SOVEREIGN IMMUNITY IN TEXAS – YOU BREACH, YOU [DON'T] PAY?

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What happens when a college coach in Texas, acting as a state employee with an employment contract with a state university, is fired for no discernable reason? What happens when a college coach at a private school in Texas, acting as a mere employee of the institution with an employment contract, is fired for no apparent cause? Obviously, in today's litigious society, both will sue for breach of contract. However, only the latter plaintiff will likely be successful in his claims, as the plaintiff in the former hypothetical will run into problems of sovereign immunity.

This comment will analyze why the sovereign immunity laws in Texas, as they relate specifically to breach-of-contract disputes with the state, still seem to swim in the muddy waters created by the Texas Supreme Court, even after multiple decisions. While the court has hinted at a case-by-case approach as to when the state waives immunity, no conclusive holdings have provided the lower courts or litigants with a clear understanding of when the state has gone beyond its limits and is subject to suit.

Part I will discuss the history of sovereign immunity in the United States, through the Eleventh Amendment, and in Texas, through its judicially-created common-law birth. Part II will examine the differences between sovereign immunity as it relates to tort law and governmental immunity for breach-of-contract claims. While the Texas Legislature has adopted statutory means of when parties can sue the state when it comes to tort actions, the same cannot be said for parties in contract disputes with the state who must rely on the vague and somewhat inconsistent holdings of the Texas Supreme Court. Part III will discuss the new developments in case law on sovereign immunity in Texas, particularly two different courts of appeals that take opposing views on when the state is vulnerable to suit for breach of contract. Part IV questions what sort of enforceable "contract" is

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really made when a governmental entity enters into an agreement with a private party. Part V concludes with a plea for the Texas Supreme Court to reshape how sovereign immunity is interpreted in Texas.

I. BASIC SOVEREIGN IMMUNITY CONCEPTS

A. Overview of Federal Sovereign Immunity Laws

The Doctrine of Sovereign Immunity, which prevents citizens from suing the government unless the government consents to such suits, is a "carryover from the days of the near-absolute power of the English kings" and is based on the idea that the government cannot commit a legal wrong and therefore should be immune from civil suit.[1] "The doctrine, as it developed at common law, had its origins in the feudal system."[2] "The King's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong."[3]

While the colonists rejected this fiction when they declared their independence from the Crown, the concept of sovereign immunity still carried over to America.[4] The Supreme Court acknowledged that while "the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the states when the Constitution was drafted and ratified."[5] Despite the persuasive assurances of the Constitution's leading advocates, such as James Madison, Alexander Hamilton, and John Marshall, that this document would not strip the states of sovereign immunity,[6] just five years after the Constitution was adopted, the Supreme Court held in *Chisholm v. Georgia*[7] that Article III of the United States Constitution authorized a private citizen of another state to sue the State of Georgia without its consent.[8] The states responded with outrage and within two years ratified

[1] Marilyn Phelan, *A Synopsis of Texas and Federal Sovereign Immunity Principles: Are Recent Sovereign Immunity Decisions Protecting Wrongful Governmental Conduct?*, 42 ST. MARY'S L.J. 725, 748 (2011) (citing Humane Soc'y of the U.S. v. Clinton, 236 F.3d 1320, 1326 (Fed. Cir. 2001)).

[2] Nevada v. Hall, 440 U.S. 410, 414 (1979).

[3] *Id.* at 415.

[4] *Id.*

[5] Alden v. Maine, 527 U.S. 706, 715–16 (1999).

[6] *Id.* at 716–18.

[7] 2 U.S. 419, 434–35 (1793).

[8] *Alden*, 527 U.S. at 719.

the Eleventh Amendment,[9] which prevented a citizen of one state from bringing a suit in federal court against another state.[10] "By its terms . . . the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court . . . ."[11] "Although the Eleventh Amendment only bars actions by non-citizens against a state,"[12] in an 1890 decision, *Hans v. Louisiana*,[13] the Supreme Court ruled that "despite the limited terms of the Eleventh Amendment, a federal court could not [also] entertain a suit brought by a citizen against his own State."[14] "[S]ince *Hans*, the U.S. Supreme Court has adhered to an interpretation of the Eleventh Amendment under which private suits are barred regardless of whether the plaintiff is a citizen of the defendant state."[15] According to the Supreme Court, "the States retain an analogous constitutional immunity from private suits in their own courts."[16]

Pursuant to the enforcement provisions of Section Five of the Fourteenth Amendment, "Congress can abrogate the Eleventh Amendment without the States' consent"[17] if there is an "unequivocal expression of congressional intent"[18] to vitiate sovereign immunity.[19] However, the Supreme Court has stated that, "[i]n light of history, practice, precedent, and the structure of the Constitution . . . the States retain immunity from private suit in their own courts, [which is] an immunity beyond the congressional power to abrogate by Article I legislation."[20] The Court recognized that the "constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant

[9] *See id.* at 720–21.

[10] U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[11] *Alden*, 527 U.S. at 723.

[12] Phelan, *supra* note 1, at 758.

[13] Hans v. State of Louisiana, 134 U.S. 1 (1890).

[14] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (citing *Hans*, 134 U.S. at 15).

[15] Caren DeLuccio, *Keys to the Kingdom: The Need for Judicial Reform of Contractual Sovereign Immunity in Texas*, 46 HOUS. L. REV. 1641, 1646–47 (2010).

[16] *Alden*, 527 U.S. at 748.

[17] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).

[18] *Pennhurst*, 465 U.S. at 99.

[19] *Atascadero*, 473 U.S. at 238–40.

