CATCH-2260: SUITS AGAINST THE STATE UNDER GOVERNMENT CODE CHAPTER 2260

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CHAPTER 10

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PROFESSIONAL BACKGROUND:

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Opened and managed Austin office; directed appellate and trial-support matters of commercial and construction clients; successfully disqualified and sanctioned AmLaw 100 law firm from federal dispute involving Fortune 500 client

Associate: **GODWIN PAPPAS RONQUILLO, L.L.P. / KANE RUSSELL COLEMAN LOGAN, P.C.**, Commercial litigation & appellate practice groups; Dallas/Houston, 2006-09

Recruited in 2009 to the former Houston office of Godwin Pappas Ronquillo, to serve as one of two appellate lawyers for an eighty-lawyer firm. Beginning in 2006 at Godwin Pappas Langley Ronquillo, pursued appeals and original proceedings at the Texas Supreme Court, Texas intermediate courts of appeals, and Fifth Circuit Court of Appeals; drafted dispositive trial pleadings in both state and federal courts; represented Fortune 500 clients; 3rd-highest grossing associate in the firm during FY 2007 (2350 hours; >$500,000 in collections)

Associate: **WINSTEAD SECHREST MINICK P.C.**; Appellate and environmental practice groups; Austin, 2004-05

Pursued appeals and original proceedings at the Texas Supreme Court & Texas intermediate courts of appeals; obtained water and wastewater permits; advised municipal utility districts regarding local law issues; drafted organic legislation for special districts

Briefing Attorney: **SUPREME COURT OF TEXAS**; Hon. Nathan L. Hecht, Senior Associate Justice; Austin, 2003-04

Assisted in the preparation of majority, concurring, dissenting, and per curiam opinions in both causes and original proceedings; featured in the Court's 2004-05 clerkship brochure

EDUCATION:

Texas Tech University School of Law; J.D. (2003)

Editor in Chief: *Texas Tech Administrative Law Journal*
CALI Award Recipient: Public Land Law (awarded for highest grade earned in course)

Texas Tech University Jerry S. Rawls College of Business Administration; M.B.A. (2003)

Texas Tech University College of Agricultural Sciences and Natural Resources; B.S. (1999)
Wildlife and Fisheries Management, *Summa Cum Laude*

Highest Ranking Graduate: College of Agricultural Sciences and Natural Resources
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President: Texas Tech University Chapter, The Wildlife Society

LICENSES & CERTIFICATIONS:

Licenses:

Texas (Nov. 2003); U.S. Supreme Court (May 2010); Fifth Circuit Court of Appeals (May 2007); U.S. District Court for the Western District of Texas (Jan. 2011); U.S. District Court for the Eastern District of Texas (Jan. 2011); U.S. District Court for the Southern District of Texas (Mar. 2009); U.S. District Court for the Northern District of Texas (Feb. 2007)

Certifications:

Associate Wildlife Biologist (Dec. 1999-2009)

PROFESSIONAL RECOGNITION:

Supreme Court of Texas

Cited in *Edwards Aquifer Auth. v. Day*, No. 08-0964, 55 Tex. Sup. Ct. J. 343, 343 n.47 (Tex. 2012)

Texas Rising Star (appellate practice)

Texas Monthly, *Law & Politics* & Thomson Reuters (2009, 2010, 2011, 2012)

Martindale-Hubbell

AV rated (2012)

College of the State Bar

Member (2005-present)

Superb Rating (10 out of 10)

Avvo (2009-12)

2010-11 State Bar of Texas Annual Report

Featured: *Sections* (forthcoming)

Texas Bar Journal

Featured: *Weblinks*, 71 TEX. B.J. 364 (May 2008) (alongside Mani Walia)

Clerkship Notification Blog (http://lawschoolclerkship.blogspot.com/)

Editor in Chief (2008-09, 2009-10, and 2010-11 clerkship seasons) (original clerkship information clearinghouse annually generating half a million page views; named to the *ABA Journal*'s 2008 Blawg 100 List)

Texas Appellate Law Blog

Featured: Dylan Drummond, *Texas Supreme Court Orders & Opinion 5/11/07*, TEXAS APPELLATE LAW BLOG (May 11, 2007), http://j.mp/uabxo2 (discussing the Texas Supreme Court's opinion in *F.F.P. Operating Partners, L.P. v. Dueñez*, 237 S.W.3d 680 (Tex. 2007))

***Tex Parte Blog* (online blog of the *Texas Lawyer*)**

Featured: Dylan Drummond, *Can-do record at CCA*, TEX PARTE BLOG (Nov. 18, 2008), http://j.mp/ukcbGe (discussing the bitter canned-food drive rivalry between the clerkship ranks of the Texas Supreme Court and Court of Criminal Appeals)

PROFESSIONAL LEADERSHIP:

State Bar of Texas

Standing Committee on Pattern Jury Charges—Business • Consumer • Insurance • Employment

Member (2011-14); Assisted in drafting the "Preservation of Charge Error" comment included in all 2012 volumes; Co-Chair, Misappropriation of Trade Secrets Charge Drafting Subcommittee

Appellate Section

Appellate Advocate, Co-Editor (2009-12; Vols. 22-24); Assistant Editor (2006-09; Vols. 19-21)
Pro Bono Pilot Program; Represented two clients in the Dallas and Fort Worth Courts of Appeals

Administrative & Public Law Section

Secretary (2007-08); Treasurer (2006-07); Advanced Administrative Law Course Planning Committee (2012, 2004-05); Advanced Texas Administrative Law Seminar Planning Committee (2006-10); Mack Kidd Administrative Law Moot Court Competition—Bench Brief Author (2006); Bench Brief Judge (2006-08)

Texas Supreme Court Historical Society

Journal of the Texas Supreme Court Historical Society

Deputy Executive Editor (2011 to present)

PUBLICATIONS AND PRESENTATIONS:

The Appellate Advocate

Author: Dylan O. Drummond & Lisa Bowlin Hobbs, *In Defense of Confidential Votes on Petitions for Review at the Texas Supreme Court*, 23 APP. ADVOC. 34 (Fall 2010)

Author: Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89 (Winter 2007), *cited in Gonzalez v. Texas*, No. 13-07-00270-CR, 2009 Tex. App. LEXIS 5860 at *12 n.2 (Tex. App.—Corpus Christi July 30, 2009, no pet.) (mem. op.); *Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 239 n.8 (Tex. App.—Corpus Christi 2008, no pet.); Andrew T. Solomon, *Practitioners Beware: Under Amended Trap 47, "Unpublished" Memorandum Opinions in Civil Cases are Binding and Research on Westlaw and Lexis is a Necessity*, 40 ST. MARY'S L.J. 693, 702 n.34 (2009)

Author: Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006, at 8 (recommended by former Texas Supreme Court Chief Justice Joe Greenhill to the Texas Supreme Court Historical Society), *cited in* Supreme Court of Texas Blog, On Dissents from the Denial of Review, http://www.scotxblog.com/practice-notes/on-dissents-from-the-denial-of-review/, at n.2 (last visited July 1, 2009)

The Houston Lawyer

Lead Author: Dylan O. Drummond, *Bridging the Gulf Between the Texas and Federal Arbitration Acts: S.B. 1650 Ends Simultaneous Mandamus and Interlocutory Appellate Proceedings in Texas*, 47 HOUSTON LAW. 44 (Sept./Oct. 2009)

Lead Author: Dylan O. Drummond, *What Constitutes the Last Word after Chemical Lime: the Mandate or the Judgment?*, 47 HOUSTON LAW. 56 (Sept./Oct. 2009)

Journal of the Texas Supreme Court Historical Society

Author: Dylan O. Drummond, *South Western Reporter Factoids*, J. TEX. SUP. CT. HIST. SOC'Y., Spring 2012, at 27

State Bar of Texas CLE Programs

Lead Author: Dylan O. Drummond & Larry Temple, *Traps for the Unwary Administrative Lawyer*, *in* State Bar of Tex. Prof. Dev. Program, Advanced Administrative Law Course ch. 11 (2005)

Texas Bar Journal

Contributor: *Party Talk 2011*, 74 TEX. B.J. 998, 1000 (December 2011)

Texas Lawyer

Author: Dylan O. Drummond, *Workers' Comp. Whirlwind*, TEX. LAW. Dec. 19, 2005, at 36

Texas Senate Natural Resources Committee

Public Witness: Testified in favor of S.B. 332 concerning groundwater law (Mar. 1, 2011)

