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Is Sue and be Sued Language a Clear and Unambiguous Waiver of Immunity.

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IS SUE AND BE SUED LANGUAGE A CLEAR AND UNAMBIGUOUS WAIVER OF IMMUNITY?

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I. INTRODUCTION

Under Texas law, governmental entities—including the state, its agencies, and political subdivisions—are entitled to sovereign immunity from both suit and liability.[1] A fundamental rule of law regarding sovereign immunity is that sovereign immunity applies unless it has been clearly and unambiguously waived by the legisla-

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1. Travis County v. Pelzel & Assocs., 77 S.W.3d 246, 248 (Tex. 2002). Some opinions distinguish between sovereign immunity and governmental immunity, applying sovereign immunity to the state and its various agencies and applying governmental immunity to political subdivisions such as counties and cities. *See* Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694 n.3 (Tex. 2003) (defining and clarifying the concept of sovereign immunity). Other opinions, however, do not make this distinction. *See Pelzel*, 77 S.W.3d at 248 (expressing the court's view that sovereign immunity encompasses the principles of "immunity from suit and immunity from liability," which protect governmental agencies in actions for monetary damages).

ture.[2] On several occasions, the state legislature has clearly and unambiguously waived sovereign immunity for certain types of claims. Well-known examples are the Texas Tort Claims Act[3] and the Whistleblower Act.[4] Another type of statutory provision which does not expressly waive sovereign immunity, but which has been interpreted as such, is statutory language providing that a governmental entity can sue and be sued.

This Article addresses the effect of statutory language that states an entity can "sue and be sued" on that governmental entity's sovereign immunity. A number of courts in Texas have addressed this issue, and while some have held that sue and be sued language does not amount to a waiver,[5] the majority of courts have held that sue and be sued language is a waiver of a governmental entity's immunity from suit.[6] This Article argues that the mere presence of

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2. *See Pelzel*, 77 S.W.3d at 248 (emphasizing that consent to waive suit must be clear and unambiguous); Duhart v. State, 610 S.W.2d 740, 742 (Tex. 1980) (indicating that the legislature may only waive sovereign immunity through the use of clear and unambiguous language); *see also* TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2003) (stating that statutes "shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language").

3. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (Vernon 1997).

4. TEX. GOV'T CODE ANN. § 554.0035 (Vernon Supp. 2003).

5. *See, e.g.*, Jackson v. City of Galveston, 837 S.W.2d 868, 871 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (declining to abandon the doctrine of sovereign immunity); Townsend v. Mem'l Med. Ctr., 529 S.W.2d 264, 267 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (finding the argument that a provision providing that the board of managers of a county hospital may sue and be sued impliedly waived governmental immunity unpersuasive); Childs v. Greenville Hosp. Auth., 479 S.W.2d 399, 401 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (declining to find an implied waiver of governmental immunity); *see also* City of Dallas v. Reata Constr. Corp., 83 S.W.3d 392, 398 (Tex. App.—Dallas 2002, pet. filed) (holding that neither the City charter language stating that the City has power to "sue and be sued" nor statutory language stating that the City "may plead and be impleaded in any court" waived immunity from suit). A separate but related issue dividing appellate courts is whether "plead and be impleaded" language is a waiver of immunity. *See* City of Mexia v. Tooke, 115 S.W.3d 618, 621-23 (Tex. App.—Waco 2003) (recognizing that other courts had previously found the "plead and be impleaded" to be a waiver of a home-rule municipality's immunity from suit, but declining to find that the language clearly and unambiguously waives immunity from suit).

6. *See, e.g.*, Mo. Pac. R.R. v. Brownsville Navigation Dist., 453 S.W.2d 812, 814 (Tex. 1970) (regarding "sue and be sued" language as an indication of the legislature's general consent to bring suit against the Navigation District); Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434, 448-49 (Tex. App.—Fort Worth 2001, no pet.) (declaring that it is well settled that code provisions which state that a board of managers may sue and be sued equate to a waiver of immunity from suit); Alamo Cmty. Coll. Dist. v. Obayashi Corp., 980 S.W.2d 745, 748 (Tex. App.—San Antonio 1998, pet. denied) (determining that the legislature, in applying the law of independent school districts to junior college districts, clearly

sue and be sued language in a statute is not a clear and unambiguous waiver of a governmental entity's immunity from suit, despite the weight of authority to the contrary. This Article further argues that such language has another equally, if not more, plausible meaning: namely that it is simply a grant of capacity to be a party to a lawsuit.

II. SUE AND BE SUED STATUTES

The question of whether sue and be sued language constitutes a waiver of a governmental entity's immunity is significant. The enabling statutes for many different types of local governmental entities in Texas, as well as some state entities, contain language stating that the entity or its governing board can sue and be sued. Examples of entities with enabling statutes containing sue and be sued language include the following: school districts,[7] municipalities,[8] municipal and county hospital authorities,[9] hospital districts,[10] health services districts,[11] emergency service districts,[12] soil and water conservation districts,[13] navigation districts,[14] and the Texas Department of Housing and Community Affairs.[15] Provisions stating that an entity can sue and be sued are commonly found in sections of enabling statutes setting out entities' powers and authority. For example, Section 11.151 of the Texas Education Code, which includes a provision stating that the trustees of an independent school district can sue and be sued in the name of the district, is

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and unambiguously granted consent to bring suit against junior colleges); *see also Pelzel*, 77 S.W.3d at 249-50 (noting in dicta that sue and be sued language "arguably" waives sovereign immunity); Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 408 (Tex. 1997) (containing dicta recognizing the holding of the *Brownsville Navigation Dist.* case).

7. TEX. EDUC. CODE ANN. § 11.151(a) (Vernon 1996).

8. *See* TEX. LOC. GOV'T CODE ANN. § 51.013 (Vernon 1999) (indicating that Type A Municipalities may sue and be sued); *id.* § 51.033 (referring to Type B Municipalities). Type C Municipalities are generally given the same authority as Type A or B Municipalities. Id. § 51.051. Home-Rule Municipalities have the authority to "plead and be impleaded in any court." Id. § 51.075. Appellate courts are divided as to whether this language constitutes a waiver of immunity. *See Tooke*, 115 S.W.3d at 622-23.

9. TEX. HEALTH & SAFETY CODE ANN. §§ 262.021, 264.021 (Vernon 2001).

10. *Id.* §§ 281.056, 282.048, 283.052, 286.086.

11. *Id.* § 287.083.

12. *Id.* §§ 775.031, 776.031.

13. TEX. AGRIC. CODE ANN. § 201.101 (Vernon Supp. 2003).

14. TEX. WATER CODE ANN. §§ 61.082, 62.078 (Vernon 1988).

15. TEX. GOV'T CODE ANN. § 2306.053 (Vernon 2000).

found within a subchapter entitled "Powers and Duties of Board of Trustees of Independent School District," which also includes provisions allowing district trustees to hold real and personal property, dispose of property, and receive bequests and donations.[16] Similarly, sue and be sued provisions applicable to municipalities are found in Chapter 51 of the Local Government Code, entitled "General Powers of Municipalities."[17] Chapter 51 also includes sections giving municipalities the authority to enter into contracts and hold, purchase, lease, and convey property.[18] A few statutes containing sue and be sued language also include specific provisions spelling out whether the entity's sovereign immunity has been waived.[19]

III. *Missouri Pacific Railroad Co. v. Brownsville Navigation District* and Prior Cases

The leading case holding that sue and be sued language is a waiver of immunity from suit is *Missouri Pacific Railroad Co. v. Brownsville Navigation District*,[20] decided by the Texas Supreme Court in 1970. The *Missouri Pacific* case involved a suit for indemnification brought against the Navigation District by Missouri Pacific after it had been sued related to the death of a brakeman.[21] The trial court granted the Navigation District's plea to the jurisdiction based on immunity, and the court of appeals affirmed.[22] The Texas Supreme Court, citing a statute which states that navigation districts may "by and through the navigation and canal commissioners, sue and be sued in all courts of this State in the name of such navigation district," held that the district's immunity from suit had been waived by virtue of this language.[23] The court noted, but rejected, the Navigation District's argument that other statutes exist in which legislative intent to give consent to suits has been ex-

16. Tex. Educ. Code Ann. § 11.151 (Vernon 1996).

17. Tex. Local Gov't Code Ann. § 51.033 (Vernon 1999).

18. *Id.* §§ 51.014, 51.015, 51.034.

