I Do Declare!
A Cautionary Tale About Declaratory Judgments for Cities.

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SOVEREIGN IMMUNITY

The doctrine of sovereign immunity, as a general rule, protects the State and its political subdivisions from lawsuits for money damages. *Texas Natural Resource Conservation Commission v. IT-Davy,* 74 S.W.3d 849 (Tex. 2002) (citing *General Services Commission v. Little –Tex Insulation Company,* 39 S.W.3d 591 (Tex. 2001). Sovereign immunity involves two principles: immunity from suit and immunity from liability. Immunity from suit bars a suit against the governmental entity unless the legislature expressly consents to the suit. Immunity from liability protects the governmental entity from a money judgment even if the legislature has expressly given consent to sue. *Id.* These doctrines are designed to protect the legislature's policy-making power by ensuring that only the legislature has the power to shift tax resources away from their intended purposes toward defending lawsuits and paying judgments. *Id.* at 854. Additionally, sovereign immunity protects governmental entities from lawsuits that seek to control the actions of government by a final judgment made by a court of law. *Director of Department of Agriculture and Environment v. Printing Industry Association of Texas*, 600 S.W.2d 264 (Tex. 1980).

In representing governmental entities we sometimes grow comfortable with the protections provided by sovereign immunity. Although sovereign immunity generally protects governmental entities from lawsuits seeking monetary damages, a party can maintain a suit against the state to determine rights under the law without legislative permission. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997); *Texas Department of Banking v. Mount Olivet Cemetery Association*, 27 S.W. 3d 276 (Tex. App. – Austin 2000, pet. denied).

One specific area where this arises, though specific legislative authority has been granted, is under the Uniform Declaratory Judgments Act contained in Chapter 37 of the Texas Civil Practice and Remedies Code ("UDJA"). This paper will discuss some of the potential dangers of seeking a declaratory judgment pursuant to the UDJA and some specific areas where the dangers may arise.

DECLARATORY JUDGMENT ACT

In adopting the Uniform Declaratory Judgment Act, the Texas Legislature provided a mechanism by which parties can determine their legal rights when there may not be another avenue to present their case to a court. TEX. CIV. PRAC. & REM. CODE ANN. §37.001 et. seq. Specifically, §37.004 (a) provides the following relief:

> 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.

Obviously, there are limitations on matters that can be presented to a court for declaratory relief. A declaratory judgment action does not give a court jurisdiction "to pass judgment upon hypothetical or contingent situations, or to determine questions not then essential to the decision of an actual controversy. . . ." *Bexar Metropolitan Water District v. City of Bulverde*, 234 S.W.3d 126, 130-131 (Tex. App. – Austin 2007, no pet.) (quoting *Firemen's Insurance Company v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968). "A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Id.* at 130. (citing *Bonham State Bank v. Beadle,* 907 S.W.2d 465, 467 (Tex. 1995).

In *City of El Paso, Texas v. Croom Construction Company, Inc.*, 864 S.W.2d 153 (Tex. App. El Paso – 1993, writ denied), the El Paso Court of Appeals ruled that the Texas Legislature clearly intended to waive sovereign immunity when adopting the UDJA. Despite a persistent sovereign immunity defense throughout the pendency of the case, particularly related to the request for attorney fees, the Court ruled, specifically referencing the language of §§37.004 and 37.006, that sovereign immunity barred neither a UDJA claim nor a request for attorney fees thereunder.

This holding was upheld by the Fort Worth Court of Appeals in *Sanders v. City of Grapevine*, 218 S.W.3d 772 (Tex. App. – Fort Worth 2007, review denied). In *Sanders*, homeowners brought suit under the Texas Tort Claims Act and the UDJA alleging that the City of Grapevine failed to enforce various conditions of its tree preservation ordinance. The trial court granted the City's Plea to the Jurisdiction. On appeal, the court determined that the allegations regarding the tree preservation ordinance did not fall within the legislative waiver of sovereign immunity provided by the Texas Tort Claims Act. The court did find, however, that the City did not retain governmental immunity as to the homeowners' claim for declaratory judgment. The Fort Worth Court recognized that private parties "cannot circumvent governmental immunity by characterizing a suit for money damages as a declaratory judgment claim or by seeking to establish a contract's viability, to enforce performance under a contract, or to impose contractual liabilities against the governmental entity." *Id.* at 779. The court went on to hold, however, that a party does not need legislative permission to bring an action seeking to determine its rights under a statute or ordinance and that the City did not have governmental immunity as to the UDJA claim. *Id.*

Despite valiant efforts to the contrary, the issue of the applicability of sovereign immunity to a declaratory judgment action was put to rest by the Texas Supreme Court in *Texas Education Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994). In this case, home school parents and curriculum providers challenged the compulsory attendance law. After ruling in favor of the plaintiffs, the trial court awarded attorney fees and costs based on Section 37.009 of the UDJA. On appeal, the Texas Education Agency argued that it was protected from paying money damages by sovereign immunity. Referring to the specific relief permitted by the UDJA, including the construction or validity of a statute, contract, ordinance or franchise and the legal rights and duties thereunder, the Texas Supreme Court stated:

> We conclude that by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the DJA necessarily waives governmental immunity for such awards. *Id.* at 446.

