

Opposite Rulings Refine Scope Of Texas Sovereign Immunity

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The [Texas Supreme Court](#) issued two opinions on March 15, 2019, dealing with breach-of-contract lawsuits in which two different cities sought to have the suits dismissed because of sovereign — or governmental — immunity. The court found immunity had been waived in one case, but not the other.

In Texas, as in most other common law jurisdictions, the state and other governmental entities are immune from suit unless the legislature or the entity itself has expressly waived that immunity. Absent a waiver, therefore, a governmental entity cannot be sued for breaching a contract. To prevent the injustice inherent in such a situation while protecting the public fisc against unlimited contractual liability, the Texas legislature adopted the Local Government Contract Claims Act,^[1] which provides in Section 271.052:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of contract, subject to the terms and conditions of this subchapter.

City of Denton v. Rushing^[2] involved a claim against the city for alleged breach of an employment contract based on a policy referenced in the city's employment manual that promised pay for "on-call" services, although the manual expressly disclaimed that its provisions were contractual. Such claims are not unique to local governments; private companies often face claims that certain provisions in an employee handbook impose contractual obligations on the employer and seek to avoid liability with similar disclaimers.

Plaintiffs in Rushing were full-time, hourly paid employees in the city's utilities department. Their job descriptions required them periodically to be "on call," i.e., prepared "to return to work for operational requirements that may develop outside normally scheduled work hours."^[3] A 2013 amendment to the employee manual deleted an earlier provision stating on-call time was uncompensated and added an explicit pay schedule for on-call time.

When the employees learned in 2015 they would not in fact be paid for on-call shifts, they sued the city for breach of contract. The city countered by citing the manual's general disclaimer, which stated:

"The contents of the manual do not in any way constitute the terms of a contract of employment and should not be construed as a guarantee of continued employment."^[4]

The issue in *Rushing* was whether the claim was encompassed by the waiver of immunity provided in Local Government Code Section 271.052, quoted above.

Specifically, the core issue was whether the employment manual was a “contract subject to this subchapter,” which the statute defined as “a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the ... entity.”[5]

The district court denied the city’s plea to the jurisdiction, and the Second Court of Appeals affirmed, holding that the “unilateral contract” reflected in the employment manual was a contract subject to the statute, and that the disclaimer was intended only to preserve an employee’s at-will status.[6]

The Texas Supreme Court reversed, holding that the city’s policy did not create an enforceable contract because the disclaimer effectively negated any intent to do so.[7] The court cited several cases enforcing similar disclaimers in private-company employee handbooks.

In *Hays Street Bridge Restoration Group v. City of San Antonio*,[8] it was undisputed that a contract was formed by a memorandum of understanding between the parties concerning funding for restoration of the Hays Street bridge and creation of a park. When the city decided not to use the property for a park and sold it to Alamo Beer Company, the Restoration Group sued for specific performance of the MOU to “[e]nsure that any funds generated by the Restoration Group ... go directly to the approved City ... budget ... for the Hays Street Bridge project.”[9]

The city claimed immunity, but the trial court rejected that defense and entered judgment requiring the city to comply with the agreement. The Fourth Court of Appeals reversed and rendered judgment for the city.[10]

Before addressing the waiver of immunity issue, the Texas Supreme Court considered whether the contract reflected the city’s “governmental” acts, which are subject to immunity, or “proprietary” acts, which are not. The court, citing its 2016 and 2018 opinions in *Wasson Interests Ltd. v. City of Jacksonville*,[11] agreed with the lower courts that the restoration of the bridge and revitalization of the surrounding area were governmental functions, so that related claims were subject to immunity if it was not waived.[12]

Both parties relied on the Texas Supreme Court’s 2014 decision in *Zachry Construction Corp. v. Port of Houston Auth. of Harris County*[13] to support their respective positions on immunity. The court in *Zachry* held:

“The ‘subject to the terms and conditions’ phrase in Section 271.152 incorporates the other provisions of the Act to define the scope of its waiver of immunity.”[14]

Of particular importance in Zachry was Section 271.153, which limited “the total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter.”[15] The court held that delay damages were a type of consequential damages that could be “due and owed” under a contract.[16] Consequently, the statute waived immunity against such claims.[17]

In Hays Street Bridge, the court of appeals observed that Section 271.153 says nothing about the equitable relief of special performance and concluded the statute did not waive the city’s immunity for such claims. The Texas Supreme Court reached the opposite conclusion, holding that the silence in other sections left the waiver effected by Section 271.152 undisturbed as to specific performance claims.[18]

The Restoration Group thus won the battle but has not yet won the war. The Supreme Court remanded to the court of appeals for consideration of other defenses raised by the city that had not previously been addressed.

In sum, these cases reflect the excruciating parsing of statutory text required to determine whether a particular claim against a municipality or other local government is barred by governmental immunity or is encompassed by a statutory waiver of immunity.

Article was originally written by Carrington Coleman partner, [Lyndon Bittle](#) for Law360.



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[1] Tex. Loc. Gov’t Code Sections 271.151–.160.

[2] [City of Denton v Rushing](#), 62 Tex Sup Ct J 618 [2019], No. 17-0336, 2019 WL 1212188 (Tex. March 15, 2019).

[3] Id., 2019 WL 1212188 at *1 (quoting manual).

[4] Id.

[5] Tex. Loc. Gov't Code §271.151(2).

[6] Rushing, 2019 WL 1212188 at *2.

[7] Id. at *3.

[8] [Hays St. Bridge Restoration Group v City of San Antonio](#), 2019 Tex LEXIS 266 [Mar. 15, 2019, No. 17-0423], No. 17-0423, 2019 WL 1212578 (Tex. March 15, 2019).

[9] 2019 WL 1212578 at *4.

[10] Id. at *3

[11] [Wasson Interests, Ltd. v. City of Jacksonville](#), 489 S.W.3d 427 (Tex. 2016), and 559 S.W.3d 142 (Tex. 2018).

[12] Hays Street Bridge, 2019 WL 1212578 at * 6.

[13] [Zachry Construction Corp. v. Port of Houston Auth. of Harris County](#), 449 S.W.3d 98 (Tex. 2014).

[14] Zachry, 449 S.W.3d at 108.

[15] Tex. Loc. Gov't Code § 271.153(a).

[16] 449 S.W.3d at 112.

[17] Id. at 114.

[18] Hays Street Bridge, 2019 WL 1212578 at * 8.