[20] *Alden*, 527 U.S. at 754.

right to disregard the Constitution or valid federal law."[21] However, the Court decided that the "good faith of the [s]tates . . . provides an important assurance" that the states will "honor the Constitution [and] obey the binding laws of the United States."[22]

"Courts have dealt with the problems stemming from this expansive construction by fashioning a series of exceptions to Eleventh Amendment immunity," most notably, waiver.[23] For instance, the Supreme Court has held that states may waive immunity by removing a suit from state to federal court.[24] A more difficult challenge has been that of constructive waiver. "This doctrine, in contrast to the instances in which state actors waive immunity through their actions over the course of litigation, recognizes waiver when a state engages in conduct regulated by federal law."[25] In *R.B. Parden v. Terminal Railway*, the Court held that a state constructively waives its immunity when it "leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation."[26] Three decades later, the Supreme Court overruled *Parden*, finding "the constructive-waiver experiment . . . ill conceived."[27] "The Court concluded that constructive waiver impermissibly abrogates a state's immunity without its consent."[28]

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[21] *Id.* at 754–55.

[22] *Id.* at 755.

[23] DeLuccio, *supra* note 15, at 1647 (citing Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1179–84 (2003)). Professor Siegel sets out four principle exceptions to the rule of state sovereign immunity: (1) *Ex Parte Young* – that sovereign immunity does not prevent an injured private party from suing a state officer and obtaining an order that the officer cease conduct that violates federal law; (2) that states have no immunity from suits brought by other states or by the United States; (3) that Congress can abrogate state sovereign immunity by passing a statute that expressly provides for private damage suits against states; and (4) where a state consents to suit or in some other way waives its sovereign immunity. Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1179–84 (2003).

[24] Lapides v. Bd. of Regents, 535 U.S. 613, 624 (2002) ("[R]emoval is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter . . . in a federal forum.").

[25] DeLuccio, *supra* note 15, at 1648 (citing Siegel, *supra* note 23, at 1202–03).

[26] Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184, 196 (1964), *overruled by* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999).

[27] *Fla. Prepaid*, 527 U.S. at 680.

[28] DeLuccio, *supra* note 15, at 1648 (citing *Fla. Prepaid*, 527 U.S. at 683–84).

Another exception, or fiction, the Supreme Court has created under the broad prohibition created under *Hans* is commonly traced to *Ex Parte Young*.[29] In *Ex Parte Young*, "the Court held that a federal court could enjoin the Attorney General of Minnesota from enforcing a state railroad . . . regulation statute on the theory that since the acts were illegal, they were merely acts of individuals acting without authority from the state."[30] "[T]he Court acknowledged the official should not have immunity because a sovereign could not and would not authorize its officers to violate its own laws."[31] Thus, the Court created this fiction to allow an exception to Eleventh Amendment immunity "so that a private party could bring suit against a state official in that officer's official capacity, but only for injunctive relief."[32] In *Edelman v. Jordan*, the Court tried to reformulate the *Ex Parte Young* fiction to hold that a "federal court's remedial power . . . is necessarily limited to prospective injunctive relief . . . and may not include a retroactive [monetary] award which requires the payment of funds from the state treasury."[33] "Thus, parties can only obtain injunctive relief against future conduct and generally cannot, through a suit against state officials in their official capacity, obtain monetary damages against the state."[34]

B. Overview of Sovereign Immunity in Texas

"As opposed to immunity derived from the Eleventh Amendment or the constitutions of other states,"[35] "[i]n Texas, the bar of sovereign immunity is a creature of the common law and not of any legislative enactment."[36] In *Hosner v. DeYoung*, the Texas Supreme Court first stated, without citation of authority, that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."[37]

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[29] William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1041 (1983) (citing Ex Parte Young, 209 U.S. 123 (1908)).

[30] Fletcher, *supra* note 29, at 1041.; *Young*, 209 U.S. at 159–60.

[31] Phelan, *supra* note 1, at 765 (citing *Young*, 209 U.S. at 160).

[32] Phelan, *supra* note 1, at 765 (citing *Young*, 209 U.S. at 163).

[33] 415 U.S. 651, 677 (1974).

[34] Phelan, *supra* note 1, at 765 (citing *Edelman*, 415 U.S. at 675–77).

[35] DeLuccio, *supra* note 15, at 1649 (citing ALA. CONST. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity.")).

[36] Tex. A&M Univ. v. Lawson, 87 S.W.3d 518, 520 (Tex. 2002) (citing Hosner v. DeYoung, 1 Tex. 764, 769 (1847)).

[37] *Hosner*, 1 Tex. at 769.

The Texas Supreme Court has ruled 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 State that sovereign immunity bars."[38] However, when governmental officials are sued in their official capacities, the court has opined that "the remedy may implicate immunity."[39] This is true because "the suit is, for all practical purposes, against the state."[40] A "judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents."[41] Therefore, if the private party is requesting retroactive monetary relief, the state will still keep its immunity and the party cannot recover damages.[42] Similar to federal law, non-monetary prospective relief is also allowed in Texas.[43] "This compromise between prospective and retroactive relief, while imperfect, best balances the government's immunity with the public's right to redress in cases involving *ultra vires* actions . . . ."[44]

It is also well-settled that "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages . . . as a declaratory-judgment claim."[45] "[I]f the sole purpose of such a declaration is to obtain a money judgment, immunity is not waived."[46] Nevertheless, Texas governmental officials retain immunity if sued in their individual capacities if they performed "discretionary duties" in "good faith" while "acting within the scope of their authority."[47]

"The waiver principles under federal law and pursuant to Texas case law are essentially the same, although the Texas Supreme Court currently construes waiver language much more strictly in favor of retaining sovereign immunity."[48] A statute can waive "immunity from suit, immunity

[38] Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 404 (Tex. 1997).

[39] City of El Paso v. Heinrich, 284 S.W.3d 366, 373 (Tex. 2009).

[40] *Id.*

[41] Brandon v. Holt, 469 U.S. 464, 471 (1985).

[42] *See* City of Houston v. Williams, 216 S.W.3d 827, 829 (Tex. 2007).

[43] *Heinrich*, 284 S.W.3d at 368–69.

[44] *Id.* at 375.

[45] *Id.* at 371 (quoting Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 856 (Tex. 2002)).

[46] *Id.* at 374 (citing *Williams*, 216 S.W.3d at 829).

[47] City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994).

