

2019 TCAA Fall Conference

Update on Contracts Immunity

Daniel R. Richards

Daniel J. Riegel

Richards Rodriguez & Skeith



2018-2019 Key Developments

- **Texas Supreme Court:** No immunity when a city engages in proprietary function by entering into a contract (*Wasson II*)
- **Texas Supreme Court:** Immunity is waived on claims for specific performance under pre-2013 Local Government Code (*Hays Street Bridge*)
- **Texas Supreme Court:** No immunity for municipal economic development corporations (*Rosenberg Development Corp*)



Wasson Interests v. City of Jacksonville
Governmental and Proprietary Functions



How We Got Here – *Wasson I* (2016)

- Facts – City of Jacksonville owned lakefront residential property and leased to tenant. City sent eviction notice alleging tenant broke lease by operating a short-term rental. Tenant sued City for breach of contract.
- Issue – Does the governmental/proprietary dichotomy apply to contract claims?
- Holding – Yes.
- Rule – Municipalities are not immune from breach of contract claims when engaging in proprietary functions as opposed to governmental functions.
- Unresolved
 - Was Jacksonville engaging in a proprietary or governmental function?
 - How to determine?



On Remand in the Appeals Court (2016)

- Appeals court focused on specific acts underlying the breach.
- Jacksonville was enforcing an ordinance to prevent commercial activity around waterway.
- Jacksonville was using governmental powers to regulate waterworks, dams and reservoirs.
- Jacksonville is immune because it was engaging in a governmental function.



Back to the Supreme Court *Wasson II* (2018)

Supreme Court Reverses

“We hold that, to determine whether governmental immunity applies to a breach-of-contract claim against a municipality, the proper inquiry is whether the municipality was engaged in a governmental or proprietary function when it entered the contract, not when it allegedly breached the contract.”



Back to the Supreme Court *Wasson II* (2018)

“[T]he focus belongs on the nature of the contract, not the nature of the breach. If a municipality contracts in its proprietary capacity but later breaches that contract for governmental reasons, immunity does not apply. Conversely, if a municipality contracts in its governmental capacity but breaches that contract for proprietary reasons, immunity does apply.”



Back to the Supreme Court *Wasson II* (2018)

- CPRC 101.0215:
 - Leasing is not listed as a governmental function.
- 4 Factor Test Announced in *Wasson II*:
 - Mandatory v. Discretionary
 - Jacksonville’s decision to lease property was discretionary.
 - Public v. Resident Benefits
 - Jacksonville entered lease for private residents, not general public.
 - State’s or City’s Behalf
 - Jacksonville leased out property on its own behalf, not the state.
 - Relation to a governmental function
 - Lease was not “essential” to Jacksonville’s governmental actions.
 - Lease merely “touches upon” government interests in regulating waters.



Wasson II – Proprietary v. Governmental

- Outcome:
 - Jacksonville was engaged in proprietary function when it entered lease.
 - Jacksonville did not have immunity from suit on the tenant’s breach-of-contract claim.
- Takeaways:
 - To determine whether a municipal contract is proprietary or governmental:
 - Analyze the contract, not the breach.
 - Consider whether functions listed in CPRC 101.0215(a) cover contract at issue
 - Analyze 4 factors under *Wasson II*.
 - If contract is governmental in nature, the municipality has immunity.
 - If contract is proprietary in nature, the municipality does not have immunity.
- Problems:
 - There is limited guidance on how to apply the 4 factors.



Hays Street Bridge – Specific Performance



Hays Street Bridge – Specific Performance

- Facts –
 - City signs an MOU with Hays Street Bridge Restoration Group.
 - Restoration Group promises to raise funds for the project.
 - City promises to ensure funds will go directly to project.
 - City decides to sell adjacent property to Alamo Beer Company in violation of the MOU.
 - Restoration Group sues City seeking specific performance.
- Issue – Is City immune from suit for specific performance?
- Holding – No.



Hays Street Bridge – Specific Performance

- Step 1 – does immunity apply?
 - CPRC 101.0215(a)
 - “Bridge construction and maintenance” (CPRC 101.0215(a)(4))
 - “Community development of urban renewal activities” (CPRC 101.0215(a)(34))
 - Application of Wasson II factors
 - MOU was discretionary act, not mandatory act (proprietary)
 - MOU benefits the general public (governmental)
 - MOU benefits the State – 80% funded through TXDOT (governmental)
 - MOU relates to bridge maintenance and community development (governmental)
 - Therefore governmental immunity on breach-of-contract claim



Hays Street Bridge – Specific Performance

- Step 2 – is immunity waived by statute?
 - § 271.152 MOU is a contract for services.
 - § 271.153 provides limitations on damages.
 - Pre-2013 version does not provide limitations on equitable remedies.
 - Court refuses to infer limitation on equitable remedies.



Hays Street Bridge – Specific Performance

- Takeaways
 - Cities are not immune from specific performance claims pre-2013.
 - Immunity is unclear in post-2013 claims.
 - Post-2013 (current) statute adds a provision re specific performance:
 - Section 271.153(c): “Actual damages, specific performance, or injunctive relief may be granted in an adjudication brought against a local governmental entity for breach of a contract described by Section 271.151(2)(B) [contracts regarding sale or delivery of reclaimed water].”
 - Few courts have cited the current statute, no cases have addressed the issue.



Rosenberg – Municipal Economic Development Corporations

Chris Martin, Chairman
Rosenberg Development Corporation (RDC)

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Economic Development and the RDC are changing the face of the Rosenberg. [Click here to learn more about what this means for you.](#)



Rosenberg – Municipal Economic Development Corporations

- Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc., 571 S.W.3d 738 (Tex. March 8, 2019)
 - Facts:
 - RDC signed a contract with Imperial to lease, renovate, and operate a historic theatre.
 - Project took longer than expected. Imperial asked for extension. RDC refused.
 - Imperial sued for breach of contract.
 - Issue – Do municipal economic development corporations have independent immunity from breach of contract claim?
 - Holding – No.



Rosenberg – Municipal Economic Development Corporations

- Analysis
 - Legislature did not intend EDCs to have governmental-entity status.
 - Governmental immunity benefits public by preventing disruptions of key governmental services.
 - EDCs do not perform key governmental services.
 - No genuine risk of unforeseen expenditures imposed on government by allowing suit against economic development corporations.
 - EDCs do not have governmental immunity.



Rosenberg – Municipal Economic Development Corporations

- Takeaway
 - Over 700 EDCs in the State of Texas.
 - EDCs do not have governmental immunity on breach of contract claims.
 - Open question whether EDCs could have derivative immunity.
 - A non-governmental entity can share a political subdivision’s immunity derivatively.
 - Circumstances which derivative immunity exist are “ill-defined” under Texas law.
 - If an EDC is found to have derivative immunity, the *Wasson II* analysis would apply to determine immunity in breach of contract claims.



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Questions?

