

## BREAKING NEWS

On July 29, 2010, the Dallas Court of Appeals issued an opinion finding that an eminent domain proceeding filed by Oncor Electric Delivery Company LLC against Dallas Area Rapid Transit (“DART”) and Fort Worth Transportation Authority (“The T”) was barred by governmental immunity. Oncor’s suit was dismissed with prejudice.

Oncor filed and received approval from the Public Utility Commission for the construction of an electric transmission line that would cross over a rail line owned by DART and The T. As the parties were unable to reach an agreement on providing Oncor with an aerial easement across the rail line, Oncor filed an eminent domain petition in order to acquire the easement. DART and The T filed a special appearance that included a plea to the jurisdiction asserting their respective governmental immunities. The parties agreed and the trial court took judicial notice that the rail line owners were “governmental entities.” The trial court denied the plea to the jurisdiction, and this was the one issue on appeal.

Oncor has authority under the Texas Utilities Code to enter and condemn property of any “person or corporation”. Under the Code Construction Act, § 311.005(2) of the Texas Government Code, a person includes a governmental entity, but the use of person does not indicate a legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction. Tex. Gov’t Code Ann. § 311.034.

As “governmental entities,” DART and The T enjoy governmental immunity, and as regional transportation authorities created under Chapter 452 of the Texas Transportation Code, they are immune from suit under Texas law. (citing *Amalgamated Transit Union Local No. 1338*, 273 S.W.3d at 661; see *Bell v. VPSI, Inc. & Fort Worth Transp. Auth.*, 205 S.W.3d 706, 710 (Tex.App.-Fort Worth 2006, no pet).

The appeals court did not concur with Oncor’s argument that governmental immunity was not implicated in a condemnation case because Oncor was not seeking money damages. Sovereign immunity does not only protect a governmental entity in suits for money damages. Further, Oncor’s argument of the “paramount importance rule” failed to impress the appeals court. The utility argued that when there are two competing public uses, the proper standard is to determine whether the taking will practically destroy the public purpose of the property. This argument failed as the court found that the issue of immunity was not raised in any of the cases cited by Oncor.

The appeals court agreed with DART and The T that there was no waiver of immunity based on Government Code § 311.034 (discussed above) nor was there any clear or unambiguous waiver by the entities. There also was no waiver due to the PUC proceedings or the entities’ failure to appear at the PUC hearing.

The issues raised in this case are significant, and appeals are expected. *Dallas Area Rapid Transit v. Oncor Elec. Delivery Co. LLC*, ---S.W.3d---, 2010 WL 2952090 (Tex.App.-Dallas).

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**Chuck Kimbrough** also practices in the Austin office of Bickerstaff Heath. He handles litigation involving governmental issues such as immunity, government contracts, and government authority. He regularly represents counties and cities in litigation as well as through counseling. He is a regular speaker before a number of government association meetings. Chuck is a graduate of Texas A&M University with a B.A. and Masters in Agriculture. His J.D. was awarded by South Texas College of Law in Houston. He is the author of *The Nuts and Bolts of Condemnation*, presented at the Bickerstaff Heath Delgado Acosta 18<sup>th</sup> Annual Local Government Seminar, 2007.