

# NO. 03-0878

IN THE SUPREME COURT OF TEXAS

---

JUDY TOOKE & EVERETT TOOKE

PETITIONERS

V.

CITY OF MEXIA

RESPONDENT

---

On Petition for Review from the  
Court of Appeals for the Tenth District at Waco

---

**BRIEF OF *AMICUS CURIAE***  
[filed by *Amicus Curiae* The Surety Association of America]

---

DUNCAN L. CLORE  
State Bar No. 04404500  
P. MICHAEL JUNG  
State Bar No. 11054600

Strasburger & Price, LLP  
4300 Bank of America Plaza  
901 Main Street  
Dallas, Texas 75202  
(214) 651-4300  
(214) 659-4022 (telecopy)  
duncan.clore@strasburger.com  
michael.jung@strasburger.com

ATTORNEYS FOR *AMICUS CURIAE*

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Table of Contents.....	i
Index of Authorities .....	iii
Interest of the <i>Amicus</i> .....	1
Summary of the Argument.....	2
Argument.....	2
<b>I. A HOLDING THAT TEXAS POLITICAL SUBDIVISIONS ARE GENERALLY IMMUNE FROM SUIT WOULD HAVE ADVERSE CONSEQUENCES FOR THE SURETY INDUSTRY, ITS CLIENTS, AND THE PUBLIC ENTITIES THAT BENEFIT FROM SURETY BONDS.....</b>	<b>3</b>
<b>II. <u>MISSOURI PACIFIC IS ALIVE AND WELL</u>.....</b>	<b>6</b>
<b>A. <u>“Sue and Be Sued” Refers to Capacity and Waiver of Immunity</u>.....</b>	<b>7</b>
<b>B. <u>The Plain Meaning of “Sue and Be Sued” Is to Waive Immunity</u>.....</b>	<b>8</b>
<b>C. <u>The Legislature Has Adopted <i>Missouri Pacific</i></u>.....</b>	<b>10</b>
<b>1. The Legislature Has Adopted <i>Missouri Pacific</i> by Continuing to Pass Statutes Conferring “Sue and Be Sued” Authority Without Otherwise Addressing Sovereign Immunity.....</b>	<b>10</b>
<b>2. The Legislature Adopted <i>Missouri Pacific</i> By Using “Sue and Be Sued” Language to Waive Immunity from Suit for Counties.....</b>	<b>10</b>
<b>3. The Legislature Has Adopted <i>Missouri Pacific</i> By Failing to Take Action in Response to the Case.....</b>	<b>12</b>
<b>D. <u>Stare Decisis Dictates Preservation of <i>Missouri Pacific</i></u>.....</b>	<b>12</b>

E.	<u><i>Missouri Pacific Fits Comfortably Into the Framework of this Court’s Recent Sovereign Immunity Jurisprudence.</i></u> .....	13
F.	<u><i>The Federal Courts Follow the Equivalent of the Missouri Pacific Rule.</i></u> .....	14
G.	<u><i>Missouri Pacific Does Not Threaten the Tort Claims Act.</i></u> .....	14
H.	<u><i>Missouri Pacific Does Not Threaten Tex. Gov’t Code ch. 2260.</i></u> .....	15
I.	<u><i>Missouri Pacific Does Not Threaten the Public Fisc.</i></u> .....	17
J.	<u><i>The Missouri Pacific Rule Should Be Applied Categorically Rather Than on a Statute-by-Statute Basis.</i></u> .....	18
	Prayer.....	19
	Certificate of Service.....	20
Appendix		<u>Tab</u>
	Tex. Gov’t Code § 311.034.....	1
	Tex. Local Gov’t Code § 262.007.....	2
	Tex. Gov’t Code ch. 2260 [excerpts] .....	3
	Statutes Granting “Sue and Be Sued” Authority .....	4

## INDEX OF AUTHORITIES

### Cases

<i>Alamo Community College District v. Browning Construction Co.</i> , 131 S.W.3d 146 (Tex. App. – San Antonio 2004, pet. filed).....	13
<i>Alamo Community College District v. Obayashi Corp.</i> , 980 S.W.2d 745 (Tex. App. – San Antonio 1998, pet. denied).....	13
<i>Armanco, Inc. v. City of Grand Prairie</i> , 835 S.W.2d 160 (Tex. App. – Fort Worth 1992, writ dism'd as moot).....	13
<i>Bates v. Texas State Technical College</i> , 983 S.W.2d 821 (Tex. App. – Waco 1998, pet. denied).....	13
<i>Brazell v. City of Camden</i> , 238 S.C. 580, 121 S.E.2d 221 (1961) .....	9
<i>Brewington v. Brewington</i> , 215 Tenn., 475, 387 S.W.2d 777 (1965).....	9
<i>City of Carrollton v. McMabon Contracting, L.P.</i> , ___ S.W.3d ___, 2004 Tex. App. LEXIS 4711, No. 05-04-00089-CV (Tex. App. – Dallas May 26, 2004, no pet. hist.) .....	13, 18
<i>City of Garland v. Shierk</i> , No. 05-99-00258-CV, 2000 Tex. App. LEXIS 3706 (Tex. App. – Dallas June 6, 2000, pet. denied) (not designated for publication).....	13
<i>City of Houston v. Clear Channel Outdoor, Inc.</i> , ___ S.W.3d ___, 2004 Tex. App. LEXIS 367, No. 14-03-00022-CV (Tex. App. – Houston [14 <sup>th</sup> Dist.] Jan. 15, 2004, pet. filed) .....	13
<i>City of San Antonio v. Butler</i> , 131 S.W.3d 170 (Tex. App. – San Antonio 2004, pet. filed).....	15
<i>Coastal Industrial Water Authority v. Trinity Portland Cement Division</i> , 563 S.W.2d 916 (Tex. 1978).....	10
<i>Dillard v. Austin Independent School District</i> , 806 S.W.2d 589 (Tex. App. – Austin 1991, writ denied) .....	13

<i>Dubart v. State</i> , 610 S.W.2d 740 (Tex. 1981).....	8
<i>Engleman Irrigation District v. Shields Brothers, Inc.</i> , 960 S.W.2d 343 (Tex. App. – Corpus Christi 1997), <i>pet. denied per curiam</i> , 989 S.W.3d 360 (Tex. 1998) .....	13
<i>Fazekas v. City of Houston</i> , 565 S.W.2d 299 (Tex. Civ. App. – Houston [1 <sup>st</sup> Dist.] 1978, writ ref’d n.r.e.).....	12
<i>FDIC v. Meyer</i> , 510 U.S. 471 (1994).....	14
<i>Federal Housing Administration v. Burr</i> , 309 U.S. 242 (1940).....	14
<i>Federal Sign v. Texas Southern University</i> , 951 S.W.2d 401 (Tex. 1997).....	15
<i>First Employees Insurance Co. v. Skinner</i> , 646 S.W.2d 170 (Tex. 1983).....	10
<i>Franchise Tax Board v. United States Postal Service</i> , 467 U.S. 512 (1984).....	14
<i>Goerlitz v. City of Midland</i> , 101 S.W.3d 573 (Tex. App. – El Paso 2003, <i>pet. filed</i> ).....	13
<i>Great American Insurance Co. v. North Austin Municipal Utility District No. 1</i> , 908 S.W.2d 415 (Tex. 1995).....	4
<i>Harris County Municipal Utility District No. 48 v. Mitchell</i> , 915 S.W.2d 859 (Tex. App. – Houston [1 <sup>st</sup> Dist.] 1995, writ denied) .....	13
<i>Hidalgo &amp; Cameron County Irrigation District No. 9 v. Ortega</i> , No. 13-98-00365-CV, 1999 Tex. App. LEXIS 4748 (Tex. App. – Corpus Christi June 24, 1999, writ <i>dism’d w.o.j.</i> ) (not designated for publication).....	13
<i>InterFirst Bank Dallas, N.A. v. United States Fidelity &amp; Guaranty Co.</i> , 774 S.W.2d 391 (Tex. App. – Dallas 1989, writ denied).....	4
<i>Interstate Contracting Corp. v. City of Dallas</i> , 47 Tex. Sup. Ct. J. 434, 2004 Tex. LEXIS 354 (Apr. 16, 2004).....	7