[48] Phelan, *supra* note 1, at 779.

from liability, or both."[49] "Immunity from suit is a jurisdictional question of whether the State has expressly consented to [the] suit."[50] "On the other hand, immunity from liability determines whether the State has accepted liability even after it has consented to [the] suit."[51] "In some statutes, immunity from suit and liability are co-extensive, whereby immunity from suit is waived to the extent of liability."[52]

As it now exists in Texas, sovereign immunity "provides a double shield to the entities it protects. They are insulated from both liability and suit."[53] "That is, one can neither sue for payment nor compel payment from the State without legislative consent."[54] This protection allows the state to retain "immunity from suit even if it acknowledges liability on [the] claim, and correspondingly retain[] immunity from liability even if the legislature has authorized a particular claimant's suit."[55] "[U]nless the words of a statute controlling a particular dispute between the government and its wards clearly and unambiguously specify that one or both aspects of immunity are removed, the governmental entity continues to enjoy its judicially[-]created insulation against paying damages."[56]

"In addition to the obstacle presented by the retention of immunity from suit, the Texas Supreme Court has also restricted litigants' ability to sue a state entity under its enabling statute."[57] In *Tooke v. City of Mexia*, the Texas Supreme Court held that organic statutes including such phrases as "sue or be sued," "plead and be impleaded," or similar language do not clearly and unambiguously waive immunity from suit.[58] The court cited

[49] State v. Lueck, 290 S.W.3d 876, 880 (Tex. 2009) (citing Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 224 (Tex. 2004); Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 696–97 (Tex. 2003)).

[50] *Lueck*, 290 S.W.3d at 880 (citing *Taylor*, 106 S.W.3d at 696).

[51] *Id.*

[52] *Id.* (citing *Miranda*, 133 S.W.3d at 224 (stating that the "Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive")).

[53] Leach v. Tex. Tech Univ., 335 S.W.3d 386, 392 (Tex. App.—Amarillo 2011, pet. denied) (citing Tex. A & M Univ. v. Lawson, 87 S.W.3d 518, 520–21 (Tex. 2002); Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997)).

[54] *Leach*, 335 S.W.3d at 392 (citing *Fed. Sign*, 951 S.W.2d at 405).

[55] DeLuccio, *supra* note 15, at 1649 (citing State v. Elliot, 212 S.W. 695, 698 (Tex. Civ. App.—Galveston 1919, writ ref'd); *Taylor*, 106 S.W.3d at 696; *Fed. Sign*, 951 S.W.2d at 405).

[56] *Leach*, 335 S.W.3d at 392; *see also* City of El Paso v. Heinrich, 284 S.W.3d 366, 368–69 (Tex. 2009).

[57] DeLuccio, *supra* note 15, at 1650.

[58] Tooke v. City of Mexia, 197 S.W.3d 325, 340–42 (Tex. 2006).

many different statutes including the "sue and be sued" and "plead and be impleaded" language that have absolutely nothing to do with immunity.[59] Because the phrases often "mean only that an entity has the *capacity* to sue and be sued in its own name . . . [the] clauses do not, by themselves, waive immunity."[60] "In other words, the 'sue and be sued' language authorizes state entities to bring or consent to suit but does not alone allow private parties to sue those entities."[61]

II. DIFFERENCES BETWEEN TORT CLAIMS AND BREACH-OF-CONTRACT CLAIMS WITH REGARDS TO SOVEREIGN IMMUNITY

A. Tort Claims

In 1946, Congress enacted the Federal Tort Claims Act, which waived the "federal government's immunity from suit due to damage to or loss of property, or on account of personal injury or death caused by the negligent or wrongful act of any governmental employee while acting within the scope of the employee's office or employment."[62] "The Act applies under circumstances where the United States would be liable to the claimant if it were a private person."[63] State legislatures were reluctant to follow this example and only limited governmental immunity after judicial prompting.[64] However, the Texas Legislature acted on its own volition to enact statutory limitations on immunity.[65]

The Texas Legislature abolished sovereign immunity for some limited types of tortious governmental conduct pursuant to the Texas Tort Claims Act.[66] The exceptions to immunity result in waiver for negligence causes of action[67] in three general areas: "use of publicly owned automobiles,

[59] *Id.*

[60] *Id.* at 342 (emphasis added).

[61] DeLuccio, *supra* note 15, at 1651.

[62] Phelan, *supra* note 1, at 786 (citing 28 U.S.C. §§ 1346(b), 2674 (2006)).

[63] Phelan, *supra* note 1, at 786; *see also* FDIC v. Meyer, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. §§ 1346(b), 2674); United States v. Yellow Cab Co., 340 U.S. 543, 549 (1951).

[64] Joe. R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462, 464–67 (1971) (discussing the various state courts that launched an era of court attacks on governmental immunity, yet often encountered the legislature restoring it in the following session).

[65] *Id.* at 467.

[66] TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109 (West 2011 & Supp. 2012).

[67] *Id.* § 101.057(2) (stating that the Act does not apply to intentional torts).

premises defects, and injuries arising out of conditions or use of property."[68] The Texas Supreme Court has held that "[t]he Texas Tort Claims Act provides a *limited* waiver of sovereign immunity."[69] As mentioned earlier, the court decided that the "Tort Claims Act create[d] a unique statutory scheme in which the two immunities [from suit and from liability,] are co-extensive."[70] Sovereign immunity to suit is waived and abolished to the extent of liability created by the Act.[71] "Thus, the [governmental entity] is immune from suit unless the Tort Claims Act expressly waives immunity."[72] However, "[i]f a claimant files suit against a governmental unit under the Texas Tort Claims Act, the claimant cannot also sue the governmental official regarding the *same* subject matter."[73] Thus, the plaintiff is put to an election on whether to file suit against an employee individually or against the governmental unit.[74]

[68] Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 225 (Tex. 2004); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021:

> A governmental unit in the state is liable for:
>
> > (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
> >
> > > (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> > >
> > > (B) the employee would be personally liable to the claimant according to Texas law; and
> >
> > (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

[69] *Miranda*, 133 S.W.3d at 224 (emphasis added).

[70] *Id.*

[71] TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a).

[72] *Miranda*, 133 S.W.3d at 224–25.

[73] Phelan, *supra* note 1, at 788 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a)) (emphasis in original).