19. *See* Tex. Educ. Code Ann. § 76.04 (Vernon 2002) (indicating that legislative consent to bring suit had been granted); *id.* § 111.33 (denying consent to bring suit).

20. 453 S.W.2d 812 (Tex. 1970).

21. Mo. Pac. R.R. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970).

22. *Id.* at 813.

23. *Id.*

pressed more clearly.[24] In response to this argument, the court cited the 1884 Texas Supreme Court opinion of *Hamilton County v. Garrett*,[25] pointing out that statutes requiring the filing of a claim before institution of a suit against a county had been held sufficient to authorize suits against counties.[26] The court's reliance on *Garrett*, however, appears to have been misplaced.

The *Garrett* opinion, which involved a suit by a resident of a county against the county for establishing a road across his land, did not include any significant discussion concerning the effect of the notice of claim statute on sovereign immunity.[27] Instead, *Garrett* cites to an earlier opinion, *Watkins v. Walker County*,[28] which the court interprets as allowing a similar suit against a county under the same statute.[29] Although the *Watkins* opinion mentions the statute in question, it was decided primarily on the basis of the takings clause of the Texas Constitution.[30] *Watkins* involved a suit by a landowner against a county seeking compensation for trees taken from his land to repair a county highway.[31] The *Watkins* court held simply that an individual may sue a county for removing property from his land for public use under the takings clause.[32] The opinion contains no express discussion of sovereign immunity.[33] Additionally, the *Watkins* decision contains no significant discussion of the notice of claim statute, other than to indicate that "[t]he action appears to have been well brought[ ] under the statute."[34]

Interestingly, the Texas Supreme Court recently held in *Travis County v. Pelzel & Associates*[35] that the county presentment of claim statute, which is the successor statute to the notice of claim

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24. *Id.*
25. 62 Tex. 602 (1884).
26. *Mo. Pac.*, 453 S.W.2d at 813.
27. Hamilton County v. Garrett, 62 Tex. 602, 603 (1884).
28. 18 Tex. 586 (1857).
29. *Garrett*, 62 Tex. at 604.
30. Watkins v. Walker County, 18 Tex. 585, 589-90 (1857).
31. *Id.* at 586.
32. *Id.* at 590-91.
33. While the *Watkins* court did not include a discussion of sovereign immunity in its decision, it is now well established that sovereign immunity is not a bar to an action for compensation under the takings clause. Gen. Serv. Comm'n. v. Little-Tex Insulation Co., 39 S.W.3d 591, 598 (Tex. 2001).
34. *Watkins*, 18 Tex. at 591.
35. 77 S.W.3d 246 (Tex. 2002).

statute referenced in *Missouri Pacific*, is only a condition precedent to suit and is not a waiver of sovereign immunity.[36] Thus, the *Missouri Pacific* court's reliance on earlier opinions that discussed the county notice of claims statute is not particularly persuasive, especially in light of the court's recent ruling in *Pelzel*.[37] More significantly, the *Missouri Pacific* opinion cites no prior cases interpreting sue and be sued language and contains no discussion of whether the phrase "sue and be sued" might have an alternative meaning.

Although not discussed by the court in *Missouri Pacific*, earlier courts of appeals addressed the issue of whether sue and be sued language is a waiver of immunity, with mixed results. The Fourth District Court of Appeals at San Antonio held, in two early opinions, that water districts were subject to suit, partly because of statutory language authorizing the districts to sue and be sued.[38] The court, in *Barnhart v. Hidalgo County Water Improvement District No. 4*,[39] specifically held that the statute giving irrigation districts the power to sue and be sued waived immunity, stating that

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36. Travis County v. Pelzel & Assocs., 77 S.W.3d 246, 250 (Tex. 2002). The court in *Pelzel* also noted that the presentment statute formerly contained "sue and be sued" language which was deleted in 1879, and that this language "arguably" showed intent to waive sovereign immunity from suit for counties. *Id.* at 249-50 (citing Mo. Pac. R.R. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970)). The 1857 opinion of *Watkins v. Walker County* makes no mention of, and in no way bases its holding on, sue and be sued language in the statute.

37. The court's rationale in *Missouri Pacific* concerning the notice of claim statute as a waiver of immunity is also a good indication that it was not applying the clear and unambiguous standard for finding a legislative waiver of immunity. The Texas Supreme Court first expressly utilized the term "clear and unambiguous" to describe the standard for finding a legislative waiver of immunity in *Duhart v. State*. Duhart v. State, 610 S.W.2d 740, 742 (Tex. 1980); *see also* Barr v. Bernhard, 562 S.W.2d 844, 849 (Tex. 1978) (noting that some states have passed legislation "expressing in clear and unambiguous terms" a waiver of immunity to the extent liability insurance has been purchased, but that Texas had no such legislation with regard to school districts). The court had refused writ on earlier appellate cases applying this standard. *See* Tex. Prison Bd. v. Cabeen, 159 S.W.2d 523, 527-28 (Tex. Civ. App.—Beaumont 1942, writ ref'd) (indicating that the legislature authorized insurance, but that it had not created a new liability); Welch v. State, 148 S.W.2d 876, 879 (Tex. Civ. App.—Dallas 1941, writ ref'd) (stating that an intention to waive immunity to liability must be through clear and unambiguous language).

38. *See* Cameron County Water Improvement Dist. No. 1 v. Hall, 280 S.W. 838, 839 (Tex. Civ. App.—San Antonio 1925, writ ref'd) (finding that the statute at issue clearly gives both the district and citizens the right to sue); Barnhart v. Hidalgo County Water Improvement Dist. No. 4, 278 S.W. 499, 500 (Tex. Civ. App.—San Antonio 1925, writ ref'd) (stressing the implications on claims of immunity if consent is given simply by the inclusion of sue and be sued language).

39. 278 S.W. 499 (Tex. Civ. App.—San Antonio 1925, writ ref'd).

"[t]here could be no plainer grant of power than is given by the right to sue and be sued."[40] The court also cited to an opinion from the California Supreme Court, holding that statutory sue and be sued language authorized suits against municipalities.[41] In *Cameron County Water Improvement District No. 1 v. Hall*,[42] the Fourth Court of Appeals followed *Barnhart*, agreeing that the sue and be sued language in question waived immunity for water improvement districts.[43] The Fourteenth District Court of Appeals at Houston, however, addressed the effect of sue and be sued language related to navigation districts and found that immunity was not waived, stating that the language "does not in any way militate against their governmental immunity."[44]

IV. CASES DECIDED AFTER *MISSOURI PACIFIC*

Most Texas courts that have addressed this issue since 1970 have fallen in line behind *Missouri Pacific Railroad. Co. v. Brownsville Navigation District*, and have adopted its holding regarding the effect of sue and be sued language on a governmental entity's immunity from suit.[45] Importantly, these subsequent opinions have not contained any serious discussion as to the question of whether sue and be sued language is simply a grant of capacity, as opposed to a waiver of immunity. In *Dillard v. Austin Independent School District*,[46] the Third District Court of Appeals at Austin, relying on *Missouri Pacific*, held that language in the Education Code stating that school district trustees can sue and be sued indicates legislative consent for suits against school districts.[47] The opinion does not include a discussion of whether sue and be sued language might have an alternate purpose. Similarly, the Fourth Court of Appeals

40. *Barnhart*, 278 S.W. at 499, 500.