In *OHBA Corporation v. City of Carrollton*, 203 S.W.3d 1 (Tex. App. – Dallas 2006, review denied), a property owner and landlord sought a declaratory judgment and injunction regarding the City of Carrollton's enforcement of its building codes and citations issued to the property manager. The City filed a plea to the jurisdiction asserting that the Court did not have subject matter jurisdiction to grant the injunctive relief requested. The Court noted that the property owner, though it had received at least constructive notice of the violations through its property manager, did not attempt to file an administrative appeal to the violations cited against it. Moreover, the Court determined that the declaratory judgment and injunction sought would not have any bearing on the misdemeanor charges filed in municipal court against the property manager. For these reasons, the Court determined that the property owner did not have standing to seek injunctive and declaratory relief. It is unclear, in reading the opinion, whether the court

relied on the failure to use administrative remedies available to the property owner to appeal the violations.

OPEN MEETINGS ACT

In *City of Richardson v. Gordon*, 316 S.W.3d 758 (Tex. App. – Dallas 2010, no pet.), a citizen filed an action under the UDJA asserting that the City Council of Richardson violated the City's charter by holding closed meetings. In response, the City filed a plea to the jurisdiction contesting the Court's subject matter jurisdiction of the action for declaratory judgment. The court ultimately ruled that the request for declaratory relief was moot due to amendments to the City's charter allowing closed meetings authorized by the Texas Open Meetings Act. The Court also ruled that the plaintiff's request for attorneys' fees under the UDJA did not keep the controversy alive since the plaintiff was unsuccessful on all claims in both the trial and appellate courts.

REGULATORY ACTIONS

In *City of Schertz v. Parker*, 754 S.W.2d 336 (Tex. App. – San Antonio 1988, no writ), operators of a mobile home park sued the City of Schertz seeking a declaration concerning a zoning ordinance related to recreational vehicles. In ruling that the City's ordinance did not apply to recreational vehicles, the Court of Appeals held that there was no governmental immunity to the suit and that an award of $16,025 in attorney fees against the City and the City Manager should be upheld.

In *Continental Homes of Texas, L.P. v. City of San Antonio*, 275 S.W.3d 9 (Tex. App. – San Antonio, review denied), the City of San Antonio filed an action for permanent injunction to prohibit a developer from removing trees in violation of the City's tree preservation ordinance. The developer counterclaimed seeking a declaratory judgment that it had complied with the

ordinance. On appeal, the San Antonio Court of Appeals ruled that the developer's declaratory judgment claim was not barred by sovereign immunity and it was entitled to attorney fees under the UDJA.

PUBLIC PROJECTS

In *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex. App. – El Paso 2004, no review), the losing bidder on a transit system project brought suit seeking, among other things, a declaratory judgment that the contract was awarded illegally. The County of El Paso argued that the suit was barred by governmental immunity. The Court of Appeals held that governmental immunity was in applicable to an action seeking declaratory relief and that the winning bidder was not a responsible bidder.

EMPLOYMENT LAW

In *City of San Benito v. Ebarb*, 88 S.W.3d 711 (Tex. App. – Corpus Christi 2002, review denied), employees brought an action against the City of San Benito alleging that the City failed to compensate them in accordance with an ordinance and seeking a declaratory judgment that they were entitled to compensation according to the ordinance. The Corpus Christi Court of Appeals ultimately ruled that the complaint amounted to a claim for money damages and was, therefore, barred by the doctrine of sovereign immunity. In the process, however, the Court determined that the employees' failure to exhaust their administrative remedies provided by the Civil Service Act did not deprive the Court of jurisdiction to hear the UDJA claim related to the construction of the City's ordinance.

Similarly, in *City of Harlingen v. Alvarez*, 204 S.W.3d 452 (Tex. App. – Corpus Christi 2005, review granted, judgment vacated), a firefighter brought a declaratory judgment action against the City of Harlingen asserting that the City failed to promote him as required by the

Civil Service Act and seeking attorney fees. The Corpus Christi Court of Appeals again held that the employee did not need to exhaust his administrative remedies under the Civil Service Act to be permitted to bring a declaratory judgment action. The Court specifically determined that the claim for declaratory relief required construction of the Civil Service Act and a declaration of his rights under the statute – all as expressly allowed under §37.004 of the UDJA. Accordingly, the Court allowed his claim for attorney fees even though he had no ability to recover such costs under the Civil Service Act. *Id.*

In *Krier v. Navarro*, 952 S.W.2d 25 (Tex. App. – San Antonio 1997, review denied), Bexar County Commissioners Court voted to terminate its Election Administrator. The Election Administrator brought suit seeking, among other things, a declaratory judgment that the Commissioners Court wrongfully terminated him and seeking attorney fees pursuant to the UDJA. The trial court granted the declaratory relief and awarded attorney fees. On appeal, the County argued that a provision of the Local Government Code requiring a person to present a claim to the commissioners court before bringing suit against a county prevented the trial court from exercising jurisdiction over the case. The San Antonio Court of Appeals disagreed, holding that the statute in question only applied to suits for monetary damages, not actions for declaratory judgments, and upheld the award of attorney fees.

