

Sovereign Immunity **Not a Defense for Contracts Involving Proprietary Functions**

On April 1, 2016, in a matter of first impression, the Texas Supreme Court held in [*Wasson Interests, Ltd. v. City of Jacksonville*](#)¹ that municipalities are not immune from breach of contract lawsuits related to their proprietary, non-governmental acts. Notably, the Court’s decision extends to contract claims not covered by Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE, the holding the Court made in tort claims: that municipalities are “**not** immune from suit for torts [and contract violations] committed in the performance of its proprietary functions.”

The *Wasson* case involved a city’s 99-year lease of real property to a private party. Wasson, the tenant, filed suit against the city for breach of contract after the city sent an eviction notice contending Wasson violated the lease agreement. In response, the city filed a traditional and no-evidence motion for summary judgment claiming immunity from suit. The motion was granted by the trial court. The court of appeals affirmed that decision, finding that immunity for municipalities was the “default position” in contract cases. A unanimous Texas Supreme Court disagreed, rejecting the city’s argument that “a city is *never* subject to suit for contract claims unless there is a legislative waiver.” The Court found the long-term lease contract was excluded from immunity under Chapter 271, and held immunity would apply only if the contract involved a governmental function of the City, a point for which no finding was made in the courts below.

In rejecting broad immunity, the Court weighed the policy arguments favoring the defense of sovereign immunity against the rationale the Legislature previously adopted in the tort arena. Using that analysis, the Supreme Court noted that, although “[p]olitical subdivisions of the state—such as counties, municipalities, and school districts—share in the state’s inherent immunity[,] . . . [t]hey represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them.” Highlighting the “derivative” nature of a municipality’s immunity, the Court considered the Legislature’s adoption of Chapter 271, noting it expressly provides immunity to contracts for goods and services only, which a lease is neither. Finding no language in Chapter 271 extending immunity to real estate leases, the Court undertook the task of determining whether immunity barred the tenant’s claims; but, first explained its jurisdiction and process for doing so.

Specifically, the Court acknowledged that sovereign immunity protects a state from suit for money damages; thus, Texas cannot be sued, unless it “consents.” And, when such immunity is granted either in a constitutional provision or by legislative enactment, courts are bound to enforce the defense. When, however, such immunity is not afforded by the constitution or legislative enactment, the Court found the doctrine has evolved in the common law, granting courts authority to shape the doctrine by balancing the dichotomy between governmental and proprietary functions.

¹ 2016 WL 1267697 (Tex. 2016, Apr. 1, 2016).

“[I]n the realm of sovereign immunity as it applies to ... political subdivisions—referred to as governmental immunity—th[e Supreme] Court has distinguished between those acts performed as a branch of the state and those acts performed in a proprietary, non-governmental capacity.” *Governmental acts* are those done as a branch of the state—such as when a city “exercise[s] powers conferred on [it] for purposes essentially public ... pertaining to the administration of general laws made to enforce the general policy of the state.” *Proprietary functions* “are those functions performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality.” While the distinction is not always clear, the Texas Supreme Court pointed out that definitional guidance is found – and can be relied upon in contract cases – in the Texas Tort Claims Act. Because neither the trial court nor the court of appeals determined whether the long-term lease agreement involved governmental functions, the Supreme Court remanded the case for that question to be answered.

In sum, the Court held that sovereign immunity is not a defense when (1) the city performs proprietary functions,” (2) such functions result in the commission of a tort or breach of contract, and (3) “the city acts of its own volition for its own benefit and not as a branch of the state.”

Apparently recognizing the potential liability risks if immunity is denied, *amicus* briefs were filed in support of each side of the debate.² If the court of appeals determines on remand that leasing of public property to a private party is a proprietary function, the ruling should enhance a tenant’s rights to enforce such agreements with public entities, and expand governmental exposure for monetary relief to those generally available to private litigants, including benefit of the bargain damages and recovery of attorneys’ fees.

Although the Court was asked to consider only the question of municipal immunity, the analysis likely applies to other political subdivisions of the State, like ports, counties, economic development entities, and school districts. That is to say, this holding is not limited to real estate contracts, but will likely impact economic development and other revenue creating agreements local governments have been known to enter into. Thus, to mitigate potential contractual risks, whether contracting with or on behalf of a political subdivision, the *Wasson* case may signal a change to negotiation strategies for certain government contracts. It also may signal, regardless of what the appellate court decides, a topic of interest for the 2017 Legislative Session.

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² The Texas Municipal League and the City of Dallas filed *amicus* briefs on behalf of the City of Jacksonville. Trinity East Energy filed an *amicus* brief in support of *Wasson*.