<i>James v. Vernon Calhoun Packing Co.</i> , 498 S.W.2d 160 (Tex. 1973).....	12
<i>Jobe v. Hodge</i> , 253 La. 483, 218 So. 2d 566 (1969) .....	9
<i>Knowles v. City of Granbury</i> , 953 S.W.2d 19 (Tex. App. – Fort Worth 1997, pet. denied).....	13
<i>Loeffler v. Frank</i> , 486 U.S. 549 (1988).....	14
<i>Loyd v. ECO Resources, Inc.</i> , 956 S.W.2d 110 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 1997, no pet.) .....	13
<i>Marmon v. Mustang Aviation, Inc.</i> , 430 S.W.2d 182 (Tex. 1968).....	12
<i>Missouri Pacific Railroad v. Brownsville Navigation District</i> , 453 S.W.2d 812 (Tex. 1970).....	passim
<i>Pearlman v. Reliance Insurance Co.</i> , 371 U.S. 132 (1962).....	4
<i>Reata Construction Corp. v. City of Dallas</i> , 47 Tex. Sup. Ct. J. 408, 2004 Tex. LEXIS 303 (Apr. 2, 2004).....	7
<i>Smith v. Commonwealth</i> , 347 Mass. 453, 198 N.E.2d 420 (1964).....	9
<i>Tarrant County Hospital District v. Henry</i> , 52 S.W.3d 434 (Tex. App. – Fort Worth 2001, no pet.).....	13
<i>Texas A&amp;M University–Kingsville v. Lawson</i> , 87 S.W.3d 518 (2002).....	14
<i>Texas Natural Resource Conservation Commission v. IT-Davy</i> , 74 S.W.3d 849 (Tex. 2002).....	17
<i>Texas Prison Board v. Cabeen</i> , 159 S.W.2d 523 (Tex. Civ. App. – Beaumont 1942, writ ref'd).....	8
<i>Travis County v. Pelzel &amp; Associates, Inc.</i> , 77 S.W.3d 246 (Tex. 2002).....	3, 11

<i>Trinity River Authority v. San Jacinto County</i> , 355 S.W.2d 422 (Tex. Civ. App. – Beaumont 1976, writ dismissed w.o.j.) .....	13
<i>Trinity Universal Insurance Co. v. Bellmead State Bank</i> , 396 S.W.2d 163 (Tex. Civ. App. – Dallas 1965, writ refused n.r.e.) .....	4
<i>United States Postal Service v. Flamingo Industries (USA) Ltd.</i> , ___ U.S. ___, 114 S. Ct. 1321 (2004) .....	14
<i>United States v. King</i> , 395 U.S. 1 (1969) .....	9
<i>United States v. Sherwood</i> , 312 U.S. 584 (1941) .....	9
<i>United Water Services, Inc. v. City of Houston</i> , ___ S.W.3d ___, 2004 Tex. App. LEXIS 3988, No. 01-02-01057-CV (Tex. App. – Houston [1 <sup>st</sup> Dist.] Apr. 29, 2004, pet. filed) .....	13, 18
<i>Webb v. City of Dallas</i> , 314 F.3d 787 (5 <sup>th</sup> Cir. 2002) .....	13
<i>Welch v. Coca-Cola Enterprises, Inc.</i> , 36 S.W.3d 532 (Tex. App. – Tyler 2000, pet. withdrawn by agr.) .....	13
<i>Woodward v. Ortiz</i> , 150 Tex. 75, 237 S.W.2d 286 (1951) .....	10

**Statutes**

Tex. Civ. Prac. & Rem. Code ch. 107 .....	16, 17
Tex. Educ. Code § 111.33 .....	12
Tex. Educ. Code § 113.33 (repealed 1979) .....	10
Tex. Educ. Code § 76.04 .....	10, 16
Tex. Gov’t Code § 2253.021 .....	3
Tex. Gov’t Code § 2253.021(a)(1) .....	3
Tex. Gov’t Code § 2253.021(b) .....	3

Tex. Gov't Code § 2253.021(c).....	3
Tex. Gov't Code § 2260.001(4).....	15
Tex. Gov't Code § 2260.005 .....	16
Tex. Gov't Code § 2260.007(a).....	16
Tex. Gov't Code § 2260.007(b)(3).....	16
Tex. Gov't Code § 311.034.....	ii, 9, 11
Tex. Gov't Code § 404.103(b).....	10
Tex. Gov't Code ch. 2260.....	ii, 15, 16, 17
Tex. Health & Safety Code § 772.113(a) .....	8
Tex. Local Gov't Code § 252.044.....	3
Tex. Local Gov't Code § 262.007.....	ii
Tex. Local Gov't Code § 262.007(a) .....	16
Tex. Local Gov't Code § 262.007(d).....	11, 12
Tex. Rev. Civ. Stat. art. 1432c, § 11(a) (repealed 1989) .....	8
Tex. Rev. Civ. Stat. art. 2654.4, § 3(e) (repealed 1971) .....	10
Tex. Rev. Civ. Stat. art. 4393-1, § 5.003 (repealed 1987).....	10
Tex. Rev. Civ. Stat. art. 8263h, § 46 (repealed 1971).....	18
Tex. Water Code § 221.001(a).....	16
Tex. Water Code § 62.078(a).....	18

**Legislative Materials**

Debate on Tex. S.B. 1017 on the Floor of the Senate, 78 <sup>th</sup> Leg., R.S. (Apr. 15, 2003) (available at <a href="http://www.senate.state.tx.us/ram/archive/2003/apr/041503Session.ram">www.senate.state.tx.us/ram/archive/2003/apr/041503Session.ram</a> ) .....	12
---	----



**Secondary Sources**

American Bar Association, *Bond Default Manual* (Clare 2<sup>nd</sup> ed. 1995) .....4

Duke and Anderson, “How Contract Surety Bonds are Underwritten,” in American Bar Association, *The Law of Suretyship* (Gallagher 2<sup>nd</sup> ed. 2000) .....4

Klinger, *et al.*, “Contract Performance Bonds,” in American Bar Association, *The Law of Suretyship* (Gallagher 2<sup>nd</sup> ed. 2000) .....4

## INTEREST OF THE *AMICUS*

The Surety Association of America (“SAA”) is a national trade association of companies licensed to write fidelity and surety insurance in the United States. SAA’s 498 members are sureties on the vast majority of contract performance and payment bonds written in the United States and in Texas.

SAA collects statistics on surety bond premiums and losses and files the statistics with the insurance departments of all fifty states. SAA is licensed by the Texas Department of Insurance as an Advisory Organization. SAA also represents the interests of its member companies before the United States Congress, the legislatures of the various states, and the executive branches of the federal and state governments.

This appeal presents a recurring issue of importance to sureties asked to underwrite public works performance and payment bonds in Texas. Sureties, like other participants in public construction, believe that a public entity authorized to “sue and be sued” cannot successfully argue that it has sovereign immunity from suit. The Court of Appeals’ decision in this case has caused a great deal of concern and uncertainty among surety companies active in Texas. If this Court were to affirm the Court of Appeals by overruling *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970), it would have a very significant adverse effect on the risk of public works bonds in Texas. This increased risk would lead to a reduced market for the bonds, heightened underwriting standards, and a decrease in competition for public construction contracts. The end result would be, at best, increased costs for Texas taxpayers and, at worst, the inability to obtain bids on necessary public construction projects.

The fee for preparation of this brief will be paid by SAA.

### **SUMMARY OF THE ARGUMENT**

The enforceability of contracts against governmental entities is of vital importance to the surety industry, for two principal reasons. First, sureties must sometimes step into a contractor's shoes and complete a project, relying for payment on the contract. Second, any risk that a contractor will not receive payment (on the bonded job or any other job in the contractor's work program) increases the risk that the contractor will default. By increasing sureties' risks, the overruling of *Missouri Pacific* would make surety bonds more expensive and less available (particularly to small and minority contractors), thereby decreasing competition for public contracts and driving up the cost of public works projects.

For numerous reasons, as outlined by the parties and *amici* in the various immunity-from-suit cases pending in this Court and as supplemented in this brief, *Missouri Pacific* remains sound law and should not be overruled or limited.

### **ARGUMENT**

Anyone asked to enter into a contract expects the other party to live up to the bargain, either voluntarily or at the insistence of the courts. If sovereign immunity bars a contract action, the private contracting party has to recognize that its ability to compel the public contracting party to abide by the bargain is compromised. Public entities thus "protected" by sovereign immunity from contract actions will find it difficult to persuade anyone to enter into one-sided contracts, as the experience of Texas counties in the wake of this

Court's decision in *Travis County v. Pelzel & Associates, Inc.*, 77 S.W.3d 246 (Tex. 2002), attests. Presumably, that is one reason the United States and the various states have generally waived or otherwise abrogated sovereign immunity in contract actions.

**I. A HOLDING THAT TEXAS POLITICAL SUBDIVISIONS ARE GENERALLY IMMUNE FROM SUIT WOULD HAVE ADVERSE CONSEQUENCES FOR THE SURETY INDUSTRY, ITS CLIENTS, AND THE PUBLIC ENTITIES THAT BENEFIT FROM SURETY BONDS.**

Payment bonds are required on all public works contracts in Texas in excess of \$25,000.<sup>1</sup> The required payment bond is for the protection of individuals or entities who provide labor or material on a public works project pursuant to a contract with the general contractor or another subcontractor.<sup>2</sup> Governmental entities must also require that the general contractor provide a performance bond on any public works contract in excess of \$100,000.<sup>3</sup> The required performance bond is for the protection of the state or governmental entity awarding the contract.<sup>4</sup>

Suretyship involves a tripartite relationship between a surety, its principal, and the bond obligee, in which the obligation of the surety is intended to supplement an obligation

---

<sup>1</sup>Tex. Gov't Code § 2253.021.

