GOVERNMENT CONTRACTS:
Tips from a Litigator's Perspective

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> Matt distills complex situations down to the critical issues and brings disputes into **actionable focus.**

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Matt is a skilled writer, and he excels at using written advocacy to translate convoluted situations into clear legal arguments. When drafting motions, pleadings, or correspondence, Matt distills the situation down to the issues that matter most, bringing the dispute into actionable focus and allowing genuine engagement, negotiation, and resolution to begin.

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GOVERNMENT CONTRACTS: TIPS FROM A LITIGATOR'S PERSPECTIVE

I. CONTRACT INTERPRETATION

Because this paper is intended for attorneys, I expect that most or all of you have a pretty good handle on contract basics. But the backbone of a contract claim is the contract—What does it say, and how will a court decide what that means? If you can't answer those questions with some level of certainty at the drafting or litigation stage, then nothing else matters. So, I think it's worth reviewing the fundamentals, but I've tried to make it painless by breaking up the text with titles that state the key rules and concepts.

A. Goal – Give effect to the parties' intent as expressed in writing.

A Texas court's primary concern in construing a written contract "is to ascertain the true intentions of the parties as expressed in the instrument." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). The key issue is what the parties wrote, not what they actually may have intended. "Even if the court could discern the actual intent, it is not the actual intent of the parties that governs, but the actual intent of the parties *as expressed in the instrument as a whole* . . . ." *See, e.g.*, *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991) (construing mineral deed).

Courts determine the parties' written intent by applying various rules of construction. Unless the contract is ambiguous, the court will not consider extrinsic evidence of the true intent of the parties. *See URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 764–65 (Tex. 2018). Ambiguity exists only if the application of established rules of construction leaves an agreement susceptible to more than one reasonable meaning. *See Webster*, 128 S.W.3d at 229. The rules of construction are numerous.

B. Determining Intent: The To-Do Rules

1. Harmonize all terms and relevant, written documents.

A court must examine the entire agreement "in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless." *Id.* Further, "[w]here several instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together although they do not expressly refer to each other." *H. G. Brelsford & Assocs. v. Bankston Rentals, Inc.*, 573 S.W.2d 604, 605 (Tex. App.—Eastland 1978, no writ); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 180–82 (2012).

2. Still, reject clear mistakes.

"Where it is clear that a word has been written into an instrument inadvertently, and it is inconsistent with, and repugnant to the meaning of the parties, as shown by the whole instrument, it will be treated as surplusage and rejected altogether." *Trinity Portland Cement Co. v. Lion Bonding & Sur. Co.*, 229 S.W. 483, 485 (Tex. Comm'n App. 1921).

3. Apply plain meaning.

Contract terms are given "their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69–77 (2012).

4. Contract construction must be reasonable.

When "possible and proper," courts avoid constructions that are "unreasonable, inequitable, and oppressive." *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987). Stated somewhat differently, courts determine "how the 'reasonable person' would have used and understood its language, considering the circumstances surrounding the contract's negotiation and keeping in mind the purposes intended to be accomplished by the parties when entering into the contract." *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc.*, 245 S.W.3d 488, 500 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

5. Grammar rules apply.

"Courts are required to follow elemental rules of grammar for a reasonable application of the legal rules of construction." *Gen. Fin. Servs., Inc. v. Prac. Place, Inc.*, 897 S.W.2d 516, 522 (Tex. App.—Fort Worth 1995, no writ); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 140–43 (2012).

6. Specific words prevail over general words.

"In a contract, a specific term controls over a more general one." *Shell v. Austin Rehearsal Complex, Inc.*, No. 03-97-00411-CV, 1998 WL 476728, at *12 (Tex. App.—Austin Aug. 13, 1998, no pet.); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183–88 (2012).

7. *Ejusdem Generis*.

Sometimes general words "are used in connection with the designation of particular objects or classes of persons or things . . . ." *Hilco Elec. Co-op. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003). In that case, "the meaning of the general words . . . [is] restricted to the particular designation." *Id.; see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 199–213 (2012).

8. Earlier words prevail over later words.

"[P]rovisions stated earlier in an agreement are favored over subsequent provisions . . . ." *Wells Fargo Bank, Minn., N.A. v. N. Cent. Plaza I, L.L.P.*, 194 S.W.3d 723, 726 (Tex. App.—Dallas 2006, pet. denied).

9. Words beat numbers and symbols.

If there is a discrepancy "between unambiguous written words and figures, the written words control . . . ." *Guthrie v. Nat'l Homes Corp.*, 394 S.W.2d 494, 496 (Tex. 1965).

C. Determining Intent: The Do-Not Rules

1. Don't render any clauses meaningless.

This rule is the counterpart to the harmonization requirement. The court's construction of a contract should "consider the entire instrument so that none of the provisions will be rendered meaningless." *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174–79 (2012).

2. Don't invalidate the contract if a valid construction exists.

In some cases, certain written contracts, like deeds, can be interpreted in two different ways—one of which would make the contract valid and the other invalid. In these cases, the valid construction must prevail. *Dahlberg v. Holden*, 238 S.W.2d 699, 701 (Tex. 1951) (noting, however, that courts "have no right to interpolate or to eliminate terms of material legal consequence in order to uphold" a contract's validity); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 66–69 (2012).

3. Don't imply terms.

"[W]hen parties reduce their agreements to writing, the written instrument is presumed to embody their entire contract, and the court should not read into the instrument additional provisions unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole." *Danciger Oil & Refin. Co. of Tex. v. Powell*, 154 S.W.2d 632, 635 (Tex. 1941).

4. Avoid forfeitures.

Courts will not declare a forfeiture unless the contract language will allow only one construction that compels forfeiture. *See Auto. Ins. Co. v. Teague*, 37 S.W.2d 151, 153 (Tex. Comm'n App. 1931).

D. Still No Clear Intent? Then parole evidence is allowed.

If a court has applied the established rules of interpretation, and the written instrument is still "susceptible to more than one meaning, extraneous evidence is admissible to determine the true meaning of the instrument." *LaGuarta, Gavrel & Kirk*, 596 S.W.2d at 519.

II. KEY CONTRACT ISSUES FROM A LITIGATOR'S PERSPECTIVE

A. Issue 1—Does the contract preserve immunity protections by specifying amounts due and owing?

Because governmental entities enjoy immunity, the very first issue I consider when facing a potential contract suit is *whether my governmental client can be sued*. All governmental entities in Texas can be sued for breach-of-contract, but only if the conditions set out in the applicable waiver-of-immunity statutes are met. Importantly, I ask this question even if the governmental entity is the contracting party considering filing suit. Why? Because once a governmental entity files a suit for damages, the other side has a right to countersue,[1] and immunity does not apply to counterclaims that are "germane to, connected with, and properly defensive" to the claims asserted by the government.[2] *Reata Constr. Co. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). Depending on how much the governmental entity is owed, dealing with your opponent's counterclaims might not be worth the potential recovery.

The Texas Legislature has enacted different waivers of immunity for breach-of-contract claims against the state, counties, and other local government entities. With the exception of claims for less than $250,000 against the state, these waivers generally limit recoverable damages to the balance due and owing under the contract. But the statutory language is not identical. Differences exist, and the rules of statutory construction require that those differences be granted meaning. *See Dewitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995). For that reason, it's important to review the specific language of each waiver.

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[1] The government "continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the . . . [government entity's] claims." *Reata Constr. Co.*, 197 S.W.3d at 377. In other words, if immunity is not legislatively waived for the counterclaim, then the counterclaim acts only as an offset to reduce the government's recovery.

[2] Also note that before reaching the issue of waiver, immunity must "exist in the first place"—a question reserved for the judiciary. *Reata Constr. Co.*, 197 S.W.3d at 375 (noting that waiver, by contrast, is within the Texas Legislature's purview). As discussed here, immunity does not exist when a governmental entity asserts affirmative claims for monetary damages in litigation. *Id.* at 375–76. With respect to municipalities specifically, another instance where immunity does not exist is when the entity engages in "proprietary," rather than "governmental" functions. *See Hays St. Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 704 (Tex. 2019). The Texas Supreme Court has dictated two steps for deciding "whether a municipality is performing a governmental or proprietary function": (i) determine whether Texas Civil Practice & Remedies Code § 101.0215 includes the type of contract at issue; and (ii) if not, "apply the general definitions using the *Wasson II* factors." *City of League City v. Jimmy Changas Inc.*, 619 S.W.3d 819, 825 (Tex. App.—Houston [14th Dist.] 2021, no pet. h.) (citing *Hays St. Bridge*, 570 S.W.3d at 704–05); *see also Hays St. Bridge*, 570 S.W.3d at 704–06 (discussing and applying *Wasson II* factors). Municipalities entering into contracts to perform "proprietary" functions should beware that immunity will not exist to protect them from suit.

1. Contract claims against the State of Texas (for over $250,000[3])

Chapter 114 of the Texas Civil Practice and Remedies Code ("Chapter 114") waives the state's[4] immunity from "claim[s] for breach of a written contract for engineering, architectural, or construction services" (or for materials related to those services) that exceed $250,000. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 114.001–.003. The total amount of money that may be awarded against a state is limited to:

a. "[T]he ***balance due and owed by the state agency under the contract*** . . . including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration ***if the contract expressly provides*** for that compensation";
b. "[T]he amount owed for written change orders";
c. "[R]easonable and necessary attorney's fees based on an hourly rate . . . *if* the contract expressly provides that recovery of attorney's fees is available to all parties to the contract"; and
d. Interest at the rate specified by the contract or, if unspecified, as set out in the Finance Code, but not to exceed 10 percent.

Id. at § 114.004(a) (emphasis added). A party suing the state under Chapter 114 may not recover consequential damages, exemplary damages, or damages for unabsorbed home office overhead. *Id*. at § 114.004(b).

2. Contract claims against counties

Through Section 262.007 of the Texas Local Government Code, the Texas Legislature has waived immunity for certain contract claims against counties. *See* Tex. Loc. Gov't Code Ann. § 262.007(a) ("A county that is a party to a written contract for engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract."). As with the state, the recoverable damages are limited. The total amount of money recoverable against the county is limited to:

a. "[T]he balance due and owed by the county under the contract . . . including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration";
b. "[T]he amount owed for change orders or additional work required to carry out the contract";
c. "[R]easonable and necessary attorney's fees"; and
d. "[I]nterest as allowed by law."

Id. at § 262.007(b). A party may not recover consequential damages (except as described above), punitive damages, or damages for unabsorbed home office overhead from a county. *Id*. at § 262.007(c).

3. Contract claims against other local governmental entities ("LGEs")

The Texas Legislature has also waived immunity from suit for certain contract claims against most—if not all—other LGEs.[5] *See* Tex. Loc. Gov't Code Ann. §§ 271.151–.159. Chapter 271, Subchapter I of the Texas Local

[3] Contract claims against the State of Texas for less than $250,000 must be pursued through the administrative process provided in Chapter 2260 of the Texas Government Code.

[4] The statute defines "state agency" as follows: "an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the constitution or a statute of this state, including a university system or a system of higher education. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state." Tex. Civ. Prac. & Rem. Code Ann. § 114.001(3).

[5] Section 271.151(3) of the Texas Local Government Code defines "local governmental entity" as follows:

> [A] political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code, including a: (A) municipality; (B) public school

Government Code ("Chapter 271")[6] allows breach-of-contract claims based on written contracts either "stating the essential terms of the agreement for providing goods or services to the local governmental entity that [are] properly executed on behalf of the local governmental entity" or "regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use." *Id*. at §§ 271.151(2), .152. Again, the damages that a party may recover against an LGE are limited to:

1. "[T]he balance due and owed by the local governmental entity under the contract . . . including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration";
2. "[T]he amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract";
3. "[R]easonable and necessary attorney's fees"; and
4. "[I]nterest as allowed by law, including interest as calculated under Chapter 2251, Government Code."

Id. at § 271.153(a). A party is prohibited from recovering consequential damages (except as described above), punitive damages, and damages for unabsorbed home office overhead. *Id*. at § 271.153(b). However, "[a]ctual damages, specific performance, or injunctive relief may be granted in an adjudication brought against a local governmental entity for breach of a contract" regarding the sale or delivery of reclaimed water as described by the statute. *Id*. at §§ 271.153(c), 271.151(2)(B).

4. <u>Judicial interpretation of "balance due and owed . . . under the contract"</u>

For contract claims against the state, a county, or an LGE, all the applicable statutes include similar language limiting recoverable damages to "the balance due and owed . . . under the contract." Tex. Civ. Prac. & Rem. Code Ann. § 114.004(a); Tex. Loc. Gov't Code Ann. §§ 262.007(b); 271.153(a). In *Zachry Constr. Corp. v. Port of Houston Auth. of Texas*, the Texas Supreme Court held that a party suing a governmental entity for breach of contract was required to allege damages recoverable under the applicable waiver statutes to establish that immunity was waived for its claim—i.e., for the balance due and owed under the contract. 449 S.W.3d 98, 109–14 (Tex. 2014).

a. *Zachry Construction Corp. v. Port of Houston Authority of Texas on 'Balance Due and Owed'*

Zachry arose from the construction of a wharf for the Port of Houston Authority. *Id*. at 101. In the parties' contract, Zachry (the contractor) agreed that it would not be entitled to damages caused by delay, even if the delay was caused "in whole or in part . . . [by] the negligence, breach of contract or other fault of the Port Authority." *Id*. at 103. In the midst of the delayed project, Zachry sued, in part, for delay damages allegedly caused by the Port Authority. *Id*. The case raised two important questions: First, did Chapter 271's immunity waiver (discussed above) apply to Zachry's claim, so that the Port Authority's immunity was waived? *Id*. at 106. Second, was the contract-at-issue's no-damages-for-delay provision enforceable if the delay was caused by the Port Authority's intentional misconduct? *Id*. at 115.

