



# STATE OF TEXAS CONSTRUCTION LAW COMPENDIUM

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## **I. INTRODUCTION**

Construction defect litigation in Texas is both standard and unique – although lock-step with the majority of jurisdictions in some areas, the depth and breadth of legislation and interpretative common law necessitates careful attention when dealing with a construction defect claim in Texas. This Compendium update attempts to merely survey general subject matters and is not intended as a complete analysis of any specific topic.

Please note that the law applicable to construction litigation in Texas, particularly insurance coverage issues, continuously evolves. Although this Compendium attempts to capture the latest cases, statutes and trends, as well as clarify matters that warrant specific distinction from prior Compendium publications, please confirm the current state of Texas law at the time your client is faced with a defect case in Texas.

## **II. CONSTRUCTION DEFECT CLAIMS ON RESIDENTIAL STRUCTURES**

The authors of this Compendium believe that mention should be made early in this update to eliminate any confusion with law as discussed in the last publication; specifically, the Texas Residential Construction Liability Act (RCLA) and its most significant modification that occurred in the Texas Residential Construction Commission Act (TRCCA), effective September 1, 2003. Despite initial enthusiasm in TRCCA, the Texas Legislature allowed the TRCCA to sunset in 2009, with an extension for one year claim openings, thus ending the application of TRCCA on August 31, 2010.

With the sunset of the TRCCA, perceived conflicts between RCLA and TRCCA resolved themselves somewhat naturally from an administrative standpoint. For houses built before the effective date of the TRCCA standards, June 1, 2005 or after the demise of the TRCC, September 2009, the standards of TRCCA do not apply. RCLA now supplants the TRCCA as the most important (and only) statutory scheme in Texas that applies to all residential construction defect claims.

### **A. HISTORY OF RCLA**

Chapter 27 of the Texas Property Code, commonly referred to as RCLA, was created in 1989 in response to disproportionate jury verdicts rendered in residential construction trials. RCLA is not a cause of action, however. The purpose of RCLA was to limit the application of the Texas Deceptive Trade Practice Act (“DTPA”), which had led to many windfall cases for the plaintiff/homeowner. To best understand how RCLA works, it is best to imagine it as a filter applying defenses and damage limitations to bar conflicting remedies and provide proof requirements and damages based on statutory and common law causes of action for residential construction defect claims.

## B. APPLICATION OF RCLA

The RCLA sets forth detailed procedures for notice, inspection, and settlement of claims arising from construction defects. The RCLA applies to single family homes, duplexes, triplexes, quadruplexes, condominium units and units in cooperative systems. Essentially, a claimant seeking damages from a contractor, or other relief from a construction defect, is obligated to provide notice of the alleged defect to the contractor, produce evidence depicting the nature and cause of the defect and the nature and extent of repairs necessary, and provide the contractor with a reasonable opportunity to inspect the property. All contracts subject to the RCLA must include statutory disclosure information the consumer of the mandatory provision of RCLA (required notice and opportunity for inspection) before suit can be filed for a construction defect.

The RCLA provides a cap on the amount of damages a homeowner can recover once a timely and reasonable settlement offer has been made and rejected. In that event, the claimant cannot recover an amount in excess of the reasonable cost of repairs necessary to cure the construction defect or the amount of the settlement offer. Furthermore, the claimant can only recover the amount of reasonable and necessary costs and attorney's fees that were incurred before the offer was rejected or considered rejected. If a contractor fails to make a reasonable offer, however, the limitation on damages does not apply and the claimant may recover the following economic damages proximately caused by the construction defect: (1) the reasonable cost of repairs necessary to cure any construction defect; (2) the reasonable and necessary costs for the replacement or repair of any damaged goods in the residence; (3) the reasonable and necessary engineering and consulting fees; (4) the reasonable expenses of temporary housing reasonably necessary during the repair period; (5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure; and (6) reasonable and necessary attorney's fee.

## C. REQUIRED PRE-ACTION NOTICE AND OFFER OF SETTLEMENT UNDER RCLA

The statute outlines the procedures and associated deadlines for addressing a residential defect claims -

### Step 1: Pre-Action Notification

At least 60 day before a homeowner or other authorized person (as identified above) initiates an action against a builder to recover damages or other relief arising from construction defect, notice of the claim must be given to the builder by certified mail, return receipt requested, to the builder's last known address.

Step 2: Opportunity to Inspect

Once the builder received the homeowner's notice, the builder, upon written requests, has 35 days to inspect the property that is the subject of the complaint "to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect.

Step 3: Offer of Settlement

Once the builder receives the homeowner's notice, the builder has 45 days to make a written offer of settlement. The written settlement offer may be made to the homeowner or to the homeowner's attorney by certified mail, return receipt requested.

Step 4: Acceptance or Rejection of the Settlement Offer

The homeowner has 25 days after receipt of the offer of settlement to accept or reject the offer. After the 25<sup>th</sup> day, if the offer has not been accepted, it is considered rejected as a matter of law.

