

The King Is Dead, Long Live The King¹

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The long awaited waiver of sovereign immunity decision relating to local government entities was issued by the Texas Supreme Court shortly before it took its summer break [in 2006]. As you likely know, sovereign immunity is a legal doctrine which stands for the proposition that a sovereign is immune from both liability and suit unless it clearly and unambiguously waives its immunity, even for contract claims. This legal doctrine applies to local government entities which are political subdivisions of the state, i.e. municipalities, public school and junior college districts, and other special purpose districts.

Typically immunity from liability is waived by the political subdivision when it contracts with another party. Immunity from suite however, is not waived by mere contracting alone, there must be a clearer statement of waiver by the legislature. The legislature, of course, speaks of its intent through statutes it promulgates. Most lawyers, based upon previous Texas Supreme Court case law, believed that statutes relating to political subdivisions had waived immunity from suit through language included in the statutes proclaiming that these political subdivisions could “sue and be sued” or plead and be impleaded”. The Court revisited whether these statutes were a clear and unambiguous waiver of immunity from suit, as the Court had held they were, thirty-six years ago.

So, the bad news first. The Court overturned its prior decision, preventing persons who contracted with political subdivisions, from suing for breach of those contracts. That’s right, even if those political subdivisions admitted that they breached an agreement, the Court determined there was no ability for the wronged party to sue for breach of contract. Why? The Court based its decision on the premise that the statutory language passed by the legislature relating to these political subdivisions was not a clear and unambiguous waiver of the political subdivision’s sovereign immunity against suit, that is, statutes stating that the subdivision could “sue and be sued” or “plead and be impleaded” were not now clear. With the opinion, thirty-six years of clarity became suddenly shrouded in fog. But, this murky condition did not cause the ship to totally founder on the rocks of hopelessness, the Court tossed a somewhat short bow line to prevent total capsizing, i.e. the good news.

The Court acknowledged the validity of §271.151, *et. seq.* in the Local Government Code which became effective on September 1, 2005. This statute applies to municipalities, public school and junior college districts, and other special purpose districts, but not counties or a unit of state government. The court determined that this statute clearly and unambiguously waives immunity from suit for political subdivisions, with some specific limitations specified in the statute. The Court further opined that the legislature’s intent was to make this statute retroactive to contracts which political subdivisions had entered into prior to the effective date of September 1, 2005. This means that to the extent that the statute allows recovery, immunity preventing

¹ This article first appeared in the September 2006 issue of the Newsletter of the South Texas Chapter of the Associated Builders & Contractors Association.

suit for breach of contract is waived for contracts with political subdivision, whether signed before or after September 1, 2005.

Of interest is the substantial hand Associated Builders and Contractors as well as members and the executive director of the local South Texas Chapter had in preparing and assuring passage of this statute. Many hours of "legislative time" were spent to provide this statutory safety net in the event he Supreme Court ruled as it eventually did.

The statute allows recovery under the legal theory of breach of contract for the balance due on the contract plus change orders and statutory interest, as well as increased cost to perform the work as the result of owner-caused delays or acceleration. Why then is the bow line short, sounds like all is well with the ship.

The challenge is the limitations the legislature placed on what a wronged party can not recover from political subdivisions. The wronged party can not recover under any legal theory other than breach of contract, can not recover consequential damages (such as lost profit), exemplary damages, or damages for unabsorbed home office overhead.

Of more significant import is the prohibition against the recovery of attorney's fees by the prevailing party to the litigation. The only way to recover fees is if a written contract with the political subdivision specifically allows recovery of reasonable and necessary attorneys fees to the prevailing party with specific reference in the written contract to the statute in the Local Government Code so allowing the recovery of fees. It is not likely that political subdivisions will be agreeable to such a provision as the settlement value of a valid breach of contract claim is reduced if attorney's fees are not recoverable.

So, the ship is still afloat although listing somewhat. Repair begins through working again with Texas legislators. The shortfalls in the statute will be addressed again by ABC in the 2007 Texas legislature. ABC is already at work drafting clarifying legislation and putting in "legislative time" with State Senators and Representatives to repair some of the shortcomings of the statute. Support these efforts of ABC through discussions with your local Senators and Representatives and through active participation in the legislative process.