<sup>2</sup>Tex. Gov't Code § 2253.021(c).

<sup>3</sup>Tex. Gov't Code § 2253.021(a)(1); *see also* Tex. Local Gov't Code § 252.044 (performance bond required for municipal contracts exceeding \$25,000).

<sup>4</sup>Tex. Gov't Code § 2253.021(b).

of the principal owed to the bond obligee.<sup>5</sup> The payment and performance bond surety takes the risk that the contractor will not be able to complete the work and pay its subcontractors and suppliers. This risk is taken into account by the surety in the underwriting process, and the surety is paid a premium to assume this risk.<sup>6</sup> However, the surety does not underwrite or collect a premium for a risk that there will not be a right of recourse against a public owner/obligee that refuses to pay the balance of its contract obligation.

If the contractor defaults, the surety has to pay the contractor's bills and pay the excess cost to complete the work over and above the remaining funds still held by the owner.<sup>7</sup> It is a well-established rule of law that the surety is equitably subrogated to the balance of contract funds payable from the owner on a contract for which a bond is written.<sup>8</sup> The surety, therefore, counts on the availability of the contract balance to offset its cost to complete the work. If the owner does not have to pay the contract balance because it can assert sovereign immunity, the risk to the surety is substantially increased.

Essentially, the payment and performance bond surety becomes a guarantor of the prime contractor. Anything which threatens the prime contractor's finances and ability to

---

<sup>5</sup>E.g., *Great American Insurance Co. v. North Austin Municipal Utility District No. 1*, 908 S.W.2d 415, 418 (Tex. 1995).

<sup>6</sup>For a discussion of the contract bond underwriting process, see Duke and Anderson, "How Contract Surety Bonds are Underwritten," in American Bar Association, *The Law of Suretyship* (Gallagher 2<sup>nd</sup> ed. 2000).

<sup>7</sup>The surety's alternatives to complete the work are discussed in American Bar Association, *Bond Default Manual* (Clare 2<sup>nd</sup> ed. 1995), and Klinger, *et al.*, "Contract Performance Bonds," in American Bar Association, *The Law of Suretyship* (Gallagher 2<sup>nd</sup> ed. 2000).

<sup>8</sup>*Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962); *InterFirst Bank Dallas, N.A. v. United States Fidelity & Guaranty Co.*, 774 S.W.2d 391, 397 (Tex. App. – Dallas 1989, writ denied); *Trinity Universal Insurance Co. v. Bellmead State Bank*, 396 S.W.2d 163, 168 (Tex. Civ. App. – Dallas 1965, writ re'f'd n.r.e.) ("it is further well settled in our law that the surety whose funds go to discharge contractor's obligations is thereby subrogated to the rights of the owner to apply the contract balances to the completion of the project and payment of bills incurred in that connection").

perform increases the surety's risk. If losses on one job deplete the contractor's capital, it may be forced to default on both the job causing the problem and its other jobs. The surety asked to consider bonding a contractor, therefore, must look at its entire work program, both bonded and non-bonded, not just the one bonded job. That is one reason sureties and contractors typically have a long term relationship under which the surety provides all of the contractor's bonds.

If this Court were to overrule *Missouri Pacific*, contractors bidding on contracts for public entities authorized to sue and be sued would be forced to run the risk that they would not be paid for work performed, because the public entity could assert sovereign immunity in any breach of contract action. Even if a particular contractor were willing to run that risk, its payment and performance bond surety would be unlikely to want to join it by providing bonds.

To a surety asked to underwrite bonds on a project for such a public entity, the normal risks of construction would be increased by the possibility that the contractor would not be paid or, if the contractor defaulted and the surety paid its bills or completed the work, the surety would not be able to compel payment of the remaining contract funds. The surety would also be concerned that the contractor's ability to complete other jobs would be adversely impacted by non-payment on the single project. This non-payment problem extends, not only to the general contractor who contracts with the public entity, but also to subcontractors, who often have "pay if paid" provisions in their contracts with the general contractor, and the subcontractors' sureties.

At the very least, the surety would tighten its normal underwriting standards and re-

quire the contractor to have enough capital to stay in business if the public entity chose to invoke sovereign immunity to avoid paying what it owed under the contract. Such higher capital requirements would likely exclude many small and minority contractors from public work in Texas. Contractors whom the surety believed could successfully perform the work, but had insufficient net worth to withstand a significant loss due to non-payment, might be denied bonds because the surety could not be sure the public entity would pay its own bills.

Most sureties do business in multiple jurisdictions. Faced with the uncertainty of payment due to sovereign immunity concerns, some sureties can be expected to redirect more of their business to other jurisdictions, thereby reducing the availability of bonding for the construction industry in Texas. A reduction in bonding capacity would invariably make it more difficult to obtain bonds from qualified sureties and would increase the price of those bonds that are written. Even if some contractors chose to bid and could obtain bonds, competition on contracts would be reduced, and, as a result, construction costs would inevitably increase. Public entities would have to pay more for needed construction work. Surely the public interest is better served by affirming that *Missouri Pacific* meant what it said and is still the law.

## **II. MISSOURI PACIFIC IS ALIVE AND WELL.**

By the time it reads these words, the Court will undoubtedly have read and heard almost all it can stand on the question of waiver of immunity from suit through statutory “sue and be sued” or equivalent language. SAA will therefore defer in principal part to the brief-

ing of the parties and *amici* in *Tooke*,<sup>9</sup> *Taub*,<sup>10</sup> *Goerlitz*,<sup>11</sup> *Satterfield*,<sup>12</sup> *Browning*,<sup>13</sup> *Clear Channel*,<sup>14</sup> *United Water Services*,<sup>15</sup> *Reata*,<sup>16</sup> and *Interstate Contracting*.<sup>17</sup> We confine ourselves here to brief response to some of the contentions made by the parties and *amici* urging the overruling of *Missouri Pacific*.

**A. “Sue and Be Sued” Refers to Capacity and Waiver of Immunity.**

It is quite correct that the phrase “sue and be sued” is often used, in the case of private and governmental entities alike, to confer capacity. But the act of conferring capacity “to be sued” is largely meaningless if an entity enjoys virtually complete immunity from suit. Many “sue and be sued” statutes<sup>18</sup> predated the Tort Claims Act, the Whistleblower Act, and other statutes granting blanket waivers of immunity from suit in particular categories of cases. To what suits, therefore, were those “sue and be sued” statutes intended to be applied? It would be an unduly cramped construction of this myriad of statutes to read them as creating capacity only for those comparatively rare cases in which the Legislature waived

---

<sup>9</sup>*Tooke v. City of Mexia*, No. 03-0878 (Tex.).

<sup>10</sup>*Harris County Flood Control District v. Taub*, No. 02-0650 (Tex.).

<sup>11</sup>*City of Midland v. Goerlitz*, No. 03-0185 (Tex.).

<sup>12</sup>*Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, No. 04-0175 (Tex.).

<sup>13</sup>*Alamo Community College District v. Browning*, No. 04-0276 (Tex.).

<sup>14</sup>*City of Houston v. Clear Channel Outdoor, Inc.*, No. 04-0406 (Tex.).

<sup>15</sup>*United Water Services, Inc. v. City of Houston*, No. 04-0547 (Tex.).

<sup>16</sup>*Reata Construction Corp. v. City of Dallas*, 47 Tex. Sup. Ct. J. 408, 2004 Tex. LEXIS 303 (Apr. 2, 2004).

<sup>17</sup>*Interstate Contracting Corp. v. City of Dallas*, 47 Tex. Sup. Ct. J. 434, 2004 Tex. LEXIS 354 (Apr. 16, 2004).

<sup>18</sup>These statutes are listed in Appendix 4.



immunity from suit on an *ad hoc* basis.

In short, the claim that “sue and be sued” is ambiguous because it could refer to capacity is a *non sequitur*; it *does* refer to capacity, but that does not mean that, as applied to a governmental entity, it is susceptible to a reasonable construction whereby it refers *only* to capacity.<sup>19</sup>

**B. The Plain Meaning of “Sue and Be Sued” Is to Waive Immunity.**

Without intending any flippancy, one may ask: what part of a legislative statement that an entity “may be sued” is unclear? It would be Orwellian indeed for this Court to hold that a statute which says that an entity “may be sued” does not really mean that the entity “may be sued.” No wonder *Missouri Pacific* said that such language “is quite plain and gives general consent” for suit. 453 S.W.2d at 813.

