Ultra Vires Claims—Where did your immunity go?

Texas City Attorneys Association
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Introduction

- In 2009, the Texas Supreme Court set forth the *ultra vires* exception to governmental immunity for declaratory judgment claims.

- *Ultra vires* is a developing area of law:
  - 17 post-*Heinrich* Texas Supreme Court decisions addressing *ultra vires* claims
  - 13 since 2015

Immunity and the UDJA Generally

- Governmental immunity for declaratory judgment claims is generally waived only for claims challenging the validity or constitutionality of ordinances or statutes.
    - 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 366, 373, n. 6 (Tex. 2009).
- But what about declarations that the government is acting unlawfully—should immunity apply to that? If so, is there no recourse to bring the government back into lawful compliance?

City of El Paso v. Heinrich, 284 S.W.3d 366 (Tex. 2009)

- Widow sued the City, a pension fund, the board of the fund, and the board members individually, alleging they unlawfully reduced her pension benefits, because per statute, any changes could only increase her benefits.
- *Heinrich* held that while governmental immunity may preclude general declaratory judgment claims against governmental entities, an exception exists for claims alleging that government officials acted without lawful authority or failed to perform a ministerial act. *Id*., at 372.
- Reasoning:
  - 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.
  - "[E]xtending 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."

Takeaways from *Heinrich*:

- 1. *Ultra vires* claims must be brought against one or more government officials in their official capacity.
- 2. While the suit names an official, the suit is *technically* against the entity.
- 3. Governmental immunity can be asserted, thus the proper answer for the official capacity defendant is a plea to the jurisdiction (if the allegations are not *ultra vires*, the court lacks jurisdiction).
- 4. Plaintiff 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 limited to *prospective* relief only, but future payments of money are not necessarily precluded.
- 6. Individual immunities such as official immunity are not applicable.

Impact on "Traditional" UDJA Claims

- *Heinrich* did not impact the immunity waiver under the UDJA for declarations as to validity or constitutionality of a statute or ordinance. The governmental entity is the proper defendant for such claims and the allegations should not be pled as an *ultra vires* claim.
    - *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 SW.3d 628 (Tex. 2010).

- Further, allegations that an official is acting pursuant to an unconstitutional or invalid statute or ordinance do not support an *ultra vires* claim.
    - *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015)

Check the Defendant

- The Petition should identify a specific government official who acted *ultra vires* and name that individual in his or her official capacity

- Nominal or apex representative such as mayor or P&Z chair are not proper simply because of the official's position.
  - "[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." *Hall v. McRaven,* 508 S.W.3d 232, 240 (Tex. 2017).

- Lack of personal involvement examples:
  - 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).
  - Defendant 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.).

Second Chances…

- The Texas Supreme Court has on multiple occasions dismissed "*ultra vires*" claims against governmental entities for lack of jurisdiction, but then found that the plaintiff should be given a chance to identify the proper official capacity defendant for the alleged unlawful acts.
    - *See, e.g.*, *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384 (Tex. 2011) and *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622-23 (Tex. 2011).

- If seeking dismissal of an *ultra vires* claim against a city, anticipate the potential defenses any official would have as you prepare for your hearing on the city's plea to the jurisdiction

Two theories for *ultra vires* acts

- (1) Failure to perform a ministerial act

- (2) Official acted without legal authority

Ministerial Acts—*Southwest Bell Telephone, L.P. v. Emmett*, 459 S.W.3d 578 (Tex. 2015)

- Utility company sued, alleging that a statute required county flood control district to pay for relocating utility facilities. The Court found that the officials had no room to review, deliberate, or exercise judgment under the language of the statute, and therefore *failed to perform ministerial duties* when they showed their "intent to not comply with the statute." *Id*., at 588.
- *Emmett* adopted the standard definitions for ministerial and discretionary acts for *ultra vires* claims:
  - 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."
  - "Discretionary acts on the other hand require the exercise of judgment and personal deliberation."

Examples of Ministerial Acts

- Tax Assessor had ministerial duty by statute to issue proper deed, and issuance of incorrect deed was an *ultra vires* act
  - *Wineinger v. Z Bar A Ranch, L.P.*, 2016 WL 3971560 (Tex. App.—Dallas 2016, no pet.)

- Charter provision requiring City Secretary to present referendum petition to City Council upon the filing of such petition.
  - *City of Plano v*. Carruth, 2017 WL 711656 (Tex. App.—Dallas 2017, pet. denied).

Without Legal Authority

- Likely the most litigated issue in *ultra vires* claims is whether an official's alleged mistake falls within his or her discretionary authority.

- Two main cases to consider when evaluating how discretion or judgment impacts the *ultra vires* analysis:
  - *Houston Belt & Terminal Railway Co. v. City of Houston,* 487 S.W.3d 154 (Tex. 2016)
    - Plaintiff friendly
  - *Hall v. McRaven.,* 508 S.W.3d 232 (Tex. 2017)
    - Government friendly

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

- Facts: City's drainage fee ordinance authorized the public works director to apply the ordinance and make calculations. However, the ordinance contained some guidance and limits on how the director was to make calculations. Director deviated in determining property as "impervious" and making his calculations, which the plaintiff claimed resulted in the City imposing excessive fees.
- City argued ordinance gave discretion in the application of the ordinance, therefore negating an *ultra vires* theory for any alleged mistake.
- Plaintiff argued immunity should apply only to absolute discretion—discretion where "no specific, substantive, or objective standards govern the exercise of judgment."