115th Texas State Historical Association Annual Meeting

Author & Speaker: Dylan O. Drummond, *Texas Groundwater Rights and Immunities: From East to Sipriano and Beyond*, *in* Joint Session with the Texas Supreme Court Historical Society, 115th Tex. St. Hist. Ass'n Ann. Meeting (2011) (presented alongside Hon. Nathan L. Hecht and Prof. Megan Benson)

Texas Tech Administrative Law Journal

Author: Dylan O. Drummond, Comment, *Texas Groundwater Law in the 21st Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH ADMIN. L.J. 173 (Summer 2003), *cited in* the *St. Mary's* and *Duke Law Journals*, and the *Arkansas* and *Texas Law Reviews*

Texas Tech Law Review

Lead Author: Dylan O. Drummond, Lynn Ray Sherman, and Edmond J. McCarthy, Jr., *The Rule of Capture—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1 (Winter 2004) (awarded the outstanding lead article in volume 37, *see Laurels*, 68 Tex. B.J. 873, 873 (Oct. 2005), *cited in Edwards Aquifer Auth. v. Day*, No. 08-0964, 55 Tex. Sup. Ct. J. 343, 343 n.47 (Tex. 2012); also cited in briefing to the Texas Supreme Court in *Edwards Aquifer Auth. v. Day*, No. 08-0964, three times in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 08-0755, and four times in *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, No. 06-0904, 263 S.W.3d 910 (Tex. 2008); the *Baylor*, *Houston*, *Louisiana*, *Vermont* and *West Virginia Law Reviews* and the *St. Mary's Law Journal*)

University of Texas CLE Programs

Author & Speaker: Dylan O. Drummond, *Groundwater Ownership in Place: Fact or Fiction?*, *in* UTCLE, Texas Water Law Institute (2008) (cited in briefing to the Texas Supreme Court in Amicus Curiae Brief of Texas Landowners Council at 8, 9, *Edwards Aquifer Auth. v. Day*, No. 08-0964 (received Feb. 12, 2010); Respondent's Brief on the Merits at ii, *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 08-0755 (filed June 30, 2009))

CIVIC INVOLVEMENT:

Legal Aid Volunteer

FEMA Bastrop Disaster Relief Center (Sept. 2011)

Red Cross Dorm Floor Manager

Austin Convention Center Shelter for Hurricane Katrina Evacuees (Aug.-Sept. 2005)

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CATCH-2260: SUITS AGAINST THE STATE UNDER GOVERNMENT CODE CHAPTER 2260

I. INTRODUCTION[1]

Sovereign immunity has traditionally presented a huge obstacle to the ability of private litigants to seek redress against the state for its alleged breach of contract.

While Chapter 2260 of the Texas Government Code provides an administrative process for disposition of certain contract claims against the state despite sovereign immunity, it also excludes the typical administrative framework specifically enacted to govern the adjudication of administrative matters. This paradoxical dilemma may therefore present a "Catch-22" to private litigants proceeding under Chapter 2260—or put another way—a "Catch-2260."[2]

II. A BRIEF HISTORY OF SOVEREIGN IMMUNITY IN TEXAS

A. 1843 to 1997

Since at least 1843, when Texas was still a Republic, it has recognized the law of sovereign immunity. *Bd. of Land Comm'rs v. Walling*, Dallam 524, 525-26 (Tex. 1843) ("one of the essential attributes of sovereignty [is] not to be amenable to the suit of a private person without its own consent[, which] has grown into a maxim, sanctioned as well by the laws of nations as the general sense and practice of mankind");[3] *see also Hosner v. DeYoung*, 1 Tex. 764, 769 (1847) ("no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent").[4] Its adoption in Texas was somewhat belated as the doctrine had then been followed already for some six centuries in England. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006). Indeed, its

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[1] I would like to thank the following, upon whose exemplary previous works I have relied in preparing this article: Michael Shaunessy, *Sovereign Immunity:* "Harry Potter and the Deathly Hallows," State Bar of Tex. Prof'l Dev. Program, 22nd Annual Suing and Defending Governmental Entities Course ch. 3 (2010); Elizabeth G. ("Heidi") Bloch, *Tricks and Traps in Chapter 2260*, *in* UTCLE, 2d Annual Advanced Texas Administrative Law Seminar (2007); Jack Hohengarten & Linda Shaunessy, *Contract Dispute Resolution Regarding the State of Texas*, *in* UTCLE, 2d Annual Advanced Texas Administrative Law Seminar (2007); Adrian Henderson, *Contract Dispute Resolution: Sovereign Immunity and Breach of Contract Claims*, State Bar of Tex. Prof'l Dev. Program, 17th Annual Advanced Administrative Law Course ch. 10 (2005).

[2] JOSEPH HELLER, CATCH-22 46 (1961); *Tex.-N.M. Power Co. v. Tex. Indus. Energy Consumers*, 806 S.W.2d 230, 232 n.4 (Tex. 1991) ("As the fictional Captain Yossarian learned during World War II, pilots would not be granted a reprieve from combat unless they were crazy; but to be relieved from duty, permission had to be requested. The "catch" was that[,] by making a request[,] one demonstrated sanity, thereby ensuring a denial.").

[3] The opinion was penned by perhaps the greatest Justice to ever serve the Supreme Court of either the Republic or the State of Texas: Chief Justice John Hemphill. *See* James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305, 31 n.97 (Dec. 1986). He was both the last Chief Justice of the Republic of Texas as well as the First Chief Justice of the State of Texas. *Id.* at 320-21. No bookish introvert, Chief Hemphill once killed a Commanche chief who had wounded him at the legendary Council-House fight in San Antonio while serving on the bench there as a district judge, and subsequently succeeded Sam Houston as a U.S. Senator. *Id.* at 320-21. His jurisprudential legacy has even been compared to that of U.S. Supreme Court Chief Justice John Marshall. *Id.* at 321 n.97.

[4] The opinion's author, Justice Abner Lipscomb, was another famous early Texan jurist, who served alongside Chief Justice Hemphill as one of the state's first three Supreme Court Justices. J.H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF TEXAS 29 (1917) [hereinafter DAVENPORT]. He was the second person to be buried in the Texas State Cemetery after Republic Vice President Edward Burleson, and served as the Republic's Secretary of State under President Mirabeau B. Lamar. *See id.* at 31.

inception in England evolved from the concept (which the Texas Supreme Court has termed a "feudal fiction")[5] that "the king can do no wrong." *Id.* (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *254); *see Leach v. Tex. Tech Univ.*, 335 S.W.3d 386, 391 (Tex. App.—Amarillo 2011, pet. denied). More recently, sovereign immunity no longer pretends to protect official infallibility, but serves the more pragmatic purpose of shielding the public from bearing the "costs and consequences of improvident actions of their government[]." *Compare Tooke*, 197 S.W.3d at 332, *with Wichita Falls St. Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003).

Because sovereign immunity was first recognized in Texas by the Texas Supreme Court,[6] it is a common-law doctrine.[7] *Compare Walling*, Dallam at 525-26, *with Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002). As such, its contours have been modified and delineated by Texas courts. *See*, *e.g.*, *Lawson*, 87 S.W.3d at 520; *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853-55 (Tex. 2002); *Gen. Servs. Comm'n v. Little-Tex Insul. Co.*, 39 S.W.3d 591, 594 (Tex. 2001); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997).

Sovereign immunity protects the state[8] both from liability as well as from suit. *Lawson*, 87 S.W.3d at 520. Immunity from suit bars a suit against the state unless the Legislature expressly gives consent. *Little-Tex*, 39 S.W.3d at 594. If the Legislature has not expressly waived immunity from suit, the state retains such immunity even if its liability is not disputed. *Federal Sign*, 951 S.W.2d at 405. The state may also waive immunity from suit by filing suit itself, but this waiver has been limited in recent years. *Compare Anderson, Clayton & Co. v. State*, 122 Tex. 530, 537, 62 S.W.2d 107, 110 (1933), *with Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). In 1933, the Court made clear that, "where a state voluntarily files a suit and submits its rights for judicial determination it will be bound thereby and the defense will be entitled to plead and prove all matters properly defensive," including "the right to make any defense by answer or cross-complaint germane to the matter in controversy." *Anderson, Clayton*, 62 S.W.2d at 110. Some seven decades later, the Court clarified that the immunity waived by the state's suit only extends to the amount of damages

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5 *Wichita Falls St. Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003).

