ORAL ARGUMENT – 9/20/00

99-1015 - GSC V. LITTLE-TEX INSULATION CO.
AND
99-1071 - TEXAS A&M V. DALMAC CONSTRUCTION

LAWYER: Federal Sign was not unanimous, but the members of this court unitedly expressed their hope or expectation that the legislature would act to alleviate the perceived unfairness of a strong sovereign immunity doctrine.

Last year after 12 years of debate in the legislature, and perhaps partly in response to Federal Sign, the legislature did act. It enacted an administrative claims process that preserves the state's sovereign immunity from suit, but creates an equitable and fair way for parties to resolve their contract disputes with the state before seeking legislative consent to sue.

Now that the legislature has acted, the court should not, and we think may not, impose a waiver by conduct exception to the state's sovereign immunity.

HANKINSON: So how can all of these cases be resolved then?

LAWYER: These cases should be resolved by reversing the CA and sending them back with instructions that they be dismissed.

ABBOTT: Assuming we don't act shouldn't we implement a mental competency test for anybody who would be stupid enough to enter into a contract with the state? Isn't there very strong public policy argument against your position because somebody would be a fool to enter into a contract with an entity that can say, well I'll pay you maybe, I probably won't pay you. There's no obligation under your argument for the political entity to have to pay.

LAWYER: I think not. In the vast, vast majority of contracts, these types of issues don't arise. These particular claims they are I think good faith disputes.

ABBOTT: We've got a whole bunch of people here where it has arisen. How many times has the legislature approved payment?

LAWYER: Until 1987 they almost always did. Since that, until 1998 or 1999 it was about 9 times out of 173. So the track record is not good. But despite the public policy arguments that existed at the time this court decided Federal Sign, they don't exist anymore because the legislature has enacted 2260 and it applies not only to contracts that are entered into the future, but to all claims pending at the time of the effective date. So if those cases were still in existence they now have an

administrative remedy.

OWEN: I want to ask you specifically your view of the statute. Is anything that we do here today relevant? Even if the court were to abolish sovereign immunity wouldn't this statute govern notwithstanding what we say? Wouldn't you have to go through the administrative claims proceeding to still get permission to whether we abolish sovereign immunity or not?

LAWYER: That's exactly our argument. My basic understanding...

OWEN: Is that your position on the statute? I didn't get that from your briefs.

LAWYER: Yes. No it is in the briefs. It may not have been as lucid as I would like to have been. Our position is when the legislature acts in the area of sovereign immunity (for instance in the tort claims act or here) it doesn't only - let's just take the tort claims act, when that was enacted it didn't only waive sovereign immunity for certain claims. But it legislatively codified or adopted both sides of the line that it drew. And all the courts in Texas for 30 years have understood that when you bring a claim under that act if you don't fit within the language of the act, you are barred by sovereign immunity. And neither this court nor the CA's have ever thought well we will just abolish the rest of sovereign immunity because the legislature didn't see fit to waive it.

This act, ch. 22.60 took a different tact. It said we're not going to abolish sovereign immunity from suit in the DC. We are going to leave it intact but instead we're going to do what a number of other states have done, as you recognized Justice Enoch in your dissent, and that is to setup what is essentially a claims commission. We're going to use the SOA process. We are going to send them through an administrative process where they can have negotiation and mediation. If they don't like the result of that, they can ask for a contested case adjudication. And I think that it is imminently fair to those who contract with the state. Reading it it seems almost unfair to the state. When you go in to that contested case adjudication once the ALJ decides issues, finds the facts and conclusions of law, if they go against the state and that is claim is valid it says the state doesn't get any appeal from that.

O'NEILL: But that's only up to $250,000.

LAWYER: That's right. Up to $250,000 then you pay. If it's over $250,000 let's look at what happens then. The ALJ files the findings of fact and conclusions of law with alleged, and they ask for an appropriation. And then the legislature gets to do an appropriation. But as this court recognized in Federal Sign, you don't get anything really more than that going to trial and getting a judgment against the state. You still have to go to the legislature to get the appropriation to pay it.

HECHT: Under the new statute do you have to get an appropriation for a claim that is

approved under $250,000?

LAWYER: If the agency has funds appropriated for the payment of that contract or for contract claims generally, then there is no appropriation. The statute says shall pay. The state shall pay if it's under $250,000. The vast majority of contract claims are for less than that. So if the ALJ thinks the state should pay, it doesn't have any appeal, it just pays if there were funds appropriated for that contract, and the case is over unless the contracting party decides it doesn't like that result.

O'NEILL: So what happens to the $30 million recreational facility?

LAWYER: Remember, we paid almost all of that. We're only talking about the overages here.

O'NEILL: Which is how much?

LAWYER: They are claiming something on the order of $3 million.

O'NEILL: So you still pay over the $250,000?

LAWYER: Absolutely. And in fact, they protectively filed with SOA. The SOA proceedings were ongoing and they've been stayed pending the outcome of this case. Do DALMAC can go back. If they get dismissed they can go back and go through the SOA procedure...

BAKER: Can all of these private contractors go back through the SOA process? Are any of them barred under the terms of the statute?

