

CATCH-2260: SUITS AGAINST THE STATE UNDER GOVERNMENT CODE CHAPTER 2260

*by Dylan O. Drummond**

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I. INTRODUCTION¹

Traditionally, sovereign immunity presented a huge obstacle to the ability of private litigants to seek redress against the State for its alleged breach of contract.² While chapter 2260 of the Texas Government Code provides an administrative process for disposition of certain contract claims against the State despite sovereign immunity, it also excludes the typical administrative framework specifically enacted to govern the adjudication of administrative matters.³ This paradoxical dilemma may therefore present a "Catch-22" to private litigants proceeding under chapter 2260—or put another way, a "Catch-2260."⁴

1. I would like to thank the following, upon whose exemplary previous works I have relied in preparing this article: Michael Shaunessy, *Sovereign Immunity: "Harry Potter and the Deathly Hallows,"* Texas Bar CLE, 22nd Annual Suing and Defending Governmental Entities Course (2010); Elizabeth G. "Heidi" Bloch, *Tricks and Traps in Chapter 2260*, UTCLE, 2nd Annual Advanced Texas Administrative Law Seminar (2007); Jack Hohengarten & Linda Shaunessy, *Regarding the State of Texas: Sovereign Immunity and Breach of Contract Claims*, UTCLE, 2nd Annual Advanced Texas Administrative Law Seminar (2007); Adrian Henderson, *Contract Dispute Resolution: Sovereign Immunity and Breach of Contract Claims*, Texas Bar CLE, 17th Annual Advanced Administrative Law Course (2005).

2. See discussion *infra* Part II.

3. See TEX GOV'T CODE ANN. ch. 2260 (West 2008).

4. *Tex.-N.M. Power Co. v. Tex. Indus. Energy Consumers*, 806 S.W.2d 230, 232 n.4 (Tex. 1991) ("As the fictional Captain Yossarian learned during World War II, pilots would not be granted a reprieve from combat unless they were crazy; but to be relieved from duty, permission had to be requested. The 'catch' was that by making a request one demonstrated sanity, thereby ensuring a denial." (citing JOSEPH HELLER, *CATCH-22* 46 (1961))).

II. A BRIEF HISTORY OF SOVEREIGN IMMUNITY IN TEXAS

A. 1843 to 1997

Since at least 1843, when Texas was still a Republic, Texas has recognized the law of sovereign immunity.⁵ The adoption of sovereign immunity in Texas was somewhat belated, as England had already followed the doctrine for some six centuries.⁶ Indeed, the inception of sovereign immunity in England evolved from the concept—which the Texas Supreme Court has termed a “feudal fiction”—that “the King can do no wrong”⁷ More recently, sovereign immunity no longer pretends to protect official infallibility but serves the more pragmatic purpose of shielding the public from bearing the “costs and consequences of improvident actions of their government[.]”⁸ Because the Texas Supreme Court first recognized sovereign immunity in Texas, sovereign immunity is a common law doctrine.⁹ As such, Texas courts have modified and delineated its contours.¹⁰

5. See *Bd. of Land Comm'rs v. Walling*, Dallam 524, 525 (Tex. 1843) (“[O]ne of the essential attributes of sovereignty [is] not to be amenable to the suit of a private person without its own consent[, which] has grown into a maxim, sanctioned as well by the laws of nations as the general sense and practice of mankind.”). Chief Justice John Hemphill, perhaps the greatest Justice to ever serve the Supreme Court of either the Republic or the State of Texas, penned the opinion. See James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305, 321 (1986). He was both the last Chief Justice of the Republic of Texas as well as the First Chief Justice of the State of Texas. *Id.* at 320. No bookish introvert, Chief Justice Hemphill once killed a Comanche chief who had wounded him at the legendary Council House fight in San Antonio while serving on the bench there as a district judge, and he subsequently succeeded Sam Houston as a U.S. Senator. *Id.* at 320–21. Writers have even compared his jurisprudential legacy to that of U.S. Supreme Court Chief Justice John Marshall. *Id.* at 321 n.97. See also *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847) (“[N]o state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”). The opinion’s author, Justice Abner Lipscomb, was another famous early Texan jurist who served alongside Chief Justice Hemphill as one of the state’s first three Supreme Court Justices. J.H. DAVENPORT, *THE HISTORY OF THE SUPREME COURT OF TEXAS* 29 (1917). He was the second person buried in the Texas State Cemetery after Republic Vice President Edward Burleson, and he served as the Republic’s Secretary of State under President Mirabeau B. Lamar. See *id.* at 31.

6. See *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006).

7. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003); *Tooke*, 197 S.W.3d at 331 (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 254 (1768)); see *Leach v. Tex. Tech Univ.*, 335 S.W.3d 386, 391 (Tex. App.—Amarillo 2011, pet. denied).

8. *Tooke*, 197 S.W.3d at 332; see *Wichita Falls State Hosp.*, 106 S.W.3d at 695.

9. See, e.g., *Walling*, Dallam at 525–26; *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002). One can argue that Texas adopted the English common law a few years before the Texas Supreme Court handed down either the *Walling* or *Hosner* decisions. Compare *Walling*, Dallam at 525–26 (issued in 1843), with *Hosner*, 1 Tex. at 769 (issued in 1847). On January 10, 1840, the Republic Congress expressly adopted the common law of England. See Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 *Repub. Tex. Laws* 3, 3–4, reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 177, 177–78 (Austin, Gammel Book Co. 1898). However, as the Texas Supreme Court clarified a mere twelve decades later, Texas only adopted English common law “so far as it [was] consistent with [the state’s] constitutional and legislative enactments[, as well as] the rule of decision in Texas.” *S. Pac. Co. v. Porter*, 331 S.W.2d 42, 45 (Tex. 1960). Texas did not adopt any other English statutes, and the Republic’s congressional act adopting English common law “was not construed as referring to the common law as applied in England in 1840, but rather to the English common law as declared by the courts of the various states of the United States.” *Id.* Texas statute still enshrines this adoption to this day. TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (West

Sovereign immunity protects the State both from liability as well as from suit.¹¹ “Immunity from suit bars a suit against the State unless the [l]egislature expressly gives consent.”¹² If the legislature has not expressly waived immunity from suit, the State retains such immunity even if the State’s liability is not in dispute.¹³ The State may also waive immunity from suit by filing suit itself, but the legislature recently limited this waiver.¹⁴ In 1933, the Court¹⁵ made clear that, “where a [S]tate voluntarily files a suit and submits its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive,” including “the right to make any defense by answer or cross-complaint germane to the matter in controversy.”¹⁶ Some seven decades later, the Court clarified that the immunity waived by the State’s suit only extends to the amount of damages claimed against the State necessary to offset the State’s affirmative claims.¹⁷ Put another way, “[a]bsent the [l]egislature’s waiver of the [State]’s immunity from suit,” a trial court cannot “acquire jurisdiction over a claim for damages against the [State] in excess of damages sufficient to offset the [State]’s recovery, if any.”¹⁸

“Immunity from liability protects the State from judgments even if the [l]egislature has expressly given consent to sue.”¹⁹ “[M]erely by entering into a contract,” the State “waives immunity from liability for breach of the contract but does not [also] waive immunity from suit.”²⁰

2002) (“The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state . . . and the laws of this state.”).

10. See, e.g., *Lawson*, 87 S.W.3d at 520; *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853–55 (Tex. 2002); *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997), *superseded by statute on other grounds as stated in Little-Tex*, 39 S.W.3d at 593.

11. *Lawson*, 87 S.W.3d at 520. In 2003, the Court clarified that the term “sovereign immunity” applies to the State, as well as “the various divisions of state government, including agencies, boards, hospitals, and universities. Governmental immunity, on the other hand, protects political subdivisions of the State, [such as] counties, cities, and school districts.” *Taylor*, 106 S.W.3d at 694 n.3 (internal citation omitted).

12. *Little-Tex*, 39 S.W.3d at 594.

13. *Fed. Sign*, 951 S.W.2d at 405.