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

- Supreme Court concluded that the exercise of discretion or judgment does not automatically preclude an *ultra vires* claim.
  - "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."
- The Director's error was a misinterpretation of the limits of his authority (authority expressly limited by the ordinance) his mistake was *ultra vires,* though he did have discretion under the ordinance.
- Defense friendly quote: *Houston Belt* "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*., at 161.

Hall v. McRaven., 508 S.W.3d 232 (Tex. 2017)

- Facts: Hall, a regent of the UT System, sought admission records and the Chancellor resisted based on his interpretation of federal privacy law, authority the Board of Regents had conveyed to the Chancellor.
- Hall argued that *Houston Belt* suggested "any legal mistake" in authority constituted an *ultra vires* act. The Court rejected the argument, making two important distinctions from *Houston Belt*:
  - 1. **Enabling Law vs. Collateral Law**
    - The 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."
    - However, McRaven misinterpreted a privacy law that was "not of his organic authority but rather federal privacy law—**a law collateral to McRaven's authority**."

Hall v. McRaven., 508 S.W.3d 232 (Tex. 2017)

- 2. **Constrained v. Unconstrained Discretion**
  - The City drainage ordinance in *Houston Belt* limited the Director with "explicit constraints" telling the Director how to make property determinations and calculations.
  - McRaven was tasked to decide whether a Regent could review information protected by privacy law—but McRaven's "discretion in making that determination is otherwise unconstrained."
- *Hall* was also the first case since *Heinrich* to evaluate the "proper party" question, and did so due to the involvement of the Board of Regents in McRaven's determination.
  - The Court noted that the proper party question is answered by determining who has a duty to act — here, McRaven.

Arguing Broad Discretion is Key

- When defending an *ultra vires* claim, argue that there are no "specific, substantive, or objective standards" dictating your official's actions or limiting your official's discretion in making his or her determination—like *Hall* and unlike *Houston Belt*.

- Remember the "enabling law" vs. "collateral law" distinction

- Case law establishes that it's not a clear as you might think.

Ultra Vires for Contract Compliance?

- "[N]on-compliance with a contract does not give rise to an *ultra vires* claim."
  - *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1 (Tex. 2015).

- However, the Supreme Court has left open the door for potential *ultra vires* application if a statute or ordinance contained sufficient language requiring a contract to be "performed in a certain way."
  - *City of Houston v. Houston Municipal Employees Pension Sys.*, 549 S.W.3d 566, 579 (Tex. 2018).

Real Property

- Allegations that a governmental entity wrongfully claims ownership to real property appears to automatically provide the basis for an *ultra vires* claim.
  - *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 393 (Tex. 2011):

    "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." Therefore, "[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."

Finality/Statutorily Precluded Review?

- What if a statute provides that the official's decision is final and not reviewable?

- *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1 (Tex. 2015)
  - *Ultra vires* can be both an exception to the "related, but conceptually distinct concepts" of sovereign immunity and the unavailability of judicial review.
  - But an *ultra vires* challenge to action made final by statute should be allowed only when there is a "manifest", "conspicuous and irreconcilable" conflict between the action and the statutory authority asserted.
    - While the idea is there, the Court admittedly has not yet seen such a case. *Morath v. Sterling City Indep. Sch. Dist.,* 499 S.W.3d 407 (Tex. 2016).

Ultra vires in the employment context?

- In *Hillman v. Nueces County*, 579 S.W.3d 354 (Tex. 2019) an Assistant DA sued the county after he was terminated for providing exculpatory evidence to a criminal defendant, contrary to his supervisor's instructions.

- The county argued that if immunity is waived for a *Sabine Pilot* claim, the claim should be considered an *ultra vires* action and allow for only prospective relief. While several amici supported this finding, Hillman opposed that theory. Therefore the majority declined to address whether a termination that violated the law could support an *ultra vires* claim in the employment context when immunity otherwise applied.

- 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 the theory, those justices "would remand in the interest of justice to allow him to pursue that claim." *Id*., at 370.

Limited to Prospective Relief

- No retroactive relief available and monetary damages are not recoverable
- However, future prospective relief can require future payments of money
- Mandamus is proper for alleged failure to perform a ministerial duty
  - *Houston Municipal* suggests mandamus relief should be limited to situations in which there are no other adequate remedies at law. However, *Houston Municipal* indicated that 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.

Check Standing from a Relief Perspective

- 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:

  - *Meyers v. JDC/Firethorne, Ltd*., 548 S.W.3d 477 (Tex. 2018)—Court did not reach issue of whether commissioner acted *ultra vires*, as commissioner individually could not grant the relief the plaintiff was seeking—processing and approving plat applications.

  - *Garcia v. City of Willis,* 593 S.W.3d 201, 207 (Tex. 2019)—Red light camera case in which the Court concluded that no relief Garcia sought was prospective in nature. Garcia had no outstanding notice of violation and did not argue his intent to violate red-light laws in the future (and the Court could presume he would act lawfully). Therefore, Garcia "no longer face[d] the purportedly unconstitutional conduct about which he complains."

Attorney's 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.
- Apply to ultra vires claims? Remember—the compromise in the immunity exception was to provide for only prospective relief.
- No guidance from Texas Supreme Court.
- *City of San Antonio v. Int'l Ass'n, Local 624*, 582 S.W.3d 455, 467 (Tex. App.—San Antonio 2018, no pet.) 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."
  - "The line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief."