

Across the great State of Texas, there are highways, bridges, sewer systems, water systems and schools, so-called “infrastructure projects,” that are in dire need of repair or replacement. With our population projected to increase by 50% or more in the coming decade, demand for new “infrastructure” is staggering. Many governmental entities have responded with successful bond programs and other means to fund these projects and many are already under way. But, even assuming adequate funding, can contractors meet the demand or, better yet, *will they be willing to?*

While many excellent contractors thrive on infrastructure projects, it is no secret that many well-qualified contractors elect not to pursue such projects because of increased bidding complexities, procedural issues, statutory and regulatory restrictions and other “red tape” that create administrative headaches and cut into already thin margins. If the project is “shovel-ready” but not enough contractors are willing to do the work, the costs of the project goes up, the work is slowed, and quality suffers, which inevitably leads to higher taxes for us all.

What is needed is more competition, among good contractors, for these projects. Lower cost, more timely completion and better quality can be obtained if more contractors compete for the jobs. If we cannot cut the red-tape and do away with statutory or regulatory headaches, what can be done to encourage more participation by competent contractors? One answer might be found by looking at what has been done to promote construction of commuter rail in Dallas through derivative sovereign immunity.

# DERIVATIVE SOVEREIGN IMMUNITY: AN IDEA WHOSE TIME HAS COME FOR TEXAS?

## I. DERIVATIVE SOVEREIGN IMMUNITY

Derivative sovereign immunity is the theory that a private entity performing an essential function of a sovereign (government) entity may enjoy the sovereign's immunity from certain claims. The concept rests on the principle that an individual entity may perform work so closely related to that of the government, that the entity becomes, in effect, a government agent.<sup>2</sup> Essentially, the private entity stands in the shoes of the governmental entity. Courts have historically been reluctant to grant immunity to private contractors working for the government, but some have recognized that the benefits of delegating government work to private contractors can often outweigh the costs of extending the immunity.<sup>3</sup>

## II. BACKGROUND

Derivative sovereign immunity has been discussed in a federal context by the United States Supreme Court and several circuit courts at least since the 1940s. The Supreme Court granted derivative immunity to a private entity that contracted with the federal government in *Yearsley v. W.A. Ross Construction*.<sup>4</sup> There, the contractor, W.A. Ross, had a contract with the government to build a series of dikes along the Missouri River.<sup>5</sup> When the plaintiff sued the

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<sup>2</sup> Katherine J. Florey, *Sovereign Immunity's Penumbra: Common Law, Accident, and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 800 (2008).

<sup>3</sup> See generally VIVIAN S. CHU & KATE M. MANUEL, CONG. RESEARCH SERV., R41755, TORT SUITS AGAINST FEDERAL CONTRACTORS: AN OVERVIEW OF THE LEGAL ISSUES (2011).

<sup>4</sup> 309 U.S. 18, 21–22 (1940).

<sup>5</sup> *Id.*

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private contractor for erosion on the plaintiff's land, the Court granted W.A. Ross the same immunity from suit that the United States government would have enjoyed had it built the dikes itself. The Court boldly stated that there should be "no ground for holding [a government] agent liable who is simply acting under the authority thus validly conferred."<sup>6</sup>

In another notable case, *Mangold v. Analytic Services*, the Fourth Circuit explained the benefits of extending immunity to the "private sector" in situations in which the "public interest in efficient government outweighs the costs of granting such immunity."<sup>7</sup> The court noted that the government has an "unquestioned need to delegate governmental functions."<sup>8</sup> Further, the government does not have the resources to complete all necessary services itself, and must contract out a portion of these services to the private sector.<sup>9</sup> Therefore, the public interest in efficient government is furthered by promoting private sector delegation.<sup>10</sup> The United States Supreme Court has also discussed the public policy involved in granting derivative immunity in *Barr v. Matteo*.<sup>11</sup> There, the Court identified the extension of immunity as a privilege that is an "expression of a policy designed to aid in the effective functioning of government."<sup>12</sup> It went on to state that the "complexities and magnitude" of governmental activity have expanded to the point where delegation of many of its functions is necessary and crucial.<sup>13</sup>