In deciding the first question, the Court considered whether Section 271.153, which limits recoverable damages, "help[s] define and restrict the scope of the [statute's] waiver of immunity." *Id*. at 105. Answering affirmatively, the Court first examined the following waiver language in Section 271.152:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract *subject to this subchapter* waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, *subject to the terms and conditions of this subchapter*.

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district and junior college district; and (C) special-purpose district or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, emergency service organization, and river authority.

[6] Sometimes referred to as "The Local Government Contract Claims Act" or hereinafter sometimes referred to as the "Act."

Id. at 106–08 (quoting Tex. Loc. Gov't Code Ann. § 271.152) (noting that the "terms and conditions" of the subchapter "are found in the Act's other nine sections," which limit § 271.152's immunity waiver). The Court noted that it previously applied this same interpretation in *Tooke v. City of Mexia* when it concluded that the City's immunity was not waived on the Tooke's lost-profits claim—i.e., consequential damages expressly prohibited under Section 271.153. *Id*. at 108 (citing *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006)). And—clarifying its analysis in *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*—the Court reiterated that Section 271.153's purpose "is to limit the amount due by a governmental agency on a contract once liability has been established, not to foreclose the determination of whether liability exists." *Id*. at 109 (quoting *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 840 (Tex. 2010)) (disagreeing with court of appeals suggesting this interpretation makes "waiver of immunity dependent on ultimate liability"). As such, immunity from suit is not waived on a claim for damages of which Section 271.153 precludes recovery. *Id*. at 110.

In light of this interpretation, the Court went on to answer "whether the delay damages Zachry [sought were] permitted by the Act." *Id*. at 106. Section 271.153 allows a party to recover "the balance due and owed . . . under the contract . . . including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays." *Id*. at 110 (quoting Tex. Loc. Gov't Code Ann. § 271.153(a)(1)). The Port Authority argued that no balance could be due and owed to Zachry "unless the contract expressly calls for payment." *Id.* at 111. The Court rejected this argument, holding that recoverable damages need not be stated in the contract. *Id*. at 111–12. Instead, it interpreted 'balance due and owed' to mean "the amount of damages for breach of contract payable and unpaid." *Id*. In other words, damages generally available under normal contract law principles are recoverable unless expressly prohibited by Section 271.153 (e.g., other consequential damages, like lost profits), regardless of whether such damages are provided for in the contract. *Id*. Perhaps most importantly, in determining whether immunity had been waived, the Court did not consider the fact that Zachry had expressly agreed that it would not be entitled to delay damages from the Port Authority. *See id*. at 111–14.

b. *Post-Zachry Opinions on 'Balance Due and Owed'*

Since *Zachry*, various courts of appeals, as well as the Texas Supreme Court, have continued to opine on whether certain amounts were due and owed under a contract to effectuate an immunity waiver. *See San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 630–31 (Tex. 2020); *Romulus Grp., Inc. v. City of Dallas*, No. 05-16-00088-CV, 2017 WL 1684631, at *4 (Tex. App.—Dallas May 2, 2017, pet. denied); *Cnty. of Galveston v. Triple B. Servs., LLP*, 498 S.W.3d 176, 185–86 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *City of San Antonio v. Casey Indus., Inc.*, No. 04-14-00429-CV, 2016 WL 320504, at *2–4 (Tex. App.—San Antonio Jan. 27, 2016, pet. denied); *City of Colleyville v. Newman*, No. 02-15-00017-CV, 2016 WL 1314470, at *2–5 (Tex. App.—Fort Worth Mar. 31, 2016, pet. denied).[7] Most courts still appear inclined to consider the contract at issue when making that immunity decision.

In *County of Galveston v. Triple B Services, LLP*, the First Court of Appeals in Houston considered, in part, whether the Texas Local Government Code allowed a breach-of-contract claim for disruption damages against the County of Galveston. 498 S.W.3d at 179. The court's analysis recognized that under *Zachry*, the plaintiff could defeat immunity simply by alleging "any damages 'for the increased cost to perform the work as a direct result of [the County's] delays . . . .' regardless of whether those damages are expressly addressed in the contract." *Id*. at 186 (quoting

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[7] *See also Amador v. City of Irving*, No. 05-19-00278-CV, 2020 WL 1316921, at *6–7 (Tex. App.—Dallas Mar. 20, 2020, no pet.) (quoting Tex. Loc. Gov't Code Ann. § 271.153) (holding that a "balance due and owed" had been alleged to waive the government's immunity where contract required government entity to ensure contractor's work performed at a certain quality, and contracting party alleged government did not meet that standard); *Tex. Southmost Coll. Dist. v. Flores Invs., Inc.*, No. 13-16-00473-CV, 2018 WL 1101656, at *3–4 (Tex. App.—Corpus Christi Mar. 1, 2018, no pet.) (quoting Tex. Loc. Gov't Code Ann. § 271.153) (holding that damages alleged by Flores were not "due and owed" under the contract, where Flores billed Texas Southmost College (TSC) for work not requested by TSC and requested payment for same as damages against TSC, even though the contract between TSC and Flores required TSC to submit written work requests to Flores); *City of Pearsall v. Tobias*, 533 S.W.3d 516, 526 (Tex. App.—San Antonio 2017, pet. denied) (quoting Tex. Loc. Gov't Code Ann. § 271.153) (looking to the contract provisions between the City and a terminated City Manager to determine whether the damages sought by the terminated City Manager alleged a "balance due and owed" under that contract).

Tex. Loc. Gov't Code Ann. § 262.007(b)(1)). Yet the court still went on to consider whether the contract at issue actually provided for at least some of the damages being claimed. *Id*. The court ultimately determined that immunity did not bar Triple B's claim for disruption damages, noting that "at least some damages . . . fit both under the contract at issue and 'under the contract' as interpreted by *Zachry*." *Id*.

City of San Antonio v. Casey Indus., Inc. is very similar. 2016 WL 320504, at *2–4. There, Casey sought additional compensation under the specific force-majeure clause in its contract. *Id*. at *2–3. Like the court in *Triple B*, the San Antonio Court of Appeals cited *Zachry*'s holding that Section 271.153 "does not require the 'balance due and owed . . . under the contract' to be ascertainable from the contract . . . ." *Id*. at *2 (quoting *Zachry*, 449 S.W.3d at 111). It then considered whether the plaintiff, Casey, had provided sufficient evidentiary support for its "claim seeking to recover damages due and owed under the contract as 'the necessary and usual result' of [San Antonio's] wrongful refusal to pay Casey for its 'Claims' under the contract . . . ." *Id*. In doing so, it did ***not*** discuss whether the damages sought were payable and unpaid under general contract law principles. *Id*. at *2–3. Instead, it reviewed "unique" provisions in the contract at issue and determined that a specific contract clause provided a method for establishing amounts due and owed under the contract so that immunity was waived. *Id*. at *2–4.

