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Recent Developments: Harford County v. Town of Bel Air: County Has No Governmental Immunity in Contract Actions, Regardless of Whether Contract Involves Proprietary or Governmental Function

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Harford County v. Town of Bel Air:

COUNTY HAS NO GOVERNMENTAL IMMUNITY IN CONTRACT ACTIONS, REGARDLESS OF WHETHER CONTRACT INVOLVES PROPRIETARY OR GOVERNMENTAL FUNCTION.

By Theo Ogune

The Court of Appeals of Maryland has held that a county does not enjoy governmental immunity in actions for breach of contract, regardless of whether or not the contract involves a governmental function. *Harford County v. Town of Bel Air*, 348 Md. 363, 704 A.2d 421 (1998). In a unanimous decision, the court ruled that a county may not abrogate its obligations under a valid contract even by reason of performing governmental functions for public good. The court also held that, under the doctrines of legal impossibility and frustration of purpose, changes in state regulations do not, by themselves, relieve the county of its contractual liabilities. In so holding, the court reaffirmed the rule that counties and municipalities are to be treated differently from State agencies, for the purpose of immunity in contract actions.

In 1954, Harford County and the Town of Bel Air executed a lease agreement upon which Bel Air leased acreage from the county. Bel Air used a portion of this land as a landfill. In 1969, the parties entered into a new agreement, which replaced the 1954 contract. Pursuant to the 1969 contract, Bel Air agreed to relinquish its claim to the twenty-five acres to which it was entitled under the 1954 contract. In exchange, the county agreed to provide adequate facilities for the disposal of all refuse that originated from Bel Air, at no "on-site expense" to Bel Air. This agreement was to last for a term of ninety-nine years.

In 1992, however, the county enacted an ordinance that imposed a thirty-five dollar per ton "tipping" fee on solid waste deposited in the county's facilities. The ordinance, according to the county, was necessary to accomplish the objective of the Maryland Recycling Act of 1988, which required the county to recycle twenty percent of its solid waste. Following the 1992 ordinance, the county attempted to charge Bel Air for the waste being deposited in the county's facilities.

Bel Air sought a declaratory judgment in the Circuit Court for Harford County, contending, among other things, that the fee in question violated the 1969 agreement. The circuit court agreed, and ruled that the 1969 contract exempted Bel Air from payment of the fees. The county appealed that ruling. Before a hearing in the court of special appeals, both the county and Bel Air petitioned for a writ of certiorari, which the court of appeals granted.

The court of appeals focused primarily on the county's argument that Maryland law entitled it to governmental immunity in contract suits. *Harford County v. Town of Bel Air*, 348 Md. 363, 371, 704 A.2d 421, 424 (1998). The county, relying on a line of cases dating back to 1866, argued that it had the right to repudiate any contractual obligations incurred in the performance of a governmental function if such repudiation would serve public good. *Id.* According to the county, since the disposal of waste involved a governmental, not a proprietary, function, it was immune from any such contractual liabilities. *Id.*

The court of appeals rejected the argument by first noting that counties and municipalities in Maryland have never been accorded immunity in contract cases. *Harford*, 348 Md. at 372, 704 A.2d at 425. (citing *Board v. Town of Riverdale*, 320 Md. 384, 389, 578 A.2d 207, 210 (1990)). Generally, governmental immunity in contract cases has only been extended to the State

and its agencies. *Id.* Although counties are State creations, they have always been treated differently from State agencies, and have enjoyed immunity only with respect to certain tort actions. *Id.* Thus, the court concluded, the question of whether the actions under scrutiny involved a governmental or proprietary function arises only in tort situations. *Id.* at 373, 704 A.2d 425.

As to the cases relied on by the county, the court rejected the county's interpretation of them. *Id.* The court looked particularly to the previous explanation of *Lake Roland Elevated Ry. Co.* and *Rittenhouse* by *American Structures v. City of Baltimore,* 278 Md. 356, 364 A.2d 55 (1976). *Id.* at 374, 704 A.2d at 426. According to the court, these cases specifically stand for the proposition that "municipalities and counties [are] subject to suit in contract actions, whether the contracts were made in the performance of a governmental or proprietary function . . ." *Id.* at 387, 704 A.2d at 426. (quoting *American Structures*, 278 Md. 356, 359-60, 364 A.2d 55 (1976)). Moreover, *Lake Roland* and *Rittenhouse* concerned the constitutional challenge of certain city ordinances that repealed previously granted contractual rights. *Id.* at 380, 704 A.2d at 429. In holding that the ordinances were valid under the Contract Clause, the courts did not create local governmental immunity in contract suits. *Id.*

The court of appeals then considered whether the county's performance of its obligations under the 1969 contract was frustrated or made legally impossible by the enactment of the Maryland Recycling Act of 1988. *Id.* at 384, 704 A.2d 431. The court observed that, under the doctrine of frustration of purpose, the determination of whether the 1988 Act thwarted the county's contractual performance depended on three factors: (1) whether the enactment of the Act was reasonably foreseeable; (2) whether the Act was enacted by a sovereign power; and (3) whether the parties were instrumental to the passage of the Act. *Id.* (citing *Montauk Corp. v. Seeds*, 215 Md. 491, 499, 138 A.2d 907, 911 (1958)).

The court noted that the contract could only be found legally impossible or frustrated if performance under it was made objectively impossible by the 1988 Act. *Id.* at 386, 704 A.2d at 432. (citing *Levine v. Rendler*, 272 Md. 1, 7-12, 320 A.2d 258, 262-5 (1974)). The court found that none of the above doctrines worked to relieve the county of its obligations to Bel Air. *Id.* at 387, 704 A.2d at 432-33. It rejected the argument that the 1988 Act's requirement of "recycling" frustrated the parties' contemplation of "disposal" in the 1969 agreement. *Id.* The court looked to the statutory definition of "solid waste acceptance facility". *Id.* "Facility," according to the court, is broadly defined to include "any other type plant the primary purpose of which is for the disposal, treatment or processing of solid waste." *Id.* (quoting Md. Ann. Code art. 43, section 387C(a)(16) (1980 Rep. Vol.)). Since, from this definition, "disposal" includes "recycling," the contractual contemplation of the parties was neither frustrated nor made legally impossible. *Id.* Moreover, the 1988 Act was reasonably foreseeable. *Id.* The Act, although expensive to the county, did not prevent the exemption of Bel Air from the thirty-five dollar fee. *Id.* at 388, 704 A.2d at 433.

The decision of the court of appeals in *Harford County v. Town of Bel Air* that a county is not entitled to governmental immunity in contract suits is consistent with Maryland public policy. The modern trend has been to curtail counties' freedom to escape liabilities via the quick enactment of local legislation. Because of the distinctive nature of local legislative process, the extension of governmental immunity in contract cases could lead to the violation of the Commerce Clause of the U.S. Constitution. The court of appeals has further ensured that a county cannot by an ordinance excuse itself of long-time obligations just because changes in times have made old bargains unprofitable or more costly.