

ULTRA VIRES CLAIMS—Where did your immunity go?

**Texas City Attorneys Association
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I. INTRODUCTION

Texas law provides that a plaintiff's ability to bring a declaratory judgment claim within a waiver of governmental immunity is both "limited" and "narrow." Ordinary declaratory judgment claims against governmental units are generally limited to declarations as to the constitutionality or invalidity of a statute or ordinance. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015). However, in 2009 the Texas Supreme Court muddied the water on immunity and declaratory judgment claims when it decided *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). *Heinrich* held that declaratory judgment claims alleging "*ultra vires*" actions are not barred by governmental immunity, reasoning that *ultra vires* claims do not seek to control the government, but rather to reclaim control from an official allegedly acting in violation of the law.

There have been, particularly in the past couple of years, a significant increase in the number of suits that include *ultra vires* allegations. And not only are the number of *ultra vires* cases increasing, plaintiffs are continually seeking to expand the breadth of the doctrine. While the *ultra vires* doctrine is narrower in scope than advanced in many cases, where the line is drawn is unclear and constantly developing.

Since deciding *Heinrich* in 2009, the Texas Supreme Court has addressed *ultra vires* claims in at least seventeen opinions, with thirteen of those coming within just the past five years. This paper seeks to highlight those decisions, discuss how a few intermediate courts are applying *ultra vires* law, and hopefully provide practical tips and suggestions on how to defend your next *ultra vires* claim.

II. GOVERNMENTAL IMMUNITY AND THE UDJA

The Texas Uniform Declaratory Judgment Act ("UDJA") provides a statutory cause of action for a party to have its rights declared by a court:

- (a) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

TEX. CIV. PRAC. & REM. CODE § 37.004(a).

Over time, Texas law established that declaratory judgment claims are limited by governmental immunity and only certain theories can be advanced against governmental entities. The UDJA is not a general waiver of sovereign immunity. *Heinrich*, 284 S.W.3d at 370. Rather, the UDJA is "merely a procedural device for deciding cases already within a court's jurisdiction." *Cheanult v. Phillips*, 914 S.W. 2d 140, 141 (Tex. 1996). "[S]tate agencies ... are immune from suits under the UDJA unless the Legislature has waived immunity for the particular claims at issue." *Tex. Dep't of Transp. v. Seftzik*, 355 S.W.3d 618, 620 (Tex. 2011).

The waiver of governmental immunity under the UDJA is “limited” and “narrow.” *Tex. Dep’t of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 746 (Tex. App.—Austin 2014, pet. dismissed) (waiver of sovereign immunity as to the UDJA as “limited”); *see also Harvel v. Tex. Dep’t of Ins.-Div. of Workers’ Comp.*, 511 S.W.3d 248, 253 (Tex. App.—Corpus Christi 2015, pet. denied) (describing the waiver of immunity as “narrow”).

The limited and narrow immunity waiver for declaratory judgment claims is generally limited to claims challenging the validity or constitutionality of ordinances or statutes. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b); *see also Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex.2015); *Tex. Parks & Wildlife Dep’t v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex.2011); *Heinrich*, 284 S.W.3d at 373, n.6.

But what about a declaration that a government official is acting unlawfully, or beyond his or her power, and therefore not as an agent of the state? Should immunity apply then? If not, what recourse exists to bring the government back into lawful compliance? The Texas Supreme Court addressed those questions in 2009 through *Heinrich*. The Court concluded that immunity does not preclude declaratory judgment claims based on alleged *ultra vires* actions by governmental officials. But what qualifies as *ultra vires* act and when it is properly asserted? When does an official’s discretion negate an *ultra vires* claim? Who should be named as a defendant? What defenses are available? What remedies exist? Are attorneys’ fees allowed on a successful *ultra vires* claim? As discussed below, Texas courts continue to define the parameters of the *ultra vires* doctrine in the context of governmental immunity, including the foregoing questions.

III. HEINRICH AND THE DEVELOPMENT OF THE ULTRA VIRES DOCTRINE.

According to Merriam-Webster, *ultra vires* means “beyond the scope or in excess of legal power or authority.” Therefore, a government official may engage in *ultra vires* acts when he or she acts beyond his or her power or authority.

Ultra vires theory is certainly not a new concept—but its application in the context of governmental immunity was addressed and clarified in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). *Heinrich* involved an El Paso police officer’s widow that filed suit after her pension payments were reduced. *Id.*, at 369. Mrs. Heinrich claimed the reduction violated a statute that only allowed changes to *increase* pensions or benefits. *Id.*, at 369, 378. Mrs. Heinrich sued the City, the public employee’s pension fund, the board of trustees of the pension fund as an entity. *Id.* She also named the individual board members. *Id.* Mrs. Heinrich sought declaratory relief and an injunction to restore her payments to the full amount. *Id.*, at 369. The defendants filed a plea to the jurisdiction asserting governmental immunity and official immunity. *Id.*, at 369. The trial court denied the jurisdictional challenges and the court of appeals affirmed. *Id.*, at 369.

The Texas Supreme Court was presented with the situation where immunity did not appear to allow a declaratory judgment claim, and if that was the case, what recourse did Mrs. Heinrich have to enforce a violation of clear statute? With that dilemma, *Heinrich* held that while governmental immunity may preclude declaratory judgment claims against governmental

units, an exception exists against officials who act *ultra vires*. The Court noted that “[t]o fall within this *ultra vires* exception, a suit must not complain of a government officer’s exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.” *Id.*, at 372.

Heinrich reasoned that governmental immunity should not preclude *ultra vires* suits because such claims do not attempt to control state action by imposing liability on the entity, but rather seek to “reassert the control of the state” by requiring the official to comply with statutory or constitutional provisions. *Id.* *Heinrich* further reasoned that “extending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring [government] resources are spent as intended.” *Id.* *Heinrich* then clarified several important principles for the *ultra vires* exception.

First, the Court addressed the question of whether the proper defendant is the governmental entity or the actor who allegedly acted *ultra vires*. *Id.*, at 373. *Heinrich* concluded that while “for all practical purposes” the suit is against the entity, because the entity cannot act outside its authority, the proper defendant in an *ultra vires* claim is the government official in his or her official capacity.” *Id.* at 373.

Second, *Heinrich* considered what relief is available through an *ultra vires* claim. The Court acknowledged that “[t]his is a curious situation: the basis for the *ultra vires* rule is that a government official is not following the law, so that immunity is not implicated, but because the suit is, for all practical purposes, against the state, its remedies must be limited.” *Id.*, at 374. Balancing this dilemma, *Heinrich* concluded that an *ultra vires* claim should be limited to prospective relief. *Id.*, at 374-76. Thus, *Heinrich* departed from *State v. Epperson*, 42 S.W.3d 228, 231 (1931), which allowed for retrospective relief. *Id.*, at 376. The Court also confirmed that an *ultra vires* claim also does not authorize the recovery of retrospective monetary damages. *Id.*, at 374-76. However, the Court recognized that in some situations the payment of future money—such as with Mrs. *Heinrich*’s future pension payments in their full amount—is prospective and would not implicate immunity simply because monetary relief enters the picture. *Id.*, at 374.

