

NOTE

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DECLARATORY RELIEF AND SOVEREIGN IMMUNITY IN OREGON: CAN SOMEONE TELL ME IF I TURNED SQUARE CORNERS?

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“[People] must turn square corners when they deal with the Government.”²

Oliver Wendell Holmes

I. INTRODUCTION: A PUBLIC CONTRACTING VIGNETTE

Contractor contracts with the state of Oregon to build a road that provides for a one-year schedule. After six months of construction, the State and Contractor are involved in a dispute that results in the State terminating the contract for default because the State alleges that

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2. *Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). My interpretation of this oft-cited quote is that those who deal with the government are charged with the knowledge of and strict compliance with the laws, regulations, and contract provisions that govern their particular situation. Justice Douglas rephrased this quote in his dissent in *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting), by stating that “those who contract with the government must turn square corners.” This Note discusses the ability of those who “deal with the government” to determine whether they “turned square corners” through the use of declaratory judgment actions.

Contractor failed to faithfully perform according to the terms and conditions of the contract.³ Termination for default may have dire consequences: Contractor may be disqualified from bidding on government projects for as long as three years.⁴ If the State disqualifies Contractor, it will have imposed the equivalent of a “death sentence” because Contractor’s primary source of income is derived from government contracts.

Contractor wishes to be reinstated on the project or, in the alternative, to have the termination for default declared unjustified so that it may continue and complete the project. To accomplish this, Contractor files a declaratory judgment action against the State in circuit court. During the lawsuit, the State concedes that it has waived sovereign immunity for contract suits but claims that it has not waived immunity for declaratory judgment suits under Oregon’s version of the Uniform Declaratory Judgments Act.⁵ What result?

3. See, e.g., OR. STATE DEP’T OF TRANSP., OREGON STANDARD SPECIFICATIONS FOR CONSTRUCTION § 00180.90(a) (2002), available at <http://www.odot.state.or.us/tsspecs/2002-book/02-00100.pdf> (last visited Feb. 6, 2004) (“Termination of the Contract for default may result if the Contractor . . . fails or refuses to faithfully perform the Contract according to its terms and conditions.”).

4. See OR. REV. STAT. § 279.037(1)(c) (2001) (“A public contracting agency or the Construction Contractors Board may not disqualify a person under this section for a period of more than three years.”).

5. The state likely will set forth the following arguments. First, the state likely will assert that only the legislature may waive sovereign immunity and that it has not done so in Oregon’s declaratory judgment statute. See discussion *infra* Part II.D. Second, the state likely will claim that Oregon’s Uniform Declaratory Judgments Act (UDJA) does not allow it to be sued for declaratory relief because the state is not a “person” as defined by the statute. See OR. REV. STAT. § 28.130 (2001) (“The word ‘person’ wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.”); *id.* § 28.110 (“When declaratory relief is sought, all persons shall be made parties who have a claim or any interest which would be affected by the declaration . . .”). Third, it is likely that the state will argue that the only mention to it as a party is in § 28.110, which reads:

In any proceeding which involves the validity of a municipal charter, ordinance or franchise, the municipality affected shall be made a party, and shall be entitled to be heard, and if the constitution, statute, charter, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Id.

This argument is nonsensical because if it were true, the state could not *bring* a declaratory judgment action against another party because the state is not a “person” entitled to bring such actions. See *id.* § 28.020 (“Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights,

If the court finds the State immune and dismisses the case, the termination for default stands and Contractor cannot complete the project. If the state contracting agency disqualifies Contractor from consideration for award of future contracts, Contractor must wait until the contracting agency or the Construction Contractors Board makes an administrative determination regarding the disqualification; and then, if the result is unfavorable, Contractor must continue the appeals process in the circuit court.⁶

Now change the facts: substitute Private Owner for the State. The result changes dramatically. Contractor sues Private Owner for a declaration of rights relative to the contract termination. If the court finds Private Owner's termination wrongful, then Contractor may resume work on the project and both parties can order their future conduct based upon the court's decision.

This Note addresses the question of whether state governments should be immune from declaratory judgment suits when they have waived immunity for liability associated with the underlying conduct. Part II discusses the history of declaratory relief, the Uniform Declaratory Judgments Act, sovereign immunity, and the basis for declaratory judgments and sovereign immunity in Oregon. Part III evaluates the current state of the law on declaratory relief as it relates to sovereign immunity in Oregon and examines approaches from other jurisdictions. Finally, Part IV sets forth a framework for how Oregon courts should approach declaratory judgment actions between the State and private parties where Oregon has waived immunity for liability associated with the underlying conduct.

status or other legal relations thereunder.”). The State of Oregon has sought declaratory relief. *See, e.g., State v. Norris*, 50 P.3d 595, 596 (Or. Ct. App. 2002) (seeking declaratory judgment regarding the defendant's use of submerged and submersible lands).

Finally, the state may argue that because it may not be sued, either because of sovereign immunity or because it is not a “person” who may be sued under the UDJA, the court therefore should refuse to render judgment because there is not a justiciable controversy as required by the Act. *See OR. REV. STAT. § 28.060* (2001) (“The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.”). This argument fails because it depends on the previous two arguments, which fail—the case is not justiciable because the court does not have jurisdiction over the state and therefore cannot terminate the uncertainty or controversy.

6. *See OR. REV. STAT. § 279.043* (2001) (requiring a determination by the public contracting agency or the Construction Contractors Board prior to petitioning the circuit court's review of the disqualification decision).