14. See *Anderson, Clayton & Co. v. State*, 62 S.W.2d 107, 110 (Tex. 1933); *but see Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006).

15. I readily admit my provincial bias in insisting upon capitalizing references to the Texas Supreme Court throughout this article, even though legal writing traditionally reserves such an upper-case honorarium only for references to the U.S. Supreme Court. See, e.g., *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* R. 8(c)(ii), at 85 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010); *MANUAL ON USAGE AND STYLE* R. 3.09, at 35 (Texas Law Review et al. eds., 12th ed. 2011). However, because I examine no federal authority in this article, this affectation will hopefully serve to more readily distinguish between Texas Supreme Court and intermediate appellate court authority.

16. *Anderson*, 62 S.W.2d at 110.

17. *Reata*, 197 S.W.3d at 377.

18. *Id.*

19. *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001).

20. *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002) (emphasis omitted).

Despite sovereign immunity's common law lineage in Texas, the legislature has "sole province to waive or abrogate sovereign immunity."²¹ However, the legislature may waive the State's sovereign immunity only "by clear and unambiguous language."²² Doing so allows the legislature to protect its policy making function, which makes the legislature "better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear."²³

B. Chronology of Notable Sovereign Immunity Jurisprudence Following Federal Sign

Beginning in 1997, the development of sovereign immunity jurisprudence in Texas accelerated with respect to immunity from suit in breach of contract cases.²⁴

I. Federal Sign (1997)

In 1997, the Court handed down its opinion in *Federal Sign v. Texas Southern University*, which held that "when the State contracts with private citizens, the State waives only immunity from liability."²⁵ The Court went as far as explicitly overruling any prior cases holding to the contrary.²⁶

While this holding was no doubt significant, it was a footnote by the majority, as well as a four-justice concurrence, that caused almost as many jurisprudential ripples as the case's seminal holding.²⁷ At note 1 of the opinion, the majority, led by the late Justice Baker, somewhat curiously observed that "[t]here may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts."²⁸ This elaboration, though undoubtedly dicta, seemed nevertheless to point towards the Court's willingness to conceptually consider that the State could waive immunity from suit by some types of conduct.²⁹

Justice Hecht's concurrence further fueled this supposition (which was only one vote shy of becoming Texas law) by laying out several fact patterns

21. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997), *superseded by statute on other grounds as stated in Little-Tex*, 39 S.W.3d at 593.

22. TEX. GOV'T CODE ANN. § 311.034 (West Supp. 2012).

23. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

24. *See* Shaunessy, *supra* note 1, at 27.

25. *Fed. Sign*, 951 S.W.2d at 408 (emphasis omitted).

26. *Id.*

27. *See id.* at 408 n.1, 412–16; *see* Shaunessy, *supra* note 1, at 27–28; *see* Henderson, *supra* note 1, at 1.

28. *Fed. Sign*, 951 S.W.2d at 408 n.1.

29. *See* Shaunessy, *supra* note 1, at 27.

not present in *Federal Sign* that might necessitate a different result.³⁰ He concluded, reiterating “[w]e do not attempt to decide such hypotheticals today, but they do suggest that the State may waive immunity by conduct other than simply executing a contract, so that it is not always immune from contract suits.”³¹

Needless to say, the combination of these two sentiments by six justices of the Court put the bench and bar into a juridical tizzy, with several intermediate appellate courts subsequently taking up the *Federal Sign* Court’s apparent invitation to define precisely what conduct by the State could waive its sovereign immunity from suit.³² The courts did so by creating “a judicially-imposed, equitable waiver of immunity from suit.”³³ Impressively, three of the five decisions originated out of the same court of appeals within forty-five days of each other, albeit authored by three different justices.³⁴

2. Chapter 2260 (1999)

Two years after the Court issued *Federal Sign*, and during the very next legislative session, the legislature somewhat unsurprisingly created an administrative process for handling certain contractual disputes with the State, which previously would have been subject to *Federal Sign*’s progeny, by enacting chapter 2260 of the Government Code.³⁵ Notably, however, the legislature explicitly refrained from allowing chapter 2260 to waive the State’s immunity from either suit or liability.³⁶

3. Little-Tex (2001)

In the jurisprudential aftermath of *Federal Sign*, numerous intermediate courts of appeals issued opinions expounding upon the State’s purported newfound ability to waive its sovereign immunity from suit.³⁷ In its 2001 opinion in *General Services Commission v. Little-Tex Insulation Co.*, the Court

30. *Fed. Sign*, 951 S.W.2d at 412 (Hecht, J., concurring).

31. *Id.* at 412–13 (Hecht, J., concurring).

32. See *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 856–57 (Tex. 2002) (listing cases); see also *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 595 (Tex. 2001) (listing cases).

33. *IT-Davy*, 74 S.W.3d at 856.

34. See *DalMac Constr. Co. v. Tex. A&M Univ.*, 35 S.W.3d 654, 657 (Tex. App.—Austin 1999), *rev’d sub nom. Little-Tex*, 39 S.W.3d at 600 (Tex. 2001); *Aer-Aerotron, Inc. v. Tex. Dep’t of Transp.*, 997 S.W.2d 687, 692 (Tex. App.—Austin 1999), *rev’d*, 39 S.W.3d 220, 220 (Tex. 2001); *Little-Tex Insulation Co. v. Gen. Servs. Comm’n*, 997 S.W.2d 358, 365 (Tex. App.—Austin 1999), *rev’d*, 39 S.W.3d 591, 600 (Tex. 2001).

35. See Act of May 31, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws. 4583, 4583–87 (current version at TEX. GOV’T CODE ANN. ch. 2260 (West 2008)).

36. GOV’T § 2260.006.

37. See *IT-Davy*, 74 S.W.3d at 856–57 (listing cases); see also *Little-Tex*, 39 S.W.3d at 595 (listing cases); see Henderson, *supra* note 1, at 2; see also Shaunessy, *supra* note 1, at 23 (explaining several different courts of appeals rulings on waiver by conduct).

acknowledged that the broad language in *Federal Sign* justified the cases below elaborating on the topic, and the Court made clear that whatever it may have potentially decided in 1997, “the situation ha[d] changed” since the legislature’s enactment of chapter 2260.³⁸ Therein, the Court rejected “that a waiver-by-conduct exception to sovereign immunity can exist . . . without first obtaining legislative consent”³⁹ In so deciding, the Court relied upon section 2260.005, which unambiguously provides that “[t]he procedures contained in this chapter are exclusive and required prerequisites to suit in accordance with [c]hapter 107” of the Civil Practices and Remedies Code governing permission to sue the State.⁴⁰

Leaving no doubt this time, the Court admonished “that there is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the [l]egislature.”⁴¹

4. *IT-Davy* (2002)

In *Texas Natural Resources Conservation Commission v. IT-Davy*, the Court faced the very situation it avoided the year before in *Little-Tex*.⁴² Namely, whether the waiver of immunity to suit by conduct—the existence of which the Court hinted at in *Federal Sign* and shrugged aside as moot in *Little-Tex*—exists.⁴³ At last the Court considered the waiver-by-conduct argument head-on because the parties executed a contract not temporarily governed by chapter 2260.⁴⁴

Alas, the confrontation was rather anticlimactic. While the Court again acknowledged that the genesis of the lower courts’ confusion was the “*Federal Sign* footnote,” it dispassionately reaffirmed that it was the “[l]egislature’s sole province to waive or abrogate sovereign immunity.”⁴⁵ The legislature, the Court reasoned, previously enacted at least two “comprehensive schemes [to] allow contracting parties to resolve breach-of-contract claims against the State” in chapters 107 of the Civil Practices and Remedies Code and 2260 of the Government Code.⁴⁶ The Court theorized that “[c]reating a waiver-by-conduct exception [to these schemes] would force the State to expend its resources to litigate the waiver-by-conduct issue before enjoying” the very protections sovereign immunity confers, as well as undermining the policy buttressing the doctrine itself.⁴⁷

38. *Little-Tex*, 39 S.W.3d at 595.

39. *Id.* at 597.

40. *Id.* (citing GOV’T § 2260.005).