Third, *Heinrich* established that an *ultra vires* claim should be challenged through a plea to the jurisdiction, and the burdens, including evidentiary considerations, are like any other jurisdictional challenge. *Id.*, at 378. A defendant sued in his or her official capacity has the same governmental immunity, derivatively, as the government employer. *Id.*, at 380. Thus, the proper “answer” for an *ultra vires* claim is to file a plea to the jurisdiction. This is because either: (a) the plaintiff has a proper *ultra vires* claim against the official, for which there is no immunity and the prospective relief is appropriate; or (b) there is no proper *ultra vires* claim and the court lacks jurisdiction.

Finally, *Heinrich* discussed whether the government actor sued in his or her official capacity could assert individual defenses, such as official immunity, to challenge jurisdiction. *Id.* The Court rejected the idea on the basis that actors are not sued in their individual capacities

on *ultra vires* claims, and therefore an individual's immunities, including official immunity, are not applicable.¹ *Id.*

With the new exception in mind, *Heinrich* reversed and dismissed all claims asserted against the City of El Paso, the fund, and the board, finding those entities had governmental immunity to Mrs. Heinrich's claims. *Id.*, at 380. However, the Court found that Mrs. Heinrich raised a fact question as to whether her pension payments were reduced in violation of state law, and therefore allowed Mrs. Heinrich's *ultra vires* claims against the board members and the mayor in their official capacities to proceed for prospective relief. *Id.*

TAKEAWAYS: *Heinrich* provides the fundamentals for an *ultra vires* claim:

- (1) the claim must be brought against one or more government officials in their official capacity;**
- (2) while the suit names an individual official, the suit is technically against the entity;**
- (3) the proper answer for the official capacity defendant is a plea to the jurisdiction, as if the allegations are not *ultra vires*, the court lacks jurisdiction;**
- (4) the claim must allege, and ultimately prove, that the official acted without legal authority or failed to perform a ministerial act, and the allegations must not complain of a government's exercise of discretion;**
- (5) remedies for an *ultra vires* claims must be prospective in nature, and prospective payments of money are not necessarily precluded; and**
- (6) individual immunities such as official immunity are not applicable to *ultra vires* claims.**

As discussed in the introductory section of this paper, since *Heinrich* the Texas Supreme Court has handed down several cases that address the *ultra vires* exception. The following section discusses several of those cases and I attempted to provide "Takeaways" for each case that will hopefully provide you with a resource to utilize when evaluating your next *ultra vires* case.

IV. RELEVANT TEXAS SUPREME COURT DECISIONS POST-HEINRICH

Texas Dep't of Ins. v. Reconveyance Services, Inc., 306 S.W.3d 256 (Tex. 2010). Reconveyance Services, Inc. sued the Texas Department of Insurance, seeking a declaration that the department acted *ultra vires*. *Id.*, at 258. The district court denied the Department's plea to

¹ As discussed below, the official could be sued in both his or her official capacity for an *ultra vires* claim, as well as in his or her individual capacity. *See, e.g., Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018). In that case, the individual can assert individual immunities as to the individual capacity claims, if appropriate otherwise.

the jurisdiction, and the court of appeals affirmed, finding that the plaintiff alleged *ultra vires* acts within an exception to immunity. *Id.* The Texas Supreme Court reversed and re-confirmed that *ultra vires* claims naming an entity are barred by immunity, regardless of any *ultra vires* allegations, because any suit alleging *ultra vires* acts must be asserted against the government actor in his or her official capacity.

TAKEAWAY: If *ultra vires* claims in your suit are asserted against the governmental entity, as opposed to a specific individual in his or her official capacity, file a plea to the jurisdiction on the entity’s behalf seeking dismissal of the *ultra vires* claims—even if the petition alleges an actionable *ultra vires* theory.

Texas Lottery Comm’n v. First State Bank of DeQueen, 325 S.W.3d 628 (Tex. 2010). *DeQueen* clarified that suits challenging the validity of a statute itself—and not a specific government official’s actions under the statute—are not *ultra vires* claims. Rather, those allegations fall within the “limited” and “narrow” waiver of immunity for the UDJA.

TAKEAWAY: *Heinrich* did not eliminate or impact the limited and narrow waiver of immunity for declaratory judgment claims against governmental entities. A suit contesting the constitutionality or validity of a statute or ordinance itself is not an *ultra vires* theory, but rather falls within the limited immunity waiver in the UDJA for claims against the governmental entity.

Texas Parks & Wildlife Dep’t v. Sawyer Trust, 354 S.W.3d 384 (Tex. 2011). *Sawyer Trust* sued the Texas Parks and Wildlife Department based on the Department’s determination that a river was navigable and claimed ownership. The trust asserted both a takings claim and a declaratory judgment claim asking the court to declare that the river was not navigable. *Id.*, at 387. The Department filed a plea to the jurisdiction asserting sovereign immunity, which the trial court denied. *Id.*, at 386. The court of appeals affirmed. *Id.* The Texas Supreme Court reversed, finding the trust’s declaratory judgment claim was barred by immunity, as it did not fall within the limited immunity waiver of the UDJA. *Id.* However, the Court remanded the case to allow the trust to attempt to plead an *ultra vires* claim. *Id.*, at 393. Because otherwise, Plaintiff had no recourse to challenge the governmental determination.

Sawyer Trust did not explicitly set out any new principal for evaluating an *ultra vires* claim. Yet, the impact of the case is significant. First, *Sawyer Trust* supports the proposition that if immunity is to be found for the entity even when the fact suggest wrongdoing, courts are very inclined to allow the plaintiff to amend to attempt to assert an *ultra vires* theory against a specific government official.

Second, as discussed below, a government official’s discretion to act is a primary defense to an *ultra vires* claim. Without any facts recited in the opinion, *Sawyer Trust* appears to find, and a concurring opinion expressly concludes, that any real property determination by a governmental body could not be discretionary as a matter of law. *Id.*, at 395 (“Government officials cannot choose which properties the State owns; our constitution and statutes set those

parameters, and our courts decide whether they have been satisfied.”) Accordingly, *Sawyer Trust* implies that immunity is waived for *ultra vires* claims alleging that a governmental entity is wrongfully claiming real property ownership. *Id.*, at 393 (“A suit to recover possession of property unlawfully claimed by a state official is essentially a suit to compel a state official to act within the officer’s statutory or constitutional authority, and the remedy of compelling return of land illegally held is prospective in nature.”)

TAKEAWAYS: When preparing a jurisdictional challenge to declaratory judgment claims against a governmental entity, anticipate that the court will allow a plaintiff to amend to assert a potential *ultra vires* claim. Prepare to address any *ultra vires* defenses at the entity’s plea hearing. Further, *Sawyer Trust* implies that an allegation that a governmental entity wrongfully claims ownership to real property automatically provides the basis for an *ultra vires* claim against the individual who made the ownership determination.

