Mandamus and *Ultra Vires* Issues: What can happen if you go "*ultra*" your *vires*

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ULTRA VIRES – WHAT'S A NICE LATIN TERM LIKE YOU DOING IN A PLACE LIKE TEXAS?

While the term "*ultra vires*" has a well-defined meaning in Latin[1], in the legal vernacular in Texas, it is used in order to allege that public official-type folks are doing something they shouldn't, or refusing to do something that they should. You shouldn't act *ultra* your *vires* – you should always act *intra* your *vires*. And if you *are* acting *ultra vires*, you may be subject to mandamus or injunction (but not money damages). That's because governmental immunity from suit applies only to claims based on actions within the scope of governmental authority; actions taken outside the scope of an official's governmental authority do not get the benefit of governmental immunity.

In Texas, the law relating to the intersection of *ultra vires* actions and governmental immunity came into its own in 2009, with the Supreme Court's opinion in *El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Since *Heinrich,* numerous Texas courts have interpreted, explained, and applied the principle in cases alleging that government officials were acting outside their authority, and the Supreme Court revisited the *ultra vires* concept just a few months ago in *Houston Belt & Terminal Railway Co. v. City of Houston*, ___ S.W.3d ___ (Tex. 2016).

THE EVOLUTION OF *ULTRA VIRES* AND THE IMPACT ON IMMUNITY IN THE COURTS

A. The "beginning:" *El Paso v. Heinrich*

The doctrine that *ultra vires* actions—i.e., unconstitutional or illegal actions of state officials—are not considered the work of the sovereign and are not protected by the shield of sovereign immunity has long been a feature of federal law. *See, e.g., Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 689 (1949). The *ultra vires* suit against state officials has an equally long pedigree in Texas. *See, e.g., State v. Epperson*, 42 S.W.2d 228, 231 (Tex. 1931); *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945).

Epperson and *Cobb*, however, did little to answer critical questions to practitioners looking to use an *ultra vires* suit. Who are the proper parties to suit? Can a state official be sued for a discretionary act? What damages are recoverable? The answers to these questions remained cloaked – or at least quite modestly-dressed – in mystery.

In 1997, the Texas Supreme Court reopened the discussion of governmental immunity in *Federal Sign v. Texas Southern University*, holding that the state does not waive its immunity from suit merely by entering into a contract with a private party. *Federal Sign v.*

[1] "Beyond the powers"

Texas S. Univ., 951 S.W.2d 401, 405 (Tex. 1997). Nonetheless, the court observed that "an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the Sate that sovereign immunity bars." *Id.* But what does that mean? Should contracts be enforced by an *ultra vires* suit? The Texas Supreme Court answered that question with a definitive "***no***" five years later. In *Texas Natural Resource Conservation Commission v. IT-Davy*, the court held that "declaratory-judgment suits against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State," which are barred by immunity. *Id.*, 74 .S.W.3d 849, 855 (Tex. 2002).

After the seemingly contradictory messages in *Federal Sign* and *IT-Davy*, many of us were left scratching our heads—was *ultra vires* dead?

In *City of El Paso v. Heinrich*, the Texas Supreme Court confirmed that *ultra vires* was alive and well. 284 S.W.3d 366 (2009). In *Heinrich*, the widow of an El Paso police officer killed in the line of duty sued the City after the Firemen & Policemen's Pension Fund reduced pension payments to her after her son turned 23 years old, alleging that the Fund violated state law by reducing her benefits retroactively. Circling back to its holding in *Epperson* nearly 80 years earlier, the Texas Supreme Court held that "where statutory or constitutional provisions create an entitlement to payment, suits seeking to require state officers to comply with the law are not barred by immunity merely because they compel the state to make those payments." *Id.* at 372.

In confirming the viability of *ultra vires* suits against public officials, the *Heinrich* Court did what no previous Texas court managed to do since *Epperson*: outline the procedural and evidentiary requirements and limitations of an *ultra vires* claim, including:

> ***Purpose:*** "*[U]ltra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state. Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy." *Id.* at 372 (footnote omitted).
>
> ***Proper parties:*** The proper defendants are the public officials, who must be sued in their official capacities.
>
> ***Status of the public entity:*** The public entity can, by definition, never act outside its authority. It therefore remains immune from suit and is not a proper party.
>
> ***Relationship between the public entity and the official sued in his official capacity:*** Though the public officials are the proper defendants, "the suit is, for all practical purposes, against the state." *Id.* at 373.

Actions subject to* ultra vires *suit: A valid *ultra vires* suit "must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* at 372.