Some parties and *amici* contend that *Missouri Pacific* is unreliable on this point because it allegedly predated the rule that a waiver of sovereign immunity must be clear and unambiguous. They are wrong. As early as 1942, this Court recognized that “if the State desires to subject itself to a specific law, it could and should do so in language of clear and unmistakable import.” *Texas Prison Board v. Cabeen*, 159 S.W.2d 523, 528 (Tex. Civ. App. – Beaumont 1942, writ ref’d).<sup>20</sup> The rule that waivers of sovereign immunity must be clear and unambi-

---

<sup>19</sup>When the Legislature intends “sue and be sued” to refer only to capacity, it says so. See Tex. Rev. Civ. Stat. art. 1432c, § 11(a) (repealed 1989) (now codified as Tex. Health & Safety Code § 772.113(a)) (giving emergency communication districts “the capacity to sue or be sued”).

<sup>20</sup>It is incorrect to trace the origin of the “clear and unambiguous” rule to *Duhart v. State*, 610 S.W.2d 740 (Tex. 1981). In *Duhart*, the Court cited *Cabeen* for the proposition that it was by 1981 already “a well-established rule that for the Legislature to

(footnote continued on next page ...)

guous had by 1970 also found expression in the decisions of the federal courts<sup>21</sup> and the highest courts of other states.<sup>22</sup> Thus the effort to portray *Missouri Pacific* as a relic of an earlier, less enlightened era in sovereign immunity jurisprudence falls short of its mark.

The enactment in 2001 of Tex. Gov't Code § 311.034 (Appendix 1), requiring that any waiver of sovereign immunity be clear and unambiguous,<sup>23</sup> has no implications for *Missouri Pacific*, which was decided under an equivalent common-law standard. Moreover, two years after enacting § 311.034, the Legislature used “sue and be sued” language in Tex. Local Gov't Code § 262.007(a) for the explicit purpose of waiving immunity from suit, thereby manifesting its belief that such language *is* a clear and unambiguous waiver of immunity. *See* Section II.C.2, *infra*.

---

(... footnote continued from previous page)

waive the State's sovereign immunity, it must do so by clear and unambiguous language.” 610 S.W.2d at 742 (emphasis supplied).

<sup>21</sup>*See, e.g., United States v. King*, 395 U.S. 1, 4 (1969) (waiver must be unequivocally expressed); *United States v. Sherwood*, 312 U.S. 584, 590 (1941) (waivers strictly interpreted).

<sup>22</sup>*See, e.g., Jobe v. Hodge*, 253 La. 483, 218 So. 2d 566, 569-70 (1969) (only by language explicitly indicating waiver); *Smith v. Commonwealth*, 347 Mass. 453, 455-56, 198 N.E.2d 420, 422 (1964) (requires clear manifestation of consent to suit); *Brazell v. City of Camden*, 238 S.C. 580, 582-83, 121 S.E.2d 221, 222 (1961) (only under plain and positive provisions of statute); *Brewington v. Brewington*, 215 Tenn. 475, 479, 387 S.W.2d 777, 779 (1965) (statute must be plain, clear, and unmistakable).

<sup>23</sup>It is arguable that § 311.034, the stated purpose of which was to “preserve the legislature's interest in managing state fiscal matters through the appropriations process,” is applicable only to waiver of immunity from liability, since protection of governmental entities from fiscal demands is principally a matter of immunity from liability. *See* Section II.I, *infra*.

**C. The Legislature Has Adopted *Missouri Pacific*.**

**1. The Legislature Has Adopted *Missouri Pacific* by Continuing to Pass Statutes Conferring “Sue and Be Sued” Authority Without Otherwise Addressing Sovereign Immunity.**

Since *Missouri Pacific*, the Legislature has passed no fewer than 61 statutes empowering various agencies, authorities, or political subdivisions to “sue and be sued.”<sup>24</sup> In only two of these statutes has the Legislature specifically addressed waiver of sovereign immunity.<sup>25</sup> As to the rest, the Legislature has impliedly adopted *Missouri Pacific*, inasmuch as the legislative use of language which has received a definitive construction from the courts reflects an acquiescence in that construction, at least as applied to the new legislation. *E.g.*, *First Employees Insurance Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983); *Coastal Industrial Water Authority v. Trinity Portland Cement Division*, 563 S.W.2d 916, 918 (Tex. 1978).<sup>26</sup>

**2. The Legislature Adopted *Missouri Pacific* By Using “Sue and Be Sued” Language to Waive Immunity from Suit for Counties.**

The clearest legislative adoption of *Missouri Pacific* came in 2003, when the Legislature used the phrase “sue or be sued, plead or be impleaded, or defend or be defended” to par-

---

<sup>24</sup>These statutes are listed in Appendix 4.

<sup>25</sup>Tex. Rev. Civ. Stat. art. 2654.4, § 3(e) (repealed 1971) (initially codified as Tex. Educ. Code § 113.33 (repealed 1979), now codified as Tex. Educ. Code § 76.04) (University of Texas at Tyler); Tex. Rev. Civ. Stat. art. 4393-1, § 5.003 (repealed 1987) (now codified as Tex. Gov’t Code § 404.103(b)) (Texas Treasury Safekeeping Trust Company).

<sup>26</sup>See *Woodward v. Ortiz*, 150 Tex. 75, 237 S.W.2d 286, 293 (1951) (statute regarding tax deeds “was enacted by the legislature with full knowledge of the construction our courts have given such deeds”).

tially abrogate the sovereign immunity of counties from suit in the aftermath of this Court's decision in *Travis County v. Pelzel & Associates, Inc.*, 77 S.W.3d 246 (Tex. 2002). See Tex. Local Gov't Code § 262.007(a) (Appendix 2). The Legislature specifically chose this language to effectuate a waiver of the "bar against suit based on sovereign immunity." Tex. Local Gov't Code § 262.007(d) (Appendix 2).

Some parties and *amici* disingenuously suggest that it is § 262.007(d) ("This section does not waive a defense . . . other than a bar against suit based on sovereign immunity") rather than § 262.007(a) (containing the "sue and be sued" language) that waives immunity from suit. Waiving a defense by stating that other defenses are not waived would not only be a grammatically awkward mode of speech, but would likely run afoul of the "clear and unambiguous" requirement of Tex. Gov't Code § 311.034. In any event, the legislative history puts to rest the contention that the Legislature used "sue and be sued" for purposes other than waiving immunity. The language of § 262.007(a) appeared in the original draft of the bill and in the Senate Committee substitute, whereas the language of § 262.007(d) was added by Senate floor amendment. Explaining the § 262.007(a) language, Senator Wentworth (the bill's sponsor) stated:

In May 2002, the Texas Supreme Court decided *Travis County v. Pelzel & Associates, Inc.* The Court was asked whether the language in § 89.004 of the Local Government Code waived immunity for suits against counties. The Supreme Court of Texas found that § 89.004 did not clearly and unambiguously waive immunity from suits for claims against counties. The Committee Substitute for Senate Bill 1017 adds language to statute to clearly state that a county may sue or be sued. *The intent of this language would be to waive immunity from suit for counties for claims arising under contracts.*

Debate on Tex. S.B. 1017 on the Floor of the Senate, 78<sup>th</sup> Leg., R.S. (Apr. 15, 2003) (at 3:26:43 of video recording, available at [www.senate.state.tx.us/ram/archive/2003/apr/](http://www.senate.state.tx.us/ram/archive/2003/apr/)-

041503Session.ram) (emphasis supplied). Explaining the § 262.007(d) floor amendment, Senator Wentworth stated that it “*clarifies* that the bill does not waive a defense or limitation on damages other than those related to sovereign immunity.” *Id.* (at 3:32:01 of video recording) (emphasis supplied)

### **3. The Legislature Has Adopted *Missouri Pacific* By Failing to Take Action in Response to the Case.**

As to pre-*Missouri Pacific* statutes, the Legislature’s failure to take action in response to *Missouri Pacific* is significant. In response to *Fazekas v. City of Houston*, 565 S.W.2d 299, 302 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 1978, writ ref’d n.r.e.), where the court held that a prior explicit statutory waiver of immunity from suit was implicitly carried forward in a 1971 non-substantive recodification despite the deletion of the explicit waiver language, the Legislature responded by enacting a specific non-waiver provision.<sup>27</sup> Conspicuously, it has never reacted in similar fashion to *Missouri Pacific*.

#### **D. Stare Decisis Dictates Preservation of *Missouri Pacific*.**

This Court has said that “the doctrine of *stare decisis* has its greatest force in the area of statutory construction.” *James v. Vernon Calboun Packing Co.*, 498 S.W.2d 160, 162 (Tex. 1973). This is because “to overrule a court’s uniform interpretation of a statute which has persisted over a long period of years as evidenced by numerous decisions, is very like amending a statute.” *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 193 (Tex. 1968). For thirty-

---

<sup>27</sup>Tex. Educ. Code § 111.33 (second sentence).

four years, two things have been simultaneously piling up, in apparent harmony: the plethora of court decisions applying the *Missouri Pacific* rule<sup>28</sup> and the myriad statutes continuing to grant “sue and be sued” authority. To overrule *Missouri Pacific* now would effectively amend these 61 statutes as well as the 35 similar statutes enacted before 1970.