Texas Dep’t of Transp. v. Sefzik, 355 S.W.3d 618, 622-23 (Tex. 2011). Citing *Sawyer Trust*, *Sefzik* also provided a plaintiff with an opportunity to amend to assert an *ultra vires* claim upon finding that declaratory judgment claims against the state were barred by immunity. However, unlike *Sawyer Trust*, at least *Sefzik* suggested that any amendment would need to specifically identify the specific individual that took the complained of action. *Id.*, at 621, fn. 2.

TAKEAWAYS: *Sefzik* confirms that challenges to actions taken pursuant to a statute or ordinance are not proper declaratory judgment claims against a governmental entity and such claims are barred by immunity unless they are properly asserted against an individual in his or her official capacity. And like *Sawyer Trust*, *Sefzik* shows the Court’s strong position that plaintiffs should be allowed to amend to attempt to assert *ultra vires* theories when immunity leaves a plaintiff with no other recourse.

Klumb v. Hous. Mun. Emps. Pension Sys., 458 S.W.3d 1 (Tex. 2015). In *Klumb* the Court considered whether courts had authority to review a municipal pension board’s actions under an *ultra vires* theory, notwithstanding statutory language precluding judicial review. The plaintiffs alleged that board members violated a statute and acted *ultra vires*. *Id.*, at 4. However, the statute provided that the board had exclusive, final, and binding authority to make determinations regarding eligibility for membership, services and benefits, and such determinations were not subject to judicial review. *Id.* The Court held that there was no *ultra vires* claim because the board acted within the scope of its broad statutory authority to construe the term “employee” for eligibility purposes. *Id.*, at 4, 11. Importantly, in its analysis, the Court also noted that “non-compliance with a contract does not give rise to an *ultra vires* claim.” *Id.*, at 12.

However, the Court also examined whether *ultra vires* is an exception to precluded judicial review. *Klumb* noted the “related, but conceptually distinct concepts” of sovereign

immunity and the unavailability of judicial review. *Id.*, at 9. The Court ultimately found that it could only “assume for purposes of [its] analysis” that the *ultra vires* doctrine was an exception to the statute’s ban on judicial review. *Id.* However, an *ultra vires* challenge to executive action made final by statute would only be allowed when there is a “manifest”, “conspicuous and irreconcilable” conflict between the action and the statutory authority asserted by the executive, which was not present. *Id.*, at 10-11.

TAKEAWAYS: Broad discretion in the interpretation and application of a statute generally negates an *ultra vires* claim. Further, the *ultra vires* doctrine can, in theory, be used to not only circumvent immunity, but also statutorily precluded judicial review—although the burden is high.

Finally, non-compliance with a contract does not generally give rise to an *ultra vires* claim (more on this in the discussion of *City of Houston v. Houston Municipal Employees Pension Sys.*, 549 S.W.3d 566, 579 (Tex. 2018), below).

Southwest Bell Telephone, L.P. v. Emmett, 459 S.W.3d 578 (Tex. 2015). In *Emmett*, a telecommunications utility sued a city, public works director, and county commissioners, alleging that a statute required a county flood control district to pay for the cost of relocating facilities. The Court found that the statute applied, and the district was responsible for the relocation costs, but relevant to the *ultra vires* claims, then addressed whether individual commissioners were entitled to immunity or whether they failed to perform ministerial duties. *Id.*, at 587.

Emmett held that the applicable statute imposed ministerial duties because the statute “contains no indication that the District is to conduct any form of review, deliberation, or judgment in exercising its payment obligation.” *Id.*, at 588. Further, the statute’s “use of the word ‘shall’ evidences the mandatory nature of the duty imposed, and the statute provides under what circumstances the District is to bear the expense.” *Id.* The Court concluded that by showing “their intent to not comply with the statute,” the commissioners failed to perform a ministerial duty set forth by statute. *Id.*

TAKEAWAYS: For purposes of *ultra vires* claims, *Emmett*, at 587, adopted the following definitions for ministerial and discretionary acts:

Ministerial acts are those “where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex.1994). Discretionary acts on the other hand require the exercise of judgment and personal deliberation. See *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 425 (Tex.2004).

In defending an *ultra vires* claim, look for opportunities to argue that an alleged requirement provides some review, deliberation, or judgment to be exercised by the individual, and therefore does not constitute a ministerial act.

Beeman v. Livingston, 468 S.W.3d 534 (Tex. 2015). *Beeman* involved inmates who sued the Texas Department of Criminal Justice’s Executive Director claiming he acted *ultra vires* in failing to provide access to phones and other rights provided by the Texas Human Resources Code. *Id.*, at 535-36. The Court provided a rather lengthy discussion, but ultimately concluded that prisons are not “public facilities” under the statute the inmates relied on, and therefore whether or not the Director failed to comply with the statute, no *ultra vires* claim could proceed. *Id.*, 536.

TAKEAWAY: A proper *ultra vires* claim must identify a specific statutory or other obligation that directly applies and requires or precludes action by the individual named. Non-compliance with a statute not directly binding does not give rise to an *ultra vires* claim.

Patel v. Texas Dep’t of Licensing and Regulation, 469 S.W.3d 69 (Tex. 2015). 2015 was a busy year for the Texas Supreme Court as far as *ultra vires* claims, with the Court issuing four opinions. In *Patel*, several eyebrow threaders sued, claiming that statutory licensing requirements, including 750 hours of training, included irrelevant material and violated their state constitutional rights. *Id.*, at 73. The plaintiffs brought declaratory judgment claims against the State and did not sue any individuals. *Id.* Perhaps acknowledging the problems with the statute, the State argued that the proper claim should be an *ultra vires* claims against the state officials that set forth the training requirements—for “acting consistently with an unconstitutional statute.” *Id.*, at 76. The Court rejected the argument, noting that the State’s proposal to expand *ultra vires* claims would in that manner “effectively immunize [the State] from suits claiming a statute is unconstitutional—an illogical extension of that underlying premise.” *Id.*

The State also argued that the Supreme Court’s decisions to that point, including *Heinrich*, suggested that the Court was departing from the rule that sovereign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief. *Id.*, at 75-76. The Court denied this assertion and countered that *Heinrich* and its other cases clarified the principle that state entities must be parties to challenges to the validity or constitutionality of a statute. *Id.* at 76-77. Challenges to a statute or ordinance and *ultra vires* claims are distinct and separate.

TAKEAWAY: An allegation that a government official is acting pursuant to an unconstitutional or invalid statute or ordinance is not an *ultra vires* claim. Rather, any claim contesting a statute or ordinance should be brought against the governmental entity pursuant to the limited waiver of the UDJA, discussed *supra*.