6 I readily admit my provincial bias in insisting upon capitalizing references to the Texas Supreme Court throughout this article, even though such an upper-case honorarium is traditionally reserved only for references to the U.S. Supreme Court. *See*, *e.g.*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.8 at 145 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010); MANUAL ON USAGE AND STYLE, R. 3.09, at 35 (Texas Law Review et al. eds., 12th ed. 2011). However, because no federal authority is examined in this article, this affectation will hopefully serve to more readily distinguish between Texas-Supreme-Court and intermediate-appellate-court authority.

7 An argument can be made that the English common law was actually adopted in Texas a few years before either the *Walling* or *Hosner* decisions were handed down by the Texas Supreme Court. *Compare Walling*, Dallam at 525-26 (issued in 1843), *with Hosner*, 1 Tex. at 769 (issued in 1847). On January 10, 1840, the Republic Congress expressly adopted the common law of England. *See* Act of Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898). However, as the Texas Supreme Court clarified a mere 12 decades later, English common law was only adopted so far as it was consistent with Texas's constitutional and legislative enactments, as well as the "rule of decision" in Texas. *S. Pac. Co. v. Porter*, 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960). No English statutes were similarly adopted, and the Republic's congressional act adopting English common law "was not construed as referring to the common law as applied in England in 1840, but rather to the English common law as declared by the courts of the various states of the United States." *Id.* This adoption is still enshrined in Texas statute to this day. TEX. CIV. PRAC. & REM. CODE § 5.001 ("The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, and the laws of this state.").

8 In 2003 the Court clarified that the term, "sovereign immunity," applies to the state, as well as the various divisions of state government, "including agencies, boards, hospitals, and universities." *Taylor*, 106 S.W.3d at 694 n.3. "Governmental immunity," on the other hand, protects political subdivisions of the state such as counties, cities, and school districts. *Id.*

claimed against the state necessary to offset the state's affirmative claims. *Reata*, 197 S.W.3d at 377. Put another way, absent the Legislature's waiver of the state's immunity from suit, a trial court cannot acquire jurisdiction over a claim for damages against the state in excess of damages sufficient to offset the state's recovery, if any. *Id.*

Immunity from liability protects the state from judgments even if the Legislature has expressly given consent to sue. *Little-Tex*, 39 S.W.3d at 594. Merely by entering into a contract, the state waives immunity from liability for breach of the contract but does not also waive immunity from suit. *Lawson*, 87 S.W.3d at 520.

Despite its common-law lineage in Texas, it is the Legislature's "sole province to waive or abrogate sovereign immunity." *Federal Sign*, 951 S.W.2d at 409. However, the Legislature may waive the state's sovereign immunity only by "clear and unambiguous language." TEX. GOV'T CODE § 311.034. Doing so allows the Legislature to protect its policymaking function, which makes it "better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear." *IT-Davy*, 74 S.W.3d at 854.

B. Chronology of Notable Sovereign Immunity Jurisprudence Following *Federal Sign*

Beginning in 1997, the development of sovereign immunity jurisprudence in Texas began to accelerate with respect to immunity from suit in breach-of-contract cases. *See* Michael Shaunessy, *Sovereign Immunity:* "Harry Potter and the Deathly Hallows," State Bar of Tex. Prof'l Dev. Program, 22nd Annual Suing and Defending Governmental Entities Course ch. 3, at 27 (2010) [hereinafter *Deathly Hallows*].

1. *Federal Sign* (1997)

In 1997, the Court handed down its opinion in *Federal Sign v. Texas Southern University*, which held that, when the state contracts with private citizens, it waives immunity from liability only. *Federal Sign*, 951 S.W.2d at 408. The Court went as far as to explicitly overrule any prior cases holding to the contrary. *Id.*

While this holding was no doubt significant, it was a footnote by the majority, as well as a four-Justice concurrence that caused almost as many jurisprudential ripples as the case's seminal holding. *See id.* at 408 n.1, 412-16; *see also Deathly Hallows*, at 27-28; Adrian Henderson, *Contract Dispute Resolution: Sovereign Immunity and Breach of Contract Claims*, State Bar of Tex. Prof'l Dev. Program, 17th Annual Advanced Administrative Law Course ch. 10, at 1 (2005) [hereinafter *Breach of Contract Claims*]. At note 1 of the opinion, the majority led by the late Justice Baker somewhat curiously observed 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." *Federal Sign*, 951 S.W.2d at 408 n.1. This elaboration, dicta though it undoubtedly was, seemed to point towards the Court's willingness to conceptually consider that the state could waive immunity from suit by some types of conduct. *See Deathly Hallows*, at 27.

This supposition was further fueled by Justice Hecht's concurrence (which was only one vote shy of becoming Texas law) that laid out several fact patterns not present in *Federal Sign* that might necessitate a different result. *Id.* at 412. He concluded, reiterating "[w]e do not attempt to decide such hypotheticals today, but they do suggest that the state may waive immunity by conduct other than simply executing a contract, so that it is not always immune from contract suits." *Id.* at 412-13.

Needless to say, the combination of these two sentiments by six Justices of the Court put the bench and bar into a juridical tizzy, with several intermediate appellate courts subsequently taking up the *Federal Sign* Court's apparent invitation to define precisely what conduct by the state could waive its sovereign immunity from suit. *See IT-Davy*, 74 S.W.3d at 856-57 (listing cases); *Little-Tex*, 39 S.W.3d at 595 (same). They did so by creating a judicially-imposed, equitable waiver of immunity from suit. *See IT-Davy*,

74 S.W.3d at 856-57. Impressively, three of the five decisions originated out the same court of appeals within forty-five days of each other, albeit authored by three different justices. *Compare DalMac Constr. Co. v. Tex. A&M Univ.*, 35 S.W.3d 654, 657 (Tex. App.—Austin 1999), *rev'd, Little-Tex*, 39 S.W.3d at 600 (Tex. 2001), *Aer-Aerotron, Inc. v. Tex. Dep't of Transp.*, 997 S.W.2d 687, 692 (Tex. App.—Austin 1999), *rev'd*, 39 S.W.3d 220, 220 (Tex. 2001), *with Little-Tex*, 997 S.W.2d 358, 365 (Tex. App.—Austin 1999), *rev'd*, 39 S.W.3d at 600 (Tex. 2001).

2. Chapter 2260 (1999)

Two years after *Federal Sign* was issued, and during the very next legislative session, the Legislature somewhat unsurprisingly created an administrative process for handling certain contractual disputes with the state by enacting Chapter 2260 of the Government Code, which previously would have been subject to *Federal Sign*'s progeny. *See* Act of May 31, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws. 4583, 4583-87 (codified at GOV'T ch. 2260). Notably, however, the Legislature explicitly refrained from allowing Chapter 2260 to waive the state's immunity from either suit or liability. GOV'T § 2260.006.

3. *Little-Tex* (2001)

In the jurisprudential aftermath of *Federal Sign*, numerous intermediate courts of appeal issued opinions expounding upon the state's purported newfound ability to waive its sovereign immunity from suit. *See IT-Davy*, 74 S.W.3d at 856-57 (listing cases); *Little-Tex*, 39 S.W.3d at 595 (same); *Breach of Contract Claims*, at 2; *see also Deathly Hallows*, at 28. Acknowledging in its 2001 opinion in *General Services Commission v. Little-Tex Insulation. Co*. that its broad language in *Federal Sign* justified the cases below elaborating on the topic, the Court made clear that, whatever it may have potentially decided in 1997, the "situation ha[d] changed" since the Legislature's enactment of Chapter 2260. *Little-Tex*, 39 S.W.3d at 595.

Therein, the Court rejected that a waiver-by-conduct exception to sovereign immunity can exist without first obtaining legislative consent. *Id.* at 597. In so deciding, the Court relied upon Section 2260.005, which unambiguously provides that "the procedures contained in this chapter are exclusive and required prerequisites to suit in accordance with Chapter 107" of the Civil Practices and Remedies Code governing permission to sue the state. *Id.*

Leaving no doubt this time, the Court admonished that "there is but one route to the courthouse for breach-of-contract claims against the state, and that route is through the Legislature." *Id.* at 597.

4. *IT-Davy* (2002)

In *Texas Natural Resources Conservation Commission v. IT-Davy*, the Court faced the very situation it avoided the year before in *Little-Tex*. *Compare IT-Davy*, 74 S.W.3d at 856, *with Little-Tex*, 39 S.W.3d at 595. Namely, whether the waiver of immunity to suit by conduct—the existence of which the Court hinted at in *Federal Sign* and shrugged aside as moot in *Little-Tex*—exists. *Compare IT-Davy*, 74 S.W.3d at 856, *with Little-Tex*, 39 S.W.3d at 595. Because the parties executed a contract not temporally governed by Chapter 2260, the Court was forced to consider the waiver-by-conduct argument head-on at last. *IT-Davy*, 74 S.W.3d at 856.

