Recent State Cases of Interest to Cities

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***Brennan v. City of Willow Park*, 2012 WL 3500069, No. 02-11-00265-CV (Tex. App.--Fort Worth Aug. 16, 2012)**
Rehearing denied.

Immunity
Exhaustion of Administrative Remedies

Property owners were given tax bill for four-year period when they were erroneously not billed for city ad valorem taxes. When they refused to pay the back taxes, one City sued to collect the unpaid taxes. The property owners counterclaimed for declaratory, injunctive, and mandamus relief, and joined the county appraisal district, the appraisal review board, and another city whose back bills were sent. The trial court dismissed the counterclaims for want of jurisdiction, finding failure to exhaust administrative remedies and governmental immunity. On appeal, the Fort Worth Court of Appeals held that the property owners were not required to exhaust administrative remedies because the district had acted outside of its statutory powers – a recognized exception to the exhaustion requirement. Neither were the cities immune from suit for declaratory relief, because they would be bound by the court's interpretation of the statutory issue regarding the appraisal district's action. Finally, the appellate court found that the trial court had jurisdiction over the mandamus counterclaim, as the defense that there was an adequate remedy at law was an argument on the merits, not a jurisdictional question.

***City of Amarillo v. Burch*, 369 S.W.3d 684, No. 07-11-0467-CV (Tex. App.--Amarillo 2012)**

Inverse Condemnation
Immunity

Property owner filed inverse condemnation claim against city for diverting water across property and ruining improvements and business conducted on property. City claimed immunity, which trial court denied. City filed interlocutory appeal. The Amarillo Court of Appeals held that the suit stated a claim (inverse condemnation) for which immunity does not apply. City's claim that contract (settlement agreement of previous suit) permitted its actions was insufficient to defeat jurisdiction, in this instance, because the contract did not explicitly grant authority to do what City was accused of; there was, as a result, a fact issue.

***City of Austin v. Whittington*, 2012 WL 3800183, No. 10-0316 (Tex. 2012)**
Motion for rehearing filed 10/16/12.

Eminent Domain

The city condemned a city block for a parking facility and a cooling facility. The special commissioners awarded the landowners $7.65 million. In trial number 1, the court granted partial summary judgment for the city on the right-to-take issue and the jury awarded $7.75 million as the value of the property taken. The court of appeals reversed, finding that summary judgment was improperly granted on both "public use" and "necessity." On remand, the trial court found that the city had failed to condemn a 20-foot strip down the middle of the block, and the jury found that the taking was not necessary for a public use, the taking was for economic development purposes, and the decision to take the property was fraudulent, in bad faith, and arbitrary and capricious. The trial court entered judgment finding that the taking was necessary, and the statute prohibiting condemnation for economic development was not retroactive. However, the trial court found that there was sufficient evidence to support the jury verdict on bad faith and fraudulent action by the council. The court of appeals affirmed, because it found that the city had misrepresented the necessity of the new cooling plant.

The Texas Supreme Court reversed. It pointed out that unless the landowner shows that the condemnor's determination of public use and necessity were "fraudulent, in bad faith, or arbitrary and capricious," the determination is conclusive. The question of fraud, bad faith, or arbitrariness is an affirmative defense. This question is submitted to the jury only if there are underlying issues of fact. In this case, the facts were not disputed, only the legal effect of those facts. The decision is, therefore, a question of law to be reviewed de novo.

A fraudulent determination of public use was defined as the taking of property for private use under the guise of a public use. The determination that the parking garage was a public use was based on its purpose to serve the public convention center a block away. The argument that it had a private purpose derived from the fact that by building the private garage, the city eliminated the need for a hotel developer on an adjacent block to build additional parking as part of the hotel. The court found, however, that problems in the development of the hotel led the city to look for alternative sources of the additional needed parking, and the fact that such choice saved money for the developer was incidental.

With regard to the necessity for the cooling plant, the court found that an email from a single city employee was not sufficient to overcome the determination of the council as a whole that the plant was necessary. The city's determination is not made by the statements of individual council members or staff members, but by the council as a whole.

The court also found that the failure to include an alley in the original property description was cured by its subsequent, post-commissioners hearing addition, because the addition did not prejudice the landowners. The two factors showing a lack of prejudice were the fact that the alley had no effect on the value of the property, and the landowners were fully prepared to litigate the matter.

Finally, the court held that the prohibition on taking “for economic development” applied to condemnations filed prior to the effective date of the statute, but that these takings fell within exceptions to the statute: takings for utility purposes (the cooling plant) and for public buildings (the garage).

***City of Beaumont v. Como*, 2012 WL 3800890, No. 11-0888 (Tex. Aug. 31, 2012)**
Motion for rehearing filed 10/17/12.

Substandard structures
Exhaustion of Administrative Remedies

Property owner’s building, damaged by a hurricane, was demolished by the City after administrative procedure, in which the property owner intermittently participated. One year after the building was demolished, property owner filed suit challenging demolition. After the case had been dismissed, the court of appeals first affirmed, then reversed after the first *Heather Stewart* case. After the supreme court issued its revised *Heather Stewart* opinion, it reversed this appeal per curiam; essentially, the supreme court said it meant what it said in *Stewart II*, and Como could not assert a takings claim unless she had properly appealed the administrative order.

***City of Boerne v. Vaughan*, 2012 WL 2839889, No. 04-11-0821 (Tex. App.--San Antonio July 11, 2012)**

Immunity

The city had a contract with Vaughan to act as the sexton for the city-owned cemetery. Based on inaccurate information provided by the city, Vaughan sold a third party a plot that had previously been sold, which ultimately resulted in the disinterment/reburial of the third party’s husband. After the third party sued Vaughan, Vaughan sued the city. The trial court denied the city’s plea to the jurisdiction, but the San Antonio Court of Appeals found that the plaintiff’s pleadings “affirmatively demonstrate[d] that no cause of action exists for which the City’s immunity is waived.” The court found that the breach of contract claim that was arguably within the waiver of immunity was the third party’s claim, not the sexton’s.