***Houston Belt & Terminal Railway Co. v. City of Houston*, 487 S.W.3d 154 (Tex. 2016).**

Of the post-*Heinrich* cases the Texas Supreme Court has handed down, *Houston Belt* is one of the more important to become familiar with as the case addresses one of the most litigated issues—how does discretion play into allegations that an official acted “without legal authority?” In *Houston Belt*, the City of Houston’s drainage fee ordinance authorized the public works director (Krueger) to administer the ordinance and make calculations. *Id.*, at 158. However, the ordinance “also provide[d] guidance as to the scope and limits of Krueger’s authority,” including how he was to make the calculations. *Id.*, at 159. Krueger used his own process to determine property as “impervious” and made his calculations accordingly, which the plaintiff claimed resulted in the City imposing excessive fees. *Id.*

On appeal, the City argued on Krueger’s behalf that because the ordinance gave Krueger some discretion, any decision he made could not be an *ultra vires* act—even if Krueger made a mistake in exercising his judgment. *Id.*, at 161. The railroad responded that immunity only protects discretion that “is absolute discretion—discretion where no specific, substantive, or objective standards govern the exercise of judgment.” *Id.*

The Court concluded that “[a]lthough governmental immunity justifiably provides broad protection to the government and its agents, it does not protect *every* act by a government officer that requires some exercise of judgment—a government officer with some discretion to interpret and apply a law may nonetheless act ‘without legal authority,’ and thus *ultra vires*, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself.” *Id.*, at 158 (emphasis in original). In other words, Krueger’s error was a misinterpretation of the limits of his authority (which was expressly limited by the ordinance)—and therefore his misinterpretation was beyond his limited discretion.

TAKEAWAYS: Just because an ordinance or statute provides an official with some discretion does not negate the potential for an *ultra vires* claim. Acts that are beyond limited discretion, or misinterpret the scope of one’s authority, provide for *ultra vires* claims.

In defending an *ultra vires* claim, look to argue that there are no “specific, substantive, or objective standards” dictating the official’s actions or limiting the official’s discretion (as were present in *Houston Belt*). Without such limitations, arguably an *ultra vires* claim does not arise.

Another useful quote when challenging *ultra vires* claims is *Houston Belt*’s statement that the decision “does not create a new vehicle for suits against the state to masquerade as *ultra vires* claims”, but rather “reinforces the narrow *ultra vires* principles we have repeatedly announced and endorsed.”) *Id.* Educate the trial judge in your case on the fact that allegations of mistake and error do not automatically equate to *ultra vires* acts, as the Supreme Court considers the *ultra vires* doctrine to be “narrow.”

Morath v. Sterling City Indep. Sch. Dist., 499 S.W.3d 407 (Tex. 2016). A statute allowed the Commissioner of Education to make certain adjustments in state aid to school districts. *Id.*, at 408. The statute provided that the Commissioner’s determinations were “final and may not be appealed.” *Id.* Despite the statute conveying discretion and indicating the determinations were not reviewable, three school districts asserted *ultra vires* claims arguing that the Commissioner exceeded his authority under the statute. *Id.* Continuing the discussion in *Klumb*, *Morath* revealed a sharp disagreement on the Court as to whether an *ultra vires* claim is authorized when the applicable statute made an official’s decision final and unreviewable.

In a plurality decision, the plurality found that the Commissioner did not act *ultra vires* and that the finality provision in the statute precluded review through an *ultra vires* claim. *Id.* The plurality further noted that the Court had “never allowed a challenge to an executive decision made final by statute,” and it would not do so “absent a ‘manifest,’ ‘conspicuous and irreconcilable’ conflict between the action and the statutory authority asserted by the executive.” *Id.*, at 412-413, citing *Klumb*, 458 S.W.3d at 9.

One concurrence found that the Commissioners’ actions *were ultra vires* but concurred in the judgment on the basis that the finality language in the statute precluded review. *Id.*, at 414. Four other justices joined a concurring and dissenting opinion that found the plurality’s logic “hard to understand” and struggled with the plurality’s reasoning that the statute’s language limiting judicial review broadens an executive’s discretion. *Id.*, at 419.

TAKEAWAY: *Morath* keeps the door open to the potential that a statute making an official’s decision final and unreviewable could support an *ultra vires* claim—although the Supreme Court has not yet seen the facts to support it.

Hall v. McRaven., 508 S.W.3d 232 (Tex. 2017). Perhaps the most defense-friendly *ultra vires* decision is *Hall*. Where *Houston Belt* arguably broadened the scope of *ultra vires* claims based on an official’s misinterpretation or mistake, a year later *Hall* drew important distinctions that limited *Houston Belt*’s application. Further, *Hall* addressed who a proper official capacity defendant is when dealing with governing bodies and delegated authority.

Hall, a regent of the University of Texas system, sought to obtain access to certain student admission records, claiming an inherent right to access. *Id.*, at 234. A nine-member Board of Regents served as the governing body, but was statutorily authorized to appoint a Chancellor, McRaven. *Id.*, at 235. The Chancellor’s duties were not specifically addressed by statute, although were governed by the rules and resolutions of the Board. *Id.*

When Hall sought to obtain records, McRaven resisted. *Id.*, at 236. A Board rule governed how requests to the Chancellor were to be addressed, including requiring that the matter be presented to the Board of Regents and allowing a vote of two or more regents to approve a request. *Id.* At the meeting, three regents—including Hall—voted to approve Hall’s request. *Id.* Importantly, however, the other two regents conditioned their approval on “the Chancellor’s office engaging in a review to determine which information was protected by FERPA [a federal privacy law.]” *Id.* At the time of the vote there was no Regents’ rule to direct

the Chancellor on how to conduct the FERPA review. *Id.* However, a month later the Board adopted the following rule:

[T]he Chancellor, in consultation with the U.T. System General Counsel, shall determine whether State or federal law restricts compliance with the request. Accordingly, the Chancellor, in consultation with the U.T. System General Counsel, shall determine whether a Regent may review information that is protected by [FERPA]....

Id., at 236. Along with passing this rule, the Board amended its rule to require a majority vote of the Board, not just two regents, to approve an unresolved request for information. *Id.* Hall again requested complete access to admission records, which McRaven again resisted based on his interpretation of FERPA. *Id.* Hall then sued McRaven in his official capacity, alleging McRaven’s refusal to provide unredacted records constituted an *ultra vires* act because McRaven misapplied FERPA and had no authority to withhold records. *Id.* The Board subsequently met, and a majority endorsed McRaven’s approach to the records issue. *Id.*

The district court granted McRaven’s plea to the jurisdiction and the court of appeals affirmed. *Id.*, at 237. In affirming, the Texas Supreme Court rejected Hall’s argument that *Houston Belt* suggested that “any legal mistake” constitutes an *ultra vires* act. *Id.*, at 241. *Hall* then distinguished *Houston Belt* and McRaven’s actions in two important ways.