41. *Id.* at 500 (citing Boehmer v. Big Rock Creek Irrigation Dist., 48 P. 908 (Cal. 1897)).

42. 280 S.W.838 (Tex. Civ. App.—San Antonio 1925, writ ref'd).

43. *Hall*, 280 S.W. at 839.

44. Jones v. Tex. Gulf Sulphur Co., 397 S.W.2d 304, 307 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.). *Jones* was later cited with approval in *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980).

45. This section discusses some, but not all, of the appellate court opinions subsequent to *Missouri Pacific*, which held that sue and be sued language is a waiver of immunity.

46. 806 S.W.2d 589 (Tex. App.—Austin 1991, writ denied).

47. Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592, 594 (Tex. App.—Austin 1991, writ denied).

in *Alamo Community College District v. Obayashi Corp.*[48] cited both *Missouri Pacific* and *Dillard* and held, without discussing alternative interpretations of the language, that sue and be sued language applicable to school districts also amounts to a waiver of immunity from suit for junior college community districts.[49] The court cited a section of the Education Code, which states that the law applicable to independent school districts governs the powers and duties of trustees of a junior college district.[50] The court reasoned that because the trustees of school districts are authorized to sue and be sued, immunity from suit for junior colleges has also been waived.[51] In *Harris County Municipal Utility District No. 48 v. Mitchell*,[52] the First District Court of Appeals at Houston held that language in the Texas Water Code stating that municipal utility districts may sue and be sued is a legislative waiver of the district's immunity from suit.[53] The court cited *Missouri Pacific* as its authority, but did not discuss whether sue and be sued language might have a purpose other than waiving immunity.[54] The Thirteenth District Court of Appeals at Corpus Christi, in *Engelman Irrigation District v. Shields Bros., Inc.*,[55] also relied on language in the Water Code to find a waiver of immunity from suit for an irrigation district.[56] The court, citing *Missouri Pacific*, held that immunity was waived by the provision in the Water Code stating that an irrigation district may sue and be sued in the courts of this state.[57] The court further cited *Duhart v. State*[58] as support for its assertion that the applicable sue and be sued provision is a "clear and unambiguous" waiver of immunity by the legislature.[59] This language in

48. 980 S.W.2d 745 (Tex. App.—San Antonio 1998, pet. denied).

49. Alamo Cmty. Coll. Dist. v. Obayashi Corp., 980 S.W.2d 745, 747-48 (Tex. App.—San Antonio 1998, pet. denied).

50. *Id.* (citing TEX. EDUC. CODE ANN. § 130.084 (Vernon 1991)).

51. *Id.* at 748.

52. 915 S.W.2d 859 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

53. Harris County Mun. Util. Dist. No. 48 v. Mitchell, 915 S.W.2d 859, 861 n.1 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (citing TEX. WATER CODE ANN. § 54.119 (Vernon 1992)).

54. *Id.*

55. 960 S.W.2d 343 (Tex. App.—Corpus Christi 1997, pet. denied) (per curiam).

56. Engelman Irrigation Dist. v. Shields Bros., Inc., 960 S.W.2d 343, 348 (Tex. App.—Corpus Christi 1997, pet. denied) (per curiam).

57. *Id.* (citing TEX. WATER CODE ANN. § 58.098 (Vernon 1988)).

58. 610 S.W.2d 740 (Tex. 1980).

59. *Id.*

Engelman Irrigation District is interesting because it highlights the fact that, prior to the *Duhart* opinion, no Texas Supreme Court opinion, including *Missouri Pacific*, had expressly used the clear and unambiguous standard for finding a legislative waiver of immunity.[60]

Perhaps the most extensive discussion of this issue is found in *Tarrant County Hospital District v. Henry*,[61] in which the Second District Court of Appeals at Fort Worth examined the effect of a Health and Safety Code section providing that the board of managers of certain hospital districts may sue and be sued.[62] The court cited to *Missouri Pacific*, as well as a number of other cases that have considered sue and be sued language a waiver of immunity from suit.[63] While the court also cited several contrary opinions, including *Townsend v. Memorial Medical Center*[64] and *Jackson v. City of Galveston*,[65] it declined to follow these opinions.[66] The court noted that *Townsend* was based primarily on cases decided prior to *Missouri Pacific*, and that the Thirteenth Court of Appeals had more recently, in *Engelman*, held that a sue and be sued statute waived immunity.[67] The court refused to follow *Jackson* because the *Jackson* court decided the issue "[w]ithout analysis" and because the opinion was contrary to *Missouri Pacific*.[68] The court also considered, but rejected, *Southwest Airlines Co. v. Texas High-*

60. *Id.* As noted previously, the *Missouri Pacific* court's rationale concerning the notice of claim statute as a waiver of immunity indicates that the court was not applying the clear and unambiguous standard for finding legislative waiver of immunity.

61. 52 S.W.3d 434 (Tex. App.—Fort Worth 2001, no pet.). *Henry* involved a number of claims, including tort and breach of contract, against a governmental entity hospital district by a former employee. *Id.* at 439. The Second Court of Appeals held that legislation applicable to the hospital district, providing that the hospital district board may sue and be sued, waived the hospital district's immunity from suit for the contract claim. *Id.* at 448-49. In regard to the tort claim, however, the court found that consent to suit is limited by the more specific language in the Texas Tort Claims Act, but that because the waiver provisions of the Act were not met, the sue and be sued provision does not waive the hospital district's immunity from suit for tort claims. *Id.* at 450-51.

62. Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434, 448 (Tex. App.—Fort Worth 2001, no pet.) (citing TEX. HEALTH & SAFETY CODE ANN. § 281.056(a) (Vernon 1992)).

63. *Id.* at 448 n.62.

64. 529 S.W.2d 264 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

65. 837 S.W.2d 868 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

66. *Henry*, 52 S.W.3d at 449.

67. *Id.*

68. *Id.*

Speed Rail Authority,[69] an opinion out of the Third Court of Appeals.[70] The *Southwest Airlines* court held that language stating that the board of a high-speed rail authority may sue and be sued waived immunity for the board, but not for the authority itself.[71] The *Henry* court rejected this reasoning, noting that the courts in both the *Missouri Pacific* and *Alamo Community College* decisions found that language stating that an entity's governing body may sue and be sued waived immunity from suit for the entity itself.[72] The court also stated that this argument is "more properly framed as a challenge to capacity rather than a challenge to subject matter jurisdiction."[73] In making this observation, the court implicitly acknowledged that the legislature's purpose for enacting particular sue and be sued language was to clarify that a hospital district has the authority to be a party to a lawsuit, either as plaintiff or defendant, through the hospital district board. The court's opinion, however, did not include any further discussion regarding an alternative interpretation of the statute.

A final opinion decided after *Missouri Pacific* that merits discussion is the United States Fifth Circuit Court of Appeals' recent decision in *Webb v. City of Dallas*.[74] In *Webb*, a family brought suit against the City of Dallas, alleging that the City failed to abide by deed restrictions attached to a gift of land, and requesting reversion of the land to the family.[75] Because the suit involved state law claims brought in federal court based on diversity jurisdiction, the court applied Texas law to the issue of whether the City was entitled to sovereign immunity.[76] The court noted that the Texas Local Government Code provides that home-rule municipalities, such as Dallas, "may plead and be impleaded in any court" and that the City Charter includes the power of the City to sue and be sued.[77]

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69. 867 S.W.2d 154 (Tex. App.—Austin 1993, writ denied).