### III. TEXAS' LEGISLATIVE APPROACH

Texas recognizes derivative sovereign immunity, but only in a very limited context. Texas law grants derivative

sovereign immunity to private contractors working on projects for a regional transportation authority, and only to a very narrow extent.<sup>14</sup> The immunity applies to light rail and commuter rail line projects. The current statute originated from Article 1118y of the Texas Civil Statutes in 1979, which created regional transportation authorities and granted the Dallas/Fort Worth area the power to create a commuter rail line.<sup>15</sup>

The findings of the House of Representatives Study Group assigned to the bill, and the plain language of the statute, provide insight into the legislative intent behind the statute.<sup>16</sup> The opening language of the original bill begins with four findings: (1) that an increasing proportion of Texas' population was located in expanding metropolitan areas; (2) that the concentration of population in these areas is accompanied by an increase in motor vehicles that emit pollutants into the air and consume "great quantities of limited energy resources"; (3) that this concentration of vehicles places a heavy burden on the existing streets and freeways and results in traffic congestion that delays mobility and "adversely affects the health and welfare of the citizenry"; and, (4) that citizen mobility is essential to the "continued growth and maintenance of economic vitality of these metropolitan areas."<sup>17</sup>

The House Study Group noted that creation of these regional transportation authorities would be a "giant step towards the solution of a number of traffic and pollution problems" in the area.<sup>18</sup> The increase in citizens' interest in commuting along with rising fuel costs also factored into the decision to create and promote these transportation systems.<sup>19</sup> Commuter rail lines reduce the congestion

<sup>6</sup> *Id.*

<sup>7</sup> *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447 (4th Cir. 1996).

<sup>8</sup> *Id.* at 1448.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> TEX. TRANSP. CODE ANN. § 452.056(d) (West 2013).

<sup>15</sup> TEX. REV. CIV. STAT. ANN. art. 1118y, repealed by Act of May 1, 1995, 74th Leg. R.S., ch. 165, § 24(a), 1995 Tex. Gen. Laws. 1025, 1870-71 (current version at TEX. TRANSP. CODE ANN. §§ 452.001-452.720).

<sup>16</sup> House Study Group, Bill Analysis, Tex. S.B. 1079, 66th Leg., R.S. (1979).

<sup>17</sup> Tex. S.B. 1079, 66th Leg., R.S. (Tex 1979).

<sup>18</sup> House Study Group, Bill Analysis, Tex. S.B. 1079, 66th Leg., R.S. (1979).

<sup>19</sup> *Id.*

of traffic during peak hours, as well as greatly limit the environmental impact that vehicle exhaust creates.<sup>20</sup> Taken in conjunction with the language of the original bill, the Group's comments show the intent to spur development of these transportation systems in order to cure many of the current and anticipated problems at that time.

With the benefits of commuter rail noted, the House Study Group provision for contractor immunity was an obvious effort to entice contractors to participate and spur rail construction. The immunity provision was elegantly simple:

[i]f an independent contractor of the entity is performing a function of the entity or of a regional transportation authority operating under Chapter 452, Transportation Code, the contractor is liable for damages only to the extent that the entity or authority would be liable if the entity or authority itself were performing the function.<sup>21</sup>

The immunity granted by this provision created potential cost benefits to encourage contractors to consider rail projects. Judging by the expansion of the DART system, this legislative goal has been realized.

#### IV. TEXAS CASE LAW

Texas case law on the topic of derivative sovereign immunity is limited but the Texas Supreme Court has accepted review of a derivative sovereign immunity case and will be issuing an opinion on it sometime in 2014. The limited jurisprudence from the Texas Supreme Court on the issue stems, predictably, from construction of the DART system.

#### A. GLF CONSTRUCTION CO. V. LAN/STV

The Fifth Circuit, applying Texas law, granted a private contractor derivative sovereign immunity in *GLF Construction Corp. v. LAN/STV*.<sup>22</sup> The Dallas Area Rapid Transit Authority ("DART") retained LAN/STV to prepare drawings and plans for an extension to the Dallas light-rail system.<sup>23</sup> Those plans were to be used by the general contractor in completing the project.<sup>24</sup> GLF was hired as the general contractor on the project and used the plans and specifications created by LAN/STV according to its contract with DART.<sup>25</sup> Subsequently, GLF contended that the plans were vague, inaccurate and inconsistent, and caused GLF delays and unanticipated costs.<sup>26</sup> It is pertinent to note that DART was in contract with both GLF and LAN/STV separately; however, LAN/STV and GLF did not have a contractual relationship.