41. *Id.*

42. *See IT-Davy*, 74 S.W.3d at 856; *see* discussion *supra* Part II.B.3.

43. *See IT-Davy*, 74 S.W.3d at 856.

44. *Id.*

45. *Id.* at 857.

46. *Id.*

47. *Id.*

III. APPLICATION OF CHAPTER 2260

As the Court recognized in *Little-Tex*, chapter 2260 of the Government Code is the legislature's preferred administrative prerequisite to suit against the State under chapter 107 of the Civil Practice and Remedies Code.⁴⁸

Where, before chapter 2260's enactment, there was only one step to waive the State's immunity from suit in breach-of-contract cases—legislative permission; after its enactment, there are two—a precursor chapter 2260 proceeding followed by legislative permission in certain instances.⁴⁹ Indeed, section 2260.006 makes clear that nothing in the chapter waives either sovereign immunity to suit or liability.⁵⁰

A. Compliance with Chapter 2260 Is Jurisdictional

Since the chapter's enactment in 1999, section 2260.005 has made clear that "the procedures contained in this chapter are exclusive and required prerequisites to suit . . ." ⁵¹ In *Little-Tex*, the Court confirmed that "[c]ompliance with [c]hapter 2260 . . . is a necessary step before a party can petition to sue the State."⁵² The Austin Court of Appeals relied upon this holding in 2004, explaining that the various notice, procedural, and substantive provisions in chapter 2260 are all prerequisites to suit.⁵³ However, the court also made clear that the State cannot refuse to refer a matter to the State Office of Administrative Hearings (SOAH) after a contractor requests a contested-case hearing based upon a factual dispute regarding compliance with a procedural prerequisite; chapter 2260 relies on SOAH's established "role as a neutral fact-finder."⁵⁴

In addition, the legislature was careful to ensure nothing in the chapter, and particularly in section 2260.005, could be interpreted to: (1) divest the legislature of either the authority to grant or deny waivers of immunity to suit against the State or the power to specify certain measures to accomplish the same; (2) require the legislature to comply with chapter 2260; or (3) "limit in any way the effect of a legislative grant of permission to sue [the State] unless the grant itself provides [otherwise]."⁵⁵

48. Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 596 (Tex. 2001); TEX. GOV'T CODE ANN. § 2260.005 (West 2008).

49. See Henderson, *supra* note 1, at 3.

50. GOV'T § 2260.006 (West 2008).

51. *Id.* § 2260.005.

52. *Little-Tex*, 39 S.W.3d at 597.

53. Hawkins v. Cmty. Health Choice, Inc., 127 S.W.3d 322, 325 (Tex. App.—Austin 2004, no pet.).

54. *Id.*

55. GOV'T § 2260.007(b) (West 2008).

B. Entities Governed by Chapter 2260

Section 2260.051 provides that only contractors may make claims against units of state government under chapter 2260.⁵⁶ In turn, section 2260.001 defines both “contractor” and “unit of state government.”⁵⁷

The chapter defines “contractor” as “an independent contractor who has entered into a contract directly with a unit of state government.”⁵⁸ However, expressly excluded from this definition are (1) students at institutes of higher learning; (2) “employee[s] of a unit of state government”; and (3) “a contractor’s subcontractor, officer, employee, agent, or other person furnishing goods or services to a contractor.”⁵⁹ A “unit of state government” includes the following: “the state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the constitution or a statute of this state, including a university system or institution of higher education.”⁶⁰ Explicitly excluded, however, are local entities such as “count[ies], municipalit[ies], court[s] of a county or municipality, special purpose district[s], or other political subdivision[s] of this state.”⁶¹

C. Scope of Actions Governed by Chapter 2260

Chapter 2260 further defines the scope of claims that a contractor can assert against the State.⁶² Section 2260.051 provides that contractors may make claims for breach of contract against units of state government and that units of state government may lodge counterclaims against contractors.⁶³

1. What Constitutes a “Contract”?

The term “contract,” defined in section 2260.001(1), “means a written contract between a unit of state government and a contractor for goods or services, or for a project as defined by [s]ection 2166.001,” but the definition “does not include a contract subject to [s]ection 201.112 [of the] Transportation Code.”⁶⁴ This section of the chapter is the “statute of frauds” provision, “prevent[ing] any claim based on an alleged oral modification of a contract.”⁶⁵

56. *See id.* § 2260.051 (West 2008).

57. *Id.* § 2260.001(2), (4) (West 2008).

58. *Id.* § 2260.001(2).

59. *Id.*

60. *Id.* § 2260.001(4).

61. *Id.*

62. *See generally id.* ch. 2260 (containing information about resolutions of certain contract claims against the State).

63. *Id.* § 2260.051(a).

64. *Id.* § 2260.001(1); *see* TEX. TRANSP. CODE ANN. § 201.112(a) (West 2011).

65. Bloch, *supra* note 1, at 2.

The term “project,” defined in section 2166.001, “means a building construction project that is financed wholly or partly by a specific appropriation, a bond issue, or federal money,” including the construction of “a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishings,” and “an addition to, or alteration, rehabilitation, or repair of, an existing building, structure, or appurtenant facility or utility.”⁶⁶

Section 201.112 of the Transportation Code governs administrative procedures put in place to adjudicate contract claims arising from the following: (1) section 22.018 (county and municipal airports); (2) chapter 223 (bids and contracts for highway projects); (3) chapter 228 (state highway toll projects); (4) section 391.091 (erection and maintenance of outdoor advertising signs along roadways); and (5) chapter 2254 of the Government Code (professional services).⁶⁷ Of note, the post-agency claim-resolution process in section 201.112(b) expressly incorporates the entire Administrative Procedure Act (APA), while chapter 2260 specifically excludes the judicial review of contested cases provisions of the APA.⁶⁸

2. What Constitutes “Goods and Services”?

Unfortunately, the term “goods and services,” included within section 2260.001’s definition of “contract,” is not itself defined.⁶⁹ Fortunately, what the Government Code lacks, the Business and Commerce Code provides.⁷⁰ Section 2.105 of the codified Uniform Commercial Code defines “goods” as meaning “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action,” including “unborn young of animals and growing crops and other identified things attached to realty”⁷¹ In turn, both sections 15.03 and 17.45 provide useful definitions of “services.”⁷² Section 15.03 defines “services” as “any work or labor, including without limitation work or labor

66. GOV’T § 2166.001(4) (West 2008).

67. TRANSP. § 201.112(a) (referring to chapter 361, renumbered as chapter 228 in the Transportation Code).

68. Compare *id.* § 201.112(b) (allowing requests for “a formal administrative hearing to resolve the claim under chapter 2001”), with GOV’T § 2260.104(f) (West 2008) (stating chapter 2001 “does not apply to a hearing under this section”). The legislature enacted the APA in 1975, and it became effective September 1, 1976. Pete Schenkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH ADMIN. L.J. 288, 290 (Summer 2006); see APA, 64th Leg., R.S., ch. 61, §§ 1–24, 1975 Tex. Gen. Laws 136, 136–48 (current version at GOV’T ch. 2001 (West 2008 & Supp. 2012)); see also GOV’T § 2001.002 (West 2008) (“This chapter may be cited as the Administrative Procedure Act.”).

69. See GOV’T § 2260.001.

70. See *id.*; see also TEX. BUS. & COM. CODE ANN. § 2.105(a) (West 2009) (defining “goods”).

71. BUS. & COM. § 2.105(a).

72. *Id.* §§ 15.03(4) (West 2011), 17.45(2) (West 2011).

furnished in connection with the sale, lease, or repair of goods.”⁷³ Similarly, section 17.45 defines “services” as meaning “work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.”⁷⁴

As always, *Black’s Law Dictionary* also relates useful definitions of both terms. It defines “goods” to mean “[t]angible or movable personal property other than money; esp[ecially], articles of trade or items of merchandise.”⁷⁵ *Black’s* defines “service” to mean “[a]n intangible commodity in the form of human effort, such as labor, skill, or advice.”⁷⁶

Some dispute exists as to whether leases are a service governed by chapter 2260.⁷⁷ At least one commentator has suggested that the chapter clearly excludes leases because they are not a good or a service.⁷⁸ However, a 2002 SOAH proposal for decision (PFD) concluded that chapter 2260 does apply to leases between private parties and state agencies.⁷⁹

3. Substantive Restrictions in Scope

The legislature also added restrictions to the substantive applicability of the chapter.⁸⁰ Section 2260.002 specifically excludes from chapter 2260’s purview “claim[s] for personal injury or wrongful death arising from the breach of a contract”⁸¹

Of course, the plain language of sections 2260.001(1) and 2260.051(a) disallows artful pleading seeking to turn a breach of contract claim into one for tort.⁸² Moreover, “[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone,” no matter how creatively the plaintiff pleads the injury.⁸³

73. *Id.* § 15.03(4).