Alas, the confrontation was rather anticlimactic. While the Court again acknowledged that the genesis of the lower courts' confusion was the "*Federal Sign* footnote," it dispassionately reaffirmed that it was the "Legislature's sole province to waive or abrogate sovereign immunity." *Id.* at 857. The Legislature, the Court reasoned, had already enacted at least two comprehensive schemes to allow contracting parties to resolve breach-of-contract claims against the state in Chapters 107 of the Civil Practices and Remedies Code and 2260 of the Government Code. *Id.* The Court theorized that creating a waiver-by-conduct exception to these schemes would force the state to expend its resources to litigate the waiver-by-

conduct issue before enjoying the very protections sovereign immunity was devised to confer, as well as undermining the policy buttressing the doctrine itself. *Id.*

III. Application of Chapter 2260

As the Court recognized in *Little-Tex*, Chapter 2260 of the Government Code is the Legislature's preferred administrative prerequisite to suit against the state under Chapter 107 of the Civil Practice and Remedies Code. *Little-Tex*, 39 S.W.3d at 596; GOV'T § 2260.005.

Where, before its enactment, there was only one step to waive the state's immunity from suit in breach-of-contract cases—legislative permission; after its enactment, there are two—a precursor Chapter-2260 proceeding followed by legislative permission in certain instances. *See Breach of Contract Claims*, at 3. Indeed, section 2260.006 makes clear that nothing in the Chapter waives either sovereign immunity to suit or liability. GOV'T § 2260.006.

A. Compliance with Chapter 2260 is Jurisdictional

Since the Chapter's enactment in 1999, section 2260.005 has made clear that "the procedures contained in this chapter are exclusive and required prerequisites to suit." *Id.* § 2260.005. In *Little-Tex.*, the Court confirmed that "[c]ompliance with Chapter 2260 … is a necessary step before a party can petition to sue the state." *Little-Tex*, 39 S.W.3d at 597. The Austin Court of Appeals relied upon this holding in 2004, explaining that the various notice, procedural, and substantive provisions in Chapter 2260 are all prerequisites to suit. *Hawkins v. Cmty. Health Choice, Inc.*, 127 S.W.3d 322, 325 (Tex. App.—Austin 2004, no pet.). However, the court also made clear that the state cannot refuse to refer a matter to the state Office of Administrative Hearings (SOAH) after a contractor requests a contested-case hearing based upon a factual dispute regarding compliance with a procedural prerequisite because Chapter 2260 relies on SOAH's established role as a neutral fact-finder. *Id.* at 325.

In addition, the Legislature was careful to ensure nothing in the Chapter, and particularly in section 2260.005, could be interpreted to: (1) divest the Legislature of either the authority to grant or deny waivers of immunity to suit against the state or the power to specify certain measures to accomplish same; (2) require the Legislature to comply with Chapter 2260; or (3) limit "in any way" the effect of a legislative grant of permission to sue the state unless the grant itself provides otherwise. GOV'T § 2260.007(b).

B. Entities Governed by Chapter 2260

Section 2260.051 provides that only contractors may make claims against units of state government under Chapter 2260. *Id.* § 2260.051. In turn, section 2260.001 defines both "contractor" and "unit of state government." *Id.* § 2260.001(2), (4).

"Contractor" is defined as "an independent contractor who has entered into a contract directly with a unit of state government." *Id.* § 2260.001(2). However, expressly excluded from this definition are: (1) students at institutes of higher learning; (2) employees of a unit of state government; and (3) a contractor's subcontractor, officer, employee, agent, or other person furnishing goods or services to a contractor. *Id.*

A "unit of state government" includes the following:

> [T]he state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the constitution or a statute of this state, including a university system or institution of higher education.

Id. § 2260.001(4); *Abilene Hous. Auth. v. Gene Duke Builders, Inc.*, 226 S.W.3d 415, 416, 416 n.4 (Tex. 2007). Explicitly excluded, however, are local entities such as "count[ies], municipalit[ies], court[s] of a county or municipality, special purpose district[s], or other political subdivision[s] of this state." *Id.* § 2260.001(4); *Abilene Hous. Auth.*, 226 S.W.3d at 416, 416 n.4.

C. Scope of Actions Governed by Chapter 2260

The scope of claims that may be brought against the state under Chapter 2260 is defined in several sections therein. Section 2260.051 provides that contractors may make claims for breach of contract against units of state government, and that units of state government may lodge counterclaims against contractors. *Id.* § 2260.051.

1. What constitutes a "contract"?

The term, "contract" is defined in section 2260.001(1) to mean a "written contract between a unit of state government and a contractor for goods or services, or for a project as defined by [s]ection 2166.001," but does not include a contract subject to section 201.112 of the Transportation Code. *Id.* § 2260.001(1) (emphasis added). It has been said that this section of the Chapter is the "statute of frauds" provision, preventing any claim based on an alleged oral modification of a contract. Elizabeth G. ("Heidi") Bloch, *Tricks and Traps in Chapter 2260*, at 2, *in* UTCLE, 2d Annual Advanced Texas Administrative Law Seminar (2007) [hereinafter *Tricks and Traps*].

Section 2166.001's definition of "project" means a "building construction project that is financed wholly or partly by a specific appropriation, a bond issue, or federal money," including the construction of "a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishings," and "an addition to, or alteration, rehabilitation, or repair of, an existing building, structure, or appurtenant facility or utility." GOV'T. § 2166.001(4).

Section 201.112 of the Transportation Code governs administrative procedures put in place to adjudicate contract claims arising out of: (1) section 22.018 (county and municipal airports); (2) Chapter 223 (bids and contracts for highway projects); (3) Chapter 228[9] (state highway toll projects); (4) section 391.091 (erection and maintenance of outdoor advertising signs along roadways); and (5) Chapter 2254 of the Government Code (professional services). TEX. TRANSP. CODE § 201.112(a). Of note, while the entirety of the Administrative Procedure Act (APA)[10] is expressly incorporated into the post-agency claim-resolution process in section 201.112(b), Chapter 2260 specifically excludes the judicial review of contested cases provisions of the APA. *Id.* § 201.112(b), *with* GOV'T § 2260.104(f).

2. What constitutes "goods and services"?

Unfortunately, the "goods and services" included in section 2260.0001's definition of "contract," are not themselves defined therein along with the other terms common to Chapter 2260. *See* GOV'T § 2260.001. Fortunately, what the Government Code lacks the Business and Commerce Code provides. Section 2.105 of the codified U.C.C. defines "goods" as meaning "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities … and things in action," including as well "unborn young of animals and growing crops and other identified things attached to realty." TEX. BUS. & COM. CODE § 2.105(a). In turn, both sections 15.03 and 17.45 provide useful definitions of "services." *Compare* BUS. & COM. § 15.03(4), *with id.* § 17.45(2). Section 15.03 defines services as "any

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9 The statute refers to Chapter 361, which has since been renumbered as Chapter 228. Act of May 30, 2005, 79th Leg., R.S., ch. 281, § § 2.34-.44, 2005 Tex. Gen. Laws. 778, 800-12.

10 The Administrative Procedure Act (APA) was enacted in 1975 and became effective September 1, 1976. Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH. ADMIN. L.J. 287, 290 (Summer 2006); *see* APA, 64th Leg., R.S., ch. 61, §§ 1-24, 1975 Tex. Gen. Laws 136, 136-48 (codified at GOV'T ch. 2001); § 2001.002 ("[t]his chapter may be cited as the Administrative Procedure Act").

work or labor, including without limitation work or labor furnished in connection with the sale, lease, or repair of goods." BUS. & COM. § 15.03(4). Similarly, section 17.45 defines "service" as meaning "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." BUS. & COM. § 17.45(2).

As always, *Black's Law Dictionary* also relates useful definitions of both terms as well. It defines "goods" to mean "tangible or movable personal property other than money; especially articles of trade or items of merchandise." BLACK'S LAW DICTIONARY 762 (9th ed. 2010). It defines "service" to mean an "intangible commodity in the form of human effort, such as labor, skill, or advice." *Id.* at 1491.