First, the Public Works Director in *Houston Belt* misinterpreted his “*enabling law*” and therefore the bounds of his own authority, “exceeding the scope of what the City permitted him to do.” *Id.*, at 241-42. To the contrary, McRaven’s alleged misinterpretation of FERPA was “not of his organic authority but rather federal privacy law—a *law collateral to McRaven’s authority*.” *Id.*, at 242. In other words, FERPA did not supply the parameters of McRaven’s authority, and therefore Hall could not show that McRaven exercised discretion “without reference to or in conflict with the constraints of the law authorizing him to act.” *Id.*, at 242.

Second, in *Houston Belt* the Director’s determination of the fee schedule “was subject to explicit constraints.” *Id.*, 242. And “[n]eglecting one of those constraints was what made the Director’s determination—right or wrong—*ultra vires*.” *Id.* To the contrary in *Hall*, McRaven was tasked to decide whether a Regent could review information protected by FERPA—but McRaven’s “discretion in making that determination is otherwise unconstrained.” *Id.* Thus, Hall’s *ultra vires* claims were barred by immunity.

In addition to setting out the “enabling law” versus “collateral law” distinction for alleged misinterpretations, *Hall* also addressed whether McRaven was the proper party considering the Board’s involvement. *Id.*, at 238-39. *Hall* acknowledged that it was the first case since *Heinrich* to address the proper party in an *ultra vires* claim. *Id.* *Hall* concluded that the proper party determination is made in evaluating the first of two components of a “without legal authority” premised *ultra vires* claim:

An *ultra vires* claim based on actions taken “without legal authority” has two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority. *Hous. Belt*, 487 S.W.3d at 158. The proper-party plea by a state official is another way of saying a higher power has deprived the official of all of his or her discretion. In other words, the higher authority has created a *ministerial* (nondiscretionary) duty for the subordinate official to engage in conduct the plaintiff claims is wrongful. Thus, the proper-party question is nothing foreign; it goes to the first component of *Houston Belt*'s clarification of a “without legal authority” claim. *Id.*

Id., at 239. The Court simplified that the proper party question is answered by determining who has a duty to act. *Id.*, at 239. Thus, the Court rejected McRaven’s argument that he was not the proper party, as McRaven had the discretion to interpret the applicable statute and therefore, he was subject to a potential *ultra vires* claim. *Id.*, at 240. At the same time, the Court rejected Hall’s argument that McRaven was the proper defendant simply because he was the highest-ranking officer in the U.T. System. *Id.*, at 240. (“[A]n *ultra vires* suit must lie against the ‘allegedly responsible government actor in his official capacity,’ **not a nominal, apex representative who has nothing to do with the allegedly *ultra vires* actions.**”) (emphasis added).

TAKEAWAYS: *Hall* provides three major takeaways—(1) misinterpretation that is not of the official’s “organic authority” or “enabling law,” but rather of something “collateral” to the official’s authority is not *ultra vires*; (2) the lack of specific parameters on granted authority leaves open the argument that an *ultra vires* is precluded; and (3) an apex or nominal defendant is not proper in an *ultra vires* claim—the official capacity defendant should be the person who had the duty to act.

Shamrock Psychiatric Clinic, P.A. v. Texas Dep’t of Health & Human Servs., 540 S.W.3d 553 (Tex. 2018). The facts of *Shamrock* pertained to a Medicaid provider’s entitlement to a hearing on the State’s claim to recoup alleged overpayments. For purposes of *ultra vires* law, the per curiam opinion issued without oral argument is confusing due to its finding that an administrative law judge’s failure to perform a “purely ministerial act” in not enforcing a rule 11 agreement between parties constituted an *ultra vires* act. *Id.*, at 562. However, the suit was not against an administrative law judge. The opinion simply ends with “[b]ecause the administrative law judge failed to perform a purely ministerial act, the *ultra vires* exception to sovereign immunity applied to Shamrock’s suit and thus “the trial court erred in granting the Inspector General’s plea to the jurisdiction on sovereign-immunity grounds.” *Id.* The Court failed to conduct any *ultra vires* analysis as to the Inspector General. *Shamrock* has not been cited for *ultra vires* principles by any other courts, and hopefully, it remains an outlier opinion that does not affect *ultra vires* case law.

TAKEAWAY: *Shamrock* appears to be limited to the peculiar facts before it but be aware that the case very generally referenced *ultra vires* as a basis for jurisdiction, when the person who acted *ultra vires* was not an official capacity defendant.

Honors Academy, Inc. v. Texas Education Agency, 555 S.W.3d 54 (Tex. 2018). *Honors Academy* is another case in which the Court found that education decisions did not constitute *ultra vires* acts because: (1) the Commissioner's authority allowed him to interpret the issues presented; and (2) the enabling statute makes his determination in the matter final.

TAKEAWAY: *Honors Academy* did not set forth any new principles for *ultra vires* law. However, the opinion shows the struggles that lower courts continue to have with the application of *ultra vires* principles.

Meyers v. JDC/Firethorne, Ltd., 548 S.W.3d 477 (Tex. 2018). *Meyers* involved a land developer's suit against a county commissioner, alleging that the commissioner acted *ultra vires* in instructing the county's engineering department to hold, delay and otherwise impede processing of a plat application that was governed by statutory timelines and approval. *Id.*, at 479. The developer sued, including asserting claims against the commissioner in both his individual and official capacities, among other defendants. *Id.* The developer sought mandamus and injunctive relief requiring the plat application to be submitted to the commissioners' court, an instruction for the commissioners' court to approve the plat and permit construction, and seeking an injunction to prohibit interference with construction on the site. *Id.*, at 482. The trial court denied the commissioner's plea to the jurisdiction as to the official capacity *ultra vires* claims and the commissioner appealed that ruling. *Id.*, at 483. The court of appeals affirmed, finding that at minimum a fact issue existed as to whether the county engineer violated the plat-application and plat-approval statutes and regulations at the behest or direction of the commissioner. *Id.*

On appeal, the parties debated what authority *Meyers* as a single commissioner had regarding the processing of plat applications for purposes of an *ultra vires* analysis. *Id.*, at 484. However, the court turned the issue into a standing question, noting "[t]hough the parties argue in terms of our *ultra vires* jurisprudence, the issue of whether *Meyers* has the power to advance *JDC/Firethorne's* plat applications, and thus remedy the alleged harm upon which *JDC/Firethorn's* suit is based, is ultimately a question of whether *JDC/Firethorne* has standing to seek this injunction against *Meyers*." *Id.*

The Court set forth the three general components of standing: (1) plaintiff suffered an injury; (2) the injury is fairly traceable to the defendant's conduct; and (3) the injury is likely to be redressed by the requested relief. *Id.*, at 486. The Court then concluded that the developer failed to satisfy the redressability requirement as to *Meyers* because *Meyers*, as an individual commissioner, could not present a completed plat application to the commissioners' court for approval, nor did he have the authority to approve a plat application himself. *Id.*, at 487-88. The Court noted that "*Meyers* has no authority or responsibility with respect to processing plat applications until they reach the commissioners court, and even then, he acts only as one member of a five-person body." *Id.*, at 488. The injunctive relief sought against *Meyers* could not

remedy the alleged harm and therefore the developer lacked standing to pursue its official capacity *ultra vires* claims against Meyers. *Id.* Note that *Meyers* only addressed the official capacity claims against Meyers, it did not foreclose the developer’s claims against other defendants or the claims against Meyers in his individual capacity. *Id.*

TAKEAWAY: In addition to evaluating the authority and discretion issues discussed above, when evaluating an *ultra vires* claim, pay close attention to the relief being sought. Can the official capacity defendant(s) named give the relief requested? If not, *Meyers* supports an argument that an *ultra vires* claim is not proper, and the claim should be dismissed for want of jurisdiction.