LAWYER: I think there is an issue as to Little TEX. Airatron(?) did file a 22.60 claim. I'm not sure that Little Tex did. I think they decided to roll the dice and take their gamble on their lawsuit.

BAKER: If I recall, that case is the only one that the CA discussed the 22.60 issue, and that was in a footnote interestingly enough wasn't it?

LAWYER: That's correct. The timing of it was that those cases had been pending in front of the CA when the legislature was considering it and then enacted 22.60. But our base position is that it is now enacted. It is the law and the legislature intended it by saying that it would apply to all pending claims, that it applied to these claims.

BAKER: Then when you're asking the court to reverse all three of them and send them back to the TC to dismiss so the three claims can file under 22.60, but one of them can't is that correct? So they have no way to get relief.

LAWYER: The statute sets out time on this for filing a SOA claim, a 22.60 claim. It also provided a backdoor for claims that had been going on so that you had 180 days after the effective date of the act to file. I don't know why they chose not to file. The other litigants did.

Perhaps there's an argument they have that if this is dismissed maybe they've got a claim on why they should then be able to file. That can be handled in the SOA proceeding once they file. What we're asking this court to do though is acknowledge that in Federal Sign you asked the legislature to act and they did. They acted responsibly. The court struggled I know in Federal Sign with the fact that the legislature hadn't done anything and it was perceived to be unfair. But they had been working for 8 years at that time unsuccessfully and now they have opted - they've gone through all of those debates and they have opted...

ABBOTT: Isn't there a pubic policy reason why maybe this ball should not stay in the legislature's court. And that is, what is the sole remedy for somebody who has entered into a contract with the state, the state does not want to pay, that the sole remedy is to approach the legislature is it not and get the legislature to approve payment?

LAWYER: Well if it's less than $250,000 there will be no contact with the legislature under 22.60.

ABBOTT: But over $250,000.

LAWYER: If it's over $250,000 ultimately the ALJ will make a recommendation. So any concerns that they won't be paid are basically a distrust that the legislature won't make appropriations based on the ALJ recommendation perhaps more than they didn't when there were actual judgments. And there's not a history of when there's judgments and the recommendation is made the legislature simply refusing. They may not grant permission, or at least for the past 12 years they may not have...

ABBOTT: Here's my concern, and you're making some argument to alleviate it to some extent. But the concern I think is obvious and that is that people who are entities that enter into big contracts with the state are going to be forced to getting the legislators around the state to go ahead and agree to pay up, which creates an uncomfortable situation of legislators asking these folks for campaign contributions and then wind up deciding to go ahead and pay up on the bill. I think that creates bad public policy.

LAWYER: I think we're presuming that bad actions will take place. I will say that for highway construction projects this has been the process for a long time. It's in 211 of the Transportation Code. For highway construction projects this type of SOA process, at least going through the APA, has long been. So they have not had access to the courts for quite some time.

ABBOTT: What's your response to all the red on this chart?

LAWYER: This is a really nice chart that they have prepared, and it talks about what states have done. But let me make two points about this chart. First, as you can see, nearly every state has provided some mechanism for resolving contract disputes with the state. But no state has done it by adopting a waiver by conduct exception to sovereign immunity. Second, in the states in which the legislature has acted to provide that mechanism, again you don't see a history and no state has the judiciary come in and said, We don't like what you, the legislature, have done in drawing these lines. So we're just going to judicially abrogate the whole thing.

ABBOTT: Going back to the chart, two things. One is, that for all the red states there was no legislative action taken.

LAWYER: No, that's not clear to me. In Federal Sign, the court pointed out that there are really relatively few in which there was an out and out judicial abrogation. Again, I don't know the cases behind all these red splotches. It says judicially abrogated or found not to apply. And I'm not sure of the exact definition. Again, that's not my chart. In Federal Sign the concurrence said, only five judicially abrogated, the dissent cited four cases for that general proposition. But they didn't cite any cases saying when the legislature acts why we will just reject that and abrogate it completely because we don't like the line the legislature has drawn.

O'NEILL: But doesn't this exhibit help you in a way because - I mean the legislature looked at all of these different states and crafted a policy in response to what the other states have done?

LAWYER: Yes, absolutely. I think it helps me a lot in that I'm just saying that whatever the states have done our legislature has chosen a direction to go. It has opted one of the options that Justice Enoch offered in his dissent that would be similar to the contract disputes act that the federal gov't enacted. I think clearly that's a legitimate way to go. The legislature has done that, and this court ought to give that a chance to succeed.

HECHT: We've said that sovereign immunity is a common law doctrine that the courts have established. Can the legislature claim sovereign immunity by statute?

LAWYER: I think that they clearly could. I think that they clearly can define various causes of action. There has not been a recognized claim against, for instance the state.

HECHT: Would they have to have a rational basis for doing so? Could they claim sovereign immunity for all claims brought by road contractors but not claims brought by anybody else?

LAWYER: I think I will concede that there has to be a rational basis for that.

HECHT: That would be true whether it was contract or tort?

LAWYER: I think the courts have said that any legislative enactment has to have some rational basis.