Damages available: No monetary damages are available. A prevailing plaintiff may only obtain a declaratory judgment against the public officials who have acted outside their legal authority. However, that declaratory judgment may have the effect of requiring ***prospective*** monetary payments (but not retrospective payments).

And so with that, the Texas Supreme Court resolved the critical issues involved in pleading and proving *ultra vires* claims, and the lower courts had no trouble applying *Heinrich* uniformly, right?

Right?

B. The middle: how Courts have handled *ultra vires* cases since *Heinrich*

Ok, not really—but then, you knew this paper wouldn't be that short (and just based on a single seven-year old Texas Supreme Court case), didn't you?

In ***Texas Parks & Wildlife Department v. Sawyer Trust***, the Texas Supreme Court appeared to widen the scope of the *ultra vires* relief established by *Heinrich*. 354 S.W.3d 384 (Tex. 2011). The Sawyer Trust, which owns property along the Salt Fork of the Red River, sued the Parks & Wildlife Department for a declaratory judgment that the Salt Fork is not a navigable stream, which, if granted, would have the effect of rendering the sand and gravel at the bottom of the Salt Fork the property of the Sawyer Trust, rather than the State. *Id.* at 387.

The Texas Supreme Court held that the Sawyer Trust's claim for a declaratory judgment that the Salt Fork is not a navigable stream is barred by sovereign immunity. *Id.* at 390. ***But***, the Supreme Court went a step further and remanded the case to the trial court to permit the Sawyer Trust to replead the claim as an *ultra vires* suit. According to the Supreme Court, "[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." *Id.* at 393.

The Texas Supreme Court therefore implicitly held that the determination of the navigability of a stream is not a discretionary act. *Id.* at 395 (Jefferson, C.J., concurring). The end result, therefore, may be that public entities have no immunity to suits to determine title to real property, so long as such suits are styled as *ultra vires* claims. *Id.* at 397-98 (Hecht, J. concurring in part and dissenting in part).

But at the same time that it was expanding *Heinrich* to cover suits to determine ownership of real property, but Texas Supreme Court was limiting *Heinrich* to suits challenging actual *actions* by state actors. In ***Texas Lottery Commission v. First State Bank*** and again in ***Patel v. Texas Department of Licensing & Regulation***, the Texas Supreme Court held that the *ultra vires* exception to sovereign immunity does not apply where the suit challenges the validity of statutes, rather than the state officials' actions (or inactions) in applying those statutes. *Texas Lottery Commission*, 325 S.W.3d 628, 634 (Tex. 2010); *Patel*, 469 S.W.69, 77 (Tex. 2015).

In *Patel*, eyebrow threaders sued the Texas Department of Licensing & Regulation, alleging that its regulation of eyebrow threading as a practice of "cosmetology" was an unconstitutional violation of their substantive due process rights. *Patel*, 469 S.W.3d at 75. The State asserted that the claim should have been brought as an *ultra vires* action against the state officials promulgating the regulations over eyebrow threading. The Texas Supreme Court, however, rejected this argument, observing that the Declaratory Judgment Act waives immunity to claims challenging the validity of statutes. *Id.* at 76.

Meanwhile, the Courts of Appeals have been busy confirming some of the key points of *Heinrich*, including the unavailability of retrospective monetary relief. For example, in ***City of Galveston v. CDM Smith, Inc.***, a contractor assisting with reconstruction after Hurricane Ike sued the City after it stopped submitting the contractor's invoices for payment by the U.S. Department of Housing and Urban Development. 470 S.W.3d 558, 562-63 (Tex. App.—Houston [14th Dist] 2015, pet. denied). The contractor sued city officials, alleging that they acted *ultra vires* in failing to invoice HUD on its behalf.

The Fourteenth Court, however, rejected the contractor's purported *ultra vires* claim because it sought retrospective relief. *See id.* at 569-570. "As *Heinrich* made clear, immunity for an *ultra vires* act is only a waiver with regard to bringing future acts into compliance with the law." *Id.* at 569. Here, however, the allegedly *ultra vires* acts—refusing to approve and submit the invoices to HUD—had already occurred and were not recurring because the contract had already expired. Hence, there was no possible prospective relief that could be attained in an *ultra vires* suit.

Since *Heinrich*, the scope of the *ultra vires* exception to immunity has been both expanded and narrowed—in the context of real property disputes and (allegedly) unconstitutional regulations, respectively. In all cases, however, "[t]o fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion." *Heinrich*, 284 S.W.3d at 372.

At least, that's what we thought.