City of Houston v. Houston Municipal Employees Pension Sys., 549 S.W.3d 566 (Tex. 2018). *Houston Municipal* revolved around the City’s creation of local government corporations, to which it transferred some of its employees, and the subsequent application of the City’s pension fund to the employees and the interpretation of governing statutes. *Id.*, at 570. *Houston Municipal* is tied to *Klumb*, discussed above. *Id.*

In a lengthy opinion, the Court noted that in cases in which alleged *ultra vires* conduct is government inaction, a court may issue a writ of mandamus to bring the official into compliance with the law. *Id.*, at 576. *Houston Municipal* also addressed, again, whether an *ultra vires* claim is a proper mechanism to enforce contractual compliance.

The Court rejected the plaintiffs’ argument that because a statute provided that a contract was “binding and enforceable,” the contract must be “performed in a certain way such that an *ultra vires* claim can be brought to enforce it.” *Id.*, at 578. The Court restated *Klumb*’s conclusion that noncompliance with a contract does not give rise to an *ultra vires* claim. *Id.*, at 578-79. However, *Houston Municipal* left the door open to the potential for a contractual *ultra vires* theory if a statute contained specific language requiring a contract to be “performed in a certain way.” *Id.*, at 579. The Court then addressed specific issues at hand and concluded that the pension system statute created a ministerial duty and defined it with sufficient clarity to support an *ultra vires* claim. *Id.*, at 581-82.

Finally, the Court evaluated whether mandamus relief on an *ultra vires* theory was appropriate considering the City’s contention that the plaintiffs had another adequate remedy at law—breach of contract. *Id.*, at 580. The Court was quick to point out the City’s expressed intent to assert immunity to any breach of contract claim resulted in the lack of an “adequate” alternative remedy—and therefore mandamus relief through the *ultra vires* claim was not precluded. *Id.*, at 581.

TAKEAWAYS: *Houston Municipal* leaves the door open as to whether a contract could give rise to an *ultra vires* claim. While the general rule is no, an *ultra vires* claim could arise if a statute contained sufficient language requiring the contract to “be performed in a certain way.” Next, the proper remedy for *ultra vires* inaction is mandamus relief when there is no other adequate remedy—and the Court suggested that a governmental unit’s

immunity defense to otherwise available remedies is considered in making the adequate remedy determination.

Chambers-Liberty Counties Navigation District v. State, 575 S.W.3d 339 (Tex. 2019). *Chambers-Liberty* involved the state’s suit over submerged land used for oyster production. As to *ultra vires* claims asserted, the opinion addressed several issues discussed above, such as retrospective relief not being allowed, a governmental entity is not the proper defendant, and the like. However, the opinion also addressed allegations that commissioners exceeded their statutory authority when they leased submerged land for oyster cultivation. The commissioners argued that *Hall* should apply and any error in granting the lease was within their “enabling authority” and did not violate the District’s enabling law or organic statutes. *Id.*, at 354. The Court rejected the argument, finding that because the District’s functions were limited by statute and statutory law precluded the lease the commissioners executed. *Id.*

TAKEAWAY: *Chambers-Liberty* did not set forth any major changes in *ultra vires* law, but rather applied established principles. However, the opinion is noteworthy in how it classified *Hall v. McRaven*—“To put it plainly, under the unusual circumstances of [Hall], McRaven’s interpretation of federal law could not have been *ultra vires* because he had state-law authority to get federal law wrong.” *Id.*, at 354. While defense attorneys should seek to align their *ultra vires* defenses with *Hall*, plaintiff’s attorneys will likely cite *Chambers-Liberty* for the proposition that *Hall* should be considered “unusual.”

Hillman v. Nueces County, 579 S.W.3d 354 (Tex. 2019). In *Hillman*, a former district attorney sued alleging wrongful termination for providing exculpatory evidence to a criminal defendant, contrary to his supervisor’s instructions to withhold it in violation of the Michael Morton Act. *Id.*, at 354. The bulk of the case addressed other issues, including whether *Sabine Pilot* allegations that an employee was terminated for failing to perform an illegal act applies to government employers (the court said it does) and whether *Sabine Pilot* or the Michael Morton Act waived immunity (the court said no). *Id.*, at 358-60.

However, Nueces County advanced an alternative argument that if the Court found that immunity did not preclude a *Sabine Pilot* employment claim, the Court should consider a *Sabine Pilot* violation as an *ultra vires* act and limit Hillman’s relief to only prospective injunctive relief (and not allow recovery of employment damages). *Id.*, at 363. Several amici also asked the Court to allow an *ultra vires* theory if Hillman was not allowed to pursue a *Sabine Pilot* claim for damages. *Id.* Interestingly, Hillman opposed allowing a *Sabine Pilot* violation to be considered *ultra vires* and argued that the County waived the alternative argument for the Court to consider. *Id.*, at 364. Therefore, the majority declined to express an opinion on the question.

However, the concurring opinion (Justice Guzman, joined by Justices Lehrmann and Devine) suggested that “Hillman might have had a viable *ultra vires* claim” and had Hillman not opposed consideration of an *ultra vires* theory, the concurrence “would remand in the interest of justice to allow him to pursue that claim.” *Id.*, at 370. In doing so, the concurrence indicated

that while a district attorney has authority to fire subordinates, “one could argue there is no discretion to undertake such an action if it ‘conflicts with the law.’” *Id.*, at 370.

TAKEAWAY: *Hillman* opened the door to the idea—which a concurring opinion from three justices supported—that employment decisions that are alleged to be violations of law, could give rise to an *ultra vires* claim when the law otherwise provides for governmental immunity.