***City of Caldwell v. Lilly*, 2012 WL 3242742 (Tex. App.--Waco Aug. 9, 2012)**

Immunity

The city fired Lilly, its police chief. Lilly alleged he was fired for being a member of CLEAT, in violation of the statute providing for a right to be in a union. Lily argued that immunity did not apply because (1) he pleaded a statutory violation; (2) declaratory, injunctive, and mandamus relief are not barred; and (3) the general statute that protected the right to join a union was applicable to cities. The trial court denied the plea to the jurisdiction. The Waco Court of Appeals reversed, finding that neither the general statute nor the statute particularly applicable to public employees "clearly and unambiguously" waived immunity from suit. The court found no authority to support Lilly's argument that a statutory violation, without more, waives immunity.

***City of Dallas v. Brown*, 373 SW3d 204, No. 05-12-00116-CV (Tex. App.--Dallas July 5, 2012)**
Petition for review filed 10/05/12.

Immunity
Injunctive Relief

Municipal Judge Brown filed to become a candidate for State District Judge. Citing a charter provision that provided that any appointive officer of the city forfeited the office by becoming a candidate for elective office, the city removed Brown from the bench. The trial court granted a TRO preventing the removal, and denied the city's plea to the jurisdiction based on governmental immunity. The Dallas Court of Appeals held that that jurisdiction is shown by facts pleaded showing a cause of action within the jurisdiction of the court. The petition adequately alleged that the removal was an ultra vires act; further, it adequately alleged the basis of a declaratory judgment on the validity of the removal ordinance. Accordingly, the trial court had jurisdiction. The court refused to rule, however, on the validity of the temporary injunction, because the 2-year term of Judge Brown had expired prior to the appellate decision, thus making the injunctive relief moot.

***City of Dallas v. Prado*, 2012 WL 2878163, No. 05-11-01598-CV (Tex. App.--Dallas July 16, 2012)**

Immunity
Tort Claims Act

The city had begun locking a side entrance to a community center when it rained because the rain was getting in the building through the door. Prado tried to get in through the locked door and slipped when she tried to open the locked door. The trial court denied the plea to the jurisdiction based on governmental immunity. The court held that the undisputed evidence showed that there had been no reports of accidents resulting from pooled water outside the door, or from the combination of the pooled water and the locked door. Further, the plaintiff was foreclosed from a general negligence claim, because that claim was subsumed within the premises defect claim.

***City of Denton v. Paper*, 2012 WL 3537810, No. 11-0596 (Tex. Aug. 17, 2012)**

Special Defects & Premises Defects
Texas Tort Claims Act

Paper was riding a bicycle on the street when she hit a 3" depression left from a sewer repair job. The city moved for summary judgment, arguing (1) the 3" depression was not a special defect, and (2) there was no notice of the depression so as to create liability for a premises defect. The trial court denied the MSJ, and the court of appeals affirmed. The Texas Supreme Court, in a per curiam opinion, reversed. It held that a 3" depression is not in the nature of an excavation or obstruction of a highway (and distinguished a 6-10" hole that extended across 90% of the width of the street, which was found to be a special defect in *County of Harris v. Baton*, 573 S.W.2d 177, 179 (Tex. 1978)). Further, although the city crew had twice returned to make the repair even with the street, the city had received no reports following the last repair, so there was no evidence that the city had notice of the premises defect.

***City of El Paso v. Arditti*, 2012 WL 3764928, No. 08-10-00272-CV (Tex. App.--El Paso Aug. 31, 2012)**

Separation of Powers
Municipal Court

The Chief Municipal Judge learned that the municipal clerks were recording the amount of time each municipal judge spent on the bench. The municipal judges issued an order requiring all clerks to cease this practice. Years before, the city had consolidated the duties of the city clerk and the duties of the municipal court clerk in to one office – the municipal clerk. The city sued the judges, claiming the order was beyond the municipal courts' powers; the judges counter-claimed, also claiming that the consolidation of clerk functions violated constitutional separation of powers. The trial court found in favor of the judges. The El Paso Court of Appeals held that the order issued by the municipal judges was beyond their jurisdiction, and that the Texas Constitution does not guarantee the separation of *local* legislative, executive, and judicial powers.

***City of El Paso v. Marquez*, 2012 WL 4357436, No. 08-11-00262-CV (Tex. App.--El Paso Sept. 25, 2012).**

Civil Service/Employment Law/ADA
Exhaustion of Administrative Remedies

Marquez complained to a supervisor of discriminatory treatment in 2004, but got no relief. Instead, he was transferred to another division in 2005. He alleged continued discrimination and mistreatment, filed EEOC and Texas Workforce Commission complaints in September 2005,and claimed that his resignation in 2007 was constructive discharge due to the hostile and intolerable work environment. The city claimed that Marquez was required to use the city's grievance process before he could file suit, that he failed to file his administrative claims within 180 days of the discrimination, and that the city was not subject to the provisions of 42 U.S.C. §1981. The El Paso Court of Appeals denied the city's motion to dismiss and motion for summary judgment because there is no requirement that the employee use internal grievance procedures before filing a claim with the EEOC or TWC, and because when the employee alleges a continuing course of discriminatory conduct, the 180-day period does not begin to run while the discrimination continues. The court granted the motion to dismiss the §1981 claim, however, because the cause of action for violation by state actors of the federal civil rights laws is found exclusively in §1983.

***City of Fort Worth v. Jacobs*, 2012 WL 4010403, No. 02-12-00143-CV (Tex. App.--Fort Worth Sept. 13, 2012).**

Constitutional violations

Jacobs sued the city for violating her rights under the Texas Constitution (due process, equal protection, and free speech). The trial court dismissed her claims to the extent that they sought money damages for state constitutional violations, but denied the city's plea to the jurisdiction for those claims to the extent they sought the remedy of reinstatement. Recognizing that the Supreme Court of Texas has expressly left the question unanswered, the Fort Worth Court of Appeals held that there was no immunity for claims seeking reinstatement as a remedy for violations of the Texas Bill of Rights.

***City of Haltom City v. Aurell,* No. 2012 WL 3600007, 02-11-00197-CV (Tex. App.—Fort Worth Aug. 23, 2012).**

Tort Claims Act

Plaintiffs were residents of a mobile home development who were in a low-lying area, and suffered personal injuries resulting from a catastrophic flood. Plaintiffs sued the city based on premises defect and negligent undertaking. The trial court denied the city's motion for summary judgment. The Fort Worth Court of Appeals reversed, holding that liability for a premises defect requires actual knowledge of the specific danger (the flood itself) rather than actual knowledge of the propensity for the dangerous condition to develop. The court cited similar supreme court precedent relating to knowledge of a leaky roof (which isn't knowledge that a leak happened and the floor was slippery) and other propensity to flood cases. The court also held that in order to recover under a negligent undertaking theory, the plaintiff is required to show either (1) that the defendant in undertaking to make the condition safer instead made the condition *more* dangerous or (2) the plaintiff relied on the defendant's efforts to his detriment.