74. *Id.* § 17.45(2).

75. BLACK’S LAW DICTIONARY 762 (9th ed. 2009).

76. *Id.* at 1491.

77. *See, e.g.*, Bloch, *supra* note 1, at 2; Hohengarten & Shaunessy, *supra* note 1, at 8–9; Henderson, *supra* note 1, at 4.

78. Bloch, *supra* note 1, at 2.

79. Hohengarten & Shaunessy, *supra* note 1, at 9; Henderson, *supra* note 1, at 4; *see* Metric Place, Inc. v. Tex. Bldg. & Procurement Comm’n, SOAH Docket No. 303–02–3316.CC (2002) (PFD not available on SOAH’s website) (on file with Texas Tech Administrative Law Journal).

80. *See* TEX GOV’T CODE ANN. § 2260.002 (West 2008).

81. *Id.* § 2260.002(1).

82. *Compare id.* § 2260.001(1) (West 2008) (“mean[ing] a written contract between a unit of state government and a contractor for goods or services”), *with id.* § 2260.051(a) (West 2008) (“A contractor may make a claim against a unit of state government for breach of a contract between the unit of state government and the contractor.”).

83. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *accord* *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 597 (Tex. 1992) (“As a general rule, the failure to perform the terms of a contract is a breach of contract, not a tort.”), *superseded by statute on other grounds as noted in* *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225–26 (Tex. 2002).

In 2001, the legislature amended section 2260.002 to add a time-bar to the scope of contracts amenable to prosecution through chapter 2260.⁸⁴ Newly added subparagraph (2) expressly excludes “contract[s] executed or awarded on or before August 30, 1999.”⁸⁵

D. Contracts Not Governed by Chapter 2260

If a contract with the State is not governed by chapter 2260, the only recourse for an aggrieved private party to seek remedy for a breach of the contract is to obtain consent to sue the State under chapter 107 of the Civil Practices and Remedies Code.⁸⁶

IV. PRACTICE AND PROCEDURE UNDER CHAPTER 2260

In order to pursue a claim against the State under chapter 2260, a contractor must meet all the procedural and substantive requirements contained in the chapter.⁸⁷ As with most administrative dispute resolution matters, the jurisdictional devil is often in the procedural details.

A. Requisite Contractual Provisions

Section 2260.004(a) requires that any contract seeking enforcement pursuant to chapter 2260 “shall include as a term of the contract a provision stating that the dispute resolution process used by the unit of state government under this chapter must be used to attempt to resolve a dispute arising under the contract.”⁸⁸ In addition, contracts with the State under chapter 2260 the duration of which “extend[] beyond the expiration of appropriations that are in effect when the contract is entered into . . . must [include] a provision that specifically conditions the [state]’s financial obligations under the contract on the availability of sufficient appropriations . . . to avoid the creation of [an] unconstitutional debt.”⁸⁹

84. Act of May 28, 2001, 77th Leg., R.S., ch. 1422, § 14.07, 2001 Tex. Gen. Laws. 5021, 5066 (current version at GOV’T § 2260.002(2)).

85. GOV’T § 2260.002(2).

86. See TEX. CIV. PRAC. & REM. CODE ANN. ch. 107 (West 2011); Gen. Servs. Comm’n v. Little-Tex Insulation Co., 39 S.W.3d 591, 597 (Tex. 2001).

87. See GOV’T § 2260.005 (West 2008); see also Hawkins v. Cmty. Health Choice, Inc., 127 S.W.3d 322, 324 (Tex. App—Austin 2004, no pet.) (“Before a party may sue the state for breach of contract, it must comply with the provisions of chapter 2260 of the government code.”).

88. GOV’T § 2260.004(a) (West 2008).

89. Hohengarten & Shaunessy, *supra* note 1, at 18; see TEX. CONST. art. III, § 49; see City of Big Spring v. Bd. of Control, 404 S.W.2d 810, 814 (Tex. 1966).

B. Notice and Counterclaims

Within 180 days of an event giving rise to a breach of contract claim, the private contractor must provide written notice of same to the State.⁹⁰ “The notice [itself] must state with particularity: (1) the nature of the alleged breach; (2) the amount the contractor seeks as damages; and (3) the [underlying] legal theory of recovery.”⁹¹

The statute itself is somewhat spartan in elucidating precisely what events may trigger the start of the 180-day period.⁹² This is likely because there is often, depending upon the complexity of the underlying contract, “no single ‘event’ that the parties can point to” as the causational occurrence giving rise to the breach of contract claim.⁹³ However, “[w]hen the claim is based on a failure to [remit payment] when due [under a contract], the [triggering] ‘event’ will generally be the due date [of the payment], if one is specified in the contract.”⁹⁴ That said, if the contract requires—as many construction contracts do—continuing payment obligations, “a separate cause of action [may] arise[] for each missed payment.”⁹⁵ Of course, the discovery rule may also operate to defer accrual of a breach of contract claim.⁹⁶ Thereafter, the State has sixty days to deliver to the private contractor any counterclaim, provided the counterclaim is in writing.⁹⁷

C. Negotiation or Mediation of Claims

Chapter 2260 requires the chief administrative officer, or other officer otherwise designated by contract of the defendant unit of state government, to examine both the contractor’s claim and the State’s counterclaim, if any, within 120 days “after the date the claim is received.”⁹⁸ Generally, within this same timeframe, the parties may also agree to mediate a contractor’s claim.⁹⁹

“Each unit of state government with rulemaking authority [is required to] develop rules to govern [both] the negotiation and mediation of” chapter 2260

90. GOV’T § 2260.051(b); *Hawkins*, 127 S.W.3d at 324.

91. GOV’T § 2260.051(c).

92. Bloch, *supra* note 1, at 3.

93. *Id.*

94. *Id.*

95. F.D. Stella Prods. Co. v. Scott, 875 S.W.2d 462, 465 (Tex. App.—Austin 1994, no pet.).

96. See *Barker v. Eckman*, 213 S.W.3d 306, 311–12 (Tex. 2006) (noting that (1) breach of contract claim only deferred “until the plaintiff knew or, by exercising reasonable diligence, should have known of the facts giving rise to” the claim; and (2) “the nature of the injury must be inherently undiscoverable and the injury itself must be objectively verifiable”).

97. TEX. GOV’T CODE ANN. § 2260.051(d) (West 2008).

98. *Id.* § 2260.052(a) (West 2008).