70. Southwest Airlines Co. v. Tex. High-Speed Rail Auth., 867 S.W.2d 154 (Tex. App.—Austin 1993, writ denied).

71. *Id.* at 158.

72. *Henry*, 52 S.W.3d at 449.

73. *Id.*

74. 314 F.3d 787 (5th Cir. 2002).

75. Webb v. City of Dallas, 314 F.3d 787, 788-89 (5th Cir. 2002).

76. *Id.* at 792.

77. *Id.* at 793. As noted above, Texas appellate courts have reached different conclusions on whether "plead and be impleaded" language, as opposed to "sue and be sued" language amounts to a waiver of immunity. *See* City of Mexia v. Tooke, 115 S.W.3d 618,

The court cited *Missouri Pacific*, opinions following *Missouri Pacific*, and contrary opinions, and concluded that *Missouri Pacific* represents controlling Texas law.[78] The court also cited the *Pelzel* opinion, noting the Texas Supreme Court's discussion regarding the deletion of sue and be sued language from the county presentment statute, as well as its comment that this language "arguably" waived immunity.[79] Finally, the court determined that the weight of authority overcame the City's argument that sue and be sued language is merely a "recognition of its corporate capacity to sue and be sued."[80] The Fifth Circuit was required to decide this issue based on the current status of Texas law. Therefore, it was constrained from considering arguments that *Missouri Pacific* was decided incorrectly.

As noted previously, a few courts deciding cases subsequent to *Missouri Pacific* have concluded that sue and be sued language is not a waiver of immunity from suit. The most significant opinions are *Jackson v. City of Galveston*, *City of Dallas v. Reata Construction Corp.*,[81] and *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*.[82] In *Jackson*, the Fourteenth Court of Appeals declined to hold that sue and be sued language applicable to the City is a waiver of immunity, citing earlier opinions that did

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621-23 (Tex. App.—Waco 2003, pet. filed) (recognizing that other courts had previously found the "plead and be impleaded" to be a waiver of a home-rule municipality's immunity from suit, but declining to find that the language clearly and unambiguously waives immunity from suit). The Fifth Circuit did not discuss this distinction, other than to say that the two types of statutes are similar. *Webb*, 314 F.3d at 794.

78. *Webb*, 314 F.3d at 794-95.

79. *Id.* at 795. The *Pelzel* court recognized that the presentment statute had formerly contained "sue and be sued" language, which was deleted in 1879. Travis County v. Pelzel & Assocs., 77 S.W.3d 246, 249-50 (Tex. 2002). The court further indicated that the language in question "arguably" evidenced an intent to waive sovereign immunity from suit for counties. *Id.*

80. *Webb*, 314 F.3d at 795. The court noted that the majority of appellate courts in the state have followed *Missouri Pacific's* contrary interpretation of this language. *Id.*

81. 83 S.W.3d 392 (Tex. App.—Dallas 2002, pet. filed).

82. No. 05-03-00004, 2003 WL 22221024 (Tex. App.—Dallas, Sept. 26, 2003); *see also* Townsend v. Mem'l Med. Ctr., 529 S.W.2d 264, 267 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (determining that a provision providing that a county hospital's board of managers may sue and be sued did not impliedly waive immunity); Childs v. Greenville Hosp. Auth., 479 S.W.2d 399, 401 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (refusing to find an implied waiver of immunity).

not find a waiver in such language.[83] The court recognized that sue and be sued language referenced the City's capacity to be a party to a lawsuit.[84] In *Reata*, the Fifth District Court of Appeals at Dallas cited to *Jackson* and concluded that "sue and be sued" and "plead and be impleaded" language applicable to the City referred only to the City's capacity to be sued once immunity has already been waived.[85] The court also reasoned that these provisions in the statute and the City Charter were found in sections concerning the City's powers and authority, not in sections concerning waivers of immunity.[86] Notably, in *Reata* the court does not cite to *Missouri Pacific* and does not attempt to resolve its conflict with that opinion.

In *Satterfield*, the Fifth Court of Appeals once again held that sue and be sued language does not waive immunity, this time directly addressing the *Missouri Pacific* opinion. Because *Satterfield* involved a breach of contract claim brought against a school district, its outcome turned on the interpretation of the sue and be sued language in Section 11.151(a) of the Texas Education Code.[87] The court interpreted this language as acknowledging capacity to be sued once immunity has been waived and concluded that, at a minimum, Section 11.151(a) is ambiguous and therefore, cannot constitute a waiver of immunity.[88] The court also rejected the contention that the holding in *Missouri Pacific* controls. The court noted that the supreme court did not apply the "clear and unambiguous" standard for finding a waiver of immunity until ten years later in *Duhart*, and that the *Missouri Pacific* opinion relied on the county presentment statute as a waiver, which the Texas Supreme Court recently rejected in *Pelzel*.[89]

Justice Lang authored an extensive dissenting opinion in *Satterfield*. The dissent began by discussing numerous supreme court

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83. Jackson v. City of Galveston. 837 S.W.2d 868. 871 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The Fourteenth Court of Appeals, however, did not include a discussion of *Missouri Pacific* in its opinion.

84. *Id.*

85. City of Dallas v. Reata Constr. Corp, 83 S.W.3d 392, 398 (Tex. App.—Dallas 2002, pet. filed).

86. *Id.* at 398 n.4.

87. Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist., No. 05-03-00004, 2003 WL 22221024, at *2 (Tex. App.—Dallas, Sept. 26, 2003).

88. *Id.*

89. *Id.* at *3.

opinions that have cited *Missouri Pacific* with approval and concluded that *Missouri Pacific* is still controlling precedent.[90] The dissent also disagreed with the majority's view that sue and be sued language refers to an entity's capacity to be sued and argued that the court's earlier holding in *Reata* is distinguishable because it was a tort case, rather than a breach of contract suit.[91] Finally, the dissent referred to an amendment of the Texas Local Government Code passed by the legislature during the 2003 session, arguing that the amendment supports the position that sue and be sued language is intended as a waiver of immunity.[92]

V. WHAT IS THE PURPOSE OF "SUE AND BE SUED" LANGUAGE IN A STATUTE?

If, as some courts have held, sue and be sued language is not intended as a waiver of immunity from suit, then a question is raised as to the actual purpose of the language. Sue and be sued language, standing alone, is not an express waiver of immunity. Examples of express waivers of immunity enacted by the legislature include the following: "[s]overeign immunity is waived and abolished";[93] "legislative consent to suits" against the entity is granted;[94] "the state's immunity from the suit is waived";[95] "sovereign immunity to suit and from liability is waived and abolished";[96] and "[t]he state's immunity from suit without consent is abolished."[97] Unlike these clear legislative provisions, language that an entity can "sue and be sued" does not expressly state that sovereign immunity is waived.[98] The Texas Supreme Court, however, has not always required express statutory language before finding a

90. *Id.* at *7-13.

91. *Id.* at *14-14 (Lang, J., dissenting).

92. *Satterfield*, 2003 WL 22221024, at *16-17 (Lang, J., dissenting).

93. TEX. GOV'T CODE ANN. § 554.0035 (Vernon Supp. 2003).

94. TEX. EDUC. CODE ANN. § 76.04 (Vernon 2002).

95. TEX. CIV. PRAC. & REM. CODE ANN. § 103.101(a) (Vernon Supp. 2003).

96. *Id.* § 110.008(a).

