

executing a contract so that it is not always immune from suit when it contracts.”¹ In his opinion today he appears to have abandoned this view, stating that “allowing . . . governmental entities to waive immunity by conduct that includes accepting benefits under a contract would be fundamentally inconsistent with out established jurisprudence.”² He does not explain this about-face. The Court was correct in *Federal Sign*. As one example, it has long been held that the State can waive immunity by filing suit.³ There may be others, such as debt obligations.⁴ We need not here decide the issue for all time, any more than we needed to in *Federal Sign*.

Federal Sign won a bid to install basketball arena scoreboards at Texas Southern University, but before it performed any work on TSU’s property or delivered any materials, TSU canceled the contract. The Court held that Federal Sign’s suit against TSU for breach of contract was barred by immunity. In a concurring opinion, I raised the question whether the result would be different “if TSU had accepted the scoreboards, acknowledged that Federal Sign had fully complied with the contract, but refused to pay the agreed price”.⁵ That question, I said, the Court need not and did not answer. In the present case, IT-Davy argues that its situation is like the hypothetical I raised in *Federal Sign*, but that simply is not true. My hypothetical supposed a government agency that chiseled a contractor just because it could get away with

¹ 951 S.W.2d 401, 408 n.1 (Tex. 1997).

² *Ante* at ____.

³ *Anderson, Clayton & Co. v. State*, 62 S.W.2d 107, 110 (Tex. Comm’n App. 1933, op. adopted); *Kinnear v. Texas Comm’n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam).

⁴ *Federal Sign*, 951 S.W.2d at 412 (Hecht, J., concurring).

⁵ *Id.*

doing so. Here, TNRCC and IT-Davy have a legitimate disagreement over what price should be paid for the extra work IT-Davy performed beyond that required by its contract. This is nothing more than an ordinary contract dispute.

I adhere to the views I expressed in my concurring opinion in *Federal Sign v. Texas Southern University* that the Legislature is better suited than the Judiciary to weigh the policy and political concerns that inhere in determining whether the State should be immune from suit for breaching its contracts.⁶ As I explained there,

not all the factors that weigh in determining the State's liability on its contracts can be assessed in a judicial proceeding. Must the State honor all long-term contracts when they no longer serve the public interest, continuing to spend tax revenues on matters that no longer benefit the people? If so, then the government's ability to respond to changing conditions for the welfare of the people as a whole is impaired. Moreover, each succeeding administration may become increasingly bound by the contracts of prior administrations with no way of escape except payment of public resources. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VANDERBILT L. REV. 1529, 1530 (1992). Would state officials be unduly anxious to conform to judicial policy wishes if they knew that judges could determine the State's liability for millions of dollars? *See id.* Would the prospect of liability smother policy initiatives based upon truly changed circumstances? *See id.* at 1530-1531. Governmental immunity rests on such concerns and not simply on the archaic idea that "the king can do no wrong". Such political concerns pertain to the nature of democratic government and cannot be assessed by a jury in a contract suit. They are best determined by the people's representatives in the Legislature.⁷

I do not include among these justifications for a legislative determination of waivers of immunity JUSTICE BAKER's idea that "subjecting the government to liability may hamper governmental functions by shifting

⁶ *Id.* at 412-416.

⁷ *Id.* at 414.

tax resources away from their intended purposes toward defending lawsuits and paying judgments.’⁸ The decision is best left to the Legislature, not because the State is above defending its actions or paying its debts, but because judicial proceedings are not the only, and not necessarily the best, avenue for resolving contract disputes with the State.

In 1999, the Legislature provided a claims procedure for certain kinds of contract disputes with the State by adopting chapter 2260 of the Government Code.⁹ Chapter 2260 limits the damages that can be recovered.¹⁰ A dispute not covered by this procedure may be presented to the Legislature with a petition for permission to sue the State under chapter 107 of the Civil Practice and Remedies Code.¹¹ I noted in *Federal Sign* that from 1989 through 1995, the Legislature granted only nine of 173 petitions for permission to sue under chapter 107;¹² in the three legislative sessions since then it has granted ten of forty-nine such petitions, and it granted two others to permit claims under chapter 2260 that could not otherwise have been made.¹³ Both by enacting chapter 2260 and by considering petitions under chapter 107, it

⁸ *Ante* at ____.

⁹ TEX. GOV'T CODE §§ 2260.001-.108.

¹⁰ *Id.* § 2260.003.

¹¹ TEX. CIV. PRAC. & REM. CODE §§ 107.001-.005.

¹² *Federal Sign*, 951 S.W.2d at 413 (Hecht, J., concurring) (citing TEXAS HOUSE OF REPRESENTATIVES, INTERIM REPORT TO THE 75TH LEGISLATURE 9 (1996)).

¹³ See *Texas Legislature Online* at <http://www.capitol.state.tx.us/> (derived from searches of concurrent resolutions).

remains true that “the Legislature has taken an active role in determining what claims have sufficient merit that they should be prosecuted.”¹⁴

JUSTICE ENOCH’s continued insistence that justifications of governmental immunity for contract suits are unconvincing is not without force, given that the vast majority of states have relinquished such immunity.¹⁵ But his argument that such immunity works an injustice goes too far. He simply disregards the fact that even if the State were not immune from contract suits, it would not be required to pay the judgments rendered without approval of the Legislature. Thus, recourse to the Legislature is unavoidable. At worst, it seems to me, petitioning the Legislature for a waiver of immunity merely delays resolution of claims, and the process provided by new chapter 2260 may prove speedier.

In sum, I have little difficulty concluding that IT-Davy’s suit is barred by immunity, but I cannot absolutely foreclose the possibility that the State may waive immunity in some circumstances other than by statute.

Nathan L. Hecht
Justice

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¹⁴ *Id.*

¹⁵ TEXAS HOUSE OF REPRESENTATIVES, INTERIM REPORT TO THE 75TH LEGISLATURE 18-29 (1996).