The Fort Worth Court of Appeals went one step further by distinguishing *Zachry* in *City of Colleyville v. Newman*. *See Colleyville*, 2016 WL 1314470, at *4–5. There, a municipal-court judge classified as an independent contractor sued the Cities of Colleyville and Keller after the IRS ruled that he should have been classified as an employee for tax purposes. *Id*. at *1. Specifically, the judge claimed that under *Zachry*, certain benefits and compensation to which city employees were entitled (e.g., vacation and health insurance), were amounts "due and owed" under his contract with the Cities. *Id*. at *1, 4. The court disagreed, distinguishing *Zachry* on two grounds. *Id*. at *4–5. First, in *Zachry*, the delay damages sought were expressly allowed under the waiver statute. *Id*. at *4. Second, the *Zachry* court invalidated the contract-at-issue's no-damages-for-delay clause, which would have precluded delay damages from being owed under the contract. *Id*. According to the court, the judge's claim was different because his "agreement expressly barred recovery . . . of any additional benefits and compensation over and above the amount the Cities agreed to pay and paid over the course of the agreement." *Id*. at *5. Finding "no reason why that provision would be unenforceable," the court found "no balance 'due and owed' by the Cities under the agreement." *Id*. While the court's decision makes sense under the plain language of Section 271.153, it does not square with *Zachry*, which ignored a contractual disclaimer of damages in deciding whether immunity was waived.

Then, in *Romulus Group, Inc. v. City of Dallas*, the Dallas Court of Appeals considered whether Romulus Group—alleging it was underpaid for its provision of temporary employees to the City of Dallas—plead sufficient support for damages allowable under Section 271.153 (i.e., the balance due and owed under the contract). No. 05-16-00088-CV, 2017 WL 1684631, at *4 (Tex. App.—Dallas May 2, 2017, pet. denied). The City argued that Romulus Group agreed to be paid based on a unit price per employee, and payment at a mark-up rate, as sought by Romulus Group, was not due and owed under the contract. *Id.* Without interpreting *Zachry*, the court looked solely to the parties' contract in holding that Romulus Group was seeking amounts due and owing under the contract as contemplated by Section 271.153. *Id.* at *4–5; *see also Tex. Ass'n of Sch. Bds. Risk Mgmt. Fund v. Greenville Indep. Sch. Dist.*; No. 05-21-01012-CV, 2022 WL 2816532 (Tex. App.—Dallas July 19, 2022, pet. denied) (mem. op).

In *San Antonio River Auth. v. Austin Bridge & Road, L.P.*, the Texas Supreme Court considered, in part, whether immunity was waived for a general contractor's breach-of-contract claim against the San Antonio River Authority. 601 S.W.3d at 619–20. In particular, the River Authority argued that "Chapter 271 [did] not waive its immunity because Austin Bridge sought consequential damages." *Id.* at 630. Quoting *Zachry*, the Court reiterated that "'the balance due and owed' by the local government under the contract is 'the amount of damages for breach of contract payable and unpaid,' even if the amount is not 'stated in,' 'expressly provided for in,' or even 'ascertainable from' the contract." *Id.* (quoting *Zachry*, 449 S.W.3d at 110–12, 114). The River Authority argued that it agreed to pay the contractor based on unit prices; because the contractor's claim encompassed amounts above and beyond the agreed-upon unit prices, they were not "due and owed . . . under the contract." *Id.* at 631 (quoting Tex. Loc. Gov't Code Ann. § 271.153(a)(1)). The contractor disagreed, arguing, for example, that part of its damages were for work performed because of change orders required by defective specifications, and that it sought such damages in accordance with the contract. *Id.* The Court, considering what damages may or may not "flow naturally and necessarily" from the contract-at-issue, concluded that the contractor sought at least some direct damages resulting from the River Authority's alleged breach that would be due and owed under the contract. *Id.* While acknowledging that "the balance due and owed" need not be provided for by contract, the Court evaluated the nature of the contractor's alleged damages in connection with the

contract to determine whether they were consequential (i.e., unrecoverable under § 271.153), and thus operated to preclude the contractor's claim, ultimately holding they were not. *See id.*; *see also La Joya Indep. Sch. Dist. v. Trevino*, No. 13-17-00333-CV, 2019 WL 1487358, at *4–6 (Tex. App.—Corpus Christi Apr. 4, 2019, pet. dism'd) (holding immunity was not waived because damages sought were lost profits, which were consequential damages unrecoverable under § 271.153).

In *A Status Construction LLC v. City of Bellaire*, Houston's First Court of Appeals closely followed *Zachry* in determining whether immunity was waived for a contractor's breach-of-contract claim against the City of Bellaire. No. 01-21-00326-CV, 2022 WL 2919934 (Tex. App.—Houston [1st Dist.] July 26 2022, no pet.). Like the Port Authority in *Zachry*, the City argued that A Status's contract prohibited the damages sought by the contractor (e.g. provisions disclaiming the City's liability for the design plans and discovery of unknown conditions), and "therefore there was no balance 'due and owed . . . under the contract' that could be recovered under Section 271.153." *Id*. at *5 (quoting Tex. Loc. Gov't Code Ann. § 271.153(a)(1)). Citing *Zachry*, the court's inquiry focused on whether the contractor "pleaded recoverable damages under Section 172.153"—not whether the contractor "will actually be able to recover those damages" under the contract. *Id*. at *6. The court held that A Status successfully pleaded a breach-of-contract claim for which immunity was waived, and that the City's ultimate liability under the contracts was irrelevant to that determination. *Id*. at *7. Unlike other post-*Zachry* decisions discussed above, the Houston court didn't consider the contract at issue.

Most recently, in *Pepper Lawson Horizon Int'l Group, LLC v. Texas Southern University*, the Texas Supreme Court considered whether a state university waived its immunity to suit under Chapter 114 of the Texas Civil Practice and Remedies Code. No. 21-0966, 2023 WL 3556689 (Tex. May 19, 2023). Pepper Lawson (a contractor) claimed the University breached express provisions of the parties' contract, giving rise to its suit for damages. *Id*. at *1–2. In addition to the damages allegedly due and owing under the contract, Pepper Lawson sought interest and attorney fees under the Texas Prompt Pay Act, because the contract expressly required the University to comply with that statute. *Id*. at *2. In response, the University argued that the damages sought by Pepper Lawson were non-recoverable under express provisions of the contract, and the University was therefore immune to Pepper Lawson's claim because the damages sought were not "due and owed" as required by Section 114.004(a). *Id*. The Court sided with Pepper Lawson, reasoning that the contractor's breach-of-contract allegations and damages claim fell squarely within the scope of Chapter 114's immunity waiver. *Id*. at 4. The Court's analysis focused on whether Pepper Lawson asserted "a claim for breach of an express contract" in accordance with Section 114.003 and whether the categories of damages sought by Pepper Lawson were enumerated under Section 114.004(a). *Id*. (quoting Tex. Civ. Prac. & Rem. Code. § 114.003). On the issue of interest and attorney fees, the Court held that immunity was also waived under Section 114.004 because the contract expressly incorporated the Texas Prompt Pay Act, and the damages sought through the Texas Prompt Pay Act (i.e., interest/attorney fees) were included in the categories of damages awardable under Chapter 114.004(a). *Id*. at 5–6. The Court relied on *Zachry*, reinforcing the Court's position that immunity analysis for breach-of-contract claims should focus on the claimant's allegations, rather than recoverability under the contract itself. *Id*. at 4 (citing *Zachry*, 449 S.W.3d at 107–10). However, the Court's inquiry in *Pepper Lawson* considers the "merits" of the contractor's breach-of-contract claim, as well as the University's contractual defenses. *Id*. at 5. Why did the Court look to the underlying contract in *Pepper Lawson*, but not *Zachry*? *Pepper Lawson* is distinguishable because the waiver statute at issue waives immunity for state agencies facing claims for "breach of an **express provision** of the contract." Tex. Civ. Prac. & Rem. Code § 114.003 (emphasis added) (compare with Tex. Loc. Gov't Code Ann. § 271.152, which waives immunity for local governmental entities facing claims for "breach of the contract").