97. TEX. PROP. CODE ANN. § 74.506(c) (Vernon Supp. 2003).

98. Jones v. Tex. Gulf Sulphur Co., 397 S.W.2d 304, 307 (Tex. Civ. App.—Houston 1966, writ refused n.r.e.) (indicating that "[h]ad the State Legislature desired to subject navigation districts to tort liability it could and should have done so in language of clear and unmistakable import").

waiver of sovereign immunity.[99] The court has, on occasion, recognized an implied waiver, although it has done so only when no other reasonable intent could be discerned in the statutory provisions in question and because the "inference of waiver" was "unavoidable."[100] Thus, the question becomes whether language stating that a governmental entity can sue and be sued is subject to an alternative interpretation, or whether there can be no other reasonable intent on the part of the legislature but to waive sovereign immunity with such language.[101]

As shown above, and as recognized by a few appellate courts in Texas, and at least one commentator, the answer is that there is another reasonable intent behind language stating that a governmental entity can sue and be sued, namely that the language is intended to show that the entity has the *capacity* to sue or to be sued.[102] Immunity from suit and capacity to be a party to a lawsuit are separate concepts. An entity can have the capacity to be sued and still be immune from suit in certain instances. A statement that a governmental entity has the capacity to be a defendant in a lawsuit or that it can "be sued" is entirely distinct from a statement waiving the entity's immunity from suit.

Sovereign immunity from suit is a jurisdictional bar against suing a governmental entity.[103] It can be waived by the legislature for particular types of claims, such as certain tort claims under the Tort

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99. *See* City of LaPorte v. Barfield, 898 S.W.2d 288, 292 (Tex. 1995) (deciding that if statutes leave no reasonable doubt as to their purpose, perfect clarity will not be required in determining whether immunity has been waived); Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994) (finding that governmental immunity for awards of attorneys fees was waived through language which authorized declaratory judgment actions to award such fees).

100. *Barfield*, 898 S.W.2d at 297.

101. *See* Teleprofits of Tex. v. Sharp, 875 S.W.2d 748, 750 (Tex. App.—Austin 1994, no writ) (indicating that "[a]mbiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses").

102. *See* Freedman v. Univ. of Houston, 110 S.W.3d 504, 507-08 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (determining that "sue and be sued" language provides express consent to suits as long as legislative consent is first obtained); Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist., 92 S.W.3d 889, 895-96 (Tex. App.—Beaumont 2002, pet. denied) (holding that sue and be sued language authorized the school district to file defamation action); *see also* George C. Kraehe, *"There's Something About Cities": Understanding Proprietary Functions of Texas Municipalities and Government Immunity*, 32 TEX. TECH L. REV. 1, 36-39 (2000) (arguing that sue and be sued provisions relating to municipalities are rooted in the law of corporations).

103. Travis County v. Pelzel & Assocs., 77 S.W.3d 246, 248 (Tex. 2002).

Claims Act or whistleblower suits under the Whistleblower Act, and it can even be waived for particular claimants.[104] Capacity, on the other hand, concerns an individual or entity's legal authority to act as a party in a lawsuit.[105] The failure to raise the issue of capacity in a lawsuit results in waiver and is not jurisdictional.[106] Thus, a reasonable interpretation of sue and be sued language is that it is intended to show that the entity in question, or some subdivision of the entity, has the legal capacity to be a party to a lawsuit. Under this interpretation, statutory language stating that a governmental entity can "be sued" simply means that it is recognized as a distinct, separate entity that can be a defendant in a lawsuit, but only under circumstances in which the legislature has specifically waived the entity's immunity from suit in a separate statutory provision.

An example of this is found in *Paredes v. City of Odessa.*[107] *Paredes* involved a suit brought in federal court against various defendants, including the City of Odessa and the Odessa Police Department.[108] As a municipality, the City had the capacity to be a party to the lawsuit.[109] The suit against the Police Department, however, was challenged based on its lack of capacity to be a party to the suit.[110] The court dismissed the claims against the Police Department based on lack of capacity, because there was no existing statutory language or language in the City Charter stating that the Police Department may "be sued."[111]

A further example of courts interpreting sue and be sued language as addressing capacity is found in federal cases determining whether a governmental entity is considered an "arm of the state" for purposes of applying Eleventh Amendment immunity in federal court. The United States Fifth Circuit Court of Appeals, in *Clark v. Tarrant County,*[112] set out a six-factor test for determining whether a particular entity is an arm of the state.[113] One factor is

104. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 107.001-.005 (Vernon 1997).
105. Nootsie v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996).
106. *Id.* at 662.
107. 128 F. Supp. 2d 1009 (W.D. Tex. 2000).
108. Paredes v. City of Odessa, 128 F. Supp. 2d 1009, 1013 (W.D. Tex. 2000).
109. *See* TEX. LOCAL GOV'T CODE ANN. § 51.075 (Vernon 1999) (stating that a "municipality may plead and be impleaded in any court").
110. *Paredes*, 128 F. Supp. 2d at 1013.
111. *Id.* at 1013-14.
112. 798 F.2d 736 (5th Cir. 1986).
113. Clark v. Tarrant County, 798 F.2d 736, 744-45 (5th Cir. 1986).

whether the entity has the authority to sue and be sued in its own name.[114] Thus, in applying this test, the United States Fifth Circuit looks for sue and be sued language in a governmental entity's enabling statute to determine "whether the agency has the authority to enter into litigation."[115]

VI. PRIVATE ENTITIES

The legislature provided additional insight into its intent when it applied sue and be sued language to private, as well as governmental, entities. For example, legislation has been enacted stating that savings banks can "sue and be sued,"[116] credit unions can "sue and be sued,"[117] non-profit corporations can "sue and be sued,"[118] for-profit corporations can "sue and be sued,"[119] and partnerships can "sue and be sued."[120] The grant to private entities of power to sue and be sued does not implicate governmental immunity for the simple reason that private entities are not governmental, and therefore cannot be possessed of governmental immunity. Instead, the reasonable interpretation is that this language, when used in the context of a private entity, refers to capacity. In fact, one commentator has argued that "sue and be sued" language had its origin in corporate law, wherein it signifies that an entity has the capacity to be a party in suits in the courts of this state.[121] There is no convincing reason why language granting the power to sue and be sued

114. *Id.* at 745.

115. Williams v. Dallas Area Rapid Transit, 242 F.3d 315, 319 (5th Cir. 2001). In conducting this analysis, the Fifth Circuit does not decide whether sue and be sued language is a waiver of the entity's immunity under state law. Rather, the court looks at several factors to help determine whether the entity is an arm of the state government or a separate legal entity. *Id.* at 319-22. Among others, the court determines whether the entity has the authority or capacity to sue and be sued, respectively. *Id.* Additionally, the court considers whether the entity has the authority to own property. *Id.* If statutory language exists stating that the entity can sue and be sued, this weighs in favor of finding that it is a separate, independent entity because it has the capacity to sue and be sued in its own name. *Id.* at 322.

116. TEX. FIN. CODE ANN. § 93.001(c)(1) (Vernon Supp. 2003).

117. *Id.* § 123.102.

118. TEX. REV. CIV. STAT. art. 1396-2.02(A)(2) (Vernon 2003).

119. TEX. BUS. CORP. ACT ANN. art. 2.02(A)(2) (Vernon 2003).

120. TEX. REV. CIV. STAT. art. 6132b-3.01 (Vernon 2003).

121. George C. Kraehe, *"There's Something About Cities": Understanding Proprietary Functions of Texas Municipalities and Government Immunity*, 32 TEX. TECH L. REV. 1, 36-39 (2000).

should have a different meaning when referring to a private entity than when referring to a governmental entity.