As a result, GLF sued LAN/STV for professional negligence and misrepresentation.<sup>27</sup> Since the parties were not in direct contractual privity, a breach of contract cause of action was not available to GLF. LAN/STV moved for summary judgment on the basis of a derivative sovereign immunity defense.<sup>28</sup> It argued that, as an independent contractor performing DART's functions, it enjoyed the same immunity from GLF's tort claims as DART would enjoy had it performed the functions itself.<sup>29</sup> The court cited the Texas Revised Civil Statutes Article 6550(d) (now codified as Texas Transportation Code §452.056) which extends immunity to private contractors performing functions of regional transportation authorities, such as DART.<sup>30</sup> GLF did not dispute that the designing and planning functions that LAN/STV performed fell within the category of functions performed by a regional transportation authority.<sup>31</sup> The relevant code section states that an authority may "acquire, construct, develop,

<sup>20</sup> *Id.*  
<sup>21</sup> TEX. REV. CIV. STAT. ANN. art. 6550(d) (amended 2009) (current version at TEX. TRANSP. CODE ANN. 452.0561(c) (West 2013)). Later amendments changing the language of the provision were intended to be a non-substantive revisions. *See* TEX. GOV'T CODE ANN. § 323.007 (West 2013).  
<sup>22</sup> *GLF Constr. Corp. v. LAN/STV*, 414 F.3d 553 (5th Cir. 2005).  
<sup>23</sup> *Id.* at 555.  
<sup>24</sup> *Id.*  
<sup>25</sup> *Id.*  
<sup>26</sup> *Id.*  
<sup>27</sup> *Id.*  
<sup>28</sup> *Id.*  
<sup>29</sup> *Id.*  
<sup>30</sup> TEX. TRANSP. CODE ANN. § 452.056(d) (West 2013).  
<sup>31</sup> *GLF Constr. Corp.*, 414 F.3d at 556.

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plan, own, operate and maintain [a public transportation system].”<sup>32</sup> Therefore, since LAN/STV performed a job that could be considered a function of DART, it would be liable for damages “only to the extent” that DART would be liable if it had prepared the plans, drawings and specifications for the project itself.<sup>33</sup>

The district court granted LAN/STV’s motion for summary judgment based on a similar order from the same court dismissing another action by GLF on derivative sovereign immunity grounds.<sup>34</sup> GLF then filed its appeal to the 5th Circuit Court of Appeals.<sup>35</sup> In its discussion of the case, the court first noted that DART was, in fact, an entity that fell under the derivative sovereign immunity statute and that the function performed by LAN/STV would entitle it to the immunity described.<sup>36</sup> The court explained that the doctrine of sovereign immunity would bar GLF’s tort claims if asserted against DART.<sup>37</sup> However, GLF would have a cause of action against DART for breach of contract based on the common law idea that an owner breaches a contract with a contractor when the shortfalls of the owner’s plans, created by the retained engineer, cause undue delay or unexpected costs to that contractor.<sup>38</sup>

The crux of GLF’s argument on appeal was that as long as the “governmental entity could have been subjected to liability under *some* cause of action,” the independent contractor (LAN/STV) performing a function of that entity “can be sued under *any* cause of action.”<sup>39</sup> In other words, because GLF could sustain a cause of action

against DART for breach of contract, it would open the door for GLF to sue LAN/STV in tort.<sup>40</sup> The court flatly disagreed.<sup>41</sup>

The court noted that, generally, DART would be immune from both suit and liability. However, the Texas Tort Claims Act actually permits government liability for certain tort claims, including personal injury, death and property damage.<sup>42</sup> While it allows liability in tort, it does limit the amount that can be recovered for certain causes of action.<sup>43</sup> Texas law thus restricts liability that can be imposed upon DART both in the causes of action that can be brought against it, as well as the maximum amount of recovery.<sup>44</sup> In denying GLF’s claim, the court held that the statute “effectively places LAN/STV, as an independent contractor performing DART’s functions, in DART’s shoes for purposes of liability.”<sup>45</sup> Further, a plain language reading of the statute clearly shows that LAN/STV is liable “only to the extent” that DART would be liable.<sup>46</sup> Under Texas law, DART cannot be sued for the tort claims of professional negligence or misrepresentation.<sup>47</sup> Therefore, since DART cannot be held liable upon these facts and causes of action, LAN/STV cannot be liable as well.<sup>48</sup>