ABBOTT: And there is no separation of powers or other constitutional problem with one branch of gov't immunizing itself?

LAWYER: Sovereign immunity - I mean we've talked about in the sense of it being recognized by the courts. But I think sovereign immunity preexisted our state constitution. I mean that's what the federal courts have said, and the judiciary has simply recognized that it didn't have power to go against the state. Now there's been a movement against that because of fairness concerns, and we're not saying that that's not a good thing.

O'NEILL: Nor or you saying that we don't have power to do it. You're just saying we shouldn't.

LAWYER: That's right. And I think that's what the court recognized in Federal Sign. I read some of the opinions of Federal Sign to basically be a plea to the legislature to act. And I think that they have done that.

HECHT: They didn't go very far. The federal gov't has administrative process that you can opt in or opt out of. You can sue, appeal. It has all sorts of ways to get your claim adjudicated depending on how you want to go about it. We have this one very narrow statute now.

LAWYER: It's probably not as broad as what's available. But that was the legislature's decision to make and I think that our process is at least as broad as some others that are available, and they were dealing with the policy issues that you pointed out in your concurrence in Federal Sign. They've been going through that for years and years. As long as the Chief has been on the bench they've been working with that. And they've made a decision. And we ought to give it a chance.

ENOCH: In that regard, waiver by conduct and all of this, suppose that in Federal Sign they had actually delivered the sign. They had built it and actually delivered the sign and the state said, Whoops, unless you get permission you can't sue us and recover. Doesn't that implicate some constitutional concerns, not the least of which is taking somebody's property without paying for it?

LAWYER: It would be a bad thing. I don't believe it would be a takings claim. The courts have thus far unanimously rejected the takings analysis. We've been dealing...The Texas

courts is what I mean to say. There have been some states that have gone that way. But the Texas courts looking at what it takes to establish a takings in Texas have said no. And I think at this late day in age to come back and back-end it I think would be unwise for the court to do. Nobody's ever thought that a contract claim was a taking.

ENOCH: I suggest that maybe until Federal Sign not many people here thought that the state really wasn't bound by its contracts. And so perhaps the takings claims never really got aired by an argument that wait a minute, we've delivered the supplies and materials and now you say you don't have to pay us.

LAWYER: I would suggest exactly to the contrary that before Federal Sign everybody knew that you couldn't sue the state unless you went to the legislature and got permission to sue from them. You got a resolution. Until 1987 that worked very well. I don't know why the legislature stopped doing that in 1987. But you don't see a lot of cases not because there weren't disputes, but because the legislature granted them in resolutions and the people understood that and knew it. And there wasn't a lot of case law because people weren't filing in DC. They knew where to go and they got their relief that way.

There was a 13-year hiatus in the fairness issues and there seemingly wasn't a good remedy for people. Now there is. Now there is, let's give it a chance. I would like to say but there is a lot of issues with the waiver by conduct. I've said that no other state has adopted it. I think Federal Sign addressed all the policy issues as to a general abrogation, and I think that the statute prevents that from happening now.

Waiver by conduct is not something that's been adopted by other states. It creates exactly the same kind of definitional problems that courts have dealt with in the tort claims act, is where do we draw the line. If we go that route we'll be litigating what conduct waives sovereign immunity for at least a decade.

ABBOTT: Why can't the bright line just be executed as opposed to executory contracts?

LAWYER: But that's what this court rejected in Federal Sign. And I think the court ought to think twice, once before going back in Federal Sign...

ABBOTT: In Federal Sign we didn't deal with an executed contract.

LAWYER: I thought it was an executed contract. It simply hadn't been performed.

ABBOTT: It was not performed. Why can't we draw the line between performance?

LAWYER: Well partial performance, full performance, nobody can really know. But I

would say the legislature has acted and we ought to respect what they have done.

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RESPONDENT

O'NEILL: If we adopt a wavier by conduct exception as the CA's have applied, wouldn't that completely undermine the legislative scheme?

LAWYER: No, I don't believe it would.

O'NEILL: I didn't say do away with it. But it would significantly undermine it wouldn't it?

LAWYER: That is certainly true. If this court and as Justice Owen alluded to earlier, if this court does abolish sovereign immunity in its entirety, then yes that would essentially do away with this particular statute.

The deference to the legislature though, I think would still be in tact. The legislature would still have the opportunity to respond to any such decision by this court.

OWEN: That's what I don't understand. Why doesn't this statute apply to partially performed contracts? Why doesn't this statute apply to all contract disputes period and require you to go through that process?

LAWYER: Because the statute does not say that it applies to all contracts.

OWEN: It says exclusive remedies.

LAWYER: It states expressly in the statute itself that it is a prerequisite only to obtaining a legislative resolution to sue the state. That is the only prerequisite that's expressly stated in the statute. The arguments that we're presenting here today really have to be taken together. The first step I think this court has to address is whether or not there is any sort of waiver of immunity either through performance or in its entirety when the state enters into a contract.

OWEN: Even if we say through partial performance there's a waiver of sovereign immunity, doesn't this statute come back behind that and say even so, you have to go through administrative process, at the end of that you have to go to the legislature to get permission to sue. So whether we say you do or not seems to me sort of moot after this statute.