5. Seeking relief for specific performance will waive immunity under Chapter 271.

The Texas Supreme Court has also held that when pursuing a breach-of-contract claim against a governmental entity under Chapter 271, seeking relief for specific performance only (and not monetary damages) will suffice to waive the governmental entity's immunity. *Hays St. Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 707–08 (Tex. 2019). While the Court decided this case under a previous version of Section 271.153, at least two courts of appeals have upheld the same holding as applied to the current version of the statute. *Tex. Mun. League Intergovernmental Risk Pool v. City of Hidalgo*, No. 13-19-00096-CV, 2020 WL 1181251, at *7–9 (Tex. App.—Corpus Christi Mar. 12, 2020, no pet.); *Joshua Dev. GP, LLC v. Johnson Cnty. Special Util. Dist.*, No. 10-20-00183-CV, 2022 WL 16839691, at *6–7 (Tex. App.—Waco Nov. 9, 2022, no pet.).

We already know that parties contracting with a governmental entity can sue the governmental entity for breach of contract (under the right circumstances) and seek monetary damages due and owing under the contract. But in light of *Hays St. Bridge*, they can also, at least under Chapter 271, sue governmental entities for breach of contract and effectuate an immunity waiver even if only seeking that the governmental entity perform under the contract as promised. *See Hays St. Bridge*, 570 S.W.3d at 707–08. Thus, when negotiating contracts, governmental entities should consider the implications of being required to perform contractual obligations, perhaps under changing circumstances, even when failing to do so may cause no monetary injury to the other party. To avoid this potential outcome, contracts should explicitly exclude specific performance as a remedy for the non-governmental entity.

Litigator's Drafting Point #1
Address "Balance Due and Owed."

Although *Zachry* holds that the contract is not relevant in determining the balance due and owed *under the contract*, subsequent courts, including the Texas Supreme Court, continue to consider contract provisions to determine whether a balance due and owed has been alleged. Since the contract may be considered by the courts, make it count. Address what will be due and owed under the contract under various situations—if the other party performs, if the other party defaults, if the governmental entity defaults, if performance is late, etc. Even better, go one step further and say when money will *not be* owed. However, courts are likely to continue to treat delay damages as an exception (i.e., delay damages need not be provided by contract to be recoverable). Additionally, courts are likely to continue to treat lost profits as categorically unrecoverable consequential damages. Finally, in light of *Hays St. Bridge*, contracts should write out specific performance as a remedy for the non-governmental entity, if possible. While the contract alone may not ultimately win the day on what balance is owed by counties and other LGEs, at the very least, it gives the litigator a good-faith basis for asserting that immunity bars suit.

B. Issue 2—Where will the fight be, and what law will apply?

Forum–selection, venue, and choice-of-law provisions don't tend to matter much in getting a deal done. But they are critical when the deal falls apart. If I'm representing a governmental entity in litigation, the most advantageous location and law for that fight is a no-brainer: I want to play on home court under Texas's rules. Well-written contract clauses can ensure that happens.

1. Forum Selection

Forum and venue selection seem simple, but parties, and even courts, don't always appreciate the distinction between the various types of clauses that can be written into contracts.

Forum–selection mandates the state where the suit must be brought (e.g., the parties hereto consent to the *exclusive* jurisdiction of the courts of Texas). Contractual forum-selection clauses are generally enforceable in Texas, unless the party opposing the clause clearly shows that "enforcement would be unreasonable or unjust," "the clause is invalid for reasons of fraud or overreaching," "enforcement would contravene a strong public policy of the forum where the suit was brought," or "the selected forum would be seriously inconvenient for trial." *In re Int'l Profit Assocs., Inc.*, 286 S.W.3d 921, 923 (Tex. 2009) (citing *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009)).

"Consent to jurisdiction" clauses are permissive and subject parties to personal jurisdiction. *In re Fisher*, 433 S.W.3d 523, 532 (Tex. 2014). In contrast to forum-selection clauses, they do not mandate where the suit must be brought (e.g., the parties hereto consent to the jurisdiction of the courts of Texas). *See id.*

2. Venue

Venue-selection clauses choose the location "within a chosen state or sovereign" in which suit must be brought (e.g., the parties hereto consent to the *exclusive* jurisdiction of the federal (or state) courts of Travis County, Texas). *In re Great Lakes Dredge & Dock Co.*, 251 S.W.3d 68, 73–74 (Tex. App.—Corpus Christi 2008, no pet.). But the right to select the venue for a dispute in Texas is not absolute; parties may contractually set the venue for contracts concerning a transaction with an aggregate value of at least $1 million. Tex. Civ. Prac. & Rem. Code Ann. § 15.020(a)–(c). But for smaller deals, parties cannot contractually agree to a venue that contravenes a Texas venue statute. *See,*

e.g., *Ramsay v. Tex. Trading Co.*, 254 S.W.3d 620, 627 (Tex. App.—Texarkana 2008, pet. denied) ("[A] venue provision cannot be the subject of a private contract unless provided by statute.").

Texas has two mandatory venue statutes specific to certain governmental entities: First, suit against a county must be filed in that county. Tex. Civ. Prac. & Rem. Code Ann. § 15.015. Second, a suit against a political subdivision[8] in a county that has a population of 100,000 or less "shall be brought in the county where the political subdivision is located." *Id*. at § 15.0151(a); *see also* Civ. Prac. & Rem. § 15.002. If no mandatory venue statute applies, then the suit will be governed by the General Venue Rule under Chapter 15, Subchapter A or the Permissive Venue Statutes under Chapter 15, Subchapter C. *Id.* at §§ 15.001(b), 15.002, 15.035. Again, the parties can't contravene the statutes, but they can contractually provide that the contract is to be performed "in a particular county, expressly naming the county or a definite place in that county by that writing," permitting venue in either the specified county or the county of the defendant's domicile for actions arising from the contractual obligation. *Id*. at § 15.035(a).