C. The most recent, or, "the return of the Supremes:" *Houston Belt & Terminal*

All of which brings us to the most recent Texas Supreme Court pronouncement on the issue—***Houston Belt & Terminal Railway Co. v. City of Houston***, ___ S.W.3d ___, 2016 WL 1312910 (Tex. Apr. 1, 2016). Houston Belt and other railroads brought suit against the City and its director of public works and engineering, in his official capacity, alleging that a drainage fee ordinance was invalid and that the director had acted *ultra vires* in imposing drainage fees on certain railway properties. The City argued that the director's decisions were not purely ministerial, but instead involved the exercise of discretion. *Id.* at *3.

Remembering that *Heinrich* held that an *ultra vires* plaintiff "must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act," the *Houston Belt* Court emphasizes the use of the conjunctive "or." *Ultra vires* suits are not so limited as to only apply to cases in which the act is "purely ministerial." Rather, a plaintiff may bring an *ultra vires* act against a discretionary act that is without legal authority. *Id.* at *5. "[W]hen an officer acts beyond his granted discretion—in other words, when he acts without legal authority—his acts are not protected." *Id.* Accordingly, only when "absolute discretion—free decision-making without any constraints—is granted are *ultra vires* suits absolutely barred." *Id.*

But our Constitution creates a government of limited powers. What public officials are granted "absolute discretion"? Perhaps judges in rendering decisions; the Legislature in passing laws; the governor in signing or vetoing bills; . . . but any others? A city council may have absolute discretion in passing city ordinances, but its discretion must still be exercised within the power granted to it by the city's charter, the Texas Constitution, and the Texas Local Government Code, for example. The *Houston Belt* Court concluded with the reassuring observation that "so many legislative grants of authority, although not absolute, will be broad enough to bar most, if not all, allegedly *ultra vires* claims." *Id.* at *6.

We are unconvinced.

THE PROCEDURAL PATH OF AN *ULTRA VIRES* CLAIM

So, in light of *Heinrich* and *Houston Belt*, what does an *ultra vires* suit look like? Or, perhaps more to the point, what ***should*** an *ultra vires* suit look like?

Let's start at the beginning:

Plaintiff's petition—does it have the proper parties?

As originally set forth in *Heinrich*, the proper party is the governmental official who is alleged to have acted outside his/her legal authority; not the state agency/political subdivision itself. The governmental official must be named in his/her official capacity.

The effect is twofold.

First, and most importantly from a client counseling standpoint, you can assure your governmental official that even though s/he is named as a party, it is only in his/her official capacity. The governmental official will not be personally liable for any monetary damages (which aren't recoverable, anyway). The *ultra vires* claim is only to figure out what the official can do in his/her job going forward.

That should earn you a deep sigh of relief from the official.

Second, it means that any judgment against the governmental official for having acted *ultra vires* will restrict the governmental entity's behavior going forward, no matter who holds that office in the future.

Plaintiff's petition—has it alleged an* ultra vires *act?

The plaintiff's petition should seek relief under the Declaratory Judgment Act, alleging that the governmental official acted outside his/her legal authority, i.e., *ultra vires*.

As part of the allegation, the petition should set forth the action—and there needs to be an action or inaction by the governmental official—that the plaintiff alleges to be *ultra vires*. To state the obvious, the *ultra vires* suit needs to allege an action that was actually *ultra* the governmental official's *vires*. So the first step is always to identify the act that is alleged to be *ultra vires*.

Practice Tip:

Special exceptions have fallen out of favor in some quarters, but they have an important place in defending *ultra vires* suits. If you can't figure out from the petition what act (or inaction) is alleged to be outside the governmental official's authority, then special exceptions can be used to gather more information about the nature and substance of the claim.

The alleged *ultra vires* action may involve ***either*** the failure to perform a ministerial act ***or*** the exercise of limited discretion in conflict with the constraints of the law that authorizes the official to act in the first place. *Houston Belt & Terminal Railway Co. v. City of Houston*, ___ S.W.3d ___, 2016 WL 1312910, at *5 (Tex. Apr. 1, 2016). If the plaintiff alleges that the statute or regulation itself is unconstitutional or otherwise unlawful, his suit

isn't an *ultra vires* suit, but instead should be brought against the governmental entity directly. *See Patel v. Texas Dept. of Licensing & Regulation*, 469 S.W.69, 77 (Tex. 2015).

Plaintiff's petition—does it ask for relief they can get?

As first set forth in *Heinrich*, the plaintiff can only seek prospective injunctive relief; retroactive relief (whether money damages or something else) is not available.

The Court of Appeals' decision in *CDM Smith* is helpful on this point. As a threshold question, one must ask whether the plaintiff's relationship to the governmental entity is ongoing, or whether it has terminated. If, as in *CDM Smith*, the suit arises out of a contract or other arrangement that has ended before the suit is filed, any relief would be, by definition, retrospective. Hence, an *ultra vires* suit cannot be maintained.

