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Quasi-Contractual Recovery When Municipal Contract Ultra Vies

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A few suggestions have been made as possible solutions to conflicts between "other insurance" clauses. One is to extend the trend developing in California and Oregon, and to have courts ignore the clauses and order proration in all cases.[30] Another suggestion is to have insurers draft standard forms that clearly state how they intend liability to be apportioned when "other insurance" clauses conflict. One commentator places a large part of the blame for the increasing litigation in this area on the insurance industry for their inaction.[31] A legislative solution has been proposed which would generally outlaw escape and modified escape clauses, limit the use of excess clauses, and favor the pro rata clause.[32]

In any case, it should be made certain that the insured will not receive less coverage than if he were protected by only one policy. The coincidence of having two policies covering the same loss should not cause a "forfeiture" but simply present the issue of apportionment.[33] The principal case indicates that the Washington court does not favor wholesale proration, but will continue fixing responsibility on one insurer or the other in appropriate cases.

QUASI-CONTRACTUAL RECOVERY WHEN MUNICIPAL CONTRACT ULTRA VIRES

While plaintiff's shopping center was under construction, defendant second-class municipality prepared for installation of a stop light to aid traffic going to and from the center. A contractor was hired and the design was approved, but funds were not budgeted for the project. With the shopping center nearing completion, it was agreed that plaintiff would pay the cost of installation and defendant city would reimburse him out of the following year's budget. The city, without calling for bids on the contract, hired a contractor and plaintiff paid the cost of the traffic signal and its installation. In plaintiff's suit on

Though the reasoning may be criticized as circular and arbitrary, we believe the better rule is that where the insurance companies would be both liable except for the other, the excess-escape clause policy should be held to be not other similar insurance to the policy containing the pro rata clause, conversely, the policy with only its pro rata clause applicable is regarded as other similar insurance as used in the excess-escape policy.

[30] See Note, 38 MINN. L. REV. 838 (1954); Note, 1 WILLAMETTE L.J. 485 (1961).
[31] Note, 65 COLUM. L. REV. 319, 331-32 (1965).
[32] Russ, *The Double Insurance Problem—A Proposal*, 13 HASTINGS L.J. 183, 191-93 (1961).
[33] Note, 65 COLUM. L. REV. 319, 321 (1965).

the reimbursement contract, the trial court held the contract void and unenforceable because the method of formation contravened statutes prohibiting a municipality from borrowing unappropriated funds,[1] and letting contracts without a call for bids;[2] however, plaintiff was allowed recovery on unjust enrichment principles for the value of the benefits conferred. On appeal, the Washington Supreme Court modified the decree, and *held:* Violation of statutory municipal budgeting and bidding requirements renders a municipal contract void, but plaintiff may recover in quasi-contract the reasonable value of the improvement when the improvement retained by the city is within the authority of the city to provide. *Edwards v. Renton,* 67 Wash. Dec. 2d 586, 409 P.2d 153 (1965).

No recovery will be allowed on an express municipal contract which is formed without observing the mandatory legal requirements specifically regulating the mode by which municipal power is to be exercised.[3] However, liability of municipal corporations in quasi-contract for benefits received under an ultra vires agreement[4] has gained recognition in several jurisdictions.[5] On one hand, public policy demands that a mu-

[1] WASH. REV. CODE § 35.33.120 (1963) provides:

> The expenditures as classified and itemized in the final budget shall constitute the city's appropriations for the ensuing fiscal year. Every officer and employee of the city shall be limited in the making of expenditures and incurring of liabilities to the amounts of the detailed appropriations items or classes....
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> Liabilities incurred by any officer or employee of the city in excess of any budget appropriation shall not be a liability of the city.

[2] WASH. REV. CODE § 35.23.352 (1963) provides:

> Whenever the [estimated] cost of [a] public work or improvement, including materials, supplies and equipment, will exceed five thousand dollars, the same shall be done by contract after a call for bids which shall be awarded to the lowest responsible bidder.

[3] See, *e.g.,* Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226 (1910); 10 MCQUILLIN, MUNICIPAL CORPORATIONS § 29.02 (3d ed. 1950).

[4] The term "ultra vires," as applied to a municipal corporation, has two distinct meanings: (1) Where the municipality has acted beyond its power altogether and is not legally capable of accepting the benefits, and (2) where the municipality has the power to achieve the end, and thus accept the benefits, but has acted beyond its statutory authority in the means of reaching the end. Compare the majority and dissenting opinions in Abrams v. City of Seattle, 173 Wash. 495, 23 P.2d 869 (1933). See generally Note, 34 MINN. L. REV. 46 (1949). It is in the latter sense that "ultra vires" is used in the principal case, as applied to the manner in which defendant city obtained funds for the traffic signal.

[5] Smith v. Town of Vinton, 216 La. 9, 43 So. 2d 18 (1949), 24 TUL. L. REV. 363 (1950); Hudson City Contracting Co. v. Jersey City Incinerator Authority, 17 N.J. 297, 111 A.2d 385 (1955), 2 U.C.L.A.L. REV. 591; Slauder v. San Antonio, 2 S.W.2d 841 (Tex. 1928).