In *Texas Department of Public Safety v. Moore*, 985 S.W.2d 149 (Tex. App. – Austin 1998, no writ), an unsuccessful candidate for promotion sued for reverse discrimination under the Texas Human Rights Act and sought a declaration under the UDJA that the Department of Public Safety acted outside its statutory authority in filling the position without competitive examination. The Austin Court of Appeals held that the claim was not barred by sovereign immunity and that the position had to be filled by competitive examination.

An example of the problems that may arise for cities under the UDJA is provided by *City of Holliday v. Wood*, 914 S.W.2d 175 (Tex. App. – Fort Worth 1996, no review). In *Holliday*, the City sued members of the volunteer ambulance service seeking a declaration concerning and recovery of certain payments made to the ambulance service's account. After ruling in favor of the volunteers, the trial court entered an award of attorney fees and costs against the City on the basis of its own action under the UDJA.

EMINENT DOMAIN

An inverse condemnation in *The City of San Antonio v. TPLP Office Park Properties, L.T.D.*, 155 S.W.3d 365 (Tex. App. – San Antonio 2004, *rev'd on other grounds* 218 S.W.3d 60 (Tex. 2007), business owners brought a takings claim and a request for relief under the UDJA against the City of San Antonio after the City closed a private drive connecting a business park to a public street. The Court of Appeals upheld the trial court judgment finding a taking against insufficient evidence challenges. The City also argued that the declaratory judgment action was only an attempt by the landowners to recover attorney fees and costs to which they would otherwise not be entitled. Citing the trial court's broad discretion in awarding attorney fees under the UDJA, the Court of Appeals upheld the award of attorney fees because it could find no clear abuse of discretion by the trial court.

ATTORNEY FEES AND COSTS

Section 37.009 of the UDJA provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary fees as are reasonable and just." Thus, the only limitations imposed on the award of attorney fees and costs is that they must be reasonable and necessary and must be equitable and just – both of which are matters of law. *City of the Colony v. North Texas Municipal Water District*, 272 S.W.3d 699 (Tex. App. – Fort Worth 2008,

review dismissed); *Bocquet v. Herring*, 972 S.W.2d 19 (Tex. 1998). Accordingly, a party does not need to prevail at the trial court on the declaratory judgment action to be entitled to an award of attorney fees under the UDJA. *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996). The determination to award attorney fees rests solely in the discretion of the trial Court. *Id.* Moreover, an appellate court may reverse the district court's award of attorney fees only on a clear showing of an abuse of discretion. *Oake v. Collin County,* 692 S.W.2d 454 (Tex. 1985); *Del Valle Independent School District v. Lopez*, 863 S.W.2d 507 (Tex. App. – Austin 1993, writ denied). In fact, in *Del Valle*, the Austin Court of Appeals held the trial court was not limited to the testimony at trial of the estimate of time spent on the case – trial court may consider several factors, "including the quality of legal work, the time and effort required by the attorney, the nature and intricacies of the case, the extent and type of the attorney's responsibilities and the benefit resulting from the litigation." *Id.* at 513.

Note, however, that there is some law seeming to indicate that it constitutes an abuse of discretion to award attorney fees and costs to a party that did not prevail on the UDJA claims in the trial court or whose claims were reversed on appeal. *City of Houston v. Harris County Outdoor Advertising Association*, 732 S.W.2d 42 (Tex. App. – Houston [14th Dist.] 1987, no writ). In the *City of Houston* case, the City was sued regarding various provisions of its sign ordinance. The trial court granted the plaintiffs' UDJA claims and awarded attorney fees pursuant to Section 37.009. After reversing the UDJA claims on appeal, the 14th Court of Appeals stated:

> Where a trial court denies declaratory relief, or, as here, a trial court improperly renders a declaratory judgment, we find it is an abuse of discretion to award attorneys' fees to a party that is not entitled to any relief.

In *City of Alton v. City of Mission*, 164 S.W.3d 861 (Tex App. – Corpus Christi 2005, no review), the two parties were cities involved in litigation over extraterritorial jurisdiction and an agreement regarding the extraterritorial jurisdiction of each between the two cities. The trial court ultimately ruled that the City of Mission was correct in its position and granted the UDJA claims in its favor, awarding the City of Alton to pay its attorney fees. The City of Alton appealed all matters, and the attorney fee award was upheld on appeal.

Similarly, in *City of Port Isabel v. HP Pinnell*, 207 S.W.3d 394 (Tex. App. – Corpus Christi 2006, no review), a property owner brought a declaratory judgment against the City of Port Isabel that its annexation ordinances were invalid. The Town of South Padre Island intervened in the suit. After ruling in favor of the Town and property owner, the trial court awarded attorney fees in favor of the Town and the property owner.

CONCLUSION

While there obviously will be occasions that cities cannot avoid a declaratory judgment action – and even times when a declaratory judgment action may be proper for cities, it is important to remember the dangers that may arise in any action or counterclaim brought under the UDJA.