**E. *Missouri Pacific* Fits Comfortably Into the Framework of this Court’s Recent Sovereign Immunity Jurisprudence.**

We cannot improve upon Justice Lang’s careful analysis of the relationship between *Missouri Pacific* and this Court’s recent sovereign immunity jurisprudence. See *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, 123 S.W.3d at 70-78 (Lang, J., dissenting). That relationship culminates in this Court’s citation of *Missouri Pacific* only two years ago for the proposition that “[f]or breach of contract claims, the Legislature has waived immunity in some instances but not all.” *Texas A&M University–Kingsville v. Lawson*, 87

---

<sup>28</sup>*United Water Services, Inc. v. City of Houston*, \_\_\_ S.W.3d \_\_\_, \_\_\_, 2004 Tex. App. LEXIS 3988, \*\*9-23, No. 01-02-01057-CV (Tex. App. – Houston [1<sup>st</sup> Dist.] Apr. 29, 2004, pet. filed); *City of Houston v. Clear Channel Outdoor, Inc.*, \_\_\_ S.W.3d \_\_\_, \_\_\_, 2004 Tex. App. LEXIS 367, \*\*3-14, No. 14-03-00022-CV (Tex. App. – Houston [14<sup>th</sup> Dist.] Jan. 15, 2004, pet. filed); *Alamo Community College District v. Browning*, 131 S.W.3d 146 (Tex. App. – San Antonio 2004, pet. filed); *Goerlitz v. City of Midland*, 101 S.W.3d 573, 577 (Tex. App. – El Paso 2003, pet. filed); *Webb v. City of Dallas*, 314 F.3d 787, 793-96 (5<sup>th</sup> Cir. 2002); *Tarrant County Hospital District v. Henry*, 52 S.W.3d 434, 448 (Tex. App. – Fort Worth 2001, no pet.); *Welch v. Coca-Cola Enterprises, Inc.*, 36 S.W.3d 532, 538 (Tex. App. – Tyler 2000, pet. withdrawn by agr.); *City of Garland v. Shierke*, No. 05-99-00258-CV, 2000 Tex. App. LEXIS 3706, \*\*4-6 (Tex. App. – Dallas June 6, 2000, pet. denied) (not designated for publication); *Hidalgo & Cameron County Irrigation District No. 9 v. Ortega*, No. 13-98-00365-CV, 1999 Tex. App. LEXIS 4748, \*2 (Tex. App. – Corpus Christi June 24, 1999, writ dismissed w.o.j.) (not designated for publication); *Bates v. Texas State Technical College*, 983 S.W.2d 821, 827 (Tex. App. – Waco 1998, pet. denied); *Alamo Community College District v. Obayashi Corp.*, 980 S.W.2d 745, 747-48 (Tex. App. – San Antonio 1998, pet. denied); *Engleman Irrigation District v. Shields Brothers, Inc.*, 960 S.W.2d 343, 348 (Tex. App. – Corpus Christi 1997), *pet. denied per curiam*, 989 S.W.3d 360 (Tex. 1998); *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 112 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1997, no pet.); *Knowles v. City of Granbury*, 953 S.W.2d 19, 23 (Tex. App. – Fort Worth 1997, pet. denied); *Harris County Municipal Utility District No. 48 v. Mitchell*, 915 S.W.2d 859, 861 n.1 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1995, writ denied); *Avmanco, Inc. v. City of Grand Prairie*, 835 S.W.2d 160, 165 (Tex. App. – Fort Worth 1992, writ dismissed as moot); *Dillard v. Austin Independent School District*, 806 S.W.2d 589, 594 (Tex. App. – Austin 1991, writ denied); *Trinity River Authority v. San Jacinto County*, 535 S.W.2d 422, 425 (Tex. Civ. App. – Beaumont 1976, writ dismissed w.o.j.); *Contra, City of Carrollton v. McMabon Contracting, L.P.*, \_\_\_ S.W.3d \_\_\_, 2004 Tex. App. LEXIS 4711, No. 05-04-00089-CV (Tex. App. – Dallas May 26, 2004, no pet. hist.); *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, 123 S.W.3d 63, 66-68 (Tex. App. – Dallas 2003, pet. filed).

S.W.3d 518, 521 & n.21 (2002).

**F. The Federal Courts Follow the Equivalent of the *Missouri Pacific* Rule.**

The federal courts follow a broad rule that statutory authorization to “sue and be sued” waives an agency’s sovereign immunity from suit:

[I]f the general authority to “sue and be sued” is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the “sue and be sued” clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to “sue or be sued”, that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

*Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940) (footnote omitted).<sup>29</sup> This rule applies “notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign.” *FDIC v. Meyer*, 510 U.S. 471, 480-81 (1994).

**G. Missouri Pacific Does Not Threaten the Tort Claims Act.**

The specter of unlimited governmental tort liability, raised by several parties and *amici*, is easily exorcised. This Court has made it crystal clear that sovereign immunity has two parts, immunity from suit and immunity from liability, and that both types of immunity must be waived before a litigant may recover against the government. *E.g.*, *Federal Sign v.*

---

<sup>29</sup>*Accord, e.g., United States Postal Service v. Flamingo Industries (USA) Ltd.*, \_\_\_ U.S. \_\_\_, \_\_\_, 124 S. Ct. 1321, 1326 (2004); *Loeffler v. Frank*, 486 U.S. 549, 554-55 (1988); *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 517-18 (1984).

*Texas Southern University*, 951 S.W.2d 401, 405 (Tex. 1997). Even if they were to be construed to waive immunity from suit in tort cases, “sue and be sued” clauses do not expand the limited waiver of immunity from liability contained in the Tort Claims Act, and thus would not expand governmental tort liability.

Moreover, it is strongly arguable that the 1969 enactment of the Tort Claims Act supplanted any waiver of sovereign immunity from tort suits except as provided in the Act, thereby “preempting the field.” See *City of San Antonio v. Butler*, 131 S.W.3d 170 (Tex. App. – San Antonio 2004, pet. filed) (Green, J.); see also *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, 123 S.W.3d at 78-80 (Lang, J., dissenting). If this is the case, “sue and be sued” clauses have no implications at all for tort cases.

#### **H. Missouri Pacific Does Not Threaten Tex. Gov’t Code ch. 2260.**

Tex. Gov’t Code ch. 2260 (Appendix 3), which sets up an administrative procedure for certain contract claims against state agencies, is fully consistent with *Missouri Pacific*. To begin with, only a few state agencies included in ch. 2260 have statutory “sue and be sued” authority.<sup>30</sup> Thus there is little overlap between the entities (mostly state agencies) to which ch. 2260 applies and the entities (mostly political subdivisions and special-purpose districts) to which *Missouri Pacific* applies, and hence little room for the statute and case to interfere with one another.

Moreover, ch. 2260 overlays the existing and future framework of waiver of immu-

---

<sup>30</sup>Compare the tabulation in Appendix 4 of governmental entities with “sue and be sued” authority with the definition of “unit of state government” in Tex. Gov’t Code § 2260.001(4).



nity from suit “by statute, resolution, or any other means the legislature may determine appropriate.” Tex. Gov’t Code § 2260.007(a). The administrative process it creates is a “required prerequisite[e] to suit,” Tex. Gov’t Code § 2260.005, not a bar to suit. Indeed, ch. 2260 specifically states that is not to be interpreted to “limit the effect of a legislative grant of permission to sue a unit of state government unless the grant itself provides that this chapter may have that effect.” Tex. Gov’t Code § 2260.007(b)(3).

There is simply no necessary connection between applicability of ch. 2260 and sovereign immunity from suit: a governmental entity may (1) be subject to ch. 2260 and have immunity from suit,<sup>31</sup> (2) be subject to ch. 2260 and not have immunity from suit,<sup>32</sup> (3) not be subject to ch. 2260 but have immunity from suit,<sup>33</sup> or (4) not be subject to ch. 2260 and not have immunity from suit.<sup>34</sup>

The very fact that political subdivisions and special-purpose districts are excluded from ch. 2260 (and probably also from Tex. Civ. Prac. & Rem. Code ch. 107, which creates a framework for legislative resolutions waiving immunity from suit) is further evidence of the Legislature’s understanding that adequate provision already exists for the processing of claims against such entities. The overruling of *Missouri Pacific* would mean that there is no systematic mechanism whatsoever for litigants to pursue contract claims against most units

---

<sup>31</sup>*E.g.*, the State of Texas.

<sup>32</sup>*E.g.*, the University of Texas at Tyler, which is a unit of state government under § 2260.001(4) but which, by express statutory waiver, does not have immunity from suit, *see* Tex. Educ. Code § 76.04.