The leading case denying quasi-contractual recovery is Zottman v. City & County of San Francisco, 20 Cal. 96, 81 Am. Dec. 96 (1862). *Accord,* City of Detroit v. Michigan Paving Co., 36 Mich. 335 (1877); Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406, 54 N.E. 372 (1899); Burgess v. City of Cameron, 113 W. Va. 127, 166 S.E. 113 (1932), 39 W. VA. L. REV. 185; Probst v. City of Menasha, 245 Wis. 90, 13 N.W.2d 504 (1944), 29 MARQ. L. REV. 70 (1945).

nicipal government remain strictly within the bounds of its delegated authority;[6] on the other, unjust enrichment and fair dealing require that a city should not be permitted to receive the benefit of money, property, or services without paying just compensation.[7] The principal case illustrates an attempted reconciliation of these conflicting principles.

The court in the principal case found that Washington had adopted the equitable rule allowing quasi-contractual recovery on a municipal contract which the city has power to make, although the means of exercising that power are ultra vires.[8] The equitable notion that a municipality must be held "to the same standard of right and wrong that the law imposes upon individuals"[9] was found to outweigh the principle that a person dealing with a municipality is chargeable with knowledge of its restricted authority.[10] Further, while recognizing that quasi-contractual recovery is generally limited to the value of the actual benefit conferred,[11] the court interpreted prior decisions to compel awarding plaintiff the reasonable value of the improvement supplied[12]—the liability that would have been imposed on the city had the budget and bid statutes been properly followed.

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[6] See Knowlton, *The Quasi-Contractual Obligations of Municipal Corporations*, 9 MICH. L. REV. 671 (1911).

[7] See Antieau, *The Contractual and Quasi-Contractual Responsibilities of Municipal Corporations*, 2 ST. LOUIS L. REV. 230, 237-38 (1953).

[8] Abrams v. City of Seattle, 173 Wash. 495, 23 P.2d 869 (1933) (city liable for reasonable value of improvements made under a void lease agreement); O'Connor v. Murray, 152 Wash. 519, 278 Pac. 176 (1929) (road contractor entitled to reasonable value of work although a commissioner was beneficially interested in contract); Besoloff v. Whatcom County, 133 Wash. 109, 233 Pac. 284 (1925) (road contractor may recover reasonable value of work where contract let without a call for bids); Mallory v. City of Olympia, 83 Wash. 499, 145 Pac. 627 (1915) (city liable for the value of the labor and property it receives under a substantially performed contract); Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226 (1910)) (city liable for funds paid out on a contract despite failure to observe the bidding requirements).

[9] 67 Wash. Dec. 2d at 592, 409 P.2d at 158, quoting from Mallory v. City of Olympia, 83 Wash. 499, 505, 145 Pac. 627, 629 (1915).

[10] Stoddard v. King County, 22 Wn. 2d 868, 158 P.2d 78 (1945); Brougham v. City of Seattle, 194 Wash. 1, 76 P.2d 1013 (1938). *But see* Antieau, *supra* note 7, at 238:

> With hundreds and hundreds of cases every year litigating the existence of particular powers of municipal corporations and with the typical city attorney himself in considerable doubt as to the existence of many municipal powers, is it fair to impose, upon a private party who would serve the city, the requirement of exact knowledge of the extent of municipal power? It is suggested that it is not.

[11] See Owens v. Floyd County, 94 Ga. App. 532, 95 S.E.2d 389 (1956); Luther v. Wheeler, 75 S.C. 83, 52 S.E. 874 (1905).

[12] Citing Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226 (1910), where the court, without discussion, allowed recovery for the reasonable value of the property received. *But see* Kruesel v. Collin, 170 Wash. 233, 239, 16 P.2d 442, 444 (1932) (dictum), where the court stated that, if a city borrows money in violation of the budgeting statute, "in ascertaining the quantum of liability the amount of

Several previous Washington cases have held that a municipality will be liable on unjust enrichment principles for failing to observe the municipal bidding statute.[13] However, holding that a creditor may recover in quasi-contract on an agreement which effectively circumvents the budgeting statute, notwithstanding the statute's specific declaration that such a liability "shall not be a liability of the city,"[14] does represent an extension of, if not a complete departure from, earlier decisions. Although no Washington case has specifically discussed the issue, in *Hailey v. King County*[15] an employee was denied recovery for the value of his services when his salary was not budgeted for the year in which he worked. The court held that personal services did not fall within the scope of unjust enrichment principles insofar as they apply to municipal corporations.[16] The court in the principal case was willing to allow recovery up to the value the city otherwise would have paid had the budgeting and bidding statutes been properly utilized. The scope of the rule would certainly seem to include personal services rendered. The court in the principal case indicated that quasi-contractual recovery would not be permitted if the objectionable acts were "manifestly violative of public policy."[17] Thus, the justification for such recovery, despite the ultra vires nature of the acts of the municipal government, must rest on an examination of the public policies being served by the specific statutes.[18] Generally,

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the loan is not taken into account, but the measure of recovery is the money actually applied to lawful municipal or county uses," quoting from Butts County v. Jackson Banking Co., 129 Ga. 801, 60 S.E. 149, 152 (1908).

