

What to Expect When You're Expecting...An Ultra Vires Lawsuit

By James F. Parker

“Are you expecting?”

Let's hope not. But whether you are, or whether you aren't, now might be a good time to do a little prep work. Likely some of you have heard the term ultra vires thrown around, but it's fine if you're just hearing it for the first time. Whatever your level of experience, it's reasonable to feel slightly uneasy about it, and we're here to help. Consider this a general outline of what to expect when you're expecting . . . an ultra vires lawsuit.

Ultra vires claims are used to allege that public officials are doing something they shouldn't, or refusing to do something that they should. And if you are acting ultra vires, you may be subject to mandamus or injunction (but not money damages). Governmental immunity from suit applies only to claims based on actions within the scope of governmental authority; actions taken outside the scope of an official's governmental authority do not get the benefit of governmental immunity.

So what does an ultra vires suit look like?

Let's start with the petition. The proper party is the governmental official who is alleged to have acted outside his/her legal authority, not the state agency/political subdivision itself, and the governmental official must be named in his/her official capacity. The governmental official will not be personally liable for any monetary damages (which aren't recoverable, anyway). The ultra vires claim is only to figure out what the official can do in his/her job going forward. It means that any judgment against the governmental official for having acted ultra vires will restrict the governmental entity's behavior going forward, no matter who holds that office in the future.

An ultra vires suit begins with a petition filed by a plaintiff, which will include the allegation. As part of the allegation, the petition should set forth the action—and there needs to be an action or inaction by the governmental official—that the plaintiff alleges to be ultra vires. So the first step is always to identify the act that is alleged to be ultra vires. As a threshold question, one must ask whether the plaintiff’s relationship to the governmental entity is ongoing, or whether it has terminated. If the suit arises out of a contract or other arrangement that has ended before the suit is filed, any relief would be, by definition, retrospective. Hence, an ultra vires suit cannot be maintained.

If the Plaintiff’s petition doesn’t meet the requirements, the governmental official (or the governmental entity improperly named) may move to dismiss under Texas Rule of Civil Procedure 91a. Enacted in 2013, Rule 91a creates a mechanism by which a defendant may obtain an accelerated dismissal of a plaintiff’s claim that is without basis in law or fact. The primary benefit of Rule 91a is its accelerated timetable—it must be heard and ruled upon by the court within 45 days after the motion is filed. And unlike private parties, a governmental entity will not be liable for attorneys’ fees if it does not prevail on the motion.

If the ultra vires suit is properly pleaded, then it’s time for the answer. Unlike other causes of action, the proper responsive pleading to an ultra vires suit is a plea to the jurisdiction. If the plaintiff does not prove the allegation that the action was ultra vires, then it was, by default, within the governmental entity’s legal authority. And, as the governmental entity is immune from suits arising from actions taken within its legal authority, that fact deprives the court of subject matter jurisdiction. The end result should be a dismissal (without prejudice) for lack of subject matter jurisdiction.

In developing the answer, the governmental entity also needs to consider its possible counterclaims. The state agency or political subdivision is the real-party-in-interest to an ultra vires suit brought against its official acting in his/her official capacity. The implication, then, is that any claims that the political subdivision may have against the plaintiff that arise out of the same transaction or occurrence would be compulsory counterclaims. As such, it is arguable that they must be brought as counterclaims in that ultra vires suit or waived.

If true, however, this raises additional questions about the political subdivision's immunity. If the political subdivision were to assert a counterclaim—whether compulsory or permissive—against the ultra vires plaintiff, it would partially waive immunity and open itself to a counterclaim in its own name.

Generally, a plea to the jurisdiction may challenge the sufficiency of the claimant's pleadings or the existence of necessary jurisdictional facts. The pretrial hearing of a plea to the jurisdiction looks very similar to a hearing for summary judgment--if the jurisdictional evidence creates a fact question, then the trial court cannot grant the plea to the jurisdiction, and the issue must be resolved by the fact finder.

The unusual thing about a trial of an ultra vires suit is that the ultimate question being tried is whether the court has jurisdiction in the first place. If the governmental official acted within his/her legal authority—i.e., intra vires—then immunity applies and the court is without subject matter jurisdiction.

Since the ultimate question before the court is whether it has jurisdiction, or, alternatively, whether the political entity operated intra vires and is immune, there should not be a jury. Only if the governmental official acted outside his legal authority—i.e., ultra vires—does the court have

jurisdiction. Thus, to determine whether it has jurisdiction, the court may have to undertake a full trial of the plaintiff's lawsuit.

If the court finds that the government official did act ultra vires, the court has several options by way of the relief to impose. The only restriction is that it must be prospective. In addition to declaratory judgment, the court can issue a permanent injunction barring the governmental official from continuing the ultra vires action. Alternatively, if the ultra vires action is really inaction, the court may issue a writ of mandamus compelling action to bring the governmental official into conformance with the law. Just because this is last, don't be fooled—a governmental official can take this off-ramp at any time by setting the plea to the jurisdiction for hearing.

The ultra vires suit remains one of litigation's most idiosyncratic creatures. Much like baby books for expecting parents, we can only provide limited guidance. It is our hope you come away knowing what to expect when you're expecting.

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