fees**~~

~~Attorney's fees incurred by a local governmental entity or any other party in the adjudication of a claim by or against a local governmental entity shall not be awarded to any party in the adjudication unless the local governmental entity has entered into a written agreement that expressly authorizes the prevailing party in the adjudication to recover its reasonable and necessary attorney's fees by specific reference to this section.~~

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.

Repealed by Acts 2009, 81st Leg., ch. 1266, § 16, eff. June 19, 2009

§ 271.160. Joint Enterprise

A contract entered into by a local government entity is not a joint enterprise for liability purposes.

Added by Acts 2005, 79th Leg., ch. 604, § 1, eff. Sept. 1, 2005.