LAWYER: I don't believe that this statute accomplishes that result. If this court does make a decision either abolishing sovereign immunity in its entirety or through a waiver by conduct

exception the legislature can then take the opportunity acting on a clean slate to come in and enact for example an ADR procedure.

OWEN: Show me the provision in the statute where it says you don't have to go through this procedure if we were to abolish sovereign immunity based on partial performance?

LAWYER: Well of course it doesn't expressly say that because when this statute was enacted sovereign immunity as it was stated by this court in Federal Sign was the law of the state.

OWEN: But it still says you have to go through the administrative process right?

LAWYER: In §2260.005 it says, the procedures contained in this chapter are exclusive and require prerequisites to suit in accordance with ch. 107 of the Civil Pract. & Rem. Code. So the legislature expressly told us what this was a prerequisite to. And it limited it these procedures to a prerequisite only when you have to go to the legislature to obtain a resolution to get the consent to sue.

ABBOTT: So one distinction that could be drawn there then would be that you have to go through this procedure if you want to sue on a contract which has not yet been performed. But if we draw the line saying that you don't have to go through this process for a contract that's been performed that would be distinction between when you would pursue the statutory remedy and when you would not have to pursue the statutory remedy. Is that correct?

LAWYER: That is correct, and I think the plaintiff in a Federal Sign kind of case - if this case affirms the lower court's decision on a waiver by conduct exception, the plaintiff in a Federal Sign kind of case would still have to comply with the administrative procedures.

O'NEILL: Have any of these states on your map adopted a waiver by conduct exception?

LAWYER: I have to confess it's not my map. It's Mr. Baldwin's map and he can explain a lot more than I can. I don't believe that's true though. I don't believe that any other state has accepted a waiver by conduct exception similar in nature to what the CA's have done here. But I would point out two things. First of all, I believe Texas is the only state where we have the dichotomy between immunity from suit and immunity from liability. So that might explain the difference. I would also suggest that waiver by conduct is not a new concept to the jurisprudence of this state. It would be different from what the other states have adopted, but it is not a new concept. For example, we have a judicially created rule in Texas that when the state files a lawsuit, becomes a suitor in its own court by filing its own lawsuit, it has waived immunity from suit. That is a judicially created exception to sovereign immunity through conduct. The conduct there is the voluntary act of filing a lawsuit. Similarly we have the judicially creates exception that when the state enters into a contract it waives its immunity from liability. Again, a judicially creates exception

based on conduct. So the concept of waiver by conduct is not a new one.

HECHT: Let me understand now. Suppose there were no sovereign immunity in these circumstances. No judicial doctrine of sovereign immunity in these circumstances in these three cases. Where does that leave the respondents vis-a-vis the statute, the administrative procedure, going to the legislature and so on?

LAWYER: Again, as I pointed out, this statute was enacted at a time when sovereign immunity did exist under Federal Sign. So I think it is so cumbersome that the legislature would have to revisit the issue if this court does away with sovereign immunity in its entirety in the breach of contract context or creates a waiver by a conduct exception.

BAKER: Weren't the Houston and San Antonio cases both decided before the 1999 legislative session?

LAWYER: They were and I think that's significant, because the legislature is presumed to know the state of the common law. In _____ and _____ashi had both been decided at that time.

BAKER: But the state's argument in response to that is well sure they knew about it and that's why they said you have to use this process.

LAWYER: If they intended to overrule _____ and _____ashi, and in fact the court in _____ expressly invited the legislature to overturn its decision and to prohibit suits if it disagreed with that decision. And the legislature did not do that.

BAKER: If even if this court has difficulty getting the legislature to issue, why would they look at a CA opinion for any reason?

LAWYER: My point is simply that that law was out there and I do believe that it was the impetus for the legislature to address this issue.

ABBOTT: I'm not clear on your answer. Why are you saying that in passing this statute, the legislature did not in essence overturn those decisions?

LAWYER: If you look at the statement that is contained in the legislative history that the state relies on, it's a statement by Rep. Greenberg on the House floor. And in that she states that consent from the legislature is still mandatory before bringing a contract suit against the state even if the contractor has performed. What I suggest to you is that that is in fact a incorrect statement of the law. Because _____ and _____ashi had been decided. Those cases determined that...

OWEN: Under our law they don't establish the common law. It's only decisions from this court that bind the legislature. So why should this court be so presumptuous - we've asked the legislature to act, they've acted and we come back and we say well we don't think it's good enough. We are going to abolish sovereign immunity and let all these cases walk around the procedure that you've established and you go back to the drawing board and start over. Why should this court take that task on?

LAWYER: I think this court should have the courage to do so simply because the legislature has not provided either a reasonable or a workable or a responsible procedure for addressing these claims.

OWEN: Isn't that really the guts of your argument that you don't' like what the legislature has done and you think it's unreasonable and you're asking this court to act when you think the legislative response is inadequate?