Litigator's Drafting Point #2
Provide that Texas law will govern, include exclusive jurisdiction in the county of the governmental entity, and make the contract performable in that county.

Private parties considering applicable law are often advised to analyze which law would be most favorable to them. In most cases, the law most favorable to Texas governmental entities is Texas law. So, absent exceptional circumstances, Texas governmental-entity contracts should specify that Texas law will apply. Similarly, governmental entities are almost always best-served by litigating on their home turf. Their contracts should state that Texas is the *exclusive* jurisdiction for suit, and that their home county is the proper venue. This is true even for counties and political subdivisions in small counties who enjoy mandatory venue statutes. Why? Imagine that Travis County entered into a contract for the construction of a $10 million courthouse, which specified that suit would be brought in Dallas County—the county of the general contractor's domicile. In that scenario, two mandatory venue statues would govern: one for counties, and one for major transactions. Texas courts disagree on the proper method for determining venue when there are two counties of mandatory venue. *Compare In re Adan Volpe Props., Ltd.*, 306 S.W.3d 369, 375 (Tex. App.—Corpus Christi 2010, no pet.) (citing *Marshall v. Mahaffey*, 974 S.W.2d 942, 950 (Tex. App.—Beaumont 1998, pet. denied)) (holding party could choose between two mandatory venue provisions within the Mandatory Venue Statutes of Texas Civil Practice and Remedies Code, Chapter 15), *with In re Sosa*, 370 S.W.3d 79, 81 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that no venue statue provides a plaintiff the right to choose between two conflicting mandatory-venue provisions, and courts must resolve the conflict by statutory construction). But governmental entities can avoid this potential quagmire by requiring contractual agreement to venue in their home county.

C. Issue 3—Trial or arbitration?

Arbitration clauses have become increasingly more common over the last ten to fifteen years. Many industries reflexively insist on arbitration based on anecdotal evidence that arbitrations are cheaper, faster, and fairer than jury trials. The analysis really isn't that simple. Arbitration has some downsides, and the decision to arbitrate should be evaluated on a case-by-case basis and consider the following:

1. Arbitration is not available for the state or counties.

Immunity is not waived for the arbitration of breach-of-contract claims against the state or counties, even if the parties agreed to arbitrate in their contract. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 114.001–.003 (waiving state agencies'[9] immunity to suit for "adjudicating" certain breach-of-contract claims for $250,000 or above, and defining adjudication as "the bringing of a civil suit and prosecution to final judgment *in county or state court*") (emphasis added); Tex. Loc. Gov't Code Ann. § 262.007(a) (waiving county's immunity to suit on certain contracts if suit is "brought in a state court in that county"); *see generally Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d

[8] Political subdivision is defined as "a governmental entity in this state, other than a county, that is not a state agency. The term includes a municipality, school or junior college district, hospital district, or any other special purpose district or authority." Tex. Civ. Prac. & Rem. Code Ann. § 15.0151(b).

[9] *See* definition of "state agency" at note 3.

849, 857–58 (Tex. 2002) (rejecting argument that state agency could contractually waive immunity from suit). While arbitration is an extra-judicial proceeding, it relies on the judiciary to make orders enforcing (i) the parties' agreement to arbitrate, and (ii) arbitration awards. Tex. Civ. Prac. & Rem. Code Ann. § 171.081. Courts lack jurisdiction to make such orders against the state and counties because of immunity; thus, neither the state nor counties can be forced to arbitrate. *See San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 627 (Tex. 2020).

2. Arbitration is available for LGEs, but the courts decides if immunity is waived.

Arbitration agreements with LGEs are enforceable, except to the extent of conflict with the statute waiving those entities' immunity (i.e., Texas Local Government Code Chapter 271, Subchapter I). *See* Tex. Loc. Gov't Code Ann. §§ 271.151–.154 (waiving immunity to suit for adjudication of certain breach-of-contract claims, including "the bringing of an authorized arbitration proceeding"); *Austin Bridge & Rd.*, 601 S.W.3d at 618. In other words, LGEs can only arbitrate a breach-of-contract claim for which immunity is waived. But who decides whether immunity has been waived for a particular claim—the arbitrator or the court? In 2020, the Texas Supreme Court took this issue up in *San Antonio River Auth. v. Austin Bridge & Road, L.P.*, concluding that "the judiciary retains the duty to decide whether a local government has waived its immunity, and the extent to which any arbitration award is recoverable against a local government . . . ." 601 S.W.3d at 619.

On the one hand, with the court as the proper decision-maker, splitting the dispute between two separate tribunals could eliminate the arguable benefits of arbitration, like lower costs, quicker resolution, and finality. The LGE could find itself in a state-court battle about whether immunity was waived before even reaching the substantive dispute in arbitration. On the other hand, the *Austin Bridge* holding could operate as a shield and a sword—LGEs could be less averse to arbitration agreements knowing they'll always have the courts to fall back on to decide immunity issues.

3. Other considerations

Pros:

- Dispute resolution procedure can be tailored for specific needs, including:
  - Expertise of arbitrator
  - Size of arbitration panel
  - Amount of discovery
  - Time for resolution
  - Finality
  - Confidentiality
  - Loose evidentiary rules

Cons:

- Arbitrators generally do not grant dispositive motions
- If time/expense/etc. not addressed up front, could be more expensive
- Arbitrator may not follow the law
- No right to appeal
- Confidentiality
- Loose evidentiary rules

Litigator's Drafting Point #3

For the state and counties, don't waste time drafting an unenforceable arbitration agreement. For LGEs, consider whether a preliminary immunity fight in a separate state-court proceeding would outweigh the potential or intended benefits of arbitration. Also consider the courts' jurisdiction over immunity decisions as a shield and a sword with respect to the downsides of arbitration.

D. Issue 4—What damages are available?

Every litigation client wants to know at least two things: "How much will litigation cost?" and "What damages are available?" These issues can and should be addressed in the parties' contract. By defining and limiting risk up front, parties can more accurately gauge the costs and potential outcomes of litigation, which often leads to quicker dispute resolution.

1. Limitations of Liability

Contractual limitations of liability ("LOL") can be structured a number of ways. Some LOL clauses establish the maximum amount of liability that one party to a contract can ever expect to have to the other party, which is usually expressed as a monetary limit on damages with any excess damages being waived. Other LOLs limit the types of damages that one or both parties can recover—e.g., damages for lost profits will not be recoverable.