***City of Houston v. Atkins*, 2012 WL 2357488, No. 01-12-00190-CV (Tex. App.--Houston [1st Dist] June 21, 2012) (mem. op.)**
Petition for review filed 08/06/12.

***City of Houston v. Guzman*, 2012 WL 1955830, No. 01-11-00234-CV (Tex. App.--Houston [1st Dist.] May 31, 2012) (mem. op.)**
Petition for review filed 08/15/12.

***City of Houston v. Lackey*, 2012 WL 1956014, No. 01-11-00248-CV (Tex. App.--Houston [1st Dist.] May 31, 2012) (mem. op.)**
Petition for review filed 08/15/12.

***City of Houston v. Rodriguez*, 371 S.W.3d 492, No. 01-11-00196-CV (Tex. App.--Houston [1st Dist.] 2012)**
Petition for review filed 08/06/12.

***City of Houston v. Vallejo*, 371 S.W.3d 499, No. 01-11-00133-CV (Tex. App.--Houston [1st Dist.] 2012) Petition for review filed 08/06/12.**

Tort Claims Act

In this group of cases, the First District Court of Appeals rejects the claim by the City of Houston that by suing both the city and its employee under the Tort Claims Act, the plaintiff in each case made a fatal procedural error under the language of Section 101.106 of the Civil Practice and Remedies Code. That section provides:

- (a) filing suit against a governmental entity constitutes an irrevocable election and "immediately and forever" bars any suit against any individual employee on the same matter;
- (b) filing suit against an individual employee constitutes an irrevocable election and "immediately and forever" bars any suit against the governmental entity regarding the same matter unless the governmental entity consents;
- (e) filing suit against both the governmental entity and the employee entitles the governmental entity to move for the dismissal of the employee; and
- (f) if suit is filed against the employee for actions within the general scope of employment, and the suit could have been filed against the governmental entity, the suit will be dismissed unless the plaintiff dismisses the employee and adds the governmental entity as a defendant.

The City of Houston has taken the position in these cases that when the plaintiff sues the employee and the city, the city can dismiss the employee under (e), and then dismiss the city under (b) because filing the suit against the employee "immediately and forever" barred the suit against the city. The First District Court has consistently rejected this position, starting with *City of Houston v. Esparza*, 369 S.W.3d 238 (Tex. App.—Houston [1st Dist.] 2011, pet. filed). The Fourteenth District Court, on the other hand, has said that the Tort Claims Act constitutes the governmental entity's consent under subsection (b), but that by suing the employee, too, the plaintiff has lost any non-Tort Claims Act claim forever. *Amadi v. City of Houston*, 369 S.W.3d 254 (Tex. App.—Houston [14th Dist.] 2011, pet. filed); *City of Houston v. Rodriguez*, 369 S.W.3d 262 (Tex. App.—Houston [14th Dist.] 2011, pet. filed). The *Amadi* and *Rodriguez*

decisions are based on the Texas Supreme Court's decision in *Mission Consolidated Independent School District v. Garcia*, 253 S.W.3d 653, 659-60 (Tex. 2008). As petitions for review are pending in all five of these cases, as well as *Esparza, Amadi,* and *Rodriguez*, the resolution of this legislative quandary awaits decision by the Texas Supreme Court.

***City of Houston v. ATSER, L.P.*, 2012 WL 3770284, No. 01-10-00240-CV (Tex. App. Houston [1st Dist.] Aug. 30, 2012)**
Motion for rehearing due 10/29/12.

Breach of Contract

Atser sued the city for breach of contract. The dispute between the parties centered around a former Atser employee who had worked under Atser's contract with the city, but had then gone to work for the city. Atser believed that the employee misappropriated trade secrets and began using them to Atser's detriment. Within its traditional and no-evidence motion for summary judgment, the city argued that some portion of the plaintiff's claim was outside the statutory waiver of immunity for breach of contract actions in Chapter 271. The Houston [1st Dist.] Court of Appeals held that the motion for summary judgment did not present the jurisdictional question squarely enough to require the trial court to rule on jurisdiction, and thus the denial of that motion was not properly the subject of an interlocutory appeal. Further, the claim of Atser that it had been damaged by the city's failure to use its services stated a claim within the court's jurisdiction under Chapter 271, because it was a claim that the city had breached a contract for the provision of services to the city.

***City of Houston v. Carlson*, 2012 WL 3610315, No. 14-11-00352-CV (Tex. App.--Houston [14th Dist.] Aug. 23, 2012)**

Substandard structures

The city issued an order requiring residents to evacuate a condominium development that it found to be dangerously deteriorated. The City gave notice of the requirement and gave the residents an opportunity to request a hearing. The residents so requested, and the hearing was held before any resident was required to leave. The trial court reversed the city's decision. On appeal, the Houston [14th Dist.] Court of Appeals found that the requirement that Chapter 214 appeals be verified was not jurisdictional and could be waived, and that the city was required by Chapter 214 to hold a hearing first before ordering the buildings to be vacated. (The court of appeals had previously held that the emergency circumstances did not prompt the order to

vacate. *Carlson v. City of Houston*, 309 S.W.3d 579 (Tex. App.—Houston [14th Dist.] 2010, no pet.).)

***City of Houston v. Hatton*, 2012 WL 3528003, No. 01-11-01068-CV (Tex. App.--Houston [1st Dist.] Aug. 16, 2012) (mem. op.)**
Petition for review filed 09/28/12.

Immunity

Hatton was struck by a police car responding with lights and sirens to an officer-needs-assistance call. The trial court denied the city's plea to the jurisdiction. The Houston [1st Dist.] Court of Appeals reversed, holding that the decisions of the officer to respond with lights and sirens, to exceed the speed limit, and to choose the particular route were all discretionary acts for which the city had official immunity. Further, there was ample evidence that the decisions were made in good faith.