[74] Phelan, *supra* note 1, at 788 n.369 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (stating that a suit under the Texas Tort Claims Act "against any employee of a governmental unit constitutes an irrevocable election . . . [that] bars any suit or recovery . . . against the governmental unit.")).

B. Breach of Contract Claims

In 1855, "Congress enacted legislation to establish the Court of Claims, permitting citizens to sue the United States for debts of the federal government."[75] Congress later enacted the Tucker Act in 1887, "which not only waived immunity for suits arising out of express or implied contracts to which the federal government was a party but also extended the jurisdiction of the Court of Claims to constitutional claims and claims for damages 'in cases not sounding in tort.'"[76] "Today, similar provisions remain in force for the United States Court of Federal Claims."[77] "Some courts have noted that there is no reason why the government should be treated differently from its citizens" concerning debt collection.[78]

"While the Texas Torts Claims Act . . . operates to waive sovereign immunity in certain tort cases,[79] the legislation does not affect contractual sovereign immunity."[80] In contrast to federal immunity law, the Texas Supreme Court has ruled that the state maintains sovereign immunity even with respect to its contracts.[81] When the state enters into contracts for its own benefit with private citizens, the state waives immunity from liability.[82] While at first glance this might seem more favorable than suing the state in a tort action,[83] the second layer of protection, immunity from suit, survives to protect the state until the legislature consents.[84]

1. *Federal Sign v. Texas Southern University* (1997)

In 1997, the Texas Supreme Court reaffirmed its stance on sovereign immunity with respect to private contractors while at the same time providing even more confusion in this area of the law with the inclusion of

[75] Phelan, *supra* note 1, at 782–83.

[76] *Id.* at 783 (citing Tucker Act, ch. 359, 24 Stat. 505 (1887) (repealed 1948)).

[77] Phelan, *supra* note 1, at 783 (citing 28 U.S.C. § 1491(a)(1) (2006)).

[78] Phelan, *supra* note 1, at 783 (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 209 (1983)).

[79] *See supra* Part II.A.

[80] DeLuccio, *supra* note 15, at 1651 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (West 2011)).

[81] *See* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 412 (Tex. 1997).

[82] *Id.* at 405–06.

[83] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 107.002 (West 2011) (stating that even if the state grants permission to sue, that grant does not waive to any extent immunity from liability).

[84] *Fed. Sign*, 951 S.W.2d at 405.

a single footnote.[85] *Federal Sign v. Texas Southern University* involved the question as to whether Texas Southern University (TSU) relinquished its immunity from suit by merely entering into a contract for goods and services with Federal Sign.[86] TSU entered into an agreement with Federal Sign to construct scoreboards in the University's athletic facility.[87] Federal Sign began building the scoreboards, but before anything was delivered to the campus, TSU terminated the agreement and contracted with a competing vendor.[88] Federal Sign sued for breach of contract rather than seeking legislative consent to sue.[89]

The court held that while the state may be liable on its contracts as if it were a private person, it only waives immunity from liability and not immunity from suit.[90] Thus, "a private citizen must have legislative consent to sue the State on a breach of contract claim."[91] This strong language seemed to definitively establish that the mere act of contracting does not waive the state's immunity from suit.[92] Although the Texas Supreme Court seemed to expressly overrule any case holding to the contrary, the court included a curious footnote suggesting that a state entity could waive immunity from suit by its conduct alone.[93] With this footnote, the court seemed to leave open the possibility that "[t]here may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts."[94]

Justice Hecht, along with the Chief Justice and two other justices, wrote a concurrence to "make plain that the Court's opinion is limited, despite

[85] *See id.* at 408 n.1.

[86] *Id.* at 404.

[87] *Id.* at 403.

[88] *Id.*

[89] *Id.* at 403–04 (stating that Federal Sign asserted it did not need legislative consent to sue TSU under the facts of the case).

[90] *Id.* at 408.

[91] *Id.*

[92] *See id.* at 412–13 (Hecht, J., concurring).

[93] *Id.* at 408 n.1 ("We hasten to observe that neither this case nor the ones on which it relies should be read too broadly. We do not attempt to decide this issue in any other circumstances other than the one before us today. There may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts."); *id.* at 412–13 (Hecht, J., concurring).

[94] *Id.* at 408 n.1.

some occasional broad language."[95] He commented on the differences between the particular facts of *Federal Sign* and potential hypothetical cases that might arise in the future.[96] He first distinguished a contract for goods and services, as found in the *Federal Sign* case, from other types of contracts that might call into question the state's immunity from suit.[97] Justice Hecht then pointed out that "at the time of TSU's breach . . . Federal Sign had not performed."[98] He questioned whether the results would be different if performance had been made by Federal Sign and benefits accepted by TSU.[99] By elaborating on the potential meaning behind the majority's footnote, Justice Hecht threw more doubt on an already unstable area of the law that is waiver-by-conduct.[100]

2. The Legislature Responds with Alternative Dispute Resolution Measures

After the court issued the *Federal Sign* opinion, the Legislature established mediation and administrative procedures to resolve certain breach-of-contract disputes against the state.[101] While retaining sovereign immunity from suit in these claims, Chapter 2260 of the Texas Government Code provides an administrative scheme to all written contracts for the sale of goods, services, or construction.[102] "Intended to promote mediation and settlement,"[103] this statute allows the contracting party to give written notice to the governmental agency if that private party believes the state has

[95] *Id.* at 412 (Hecht, J., concurring) ("The immunity issue in this case is a narrow one. It is this: should a court hold that the State, merely by entering into a contract for goods and services, waives immunity from suit for breach of the contract before the other party has tendered performance?").

[96] *Id.* at 412–13.

[97] *Id.* (specifically pointing out that "[w]e do not address whether the State is immune from suit on debt obligations, such as bonds.").