No? Then let's get rid of this thing in a hurry using Rule 91a!

If the Plaintiff's petition doesn't meet the requirements of *Heinrich* and its progeny—if, for example, it names the governmental entity as a defendant or asks for retrospective money damages—the governmental official (or the governmental entity improperly named) may move to dismiss under Rule 91a.

Enacted in 2013, Rule 91a creates a mechanism by which a defendant may obtain an accelerated dismissal of a plaintiff's claim that is without basis in law or fact. Tex. R. Civ. P. 91a.1. Rule 91a can be used as a platform to assert immunity. *See, e.g., City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822 (Tex. App.—Austin 2014, no pet.). To do so, however, the motion to dismiss must be filed within 60 days of service of the petition.

The primary benefit of Rule 91a is its accelerated timetable—it must be heard and ruled upon by the court within 45 days after the motion is filed. Tex. R. Civ. P. 91a.3(c). And unlike private parties, a governmental entity will not be liable for attorneys' fees if it does not prevail on the motion. Tex. R. Civ. P. 91a.7.

Not a Practice Tip, but Something We've Always Wanted to Do:

The point has been made to us by several eminent district court judges that the 45-day ruling requirement has no enforcement mechanism. "So what happens if I don't rule in 45 days," we've been asked.

We don't know, because judges tend to abide by the Rules, even without an enforcement mechanism.

Nonetheless, we would argue that the refusal to rule on a plea to the jurisdiction constitutes a *de facto* denial, as it permits the district court to continue exercising jurisdiction over the case. Hence, once the 45-day period lapses (with or without a ruling), we would suggest that the governmental official can file an interlocutory appeal under Section 51.014(a) of the Texas Civil Practice & Remedies Code.

Oh, they do? Then I guess we'll need to file an answer. Or a plea to the jurisdiction. Or something—but what?

If the *ultra vires* suit is properly pleaded, it's time for the answer. But unlike in virtually every other lawsuit under the Texas Rules, a general denial really doesn't fit. The proper responsive pleading to an *ultra vires* suit is a plea to the jurisdiction.

Practice Tip:

Remember that filing your answer/plea to the jurisdiction starts the clock running on the 180-day deadline to appeal with the benefit of the interlocutory stay under Section 51.014(c) Texas Civil Practice & Remedies Code.

The reasoning for this is simple, if a bit confusing. If the plaintiff does not prove his allegation that the action was *ultra vires*, then it was, by default, within the governmental entity's legal authority. And, as the governmental entity is immune from suits arising from actions taken within its legal authority, that thereby deprives the court of subject matter jurisdiction.

Perhaps the oddest thing about an *ultra vires* arises from this interjection of immunity—the final order from the court finding against a plaintiff in an *ultra vires* suit is not a take-nothing judgment. Rather, it should be a dismissal (without prejudice) for lack of subject matter jurisdiction.

And what about the compulsory counterclaim rule?

In developing the answer, the governmental entity needs to consider its possible counterclaims. "Of course, naming a state official instead of the State is a complete fiction. For all practical purposes, the suit is against the State." *Texas Parks & Wild. Dept. v. Sawyer Trust*, 354 S.W.3d 384, 397 (Tex. 2011) (Hecht, J. concurring in part and dissenting in part). The state agency or political subdivision is the real-party-in-interest to an *ultra vires* suit brought against its official acting in his/her official capacity. *See Texas A & M Univ. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007).

The implication, then, (for which we have no direct authority) is that any claims that the political subdivision may have against the plaintiff that arise out of the same transaction or occurrence would be compulsory counterclaims. As such, they must be brought as counterclaims in that *ultra vires* suit or waived. Tex. R. Civ. P. 97(a).

If true, however, this raises additional questions about the political subdivision's immunity. If the political subdivision were to assert a counterclaim—whether compulsory or permissive—against the *ultra vires* plaintiff, it would partially waive immunity and open itself to a counterclaim in its own name. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006).

Not a Practice Tip; Just an Observation:

The plaintiff bears the ultimate burden of persuasion to show that the governmental official acted *ultra vires*. So until the plaintiff meets that burden and the court renders declaratory judgment to that effect, the governmental official and the governmental entity are one-and-the-same.

But despite that unity of identity, one is a proper party, and one definitely is not.

We've found that this dichotomy causes endless confusion with some parties in litigation. For instances, some attorneys are under the misimpression that only documents within the possession, custody, or control of the governmental official are subject to first-party discovery, and that the records of the governmental entity must be obtained through a third-party subpoena.