99. Compare *id.* (referencing in the negotiation provision “the date the claim is *received*” (emphasis added)), with *id.* § 2260.056(a) (West 2008) (referencing in the mediation provision “the date the claim is *filed*” (emphasis added)).

claims.¹⁰⁰ However, “[i]f a unit of state government [is without] rulemaking authority, that unit [is required to] follow the rules adopted by the attorney general.”¹⁰¹ A copy of these model rules is available at the attorney general’s website.¹⁰²

There appear to be two options if the State does not comply with the mandatory negotiation provision in section 2260.052(a).¹⁰³ First, because compliance with this provision is mandatory (“*shall* examine”) and because the wording of the provision itself is seemingly clear, observance of its terms is arguably a ministerial act subject to enforcement by writ of mandamus.¹⁰⁴ Second, section 2260.055 provides that “if a claim is not entirely resolved” under the negotiation section within 270 days of the date the claim was *filed*, the contractor may request a hearing at SOAH pursuant to subchapter C.¹⁰⁵ Certainly, if the State refuses to negotiate, the claim would seem unlikely to be resolved—partially or otherwise—thereby making it ripe for a request to refer the matter to SOAH.¹⁰⁶

The way the statute is written, however, a contractor may not request a hearing before the expiration of 270 days from the date the claim was filed.¹⁰⁷ Even more curious is that, while the statute provides a minimum time requirement, chapter 2260 does not appear to provide any maximum deadline to forward a request at all.¹⁰⁸

D. Settlement and Payment of Negotiated Claims

“If the negotiation . . . results in the resolution of some [or all of the] disputed issues” in the claim, “the parties [must] reduce the agreement or settlement to [a signed] writing”¹⁰⁹ If the settlement of the claim only partially resolves matters still in dispute, however, it does not waive the aggrieved party’s rights under chapter 2260 as to those unresolved grounds.¹¹⁰

Even after the parties reach an agreeable settlement via negotiation, there is no guarantee of fulfillment of the payment terms of that agreement.¹¹¹ This is

100. *Id.* § 2260.052(c).

101. *Id.*

102. TEX. ATT’Y GEN., CHAPTER 2260 MODEL RULES, https://www.oag.state.tx.us/notice/model_rules.pdf (last visited Nov. 8, 2012).

103. *See* Bloch, *supra* note 1, at 4.

104. GOV’T § 2260.052(a) (emphasis added); *Hawkins v. Cmty. Health Choice Inc.*, 127 S.W.3d 322, 326 (Tex. App.—Austin 2004, no pet.); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (“An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.”).

105. GOV’T § 2260.055 (West 2008). The parties may agree in writing to extend this deadline. *Id.*

106. Bloch, *supra* note 1, at 4.

107. *Id.* at 5.

108. *Compare* GOV’T § 2260.055 (stipulating when a contractor may file a request for a hearing), *with id.* § 2260.102 (West 2008) (outlining how a contractor requests a hearing).

109. *Id.* § 2260.053(a) (West 2008).

110. *Id.* § 2260.053(b).

111. Bloch, *supra* note 1, at 5.

because the opposing unit of state government may only pay a negotiated claim with “money [previously] appropriated to it for payment of contract claims” generally, or with monies appropriated to it specifically for payment of the contract subject to the claim.¹¹² If there are insufficient funds in either of these repositories to pay the claim, it “may be paid only from money [otherwise] appropriated by the legislature for payment of the claim.”¹¹³

Even more troubling is the possibility that the State might breach the settlement agreement negotiated under section 2260.053. Section 2260.054 provides only that a unit of state government “may pay” such a claim at its election, not that it must.¹¹⁴ As a result, mandamus would likely be unavailable to enforce the agreement.¹¹⁵

Such a breach is not an enumerated category of claim for which the legislature has waived immunity to suit.¹¹⁶ Therefore, the State would also likely enjoy immunity from suit.¹¹⁷ Because no goods or services would be at issue, chapter 2260 would arguably not even provide an administrative remedy to enforce the settlement agreement.¹¹⁸ The only remaining avenue would be to seek permission from the legislature to sue the breaching unit of state government under chapter 107 of the Civil Practices and Remedies Code.¹¹⁹

One possible contractual solution to this conundrum is to include a provision in the settlement agreement that renders the agreement null and void upon breach by the State—thus conceivably resurrecting the original claim still subject to chapter 2260.¹²⁰

E. Referral to the State Office of Administrative Hearings

The importance of chapter 2260 is its provision of an administrative avenue to resolve contract claims against the State despite the dual bars of sovereign immunity from liability and suit.¹²¹ However, one must take great care to abide by the labyrinthine procedural pitfalls to avoid falling prey to a “Catch-2260.”

112. GOV'T § 2260.054 (West 2008).

113. *Id.* The biennial appropriation system in Texas may affect this analysis. *See infra* Part IV(E)(3)(b).

114. GOV'T § 2260.054 (emphasis added).

115. Bloch, *supra* note 1, at 4; *compare* Hawkins v. Cmty. Health Choice, Inc., 127 S.W.3d 322, 326 (Tex. App.—Austin 2004, no pet.) (issuing a writ of mandamus), *with* Anderson v. City of Seven Points, 806 S.W.2d 791, 793 (Tex. 1991) (refusing to issue a writ of mandamus).

116. *See* Texas A&M Univ.-Kingsville v. Lawson, 87 S.W.3d 518, 521 (Tex. 2002); Shaunessy, *supra* note 1, at 18–22.

117. *See* Lawson, 87 S.W.3d at 521.

118. Bloch, *supra* note 1, at 4; *compare* TEX. BUS. & COM. CODE ANN. § 2.105(a) (West 2009) (defining “goods”), *with id.* § 15.03(4) (West 2011) (defining “services”), *and id.* § 17.45 (West 2011) (defining “services”).

119. Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 597 (Tex. 2009); *see* TEX. CIV. PRAC. & REM. CODE ANN. ch. 107 (West 2011).

120. Bloch, *supra* note 1, at 4.

121. *See generally* TEX. GOV'T CODE ANN. §§ 2260.101–.108 (West 2008) (outlining how a contractor requests a contested case hearing).

*1. Requests for and Referrals to the State Office of Administrative Hearings
for Hearing*

If, after negotiation under section 2260.052, the contractor is dissatisfied with the results obtained, “the contractor may file a request for a hearing [at SOAH] with the [opposing] unit of state government.”¹²² “The request must: (1) state the factual and legal basis for the claim; and (2) request that the claim be referred to [SOAH] for a contested case hearing.”¹²³ SOAH Rule 155.5(9) defines a “contested case” as a “proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined after opportunity for an adjudicative hearing.”¹²⁴

Of note, a contractor’s right to request a hearing under section 2260.102 (or 2260.055 for that matter) does not have the effect of automatically transferring the matter to SOAH.¹²⁵ While section 2260.102(c) bounds a unit of state government to refer a matter to SOAH once a contractor makes a complaint request, only a unit of state government—not a private party—may technically refer a case to SOAH for a contested-case hearing.¹²⁶ Because a “referral to SOAH [is] non-discretionary,” compliance with section 2260.102(c) is a ministerial act subject to enforcement via a writ of mandamus.¹²⁷

Indeed, the Austin Court of Appeals examined this very situation in its 2004 opinion in *Hawkins v. Community Health Choice, Inc.*¹²⁸ Therein, the Commissioner of Texas Health and Human Services refused to refer a dispute to SOAH after the contractor’s request to do so because the Commissioner asserted the contractor did not provide timely notice, thereby divesting SOAH of jurisdiction to adjudicate the matter under chapter 2260.¹²⁹ The contractor successfully sought a writ of mandamus from the trial court, and the Austin Court of Appeals affirmed the writ on appeal.¹³⁰

In so doing, the court reasoned that, while it agreed that proper notice is indeed a prerequisite to suit under chapter 2260, whether a contractor has in fact complied with the notice provisions of section 2260.051(b) and (c) is a disputed question of fact that should be presented to SOAH.¹³¹ The court further explained that, “[w]ere the agency charged with making the referral the ultimate finder of fact, then conceivably no issues of fact would make it past the

122. *Id.* § 2260.102(a).

123. *Id.* § 2260.102(b).

124. 1 TEX. ADMIN. CODE § 155.5(9) (2012) (State Office of Admin. Hearings, Definitions).

125. *See* Bloch, *supra* note 1, at 4 (“[I]f the agency refuses to make that referral [to SOAH], the claimant cannot initiate the SOAH proceeding.”); *see also* GOV’T § 2260.102(c) (“On receipt of a request [for a SOAH hearing by a contractor], the unit of state government shall refer the claim to [SOAH].” (emphasis added)).

126. Bloch, *supra* note 1, at 4; GOV’T § 2260.102(c).

127. *Hawkins v. Cmty. Health Choice, Inc.*, 127 S.W.3d 322, 326 (Tex. App.—Austin 2004, no pet.); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991); *see* Bloch, *supra* note 1, at 4.