[98] *Id.*

[99] *Id.*

[100] *See id.* In fact, Justice Enoch criticized Justice Hecht's refusal to adopt a bright-line rule against waiver-by-conduct in his dissent in *Texas Natural Resources Conservation Commission v. IT-Davy*. 74 S.W.3d 849, 863 (Tex. 2002) (Enoch, J., dissenting). Justice Enoch declares that Justice Hecht is only offering "false hope" without identifying what waiver-by-conduct may look like. *Id.* "This just encourages endless, fruitless litigation as each new contracting party, thinking it has discovered the key, seeks to open the courthouse door." *Id.*

[101] *See* TEX. GOV'T CODE ANN. §§ 2260.001–.108 (West 2008).

[102] *Id.* § 2260.001(1).

[103] Gen. Servs. Comm'n v. Little-Tex. Insulation Co., 39 S.W.3d 591, 595 (Tex. 2001).

breached a written contract.[104] After the agency's chief administrative officer has attempted to resolve the claim,[105] if still unsatisfied, the contracting party may request a contested-case hearing before the State Office of Administrative Hearings.[106] However, this merely provides an administrative law judge to hear the claim and not a district court judge.[107] If the administrative judge determines that the party has a valid claim for more than $250,000, the judge issues a written report recommending the Legislature either appropriate funds or deny consent to sue.[108] The Legislature may accept or reject this recommendation.[109]

In *General Services Commission v. Little-Tex Insulation Company, Inc.*, the Texas Supreme Court later determined whether this administrative scheme applies to waiver-by-conduct cases.[110] The court decided to defer to the Legislature once again and "refuse[d] to intercede . . . by judicially adopting a waiver-by-conduct doctrine."[111] The court rejected the premise that the "waiver-by-conduct doctrine can exist in the face of the administrative procedure that Chapter 2260 establishes."[112] The court concluded that "there is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature."[113]

III. NEW DEVELOPMENTS AND RECENT CASES ON SOVEREIGN IMMUNITY IN TEXAS

A. Texas Southern University v. State Street Bank & Trust Company *(2007)*

The dispute in *Texas Southern University v. State Street Bank & Trust Company* arose from an alleged contract between Viron Corporation and

[104] *See* TEX. GOV'T CODE ANN. § 2260.051(b).

[105] *Id.* § 2260.052(a).

[106] *Id.* §§ 2260.102(a), (c).

[107] *Id.* §§ 2260.102(c).

[108] *Id.* § 2260.1055.

[109] Gen. Servs. Comm'n v. Little-Tex. Insulation Co., 39 S.W.3d 591, 596 (Tex. 2001); *see generally* TEX. CIV. PRAC. & REM. CODE ANN. § 107.002 (West 2011).

[110] *Little-Tex*, 39 S.W.3d at 596.

[111] *Id.* at 597.

[112] *Id.*

[113] *Id.*

Texas Southern University (TSU).[114] Viron claimed that TSU's immunity from suit was waived when it accepted full contractual benefits, that being millions of dollars worth of equipment under the contract.[115] Viron assigned its right to receive payment to State Street Bank, but the University refused to pay the contract price.[116] At the time of the court's opinion, TSU had not made any of the payments due under the contract, yet it still retained all of the equipment on its campus.[117] The First Court of Appeals recognized a "waiver-by-conduct" exception to sovereign immunity and held that the University's conduct resulted in the waiver of its immunity.[118]

The basis for the court's holding seems to stem from the many Texas Supreme Court cases that neither completely rule out a waiver-by-conduct exception nor totally adopt instances where this exception would be appropriate.[119] The court of appeals stated that "[l]egislative control over waiving immunity from suit does not mean that the State can freely breach contracts with private parties or that the State can use sovereign immunity as a shield to avoid paying for benefits the State accepts under a contract."[120] The First Court of Appeals looked to the last Texas Supreme Court case, *Catalina Development, Inc. v. County of El Paso*, that discussed waiver-by-conduct.[121] The court of appeals determined that "[w]hile repeatedly stating that the State may waive its immunity by conduct, the [Texas Supreme Court] held 'the equitable basis for such a waiver simply does not exist under this set of facts.'"[122] The court of appeals also noted that the Texas Supreme Court "distinguished the facts in *Catalina* from those in *Federal Sign*."[123] The court of appeals interpreted this to "clearly establish[] that the [Texas Supreme Court] will evaluate the waiver-by-

[114] 212 S.W.3d 893, 897 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

[115] *Id.* at 904.

[116] *Id.*

[117] *Id.* at 899.

[118] *Id.* at 908.

[119] *See id.* at 905–07 (discussing Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 403–13 (Tex. 1997); Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594–99 (Tex. 2001); Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 851–62 (Tex. 2002); Travis Cnty. v. Pelzel & Assocs., Inc., 77 S.W.3d 246, 247–52 (Tex. 2002); Tex. A & M Univ. v. Lawson, 87 S.W.3d 518, 519–23 (Tex. 2002); Catalina Dev., Inc. v. Cnty. of El Paso, 121 S.W.3d 704, 704–06 (Tex. 2003)).

[120] *Id.* at 901 (citing *IT-Davy*, 74 S.W.3d at 854).

[121] *Id.* at 907 (citing *Catalina Dev.*, 121 S.W.3d at 704).

[122] *Id.* (quoting *Catalina Dev.*, 121 S.W.3d at 706).

[123] *Id.*

conduct exception to sovereign immunity on the facts of each case, not as a categorical matter or bright-line rule."[124] In fact, Justice Enoch's dissenting opinion in *Catalina* declares that "the Court misleads the public by refusing to disavow its acknowledgment that a governmental unit can waive its immunity by conduct."[125]

The court of appeals in *State Street* attempted to support its argument for this exception by claiming the instant case was faced with "extraordinary factual circumstances."[126] Apparently, the court of appeals is referring to the many previous Texas Supreme Court cases where the given set of facts demonstrated "nothing more than an ordinary contract dispute."[127] In *State Street*, the court of appeals seemed concerned when the "government officials lured [the private party into the agreement] with false promises that the contract would be valid and enforceable, then disclaimed any obligation on the contract by taking the position that the contract was not valid after all."[128] Does this "luring" of a governmental entity represent one of the circumstances envisioned by Justice Hecht as a potential waiver of immunity by the state through its conduct?[129] As to *State Street*'s facts specifically, we do not know the answer, as the Texas Supreme Court, the only body that could enlighten us as to whether the First Court of Appeals got it right, denied TSU's petition for review.

