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The **Construction Law** Corner: “At the Intersection of Construction and Law”

P3 Projects: Does the private sector partner of a P3 enjoy governmental immunity?

by *Sean Hanlon, Partner*
and *Thomas Morales, Law Clerk*

Sean Hanlon discusses a recent Colorado case with the newest member of Holland & Hart’s construction projects practice, Thomas Morales.

Sean: Welcome to the firm, Thomas!

Thomas: Thanks! I really enjoyed law school, but I am excited to start my legal career.

Sean: Excellent. While law school is behind you, learning never really stops. Did you have a chance to read the recent opinion entered by the Colorado Court of Appeals that I put on your desk?

Thomas: I did. Pretty interesting.

Sean: I thought so too. [In his best law professor voice] Mr. Morales, how would you describe the case and the issue involved?

Thomas: Well, it involved a slip and fall lawsuit brought by a resident of a low-income housing facility against the entity that owned and managed the apartment building (“Entity”). The Entity argued that it is immune from tort liability under Colorado’s Governmental Immunity Act (“Immunity Act”) as an “instrumentality” of a public entity and that the case should be dismissed against it as a result.

Sean: Exactly. Did the Entity’s argument that it was an instrumentality of the government seem like a slam dunk?

Thomas: No. The Entity was 99.89% privately owned! The Entity was initially comprised of only public entity ownership. It managed and controlled the apartment building under complete public agency ownership for nearly 30 years.

But in 2014, the Entity needed substantial funding to renovate the apartment building and took on a private

investor entity as a limited partner of the Entity. In exchange for providing the necessary equity financing, the private investor received a 99.89% ownership interest in the Entity.

Sean: Right. In other words, the public entity partners **only had a 0.1% owner interest** in the Entity. So, what happened?

Thomas: The trial court agreed with the argument and dismissed the case against the Entity. The Colorado Court of Appeals affirmed and held that the Entity was “governmental in nature” and an “instrumentality” of a public entity.

Sean: The level of private ownership of the Entity didn’t ultimately matter. Did you find that surprising?

Thomas: Absolutely.

Sean: What then, were the keys to the decision?

Thomas: The Colorado Court of Appeals applied a two-part test: (1) whether the governmental entity had extensive control over the Entity and (2) whether the Entity had a public purpose.

Sean: Yes, the Colorado Court of Appeals concluded that—despite the Entity’s high private party ownership interest—the governmental entity controlled most of the Entity’s operations and that the Entity had a public purpose in providing low-income housing.

Thomas: Do you think this case might apply to provide governmental immunity to a private entity that partners with a governmental entity on a P3 project?

Sean: That's a fantastic question. I believe that may be an argument that gets tested in our courts. While the case we've been discussing didn't involve a P3 project, it did involve a public entity's decision to partner with a private entity to provide the funding necessary to complete a renovation project. And that's one of the benefits of P3s.

Thomas: Don't public owners routinely engage private entities to design and construct public works?

Sean: You bet, under traditional project delivery methods. But under a P3 project delivery method, a private entity undertakes more than the risks and responsibilities of designing and constructing a public project. Rather, the private entity typically agrees to design, build, finance, operate, and maintain the public project. The period of time the private entity is charged with operating and maintaining the project can span decades. Under this P3 delivery model, nearly everything but ownership of the public project is transferred to the private entity partner.

But whether the private entity partner of a P3 qualifies as "governmental in nature" and an "instrumentality" of the public entity entitled to enjoy governmental immunity under the Immunity Act is up for debate and will almost certainly turn on the first element of the two-part test: whether the governmental entity had extensive control over the private entity partner. Stay tuned!

Sean Hanlon is a partner in the construction projects practice group at Holland & Hart LLP. Sean recently completed a fully-dedicated secondment as in-house counsel for a large transportation infrastructure prime contractor. During his secondment, Sean served as the contractor's internal senior counsel on many of its projects around the country that utilized a variety of project delivery methods, including a public-private-partnership ("P3") project exceeding \$2 billion.

Thomas Morales, a recent CU law graduate, just joined the construction projects group at Holland & Hart LLP.



Strategic Navigation. Our sophisticated construction team helps contractors and developers navigate the complexities of P3 projects to create great public works.

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