The Court did take care to note that GLF is not without recourse. GLF could opt to pursue a claim against DART for breach of contract by first exhausting DART’s administrative procedures and then filing suit if necessary.<sup>49</sup> Furthermore, DART could sue LAN/STV directly for the inadequacies of the work performed as well.<sup>50</sup> Therefore, the Court held, GLF is not denied a

<sup>32</sup> TEX. TRANSP. CODE ANN. § 452.056(d).

<sup>33</sup> *GLF Constr. Corp.*, 414 F.3d at 556.

<sup>34</sup> *Id.* at 555.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 556.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 556–57 (citing *United States v. Spearin*, 248 U.S. 132 (1918)).

<sup>39</sup> *Id.* at 557 (emphasis in original).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. §101.021 (West 2013).

<sup>43</sup> TEX. CIV. PRAC. & REM. CODE ANN. §101.021.

<sup>44</sup> *GLF Constr. Corp.*, 414 F.3d at 557.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See TEX. CIV. PRAC. & REM. CODE ANN. §101.021.

<sup>48</sup> *GLF Constr. Corp.*, 414 F.3d at 557.

<sup>49</sup> *Id.* at 558.

<sup>50</sup> *Id.*

remedy and LAN/STV is not immunized from liability for its failures.<sup>51</sup> Accordingly, the Fifth Circuit affirmed the judgment of the District Court in favor of LAN/STV.<sup>52</sup>

**B. MARTIN K. EBY CONSTRUCTION CO. V. LAN/STV**

LAN/STV is once again embroiled in a dispute similar to the *GLF* case. With a complicated procedural history, this case originated in a Dallas district court and was appealed to the Dallas Court of Appeals. The Court of Appeals reversed and remanded. The case is currently being appealed to the Texas Supreme Court and oral arguments occurred on October 8, 2013. We can expect an opinion from the Court sometime in 2014. The facts of the case are substantially similar to the *GLF* case; however, they involve different causes of action and different theories of recovery.

DART hired Eby to construct a portion of a rail-line project in Dallas.<sup>53</sup> In creating its bid for the project, Eby relied on various documents submitted by DART that were originally created by LAN/STV during the initial planning stages of the project.<sup>54</sup> After submitting its bid and beginning construction, Eby experienced several delays and amplified costs, which it attributed to mistakes in the bid documents created by LAN/STV.<sup>55</sup> Eby first sued DART for breach of contract and misrepresentation, a claim that eventually settled for slightly less than \$5 million.

Eby then sued LAN/STV in state district court bringing claims of negligence and negligent misrepresentation.<sup>56</sup> LAN/STV moved for summary judgment on the basis of a derivative sovereign immunity defense, which the district court granted; Eby appealed the judgment to the Dallas Court of Appeals, which reversed and remanded the judgment.<sup>57</sup> Upon remand, the case went to trial and resulted in a \$5 million award in favor of Eby; however, the jury delegated responsibility to all three parties involved: Eby at 15%, DART at 40% and LAN/STV at 45%.<sup>58</sup> The Court subsequently gave Eby 45% of the \$5 million, or \$2,250,000. LAN/STV then appealed to the Dallas Court of Appeals, which affirmed the judgment; however, the Court declined to discuss the derivative sovereign immunity claim further.<sup>59</sup> Instead, it adopted the reasoning of the Court in the first appeal of the case as controlling.

In the first appeal, the Court discussed the derivative sovereign immunity defense forwarded by LAN/STV.<sup>60</sup> As it did in previous cases, LAN/STV argued that under the Texas Transportation Code, a private contractor performing a function of DART is liable “only to the extent that the authority would be liable if it were performing the function.”<sup>61</sup>

The main issue revolved around the distinction between immunity from suit and immunity from liability, brought forth by Eby.<sup>62</sup> Eby claimed that the applying the statute to the situation depended on whether DART

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Martin K. Eby Constr. Co. v. LAN/STV (Martin K. Eby Constr. Co. II)*, 350 S.W.3d 675, 679 (Tex. App.—Dallas 2011, pet. granted).