There is some dispute as to whether leases are included as a service governed by the Chapter. Some commentators assert leases are clearly excluded because they are not a good or a service. *Tricks and Traps*, at 2. However, a 2002 SOAH proposal for decision (PFD) concluded that Chapter 2260 does apply to leases between private parties and state agencies. *Metric Place, Inc. v. Tex. Bldg. & Procurement Comm'n*, No. 303-02-3316.CC (2002).[11]

3. Substantive restrictions in scope

The Legislature has also added restrictions to the substantive applicability of the Chapter. GOV'T § 2260.002. Section 2260.002(a) specifically excludes from Chapter 2260's purview claims for personal injury or wrongful death arising from a breach of contract. *Id.* § 2260.002(a).

Of course, artful pleading seeking to turn a breach-of-contract claim into one for tort is disallowed by the plain language of sections 2260.001(1) and .051(a). *Compare id.* § 2260.001(1), *with id.* § 2260.051(a). Moreover, when the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone, no matter how creatively it is pled. *See*, *e.g.*, *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *see also Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 597 (Tex. 1992) ("As a general rule, the failure to perform the terms of a contract is a breach of contract, not a tort.").

In 2001, the Legislature amended section 2260.002 to add a time-bar bar to the scope of contracts amenable to prosecution through Chapter 2260. Act of May 28, 2001, 77th Leg., R.S., ch. 1422, § 14.07, 2001 Tex. Gen. Laws. 5021, 5066 (codified at GOV'T § 2260.002(2)). Newly-added subparagraph (2) expressly excludes contracts executed or awarded on or before August 30, 1999. *Id.* § 2260.002(2)).

D. Contracts Not Governed by Chapter 2260

If a contract with the state is not governed by Chapter 2260, the only recourse for an aggrieved private party to seek remedy for a breach of the contract is to obtain consent to sue the state under Chapter 107 of the Civil Practices and Remedies Code. TEX. CIV. PRAC. & REM. CODE ch. 107; *Little-Tex*, 39 S.W.3d at 597.

IV. PRACTICE AND PROCEDURE UNDER CHAPTER 2260

To pursue a claim against the state under Chapter 2260, a contractor must meet all the procedural and substantive requirements contained in the chapter. GOV'T § 2260.005; *Hawkins*, 127 S.W.3d at 324. As with most administrative dispute resolution matters, the jurisdictional devil is often in the procedural details.

A. Requisite Contractual Provisions

Section 2260.004(a) requires that any contract sought to be enforced pursuant to Chapter 2260 "shall include as a term of the contract a provision stating that the dispute resolution process used by the unit of state

[11] Unfortunately, SOAH's online PFD search function does not contain PFDs from 2002. *See* STATE OFFICE OF ADMINISTRATIVE HEARINGS, SOAH PFD SEARCH http://www.soah.state.tx.us/PFDSearch/Search.asp (last visited May 8, 2012). However, I am informed that this PFD may obtained by submitting an open records request. *See*, *e.g.*, TEX. GOV'T CODE § 552.221.

government under this chapter must be used to attempt to resolve a dispute arising under the contract." GOV'T § 2260.004(a).

In addition, contracts with the state under Chapter 2260—the duration of which extend beyond the expiration of appropriations that are in effect when the contract is entered into—must include a provision that specifically conditions the state's financial obligations under the contract on the availability of sufficient appropriations to avoid the creation of an unconstitutional debt. Jack Hohengarten & Linda Shaunessy, *Contract Dispute Resolution Regarding the State of Texas*, at 18, *in* UTCLE, 2d Annual Advanced Texas Administrative Law Seminar (2007) [hereinafter *Contract Dispute Resolution*]; *see also* TEX. CONST. art. III, § 49; *City of Big Spring v. Bd. of Control*, 404 S.W.2d 810, 814-15 (Tex. 1966).

B. Notice and Counterclaims

Within 180 days of an event giving rise to a breach of contract claim, the private contractor must provide written notice of same to the state. *Id.* § 2260.051(b); *Hawkins*, 127 S.W.3d at 324. The notice itself must "state with particularity" the: (1) nature of the alleged breach; (2) amount the contractor seeks as damages; and (3) underlying legal theory of recovery. GOV'T § 2260.051(c).

The statute itself is somewhat spartan in elucidating precisely what events may trigger the start of the 180-day period. *Tricks and Traps*, at 3. This is likely because there is often—depending upon the complexity of the underlying contract—no single "event" parties can point to as the causational occurence giving rise to the breach-of-contract claim. *Id.* However, when a claim is based upon a failure to remit payment when due under a contract, the triggering "event" will generally be the due date of the payment, if one is specified in the contract. *Id.* That said, if the contract requires—as many construction contracts do—continuing payment obligations, a separate cause of action may arise for each missed payment. *F.D. Stella Prods. Co. v. Scott*, 875 S.W.2d 462, 465 (Tex. App.—Austin 1994, no writ). Of course, the discovery rule may also operate to defer accrual of a breach-of-contract claim. *See*, *e.g.*, *Barker v. Eckman*, 213 S.W.3d 306, 311-12 (Tex. 2006) ((1) breach-of-contract claim only deferred until the plaintiff knew or, by exercising reasonable diligence, should have known of the facts giving rise to the claim; and (2) the nature of the injury must be inherently undiscoverable and the injury itself must be objectively verifiable).

Thereafter, the state has 60 days to deliver to the private contractor any counterclaim, provided it is in writing. GOV'T § 2260.051(d).

C. Negotiation or Mediation of Claims

The chief administrative officer or other officer otherwise designated by contract of the defendant unit of state government is required to examine both the contractor's claim and the state's counterclaim, if any, within 120 days after the date the claim is received. *Id.* § 2260.052(a). Generally within this same timeframe,[12] the parties may also agree to mediate a contractor's claim. *Id.* § 2260.056(a).

Each unit of state government with rulemaking authority is required to develop rules to govern both the negotiation or mediation of Chapter-2260 claim. *Id.* § 2260.052(c). However, if a unit of state government is without rulemaking authority, that unit is required to follow the rules adopted by the Attorney General. *Id.* A copy of these model rules is included in the Appendix, and may also be accessed online at the Attorney General's website. OFFICE OF TEXAS ATTORNEY GENERAL, CHAPTER 2260 MODEL RULES, https://www.oag.state.tx.us/notice/model_rules.pdf (last visited May 10, 2012).

There appear to be two options if the state does not comply with the mandatory negotiation provision in section 2260.052(a). *See Tricks and Traps*, at 4. First, because compliance with this

[12] Chapter 2260's mediation provision in section 2260.056(a) makes reference to the "date the claim is *filed*," while section 2260.052's negotiation provision specify the "date the claim is *received*." *Compare* GOV'T § 2260.056(a), *with id.* § 2260.052(a).

provision is mandatory ("*shall* examine")[13] and the wording of the provision itself is seemingly clear, observance of its terms is arguably a ministerial act subject to enforcement by writ of mandamus. *Hawkins*, 127 S.W.3d at 326; *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) ("[a]n act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.").

Second, section 2260.055 provides that, if a claim is not "entirely resolved" under the negotiation section within 270 days of the date the claim was *filed*,[14] the contractor may request a hearing at SOAH pursuant to subchapter C. GOV'T § 2260.055. Certainly, if the state refuses to negotiate, the claim would seem unlikely to be resolved—partially or otherwise—thereby making it ripe for a request to refer the matter to SOAH. *Tricks and Traps*, at 4.

The way the statute is written, however, a contractor may not request a hearing before the expiration of 270 days from the date the claim was filed. *Id.*; *Tricks and Traps*, at 5. Even more curious is that, while a minimum time requirement is provided, Chapter 2260 does not appear to provide any maximum deadline to forward a request at all. *Compare* GOV'T § 2260.055, *with id.* § 2260.102.

D. Settlement and Payment of Negotiated Claims

If negotiation results in the resolution of some or all of the disputed issues in the claim, the parties must reduce the settlement agreement to a signed writing. *Id.* § 2260.053(a). If the settlement of the claim only partially resolves matters still in dispute, however, the aggrieved party's rights under Chapter 2260 are not waived as to those unresolved grounds. *Id.* § 2260.053(b).

Even after an agreeable settlement has been reached via negotiation, fulfillment of the payment terms of that agreement is not guaranteed. *Tricks and Traps*, at 5. This is because payment of a negotiated claim may only be remitted by the opposing unit of state government by money previously appropriated to it for payment of contract claims generally or payment of the specific contract subject to the claim. GOV'T § 2260.054. If there are insufficient funds in either of these repositories to pay the claim, the remaining balance may only be paid by money appropriated by the Legislature. *Id.* For a discussion of how the biennial appropriation system in Texas may affect this analysis, please see Part IV(E)(3)(b), *infra*.