Garcia v. City of Willis, 593 S.W.3d 201 (Tex. 2019). *Garcia* involved a plaintiff, representing a putative class of citizens, who challenged the constitutionality of red-light cameras as traffic-enforcement tools and “asked a district court to strike down both the state statutes authorizing use of red-light cameras and the City of Willis’ ordinance providing for the use of red-light cameras within its jurisdiction.” *Id.*, at 204. *Garcia* included *ultra vires* allegations among his claims. *Id.*, at 205. As to the *ultra vires* and prospective relief claims, the Texas Supreme Court affirmed dismissal, but did so based on a standing determination that the Court raised *sua sponte*. *Id.*, at 206. The Court concluded that no relief *Garcia* sought was prospective in nature, noting: *Garcia* had no outstanding notice of violation; did not argue his intent to violate red-light laws in the future (and the Court could presume he would act lawfully); and *Garcia* “no longer face[d] the purportedly unconstitutional conduct about which he complains.” *Id.*, at 207.

TAKEAWAY: *Garcia* was the second time in two years that the Texas Supreme Court considered, *sua sponte*, the issue of standing when presented with an *ultra vires* theory and its prospective relief limitation. The other case is *Meyers*, discussed above. Both cases made it through the trial and intermediate courts without standing being raised as a jurisdictional defense.

In addition to examining the alleged violation of law, a prudent practitioner will closely evaluate the remedy being sought and determine whether or not the official capacity defendant: (1) can grant the relief requested; and (2) whether the relief would address the injury at issue.

V. SUMMARIZING THE *ULTRA VIRES* PRINCIPLES TO ANALYZE YOUR CASE

This final section of the paper seeks to summarize the issues you should evaluate upon receipt of a suit containing an *ultra vires* claim. Also, a chart summarizing *ultra vires* cases, including some from intermediate courts of appeal, is provided as an attachment, which I hope will assist in preparing your defense.

A. Check the defendant and file a plea to the jurisdiction.

If the suit names an entity as a defendant on an *ultra vires* claim, seek dismissal, as an entity is not a proper defendant on an *ultra vires* claim. Further, if the suit contests an ordinance on an “*ultra vires*” theory, that too is improper—as that claim should be a traditional declaratory judgment claim within the limited waiver of immunity.

Rather than the governmental entity, the petition should allege that a specific government official acted *ultra vires* and the suit should name that individual in his or her official capacity. *Ultra vires* claims may not be asserted against a nominal or apex defendant, simply because he or she oversees certain matters—the defendant must be involved in the alleged *ultra vires* act and have the duty to act.

For example, an executive director that did not serve on the board that voted on the issues in dispute was not a proper *ultra vires* defendant. *Montrose Management Dist. v. 1620 Hawthorne, Ltd.*, 435 S.W.3d 393, 413 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). And an official not alleged to have been directly involved in alleged unconstitutional actions was not a proper *ultra vires* defendant. *Texas A&M University, Mark Hussey, Ph.D. v. Starks*, 500 S.W.3d 560, 571 (Tex. App.—Waco 2016, no pet.).

Also, recall that *Meyer* suggests that a person encouraging or instructing *someone else* to commit an *ultra vires* act may not be the proper defendant—the suit should be against the actual person who acted *ultra vires*. 548 S.W.3d at 488.

Finally, remember that the proper pleading in response to an *ultra vires* allegation is a plea to the jurisdiction. Either the claim is not *ultra vires*, and the court lacks jurisdiction, or the plaintiff meets his or her burden and jurisdiction is established.

B. Are sufficient *ultra vires* acts alleged?

Next, evaluate whether the Plaintiff alleges that the official capacity defendant either failed to perform a ministerial act or acted without legal authority, without exercising discretion.

1. Ministerial Acts

For an act to be ministerial, the law must be one that “prescribes and defines the duties to be performed with such precision and certainly as to leave nothing to the exercise of discretion or judgment.” *Houston Municipal*, 549 S.W.3d at 576 (quoting *Emmett*, 459 S.W. 3d at 587). To the contrary, discretionary acts “are those that require the exercise of judgment and personal deliberation.” *Id.*

A couple of examples of *ultra vires* acts based on ministerial duty theories are: *Wineinger v. Z Bar A Ranch, L.P.*, 2016 WL 3971560 (Tex. App.—Dallas 2016, no pet.) (Tax Assessor had ministerial duty by statute to issue proper deed; and issuance of incorrect deed was an *ultra vires* act) and *City of Plano v. Carruth*, 2017 WL 711656 (Tex. App.—Dallas 2017, pet. denied) (Charter provision required City Secretary to present referendum petition to City Council upon the filing of such petition, and failure to do so provided jurisdiction to pursue an *ultra vires* claim.)

2. Without Lawful Authority

As discussed above, for an act to be beyond lawful authority, the relevant authority must give the official some authority, but not absolute authority, and the official must act beyond the specified limits. Often the “without lawful authority” allegation will consist of accusations that the official decided something for which he or she allegedly lacked discretion. Remember, the

amount and type of discretion are primary considerations in determining if a plaintiff has alleged action without lawful authority.

The two primary cases to consider when evaluating where the line is drawn on discretion are *Houston Belt* and *Hall*. Plaintiffs will attempt to align their case with *Houston Belt* and argue that the official misinterpreted the extent of his or her own authority, which is *ultra vires*. The defendant should attempt to align any alleged mistake or misinterpretation with *Hall*, contending that the official was not constrained in his or her discretion and any alleged mistake or misinterpretation was within the official's duties to make the interpretation. Focus on the "enabling law" vs. "collateral law" discussion in *Hall*.

City of Austin v. Utility Associates, Inc., 517 S.W.3d 300 (Tex. App.—Austin 2017, pet. denied) is a good example of where statutory limitations and discretion connect. *Utility Associates* involved *ultra vires* allegations for alleged manipulation and corruption of awards under a municipal procurement statute. While the statute sets out procedures and standards, it does not negate all discretion, and therefore the court found the alleged actions at issue in that case were not *ultra vires*. *Id.*, at 310-11.

In *Ray's Drive Inn, Inc. v. Angelina County & Cities Health District*, 2018 WL 4474054 (Tex. App.—Tyler, no pet.), the court concluded that complaints regarding when a health district chose to withhold a permit pending installation of a special sink, even if wrong, failed to allege an *ultra vires* claim because the district had the authority to make the decision. *Id.*, at *4.

In *Kilgore Indep. Sch. Dist. v. Axberg*, 535 S.W.3d 21 (Tex. App.—Texarkana 2017, no pet.), the Texarkana Court applied the *Houston Belt* and *Hall* discretion analysis to voting. The court noted that "merely asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an *ultra vires* claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *Id.*, at 30 (quoting *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.)). While the case did not involve a municipality, the case provided helpful authority to site for the proposition that a "vote or non-vote" of an individual member of a governing body, "by definition, cannot be an *ultra vires* act." *Id.*, at 30-31. The court then held that suing the individuals meant that the plaintiff had to show that "each of those seven people acted without legal authority or failed to perform a ministerial act." *Id.* The court concluded that the plaintiff failed to allege *ultra vires* acts based on votes. *Id.* at 31-32.