128. *Hawkins*, 127 S.W.3d at 326.

129. *Id.* at 325.

130. *Id.* at 327.

131. *Id.*

agency determination.”¹³² If such were the case, any need to refer a matter to SOAH would essentially disappear “altogether and frustrate the legislature’s intent to provide an alternate procedure of resolving contractual disputes with government agencies.”¹³³

2. *Hearings and Decisions at the State Office of Administrative Hearings*

Following referral to SOAH, an administrative law judge (ALJ) “shall conduct a [contested-case] hearing in accordance with the procedures adopted by the chief” ALJ at SOAH.¹³⁴ These rules are in the Texas Administrative Code, as well as online at SOAH’s website.¹³⁵

The chief ALJ may set a fee for the contested-case hearing, not less than \$250 and sufficient to allow SOAH “to recover all or a substantial part of its costs in holding [the] hearing[.]”¹³⁶ The fee may also be graduated, “increasing . . . in relation to the amount in controversy.”¹³⁷ In addition, the fee may be assessed only against the non-prevailing party in the contested-case hearing or may be apportioned between the parties in equity.¹³⁸

The attorney general must defend the State in any contested-case hearing under chapter 2260 and is authorized to “settle or compromise [a] portion of a claim” for which the State is liable.¹³⁹

“Within a reasonable time after the . . . hearing, the [ALJ must] issue a written decision containing the [ALJ]’s findings and recommendations,” based upon the pleadings filed and evidence received.¹⁴⁰ While chapter 2260 does not clarify at what point the time elapsed after the conclusion of contested-case hearing turns from reasonable to unreasonable, section 2001.143(a) of the APA provides that, generally, a decision or order must be rendered within sixty days of the end of the hearing.¹⁴¹ Accordingly, the APA’s sixty-day rule should serve as a serviceable approximation of what may constitute a reasonable time in which to render a decision on chapter 2260.¹⁴²

132. *Id.* at 325.

133. *Id.*; see TEX. GOV’T CODE ANN. § 2003.021(a) (West 2008) (“The purpose of [SOAH] is to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch in relation to hearings that [SOAH] is authorized to conduct.”).

134. GOV’T § 2260.104(a) (West 2008).

135. 1 TEX. ADMIN. CODE ch. 155 (2012) (State Office of Admin. Hearings, Rules of Procedure); see *Texas Administrative Code*, TEX. SEC’Y OF STATE, [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac) (last visited Nov. 8, 2012).

136. GOV’T § 2260.103(a)–(b) (West 2008).

137. *Id.* § 2260.103(c).

138. *Id.* § 2260.103(d).

139. *Id.* § 2260.108 (West 2008).

140. *Id.* § 2260.104(b)–(c).

141. *Id.* § 2001.143(a) (West 2008). Although sections 2260.104(e)(2) and (f) expressly exempt chapter 2260 actions from the provisions of section 2001.058(e) as well as subchapter G of the APA, section 2001.143 has no such exemption as found in subchapter F. Compare *id.* § 2260.104(f) (making subchapter G, chapter 2001 inapplicable), with *id.* § 2001.143 (excluding chapter 2260 exemption).

142. See *id.* § 2001.143(a).

“The decision must include [both]: (1) the findings of fact and conclusions of law on which the [ALJ]’s decision is based; and (2) a summary of the evidence [received].”¹⁴³

Although SOAH ALJs typically issue *proposals* for decisions as opposed to *decisions* themselves under SOAH Rule of Procedure 155.507, the post-decision treatment of a chapter 2260 claim is vastly different from that of a typical SOAH matter.¹⁴⁴ While, under both regimes, units of state government may refer matters to SOAH for adjudication, chapter 2260 permits no agency approval or modification of a decision rendered by SOAH as does the APA.¹⁴⁵

3. Recoverable Damages and Payment of Claims

a. Recoverable Damages

In enacting chapter 2260, the legislature was mindful to include many express limitations on both the amount and type of recoverable damages permitted.¹⁴⁶ First, “[a]ny amount owed [to] the [State] for work not performed under a contract or in substantial compliance with its terms shall be deducted from the amount” awarded under the chapter.¹⁴⁷ After deducting this amount, the total amount of money recoverable under the chapter may not exceed the sum of: “(1) the balance due and owing on the contract price; (2) the amount or fair market value of orders or requests for additional work made by [the State] to the extent [the contractor actually performed such work]; and (3) any delay or labor-related expense incurred by the contractor as a result of an action of or a failure to act by the [State] or a party acting under the [State’s] supervision”¹⁴⁸

Moreover, subparagraph (c) explicitly forbids any award of damages under chapter 2260 from including: “(1) consequential or similar damages except delays or labor-related expenses . . . ; (2) exemplary damages; (3) any damages based on an unjust enrichment . . . ; (4) attorney’s fees; or (5) home office overhead.”¹⁴⁹ Finally, while chapter 304 of the Finance Code applies to the award of a judgment under chapter 2260, the applicable rate of prejudgment interest on any award may not exceed 6%.¹⁵⁰

143. *Id.* § 2260.104(d).

144. *See* 1 TEX. ADMIN. CODE § 155.507 (2012) (State Office of Admin. Hearings, Proposal for Decision).

145. *Compare* GOV’T § 2260.104(e)(2) (expressly disallowing the application of section 2001.058(e) to chapter 2260 disputes), *with id.* § 2001.058(e) (West 2008) (allowing an agency to “change [an ALJ]’s finding of fact or conclusion of law” under certain circumstances).

146. *Id.* § 2260.003 (West 2008).

147. *Id.* § 2260.003(b).

148. *Id.* § 2260.003(a).

149. *Id.* § 2260.003(c).

150. *Id.* § 2260.106 (West 2008). Interestingly, section 2260.106 refers to “*judgment[s]* awarded to a claimant under this chapter,” even though that term does not appear anywhere else in the chapter. *Id.* (emphasis added). Indeed, subchapter F to the APA does not contain the term “judgment.” *Id.* §§ 2001.141–

b. Payment of Claims

In order for the State to be bound to pay an award of damages, the ALJ must find “by a preponderance of the evidence” that the contractor’s claim is valid under state law.¹⁵¹ If, taking into account any counterclaim, the award against the State is less than \$250,000, the State must pay the amount of the claim.¹⁵² In 2005, the legislature added subparagraph (a-1) to section 2260.105, which provides that, if—taking into account any counterclaim—the award against the State equals or exceeds \$250,000, the State must nevertheless pay the part of the claim that is less than \$250,000.¹⁵³ For the remaining unpaid amount of an award equaling or exceeding \$250,000, the ALJ must “issue a written report containing the [ALJ]’s findings and recommendations to the legislature.”¹⁵⁴ In the written report, “[t]he [ALJ] *may* recommend that the legislature: (1) appropriate money to pay the claim or part of the claim if the [ALJ] finds, by a preponderance of the evidence, that under [Texas law] the claim . . . is valid; or (2) not appropriate money to pay the claim and that consent to suit under [c]hapter 107, Civil Practices and Remedies Code, be denied.”¹⁵⁵

Section 2260.105(b) governing payment of adjudicated claims is identical to section 2260.054 governing payment of negotiated claims.¹⁵⁶ As with negotiated claims, the effect of section 2260.105(b) is that payment of a claim, according to the ALJ’s decision, may not necessarily occur.¹⁵⁷ This is because the opposing unit of state government may only pay an adjudicated claim with “money previously appropriated [to it] for payment of contract claims” generally, or with monies appropriated to it specifically for payment of the contract subject to the claim.¹⁵⁸ If there are insufficient funds in either of these coffers to pay the claim, the claim’s remaining balance “may be paid only from money [otherwise] appropriated by the legislature for payment of the claim.”¹⁵⁹ Complicating this process further is the effect that Texas’s system of biennial appropriation may have on the payment of chapter 2260 claims.¹⁶⁰

.147 (West 2008). Of course, this is likely because a decision under chapter 2260—or the APA for that matter—is, by definition, not a judgment as defined under TEX. R. CIV. P. 301. *Compare id.* § 2260.104 (discussing an ALJ’s decision), *with* TEX. R. CIV. P. 301 (discussing “judgments”).