***City of Houston v. Proler*, 373 S.W.3d 748, No. 14-10-00971-CV (Tex. App.--Houston [14th Dist.] 2012) Rehearing overruled.**

Civil Service/Employment Law/ADA

Proler was a fire chief who had developed a reputation for being scared to go into fires. After some years in duty away from active firefighting, he was given another chance. There was another incident where he was found standing, disoriented, in a smoke-filled room. He was taken by ambulance to the hospital, and the diagnosis was an episode of "global transient amnesia." He was again reassigned to the academy. Proler filed a grievance and appealed its denial to a hearings examiner under the civil service law. The hearings examiner returned Proler to firefighting duties. The city appealed, and Proler counterclaimed for discrimination under the Americans with Disabilities Act (ADA) and its state counterpart in the Texas Commission for Human Rights Act. The trial court dismissed the city's appeal, and a jury found that the city had violated the ADA, awarding no damages, but over $300,000 in attorney's fees and injunctive relief. On appeal, the Houston [14th Dist.] Court of Appeals found:

- the trial court erroneously dismissed the city's civil service appeal (which was based on the award of overtime pay that Proler did not earn);
- the evidence was sufficient to support a finding that the city considered Proler to be disabled (the dissent argued that the city considered Proler to suffer from lack of courage and fortitude);

- the attorney's fees were reasonable, even though no damages were awarded, because the lodestar amount (hours worked times hourly rate) was reduced by 25% for this reason; and
- injunctive relief was proper even without finding the traditional elements necessary for injunctive relief (this holding was under the TCHRA, and differs from federal ADA precedent that requires an employee to show the traditional elements, including irreparable harm, in order to obtain injunctive relief).

***City of Houston v. Rhule*, 2012 WL 2106543, No. 01-09-01079-CV (Tex. App.--Houston [1st Dist.] June 7, 2012)**
Petition for review filed 10/05/12.

Immunity
Breach of Contract

Rhule was a firefighter and suffered a catastrophic on-the-job injury in 1988. The city and Rhule reached a settlement in the appeal of his workers' compensation claim, wherein the city agreed to pay for "lifetime open reasonable and necessary medical expenses." For approximately 15 years, the city paid for pain medication and a pain pump to address Rhule's injury. When his pain pump failed, the city's risk manager decided that the city would not pay to replace the pain pump, and decided to cease paying for doctor visits and pain medication. Rhule sued for violating the contractual settlement agreement, and was awarded damages for past pain, past mental anguish, past out-of-pocket expenses, and attorney's fees. On appeal, the city claimed that Rhule had to present his claim through the administrative workers' compensation process, that the city was immune from the breach of contract suit, that Rhule could not recover damages for pain and suffering in a breach of contract suit. The Houston [1st Dist.] Court of Appeals held that authority dating from 1973 held that a suit for breach of an agreement settling a workers compensation claim need not be presented through the administrative process. Further, the court held that the 1997 decision of *Texas A & M University—Kingsville v. Lawson*, 951 S.W.2d 401 (Tex. 1997), conclusively determined that there was no immunity for breach of a settlement agreement when immunity had been waived for the underlying claim. Finally, the court held that although damages for pain and suffering are not normally recoverable for breach of contract, they are recoverable when, as here, physical pain is the foreseeable result of the breach (withholding payment for pain medication).

***City of Houston v. Trail Enters., Inc.*, 2012 WL 3223662, Nos. 14-10-0094-CV, 14-11-00417-CV (Tex. App.--Houston [14th Dist.] Aug. 9, 2012).**

Eminent Domain
Inverse Condemnation

In 1967, the City of Houston enacted an ordinance prohibiting drilling for oil or gas within its city limits and ETJ surrounding Lake Houston, its water supply. Trail Enterprises owned minerals in the area subject to restrictions. In 1977, the ordinance was amended to apply only to the ETJ. In 1996, the City annexed the area owned by Trail. One year later, in 1997, the ordinance was again amended to expand the area subject to restriction to again cover the Trail property (which was now inside the city). In 1995, Trail sued for inverse condemnation, but that suit was barred by the statute of limitations. In 1999, Trail sued again, and the trial court again granted summary judgment in favor of the city, and the appeal was ultimately dismissed by agreement "due to jurisdictional concerns." In 2003, Trail sued yet again. After trial, the court determined that a taking occurred and the jury awarded $19 million. However, the trial court granted a post-trial motion to dismiss by the city based on the failure of Trail to exhaust administrative remedies by filing an application seeking permission to drill. The Supreme Court of Texas reversed and remanded, and a second trial was held. The second trial found a taking and the previous jury finding on damages was entered as a judgment.

The City appealed. The Houston [14th Dist.] Court of Appeals reversed and rendered, finding that no compensable taking occurred. The court found that the "ad hoc, highly fact-specific" balancing analysis required by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and *Sheffield Development Company v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004) is required unless one of three situations is presented: (1) when there is an actual physical invasion of property; (2) when the regulation deprives the owner of *all* economically beneficial use of the property; or (3) when there is no legitimate state interest advanced by the regulation. In this instance, the owners were not allowed to drill additional wells, but there was no contention that there was a physical invasion. Further, the record showed that the owners had some existing pre-regulation wells that continued to produce; thus while the record conflicted on how profitable those wells were, it could not be argued that there was no economically beneficial use. Finally, while there was some controversy regarding the effectiveness of the regulation and whether the City had adequately protected its water supply from other threats, the protection of the city's water supply is clearly a legitimate state interest. Thus, the *Penn Central* balancing test applied.

Three non-exclusive factors were pointed out in performing that test: (1) the importance of the regulation; (2) the investment-backed expectations of the owner; and (3) the economic impact of the regulation. Again, the court found that protection of drinking water was an important goal of

the regulation (factor #1), but the jury's finding of multi-million dollar lost value was a factor in favor of the owners (factor #3); the test turned, therefore, on factor #3: the investment-backed expectations of the property owners. With one exception, the involved properties were acquired by the owners after the regulations came into place, and many of the owners had acquired their property through inheritance. None of the owners had invested any money into drilling activities. Accordingly, the second factor weighed in favor of the city, and the court of appeals reversed.

***City of Lufkin v. AKJ Properties, Inc.*, 2012 WL 2393087, No. 06-12-00005-CV (Tex. App.--Texarkana June 26, 2012) (mem. op.).**

Annexation

The City sued the property owner for using property in violation of the zoning ordinance. The property owner's defense was that the property was being used for this purpose when the property was annexed, so the property was "grandfathered" under §43.002 of the Local Government Code. The jury found that the property was being used for the defined purposes when the property was annexed. The Texarkana Court of Appeals held that there was sufficient evidence to support the jury's verdict, that photographic evidence of use after annexation was properly excluded, and that the refusal of requested jury instructions regarding what legally constituted "use" of the property under Texas case law was harmless.