LAWYER: That's the guts of one part of my argument. But the guts of my other part really has to do with a very simple statutory construction. And that is, look at what the legislature did, not what Rep. Greenberg's statements were on the house floor...

ENOCH: There are a number of claims that could be made against the state that don't necessarily arise out of contracts for which sovereign immunity would not be waived. And that even includes torts if they are not covered by the tort claims act. In which event if it's some sort of tort not covered by the tort claims act, the legislature could waive its sovereign immunity and get permission to sue couldn't it?

LAWYER: Yes.

ENOCH: So this statute would have application in any circumstance involving where the sovereign immunity has not been waived or not?

LAWYER: The statute is limited to contract claims. But it's further limited to contract claims where legislative permission through a resolution from the legislature is a prerequisite to suit. And let me suggest that the state's construction of the statute, the construction that they are asking this court to adopt is nonsensical when you consider other situations where the state through its conduct has already waived immunity from suit, such as when the state files a lawsuit. It cannot be that when the state files a lawsuit the defendant in that case cannot simply file a counterclaim, which has been the law in this state for some time, but rather must go back to the administrative procedures, follow those procedures before it can assert the counterclaim. That cannot be the construction of the statute.

OWEN: You say it cannot be, but the legislature establishes the jurisdiction of all the

courts in this state doesn't it? They can pick and choose who gets to sue where.

LAWYER: Absolutely. And they could have done that in this case, but they did not. What they told us was that this was a prerequisite to suits where a legislative resolution granting consent to sue under ch. 107 of the Civ. Pract & Rem. Code...

OWEN: Well why weren't they entitled to rely on this court's decision in Federal Sign that we were not going to abolish sovereign immunity with respect to contracts if they acted, and they did act. Now why shouldn't we leave that alone. Why should this court come back and say well what you did is unreasonable.

LAWYER: What they did was unreasonable. Let me point out that this statute really is nothing more than a procedure. And I suggest to you a very expensive and cumbersome procedure for obtaining - for the legislature to obtain what is essentially an advisory opinion from an administrative law judge on whether or not funds should be appropriated and whether or not consent to sue should be granted. It does not adjudicate any claims. It does not resolve any claims. Even for claims under $250,000 if the claimant is not satisfied with that award - for example if the claimant was seeking more than $250,000 but the ALJ determined that only $250,000 was valid, the claimant is not even bound by that award nor is the state because funds still might have to be appropriated to pay that. So if the statute does not provide any real workable remedy, and it leaves you in a situation where you were to start with, and that is the possibility of seeking legislative consent to sue potentially doubly exposing the state to the costs which I think the legislature was attempting to avoid in enacting what is essentially an ADR procedure.

BAKER: I'm concerned about what the legislature did was unfair is what your argument is. And then you express the reasons why. But the legislature is the policy making body of our state government isn't it, and isn't that the kind of decisions they make when they exercise that constitutional responsibility and authority? It may not be fair but it's within their discretion to make that policy decision isn't it?

LAWYER: It is, but it is also I think this court's responsibility to review the actions that the legislature has taken in this area.

BAKER: But we don't' have a constitutional attack on that process, and we don't just go out and say well we think it's unfair to even if we do and decide well we're going to agree with you. It's unfair, so we are going to throw it out. What is the constitutional basis if any even though it hasn't been alleged to say this is unfair and it's gone?

LAWYER: I don't believe there's a constitutional basis. But I would simply point out that sovereign immunity is a judicially created doctrine. It is subject to judicial abrogation.

BAKER: Can we disagree with that, the doctrine of sovereign immunity existed before Texas was a state. Do you agree with that?

LAWYER: Yes.

BAKER: And the constitution adopted common law that existed before we became a state. And so, therefore, it's a constitutionally approved doctrine that this court has followed as it must.

LAWYER: By implication I suppose you could make that argument.

BAKER: It's been made and said in cases.

LAWYER: The legislature has however never adopted that either as part of the constitution or as part of any legislative enactments. There is no legislation...

BAKER: Would you agree on the other side they have not only implicitly but expressly recognized its existence, such as saying we're going to waive it in tort cases, or we're going to...

GONZALES: What about in 2260.006 when the legislature says this chapter does not waive sovereign immunity to suit or liability. Isn't that a recognition of the doctrine?

LAWYER: Certainly. And again at the time this statute was enacted, sovereign immunity did exist. There's no question about that. This is simply saying that this statute is not where you look to determine whether or not sovereign immunity is waived either for suit or for liability. And that's precisely my point. In our situation if you have judicial determinations of a situation where sovereign immunity from suit has already been waived so that legislative resolution of consent to sue is not necessary, then you need not follow the procedures in this statute.

BAKER: Well isn't a corollary to that assume that the legislature said we don't care when a state agency sues about a waiver. We're going to hold that they don't waive their sovereign immunity, so you can't file a cross-claim. Fair or not they can say that would you agree?

LAWYER: They could, but they have not done that.

BAKER: But they have said something here as Judge Gonzales points out that it doesn't waive immunity from suit.

LAWYER: And I agree with that. This doesn't address it. This statute is not where you look to determine whether or not...