<sup>54</sup> *Id.* at 679–680.

<sup>55</sup> *Id.*

<sup>56</sup> *Martin K. Eby Constr. Co. v. LAN/STV (Martin K. Eby Constr. Co. I)*, 205 S.W.3d 16, 17 (Tex. App.—Dallas 2006, pet. filed).

<sup>57</sup> *Id.*

<sup>58</sup> *Martin K. Eby Constr. Co. II*, 350 S.W.3d at 679.

<sup>59</sup> *Id.* at 685.

<sup>60</sup> *Martin K. Eby Constr. Co. I*, 205 S.W.3d at 18.

<sup>61</sup> *Id.* at 19–20.

<sup>62</sup> *Id.* at 17.

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would be immune from liability in performing the same function as LAN/STV (preparing the plans and drawings), or if it would be immune from liability for the same type of claim as that asserted against LAN/STV (negligent misrepresentation).<sup>63</sup> LAN/STV, on the other hand, argued that Eby ignored the statutory language of “only to the extent.” LAN/STV proffered that this wording intimates that if DART was immune from tort liability, then LAN/STV was “derivatively immune from tort liability.”<sup>64</sup> Further, it argued that the statute should not be interpreted to mean that finding DART liable in contract would subsequently result in a finding of LAN/STV’s liability in tort.

Where LAN/STV’s argument failed was that it asserted that it has immunity from liability, while also arguing that Eby is not without remedy because DART is *not* immune from liability.<sup>65</sup> The Court countered this notion by noting that if Dart is not immune from liability in performing the same function, then “LAN/STV is not immune from liability for performance of those same functions,” since LAN/STV’s immunity is said to derive from DART’s. The Court ultimately sided with Eby, concluding that to determine whether a private contractor is able to assert a derivate sovereign immunity defense depends on an analysis of the *function* performed, not the *type of claim* asserted against it.<sup>66</sup>

The case has been appealed to the Texas Supreme Court as one of first impression in construing the derivative sovereign immunity statute involving public transportation authorities. As LAN/STV states in its brief to the Court, “these statutes are important and are ready for review.”<sup>67</sup> LAN/STV argues to the Texas Supreme Court that the Transportation Code effectively places it “in the shoes of” DART.<sup>68</sup> The Court’s opinion will not only answer questions about that particular statute, but it will also provide guidance for future similar legislation.

V. A PROPOSAL AND CONCLUSION

It is easy to envision language describing the need for new or better roads, water systems and schools, etc. in terms similar to the language in the bill establishing immunity relating to commuter rail projects. Roads, water systems and schools, and other infrastructure are largely owned and built by governmental entities. Involving private contractors in such projects has many benefits—it increases efficiency and can often lower the cost to the government and the taxpayer. However, those private contractors should not be left holding the liability bag any more than the governmental entities that hired them. Those contractors, stepping into the shoes of the government, should be granted the same immunity that the government would enjoy. The following is offered as a proposed modification to existing statutory language for the liability portion of legislation addressing the need to promote infrastructure construction:

[i]f an independent contractor is performing a function of the entity (*school district, utility district, city or county government, etc.*), the contractor is liable for damages only to the extent that the entity would be liable if the entity itself were performing the function.<sup>69</sup>

In conclusion, it is clear that the infrastructure needs of this state are great and growing right along with our population. It is also clear we need to motivate more qualified contractors to get in this game. Derivative immunity seems to have worked in the area of commuter rail projects. Extending the same to other infrastructure projects is worth considering.

<sup>63</sup> *Id.* at 19.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 20.

<sup>66</sup> *Id.* (emphasis added).

<sup>67</sup> Brief For Petitioner-Appellant at 28–29, LAN/STV v. Martin K. Eby Constr. Inc., No. 11-0810 (Tex. Aug. 13, 2012).

<sup>68</sup> *Id.*

<sup>69</sup> See TEX. TRANSP. CODE ANN. § 452.0561(c). The italicized language is the proposed addition.