***City of Mission v. Gonzalez*, 2012 WL 3762040, No. 13-10-00688-CV (Tex. App.--Corpus Christi Aug. 30, 2012)**
Petition for review filed 10/12/12.

Civil Service/Employment/ADA

Gonzalez was indefinitely suspended (i.e., discharged) for (1) allowing a female visitor inappropriate access the police department and (2) engaging in "inappropriate activities" with her. Gonzalez appealed to a hearings examiner, who found no evidence of "inappropriate activities," but found that Gonzalez had allowed inappropriate access. However, the examiner determined that the punishment for the infraction was excessive. The city appealed, arguing that the examiner exceeded his jurisdiction by making a ruling on sexual harassment allegations that were not part of the charge, and by considering perjured testimony. The Corpus Christi Court of Appeals affirmed the trial court's dismissal of the appeal on jurisdictional grounds, finding that the hearings examiner explicitly stated that the sexual harassment matter was outside the scope of the hearing, and that the hearings examiner's determination regarding credibility of the witnesses did not constitute an act beyond his jurisdiction.

***City of North Richland Hills v. Laura Friend*, 370 S.W.3d 369, No. 11-0367 (Tex. June 29, 2012).**

Tort Claims Act

Friend collapsed at a city-owned pool while waiting in line. Efforts to revive her were unsuccessful, and she died the next day. The Estate sued the city claiming that had the city used an available Automatic External Defibrillator device, the death would not have occurred. The trial court and court of appeals denied the plea to the jurisdiction. The Supreme Court of Texas reversed, holding that the Tort Claims Act's waiver of immunity for the use of personal property is not invoked by a complaint of non-use, and the non-use of safety equipment does not bring the claim within the narrow exception applicable when the governmental entity uses a piece of personal property that "lacks an integral safety component."

***City of San Antonio v. Martin*, 2012 WL 3711708, No. 04-11-00402-CV (Tex. App.--San Antonio Aug. 29, 2012).**

Whistleblower statute

Martin complained to TCEQ regarding the city water system's practices regarding the disposal of asbestos-containing pipe. When TCEQ asked him to give up his anonymity and discuss the violations with TCEQ and upper management, he was concerned about retaliation, but was assured that he was protected by the whistleblower laws. Although the evidence was conflicting, the testimony of Martin drew a picture from which the jury could conclude that his discharge was pretextual and that it was actually in retaliation for the complaint. Because the jury verdict was supported by sufficient evidence, it was upheld. Some of Martin's damages were reversed, however, because there was insufficient evidence to support the jury's finding that Martin had suffered "emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-economic damages" as a result of the discharge.

***City of San Antonio v. Casey Industrial, Inc*., 2012 WL 3104429, Nos. 04-11-00791-CV, 04-11-00814-CV (Tex. App.--San Antonio Aug. 1, 2012).**

***City of San Antonio v. Wheelabrator Air Pollution*, 2012 WL 3104438, No. 04-11-00821-CV (Tex. App.--San Antonio Aug. 1, 2012)**
Petition for review filed 09/17/12.

Breach of Contract
Procurement

The city entered into a design-build contract with Casey and Wheelabrator. (Wheelabrator was originally identified by Casey in its proposal as a subcontractor, but bonding issues resulted in the final contract being between all three parties.) Wheelabrator's inability to perform caused Casey to incur greater costs, and Casey sued the city. Casey was granted summary judgment finding the contract void as it did not meet the statutory standards of a design-build contract, and the city's plea to the jurisdiction challenging Casey's quantum meruit claim was denied. The court of appeals found that the contract did not violate the statute because nothing in the statute required the contract to be with a single design-build firm.

Both Casey and Wheelabrator also sued the city under quantum meruit. The court had previously held in other cases that the Chapter 271 waiver of immunity was inapplicable to quasi-contract claims, because the Legislature explicitly limited its applicability to written contracts. Casey and Wheelabrator argued, however, that there was no immunity in the first place because the governmental/proprietary distinction applicable to tort claims was applicable to the quasi-contract claim. They argued that the city's immunity for quantum meruit claims was limited to governmental functions, and did not apply to proprietary functions. The court held that when the Legislature made the choice to exclude non-written contract claims from the waiver of immunity, it could easily have included the proprietary/governmental distinction, but chose not to do so. Although there was authority implying that a municipality's contractual liability when acting in its proprietary capacity was that of a private company, that authority pre-dated the *Tooke* line of cases and the enactment of Chapter 271.

***City of San Antonio v. Rogers Shavano Ranch, Ltd.,* 2012 WL 2581061, Nos. 04-11-00871-CV, 04-11-00872-CV (Tex. App.--San Antonio July 5, 2012)**
Opinion withdrawn and superseded by 2012 WL 3731682.

***City of San Antonio v. Rogers Shavano Ranch, Ltd*., 2012 WL 3731682, No. 04-11-00871-CV (Tex. App.--San Antonio Aug. 29, 2012)**
Motion for extension of time to file petition of review filed.

Vested Rights

Property owners of a large tract made arrangements to get commitments from the San Antonio Water System for water and wastewater service in 1993 and 1994. In 2005, the property owners sought recognition that it gained vested rights in 1993 or 1994 when it reached written agreements for water and wastewater service. That request was denied, and the landowners sued. The city filed a plea to the jurisdiction, claiming that the owners of the tracts had changed and that the new owners had no standing to sue based on agreements with old owners. When the trial court denied that plea (in part because the landowners excluded the parts of the larger tract that had been developed), the city filed another plea, claiming that the landowners had not exhausted administrative remedies because the city had never considered the request for vested rights when limited to the property that was still owned. The San Antonio Court of Appeals affirmed the trial court's denial of both pleas, holding that (1) the pleadings alleged (1) that plaintiffs owned the property; (2) that 2 plaintiffs were applicants on the original letters to the water system, and (3) that those plaintiffs general partners and agents of the other landowners. The court also held that if exhaustion is required, those administrative remedies were fully sought and denied.

***City of San Antonio v. Valemas, Inc*., 2012 WL 2126932, No. 04-11-00768-CV (Tex. App.--San Antonio June 13, 2012)**
Petition for review filed 07/27/12.