Even more troubling is the possibility that the state might breach the settlement agreement resulting from negotiation under section 2260.053. Section 2260.054 provides only that a unit of state government "*may* pay" such a claim at its election, not that it must. *Id.* As a result, mandamus would likely be unavailable to enforce the agreement. *Tricks and Traps*, at 4; *compare Hawkins*, 127 S.W.3d at 326, *with Seven Points*, 806 S.W.2d at 793.

What is more, such a breach is not an enumerated category of claim for which the Legislature has waived immunity to suit. *See Lawson*, 87 S.W.3d at 521; *Deathly Hallows*, at 18-22. Therefore, the state would also likely enjoy immunity from suit. *See Lawson*, 87 S.W.3d at 521. Because no goods or services would be at issue, Chapter 2260 would arguably not even provide an administrative remedy to enforce the settlement agreement. *Tricks and Traps*, at 4; *compare*, *e.g.*, BUS. & COM. § 2.105(a), *with id.* § 15.03(4), *id.* § 17.45(2). The only remaining avenue would be to seek permission from the Legislature to sue the breaching unit of state government under Chapter 107 of the Civil Practices and Remedies Code. CIV. PRAC. & REM. ch. 107; *Little-Tex*, 39 S.W.3d at 597.

One possible contractual solution to this conundrum is to include a provision in the settlement agreement that renders it null and void upon breach by the state—thus conceivably

[13] *Id.* § 2260.052(a) (emphasis added).

[14] The parties may agree in writing to extend this deadline. *Id.* § 2260.055.

resurrecting the original claim still subject to Chapter 2260. *Tricks and Traps*, at 4.

E. Referral to SOAH

The import of Chapter 2260 is its provision of an administrative avenue to resolve contract claims against the state despite the dual bars of sovereign immunity from liability and suit. However, great care must be taken to abide by the labyrinthine procedural pitfalls to avoid falling prey to a "Catch-2260."

1. Requests for and referrals to SOAH for hearing

If, after negotiation under section 2260.052, the contractor is dissatisfied with the results obtained, the contractor may file a request for a hearing at SOAH with the opposing unit of state government. GOV'T § 2260.102(a). The request must: (1) state the factual and legal basis of the claim; and (2) request that the claim be referred to SOAH for a contested-case hearing. *Id.* § 2260.102(b). SOAH Rule 155.5(9) defines a "contested case" as a "proceeding … in which the legal rights, duties, or privileges of a party are to be determined after opportunity for an adjudicative hearing." 1 TEX. ADMIN. CODE § 155.5(9) (St. Off. of Admin. Hearings).

Of note, a contractor's right to request a hearing under section 2260.102 (or 2260.055 for that matter) does not have the effect of automatically transferring the matter to SOAH. *Compare Tricks and Traps*, at 4, *with* GOV'T § 2260.102(c). While a unit of state government is bound under section 2260.102(c) to refer a matter to SOAH once a compliant request is made, only a unit of state government—not a private party—may technically refer a case to SOAH for a contested-case hearing. *Compare Tricks and Traps*, at 4, *with* GOV'T § 2260.102(c). Because a "referral to SOAH [i]s non-discretionary,"[15] compliance with section 2260.102(c) is a ministerial act subject to enforcement via a writ of mandamus. *Compare Hawkins*, 127 S.W.3d at 326, *with Seven Points*, 806 S.W.2d at 793; *see Tricks and Traps*, at 4.

Indeed, this was the very situation examined in the Austin Court of Appeals's 2004 opinion in *Hawkins v. Community Health Choice, Inc.* 127 S.W.3d at 326. Therein, the Commissioner of Texas Health and Human Services refused to refer a dispute to SOAH after the contractor's request to do so because the Commissioner asserted the contractor did not provide timely notice, thereby divesting SOAH of jurisdiction to adjudicate the matter under Chapter 2260. *Id.* at 325. The contractor successfully sought a writ of mandamus from the trial court and the Austin Court affirmed the writ on appeal. *Id.* at 325-26.

In so doing, the court reasoned that, while it agreed that proper notice is indeed a prerequisite to suit under Chapter 2260, whether a contractor has, in fact, complied with the notice provisions of section 2260.051(b) and (c) is a disputed question of fact that should be presented to SOAH. *Id.* at 325. The court further explained that, "were the agency charged with making the referral the ultimate finder of fact, then conceivably no issues of fact would make it past the agency determination." *Id.* If such were the case, any need to refer a matter to SOAH would essentially be eliminated altogether and frustrate the Legislature's intent to provide an alternate procedure of resolving contractual disputes with government agencies. *Id.*; GOV'T § 2003.021(a) ("The purpose of [SOAH] is to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch in relation to hearings that [SOAH] is authorized to conduct.").

2. Hearings and decisions at SOAH

Following referral to SOAH, an administrative law judge (ALJ) shall conduct a contested-case hearing in accordance with the procedures adopted by the Chief ALJ at SOAH. GOV'T § 2260.104(a). These rules may be found in the Texas Administrative Code, as well as online at SOAH's website. *Compare* 1 TEX. ADMIN. CODE ch. 155 (St. Off. of Admin.

[15] *Hawkins v. Cmty. Health Choice, Inc.*, 127 S.W.3d 322, 326 (Tex. App.—Austin 2004, no pet.).

Hearings), *with* TEXAS SECRETARY OF STATE, CHAPTER 155 OF THE TEXAS ADMINISTRATIVE CODE, http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=4&ti=1&pt=7&ch=155 (last visited May 11, 2012).

The Chief ALJ is permitted to set a fee for the contested-case hearing, not less than $250 and sufficient to allow SOAH to recover all or a substantial part of its costs in holding the hearing. GOV'T § 2260.103(a), (b). The fee may also be constituted as a graduated fee scale, increasing in relation to the amount in controversy. *Id.* § 2260.103(c). In addition, the fee may be assessed only against the non-prevailing party in the contested-case hearing or may be apportioned between the parties in equity. *Id.* § 2260.103(d).

The Attorney General is required to defend the state in any contested-case hearing under Chapter 2260, and is authorized to settle or compromise a portion of a claim for which the state is found liable. *Id.* § 2260.108.

Within a reasonable time after the conclusion of the hearing, the ALJ must issue a written decision containing the ALJ's findings and recommendations, which itself must be based upon the pleadings filed and evidence received. *Id.* § 2260.104(b), (c). While Chapter 2260 does not clarify at what point the time elapsed after the conclusion of contested-case hearing turns from reasonable to unreasonable, section 2001.143(a) of the APA provides that,[16] generally, a decision or order must be rendered within 60 days of the end of the hearing. *Id.* § 2001.143(a). Accordingly, the APA's 60-day rule should serve as a serviceable approximation of what may constitute a reasonable time in which to render a decision on Chapter 2260.

The decision must include both: (1) the findings of fact and conclusions of law on which the administrative law judge's decision is based; as well as (2) a summary of the evidence received. *Id.* § 2260.103(d).

Although SOAH ALJs typically issue *proposals* for decisions as opposed to *decisions* themselves under SOAH Rule of Procedure 155.507, the post-decision treatment of a Chapter-2260 claim is vastly different from that of a typical SOAH matter. *See* 1 TEX. ADMIN. CODE § 155.507 (St. Off. of Admin. Hearings). While, under both regimes, units of state government may refer matters to SOAH for adjudication, Chapter 2260 permits no agency approval or modification of a decision rendered by SOAH as does the APA. *Compare* GOV'T § 2260.104(e)(2) (expressly disallowing the application of section 2001.058(e) to Chapter-2260 disputes), *with id.* § 2001.058(e).

3. Recoverable damages and payment of claims

a. Recoverable damages

In enacting Chapter 2260, the Legislature was mindful to include many express limitations on both the amount and type of recoverable damages permitted. *Id.* § 2260.003.

First, any amount owed to the state for work not performed under a contract or in substantial compliance with its terms shall be deducted from amounts awarded under the Chapter. *Id.* § 2260.003(b). After deducting this amount, the total amount of money recoverable under the Chapter may not exceed the sum of: (1) the balance due and owing on the contract price; (2) the amount or fair-market value of orders or requests for additional work made by the state to the extent such actual work was actually performed; and (3) any delay or labor-related expense incurred by the contractor as a result of an action of or a failure to act by the state or party acting under the state's supervision. *Id.* § 2260.003(a).

