Bond-Validation Lawsuits: Expedited Litigation to Get Projects Moving

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Like other public entities in Texas, TWCA members regularly issue public securities—i.e., bonds—to finance their projects. Bonds are often a great way to finance such projects because they offer a very low interest rate and are repayable over a long period.

Such projects often operate on time-sensitive schedules, so the financing also must be completed on a tight schedule. Recognizing the needs of public entities to finalize and validate their bonds on an expedited basis, the Legislature has created a mechanism to do just that through expedited litigation.

This type of litigation can be a tool to address a wide range of challenges to all aspects of public securities. For example, legal challenges to a tax imposed to repay the bonds, to a contract that provides the revenues to repay the bonds, or to the expenditure of money raised by issuance of the bonds can all be consolidated into a single lawsuit.

Most importantly for the bond issuer, the lawsuit is conducted on an expedited basis, often resulting in a final judgment within three to six months.

The conventional bond-validation process requires submission to the Attorney General.

Most public securities are validated by submission of a "bond transcript" to the Attorney General pursuant to Chapter 1202 of the Texas Government Code. If the Attorney General approves of the public securities based on the submitted documents, they are deemed legal, valid, and incontestable once registered with the Comptroller of Public Accounts.

But . . . there is an alternative: bond-validation litigation under Chapter 1205 (i.e., the EDJA).

Without validation, it is difficult for an issuer to market its bonds. Even if it is able to find willing buyers, it will be at a significantly higher interest rate, dramatically increasing the cost of the project, which can result in higher costs for stakeholders.

If that happens, the issuer is not without recourse. It may validate its public securities in court. The mechanism for obtaining that judgment is set forth in Chapter 1205 of the Texas Government Code, also known as the "Expedited Declaratory Judgments Act," or "EDJA."

An EDJA suit is unique in that it is both an in-rem action involving the public securities and a class action as to a broad range of people, including all residents, taxpayers, and property owners within the bond issuer's boundaries. An EDJA suit is a public proceeding, specifically providing for notice of the suit to the public, with the trial court ordering that a notice generally stating the relief requested and notifying all interested parties of the trial date be published in newspapers in Austin and the county of the issuer's principal office in two consecutive weeks. Importantly, a final judgment puts the matter to rest against all who might challenge it.

The EDJA may be used to promptly adjudicate other ancillary matters.

In addition to the legality and validity of the public securities themselves, other ancillary issues may be litigated in an EDJA action. Among those issues are:

- the legality of a tax, fee, or assessment imposed to repay the bonds,
- the validity of a contract that provides the revenues to repay the bonds, and
- the legality of the expenditure of money raised by issuance of the bonds.

Other lawsuits can be consolidated in the EDJA case.

One aspect of the EDJA that makes it such an efficient process is the fact that the court may consolidate any other lawsuit pending in any other court involving the same issues. The court can also enjoin the commencement of any unfiled lawsuit regarding those issues.

So if an issuer faces litigation concerning matters ancillary to its public securities, the EDJA allows the court to move that controversy either to the county of the issuer's principal office or to Travis County, and resolve all of the issues in one proceeding. And because of the expedited nature of an EDJA proceeding, the matter can proceed to judgment faster than it would otherwise.

A key characteristic of an EDJA action is its speed.

A bond issuer can therefore conceivably obtain a judgment validating its bonds within three weeks of filing an EDJA petition. It is more likely that the court will briefly continue the trial to allow for briefing and limited discovery, if any persons appear to contest or question the requested relief. And if appealed, the court of appeals is obligated to give the case priority over all other cases, except those involving habeas corpus.

The Attorney General is a necessary party, and has an important role to play.

While the public is notified of the EDJA action by multiple publications of a statutorily-required notice in the newspaper, the Attorney General must receive specific notice through service of process. The Attorney General is a mandatory party, and will offer the court its opinion as to the state of the law relating to the bond issuance and the underlying legal questions.

It is our experience that the trial judge will rely heavily on the Attorney General's opinion in reaching a decision, especially in cases filed outside of Travis County. For this reason, some of the most important work the bond issuer will do is in working closely with the Attorney General to reach a determination that the public securities are not unlawful. Counsel experienced in dealing with the Attorney General's Public Finance Litigation department is therefore critical to obtaining a favorable judgment.

A judgment under the EDJA provides certainty by preventing all future challenges to the public securities.

If successful, the final judgment in an EDJA suit declares that the public securities are valid—a statement that can then be put on the face of public securities. Moreover, the judgment acts as a permanent injunction, preventing anyone from challenging the public securities and any of the other ancillary matters at issue in the EDJA suit.

The litigation process thus provides important differences to the conventional bond-validation process through the Attorney General. First, litigation can validate not only the bonds themselves, but other matters (e.g., taxes, contracts, and expenditures) associated with those bonds. And second, successful litigation provides the security of a permanent injunction preventing those issues from ever being challenged again.

With that judgment in hand, a public entity can go forward with issuing bonds. And buyers can purchase those bonds with the knowledge that the bonds can never be challenged. All of which allows the public entity to complete its projects on time and with the lowest possible financing cost, thus benefiting both the entity and its stakeholders.

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