Breach of Contract

Valemas, Inc. began work on a project for the city renovating a park. The contract provided for the project to be completed in 250 days, but it took almost 2 years. The city refused to pay all of the balance because of the delay, and Valemas claimed it incurred additional costs and expenses because of delays caused by the City. As a result of the withheld payment, Valemas was unable to pay Payne, a subcontractor. The City claimed that Valemas's claim was actually a pass-through claim of the subcontractor, and that Chapter 271 does not waive immunity for such claims; alternatively, the City claimed that the pass-through claim constituted the assignment of a right under the contract, which was not permissible under the contract's terms. The San Antonio

Court of Appeals held that nothing in Chapter 271 indicated that there was any intent by the legislature to exclude pass-through claims, because they were claims for breach of a contract within the scope of the statute, and there is no language in the statute limiting the suit to claims *by parties to the contract*. State law recognizes pass-through claims, so they are within the waiver of immunity. Further, precedent holds that a pass-through claim is not the assignment of a right under an anti-assignment provision in a contract.

***Dacus v. Parker*, 2012 WL 2783181, No. 14-11-00688-CV (Tex. App.--Houston [14th Dist.] July 10, 2012)**
Motion for rehearing filed 8/31/12.

Elections

Plaintiffs challenge the legality of a charter amendment submitted for public vote. The charter amendment created a dedicated fund for street and drainage improvements. The language on the ballot was challenged on the basis that it did not accurately describe the charter amendment, and the proposed amendment as a whole was challenged on the basis that it included more than one subject. The trial court granted the city's motion for summary judgment. The Houston [14th Dist.] Court of Appeals affirmed. The first part of the appeal was based primarily on a statement in the cover letter the judge included with the order granting summary judgment. The letter stated that the judge based the decision on a state law that gave the city power to assess the fee underlying the amendment, which meant that the failure of the ballot language to mention assessment of the fee was not misleading because the city already had the power to assess the fee. The appeals court found that the statement in the letter by the judge was irrelevant, because the order itself included no grounds for granting the summary judgment (thus any legal ground is sufficient to affirm the order). The standard for approving ballot language is that the language must allow the voters to identify the actual amendment it refers to and distinguish it from the other matters on the ballot. Further, the fact that the fund would be used for streets and drainage did not mean it encompassed more than one subject; the subject was the creation of the fund. Finally, a challenge based on subsequent statements by the Mayor that the voters may have been misled by some informational publications by the city was not relevant to whether the ballot itself was misleading.

***Eden Cooper, L.P. v. City of Arlington*, 2012 WL 2428481, No. 02-11-00439-CV (Tex. App.--Fort Worth June 28, 2012) (mem. op.).**

Standing

The city granted an SUP permitting a third party to drill gas wells. The SUP contained a condition that access to the drill sites would be by a particular road, which was not yet built, but which would be located on Eden Cooper's land. When the third party had difficulty negotiating payment to Eden Cooper for the access route, the third party applied to amend its drilling permits (but not the SUP) to permit an alternative route. The amendment was granted, and Eden Cooper sued. The Fort Worth Court of Appeals upheld the trial court's determination that Eden Cooper had no standing to challenge the city's action, because the suggested harm to Eden Cooper (the lost payment for the access route) was too conjectural (because there was no guarantee that the third party would have negotiated a route with Eden Cooper or that the city would not have approved an alternative legal route), and any other alleged harm was common with that of the general public.

***Enbridge Pipelines (East Texas) L.P. v. Avinger Timber, LLC*, 2012 WL 3800234, 10-0950 (Tex. Aug. 31, 2012)**
Motion for rehearing due 10/29/12.

Eminent Domain

Enbridge Processing was the lessee of a tract of land on which was constructed a gas processing plant. It was unable to negotiate an extension of the lease with the landowner, so Enbridge Processing merged with an affiliate (Enbridge Pipelines) that had eminent domain power, and instituted condemnation proceedings. The difficulty in the case arose because the plant itself was owned by the condemning entity, thus that value was not properly included in the value of the property taken. On the other hand, if it did not gain ownership of the property, it would have to remove the entire plant from the property within six months. Another complication was the fact that the property had about fifteen gas pipelines running into it, along with a high-voltage electric line.

Enbridge valued the property as if it was raw, vacant land (approximately $2,000 an acre or $47,940). Avinger, on the other hand, valued the property at $20,995,000. That analysis determined that a knowledgeable and prudent investor would recognize the value of the property based on the pipeline infrastructure, and the fact that Enbridge would likely sell the plant rather than expend a great deal to dismantle it.

The trial court found that the Enbridge expert testimony was inadmissible because it failed to take into account the condition of the property when the taking occurred – with pipeline infrastructure. As a result, the jury awarded $20,995,000 as compensation. The Supreme Court of Texas reversed. Although the expert for Enbridge testified that the value of the property would be $20,995,000 even if the plant was swept away by a tornado, other testimony seemed to indicate that the expert took into account the cost savings Enbridge would realize by avoiding the necessity of removing the plant. The valuation of the property is not properly based on the value to the specific entity taking the property. So if, for instance avoiding a particular tract of land would cost the highway builder an additional $10,000,000, that cost is not properly part of the calculation of the fair market value of the property. The dissent argued that although some of the expert's testimony seemed to take into account impermissible factors, there was enough testimony that explicitly stated it excluded those factors to support the jury's verdict.

The difficulty that these parties must face is how do they try the case in light of this decision. The landowner's expert was excluded because he took into account the special nature of the property too much; the pipeline's expert was excluded because he didn't take it into account at all. It seems that the appropriate inquiry would be to imagine that the condemning entity had no interest in the gas plant. However, the dissent pointed out that even if the condemning entity was not Enbridge, the property was suited for a gas plant, the new company would be required to spend $50 million to build a gas plant (which would be, according to the testimony, very profitable even if a new plant was built), and Enbridge would be required to spend $38 million to tear down a plant. In a free market transaction, it would appear that a prudent buyer would spend something less than $50 million to get an existing plant, and Enbridge would have an incentive to charge far less than market value to avoid the $38 million in costs.