151. GOV’T § 2260.105(a)(1), (a-1)(1) (West 2008).

152. *Id.* § 2260.105(a)(2).

153. *Id.* § 2260.105(a-1)(2); *see* Act of May 30, 2005, 79th Leg., R.S., ch. 988, § 7, 2005 Tex. Gen. Laws 3294, 3295 (amended 2005) (current version at GOV’T § 2260.105(a-1)).

154. GOV’T § 2260.1055(a) (West 2008).

155. *Id.* § 2260.1055(b).

156. *See id.* §§ 2260.105(b), .054 (West 2008).

157. *See* Bloch, *supra* note 1, at 5.

158. GOV’T § 2260.054.

159. *Id.*

160. *See* Hohengarten & Shaunessy, *supra* note 1, at 16–19.

i. Biennial Legislative Appropriation

While the legislature may appropriate funds through several different avenues, the most common method is to do so through the biennial General Appropriations Act (GAA).¹⁶¹ The GAA contains both appropriations as well as restrictions on those appropriations and covers virtually every state agency each biennium.¹⁶² As such, the GAA is the primary method for funding agency operations.¹⁶³ In addition, biennial appropriations expire after two years.¹⁶⁴

ii. Comptroller Warrants

Generally, the State Funds Reform Act requires state agencies to deposit all money they receive into the state treasury.¹⁶⁵ The comptroller is the trustee for all funds contained in the treasury.¹⁶⁶ Monies are forbidden from being “paid out of the treasury except on a warrant drawn . . . by the comptroller.”¹⁶⁷

For well over a century though, the Court has recognized that, where the legislature has not made an appropriation, the comptroller cannot issue a warrant.¹⁶⁸ The comptroller may not pay a state agency’s claim “from an appropriation unless the claim is presented to the comptroller for payment [within] two years [of] the end of the fiscal year for which the appropriation was made.”¹⁶⁹ This deadline is extended to four years for certain construction claims as well as repair and modeling projects that exceed \$20,000.¹⁷⁰

“If appropriated money is available to pay [a chapter 2260] claim, the [unit of state government] should submit a [form prescribed by] the [c]omptroller requesting payment to the private contractor.”¹⁷¹ The payment form must contain:

161. *Id.* at 17.

162. *Id.*

163. *Id.*

164. TEX. CONST. art. VIII, § 6 (“nor shall any appropriation of money be made for a longer term than two years”); see GOV’T § 403.095(b) (West Supp. 2012); *Dallas Cnty. v. McCombs*, 140 S.W.2d 1109, 1111 (Tex. 1940).

165. See GOV’T §§ 404.091, .094 (West 2005).

166. *Id.* § 404.041 (West 2005).

167. *Id.* § 404.046 (West 2005).

168. See *Pickle v. Finley*, 44 S.W. 480, 482 (Tex. 1898). The opinion’s author was Chief Justice Reuben Gaines, who served on the Court for some twenty-five years and whose opinions fill volumes 66 to 103 of the *Texas Reports*. DAVENPORT, *supra* note 5, at 170–71, 268. In his later years of service, before he resigned from the Court to reside in the Driskill Hotel, Chief Justice Gaines was rumored to have occasionally napped during oral argument, padded around his chambers in slippers, and made a habit of departing the Court each day promptly at 5:00 pm. *Justices of Texas 1836–1986: Reuben Reid Gaines*, UNIV. OF TEX. AT AUSTIN: TARLTON LAW LIBRARY DIGITAL COLLECTIONS, <http://tarlton.law.utexas.edu/justices/profile/view/35> (last visited Nov. 8, 2012).

169. GOV’T § 403.071(b) (West Supp. 2012).

170. *Id.*

171. Hohengarten & Shaunessy, *supra* note 1, at 18 (emphasis added).

(1) authorization of the head of the office or other person responsible for the expenditure; (2) the appropriation against which the disbursement is to be charged; (3) information required by the comptroller's rules; (4) proof that the claim or account was presented to the state within the period of limitation provided by [s]ection 16.051, Civil Practices and Remedies Code, or other applicable statute; and (5) other appropriate matters.¹⁷²

Because payment of a claim under chapter 2260 may only be made from previously-appropriated funds, the State may validly refuse to pay a claim unless and until the legislature appropriates the funds.¹⁷³ If a unit of state government possesses appropriated funds to pay all or part of a claim under chapter 2260, but the unit of state government refuses to submit a proper payment form to the comptroller for issuance of a warrant to remit payment for the claim, compliance with the ministerial payment provisions of section 2260.105 is likely subject to enforcement via a writ of mandamus.¹⁷⁴ However, if the Office of the Comptroller itself refuses to issue a warrant after presentment of a proper payment form under section 403.078, then mandamus may still be available to remedy such inaction, but only the Court can issue the writ.¹⁷⁵

iii. Execution on State Property Forbidden

Section 2260.107 makes clear that the court cannot construe chapter 2260 to “authorize execution on property owned by the state”¹⁷⁶

4. Appeal of Contested-Case Hearing Decisions

a. No Agency Modification of the State Office of Administrative Hearings Administrative Law Judge’s Conclusions of Law, Findings of Fact, or Orders

In stark contrast to the APA’s assent to agency modification of SOAH ALJ’s findings of fact, conclusions of law, as well as orders themselves, which an agency may vacate in their entirety under certain circumstances, chapter 2260 expressly forbids agencies from any such modification or vacation.¹⁷⁷

172. GOV’T § 403.078 (West 2005).

173. *See id.* § 2260.105(b).

174. *See Hawkins v. Cmty. Health Choice, Inc.*, 127 S.W.3d 322, 326 (Tex. App.—Austin 2004, no pet.); *see also Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (“A writ of mandamus will issue to compel a public official to perform a ministerial act.”).

175. GOV’T § 22.002(c) (West Supp. 2012); *see A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672–73 (Tex. 1995) (“[W]hen a relator seeks to compel an executive officer to perform duties imposed by law, generally this Court alone is the proper forum.”).

176. GOV’T § 2260.107 (West 2008).

177. *Compare id.* § 2260.104(e)(2) (stating that a state agency may not vacate or modify an order), *with id.* § 2001.058(e) (stating the exemption that allows agencies to modify or vacate).

b. Standard of Review

Following the 2005 amendments to chapter 2260, the legislature provided that a contested-case “decision may not be appealed except for abuse of discretion”¹⁷⁸ Historically, Texas measures abuse of discretion by whether the decision at issue is ““arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles.””¹⁷⁹ In contrast, judicial review of SOAH decisions under the APA is either by *de novo* or by substantial evidence review.¹⁸⁰ The governing law at issue will prescribe which standard of review to apply in a given matter.¹⁸¹

In practice, there is likely not much daylight between the review afforded under the abuse of discretion and substantial evidence standards.¹⁸² This similarity is underscored by the six prongs outlined in the substantive evidence review statute—the fulfillment of any one of which may trigger reversal under the standard.¹⁸³ The last of these expressly references “arbitrary or capricious” action, as well as “abuse of discretion.”¹⁸⁴ Indeed, the Austin Court of Appeals has held that, because an agency’s action was arbitrary and capricious, the agency failed substantial evidence review.¹⁸⁵ Regardless, under either test, the “standard is not whether the decision was correct, but [instead] whether it was reasonable.”¹⁸⁶

Crucial to any subsequent review of an adjudicative decision—particularly as in chapter 2260 where the discretion exercised by the adjudicator is at

178. *Id.* § 2260.104(e)(1); see Act of May 30, 2005, 79th Leg., R.S., ch. 988, § 6, 2005 Tex. Gen. Laws 3292, 3293 (current version at GOV’T § 2260.104(e)(1)).

179. W. Wendell Hall et al., *Hall’s Standards of Review in Texas*, 42 ST. MARY’S L.J. 3, 16 (2010) (citing Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996)).