That's wrong.

So yes, an *ultra vires* plaintiff can get first-party discovery from the governmental entity, and no, not giving documents to the governmental official will not shield those documents from first-party discovery.

Can we just get our summary judgment on file already?

When is a summary judgment not a summary judgment?

When it's a plea to the jurisdiction.

Generally, a plea to the jurisdiction may challenge the sufficiency of the claimant's pleadings or the existence of necessary jurisdictional facts. *See Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98, 110 n. 53 (Tex.2014). A plea to the jurisdiction may be set for hearing before trial. But the pretrial hearing of a plea to the jurisdiction looks very similar to a summary judgment--if the jurisdictional evidence creates a fact question, then the trial court cannot grant the plea to the jurisdiction, and the issue must be resolved by

the factfinder. *City of Dallas v. East Village Ass'n*, 480 S.W.3d 37, 42 (Tex. App.—Dallas 2015, pet. filed).

You mean I didn't get summary judgment? What now?

The unusual thing about a trial of an *ultra vires* suit is that the ultimate question being tried is whether the court has jurisdiction in the first place. If the governmental official acted within his/her legal authority—i.e., *intra vires*—then immunity applies and the court is without subject matter jurisdiction.

Since the ultimate question before the court is whether it has jurisdiction, or, alternatively, whether the political entity operated *intra vires* and is immune, there should not be a jury. *See Texas Dept. of Pub. Safety v. Moore*, 985 S.W.2d 149, 153 (Tex. App.—Austin 1998, no pet.) (holding that jurisdiction is a question of law to be determined by the court).

Only if the governmental official acted outside his legal authority—i.e., *ultra vires*—does the court has jurisdiction. Thus, to determine whether it has jurisdiction, the court may have to undertake a full trial of the plaintiff's lawsuit.

If the government official did act *ultra vires*, the court has several options by way of the relief to impose. The only restriction is that it must be ***prospective***. In addition to declaratory judgment, the court can issue a permanent injunction barring the governmental official from continuing the *ultra vires* action. *See Heinrich*, 284 S.W.3d at 377. Alternatively, if the *ultra vires* action is really inaction, the court may issue a writ of mandamus compelling action to bring the governmental official into conformance with the law. *See Hamilton v. Washington*, No. 03–11–00594–CV, 2014 WL 7458988, at*9 (Tex. App.—Austin Dec. 23, 2014, no pet.) (not designated for publication).

Now for the most important part—<u>the appeal.</u>

Just because this is last, don't be fooled—a governmental official can take this off-ramp at any time by setting the plea to the jurisdiction for hearing.

Under Section 51.014 of the Civil Practice & Remedies Code, a party may appeal from an interlocutory grant or denial of a plea to the jurisdiction. Tex. Civ. Prac. & Rem. Code §51.014(a). As an added bonus, an interlocutory appeal from a grant or denial of a plea to the jurisdiction operates to stay all other proceedings in the trial court pending resolution of that appeal. Tex. Civ. Prac. & Rem. Code §51.014(b).

But to get the benefit of that automatic stay, the governmental entity has to act reasonably promptly. The automatic stay provision will not apply to a denial of a plea to the jurisdiction if it is not heard or set for submission within 180 days after the answer or

other responsive pleading to the plaintiff's petition. Tex. Civ. Prac. & Rem. Code §51.014(c).

As a final note—don't think that just because Section 51.014 only speaks to a "plea to the jurisdiction" or "summary judgment" that those are the only two procedural vehicles covered. An interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the argument is presented as a plea to the jurisdiction, a motion for summary judgment, a motion to dismiss, or some other vehicle. *See Texas Dep't of Crim. Justice v. Simons*, 140 S.W.3d 338, 349 (Tex.2004); *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822 n.1 (Tex. App.—Austin 2014, no pet.).

CONCLUSIONS

The *ultra vires* suit remains one of litigation's most idiosyncratic creatures, and not just because of linguistics. In just about every other case, the court's jurisdiction is something that is settled at the outset of the case. But in the *ultra vires* context, the court's jurisdiction is the ultimate question for the court to determine after a trial on the merits.

It is perhaps because of the unusual nature of this claim that the Texas Supreme Court seems to revise and refine its vision for it every few years. Today, after *Heinrich* and *Houston Belt*, we have gained some limited certainty about the parameters for a valid *ultra vires* claim.

But unlike Latin, *ultra vires* actions in Texas have a way of adapting and evolving. And so we feel less bad about the misuse of the ancient language when we counsel our clients that, irrespective of today's limitations on these types of cases, they are best served to make sure that they are always acting *intra* their *vires*.