Moreover, subparagraph (c) explicitly forbids any award of damages under Chapter 2260 from including: (1) consequential or similar damages (except delays or labor-related expenses); (2) exemplary damages; (3) any damages based

[16] Although section 2260.104(e)(2) and (f) expressly exempt Chapter 2260 actions from the provisions of section 2001.058(e) as well as subchapter G of the APA, section 2001.143 is not similarly prohibited as it is found in subchapter F. *Compare* GOV'T § 2260.104(e)(2), (f), *with id.* § 2001.143.

upon unjust enrichment; (4) attorney fees; or (5) home-office overhead. *Id.* § 2260.003(c).

Finally, while Chapter 304 of the Finance Code applies to the award of a judgment under Chapter 2260,[17] the applicable rate of prejudgment interest on any award may not exceed 6%. *Id.* § 2260.106.

b. Payment of claims

In order for the state to be bound to pay an award of damages, the ALJ must find by a preponderance of the evidence that the contractor's claim is valid under state law. *Compare id.* § 2260.105(a)(1), *with id.* § 2260.105(a-1)(1).

If, taking into account any counterclaim, the award against the state is less than $250,000, the state must pay the amount of the claim. *Id.* § 2260.105(a)(2). In 2005, the Legislature added subparagraph (a-1) to section 2260.105, which provides that, if—taking into account any counterclaim—the award against the state equals or exceeds $250,000, the state must nevertheless pay the part of the claim that is less than $250,000. *Id.* § 2260.105(a-1)(2); *see* Act of May 30, 2005, 79th Leg., R.S., ch. 988, § 7, 2005 Tex. Gen. Laws 3292, 3293. For the remaining unpaid amount of an award equaling or exceeding $250,000, the ALJ must issue a written report containing the ALJ's findings and recommendations to the Legislature. GOV'T § 2260.1055(a). In the written report, the ALJ *may* recommend either that the Legislature: (1) appropriate money to pay the claim or part of the claim if the ALJ finds, by a preponderance of the evidence, that the claim is valid under Texas law; or (2) not appropriate money to pay the claim, and the ALJ may also recommend that consent to suit under Chapter 107 of the Civil Practices and Remedies Code be denied. *Id.* § 2260.1055(b).

Section 2260.105(b) governing payment of adjudicated claims is identical to section 2260.054 governing payment of negotiated claims. *Compare* GOV'T § 2260.105(b), *with id.* § 2260.054. As with negotiated claims, the effect of section 2260.105(b) is that payment of a claim according to the ALJ's decision is not guaranteed. *See Tricks and Traps*, at 5. This is because payment of an adjudicated claim may only be remitted by the opposing unit of state government by money previously appropriated to it for payment of contract claims generally or payment of the specific contract subject to the claim. GOV'T § 2260.054. If there are insufficient funds in either of these coffers to pay the claim, the remaining balance may only be paid by money appropriated by the Legislature. *Id.*

Complicating this process further is the effect that Texas's system of biennial appropriation may have on the payment of Chapter-2260 claims. *See Contract Dispute Resolution*, at 16-19.

i. Biennial legislative appropriation

While the Legislature may appropriate funds through several different avenues, the most common method is to do so through the biennial General Appropriations Act (GAA). *See Contract Dispute Resolution*, at 17. The GAA contains both appropriations as well as restrictions on those appropriations, and covers virtually every state agency each biennium. *Id.* As such, it is the primary method for funding agency operations. *Id.*

In addition, biennial appropriations expire after two years. TEX. CONST. art. VIII, § 6 ("… nor shall any appropriation of money be made for a long term than two years"); GOV'T § 403.095(b); *Dallas Cnty. v. McCombs*, 135 Tex. 272, 276, 140 S.W.2d 1109, 1111 (1940).

[17] Interestingly, section 2260.106 refers to "*judgment*[s] awarded to a claimant under this [C]hapter," even though that term does not appear anywhere else in the Chapter. *Compare id.* § 2260.106 (emphasis added), *with id.* ch. 2260. Indeed, the term, "judgment," is also not found in subchapter F to the APA. *Id.* §§ 2001.141-47. Of course, this is likely because a decision under Chapter 2260 (or the APA for that matter) is, by definition, not a judgment as it is defined and operates under Texas Rule of Civil Procedure 301. *Compare id.* § 2260.104(c), .(d), *with* TEX. R. CIV. P. 301.

ii. Comptroller warrants

Generally, the state Funds Reform Act requires state agencies to deposit into the state treasury all money they receive. GOV'T §§ 404.091 (short title), .094 (funds to be deposited into treasury). The Comptroller is the trustee for all funds contained in the treasury. *Id.* § 404.041. Monies are forbidden from being paid out of the treasury except on a warrant drawn by the Comptroller. *Id.* § 404.046.

For well over a century though, the Court has recognized that, where the Legislature has not made an appropriation, the Comptroller cannot issue a warrant. *Pickle v. Finley*, 91 Tex. 484, 488, 44 S.W. 480, 482 (1898).[18]

The Comptroller may not pay a state agency's claim from an appropriation unless the claim is presented to the Comptroller for payment within two years of the end of the fiscal year for which the appropriation was made. GOV'T § 403.071(b). This deadline is extended to four years for certain construction claims, as well as repair and modeling projects that exceed $20,000. *Id.*

If appropriated money is available to pay a Chapter-2260 claim, the unit of state government should submit a form prescribed by the Comptroller requesting payment be made to the private contractor. *Contract Dispute Resolution*, at 18. The payment form must contain: (1) authorization of the head of the office or other person responsible for the expenditure; (2) the appropriation against which the disbursement is to be charged; (3) information required by the Comptroller's rules; (4) proof that the claim or account was presented to the state within the period of limitation provided by section 16.051 of the Civil Practices and Remedies Code or other applicable statute; and (5) "other appropriate matters." GOV'T § 403.078.

Because payment on a Chapter 2260 claim may only be made from previously-appropriated funds, the state may validly refuse to pay a claim unless and until funds are appropriated. *See* § 2260.105(b). That said, if a unit of state government possesses appropriated funds to pay all or part of a claim under Chapter 2260, but the unit of state government refuses to submit a proper payment form to the Comptroller for issuance of a warrant to remit payment for the claim, compliance with the ministerial payment provisions of section 2260.105 is likely subject to enforcement via a writ of mandamus. *Compare Hawkins*, 127 S.W.3d at 326, *with Seven Points*, 806 S.W.2d at 793. However, if the Office of the Comptroller itself refuses to issue a warrant after presentment of a proper payment form under section 403.078, then mandamus may still be available to remedy such inaction, but the writ may only issue from the Court. *See* GOV'T § 22.002(c); *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672-73 (Tex. 1995) ("when a relator seeks to compel an executive officer to perform duties imposed by law, generally this Court alone is the proper forum").

iii. Execution on state property forbidden

Section 2260.107 makes clear that nothing in Chapter 2260 may be construed to authorize execution on property owned by the state. GOV'T § 2260.107.

4. Appeal of contested-case hearing decisions

a. No agency modification of SOAH ALJ conclusions of law, findings of fact, or orders

In stark contrast to the APA's assent to agency modification of SOAH ALJ findings of fact, conclusions of law, as well as orders

[18] The opinion's author was Chief Justice Reuben Gaines, who served on the Court for some 25 years and whose opinions fill volumes 66 to 103 of the *Texas Reports*. DAVENPORT, at 170-71, 268. In his later years of service before he resigned from the Court to reside in the Driskill Hotel, Chief Justice Gaines was rumored to have occasionally napped during oral argument, padded around his chambers in slippers, and made a habit of departing the Court each day promptly at 5:00 pm. TARLTON LAW LIBRARY DIGITAL COLLECTIONS, JUSTICES OF TEXAS 1836-1986: REUBEN REID GAINES (1836-1914), http://tarlton.law.utexas.edu/justices/profile/view/35 (last visited May 11, 2012).

themselves (which may be vacated in their entirety by an agency) under certain circumstances, Chapter 2260 expressly forbids agencies from any such modification or vacation. *Compare id.* § 2260.104(e)(2), *with id.* § 2001.058(e).

b. Standard of review

Following the 2005 amendments to Chapter 2260, the Legislature provided that a contested-case decision may not be appealed except for abuse of discretion. Act of May 30, 2005, 79th Leg., R.S., ch. 988 § 6, 2005 Tex. Gen. Laws 3292, 3293 (codified at § 2260.104(e)(1)). Abuse of discretion in Texas is historically measured by whether the decision at issue is arbitrary, unreasonable, and without reference to any guiding rules and principles. *See*, *e.g.*, *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996); W. Wendell Hall et al., *Hall's Standards of Review*, 42 ST. MARY'S L.J. 3, 16 (2010) [hereinafter *Hall's Standards of Review*].