[13] Besoloff v. Whatcom County, 133 Wash. 109, 233 Pac. 284 (1925); Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226 (1910). *But see* RESTATEMENT, RESTITUTION § 62, comment *b* at 242 (1937).

[14] WASH. REV. CODE § 35.33.120 (1963).

[15] 21 Wn. 2d 53, 149 P.2d 823, 154 A.L.R. 351 (1944).

[16] The court in *Hailey* spoke in terms of "implied contract," and it is not clear whether the court was referring to contracts implied in fact or implied in law. For a discussion of the distinction between implied in fact contracts and quasi-contracts, and its significance, see Antieau, *supra* note 7, at 230-35; RESTATEMENT, CONTRACTS § 5, comment *a* at 7 (1932).

[17] 67 Wash. Dec. 2d at 591, 409 P.2d at 157. The majority rule, denying quasi-contractual recovery in all situations involving ultra vires acts of a city, rests on the fear of local governments exceeding their authority through fraud, collusion, or favoritism. See Green v. Okanogan County, 60 Wash. 309, 323, 111 Pac. 226, 231 (1910) (Rudkin, C. J., dissenting):

> It is presuming entirely too much in favor of weak human nature to assume that the delinquent officials will be overdiligent or overzealous in proving that their unauthorized contract was improvidently or fraudulently entered into.

The court in the principal case attempted to rectify this problem by keeping a judicial eye open for possible signs of fraud or collusion. Such judicial policing seems inadequate if the trial court is confined to the record before it. A possible solution may be the mandatory joinder of a third party, such as the Attorney General, to protect the public's interest in a proper distribution of municipal funds.

[18] See Note, 34 MINN. L. REV. 46, 47-48 (1949). Some courts allow quasi-contractual relief where the statute is "directory," but deny relief where the statute

the purpose of a municipal bidding requirement is to insure the public of proper disposition of the tax dollar.[19] This end will be achieved by limiting recovery to the expense which the city would have incurred had the bidding requirement been observed.[20]

On the other hand, the propriety of allowing quasi-contractual recovery after the non-observance of a municipal budgeting requirement is questionable. If the purpose of such a statute is "to inculcate sound business principles and practices into the municipal economy,"[21] allowing recovery on a contract implied in law certainly appears to defeat the legislative policy. In theory, however, the city is not held liable on the contractual obligation; rather, quasi-contractual liability is a judicially-imposed obligation for benefits the city has received by its own extra-legal behavior.[22] Thus, holding a city liable on a contract implied on law appears closely analogous to the recent demise of municipal immunity on the tort area;[23] in both instances the courts are endeavoring "to hold municipalities to the same standard of right and wrong that the law imposes upon individuals."[24]

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is "mandatory." See, *e.g.*, Hines v. City of Bellefontaine, 74 Ohio App. 393, 57 N.E.2d 164 (1944). For a criticism of this approach see Tooke, *Quasi-Contractual Liability of Municipal Corporations*, 47 HARV. L. REV. 1143, 1161-64 (1934). Fortunately, the Washington court has avoided this quagmire. See also Antieau, *supra* note 7, at 249, 250:

> [W]hether recovery should be possible in contract or in quasi-contract demands not a mechanical retreat to [directory-mandatory] labels but a judicially conscious awareness and weighing of the social purpose underlying the statute, the persons intended to be protected thereby, the degree of deception or bad faith of municipal agents and officers in the particular trading, the extent of culpable carelessness on the part of the private contractor, the possibilities of restoration to the status quo, and, in general, the chance of honoring worthy private claims without making a mockery of the applicable statute.

[19] Edwards v. City of Renton, 67 Wash. Dec. 2d 586, 590, 409 P.2d 153, 157 (1965). See generally 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 10.11, at 690 (1965); 10 McQUILLIN, *op. cit supra* note 3, § 29.29.

[20] See Antieau, *supra* note 7, at 250; Note, 34 MINN. L. REV. 46, 48-50 (1949).

[21] Edwards v. City of Renton, 67 Wash. Dec. 2d 586, 590, 409 P.2d 153, 157 (1965). See generally 2 ANTIEAU, *op. cit. supra* note 19, § 15.31, at 453; 15 McQUILLIN, *op. cit. supra* note 3, § 39.39, at 125.

[22] See 1 CORBIN, CONTRACTS § 19 (1950); RESTATEMENT, RESTITUTION, § 5, comment *a* at 22 (1937).

[23] See, *e.g.*, Kelso v. City of Tacoma, 63 Wn. 2d 913, 390 P.2d 2 (1964), 39 WASH. L. REV. 275; Comment, *Abolition of Sovereign Immunity in Washington*, 36 Wash. L. REV. 312 (1961); PROSSER, TORTS § 125, 1010-13 (3d ed. 1964).

[24] 67 Wash. Dec. 2d at 592, 409 P.2d at 158; *cf.* cases cited note 9 *supra*.