B. Leach v. Texas Tech University *(2011)*

Mike Leach, a highly successful former college football coach, brought suit against Texas Tech University (a state institution) and University officials for breach of contract, violation of a whistleblower statute, and violation of the takings clause.[130] "The compensation sought by and

[124] *Id.*

[125] Catalina Dev., Inc. v. Cnty. of El Paso, 121 S.W.3d 704, 704–06 (Tex. 2003) (Enoch, J., dissenting).

[126] *State St.*, 212 S.W.3d at 907.

[127] *See* Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 861 (Tex. 2002) (Hecht, J., concurring); *see also Catalina Dev.*, 121 S.W.3d at 706; Travis Cnty. v. Pelzel & Assocs., Inc., 77 S.W.3d 246, 252 (Tex. 2002); Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 598 (Tex. 2001); Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 408 n.1 (Tex. 1997).

[128] *State St.*, 212 S.W.3d at 908.

[129] *See supra*, Part II.B.1.

[130] Leach v. Tex. Tech Univ., 335 S.W.3d 386, 395, 398 (Tex. App.—Amarillo 2011, pet. denied).

allegedly due Leach is that which the University contracted to pay him in return for his performance of services as the head football coach."[131] "The University purport[ed] to withhold that compensation because Leach failed to abide by the terms of their accord."[132] The district court dismissed all claims except breach of contract.[133]

In reviewing Leach's breach of contract claim, the Amarillo Court of Appeals touched upon the double-shield concept of sovereign immunity in Texas. In Texas, when the state executes a contract, it loses its immunity from *liability*.[134] "Yet, it remains protected from being forced into litigation via *suit*."[135] "So, while it must perform . . . it cannot be sued for damages without its permission if it opts to forego performance."[136] The court of appeals found that the Texas statute Leach relied on did not unambiguously give consent to sue the University in a state court.[137] The statute underlying Leach's claim of waiver was § 109.001(c) of the Texas Education Code.[138] Leach claimed that the statute purported to "vest the University's regents with the power to do most anything they want, including the power to waive immunity."[139] However, the court "reject[ed] the notion that by enacting § 109.001(c) the legislature unambiguously permitted the University to waive its immunity."[140]

The Amarillo Court of Appeals declined to follow the "waiver-by-conduct" approach adopted by the First Court of Appeals in *State Street*, however, declaring that it "contradicts the Supreme Court's statements in *Little-Tex*, *IT-Davy*, and *E.E. Lowrey Realty, Ltd.* about the only avenue for redress being through the Texas Legislature."[141] The court stated:

> If the highest civil court in Texas truly means what it said, then the holding in *State Street* simply is wrong. If, on the other hand, there may still be instances akin to those in

[131] *Id.* at 398.

[132] *Id.*

[133] *Id.* at 390.

[134] *Id.* at 392 (citing Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405–06 (Tex. 1999)) (emphasis added).

[135] *Id.* (emphasis added).

[136] *Id.*

[137] *Id.* at 394.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 395.

[141] *Id.* at 401.

> *State Street* warranting the application of waiver by conduct, then the Supreme Court's utterances about the legislature having the exclusive authority to waive sovereign immunity are inaccurate.[142]

In discussing the University's purported taking without compensation of Leach's property and his termination without due process, the court references in a footnote that Leach was restricting his due process claim to rights emanating from the Texas Constitution.[143] However, the Amarillo Court of Appeals seems to be inviting an argument regarding this taking-without-due-process claim under the United States Constitution's Fifth and Fourteenth Amendments.[144] This raises an interesting question as to whether the outcome would be any different if Leach had pled any federal constitutional claims along with his state constitutional rights. As mentioned earlier, Texas has been said to have a stricter policy with sovereign immunity than the federal government.[145] Would the perceived broader construction of condemnation language have the same effect? Could Leach have received a different outcome had he pled a due process violation of the United States Constitution?

The court of appeals disregards these issues and focuses on the Texas Supreme Court's decisions with regards to takings claims. In *Little-Tex*, the Texas Supreme Court stated that to establish a takings claim, the complainant "must prove (1) the State intentionally performed certain acts, (2) that resulted in a 'taking' of property, (3) for public use."[146] The Amarillo Court of Appeals notes, however, that "[t]hese elements are not satisfied when the State withholds property in a contractual dispute."[147] "[T]he party demanding compensation after performing his contractual duty to provide goods or services actually provided those goods or services *voluntarily* as opposed to being forced to do so via the State's power of eminent domain."[148] Accordingly:

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[142] *Id.*

[143] *Id.* at 398 n.6.

[144] *See id.*

[145] *See* Phelan, *supra* note 1, at 779.

[146] Gen. Servs. Comm'n v. Little-Tex. Insulation Co., 39 S.W.3d 591, 598 (Tex. 2001).

[147] *Leach*, 335 S.W.3d at 398; *see also Little-Tex*, 39 S.W.3d at 598–99 (finding that the state does not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute).

[148] *Leach*, 335 S.W.3d at 398 (emphasis added) (citing *Little-Tex*, 39 S.W.3d at 599; State v. Steck Co., 236 S.W.2d 866, 869 (Tex. Civ. App.—Austin 1951, writ ref'd)).

> So, when the State withholds property under color of a contractual right, such as when it believes the contract was not properly performed, it is not acting as a sovereign invoking powers of eminent domain, but rather as a private party to a contract invoking rights expressed or implicit in the contract.[149]

However, this explanation seems to disagree with the court of appeal's previous statement describing how the state's entities enjoy sovereign immunity insulation, in that one can neither sue for payment nor compel payment from the state without legislative consent. The state obviously gets to have its cake and eat it too. By not being subject to a takings claim because the state is not acting as a sovereign, but rather a private party, the Texas courts allow the state to escape this cause of action; however, they do not hold the state, as a private party, to the fire for breaching its contracts and accepting goods without paying for them.[150] Realizing this contradiction in a footnote, the court of appeals punts: "No doubt there is a reasonable explanation for the apparent inconsistency, and the Supreme Court is in the best position to explain it." [151] The court dismisses the issue as "nothing other than a contractual dispute described in *Little-Tex* and which falls outside the takings clause."[152] However, the court "in the best position to explain" this inconsistency denied Leach's petition for review.[153]

IV. IS THERE EVER REALLY A "CONTRACT" WHEN THE STATE ENTERS INTO AN AGREEMENT WITH A PRIVATE PARTY?

If the state can breach any "contract" with impunity under the protection of sovereign immunity, what *consideration* is the state actually providing? In contract law, there must be consideration for there to be a legal contract.[154] In other words, if there is no consideration, there is no contract.

