

## Contractual Immunity

Ryan Henry  
Denton, Navarro, Rocha &  
Bernal, P.C.



## Immunity E

- Immunity from Suit
  - Jurisdictional
  - Interlocutory appeal
  - Only waived by Legislature
- Immunity from Liability
  - Affirmative Defense
  - Can be waived
  - Entering into Contract Waives Immunity from Liability



## Contract Basics to Remember

- Breach of Contract
  - Contract Exists
  - Plaintiff's Performance
  - Defendant's Breach
  - Damages
- Does not need to be contained within a single document



## Properly Authorized by Governing Body

- **Persons or entities contracting with the City are charged by law with notice of the limits of their authority and are bound at their peril to ascertain if the contemplated contract is properly authorized.**
- *State v. Ragland Clinic-Hospital*, 138 Tex. 393, 159 S.W.2d 105, 107 (1942).





## Legislative Solutions

- 1999 – State Claim's process
- 2005 – Political Subdivision Waiver Statute
  - Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 1, 2005 Tex. Gen. Laws 1548 (codified at Tex. Gov't Code Ann. §§ 271.151-.160).



## Case Law

- In 2006- *Tooke v Mexia*.<sup>[1]</sup> The Supreme Court noted that the “and be sued” and “plead and implead” language was **not** an implied and unambiguous waiver of sovereign immunity.<sup>[2]</sup>



- Cities retain immunity from suit for any contract claims not covered by §271.152 or other specific waiver statutes.

<sup>[1]</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

<sup>[2]</sup> *Id.* at 329.



## Statutory Waiver

- § 271.151. Definitions

...

(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.



§ 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 . . . under the contract . . . ;
- (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) interest as allowed by law.



§ 271.153. Limitations on Adjudication Awards

- (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.



## § 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 . . . shall not be awarded . . . unless . . . [the] written agreement . . . expressly authorizes the prevailing party in the adjudication to recover its reasonable and necessary attorney's fees by specific reference to this section.



## So, What Do You Need to Know?

- Is there a valid contract?
- Does the contract fall under Subchapter I of Chapter 271?
- Is there any other statutory waiver?
- What damages are allowed?



## Valid Contract

- Basic Contract Law
  - Offer
  - Acceptance
  - Essential Terms (meeting of minds)
  - Consideration
- In Writing (collection of writings is sufficient)
- Authorized by the City



## Does Subchapter I Apply?

- **Is the contract in writing?**
- **Was the City authorized by statute or the constitution to enter into a contract?**
  - Remember your Charter
- **Does the contract state the essential terms of the agreement?**





## Subchapter I continued

- **Is the contract for goods or services?**
  - Lease Agreements
  - Sales of Property
  - Some Interlocal Agreements
- **Is the claimant providing goods and services "TO" the municipality?**



## More Subchapter I

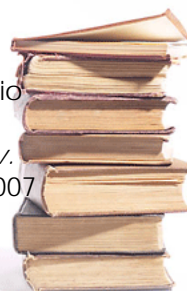
- **Was the contract properly executed?**
  - Be Cautious of Official Actions
- **Does your contract specifically provide for attorney's fees?**



- **What damages are being sought?**

- Courts are holding claimants to a very strict pleading requirement. If they do not specifically plead the damages allowed under Subchapter I, then there is no waiver of immunity and the claims are being dismissed via pleas to the jurisdiction.

- *City of San Antonio v. Polanco & Co., L.L.C.*, No. 04-07-00258-CV, 2007 WL 3171360 at \*5, (Tex. App.—San Antonio Oct. 31, 2007)(not designated for publication); *SE Ranch Holdings, Ltd. v. City of Del Rio*, No. 04-06-00640-CV, 2007 WL 2428081 at \*5, (Tex. App.—San Antonio Aug. 29, 2007, pet denied).



## Additional Traps and Things to Consider

- **Verified Pleas**

- Texas Rule of Civil Procedure 93 requires verification of certain answers.
- Failure to file a verified denial **does not waive** immunity, but **will relieve** the plaintiff of the burden of proving an executed (and authorized) contract exists or that such contract is without consideration.
- *Nelson Mobile Homes, Inc. v. Morace*, 486 S.W.2d 194 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ)



## Waiver

- i. Seeking Affirmative Relief
  - City enters into the litigation process by asserting its own affirmative claim for monetary relief, it waives immunity to the extent of allowing opposing parties to assert as an offset any claims germane to, connected with, and properly defensive to those asserted by the governmental entity.
  - Absent the Legislature's waiver of the City's immunity from suit, however, the trial court does not "acquire jurisdiction over a claim for damages against the City in excess of damages sufficient to offset the City's recovery, if any."
  - Sword and Shield
  - *Reata Constr. Corp.*, 197 S.W.3d at 377.