In contrast, judicial review of SOAH decisions under the APA is either by de novo or substantial evidence review. GOV'T §§ 2001.173, .174; *Hall's Standards of Review*, 42 ST. MARY'S L.J. at 71. Which standard of review to apply in a given matter should be prescribed by the governing law at issue. *See* GOV'T §§ 2001.173, .174; *Hall's Standards of Review*, 42 ST. MARY'S L.J. at 71.

In practice, there is likely not much daylight between the review afforded under the abuse of discretion and substantial evidence standards. *See*, *e.g.*, *Contract Dispute Resolution*, at 13. This similarity is underscored by the six prongs outlined in the substantial-evidence-review statute, the fulfillment of any one of which may trigger reversal under the standard. *See* GOV'T § 2001.174(2). The last of these expressly references "arbitrary or capricious" action, as well as "abuse of discretion." *Id.* § 2001.174(2)(F). Indeed, the Austin Court of Appeals has held that, because an agency's action was arbitrary and capricious, it failed substantial-evidence review. *See Sam Houston Elec. Coop., Inc. v. Pub. Util. Comm'n*, 733 S.W.2d 905, 913 (Tex. App.—Austin 1987, writ denied).

Regardless, under either test, the standard is not whether the decision was correct but instead whether it was reasonable. *Compare City of Waco v. Tex. Comm'n on Env't Quality*, 346 S.W.3d 781, 813 (Tex. App.—Austin 2011, pet. pending)[19] (citing *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994)), *with Rhyne*, 925 S.W.2d at 666 ("[w]e only find an abuse of discretion when the trial court's decision is arbitrary, *unreasonable*, and without reference to guiding principles" (emphasis added)), *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (reiterating that an intermediate court of appeals cannot "reverse for an abuse of discretion merely because it disagrees with a decision by the trial court"); *Contract Dispute Resolution*, at 13.

Crucial to any subsequent review of an adjudicative decision—particularly as in Chapter 2260 where the discretion exercised by the adjudicator is at issue—is the record containing evidence of what actually transpired below. *See Contract Dispute Resolution*, at 14. Even though Chapter 2260 is silent as to the creation of a record from which to adjudge abuse of discretion, it does require the ALJ's decision to include both: (1) findings of fact and conclusions of law; as well as a (2) summary of the evidence. GOV'T § 2260.104(d). This requirement should allow for enough materials to be provided to a reviewing court so as to determine the reasonableness of an ALJ's actions sufficient to

[19] The *Greenbook* offers only one subsequent history notation to denote petitions currently under consideration at the Court: "petition filed." *See* THE GREENBOOK: TEXAS RULES OF FORM 108, App. D (Texas Law Review et al. eds., 12th ed. 2010). Unfortunately, this notation excludes by its own definition petitions in which the merits are under consideration (i.e., petitions in which merits briefing has been requested by the Court). *See id.*; *see also* TEX. R. APP. P. 55.1. Therefore, I have encouraged the use of the notation, "pet. pending," which it appears the Court may already favor. *See*, *e.g.*, *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 239 S.W.3d 236, 241 (Tex. 2007); *see also* Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 102 n.156 (Winter 2007).

determine whether an abuse of discretion occurred below.

c. Procedural anarchy

While the 2005 amendments to Chapter 2260 made clear the *standard of review* the Legislature chose to govern appeals from ALJ decisions under the Chapter, it curiously left in place section 2260.104(f) that excludes the venerable *procedure* established in subchapter G of the APA as a mechanism governing the processing of such appeals. *Compare id.* § 2260.104(e)(1), *with id.* § 2260.104(f); *see also* Act of May 30, 2005, 79th Leg., R.S. ch. 988, § 6, 2005 Tex. Gen. Laws 3292, 3293. Accordingly (and amazingly), no procedure currently exists to govern appeals of Chapter 2260 decisions.

i. "Appeal" versus "judicial review"

Subchapter G lays out the procedure for "judicial review" of contested-cases adjudicated at SOAH. *See*, *e.g.*, *id.* §§ 2001.003(1), (7); .171. This terminology contrasts with Chapter 2260's use of "appeal" instead of "judicial review." *Compare id.* § 2260.104(e)(1), *with id.* § 2001.171; *see also Little-Tex*, 39 S.W.3d at 599 ("The Legislature has expressly precluded *judicial review* of the [ALJ]'s rulings under Chapter 2260.") (emphasis added).

The import of this distinction has not yet been vetted in court, but at least one commentator has suggested that a dissatisfied party under Chapter 2260 could appeal an adverse decision directly to the Austin Court of Appeals instead of to a Travis County district court as the APA's mandatory venue statute requires. *See Contract Dispute Resolution*, at 14; *see also* GOV'T § 2001.176(b)(1). It is unclear whether section 22.220(a)'s provision that intermediate courts of appeal have civil appellate jurisdiction only over civil cases in which the *district* and county courts in a given appellate district have jurisdiction, coupled with section 2260.104(f)'s exclusion of subchapter G—which would otherwise make venue mandatory in Travis County *district* court—could be used to disallow such a direct appeal. *Compare id.* § 2001.176(b)(1), *id.* § 2260.104(f), *with id.* § 22.220(a). In addition, a Chapter 2260 decision does not appear to fall into one of the enumerated categories of interlocutory orders from which an accelerated or agreed appeal may be taken. *Compare* CIV. PRAC. & REM. § 51.014(a), *with* TEX. R. APP. P. 28.1-.2, .4.

However, the 2011 amendments to section 51.014 of the Civil Practices and Remedies Code gave trial courts in civil actions the authority to grant permission for parties to appeal an order not otherwise appealable if the order: (1) involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. CIV. PRAC. & REM. § 51.014(d). In turn, Texas Rule of Appellate Procedure 28.3 governs the methods that must be observed in the appeal of such matters to the intermediate courts of appeal. TEX. R. APP. P. 28.3. This approach would likely necessitate a domestication of sorts of the SOAH decision from a Chapter 2260 proceeding in a Texas "trial court," but at least does not appear to be prohibited by the Chapter. Regardless, it does appear certain that no direct appeal to the Court may be taken from a decision issued by SOAH under the Chapter. *See* TEX. R. APP. P. 57.2 (explaining the Court is without jurisdiction to hear a direct appeal from "any other court other than a district court or county court").

Another commentator has suggested that, while subchapter G may not apply to a Chapter 2260 *hearing*, it may conceivably apply to an *appeal* of a resulting decision. *Tricks and Traps*, at 5.

ii. Whither the record?

While it is true that Chapter 2260 does not contain any procedure for obtaining or filing the record of the contested-case hearing with a reviewing court, it does require a decision to include both: (1) findings of fact and conclusions of law; as well as a (2) summary of the evidence. GOV'T § 2260.104(d). It is unclear whether the

Legislature intended this provision to supersede or act in conjunction with the record requirements contained in SOAH Rule 155.423. *See* 1 TEX. ADMIN. CODE § 155.423 (St. Off. of Admin. Hearings); *Contract Dispute Resolution*, at 15; *see also* GOV'T § 2260.104(e), (f). Therefore, in practice, litigants may wish to ensure that their Chapter 2260 proceedings abide by both SOAH's record-preparation requirements and section 2260.104(d)'s decision mandates.

iii. Perfecting the "appeal"

Yet another area where Chapter 2260 is silent is how a litigant may perfect their appeal to a reviewing court—whether it be a trial or appellate court. *See Contract Dispute Resolution*, at 15. Therefore, out of an abundance of caution, practitioners may consider perfecting the appeal of a Chapter 2260 decision in either or both Travis County district court pursuant to Government Code section 2001.176, or in any other trial court under Texas Rule of Appellate Procedure 25.1. *Compare* GOV'T § 2001.176, *with* TEX. R. APP. P. 25.1.

V. CONCLUSION

While Chapter 2260 is no doubt fraught with potential hazards that might befall private litigants, deliberate adherence to the Chapter's provisions may assist private parties in avoiding being caught in a "Catch-2260."

APPENDIX

EXHIBIT A