<sup>33</sup>*E.g.*, the Brazos River Authority, which is a municipality, *see* Tex. Water Code § 221.001(a), and therefore excluded from ch. 2260 under § 2260.001(4) but which is not the subject of any waiver of sovereign immunity from suit.

<sup>34</sup>*E.g.*, counties, which are excluded from ch. 2260 under § 2260.001(4) but which, by express statutory waiver, do not have immunity from suit on certain contract claims, *see* Tex. Local Gov’t Code § 262.007(a).

of local government, leaving the Legislature at the mercy of importunate would-be litigants seeking authorization to sue. This was the very situation chs. 2260 and 107 were intended to avoid.

**I. Missouri Pacific Does Not Threaten the Public Fisc.**

It is repeatedly said by those who favor immunity from suit that the *Missouri Pacific* rule, if left unchanged, will threaten the public fisc. But it is the purpose of immunity from *liability*, left unaffected by *Missouri Pacific*,<sup>35</sup> rather than immunity from *suit*, to protect public entities against intolerable burdens on their treasuries. Immunity from suit derives instead from a desire to repose decisionmaking authority regarding governmental liability in the legislative rather than the judicial branch. *See generally Texas Natural Resource Conservation Commission v. IT-Davy*, 74 S.W.3d 849, 862 (Tex. 2002) (Hecht, J., concurring on behalf of four justices). By specifically stating that a governmental entity “may be sued,” however, the Legislature has determined that it is appropriate for the courts to be the ones to determine the entity’s liability.

Perhaps the surest proof that the *Missouri Pacific* rule produces no untoward fiscal consequences lies in the fact that it has existed for 34 years without any legislative attempt at alteration. *See* Section II.C.3, *supra*. The Legislature has instead reasonably determined that holding political subdivisions to the contracts they make serves the salutary purpose of ensuring fiscal responsibility at the lower levels of state government.

---

<sup>35</sup>“The case is not ripe for a determination of the question of immunity from liability, and it is not considered or decided.” *Missouri Pacific*, 453 S.W.2d at 814.

**J. The *Missouri Pacific* Rule Should Be Applied Categorically Rather Than on a Statute-by-Statute Basis.**

Some parties and *amici* have suggested that if *Missouri Pacific* is not overruled, it should be limited to statutes similar to the one at issue in that case,<sup>36</sup> by drawing fine distinctions among “may sue and be sued,” “have the power to sue and be sued,” and other statutory phrases, or according to whether “sue and be sued” authority is separately stated or is included in a list of enumerated powers. Such an approach would create a judicial quagmire. There are presently at least eight cases on this Court’s docket involving the effect of “sue and be sued” or similar language on immunity from suit,<sup>37</sup> with at least three more such cases in the judicial pipeline.<sup>38</sup> These involve four different kinds of political subdivisions (home-rule municipalities, independent school districts, community college districts, and flood control districts), and future cases could involve many others. Unless this Court is prepared to consider and resolve issues of immunity from suit separately under each of the 96 Texas statutes granting “sue and be sued” authority, *see* Appendix 4, not to mention the hundreds or thousands of home-rule charters which do so, it should resolve the immunity from suit issue on a categorical basis.

Failure to settle this issue across-the-board would also disserve litigants and the pub-

---

<sup>36</sup>Tex. Rev. Civ. Stat. art. 8263h, § 46 (repealed 1971) (now codified as Tex. Water Code § 62.078(a)).

<sup>37</sup>*See* nn.9-16, *supra*.

<sup>38</sup>*City of Carrollton v. McMabon Contracting, L.P.*, \_\_\_ S.W.3d \_\_\_, 2004 Tex. App. LEXIS 4711, No. 05-04-00089-CV (Tex. App. – Dallas May 26, 2004, no pet. hist.); *City of Irving v. Inform Construction, Inc.*, No. 05-03-01460-CV (Tex. App. – Dallas) (argued and submitted Feb. 17, 2004); *City of Dallas v. Martin*, No. 05-03-01310-CV (Tex. App. – Dallas), *consolidated with City of Dallas v. Parker*, No. 05-03-01334-CV (Tex. App. – Dallas) (both argued and submitted Feb. 4, 2004).

lic. A decision from this Court indicating that “sue and be sued” may or may not waive immunity from suit, depending on the statutory context, would produce an even worse chilling effect on government contracts than a categorical holding of non-waiver, inasmuch as parties and their sureties would lack assurance that those contracts are enforceable, *see* Section I, *supra*, yet no concrete impetus for the Legislature to address the issue by statute would have been created.

### **PRAYER**

**WHEREFORE, PREMISES CONSIDERED,** *Amicus Curiae* The Surety Association of America respectfully prays that this honorable Court consider the matters set forth in this brief in making its decision in this case.

Respectfully submitted,

---

DUNCAN L. CLORE  
State Bar No. 04404500  
P. MICHAEL JUNG  
State Bar No. 11054600

Strasburger & Price, LLP  
4300 Bank of America Plaza  
901 Main Street  
Dallas, Texas 75202  
(214) 651-4300  
(214) 659-4022 (telecopy)  
duncan.clore@strasburger.com  
michael.jung@strasburger.com

ATTORNEYS FOR *AMICUS CURIAE*

**CERTIFICATE OF SERVICE**

I hereby certify that this Brief of *Amicus Curiae* has been served on all parties to this appeal by mailing copies thereof to: Brian L. Gibson, Esq., Attorney for Petitioners, Gibson & Associates, P.L.L.C., 108 S. Dr. J. B. Riggs Drive, P.O. Drawer 148, Groesbeck, Texas 76642; and Kathleen French Dow, Esq., Attorney for Respondent, Buenger & Associates, 3203 Robinson Drive, Waco, Texas 76706; both on this 1<sup>st</sup> day of July, 2004.

---

P. MICHAEL JUNG

# Appendix

**Tex. Gov't Code § 311.034**

§ 311.034. WAIVER OF SOVEREIGN IMMUNITY. In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of "person," as defined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction.

**Tex. Local Gov't Code § 262.007**

§ 262.007. SUIT AGAINST COUNTY ARISING UNDER CERTAIN CONTRACTS.

(a) A county that is a party to a written contract for engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract. A suit on the contract brought by a county shall be brought in the name of the county. A suit on the contract brought against a county shall identify the county by name and must be brought in a state court in that county.

(b) The total amount of money recoverable from a county on a claim for breach of the contract is limited to the following:

(1) the balance due and owed by the county under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work required to carry out the contract;

(3) reasonable and necessary attorney's fees that are equitable and just;  
and

(4) interest as allowed by law.

(c) An award of damages under this section may not include:

(1) consequential damages, except as allowed under Subsection (b)(1);

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

(d) This section does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.

(e) This section does not waive sovereign immunity to suit in federal court.



**Tex. Gov't Code ch. 2260 [excerpts]**

CHAPTER 2260. RESOLUTION OF CERTAIN CONTRACT CLAIMS AGAINST THE  
STATE

SUBCHAPTER A. GENERAL PROVISIONS

§ 2260.001. DEFINITIONS. In this chapter:

(1) “Contract” means a written contract between a unit of state government and a contractor for goods or services, or for a project as defined by Section 2166.001. The term does not include a contract subject to Section 201.112, Transportation Code.

\* \* \*

(3) “Institution of higher education” has the meaning assigned by Section 61.003, Education Code.

(4) “Unit of state government” means the 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. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state.

§ 2260.002. APPLICABILITY. This chapter does not apply to:

(1) a claim for personal injury or wrongful death arising from the breach of a contract; or

(2) a contract executed or awarded on or before August 30, 1999.

\* \* \*

§ 2260.005. EXCLUSIVE PROCEDURE. Subject to Section 2260.007, the procedures contained in this chapter are exclusive and required prerequisites to suit in accordance with Chapter 107, Civil Practice and Remedies Code.

§ 2260.006. SOVEREIGN IMMUNITY. This chapter does not waive sovereign immunity to suit or liability.

§ 2260.007. LEGISLATIVE AUTHORITY RETAINED; INTERPRETATION OF CHAPTER. (a) Notwithstanding Section 2260.005, the legislature retains the authority to

deny or grant a waiver of immunity to suit against a unit of state government by statute, resolution, or any other means the legislature may determine appropriate.

(b) This chapter does not and may not be interpreted to:

(1) divest the legislature of the authority to grant permission to sue a unit of state government on the terms, conditions, and procedures that the legislature may specify in the measure granting the permission;

(2) require that the legislature, in granting or denying permission to sue a unit of state government, comply with this chapter; or

(3) limit in any way the effect of a legislative grant of permission to sue a unit of state government unless the grant itself provides that this chapter may have that effect.

