



The Office of Vince Ryan
County Attorney

March 4, 2015

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Re: Request to join Amicus Curiae brief to be filed in Texas Supreme Court in *Forte v. Wal-Mart* re civil penalties

The Texas Supreme Court will soon consider a case that will greatly affect the ability of counties and cities to seek civil penalties. We anticipate that Harris County and others will file an amicus brief explaining why their ability to use civil penalties to enforce compliance with the law should not be eliminated. We hope that other counties and cities, and the groups that represent their interests, will join in the brief. We are requesting that your office do so.

Last year, the Fifth Circuit Court of Appeals issued a decision in *Forte v. Wal-Mart*, a case in which optometrists had recovered civil penalties against Wal-Mart under a Texas statute. The Fifth Circuit held that civil penalties were exemplary damages (also called punitive damages) under Texas law. That meant that the complex set of rules for recovery of exemplary damages would apply to civil penalties, **including the requirement that a party cannot recover civil penalties unless it also recovers actual damages.**

The Fifth Circuit's *Forte* decision was very troubling because it appeared that it would apply to cases where the government (local or state) seeks to recover civil penalties. In fact, the statute that the optometrists used in *Forte* also allowed the state to recover civil penalties for the same violations. There are dozens—if not hundreds—of Texas statutes that allow the government to recover civil penalties. And in most of those situations, the government itself has not suffered harm; instead, it is using civil penalties to encourage compliance with the law. If the Fifth Circuit's *Forte* decision stands and is applied to government cases, then it would be virtually impossible for the government to recover civil penalties under Texas law.

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Harris County saw the effect of the *Forte* decision just days after it was issued. Harris County sued several companies that polluted the San Jacinto River. It sued them under a provision of the Texas Water Code that allows local governments to seek civil penalties for violations of Texas environmental laws. The penalties range from \$50 to \$25,000 per day, and the local government shares half of the recovery with the State. The defendants in Harris County's case had previously argued that the civil penalties were exemplary damages and not recoverable, but they had withdrawn that argument when Harris County challenged it. But just days after *Forte* was decided, the defendants tried to re-raise that issue and sought to have the case dismissed because Harris County was seeking civil penalties but could not recover actual damages. The trial court rejected the argument and denied the motion. Harris County settled with some of the defendants at the end of the trial for \$29 million. If the *Forte* decision were to become Texas law, then Harris County's case would have been dismissed.

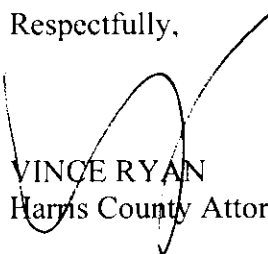
Because of the potentially far-reaching consequences of the *Forte* decision, Harris County (joined by Hunt County, the City of Houston, the Texas Municipal League, and the Texas City Attorneys Association) filed an amicus brief asking the Fifth Circuit to grant rehearing. Recently the Fifth Circuit granted rehearing and vacated its prior ruling. Rather than deciding the issue, the Fifth Circuit **certified the question to the Texas Supreme Court, asking the Supreme Court to determine whether civil penalties are considered exemplary damages.**

We expect that in the next few weeks the Texas Supreme Court will agree to answer this question for the Fifth Circuit. Technically, the Supreme Court has discretion whether to do so, but it virtually always agrees to accept a certified question. The Supreme Court would then set a briefing schedule and hear oral argument on the issue.

Because of the importance of this issue, Harris County and the other groups and entities that filed the amicus brief in the Fifth Circuit are going to file an amicus brief in the Supreme Court. The brief will explain why civil penalties are important to local governments and why it is wrong to read the Texas law on exemplary damages—which was part of a tort-reform package that had nothing to do with civil penalties—as prohibiting the government from recovering civil penalties. We hope that other counties and cities, as well as the groups that represent their interests, will join our brief. We want the Supreme Court to see that Texas local governments agree that their right to use civil penalties to encourage compliance with the law should not be taken away.

We are asking you to join us on the amicus brief and to encourage others to do the same. Please let us know if you wish to join in the amicus brief by signing and returning the enclosed form or emailing john.odam@cao.hctx.net. Thank you for your consideration.

Respectfully,



VINCE RYAN
Harris County Attorney