BAKER: Why did it say that every claim that was pending or what happened after August of 1999 is covered by the statute? Wasn't your claim pending at that time?

LAWYER: Yes it was.

BAKER: So really the only way to sustain your argument is if this court says well that doctrine that's fashioned by the Austin CA in the other two cases is not a viable one and it's not going to be recognized by this court?

LAWYER: There are two ways to get there. One is to read the actual language that the legislature used in enacting the statute...

BAKER: No I mean without regard to the statute that this court just says we're not buying in to the Austin court's view that there is waiver by conduct and that's not a viable theory and we reverse them, then the statute applies.

LAWYER: They go back to the statute, yes.

BAKER: It is correct there's only discussion about 2260 in the Little Tex case, but is it true that the other two private parties agree that the 2260 is an issue that needs to be considered by this court?

LAWYER: Absolutely. There is a concern that's been expressed by many members of the court about deference to the legislature. And I would simply point out that deference is not absolute. Reviewing courts for example certainly give deference to TC determinations that are within their discretion. But that discretion is not absolute. And courts must and should have the courage to act in this situation when the legislature has attempted to act but has enacted a statute that is unworkable, that doesn't address the issues that are truly before this court. And we would ask the court to reexamine Federal Sign, and determine whether or not sovereign immunity ought to be abolished...

BAKER: Well I think we are going to have to reexamine it one way or the other.

* * *

LAWYER: My part of this argument was designed to be much simpler. Rather than argue that waiver by conduct ought to be adopted by this court as a method of sustaining the decision of the Austin CA, my part of this argument was to ask you to reconsider and to reverse Federal Sign.

HECHT: But if we do where does that leave the respondents in this case?

LAWYER: I believe that if you were to reverse Federal Sign to sustain the Austin CA, we would be back in DC.

HECHT: Why don't you have to comply with the statute?

LAWYER: Because I don't think the statute applies if we don't have to get legislative permission to sue. I think the portion of the statute that Ms. Block read clearly makes the statute a condition precedent to seeking permission to sue.

O'NEILL: Wouldn't that then gut the statute? Why would anybody then ever proceed under the statute?

LAWYER: I think there are two reasons that the statute might have vitality if this court were simply to sustain the Austin CA, especially on the issue of waiver by conduct. One, of course is, in the Federal Sign instance, where there is no performance.

O'NEILL: I didn't understand that to be your argument. I'm talking about under your argument to change our decision in Federal Sign. If we were to do that we'd be wiping the statute off the books.

LAWYER: I believe you would. I believe if you were to reverse Federal Sign and say that when the state enters into a contract it waives its immunity from suit, and it's immunity from liability, then yes, the statute would have no vitality. Except the statute is being incorporated in to the contracts that are folks are signing around this state...

O'NEILL: But that's no different than any other...

LAWYER: It would become an administrative procedure to address and possibly resolve claims.

ENOCH: You said you were going to make a simple argument. And your argument is to overrule Federal Sign. What more could I have said to have tried to convince my colleagues that there was not sovereign immunity in contract cases?

LAWYER: Your colleagues gave great deference to the legislature in the majority and concurring opinion. I would argue that haven given deference to the legislature and looking what the legislature did in 2260, what you're left with is a statute that basically has no vitality, no use even if you were to overrule the Austin CA. The statute is a losery. It doesn't provide remedy. The argument that was brought when Federal Sign initially came up, the attacks on sovereign immunity over the last 10 years in the courts of this state, have focused on the absence of a remedy afforded disappointed contractors by the State of Texas.

OWEN: Even if we were to abolish sovereign immunity and you got a judgment, don't you still have to go to the legislature and get permission to collect that?

LAWYER: We would still have to go to the legislature to get an appropriation.

OWEN: So you're in the same boat ultimately?

LAWYER: I don't believe we are in the same boat ultimately. I believe we would have a judgment of the DC perhaps affirmed by a CA and by this court and the legislature wouldn't be in a position where it would need to evaluate my claim. It wouldn't be a position to send me back to the try the case over again. I would have tried the case.

OWEN: But they could say we are not going to pay.

LAWYER: They could perhaps say. They haven't said that in the past.

OWEN: How about Mr. Green?

LAWYER: Mr. Green settled his case.

BAKER: You can't levy execution if the legislature says no we're not going to appropriate the money to pay your judgment can you?

LAWYER: Absolutely not. And that establishes the...

BAKER: Well so doesn't that cut against your argument that this process that's been set up in 2260 furnishes nothing, it's a losery?

LAWYER: I don't believe it does because if you were to follow the procedure that's set out in 2260, you would have to initially mediate or negotiate your claim. Fine. Everybody wants to do that. That's a good way of resolving a claim. You've then got to go through basically an extensive fact finding endeavor with an administrative law judge in which the state rules of civil procedure are involved in which the state rules of evidence are involved. Basically you need to try your case in front of an ALJ, who then would render a decision that really isn't binding on anybody. If the decision is less than $250,000 and the state somehow has money to pay it and the state somehow chooses to pay it perhaps you will get paid. But if the litigant doesn't like that decision, or the state doesn't like that decision and chooses not to pay or the award is over $250,000, you are left to got to the legislature.