LOL clauses are distinguishable from indemnity clauses: A liability limitation defines liability between contracting parties, while an indemnity clause (discussed in more detail in the next section) defines one party's duty to protect the other from liability to a third party.

a. *Specify Theories of Liability*

From a litigator's perspective, the most important issue in drafting LOL clauses is specificity. First, the clause should specifically identify the theories of liability to which it applies, rather than using a blanket statement of "all" liability. While a broad statement might be effective in some instances, Texas courts may decline to enforce a clause as applied to situations not specifically addressed by the clause. For example, in *Zachry*, the Texas Supreme Court highlighted certain "generally recognized exceptions" to the enforcement of contract provisions where a contractor "agree[s] to assume the risk of construction delays and not seek damages." *Zachry Constr. Corp. v. Port of Hous. Auth. of Harris Cnty.*, 449 S.W.3d 98, 114–15 (Tex. 2014) (quoting *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997)). One such exception is when the delay at issue "is not within the specifically enumerated delays to which the clause applies." *Id.* at 115 (quoting *Green Int'l*, 951 S.W.2d at 387). Further, consider the types of arguments that a general clause leaves open for the other side to claim, e.g., that the parties did not intend the limitation to apply to purely economic damages, as opposed to physical loss; that the limitation only covered liability for breach of the contract but not for negligence or other torts; or that the limitation does not apply to warranty liability.

These arguments can be undercut at the outset with language like:

> This limitation of liability applies to all liability arising from PARTY A's activities and obligations related to the Contract, including but not limited to, duty arising in contract, warranty, statute, and tort (WHETHER SUCH OCCURRENCE ARISES OUT OF PARTY A'S SOLE OR CONCURRENT NEGLIGENCE OR BREACH OF ANY STANDARD OF STRICT LIABILITY).

b. *Specify the Extent of Liability*

Second, the LOL clause should carefully specify the extent of any liability. Consider the potential contractual risk versus reward. For example, a geotechnical engineer who is paid $20,000 to perform a soil study for a building has a relatively modest reward compared to his or her potential risk if the building's foundation experiences problems. LOL clauses can help better align the parties' risks and rewards. Again, it's important to be specific in defining what liability is possible, particularly if the limitation is not a readily identifiable number (i.e., in no event will engineer be liable for more than the amount of his or her fees). Parties often simply limit liability to direct damages, disclaiming liability for consequential damages. The limitation may sound comprehensive and fair, but consider what it actually means:

> **Direct Damages**: Flow naturally and necessarily from the breach; compensate for a loss that is presumed to have been foreseen as a consequence of a breach. *See San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 631 (Tex. 2020).
>
> **Consequential Damages**: Result naturally, but not necessarily, from the breach; "need not be the usual result of the wrong, but must be foreseeable." *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997).

In a word—huh? LOLs that rely solely on disclaiming consequential damages do little more than create a hotly disputed fact issue in litigation. Clients are better served when contract drafters consider the possible and specific types of liability that might result from the deal and their treatment—e.g., lost rent, increased overhead, carrying costs—and expressly address those items in the contract.

2. Attorney Fees

In my experience, the relatively small disputes can be the most difficult to resolve. When the amount in controversy is not substantial, it can quickly be outweighed by the costs of litigation. Attorney-fee shifting, where the losing party pays the other side's legal fees, helps address this problem. It also tends to discourage "frivolous" or unnecessary suits by giving the plaintiff a downside.

As you may already know, Chapter 38 of the Texas Civil Practice & Remedies Code ("Chapter 38") provides for the recovery of attorney fees on breach-of-contract claims—even in the absence of a contractual provision providing for fee recovery. Before Section 38.001 was amended in 2021, Chapter 38 allowed fee recovery only against "an individual or corporation." *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.001. Texas courts construed these terms to preclude fee recovery from limited partnerships (LPs), limited liability partnerships (LLPs), limited liability companies (LLCs), *and governmental entities*. *See Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 454–55 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Cnty. of Galveston v. Triple B. Servs., LLP*, 498 S.W.3d 176, 189 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (noting that Chapter 38 cannot support attorney-fee recovery against a county). In other words, Chapter 38 has only allowed for the collection of fees against individual persons and corporations.

In 2021, the Texas Legislature passed House Bill No. 1578, which amended the above-referenced Section 38.001. *See* Act effective Sept. 1, 2021, 87th Leg., R.S., H.B. 1578, § 1 (codified as an amendment to Tex. Civ. Prac. & Rem. Code § 38.001) (hereinafter cited as "H.B. 1578"). The amendment only applies to fee awards in actions commenced on or after September 1, 2021. *Id.* at §§ 2–3. The revised statute provides, in pertinent part, that:

> A person may recover reasonable attorney's fees from an individual or **organization other than a quasi-governmental entity authorized to perform a function by state law**, a religious organization, a charitable organization, or a charitable trust . . . .

Id. at § 1 (emphasis added). "Organization" has the meaning assigned in Section 1.002 of the Texas Business Organizations Code. *Id.*; Tex. Bus. Orgs. Code Ann. § 1.002(62) (defining "Organization" as a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign).

House Bill No. 1578 took effect on September 1, 2021, and, at the time of this paper, no courts have interpreted whether the amended statute provides for recovery of attorney fees against governmental entities. However, the language and structure of the amended statute suggest that the Texas Legislature intended to continue to insulate governmental entities from fee awards under Chapter 38. First, Section 38.001 still retains distinct use between "person" and "individual." *See* H.B. 1578, § 1 (stating that a "person" may recover fees under Section 38.001). Why does this matter? Because in various other statutes—including within the Texas Business Organizations Code, which the revised statute explicitly references—"person" is defined to include governmental entities along with other types of private entities. *See* Tex. Bus. Orgs. Code Ann. § 1.002(69-b) (defining person as "an individual or a corporation, partnership, limited liability company, business trust, trust, association, or other organization, estate, **government or governmental subdivision or agency**, or other legal entity, or a series of a domestic limited liability company or foreign entity) (emphasis added); Tex. Gov't Code Ann. § 311.005(2) (defining person to include a "corporation, organization, **government or governmental subdivision or agency**, business trust, estate, trust, partnership, association, and any other legal entity) (emphasis added). If the Texas Legislature wanted to provide for fee recovery against governmental entities in the revised statute, it could have changed "individual" to "person," which it did not. *See* H.B. 1578, § 1. Second, the revised statute incorporates the Texas Business Organizations Code's definition of "organization," which excludes governmental entities. While the revised statue addresses "quasi-governmental entities," it appears to do so, at least in part, for the purpose of protecting such entities from fee awards under Chapter 38 when they are acting in certain capacities, including when "authorized to perform a function by state law." *See* H.B. 1578, § 1.[10]

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[10] It's worth noting that the House Committee Report version of House Bill No. 1578 attempted, unsuccessfully, to include the "state, or an agency or institution of the state," in the list of entities from which fees could be recovered. *Id.* (House Committee Report version). The corresponding Bill Analysis also seems to indicate a consistent intent to include the state, or an agency or institution of the state, as entities from which fees could be recovered. However,

Further, while the Texas Legislature has waived immunity for an attorney-fee claim against the state (for claims over $250,000), counties, and LGEs, courts of appeals have held that the waiver statutes applicable to counties do not provide a substantive basis for the recovery of attorney fees—they only allow a party to recover fees "if another statute—or the contract—allows attorney's fees." *Triple B. Servs.*, 498 S.W.3d at 189. Even in light of House Bill No. 1578, Chapter 38 still does not appear to apply to governmental entities. Therefore, a party would only be able to recover attorney fees against the governmental entity if expressly permitted by contract or a separate statute.