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[149] *Id.* (citation omitted).

[150] *Id.* at 398 n.7.

[151] *Id.*

[152] *Id.* at 398.

[153] *Id.*at 398 n.7.

[154] *See* Tex. Gas Utils. Co. v. Barrett, 460 S.W.2d 409, 412 (Tex. 1970); *see also* 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.29(1995) ("[I]n the case of bilateral contracts, [that is] promise exchanged for promise . . . both promises become binding simultaneously at the moment of acceptance of the offer. If, at that moment, something

Taking this a step further, if there is no contract, then neither party to the agreement can enforce the terms.[155] Would this mean that a private party can breach any "contract" with the state and later claim there was no contract to begin with since the state provided no consideration? This would essentially be flipping the sovereign immunity scenario around on the state if the private individual or business was the breaching party and the state wished to enforce the contract.

The Texas Supreme Court also touched upon this argument in *Federal Sign* by distinguishing between the concepts of mutuality of obligation and mutuality of remedy.[156] According to the majority, "[a] contract that lacks consideration, lacks mutuality of obligation and is unenforceable."[157] However, "[m]utuality of remedy is the right of both parties to a contract to obtain *specific performance*."[158] "Unlike a contract lacking mutuality of obligation, a contract lacking mutuality of remedy is not illusory and void."[159] However, as most contract disputes with the state will likely revolve around money damages, and not any type of specific performance, the lack of this type of mutuality seems irrelevant.

Recognizing that "[m]utuality of remedy [did] not apply [in the *Federal Sign* case] because specific performance [was] not an issue," the majority still found that there was valid consideration to support a binding contract between the private party and the University.[160] "That a private citizen must get permission to sue the State for breach of contract has never rendered a State contract illusory in Texas."[161] In addition to rebutting this argument

prevents one of the promises from being legally enforceable, it is frequently assumed that the return promise is void for lack of consideration.").

[155] *See* 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 7:2 (4th ed. 2008) ("One of the underlying bases of enforcement is the promisee's reliance. . . . [Another] underlying basis for the enforcement of promises is the notion of a bargained-for exchange, and the meaning of consideration here is the idea that consideration is the exchange or price requested and received by the promisor for its promise."); *see also* 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 6.1 (1995) (describing how consideration is necessary for enforcement).

[156] *See* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 408–09 (Tex. 1997).

[157] *Id.* at 409 (citing Tex. Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 1105 (Tex. 1923)).

[158] *Id.* (emphasis added) (citing Adams v. Abbott, 254 S.W.2d 78, 80 (Tex. 1952)).

[159] *Id.*

[160] *Id.*

[161] *Id.* (citing W.D. Haden Co. v. Dodgen, 308 S.W.2d 838, 842 (Tex. 1958)); *see also* Ferguson v. Johnson, 57 S.W.2d 372, 376 (Tex. Civ. App.—Austin 1933, writ dism'd) ("The

by *Federal Sign*, the court also found that "Federal Sign actually ha[d] a remedy against [the University]—it may sue and recover its damages, *if it first obtains legislative permission to do so*."[162] The last part of that sentence is a rather big caveat that seems to leave private parties stranded without true and practical recourse.

Joined by two other dissenting justices in *Federal Sign*, Justice Enoch noticed this problem too, describing the majority's opinion as a "catch-22," in that "the State can *be* liable for its breach of contract, but it cannot be *held* liable."[163] The dissent realized this holding called "into question the enforceability of State contracts."[164] According to Justice Enoch, the court should make its waiver-of-immunity determination following a logical approach: "the Legislature, by authorizing TSU to enter into contracts, intended the contracts to be enforceable and waived *both* the State's immunity from liability and immunity from suit for breach of contract claims."[165]

However, a plaintiff relying on the waiver-by-conduct theory "may clear the sovereign immunity and legislative permission hurdles, but still must confront legislative appropriation."[166] In his concurrence in *Federal Sign*, Justice Hecht describes how abrogating sovereign immunity will not necessarily result in payment of the judgment by the state.[167] "[E]ven if the Court were to abolish governmental immunity from contract suits, successful plaintiffs still could not be paid without legislative appropriation."[168] Articulating an example of an appropriation bill that limits the satisfaction of judgments,[169] Justice Hecht explains that dancing

impotence of private individuals to enforce . . . their contractual rights against the state . . . without its consent . . . does not affect the binding force of State obligations . . . .").

[162] *Id.* (emphasis added).

[163] *Id.* at 420 (Enoch, J., dissenting).

[164] *Id.* at 416.

[165] *Id.* at 418.

[166] L. Katherine Cunningham & Tara D. Pearce, *Contracting with the State: The Daring Five—The Achilles' Heel of Sovereign Immunity?*, 31 ST. MARY'S L.J. 255, 294 (1999).

[167] *See Fed. Sign*, 951 S.W.2d at 414.