VII. Specific Statutes

The argument that the legislature has not intended the phrase "sue and be sued" to constitute a waiver of immunity from suit is further supported by a review of three particular statutes containing sue and be sued language: two in the Education Code and a recent amendment to the Local Government Code addressing suits against counties. The particular statutes in the Education Code concern the University of Texas at Tyler[122] and the University of Houston.[123] Regarding the University of Texas at Tyler, Chapter 76 of the Texas Education Code contains a section stating that "[t]he board may sue and be sued in the name of the institution."[124] The section further states that "[v]enue is in Smith or Travis County. The institution may be impleaded by service of citation on its president, and legislative consent to suits against the institution is granted."[125]

Chapter 111 of the Texas Education Code governs the University of Houston and contains a section which states:

> The board has the power to sue and be sued in the name of the University of Houston. Venue shall be in either Harris County or Travis County. The university shall be impleaded by service of citation on the president or any of its vice presidents. Nothing in this section shall be construed as granting legislative consent for suits against the board, the University of Houston System, or its component institutions and entities except as authorized by law.[126]

These sections both state that the boards governing the respective universities have the power to sue and be sued; yet each section also contains language specifically spelling out whether immunity from suit is being waived. If the phrase "sue and be sued" is a clear and unambiguous waiver of immunity, the additional language in these statutes is unnecessary or inappropriate, and the language in Section 76.04 of the Education Code stating

122. Tex. Educ. Code Ann. § 76.04 (Vernon 2002).
123. *Id.* § 111.33.
124. *Id.* § 76.04.
125. *Id.*
126. *Id.* § 111.33.

that "legislative consent to suits against the institution is granted" is rendered meaningless and superfluous.[127]

Interpreting sue and be sued language as a waiver of immunity becomes even more problematic in light of Section 111.33 of the Education Code. Such an interpretation leads to the conclusion that the legislature included two contradictory and competing sentences within the same paragraph, one waiving immunity and another specifically stating that no legislative consent for suits has been granted. The First Court of Appeals recently addressed this contradiction in *Freedman v. University of Houston*.[128] The *Freedman* case involved former university administrators attempting to sue the university, arguing that Section 111.33 of the Education Code is self-contradictory.[129] The court disagreed with the argument, finding that the first sentence of Section 111.33, which states that the university board has the power to sue and be sued, "clarifies the *capacity* in which UH's board of regents has the authority to litigate."[130] Thus, the court of appeals recognized that language granting the authority to sue and be sued refers to the capacity to litigate rather than immunity.[131]

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127. *See* Spence v. Fenchler, 107 Tex. 443, 457, 180 S.W. 597, 601 (Tex. 1915) (stating that "[i]t is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous or inoperative"); *see also* Tex. Prop. & Cas. Ins. Guar. Ass'n v. Johnson, 4 S.W.3d 328, 333 (Tex. App.—Austin 1999, pet. denied) (acknowledging that denial of the legal effect of a sentence renders the sentence superfluous).

128. 110 S.W.3d 504 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

129. Freedman v. Univ. of Houston, 110 S.W.3d 504, 507-08 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

130. *Id.* at 508 (emphasis added).

131. The court also noted that it had "previously held that the 'sue and be sued' language of Section 111.33" was a waiver of immunity and that subsequent to its earlier opinion, the legislature amended Section 111.33 to add its current final sentence. *Id.* at 507 (citing Fazekas v. Univ. of Houston, 565 S.W.2d 299, 302 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.)). Importantly, when the legislature amended Section 111.33 to clarify that it was not waiving the University of Houston's immunity from suit, it did not delete the language granting the board the power to sue and be sued. A review of the legislative history regarding this amendment reveals only that the legislature intended the amendment to put the University of Houston in an equal position with most other state universities, which cannot be sued without specific legislative permission. *Hearings on Tex. H.B. 1182 Before the House Comm. on Higher Educ.*, 69th Leg. (Mar. 18, 1985) (comments of Rep. Delco concerning purpose of amendment) (tapes available from House media office) (on file with the *St. Mary's Law Journal*); *Hearings on Tex. H.B. 1182 Before the Senate Comm. on Educ.*, 69th Leg. (Apr. 17, 1985) (comments of Sen. Parker concerning purpose of amendment) (tapes available from Senate media office) (on file with the *St.*

As noted above, the legislature added a section to the Local Government Code in the 2003 session which has been cited as support for the argument that sue and be sued language is intended as a waiver of immunity.[132] Subsection (a) of Section 262.007, which was added by Senate Bill 1017, provides that a county that is a party to a contract for certain goods or services "may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract."[133] Subsection (d) of the new statute states: "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."[134] As pointed out by the dissent in *Satterfield*, Senate Bill 1017, which indicates that it is "relating to the ability of a county to sue and be sued," was passed in response to the Texas Supreme Court's decision in *Pelzel*.[135] The dissent in *Satterfield* argues that this new language shows that the legislature intends for sue and be sued language to be construed as a clear and unambiguous waiver of immunity.[136]

Section 262.007 does appear to be a clear expression by the legislature of its intent to waive counties' immunity from suit on certain contract claims. What is less clear is whether this section supports the position that all sue and be sued language should now be read as a clear and unambiguous waiver of immunity from suit for all entities that have this language in their enabling statues. First, Section 262.007 can be read as a clear waiver of immunity from suit not only because it uses "sue and be sued" language, but also because it states that it is not waiving any defenses "other than a bar

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Mary's Law Journal). The legislative history sheds no light on why this was accomplished by adding the additional language regarding no legislative consent for suits, as opposed to simply deleting the sue and be sued language. Thus, it must be presumed that the legislature intended the sue and be sued language in Section 111.33 to have some continued meaning and purpose, other than waiving immunity from suit. *See Spence*, 180 S.W. at 601 (mandating that every phrase, clause, and sentence in a statute must be given effect to avoid rendering the statute superfluous).

132. *See* Tex. S.B. 1017, 78th Leg., R.S. (2003) (adding Section 262.007 to the Local Government Code).

133. *Id.*

134. *Id.*

135. Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist., No. 05-03-00004, 2003 WL 22221024, at *16 (Tex. App.—Dallas, Sept. 26, 2003) (Lang, J., dissenting) (citing TEX. SEN. JURISPRUDENCE COMM., BILL ANALYSIS, Tex. S.B. 1017, 7th Leg., R.S. (2003)).

136. *Satterfield*, 2003 WL 22221024, at *17 (Lang, J., dissenting).

against suit based on sovereign immunity."[137] Other sue and be sued statutes contain no such clear expression by the legislature of its intent to waive immunity. Additionally, Section 262.007 is limited to contracts with counties for "engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services,"[138] and the section contains limits on the amount of money recoverable from a county in a suit for breach of this type of contract.[139] It seems unlikely that the legislature's intent is to waive immunity from suit for counties for only this narrow category of breach of contract claims and yet impose a blanket waiver of immunity from suit for all other types of governmental entities that are subject to sue and be sued statutory language.

VIII. Law from Other Jurisdictions

Courts outside of Texas have also interpreted the meaning of sue and be sued language in the context of governmental immunity.[140] A number of opinions have held that such language is not a waiver of immunity. For example, the Virginia Supreme Court held, in *Elizabeth River Tunnel District v. Beecher*,[141] that "[t]he language 'sue and be sued,' 'plead and be impleaded,' 'contract and be contracted with,' are words affording a procedural right only and do not constitute a waiver of immunity or a consent to suit" on behalf of a governmental entity.[142] The Oklahoma Supreme Court, in *Mustain v. Grand River Dam Authority*,[143] also held that sue and be sued language does not waive the government's immunity.[144] The Georgia Supreme Court, in *Self v. City of Atlanta*,[145] held that "in any instances in which an entity is given the power 'to sue and be sued' that language means only that the entity has the status and capacity to enter our courts, and does not signify a waiver of sover-

137. Tex. Loc. Gov't Code Ann. § 262.007(d) (Vernon Supp. 2003).

138. *Id.* § 262.007(a).