- This exception to the "no waiver by conduct" doctrine, is not limited to simply filing suit, but has been applied when the entity seeks certain types of monetary relief, including attorney's fees because attorney's fees are ordinarily considered a claim for affirmative relief. *In re Frost Nat'l Bank*, 103 S.W.3d 647, 650 (Tex. App.—Corpus Christi 2003, no pet.).
- However, if the affirmative relief being sought is merely relief sought as part of a defense, there is no waiver of immunity.



- The *DeMino* court stated that the issue of whether an answer pleads a counterclaim or is defensive is whether a defendant could have maintained an independent suit. If the suit could not have been maintained, it is defensive.
- *DeMino v. Sheridan*, 176 S.W.3d 359 (Tex. App.—Houston [1st Dist.] 2004, no pet.)
- In *Bexar Metropolitan Water Dist. v. Education and Economic Joint Venture*, the San Antonio Court of Appeals opined that a general pleading for costs is not the type of affirmative claim contemplated in *Reata*.
- *Bexar Metropolitan Water Dist. v. Education & Economic Development Joint Venture*, 220 S.W.3d 25, 32 (Tex. App.—San Antonio 2006, pet. filed).



## Waiver Within the

- In the context of contract clauses, the “fundamental reason[s] why sovereign immunity exists [is] to prevent governmental entities from being bound by the policy decisions of their predecessors.”
- Courts “defer to the Legislature to waive immunity” because “legislative control over sovereign immunity allows the Legislature to respond to changing conditions and revise existing agreements if doing so would benefit the public.”  
*Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003).



- In *Fed. Sign v. Tex. State Univ.*, the Texas Supreme Court suggested in a footnote that there may be circumstances "where the State may waive its immunity by conduct other than [by] simply executing a contract." [1] But since then, the Supreme Court has consistently declined to fashion a waiver-by-conduct exception to the doctrine of governmental immunity. [2]

- [1] 951 S.W.2d 401, 408 n. 1 (Tex. 1997).
- [2] See *IT- Davy*, 74 S.W.3d at 857 ("Creating a waiver-by-conduct exception would force the State to expend its resources to litigate the waiver-by-conduct issue before enjoying sovereign immunity's protections-and this would defeat many of the doctrine's underlying policies.").



- *Catalina Development, Inc. v. County of El Paso* illustrate a fundamental reason why immunity exists-to prevent governmental entities from being bound by the policy decisions of their predecessors.
- In this case, the County, upon an electoral change in the commissioners court, determined that selling the property to Collins was a poor decision.



- *SE Ranch Holdings, Ltd. v. City of Del Rio*,<sup>[1]</sup> after a political change in the City Council, the City walked away from an authorized and executed development agreement with SE Ranch to develop a master plan for a community on undeveloped land in a newly created Tax Incremental Reinvestment Zone. The court did not find a waiver of immunity from suit and allowed the City to walk away from the contract.



- <sup>[1]</sup> *SE Ranch Holdings, Ltd. v. City of Del Rio*, No. 04-06-00640-CV, 2007 WL 2428081 at \*5, (Tex. App.—San Antonio Aug 29, 2007, pet denied).



## Declaratory Judgment

- The Uniform Declaratory Judgment Act is a remedial statute and is not a suit which implicates sovereign immunity
- However, suits to establish a contract's validity, to enforce its performance, or to impose its liabilities **are** suits against the entity that are precluded by the doctrine of immunity from suit.



- **Proprietary Functions**
  - Contracts involving proprietary functions are governed by the same rules as contracts between individuals.”<sup>[1]</sup>  
<sup>[1]</sup> *Gates v. City of Dallas*, 704 S.W.2d 737, 738-39 (Tex. 1986).
- **Suits Between Entities**
  - Since the Texas Supreme Court’s ruling in *City of Galveston v. State*<sup>[1]</sup> held that a governmental entity can retain immunity from suit against a different governmental entity, the enforceability of many interlocal agreements may be in question.
  - <sup>[1]</sup> *City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007).



- Just this year, the Texas Supreme Court held in *Nueces County v. San Patricio*<sup>[1]</sup> that one county retained immunity from suit against the claims brought by another county.
- <sup>[1]</sup> *County Nueces County v. San Patricio County*, 246 S.W.3d 651 (Tex. 2008)