Two years after *Kilgore*, the Amarillo Court of Appeals decided *White Deer Indep. Sch. Dist. v. Martin*, 596 S.W.3d 855 (Tex. App.—Amarillo 2019, pet. filed March 13, 2020). In *Martin*, the court clarified that simply because members of a governing body are sued for their vote does not mean an *ultra vires* claim cannot lie. *Id.*, at 869. The court explained that it "must go one step further than the court in *Kilgore*" to "consider not just the legality of the act of voting, but the legality of the directly resulting enactment." *Id.*, at 869. In other words, in *Martin* the court found that while the specific act of voting may not support an *ultra vires* claim, the resulting enactment (such as an ordinance) may. *Id.* The court held that it could not "accept as

true . . . that the board members are within the bounds of their legal authority merely because they used a permissible means (voting) to achieve an impermissible result.” *Id.*, at 870. The court concluded that *each* member who voted to reduce a tax exemption despite their lack of statutory authority was a proper defendant in the *ultra vires* suit. *Id.*

A few other examples of *ultra vires* cases that directly address municipalities:

- *Suarez v. Silvas*, 2020 WL 2543311, *5 (Tex. App.—San Antonio, May 20, 2020)—*ultra vires* allegations existed when plaintiff claimed other city councilmembers acted without legal authority under city charter in declaring plaintiff’s position as a councilmember forfeited. Interestingly, the case also found that *ultra vires* claims against the city manager and city secretary were valid since a notice for applications for the vacant seat was posted and the plaintiff alleged that the city manager and city secretary were responsible for compiling and processing the applications. *Id.*, at *5.
- *Nelson v. Head*, 2019 WL 6315425 (Tex. App.—Corpus Christi-Edinburg 2019, no pet.)—court reversed denial of plea to the jurisdiction on *ultra vires* claims pertaining to a mayor’s votes. *Id.*, at *3-4. In doing so, the court noted that seeking to have past votes declared invalid does not state an *ultra vires* claim. *Id.*
- *Turner v. Robinson*, 534 S.W.3d 115 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)—suit to have two propositions added to city charter constituted prospective relief for purposes of *ultra vires* claim and mayor was proper *ultra vires* defendant due to declared intentions. *Id.*, at 125.
- *EP Hotel Partners, L.P. v. City of El Paso*, 527 S.W.3d 646 (Tex. App.—El Paso 2017, no pet.)—no *ultra vires* claim based on allegations that city council lacked “full knowledge” when voting to enter a lease. *Id.*, at 662. However, the court kept open the idea that had the plaintiff shown that the contract violated the charter, perhaps an *ultra vires* claim could exist. *Id.*

Finally, as it currently stands, the Texas Supreme Court has not authorized an *ultra vires* suit to require compliance with a contract. However, be aware that *Houston Municipal*, decided in 2018, left open the idea for an *ultra vires* theory if a statute contained specific language requiring a contract to be “performed in a certain way.” *Houston Municipal*, 549 S.W.3d at 579.

C. Examine the requested relief.

Under both *Heinrich* and *Houston Municipal* the law is established that a plaintiff is only entitled to prospective relief. Monetary damages are not recoverable. But keep in mind that if the future prospective relief obtained through an *ultra vires* suit requires the payment of money, such as in *Heinrich*, that is not considered the recovery of monetary damages. However, when

an injury has already occurred and the only plausible remedy is monetary damages, no *ultra vires* claim exists.

Next, for governmental inaction in the failure to perform a ministerial duty, mandamus relief is allowed. *Houston Municipal* suggests that mandamus relief should be limited to situations in which there are no other adequate remedies at law. In making the adequate remedy determination, a court can consider that governmental immunity may bar otherwise available theories. *Houston Municipal*, 549 S.W.3d at 581.

Finally, on two occasions in the last two years, the Texas Supreme Court has, *sua sponte*, evaluated the relief sought in the petition to dismiss *ultra vires* claims for lack of standing. See *Meyers* (2018) and *Garcia* (2019). A prudent practitioner will evaluate the specific relief being prayed for in the petition and determine if the relief requested raises any standing issues that may negate jurisdiction over the *ultra vires* claims presented.

D. Attorneys' Fees?

Finally, one of the major incentives for plaintiffs to assert declaratory judgment claims is the potential recovery of attorneys' fees. Under the UDJA, a court may award "reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. As discussed above, *Heinrich* acknowledged that an *ultra vires* claim is technically against the governmental entity. For that reason, *Heinrich* limited the permitted relief available on an *ultra vires* claim to prospective relief. But are attorneys' fees recoverable on an *ultra vires* claim?

The Texas Supreme Court has not answered this question. There is also minimal intermediate authority on this issue, although the one case that did address the issue head on found that attorneys' fees are permitted on an *ultra vires* claim.

In *Cameron County Appraisal Dist. v. Rourk*, 2016 WL 380309 (Tex. App.—Corpus Christi-Edinburg 2016, pet. denied) the trial court found that the defendant "acted without authority and in violation of statutory and constitutional provisions in assessing the plaintiffs' travel trailers." *Id.*, at *3. The trial court then awarded the plaintiff attorneys' fees under the UDJA. *Id.* The Court of Appeals reversed, finding no *ultra vires* claim. *Id.*, at *6. While the decision obviously negated the attorneys' fees award, the Court of Appeals did not address whether attorneys' fees would have been recoverable if an *ultra vires* claim did exist.

In 2018 the San Antonio Court of Appeals answered the question, which appears to be the only case to have addressed the issue directly. In *City of San Antonio v. Int'l Ass'n, Local 624*, 582 S.W.3d 455, 467 (Tex. App.—San Antonio 2018, no pet.) the court expressly held that "a public official does not have governmental immunity from a claim for attorneys' fees ancillary to an award of prospective relief in an *ultra vires* action brought under the UDJA." While the City argued that attorneys' fees were retroactive in nature, the court reasoned that attorney's fees do not compensate for a state official's pre-litigation conduct (i.e. retroactive relief), but instead reimburse the plaintiff for a portion of the expenses incurred in seeking prospective relief. *Id.* The court found that "the line between retroactive and prospective relief

cannot be so rigid that it defeats the effective enforcement of prospective relief.” *Id.* Plaintiffs will certainly argue that because an *ultra vires* theory is a permitted declaratory judgment claim, any successful *ultra vires* action should allow for an award of attorneys’ fees. And the only published opinion I have located supports that contention.

VI. CONCLUSION

The parameters of *ultra vires* claims are continuing to develop, both by the Texas Supreme Court and the intermediate courts applying the law. *Ultra vires* claims started as an exception that was to be considered “narrow.” The doctrine is increasing in application, and I suspect that the Texas Supreme Court will continue to identify the nuances to be applied. Keep in mind that many *ultra vires* cases are decided on interlocutory appeals following rulings on pleas to the jurisdiction based on the pleadings alone. And most *ultra vires* claims are obviously case specific, particularly in the application of ordinances and the official’s discretion (or lack thereof). Hopefully, the foregoing discussion and the chart of cases attached hereto provide a good starting point as you evaluate and defend your next *ultra vires* case.