[168] *Id.*

[169] Act of May 25, 1995, 74th Leg., R.S., ch. 1063, art. IX, § 56, 1995 Tex. Gen. Laws 5242, 6097.

around the sovereign immunity barrier offers the private contractor no real redress, as the Legislature's consent is still required to appropriate funds.[170]

Questioning Justice Enoch's dissenting arguments on the enforceability of the contract, Justice Hecht observes that "[t]here is no reason why requiring legislative consent to sue makes a contract unenforceable but requiring legislative consent to collect does not."[171] So does it really matter if the judiciary abrogates sovereign immunity from suit if the Legislature will always control appropriations and may not grant money to satisfy the judgment?[172] "By imploring the judiciary instead of the Legislature, a plaintiff may lose all recourse to enforce the contract."[173] As Justice Hecht noted, "Federal Sign lost its recourse to enforce its contract when it *refused* to petition the Legislature for consent to sue . . . ."[174] This puts private contractors who have been burned by the state in a tough predicament: do they attempt to try their hand at a waiver-by-conduct approach to sovereign immunity to circumvent the Legislature,[175] or do they take their chances with the administrative procedures[176] and legislative-permission statutes?[177]

V. CONCLUSION

As the First Court of Appeals noted in its support of the waiver-by-conduct approach as an exception to sovereign immunity, the Texas Supreme Court has not been completely clear with its holdings, many of which have been mere pluralities.[178] The concurring opinion in *Federal*

[170] *Fed. Sign*, 951 S.W.2d at 414; *see also* Cunningham, *supra* note 166, at 293 ("Despite the apparent loophole developed by the judiciary, the Legislature still may uphold sovereign immunity by refusing to recompense the plaintiff or outlawing such suits.").

[171] *Fed. Sign*, 951 S.W.2d at 415.

[172] *Compare id.* at 418 (Enoch, J., dissenting) (stating "whether the Legislature ultimately appropriates the funds necessary to satisfy a judgment is *not relevant* to the issue of whether the Legislature has waived sovereign immunity") (emphasis added), *with id.* at 415 (Hecht, J., concurring) (explaining how abolishing sovereign immunity is pointless and criticizing Justice Enoch for the lack of an explanation as to how this point is "not relevant").

[173] Cunningham, *supra* note 166, at 295.

[174] *Fed. Sign*, 951 S.W.2d at 416.

[175] *See State St.*, 212 S.W.3d at 908; *see also Fed. Sign*, 951 S.W.2d at 418 (Enoch, J., dissenting) (noting that only six percent of the requests to sue had been granted in an eight-year span (citing Tex. H. Comm. on Civ. Prac., Interim Report 75th Leg., at 9 (1996))).

[176] *See* TEX. GOV'T CODE ANN. §§ 2260.001–.108.

[177] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 107.001–.005.

[178] *See State St. Bank*, 212 S.W.3d at 905–07 (discussing *Fed. Sign*, 951 S.W.2d at 403–13); *Fed. Sign*, 951 S.W.2d at 415; *see also* Little-Tex Insulation Co., 39 S.W.3d 591, 594–99 (Tex.

Sign commented that the defendant University terminated its agreement with Federal Sign before the plaintiff had delivered anything to the University.[179] This seemed to open the door to the idea that the state would not have been immune from suit and liability had Federal Sign complied fully with the contract and the University then refused to pay the agreed price.[180] However, in the years following this seminal case, the Texas Supreme Court has not fully answered whether the sovereign is immune in all circumstances, no matter what.[181]

Texas now has a statute that provides for dispute resolution and negotiation of claims against the state for breach of contract, [182] but this provision only applies to contracts with independent contractors, not to contracts between the state and its employees.[183] Therefore, the Mike Leach's of the world are still stuck between a rock and a hard place. One might wonder if the Texas Supreme Court justices, as officers of the state,[184] would sing a different tune if their paychecks,[185] or the paychecks of their administrative staff, as employees of the State,[186] stopped being deposited in their accounts, only to have to turn to the Legislature for consent to sue the sovereign.[187]

There may need to be a change in the law regarding the state's sovereign immunity powers, as this could have drastic legal consequences on every "contract" entered into between the state and a private party. "The

2001); Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 851–62 (Tex. 2002); Travis Cnty. v. Pelzel & Assocs., 77 S.W.3d 246, 247–52 (Tex. 2002); Tex. A & M Univ. v. Lawson, 87 S.W.3d 518, 519–23 (Tex. 2002); Catalina Dev., Inc. v. Cnty. of El Paso, 121 S.W.3d 704, 704–06 (Tex. 2003)).

[179] *Fed. Sign*, 951 S.W.2d at 412 (Hecht, J., concurring).

[180] *See id.*

[181] *See, e.g.*, *IT-Davy*, 74 S.W.3d at 860 (Hecht, J., concurring); *Catalina Dev.*, 121 S.W.3d at 706; *Lawson*, 87 S.W.3d at 521; *Little-Tex*, 39 S.W.3d at 594–600.

[182] TEX. GOV'T CODE ANN. §§ 2260.001–.108.

[183] *See id.* § 2260.001(2).

[184] *Id.* § 572.002(12).

[185] *Id.* §§ 659.011–.012.

[186] *Id.* § 572.002(11).

[187] It should be noted that Section 659.012 of the Texas Government Code lays out the judicial salaries for judges at every level. *Id.* § 659.012. This statute would likely be the "legislative consent" necessary to hurdle suing the state for lack of compensation in this hypothetical. The same cannot be said, however, for any of the administrative staff of these state judges. Those mere employees would be in the same difficult position as a college coach at a state university, a teacher at a public school, or a nurse at a state hospital.

continued adherence of both the Texas Supreme Court and the legislature to [retain] sovereign immunity in breach of contract actions leaves aggrieved contractors with few options."[188] As Justice Enoch noted in one of his many dissents to the issue:[189]

> [I]t is no answer to say there is no taking because a private party consents to the delivery of goods or services by voluntarily contracting with a state entity. [The private party] only built a multi-million dollar building for [the governmental entity] because it expected to be paid under its contract. It defies logic to contend that [the private party] continues to consent to [the governmental entity] retaining the benefits of its labor if [the State] refuses to pay and [the private party] cannot compel the [State] to honor its contract.

The Texas Supreme Court reminds us that they still have the power to transform how this principle is interpreted. "Recognizing that sovereign immunity is a common-law doctrine, we have not foreclosed the possibility that the judiciary may modify or abrogate such immunity by modifying the common law."[190] Maybe now is the time to make these revisions using a fair and logical approach.

[188] DeLuccio, *supra* note 15, at 1651.

[189] *Little-Tex*, 39 S.W.3d at 603 (Enoch, J., dissenting).

[190] Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 375 (Tex. 2006).