However, at least one court of appeals (and the Northern District of Texas) has interpreted the statutory-waiver scheme applicable to LGEs (versus counties) to mean that attorney fees need not be provided for by a separate statute to be recoverable. *City of Corpus Christi v. Graham Constr. Servs., Inc.*, No. 13-19-00367-CV, 2020 WL 3478661, at *5 (Tex. App.—Corpus Christi June 25, 2020, pet. denied); *see also Dallas/Fort Worth Int'l Airport Bd. v. INET Airport Sys., Inc.*, No. 4:13-CV-753-A, 2017 WL 4221077, at *6 (N.D. Tex. Sept. 21, 2017) (noting that the Texas Supreme Court has allowed the damages enumerated in § 271.153 "without the requirement that they be provided for in the contract . . . or otherwise," and that § 271.153 does not require a separate statutory provision to authorize an attorney-fee award).

For governmental entities, the best practice is to include contract provisions allowing for and defining fee recovery against the entity with which the governmental entity is contracting. Chapter 38 will allow a governmental entity to recover attorney fees for breach-of-contract actions against individuals and "organizations," as defined by the Texas Business Organizations Code, which, presumably, does not include governmental entities. But this only takes effect in actions commenced as of September 1, 2021. As for the recovery of fees against the governmental entity, unless another statute or contractual provision provides for it, such recovery may not be available. However, in light of *Graham*, parties contracting with LGEs may be able to assert that the applicable statutory waiver scheme provides an independent basis for the recovery of fees in breach-of-contract actions against an LGE. Parties should also consider whether Chapter 38's structure, which allows only a successful plaintiff to recover fees, adequately addresses their needs. If the parties want to encourage early resolution and discourage unwarranted claims, they may want to allow whichever party is successful to recover fees, thereby creating a potential downside for not only the defendant but also the plaintiff.

Litigator's Drafting Point(s) #4

Specifically define the limits of liability. Include specific provisions allowing for and defining fee recovery, even in light of House Bill No. 1578. If attorney fees aren't provided for by contract or another statute, parties contracting with LGEs may still be able to recover fees against an LGE in light of *Graham*.

E. Issue 5—Is someone besides my client responsible for paying for my client's fees and liability?

Indemnification is a method by which a party that is legally responsible for a loss can shift liability for that loss to another party. Although similar to a limitation of liability (LOL), indemnity has a different purpose and applies under a different set of circumstances. Specifically, it provides protection against claims by parties outside the contract, whereas a LOL allocates risk and defines remedies between the contracting parties.

Indemnity can be a useful tool for limiting potential liability, but only if the agreement is enforceable. In Texas, "fair notice" is required for a party to obtain indemnification for its own negligence in advance, which has two components: the Express Negligence Doctrine and conspicuousness. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004). The Express Negligence Doctrine requires that "a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract." *Transcon. Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 669 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (quoting *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993)). The rule only applies to future acts of negligence. *Id.*

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this language did not appear in the enrolled version of the bill. So, arguments that governmental entities were intended to be included in the revised statute on the basis of legislative intent would appear attenuated by the language actually enacted.

Use of the word "negligence" is not necessarily required, but including it is the best practice to eliminate any competing contractual interpretations down the line. *See Tex. Eng'g Extension Serv. v. Gifford*, No. 10-11-00242-CV, 2012 WL 851742, at *2–4 (Tex. App.—Waco Mar. 14, 2012, no pet.) (mem. op.). The Express Negligence Doctrine has also been held to apply to other causes of action, including strict liability, gross negligence, the DTPA, Insurance Code violations, "breach of the covenant of good faith and fair dealing," breach of warranty, and intentional torts. *See Hous. Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Ry. Co.*, 890 S.W.2d 455, 458–59 (Tex. 1994); *Aetna Cas. & Sur. Co. v. Tex. Workers' Comp. Ins. Facility*, No. 03-97-00285-CV, 1998 WL 153564, at *3–4 (Tex. App.—Austin Apr. 2, 1998, pet. denied); *Staton Holdings, Inc. v. Tatum, L.L.C.*, 345 S.W.3d 729, 735 (Tex. App.—Dallas 2011, pet. denied); *Hamblin v. Lamont*, 433 S.W.3d 51, 54–57 (Tex. App.—San Antonio 2013, pet. denied).

Texas has adopted the UCC definition of conspicuousness: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . . " *Dresser*, 853 S.W.2d at 511 (quoting Tex. Bus. & Com. Code Ann. § 1.201(10)) (noting that capital headings, larger font size, contrasting font color, and bold type are all conspicuous). The goal is to make the provision "stand out in a crowd." What is required to achieve that will depend on the length and complexity of the contract at issue.

Special restrictions apply to certain indemnity agreements involving governmental entities. Generally, neither cities nor counties can agree to indemnify another party. *Tex. & New Orleans R.R. Co. v. Galveston Cnty.*, 169 S.W.2d 713, 715 (Tex. 1943). Such an agreement is prohibited by Article XI, section 7 of the Texas Constitution, with some exceptions:

> But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two percent (2%) as a sinking fund . . . .

Tex. Const. Art. XI, § 7(a); *see also City of San Antonio v. San Antonio Firefighters' Ass'n, Loc. 624*, 533 S.W.3d 527, 533–36 (Tex. App.—San Antonio 2017, pet. denied) (discussing constitutional debt limitations as applied to cities).

Governmental entities are also limited in what types of indemnity protections they can require from design professionals (architects and engineers). *See* Tex. Loc. Gov't Code Ann. § 271.904. First, a governmental agency may only require a design professional to indemnify the governmental agency to the extent of the design professional's liability for damage "caused by or result[ing] from an act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier committed by" the design professional, its agent, consultant, or entity over which the design professional exercises control. *Id*. at § 271.904(a). In other words, a design professional cannot be required to indemnify the governmental agency for the agency's own negligence or other culpable act. *Id*. An indemnity provision that violates this limit is void. *Id*.

Second, a governmental agency may not require a design professional to defend a party, including a third party, against a claim that is based in whole or in part on the fault of the governmental agency. *Id*. at § 271.904(b). The governmental agency is allowed to require the reimbursement of its reasonable and necessary attorney fees in proportion to the design professional's actual liability after there has been a determination of fault. *Id*. The governmental agency can also require by contract that the design professional names the agency as an additional insured and provide any defense provided by the policy. *Id*. at § 271.904(c).

It's important to note that in contract negotiations, some non-governmental parties may require indemnity provisions to be included in the contract. If that's the case, it does not make a difference, because the clause will likely be unenforceable.

Litigator's Drafting Point(s) #5
Enforceable indemnity provisions must be clear, specific, and conspicuous. Certain government entities may not be indemnitors. Special requirements apply for LGEs to require indemnity from design professionals.