Entergy Texas, Inc. v. Public Utility Comm. of Tex., **2012 WL 3239157, No. 03-11-00005-CV (Tex. App.--Austin Aug. 8, 2012).**

Utility Ratemaking

Although an electric utility cannot generally recover additional revenues to make up for historical revenue shortfalls, the Texas Legislature created a separate revenue stream to allow utilities to begin recovery of costs expended to meet the Legislature's directives to increase energy efficiency. Further, the statute stated that the newly-created charge, the "energy efficiency cost recovery factor," or "EECRF," could be adjusted to make up for "any over-collection or under-collection of energy efficiency cost recovery revenues in previous years." Entergy sought to increase its EECRF to recover costs incurred prior to the institution of the EECRF. The PUC, however, rejected the stipulated settlement reached by Entergy and several protesting cities and held that the EECRF could only be adjusted to make up for under- or over-

collection of costs by the EECRF itself. The Austin Court of Appeals upheld the decision of the PUC.

***Goss v. City of Houston*, 2012 WL 4168334, No. 01-10-00836-CV (Tex. App.--Houston [1st Dist.] Sept 20, 2012).**

Civil Service/Employment/ADA

In 2006 and 2007, Goss filed complaints with the TWC and the EEOC. The EEOC found, in April 2009. that the city had violated Title VII, and after conciliation efforts failed, issued a right to sue letter in November 2009. The right to sue letter stated that suit could be filed "within 90 days of your receipt of this Notice." Under state law, a suit must be filed within 2 years of the filing of the complaint. Goss filed suit on February 26, 2010, three or more years after filing the complaint and 95 days after the notice letter was filed. The suit alleged violations of state law, and included no federal claims. The city moved to dismiss for lack of jurisdiction. Just before the hearing on the motion, Goss amended the suit to add the federal claims. The entire case was dismissed with prejudice.

The Houston [1st Dist.] Court of Appeals ruled that the case was appropriately dismissed with prejudice because the jurisdictional flaws were not reparable, that the statute of limitations was jurisdictional in discrimination suits against governmental entities due to Texas Government Code §311.034, and because the Title VII claims did not relate back to the original suit because a claim relates back only if the claims made in the original suit were not time-barred. (Tex. Civ. Prac. & Remedies Code §16.068.) Finally, the court found that because there was no jurisdiction when the motion was filed, the court had no power to do anything but dismiss the case. The dissent argued that because the motion addressed only the state law claims, it was error for the trial court to rule on the Title VII claims that were not properly challenged.

***HDW2000 256 East 49th Street, LLC, et al. v. City of Houston*, 2012 WL 2928496, No. 01-10-00942-CV (Tex. App.--Houston [1st Dist.] July 19, 2012) (mem. op.).**

Substandard Buildings

Property owner appealed an order of the city's building and standards board requiring repair of a vacant office building within 60 days. The property owner appealed within 30 days of receiving the written order. The city moved for dismissal on the basis that the appeal was filed more than 30 days from the mailing of the order. The trial court dismissed. The Houston [1st Dist.] Court of Appeals reversed, holding that Section 54.039(a) of the Local Government Code requires the appeal to be file within 30 days after the decision is personally delivered, mailed, **or** delivered by

the postal service. The court found that if the appeal is filed within 30 days of either of the three triggers, it is timely.

***Ibarra v. City of Laredo*, 2012 WL 2914216, No. 04-10-00665-CV (Tex. App.--San Antonio July 18, 2012) (mem. op.)**
Petition for review filed 09/19/12.

Breach of Contract

Ibarra opened a residential water account in 1980. Some time after 1992, the water service was disconnected for non-payment. In 1998, a friend living in the house with Ibarra applied for service, and agreed to make monthly payments to retire the unpaid balance of $10,928. In 2000, Ibarra's daughter applied for service, and agreed to make monthly payments to retire an unpaid balance of $2,692. The payments were not made and service was discontinued just after the Christmas holidays at the end of 2000. In August 2001, Ibarra's daughter again applied for service and agreed to make monthly payments towards an unpaid balance of $5,033. When for the third time the occupants of Ibarra's house failed to make the payments they had agreed to make, service was again cut off. Ibarra filed suit for breach of contract and nuisance. The trial court directed a verdict for the city on the nuisance claim, and the jury returned a verdict on the breach of contract claim in favor of the city.

The San Antonio Court of Appeals affirmed, finding that Ibarra had failed to object to the jury question on breach of contract, and that the court did not err in refusing an instruction on impossibility because nothing in the record supported a finding that the city had done anything to make it impossible for Ibarra, her friend, or her daughter to comply with the agreements that they had made to pay for the water they had used.

***In re City of Corpus Christi*, 2012 WL 3755604, No. 13-12-00510-CV (Tex. App.--Corpus Christi Aug. 29, 2012) (mem. op.).**

Venue

The City of Ingleside sought a declaratory judgment regarding the validity of ordinances of the City of Corpus Christi. The controversy related to the jurisdiction, for taxation purposes, over wharves, piers, and docks that extended from the shoreline of Nueces Bay from the City of Ingleside. Ingleside also sought temporary injunctive relief to either prevent Corpus Christi from assessing and collecting taxes on those structures, or to require those taxes to be placed in the registry of the court pending final hearing.

Ingleside sued in San Patricio County, and Corpus Christi sought to change venue to Nueces County. When the motion to transfer venue was denied, Corpus Christi sought a writ of mandamus, claiming that venue was mandatory in Nueces County because venue of a suit for a writ of injunction is mandatory in the county where the defendant is domiciled (citing §65.023(a) of the Civil Practice and Remedies Code). Only the mandatory venue argument was properly before the court, because venue decisions based on permissive venue are neither appealable nor reviewable on mandamus. The Corpus Christi Court of Appeals held that the underlying suit was primarily for declaratory relief, not injunctive relief, so the suit did not properly fall within the mandatory venue provision.

***Mission Consol. Independent School Dist. v. Garcia*, 372 S.W.3d 629, No. 10-0802 (Tex. 2012).**

Civil Service/Employment/ADA

Garcia alleged that she was terminated from her position because of her race, national origin, age, and gender. The district filed a plea to the jurisdiction, claiming that Garcia's pleadings had failed to establish a prima facie case of discrimination. The district produced evidence that it had replaced Garcia with an older woman of the same race and national origin. That evidence was undisputed and no evidence was presented in opposition by Garcia.