BAKER: Which isn't any different than for 150 years.

LAWYER: Except under that particular procedure what the legislature is likely to tell you to do is go try your case in a DC. And then when you're finally finished trying the case in a DC, come back to the legislature again and try to get the judgment funded. You're looking at a process that could well take 5, 6 or 7 years. That simply is not economically justified. It certainly isn't going to benefit the state in terms of saving it money in the process, and could well bankrupt most contractors that have to go through it. If in fact you were to abrogate sovereign immunity and the DC had jurisdiction over breach of contract claims against the state, you would try it once. Sure, you would have to go to the legislature to get funding for your judgment if the case didn't settle and as we all know, 95 to 98% of the cases that I'm involved with, construction contract cases settle, you go to the legislature and say I have a judgment please fund it. What you would not get from the legislature is a direction to go relitigate the case. And I think that's far different.

HANKINSON: How does 2260 compare to the laws enacted to give a right to hearing and actions in those purple states on your map?

LAWYER: What the map doesn't show is, is in those blue states where the legislature abrogated sovereign immunity, which of those states the legislature said go to court and which of those states established an administrative procedure, a court of claims.

HANKINSON: Are those binding administrative procedures?

LAWYER: In the roughly 6 to 8 states that have courts of claims, which would mean that 18 of those legislatures said jurisdiction is in the DC. It's my understanding they are binding. They are binding in Illinois. It's binding in Pennsylvania. I believe it's binding in Wisconsin.

HANKINSON: So in 6 to 8 of those blue states there is binding administrative procedure and in the remainder of the states the legislature abrogated sovereign immunity and said go to court and you can sue us?

LAWYER: And said go to court. That's correct. A question did arise as to whether any of those red states adopted the idea of waiver by conduct. The answer to that question is yes and no. As Ms. Block said, only Texas as far as I've been able to tell has this sort of peculiar dichotomy between immunity from suit and immunity from liability. Other states haven't had to deal with that. But what other states have said, one of the four basic ways that states have abrogated sovereign immunity judicially is that through the conduct of entering into a contract, the state has waived its immunity because inherent in the nature of contract is mutuality of obligation and neutrality of remedy.

BAKER: But we talked about that in Federal Sign and settled that argument against your viewpoint.

LAWYER: I think you discussed the issue of mutuality...

BAKER: That's what you just said didn't you?

LAWYER: I said mutuality of obligation and mutuality of remedy. Interestingly enough common law principles that existed at the time when Texas constitution was adopted.

OWEN: Aren't you actually asking this court to engage in a tug war, a tussle with the legislature, because if we were to do what you suggest, which is to gut their statute, and they come back in the session in January and by legislative decree say there is sovereign immunity and we are reestablishing this same procedure, where are you then?

LAWYER: If you were to do what I would posit would happen is that this court would say there is a common law doctrine called sovereign immunity that we don't believe has any vitality at this point in time. The legislature would then be free to enact...(tape runs out on side 1) _____ under those circumstances, or perhaps say sovereign immunity ought to be the law of the land. But the legislature would be acting on a blank slate. The legislature would be empowered at that point to establish some kind of remedy. It probably would.

OWEN: And what if they come back and do exactly what they've done in this statute?

LAWYER: Then I think the statute would have to be analyzed in terms of whether it provides an appropriate remedy and is constitutionally sound.

OWEN: Why don't we wait until we get that case to decide whether we're going to abrogate the statute?

LAWYER: Because I think the doctrine is yours to abrogate. And I think the statute that was enacted in 1999 doesn't provide a remedy that's effective or economic or fair for that matter. The proof of that pudding is in the sum year since that statutes has been effective. Nothing has occurred under that statute. There's been a case that was filed by my client that's been abated pending this lawsuit. But few other litigants have taken advantage of that particular administrative process. In one case in which a litigant tried to take advantage of that process, the state agency in question filed the lawsuit because it didn't want to go through the legislative process. So there's something inherently...

BAKER: But when they did that they waived immunity from suit. So why would that company want to go through the process if the state said the door is open come on in?

LAWYER: The company was overjoyed to be in DC.

BAKER: In answer to Justice Owen's question you said well we should just abrogate sovereign immunity. If we did that 100% does it affect the tort claims act or any other act where there's limited waivers and so forth? What happens?

LAWYER: We're only asking you to abrogate sovereign immunity in the instance where the state enters in to a valid written contract. That's the only set of circumstances under which we are asking you to abrogate the doctrine, where the legislature has already authorized the state to enter into a contract, where the legislature has appropriated the money for the state to pay for the contract, where the legislature has clearly expressed the intent that the state pay for that contract, and where the legislature has clearly intended that the money go to the contracting party. I think that's the area where you should give deference to the legislature.

ABBOTT: Is there any research or law that supports your map that is not included in your briefing?

LAWYER: My appendix includes case citations from 20 states. I don't believe it includes the cases from Maine or from Nebraska which I would be more than happy to supply.

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REBUTTAL

O'NEILL: Is there anything a contractor can do to prospectively protect themselves? Can they go to the legislature before entering into a contract and get an appropriation, or have money set aside? I just don't know how the process works.