139. *Id.* § 262.007(b).

140. This section cites some representative cases from other jurisdictions that discuss the issue. It is not intended as an exhaustive survey of the law in all fifty states and the federal courts.

141. 117 S.E.2d 685 (Va. 1961).

142. Elizabeth River Tunnel Dist. v. Beecher, 117 S.E.2d 685, 689 (Va. 1961).

143. 68 P.3d 991 (Okla. 2003).

144. Mustain v. Grand River Dam Auth., 68 P.3d 991, 999 (Okla. 2003).

145. 377 S.E.2d 674 (Ga. 1989).

eign immunity against suit."[146] In *Ransom v. St. Regis Mohawk & Community Fund, Inc.*,[147] the New York Court of Appeals held that language stating a tribal corporation could sue and be sued was not a waiver of the tribe's sovereign immunity.[148]

Some courts, however, have reached the opposite conclusion, finding that sue and be sued provisions constitute a waiver of immunity. For example, in *Guillaume v. Staum*,[149] the South Dakota Supreme Court held that sue and be sued language, although not constituting a waiver of immunity from liability in tort, is a waiver of governmental immunity from suit.[150] Similarly, in *Ballinger v. Delaware River Port Authority*,[151] the New Jersey Supreme Court held that sue and be sued language applicable to a river authority waived the authority's sovereign immunity.[152] Thus, courts around the country have reached differing conclusions on the effect of sue and be sued language on a governmental entity's immunity. This is significant with regard to Texas law. The fact that a number of courts in other jurisdictions have held that such language is not a waiver of immunity supports the argument that sue and be sued statutes are subject to alternative interpretations and therefore are not "clear and unambiguous" waivers.

IX. Effect of Construing Sue and Be Sued Language As Waiver of Immunity

Most cases holding that sue and be sued language constitutes a waiver of sovereign immunity have done so in the context of breach of contract claims. This is significant because the general rule of law in Texas provides that when a governmental entity enters into a contract, it waives its immunity from liability, but not from suit.[153] Thus, according to cases interpreting sue and be sued language as a waiver of immunity, when a governmental entity with such language in its enabling statute enters into a contract, it has

146. Self v. City of Atlanta, 377 S.E.2d 674, 676 (Ga. 1989).

147. 658 N.E.2d 989 (N.Y. 1995).

148. Ransom v. St. Regis Mohawk & Cmty. Fund, Inc., 658 N.E.2d 989, 995 (N.Y. 1995).

149. 328 N.W.2d 259 (S.D. 1982).

150. Guillaume v. Staum, 328 N.W.2d 259, 261 (S.D. 1982).

151. 800 A.2d 97 (N.J. 2002).

152. Ballinger v. Del. River Port Auth., 800 A.2d 97, 103 (N.J. 2002).

153. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 408 (Tex. 1997).

lost its immunity from suit as well as liability in relation to the contract. The analysis becomes more difficult, however, when the suit against the entity involves other types of claims. Does the presence of sue and be sued language in a governmental entity's enabling legislation waive the entity's immunity from suit for all types of claims? The Second Court of Appeals addressed this question in the context of a tort claim against a governmental entity in *Tarrant County Hospital District v. Henry*.

Henry involved numerous claims, including tort and breach of contract, brought by an ex-employee against a governmental entity hospital district.[154] Because legislation applicable to the hospital district provided that the hospital district board may sue and be sued, the court of appeals held that the legislature waived the hospital district's immunity from suit for the contract claim.[155] Regarding the tort claims, however, the court held that the general consent to suit implemented by sue and be sued language was limited by the more specific language in the Texas Tort Claims Act, and that the sue and be sued provision did not waive the hospital district's immunity from suit for tort claims.[156]

While the court's solution in *Henry* seems logical, the holding is problematic. The court based its holding on the premise that, by enacting the specific language of the Tort Claims Act, the legislature limited the general waiver of immunity created by sue and be sued statutes.[157] According to the reasoning of the *Henry* decision, the legislature effectively expanded sovereign immunity for certain governmental entities when it enacted the Tort Claims Act. However, the Tort Claims Act was not intended to grant or create im-

154. Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434, 439 (Tex. App.—Fort Worth 2001, no pet.). In *Henry*, the court examined a number of cases holding sue and be sued language to be a waiver of immunity from suit. *Id.* at 448 n.62. The court also examined contrary opinions, but agreed with the decisions of the courts in *Missouri Pacific* and *Alamo Cmty. College*, finding that language stating that an entity's governing body may sue and be sued constituted a waiver of immunity from suit for the entity itself. *Id.* at 448-49.

155. *Id.* at 448-49.

156. *Id.* at 450-51. The court held that the Texas Tort Claims Act itself did not waive the district's immunity, because the waiver provisions of the Act were not met. *Id.* The court also held that the sue and be sued provisions did not waive the hospital district's immunity from suit from a claim under the Texas Commission on Human Rights Act (TCHRA), and that the district was not entitled to immunity from this claim based on language in the TCHRA. *Id.*

157. *Id.*

munity. Rather, the legislature's purpose in enacting the Tort Claims Act was to provide for a limited *waiver* of sovereign immunity for tort claims.[158] Thus, the underlying reasoning in *Henry*, that sue and be sued language is a general waiver of immunity that is then limited by the specific language of the Tort Claims Act, is flawed.

Another possible reconciliation of sue and be sued statutes with statutes containing express, limited waivers of immunity, such as the Tort Claims Act, is to reason that sue and be sued language waives immunity from suit for all claims, and the issue of immunity from liability is resolved by reference to the more specific statute. Following this rationale, the court in *Henry* could have held that the hospital district's immunity from suit for tort claims was waived by the statute containing the sue and be sued provision, but that the hospital retained its immunity from liability because the waiver provisions of the Tort Claims Act were not satisfied. The only problem with this scenario is that the court of appeals could not have reached the issue of immunity from liability because the appeal was brought under Section 51.014(a)(8) of the Texas Civil Practices and Remedies Code, which allows an interlocutory appeal of an order granting or denying a plea to the jurisdiction by a governmental entity.

As noted above, immunity from suit is jurisdictional in nature and can be asserted in a plea to the jurisdiction.[159] However, because immunity from liability is not jurisdictional, it is not properly asserted in a plea to the jurisdiction.[160] Thus, another effect of construing sue and be sued language as a waiver of immunity might be that governmental entities subject to such statutory language are precluded from utilizing the interlocutory appeal provisions of Section 51.014(a)(8), even for tort claims. It seems unlikely that the

158. *See* Tex. Dep't Crim. Justice v. Miller, 51 S.W.3d 583, 587 (Tex. 2001) (explaining that the Texas "Tort Claims Act provides a limited waiver of sovereign immunity"); Univ. Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 177 (Tex. 1994) (stating that the Texas Tort Claims Act constitutes a limited waiver of governmental immunity); Bell v. Love, 923 S.W.2d 229, 232 (Tex. App.—Houston [14th Dist.] 1996, no writ) (stating that "[t]he Tort Claims Act broadened, rather than restricted, an injured party's remedies").

159. *See* Travis County v. Pelzel & Assocs., 77 S.W.3d 246, 248 (Tex. 2002) (stating that immunity from suit is properly asserted in pleading to jurisdiction).