SUBCHAPTER B. NEGOTIATION OF CLAIM [omitted]

SUBCHAPTER C. CONTESTED CASE HEARING [omitted]

**Statutes Granting “Sue and Be Sued” Authority**

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
<b><i>Pre-Missouri Pacific</i></b>		
1875 Tex. Gen. Laws, 14 <sup>th</sup> Leg., R.S., p. 113 (Tex. Rev. Civ. Stat. art. 962 (repealed 1987); <i>see also</i> Tex. Rev. Civ. Stat. art. 968 (repealed 1987)) (now codified as Tex. Local Gov’t Code § 51.013) <sup>1</sup>	1875	Type A general-law municipalities
1879 Rev. Stat. art. 514 (Tex. Rev. Civ. Stat. art. 1140 (repealed 1987)) (now codified as Tex. Local Gov’t Code § 51.033) <sup>2</sup>	1879	Type B general-law municipalities
1907 Tex. Gen. Laws, 30 <sup>th</sup> Leg., R.S., p. 91, § 53 (Tex. Rev. Civ. Stat. art. 8174 (repealed 1971)) (codified as Tex. Water Code § 56.083(a) (repealed 1995)) (now codified as Tex. Water Code § 49.066(a))	1907	Drainage districts
1907 Tex. Gen. Laws, 30 <sup>th</sup> Leg., R.S., p. 224 (Tex. Rev. Civ. Stat. art. 5784 (repealed 1987)) (now codified as Tex. Gov’t Code § 431.009(2)) <sup>2</sup>	1907	State militia units
1909 Tex. Gen. Laws, 31 <sup>st</sup> Leg., R.S., p. 32 (Tex. Rev. Civ. Stat. art. 8228 (repealed 1971)) (now codified as Tex. Water Code § 61.082(a))	1909	Certain navigation districts

---

<sup>1</sup>Statute includes “implead and be impleaded, and answer and be answered in any matter in any court or other place.”

<sup>2</sup>Statute includes “plead and be impleaded.”

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
1909 Tex. Gen. Laws, 31 <sup>st</sup> Leg., R.S., p. 140, § 54 (Tex. Rev. Civ. Stat. art. 8026 (repealed 1971)) (codified as Tex. Water Code § 57.069 (repealed 1995)) (now codified as Tex. Water Code § 49.066(a))	1909	Levee improvement districts
Tex. Water Aux. Laws art. 7847	1918	Water control and preservation districts
1919 Tex. Gen. Laws, 36 <sup>th</sup> Leg., 2 <sup>nd</sup> C.S., ch. 28, § 1 (Tex. Rev. Civ. Stat. art. 7655 (repealed 1971)) (codified as Tex. Water Code § 55.126 (repealed 1995)) (now codified as Tex. Water Code § 49.066(a))	1919	Water improvement districts
1925 Tex. Gen. Laws, 39 <sup>th</sup> Leg., R.S., ch. 5, § 46 (Tex. Rev. Civ. Stat. art. 8263h, § 46 (repealed 1971)) (now codified as Tex. Water Code § 62.078(a))	1925	Certain navigation districts
Tex. Rev. Civ. Stat. arts. 7880-51(25) & 7880-137(25) (repealed 1971) (codified as Tex. Water Code § 51.099 (repealed 1995)) (now codified as Tex. Water Code § 49.066(a))	1925	Water control and improvement districts
Tex. Rev. Civ. Stat. art. 6702-1, § 4.432 (repealed 1995) (now codified as Tex. Transp. Code § 257.001(a)) <sup>3</sup>	1926	Road districts
Tex. Rev. Civ. Stat. art. 2815h, § 20 (repealed 1969) ( <i>see</i> now Tex. Educ. Code §§ 11.151 & 130.084)	1929	Junior college districts

---

<sup>3</sup>Statute includes “in the same manner as a county.” In 1983, a proviso was added that road districts would be subject to tort liability only in accordance with the Tort Claims Act.

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Rev. Civ. Stat. art. 8263e, § 75 (repealed 1971) (now codified as Tex. Water Code § 63.112(a))	1932	Self-liquidating navigation districts
1934 Tex. Gen. Laws, 43 <sup>rd</sup> Leg., 4 <sup>th</sup> C.S., ch. 7 (repealed 2003) (now codified as Tex. Water Code § 222.004(k))	1934	Lower Colorado River Authority
Tex. Rev. Civ. Stat. art. 165a-2, § 5(f) (now codified as Tex. Agric. Code § 202.022(4))	1935	Wind erosion districts
Tex. Rev. Civ. Stat. art. 165a-4, § 7(8) (repealed 1981) (now codified as Tex. Agric. Code § 201.101(1))	1939	Soil and water conservation districts
Tex. Rev. Civ. Stat. art. 320a-1, § 2(a) (repealed 1987) (now codified as Tex. Gov't Code § 81.014)	1939	State Bar of Texas
Tex. Rev. Civ. Stat. art. 1269k, § 8(a) (repealed 1987) (now codified as Tex. Local Gov't Code § 392.065(1))	1939	Housing authorities
Tex. Rev. Civ. Stat. art. 6079c, § 11 (repealed 1987) (now codified as Tex. Local Gov't Code § 321.048(a))	1951	Certain county boards of park commissioners
Tex. Rev. Civ. Stat. art. 4494n, § 5 (repealed 1989) (now codified as Tex. Health & Safety Code § 281.056(a))	1955	Certain hospital districts
Tex. Rev. Civ. Stat. art. 4437e, § 3 (repealed 1989) (now codified as Tex. Health & Safety Code § 262.021(b)(2))	1957	Municipal hospital authorities
Tex. Rev. Civ. Stat. art. 4494o, § 7 (repealed 1989) (now codified as Tex. Health & Safety Code § 282.048(a))	1957	Certain hospital districts
Tex. Rev. Civ. Stat. art. 4494p, § 7(a) (repealed 1989) (now codified as Tex. Health & Safety Code § 283.052(a))	1957	Certain hospital districts

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Rev. Civ. Stat. art. 6079e, § 11(c) (repealed 1987) (now codified as Tex. Local Gov't Code § 320.048(a))	1957	Certain county boards of park commissioners
Tex. Rev. Civ. Stat. art. 2372o, § 9(a) (repealed 1987) (now codified as Tex. Local Gov't Code § 293.026(a)(2)) <sup>4</sup>	1959	County building authorities
Tex. Rev. Civ. Stat. art. 6079f, § 11 (repealed 1987) (now codified as Tex. Local Gov't Code § 322.048)	1959	Certain county boards of park commissioners
Tex. Rev. Civ. Stat. art. 2615g, § 3 (repealed 1971) (now codified as Tex. Educ. Code § 111.33) <sup>5</sup>	1961	University of Houston
Tex. Rev. Civ. Stat. art. 6081g-1, § 7(j) (repealed 1987) (now codified as Tex. Local Gov't Code § 306.041)	1962	Park boards of trustees
Tex. Rev. Civ. Stat. art. 4494r, § 3 (repealed 1989) (now codified as Tex. Health & Safety Code § 264.021(b)(2))	1963	County hospital authorities
Tex. Rev. Civ. Stat. art. 4494i-1, § 2 (repealed 1989) (now codified as Tex. Health & Safety Code § 265.035)	1965	Joint municipal and county hospital authorities
Tex. Rev. Civ. Stat. arts. 5931-4, 5931-5(a) (repealed 1987) (now codified as Tex. Gov't Code § 435.013(b)(1))	1967	Texas Military Facilities Commission
Tex. Rev. Civ. Stat. art. 1269j-101, § 3 (repealed 1971) (now codified as Tex. Educ. Code § 53.13)	1969	Higher education authorities

---

<sup>4</sup>Statute includes “implead and be impleaded, and complain and defend in court.”

<sup>5</sup>Statute initially included specific waiver of sovereign immunity, which was omitted in 1971 recodification. Statute now includes specific disclaimer of waiver of sovereign immunity, added in 1985.

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Rev. Civ. Stat. art. 2615f-1a, § 3 (repealed 1971) (now codified as Tex. Educ. Code § 135.55)	1969	Texas State Technical College System
Tex. Rev. Civ. Stat. art. 5415d-3, § 7 (repealed 1977) (now codified as Tex. Nat. Resources Code § 62.054)	1969	Beach park boards of trustees
Tex. Educ. Code § 23.26(a) (repealed 1995) (now codified as Tex. Educ. Code § 11.151(a))	1969	Independent school districts
<b><i>Post-Missouri Pacific</i></b>		
Tex. Rev. Civ. Stat. art. 1269j-4.5, § 28 (repealed 1987) (now codified as Tex. Local Gov't Code § 281.052)	1971	Municipal civic center authorities
Tex. Rev. Civ. Stat. art. 2654.4, § 3(e) (repealed 1971) (codified as Tex. Educ. Code § 113.33 (repealed 1979)) (now codified as Tex. Educ. Code § 76.04) <sup>6</sup>	1971	University of Texas at Tyler
Tex. Water Code § 54.119 (repealed 1995) (now codified as Tex. Water Code § 49.066(a))	1971	Municipal utility districts
Tex. Rev. Civ. Stat. art. 1118x, § 6(c) (repealed 1995) (now codified as Tex. Transp. Code § 451.054(c))	1973	Metropolitan rapid transit authorities
Tex. Educ. Code § 20.56(c) (repealed 1995) (now codified as Tex. Educ. Code § 45.152(b))	1973	Athletic stadium authorities
Tex. Ins. Code art. 9.48, § 14(c)(6) (repealed effective 2005) (to be codified as Tex. Ins. Code § 2602.101(a)(3) (effective 2005))	1975	Texas Title Insurance Guaranty Association

---

<sup>6</sup>Statute includes specific waiver of sovereign immunity.