LAWYER: I haven't seen that done. I don't know whether they could. I would suspect not. But certainly prospectively all contracts for goods, services and building construction will have provisions and do now have provisions that require that these SOA procedures be used. That's subsection .004 of the statute. When they say that the legislature didn't intend this statute to apply to claims in which there could be an arguable waiver by conduct, I think that's completely inconsistent with .004. I think the statute by its own terms is meant to apply to all contracts for goods, services and building construction. .004 requires that it be included in all of these contracts, so on a going forward basis you are not going to have a contract that doesn't say you have to go to SOA. So that really the only question is what about the contracts that were in existence before the effective date. The legislature said those have got to go. The exchange between Rep. Farrabe and Rep. Greenberg wasn't just statements on the floor. It was adopted as a statement of legislative intent and they said no you've got to go even if there has been arguably waiver by conduct. There's been some performance on the contract or other...

BAKER: In the Little Tex case, they attached as an exhibit to their brief a copy of the

proposed amendment which they say failed, which very clearly says what your argument is. And your response in your brief was, well they said that but there's no legislative history that they quote. Is there any legislative history that shows why that was brought before the house on the floor and what resulted in its alleged failure?

LAWYER: I didn't locate anything specifically. But I think it was imminently reasonable for them to not put that in the text of the statute. The statute was intended to set out the procedures. That sentence which does appear in the legislative history by Rep. Greenberg is really about the same as what was in that amendment. And I think it was properly put in the legislature's statement of what they intended rather in the statutory procedures themselves. So I think it was reasonable. But the answer to you question is no. I don't have anything specific on it.

ABBOTT: One argument made by the respondents was that this statute can be given full vitality if it is applied to a Federal Sign type situation, but does not have to be applied to a situation where you have a fully performed contract. Did I understand you as saying that .004 is the answer to that?

LAWYER: I think .004 is part of the answer to that on a going forward basis yes. But I also think that your question is a great big softball for me. What that invites is that - if the court says that, that's what this statute means, every complaint will be a lawsuit as you recognized Justice Owen, and will have an allegation and we will have to litigate, or you, the courts will have to litigate whether that case presented sufficient facts of waiver by conduct. If it does it goes forward. If it doesn't then you go back to SOA. That's not what the legislature wanted t do.

ABBOTT: Would you go back to .004 because I'm not certain which language you're pointing to in .004, you are saying answers that question.

LAWYER: .004 says, after the effective date of this chapter you've got to include in every contract for goods, services, building construction a provision that requires the dispute resolution process under this chapter. So those contracts have to say if we have a dispute, we've got to use ch. 2260. So contracts that have been entered after August 31 of last year, hopefully include that provision, and they will have to use that, whether there is conduct that might witness a waiver or not.

ENOCH: Can a state agency contract without the authority of the legislature? Without a statutory authority to enter into a contract? Could a state agency enter into any sort of contract to buy services or products? Is there some sort of inherent power to do so?

LAWYER: No.

ENOCH: So the legislature actually has to give authority to an agent to contract on the government's behalf?

LAWYER: That's correct.

ENOCH: So what sense does it make to say that by giving that authority, that's not some sort of clear statement that the state ought to be bound by that contract. What's the rationale for the state having to authorize someone to enter into a contract if in fact the other party of the contract has no agreement unless they go back to the legislature to get permission by the legislature to then litigate over whether they had disagreement that they are bound by?

O'NEILL: What rational basis is there for drawing a distinction between immunity from suit and immunity from liability, since we seem to be the only state doing that in light of Justice Enoch's question?

LAWYER: Justice Enoch, I know you disagreed with that part, but it was part of the holding of Federal Sign, that when you enter into a contract, you are in fact bound and the law of contracts does apply to you. Sovereign immunity really is a remedial doctrine. You simply can't sue, but the law as it exists does apply to you. And so in that sense, you are bound and you do have a remedy. It's simply that the legislature has said before we allow people to start executing on our state office buildings, we want a chance to determine whether in fact we are going to appropriate monies to pay those judgements.

ENOCH: Whether you have sovereign immunity or not, the court doesn't need to protect the state. The state has to appropriate it or not. Clearly you get a judgment without an appropriation. Green is an example. There is no collection there...

LAWYER: That's part of the immunity though.

ENOCH: But it doesn't require the court to sit there and say you've got to get permission to sue.

LAWYER: No it doesn't. But it has historically been the law in Texas. This court has always said look to the legislature. The legislature has acted and it has chosen to - and I disagree with counsel. I don't think it's a slower process. I think it is a faster and more efficient process to go through administrative contested case adjudication. And the vast, vast majority of those claims will be resolved in that setting so that the number of requests for consent to sue that the legislature sees will be far fewer than they have been in the past, and they will have hopefully the opportunity to look at them a little more closely and make a reasoned and rational decision about which ones to grant if the procedures of 2260 are ultimately unsuccessful. But we hope that in most or all cases that those procedures will be successful to the satisfaction of both the state and those who contract with the state. That is our ultimate hope for this procedure.