160. *See id.* (stating that immunity from liability has no effect on subject matter jurisdiction); *see also* Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 696 (Tex. 2003) (noting that immunity from liability is ineffective in a jurisdictional plea).

legislature intended that some governmental entities are entitled to use Section 51.014(a)(8), while others are barred from utilizing the section.

X. Policy Considerations

Some commentators and judges have advocated for the abolition of sovereign immunity in Texas, particularly as it applies to breach of contract suits against the government.[161] For example, former Texas Supreme Court Justice Craig Enoch has repeatedly voiced his disagreement with sovereign immunity for breach of contract claims.[162] The basis of these arguments is that under basic contract law, the validity of a contract depends on its mutual enforceability. If private parties cannot enforce their contracts with the government, these contracts are invalid, and private parties have a strong disincentive to enter into contracts with the government.[163] As convincing as these arguments may be, they do not support any particular interpretation of sue and be sued language. The Texas Supreme Court has repeatedly held that waiver of sovereign immunity is a policy issue best left to the legislature.[164] Thus, courts should resolve the issue of whether sue and be sued provisions are a waiver of immunity by applying the clear and unambiguous standard to the particular language and determining whether there is

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161. *See* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 708 (1996) (opining that applying sovereign immunity denies plaintiffs remedies for real damages); *see also* L. Katherine Cunningham & Tara D. Pearce, Recent Development, *Contracting with the State: The Daring Five—The Achilles' Heel of Sovereign Immunity?*, 31 ST. MARY'S L.J. 255, 289 (1999) (criticizing the application of sovereign immunity in breach of contract cases).

162. *See, e.g.*, *Pelzel*, 77 S.W.3d at 252 (Enoch, J., dissenting) (listing cases in which Justice Enoch believes that private parties were unfairly deprived of their day in court due to application of the doctrine of sovereign immunity); Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 416-19 (Tex. 1997) (Enoch, J., dissenting) (claiming that waiver of immunity from liability also "waives immunity from enforcement of the contract by suit").

163. *See Fed. Sign*, 951 S.W.2d at 416-19 (Enoch, J., dissenting) (explaining that immunity from suit runs contrary to fundamental contract law).

164. *See* Guillory v. Port of Houston Auth., 845 S.W.2d 812, 813-14 (Tex. 1996) (stating that the legislature, not the judicial system, is better suited to expand the limits of governmental immunity); Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 211 (Tex. 1989) (holding that a cause of action may accrue only when the legislature has waived immunity); Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978) (determining that waiver of immunity is an issue best left to the legislature).

any other possible purpose or meaning for that language.[165] Courts should not decide the question based on policy considerations.

XI. CONCLUSION

Although numerous Texas appellate courts have held that sue and be sued language is a waiver of sovereign immunity, the Texas Supreme Court has squarely addressed the issue only once, in its 1970 *Missouri Pacific Railroad Co. v. Brownsville Navigation District* decision. However, there are convincing arguments to be made that the court in *Missouri Pacific* did not apply the clear and unambiguous standard that is now an unquestionable requirement of the law on sovereign immunity. First, the court did not recite that standard in its opinion. Further, no Texas Supreme Court opinion expressly utilized that standard until 1980 in the *Duhart* case. Finally, the county notice of claim statute, which the court in *Missouri Pacific* recognized as a waiver, is obviously not a "clear and unambiguous" waiver of immunity, a point recently confirmed by the court in *Pelzel*. Thus, the Court's ruling in *Missouri Pacific* is ripe for reconsideration.

There are a number of strong arguments in favor of the proposition that sue and be sued language is not a waiver of governmental immunity, but rather functions simply as a grant of capacity. One such argument is based on the fact that a number of courts, in both Texas and other jurisdictions, have interpreted the language to simply confer capacity on an entity to be a party to a lawsuit. Additionally, the conclusion that sue and be sued language should not have a different meaning when applied to government entities is supported by the legislative application of the same language to private entities. Further, instances in which the legislature has stated that a governmental entity may "sue and be sued" while specifically spelling out whether sovereign immunity is waived for the entity indicates that the language has a purpose other than waiving immunity.

The Legislature's recent amendment to the Local Government Code, wherein it appears to have waived counties' immunity from suit for certain contract claims, partly by use of sue and be sued

165. *See Wichita Falls State Hosp.*, 106 S.W.3d at 697 (stating that when a statute is ambiguous, immunity is generally retained).

language, lends support to the argument that sue and be sued language is intended as a waiver of immunity. This expression of intent appears to be contradicted, however, by the provisions in the Education Code which state that the University of Texas at Tyler and the University of Houston may "sue and be sued" and yet still specifically spell out whether sovereign immunity has been waived for those entities. This statutory language indicates that sue and be sued language has a purpose other than waiving immunity. Thus, the Legislature's recent enactment concerning certain contract suits against counties, while adding a new element to the debate, does not ultimately resolve the issue of whether sue and be sued language should be interpreted as a general waiver of immunity from suit.

Normally, when a statute can be interpreted in varying ways, courts are to apply well-known rules of statutory construction to derive the intent of the legislature.[166] However, when addressing the issue of sovereign or governmental immunity, courts do not perform such an analysis. Instead, as stated above, sovereign immunity is waived only when the legislature does so by clear and unambiguous language.[167] The legislature emphasized this standard in 2001 when it codified the rule in the Code Construction Act.[168] Thus, "a statute that waives [a governmental entity's] immunity must do so beyond doubt," and ambiguities concerning whether a statute's waiver of immunity are generally resolved by retaining immunity.[169] Based on the arguments set out above, the exact meaning and purpose of the phrase "sue and be sued" as it is applied to governmental entities is less than clear. Because sue and be sued language is ambiguous at best, courts should not find that this language is a waiver of immunity.

It seems likely that appellate courts will continue to be called upon to interpret sue and be sued language. Therefore, another forum for resolution of this ambiguity is the legislature. If the legislature intends for sue and be sued statutes to waive sovereign immunity, it could pass legislation clearly stating that intent.

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166. Teleprofits of Tex. v. Sharp, 875 S.W.2d 748, 750 (Tex. App.—Austin 1994, no pet.).

167. *Id.*

168. *See* TEX. GOV'T CODE ANN. § 311.034 (Vernon 1998) (allowing waiver of sovereign immunity only when language unambiguously waives immunity).

169. *Wichita Falls State Hosp.*, 106 S.W.3d at 697.

However, if such language is not intended as a waiver of immunity, that intent could also be expressly stated in a statute, as has been done by at least one other state.[170] To address concerns that such a statute might make private parties' contracts with local governments unenforceable, the legislature could also pass provisions allowing for administrative resolution of contract claims against local governmental entities, similar to Chapter 2260 of the Texas Government Code, which is only applicable to state governmental entities.[171] Another possibility could be to enact legislation similar to the new Section 262.007 of the Local Government Code, making it applicable to all local governmental entities.

Until the Texas Supreme Court revisits this issue, or the legislature further addresses the matter, attorneys representing governmental entities will continue to argue that sue and be sued language is not a clear and unambiguous waiver of immunity from suit. Moreover, uncertainty about the meaning and effect of the language will continue to cloud both existing and prospective contracts between governmental entities and private parties.

170. *See* Delaware County & Mun. Tort Claims Act, DEL. CODE ANN. tit. 10, § 4011(a) (1999) (stating, "Except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages. That a governmental entity has the power to sue or be sued, whether appearing in its charter or statutory enablement, shall not create or be interpreted as a waiver of the immunity granted in this subchapter.").

171. *See* TEX. GOV'T CODE ANN. § 2260.001(4) (Vernon 2000) (defining what is and what is not a "unit of government"); *see also id.* § 2260.006 (stating that the "chapter does not waive sovereign immunity to suit or liability").