The question raised was whether it was proper to dismiss the claim at the plea to the jurisdiction stage, before any evidence was developed through discovery. The majority held that the pleadings must show a claim within the scope of the waiver of immunity, and thus dismissal at the jurisdictional challenge stage was appropriate. Because Garcia was replaced by an older worker, she was not entitled to the prima facie presumption of discrimination established by *McDonnell Douglas*. The court held that the plaintiff must present some evidence if the defendant has negated one of the elements of the prima facie case. The court suggests that there was sufficient time in this case to have developed some record of facts to support the allegation that the district had discriminatory intent.

The dissent, written by Chief Justice Jefferson, argues that the prima facie structure of *McDonnell Douglas* is but one option of how to prove discrimination under the statute, and that failure to prove an element of the prima facie case is not equivalent to failing to allege a claim.

At first glance, the dissent in this case was much more persuasive. However, on further review, it appears that the decision leaves a complainant with a reasonable opportunity to bring forth a legitimate claim. The question must be asked: if Garcia was replaced by someone of the same demographic profile, what makes her think that she was discriminated against? The answer to

that simple question should be provable – at least in a prima facie way. For example, an affidavit by the plaintiff that she observed the decision-maker mistreating older workers through the years would, arguably, be a factual basis for the allegation. When, after months of preliminary legal wrangling, Garcia could offer nothing more than a bare allegation that the employer had discriminatory intent, it seems more appropriate that the case is disposed of at an early stage.

***Rusk State Hosp. v. Black*, 2012 WL 3800218, No. 10-0548, (Tex. Aug. 31, 2012).**

Immunity

The Blacks' son committed suicide while admitted to the Rusk State Hospital by putting a plastic bag over his head. The Blacks filed suit, and filed an expert report under the requirements of the statute regarding health care liability claims. The hospital challenged the report unsuccessfully at the trial court, and appealed that ruling. At the court of appeals, the hospital raised for the first time that it had sovereign immunity from the claims. The court of appeals sustained the challenge with regard to some claims, remanded others to the trial court to permit the plaintiffs to supplement their report, and declined to address the sovereign immunity issue because it had not been presented to the trial court.

The Supreme Court of Texas found that because sovereign immunity was a jurisdictional issue, it could be raised for the first time on appeal. However, when the immunity argument is raised for the first time on appeal, the case should be remanded unless the government can show either that (1) the pleadings conclusively negate jurisdiction; (2) the plaintiffs have had a full and fair opportunity to develop the record and amend their pleadings and have failed to do so; or (3) they cannot show jurisdiction even if given such an opportunity. Ultimately, it ruled that the hospital could not conclusively show that the Blacks could never show jurisdiction even with amendment of the pleadings or development of the record, so the case was remanded.
Three justices of the court dissented, holding that immunity should not be treated the same as other jurisdictional issues. The dissent argued that sovereign immunity has characteristics of both personal jurisdiction and subject matter jurisdiction, but is identical to neither. One of the key differences between immunity and subject matter jurisdiction is that immunity can be waived. The dissent argued, therefore, that the argument should not be allowed to be raised for the first time on appeal. The majority opinion does not unambiguously reject this analysis, however, holding that the issue was not fully briefed or argued by the parties, thus reserving the question for a future case.

***Save Our Springs Alliance, Inc. v. City of Kyle*, 2012 WL 3793183, No. 03-11-00686-CV (Tex. App.--Austin Aug. 30, 2012).**

Water Rights

The City of Kyle applied to the Barton Springs-Edwards Aquifer Conservation District for an amendment to its water production permit. The application was protested by the Save Our Springs Alliance. The District partially approved the application, and the city appealed. The Alliance sought to intervene in the appeal, but the trial court granted the City's motion to strike the intervention. After a ruling in favor of the city on cross motions for summary judgment, the city and the district reached a settlement, and the trial court entered a judgment granting the water rights to which the city and district had agreed. The Alliance appealed on the grounds that its intervention should not have been stricken. The Austin Court of Appeals never reached the merits of the appeal, however, holding that the trial court exceeded its jurisdiction by approving the settlement. Under the Administrative Procedures Act, the reviewing court's power, when it finds error, is limited to reversing and remanding the case to the agency. The agreement of the remaining parties could not increase that power.

***Steele v. City of Southlake*, 370 S.W.3d 105, No. 02-11-00229-CV (Tex. App.--Fort Worth 2012).**

Whistleblower Act

Steele was a police officer who had brought complaints of wrongdoing with the department to the district attorney. The district attorney had taken no action in response to the complaints. Subsequently, Steele sent an email to city management anonymously making many of the same complaints. Because there was a question whether confidential information had been improperly disclosed in the email, an investigation to determine the author was begun. In order to divert attention from himself, Steele wrote a second email, stating it was from a former officer, and implying that the first email was also sent by the former officer. Steele was suspended and then terminated.

The trial court granted summary judgment for the city. On appeal, the Fort Worth Court of Appeals found that there was no material fact question that the city would have taken the same action based on unrelated evidence, because the city's regulations required termination for untruthfulness, the city manager stated that the termination decision was based on untruthfulness in claiming the emails were sent by someone else, and there was no evidence (such as evidence of other officers who were **not** terminated for untruthfulness) that this basis was pretextual.

***Wild Rose Rescue Ranch v. City of Whitehouse*, 2012 WL 2834182, No. 12-11-00371 (Tex. App.--Tyler July 11, 2012).**

Jurisdiction

The city adopted an ordinance limiting any property owner to four dogs, four rabbits, and other enumerated collections of animals. Wild Rose sued for a declaratory judgment that the ordinance was unconstitutional before it had been cited for violating the ordinance. The trial court granted the city's plea to the jurisdiction and dismissed the case.

The Tyler Court of Appeals held that the ordinance was a penal ordinance, despite the fact that it had certain civil aspects such as a seizure provision. In Texas, a party cannot seek construction or enjoin enforcement of a penal ordinance in a civil proceeding without a showing of irreparable injury to the party's vested property rights. Holding that the ordinance was at its core a land use regulation, the court found that Wild Rose had no vested property right to operate an animal rescue center on its property. Further, if the animals were seized, this would not result in irreparable harm because if successfully challenged, the animals could be returned. Finally, Wild Rose argued that it should have been allowed to present evidence at the hearing on the motion to dismiss or amend its pleadings after the ruling. The court ruled that as Wild Rose had made no offer of evidence, it could not complain of its exclusion; similarly, having made no showing of how its pleadings could be amended to save its case, it could not complain about not being permitted to amend.