

Are Proprietary Contracts Putting Cities at Risk?

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Does the governmental-proprietary distinction apply to contract-related claims?

- ▶ Background
- ▶ Competing Legal Arguments
- ▶ Recommendations

Why it matters

- ▶ Yes - No Immunity
- ▶ No - Immunity Protections

Judicial History – TX Supreme Court

- ▶ *City of Galveston v. Posnainsky* (1884)
 - Tort case – Creates distinction
- ▶ *Gates v. City of Dallas* (1986)
 - Contract case – Liability for attorneys fees
- ▶ *Tooke v. Mexia* (2006)
 - Supreme Court: “[W]e have never held that this same distinction determines whether immunity from suit is waived for breach of contract claims.”
- ▶ The Supreme Court still has not weighed in on the issue.

Judicial History – Courts of Appeals

- ▶ Numerous decisions apply distinction to contracts.
 - See FN 4 from *Georgetown v. LCRA*
- ▶ *City of San Antonio v. Wheelabrator* (2012)
 - Petition denied

Legislative Developments

- ▶ Texas Tort Claims Act of 1987 (TTCA)
- ▶ The Legislature has enacted various statutes that waive governmental immunity from suit.
 - Eg: Tex. Loc. Govt. Code §§271.151–160.
- ▶ Do not mention distinction.

The Current Split

- ▶ Distinction applies to contract claims (no immunity).
 - The Third Court of Appeals (Austin)
 - *City of Georgetown v. Lower Colo. River Auth.*, 2013
 - *City of Seguin v. Lower Colo. River Auth.*, 2014
 - *City of Austin v. MET Center NYCTEX Phase II, Ltd.*, 2014
- ▶ Distinction does not apply to contract claims (immunity).
 - The Fourth Court of Appeals (San Antonio)
 - *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 2012
 - *Lower Colorado River Authority v. City of Boerne*, 2014
 - The Seventh Court of Appeals (Amarillo)
 - *Republic Power Partners, L.P. v. City of Lubbock*, 2014
 - *West Texas Municipal Power Agency v. Republic Power Partners, L.P.*, 2014

There are currently five pending cases in Tyler, El Paso, and Beaumont that present the same issue.

Position 1: Distinction applies to contract claims – immunity does not exist

- ▶ Issue is whether immunity exists not whether it is waived.
- ▶ There is no proprietary immunity.
- ▶ The Texas Supreme Court and numerous courts of appeals agree.
- ▶ §271.152 did not change common law.

Position 2: Distinction does not apply to contract claims – immunity exists unless waived

- ▶ The distinction was created for tort cases and should remain that way.
 - The Supreme Court has not decided.
 - Courts of appeals are wrong.
- ▶ Policy:
 1. Protect the public fisc.
 2. Torts and contracts are conceptually different.
 3. Logistical issues involving multifunctional contracts.
- ▶ The Legislature purposefully omitted the distinction from §271.152.

Impact on Cities

- ▶ No immunity
 - All causes of action possible
- ▶ No limit on damages for proprietary contracts
- ▶ What is governmental vs. proprietary?
- ▶ Multi-function contracts

Recommendations

1. When contracting, consider whether the contract involves or *may involve* a proprietary function.
2. Consider separate contracts for governmental and proprietary activities.
3. Insist on contractual limitations on liability.
4. Use merger and written amendment clauses.
5. Watch out for contractual pitfalls.

Questions?

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