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Water Code § 19.052(a)(5)	1977	Texas Deepwater Port Authority
Tex. Water Code § 58.098 (repealed 1995) (now codified as Tex. Water Code § 49.066(a))	1977	Irrigation districts
Tex. Rev. Civ. Stat. art. 1118y, § 10(b) (repealed 1995) (now codified as Tex. Transp. Code § 452.054(b))	1979	Regional transportation authorities
Tex. Water Code § 64.092(25)	1979	Ogalalla Water Import Authority of Texas
Tex. Gen. Laws ch. 823, 66 <sup>th</sup> Leg., R.S. (1979) (repealed 1993) (now codified as Tex. Gov't Code § 2306.053(b)(1)) <sup>7</sup>	1979	Texas Department of Housing and Community Affairs
Tex. Rev. Civ. Stat. art. 6550c, § 5(c)	1981	Rural rail transportation districts
Tex. Rev. Civ. Stat. art. 6550c-1, § 4(c)	1981	Intermunicipal commuter rail districts
Tex. Rev. Civ. Stat. art. 717r, § 3(f)	1983	Metropolitan water control and improvement subdistricts
Tex. Rev. Civ. Stat. art. 1432c, § 11(a) (repealed 1983) (now codified as Tex. Health & Safety Code § 772.113(a)) <sup>8</sup>	1983	Emergency communication districts
Tex. Rev. Civ. Stat. art 4436b (repealed 1989) (now codified as Tex. Health & Safety Code § 121.043(c))	1983	Public health districts
Tex. Rev. Civ. Stat. art. 6830a (repealed 1987) (now codified as Tex. Local Gov't Code § 421.023(h))	1983	Matagorda County Seawall Commission
Tex. Water Code § 65.118(a) (repealed 1995) (now codified as Tex. Water Code § 49.066(a))	1983	Special utility districts

<sup>7</sup>Statute includes “plead and be impleaded.”

<sup>8</sup>Statute reads “the capacity to sue or be sued.”



<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Rev. Civ. Stat. art. 601d, § 21(3) (repealed 1999) (now codified as Tex. Gov't Code § 1232.067(3))	1984	Texas Public Finance Authority
Tex. Rev. Civ. Stat. art. 6674r-1, § 30(a) (repealed 1995) (now codified as Tex. Transp. Code § 441.103(a))	1984	Road utility districts
Tex. Rev. Civ. Stat. art. 969a-2, § 5(b)(10) (repealed 1999) (now codified as Tex. Local Gov't Code § 254.023(b)(7))	1985	Island property boards of trustees
Tex. Rev. Civ. Stat. art. 1269j-4.35, § 4 (repealed 1987) (now codified as Tex. Local Gov't Code § 431.027(a)(5)) <sup>9</sup>	1985	Municipal parking authorities
Tex. Water Code § 66.119(a) (repealed 1995) (now codified as Tex. Water Code § 49.066(a))	1985	Stormwater control districts
Tex. Rev. Civ. Stat. art. 4393-1, § 5.003 (repealed 1987) (now codified as Tex. Gov't Code § 404.103(b)) <sup>10</sup>	1986	Texas Treasury Safekeeping Trust Company
Tex. Rev. Civ. Stat. arts. 2351a-8 & 2351a-9 (repealed 1989) (now codified as Tex. Health & Safety Code §§ 775.031(a)(4), 776.031(a)(3))	1987	Emergency services districts
Tex. Rev. Civ. Stat. art. 4413(47e), § 4(a) (repealed 1993) (now codified as Tex. Gov't Code § 2301.032)	1987	Superconducting Super Collider research facility authority
Tex. Rev. Civ. Stat. art. 5115f (repealed 1989) (now codified as Tex. Local Gov't Code § 351.134(b))	1987	Jail districts

---

<sup>9</sup>Statute includes “implead and be impleaded, and complain and defend in court.”

<sup>10</sup>Statute includes specific waiver of sovereign immunity.

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Rev. Civ. Stat. art. 6079g, § 18 (repealed 1989) (now codified as Tex. Local Gov't Code § 324.065)	1987	Park and recreation districts
Tex. Agric. Code § 58.022(2)	1987	Texas Agricultural Finance Authority
Tex. Water Code § 20.022	1987	Texas Water Resources Finance Authority
Tex. Rev. Civ. Stat. art. 1187f, § 3(b)(10) (repealed 1999) (now codified as Tex. Transp. Code § 54.053(b)(7))	1989	Port improvement or facility boards of trustees
Tex. Rev. Civ. Stat. art. 4494q-1, § 4.15 (repealed 1989) (now codified as Tex. Health & Safety Code § 286.086)	1989	Certain hospital districts
Tex. Rev. Civ. Stat. art. 8280-15, § 8 (repealed 1991) (now codified as Tex. Local Gov't Code § 375.092(c))	1989	Municipal management districts
Tex. Local Gov't Code § 325.034(a)	1989	Sports facility districts
Tex. Rev. Civ. Stat. art. 4477-7j, § 3.19(a)	1991	Gaines County Solid Waste Management District
Tex. Rev. Civ. Stat. art. 4477-7k, § 3.17(a)	1991	Upper Sabine Valley Solid Waste Management District
Tex. Health & Safety Code § 403.006, Art. III, §§ 3.01, 3.05(5)	1993	Texas Low-Level Radioactive Waste Disposal Compact Commission
Tex. Ins. Code art. 26.56, § 2 (repealed effective 2005) (to be codified as Tex. Ins. Code § 1501.307(b)(2) (effective 2005))	1993	Texas Health Reinsurance System
Tex. Water Code § 151.037(a) (repealed effective 2005)	1993	Harris-Galveston Coastal Subsidence District
Tex. Educ. Code § 54.618(b)(3)	1995	Texas Prepaid Higher Education Tuition Board
Tex. Local Gov't Code § 383.062	1995	County development districts

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Water Code § 36.066(a)	1995	Groundwater conservation districts
Tex. Local Gov't Code § 326.063(a)	1997	Library districts
Tex. Local Gov't Code § 363.161	1997	Crime control and prevention districts
Tex. Transp. Code § 366.033(e) <sup>11</sup>	1997	Regional tollway authorities
Tex. Health & Safety Code § 287.083	1999	Health services districts
Tex. Local Gov't Code § 379B.005(a)	1999	Defense base development authorities
Tex. Local Gov't Code § 384.051(a)	1999	Southeast Texas Agricultural Development District
Tex. Local Gov't Code § 396.005(a)(1) <sup>12</sup>	1999	Lubbock Reese Development Authority
Tex. Local Gov't Code § 396.035(1)	1999	Westworth Village-White Settlement Redevelopment Authority
Tex. Local Gov't Code § 396.065(a)(1) <sup>11</sup>	1999	Red River Redevelopment Authority
Tex. Agric. Code § 60.060(a)	2001	Agricultural development districts
Tex. Gov't Code § 510.017, Art. III, § a, & Art. IV, § n	2001	Interstate Commission for Adult Offender Supervision
Tex. Local Gov't Code § 386.106	2001	Commercial and industrial development zones
Tex. Transp. Code § 460.103(b)	2001	Coordinated county transportation authorities
Tex. Ins. Code § 1506.108(a) (effective 2005)	2003	Texas Health Insurance Risk Pool
Tex. Local Gov't Code § 262.007(a) <sup>13</sup>	2003	Counties

---

<sup>11</sup>Statute includes “plead and be impleaded.”

<sup>12</sup>Statute includes “to the extent permitted by law, and plead and be impleaded.”

<sup>13</sup>Statute includes “plead or be impleaded, or defend or be defended.”

<i>Statute</i>	<i>Enacted</i>	<i>Entity</i>
Tex. Local Gov't Code § 327.161(a)	2003	Zoological operation and maintenance boards
Tex. Local Gov't Code § 335.005	2003	Sports and community venue districts
Tex. Local Gov't Code § 344.161	2003	Fire control, prevention, and emergency services districts
Tex. Transp. Code § 370.033(d) <sup>14</sup>	2003	Regional mobility authorities

---

<sup>14</sup>Statute includes “plead and be impleaded.”