180. See GOV’T §§ 2001.173–.174 (West 2008); Hall et al., *supra* note 179, at 71.

181. See GOV’T §§ 2001.173–.174; Hall et al., *supra* note 179, at 71.

182. See Hohengarten & Shaunessy, *supra* note 1, at 13.

183. See GOV’T § 2001.174(2).

184. *Id.* § 2001.174(2)(F).

185. See Sam Houston Elec. Coop., Inc. v. Pub. Util. Comm’n of Tex., 733 S.W.2d 905, 913 (Tex. App.—Austin 1987, writ denied).

186. Hohengarten & Shaunessy, *supra* note 1, at 13; compare *City of Waco v. Tex. Comm’n on Envtl. Quality*, 346 S.W.3d 781, 808–09 (Tex. App.—Austin 2011, pet. pending) (“agency action is arbitrary and capricious if, among other things, agency failed to consider factor [l]egislature directs it to consider or considered irrelevant factor” (citing *City of El Paso v. Pub. Util. Comm’n*, 883 S.W.2d 179, 184 (Tex. 1994))), with *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996) (“We only find an abuse of discretion when the trial court’s decision is arbitrary, *unreasonable*, and without reference to guiding principles.” (emphasis added)); see *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (reiterating that an intermediate “court of appeals may not reverse for [an] abuse of discretion merely because it disagrees with a decision by the trial court”). The *Greenbook* offers only one subsequent history notation to denote petitions currently under consideration at the Court: “petition filed.” See *The Greenbook: Texas Rules of Form* 108, App. D (Texas Law Review Ass’n ed., 12th ed. 2010). Unfortunately, this notation excludes by its own definition petitions in which the merits of a case are under consideration (e.g., petitions in which merits briefing has been requested by the Court). See *id.*; see also TEX. R. APP. P. 55.1. Therefore, I have encouraged the use of the notation “pet. pending,” which it appears the Court may already favor. See, e.g., *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 6 (Tex. 2007); Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 102 n.156 (Winter 2007).

issue—is the record containing evidence of what actually transpired below.¹⁸⁷ Even though chapter 2260 is silent as to the creation of a record from which to adjudge abuse of discretion, it requires the ALJ’s decision to include both “findings of fact and conclusions of law” as well as “a summary of the evidence.”¹⁸⁸ This requirement provides enough materials to a reviewing court to determine the reasonableness of an ALJ’s actions sufficient to determine whether an abuse of discretion occurred below.

c. Procedural Anarchy

While the 2005 amendments to chapter 2260 made clear the *standard of review*, the legislature chose to govern appeals from ALJ decisions under the chapter and curiously left in place section 2260.104(f), which excludes the venerable *procedure* established in subchapter G of the APA as a mechanism governing the processing of such appeals.¹⁸⁹ Accordingly (and amazingly), no procedure currently exists to govern appeals of chapter 2260 decisions.¹⁹⁰

i. “Appeal” Versus “Judicial Review”

Subchapter G lays out the procedure for “judicial review” of contested cases adjudicated at SOAH.¹⁹¹ This terminology contrasts with chapter 2260’s use of “appeal” instead of “judicial review.”¹⁹²

Texas courts have not yet directly vetted the importance of this distinction, but at least one commentator has suggested that a dissatisfied party under chapter 2260 could appeal an adverse decision directly to the Austin Court of Appeals instead of to a Travis County district court as the APA’s mandatory venue statute requires.¹⁹³ It is unclear whether section 22.220(a)’s provision that intermediate courts of appeals have civil appellate jurisdiction only over civil cases in which the *district* and county courts in a given appellate district have jurisdiction, coupled with section 2260.104(f)’s exclusion of subchapter G—which would otherwise make venue mandatory in Travis County *District Court*—could be used to disallow such a direct appeal.¹⁹⁴ In addition, a chapter 2260 decision does not appear to fall into one of the enumerated categories of

187. See Hohengarten & Shaunessy, *supra* note 1, at 14.

188. GOV’T § 2260.104(d).

189. See *id.* § 2260.104(e)(1), (f); see Act of May 30, 2005, 79th Leg., R.S. ch. 988, § 6, 2005 Tex. Gen. Laws 3292, 3293 (current version at GOV’T ch. 2260 (West 2008)).

190. See GOV’T ch. 2260.

191. See *id.* §§ 2001.003(1), (7), .171 (West 2008).

192. See *id.* § 2260.104(e)(1); see *id.* § 2001.171; see Gen. Servs. Comm’n v. Little-Tex Insulation Co., 39 S.W.3d 591, 599 (Tex. 2001) (“[T]he [l]egislature has expressly precluded *judicial review* of the [ALJ]’s rulings under [c]hapter 2260.” (emphasis added)).

193. See Hohengarten & Shaunessy, *supra* note 1, at 14; see also GOV’T § 2001.176(b)(1) (West 2008) (outlining petition process for judicial review).

194. See GOV’T §§ 2001.176(b)(1), .104(f); see *id.* § 22.220(a) (West Supp. 2012).

interlocutory orders from which an accelerated or agreed appeal may be taken.¹⁹⁵

However, the 2011 amendments to section 51.014 of the Texas Civil Practices and Remedies Code gave trial courts in civil actions the authority to grant permission for parties to appeal an order “not otherwise appealable if: (1) the order . . . involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.”¹⁹⁶ In turn, Texas Rule of Appellate Procedure 28.3 governs the methods that must be observed in the appeal of such matters to the intermediate courts of appeal.¹⁹⁷ This approach would necessitate a domestication of the SOAH decision from a chapter 2260 proceeding in a Texas “trial court,” but at least it does not appear the chapter prohibits this.¹⁹⁸ Regardless, it does appear certain that no direct appeal to the Court may be taken from a decision issued by SOAH under the chapter.¹⁹⁹

Another commentator has suggested that, while subchapter G may not apply to a chapter 2260 *hearing*, it may apply to an *appeal* of a resulting decision.²⁰⁰

ii. Whither the Record?

While true that chapter 2260 does not contain any procedure for obtaining or filing the record of the contested-case hearing with a reviewing court, the chapter does require a decision to include both “findings of fact and conclusions of law” as well as “a summary of the evidence.”²⁰¹ Whether the legislature intended this provision to supersede or act in conjunction with the record requirements contained in SOAH Rule 155.423 is unclear.²⁰² Therefore, in practice, litigants may wish to ensure that their chapter 2260 proceedings abide by both SOAH’s record-preparation requirements and section 2260.104(d)’s decision mandates.

195. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (West Supp. 2012); see TEX. R. APP. P. 28.1–2, 4.

196. CIV. PRAC. & REM. § 51.014(d).

197. TEX. R. APP. P. 28.3.

198. See GOV’T ch. 2260; TEX. R. APP. P. 28.3.

199. See TEX. R. APP. P. 57.2 (explaining the Court is without jurisdiction to hear a direct appeal from “any court other than a district court or county court”).

200. Bloch, *supra* note 1, at 5.

201. GOV’T § 2260.104(d).

202. Hohengarten & Shaunessy, *supra* note 1, at 15; see 1 TEX. ADMIN. CODE § 155.423 (2012) (State Office of Admin. Hearings, Making a Record of the Proceeding); see GOV’T § 2260.104(e)–(f).

iii. Perfecting the “Appeal”

Yet another area where chapter 2260 is silent is how litigants may perfect their appeal to a reviewing court—whether the reviewing court is a trial or appellate court.²⁰³ Therefore, out of an abundance of caution, practitioners may consider perfecting the appeal of a chapter 2260 decision in either the Travis County District Court pursuant to Government Code section 2001.176 or in any other trial court under Texas Rule of Appellate Procedure 25.1, or both.²⁰⁴

V. CONCLUSION

While chapter 2260 is no doubt fraught with potential hazards that might befall private litigants, deliberate adherence to the chapter’s provisions may assist private parties to avoid falling prey to a “Catch-2260.”

203. See Hohengarten & Shaunessy, *supra* note 1, at 15.

204. See GOV’T § 2001.176; see TEX. R. APP. P. 25.1.