**III. PRELITIGATION CONSIDERATIONS – ALL PROJECTS**

**A. CAUSE OF THE DEFECT – CONSTRUCTION, DESIGN OR BOTH?**

When a defect arises, the first inquiry is the nature and cause of the defect. The contracts between the owner and the contractor and between the contractor and its sub-contractors normally require the work to (1) be constructed in accordance with the project plans and specifications; (2) meet all applicable building codes and standards; and (3) be in accordance with industry standard and good construction practice. The contract between the owner and the architect, and between the architect and its consultants such as engineers, require the design to comply with applicable building codes and standards, and to meet a certain standard of care. Is the defect caused by defective construction, defective design, or both? Was a certain product appropriate for the specified use, or did a product fail? The careful practitioner must investigate the root cause of the problem prior to litigation. It is advisable to retain experts to provide preliminary evaluation prior to litigation.

**B. CLAIMS AGAINST THE ARCHITECT OR ENGINEER**

Texas law requires a party making a claim against an architect, engineer or surveyor to file a supporting "Certificate of Merit" with the complaint against such a design professional. TEX. CIV. PRAC. & REM. CODE § 150.001 *et seq.* The Certificate of Merit is an affidavit of a third-party registered/licensed architect, engineer, or land surveyor competent to testify, knowledgeable

and holding the same professional license or registration as the defendant. A claimant must set forth specifically, for each theory of recovery for which damages are sought, the negligence, if any, or other action error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion or similar professional skill claimed to exist and the factual basis for each such claim. As such, the safer approach is to assume that the statute ostensibly applies to all claims asserted against a design professional, instead of only claims of negligence. Therefore, the practitioner must retain an expert to evaluate all claims against a design professional prior to litigation of such claim. Failure to do so and attach a required Certificate of Merit can lead to mandatory dismissal of the claim, perhaps with prejudice.

#### **IV. CAUSES OF ACTION**

Parties to a construction project typically find themselves in litigation after negotiations have broken down. What began as claims and demands for money will soon find themselves memorialized in court filings. The initiation of suit makes the dispute public and involves the judiciary and attorneys. Although lawsuits can be expensive and a laborious process, they can achieve finality and closure to what most often has become an intractable dispute. Common theories of liability for construction defect lawsuits include breach of contract, quantum meruit, breach of warranty, negligence, negligent misrepresentation, fraud/fraud inducement, contribution, and indemnity. Each cause of action has its own unique elements, defenses and remedies available.

##### **A. BREACH OF CONTRACT**

Contract claims are extremely common in construction litigation because a construction project typically has multiple players who often have more than one contract with another party. For example, a typical construction project will have an owner who will contract with a general contractor, that general contractor will then contract with a sub-contractor, and that sub-contractor may contract with a manufacturer or supplier. Each contract contains its own unique rights and obligations that are within themselves actionable. Thus, a breach of contract claim often serves as the basis for any construction defect lawsuit. Contract claims also typically permit the prevailing party to seek attorney's fees. The elements of breach of contract are:

- (1) There is a valid, enforceable contract;
- (2) The plaintiff has standing to sue for breach on contract;
- (3) The plaintiff performed, tendered performance, or was excused from performing its contractual obligations;
- (4) The defendant breached the contract; and

- (5) The defendant's breach caused damages to the Plaintiff.

Common defenses in construction defect litigation are limitations, failure of consideration, statute of frauds, failure to perform conditions precedent, impossibility of performance, accord and satisfaction, ratification, waiver, failure to mitigate damages, limitation of liability, estoppel and prior breach.

## B. QUANTUM MERUIT

A party who has provided labor and materials should plead quantum meruit as an alternative theory to breach of contract to address the occasion of less than full and complete performance, as well as for work beyond the scope of the contract. The elements necessary to sustain a quantum meruit claim (also known as an unjust enrichment claims) are as follows:

- (1) The services rendered or materials provided must be valuable;
- (2) The services rendered or materials provided must be for the person sought to be charged;
- (3) The services and materials accepted must have been accepted, used, and enjoyed by the person sought to be charged; and
- (4) The circumstances must reasonably notify the person sought to be charged that the party seeking recovery expected payment for the services performed.

*Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 49 (Tex. 2008). Common defenses are limitations, express contract, unclean hands, offset and other contract defenses.

A recent appellate decision addressed application of these traditional standards. In *Bluelinx Corp. v. Texas Construction Systems, Inc.*, the Fourteenth Court of Appeals held that, while a general contractor was entitled to have a quantum meruit question submitted to the jury, neither (1) the time it spent attempting to obtain a building permit from a municipality, nor (2) the amount withheld by the owner as retainage from the general contractor's pay application was compensable via quantum meruit. — S.W.3d — , 2011 WL 1049545, at \*3 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (op. on reh'g). An owner hired a general contractor to design and build a storage shed at its facility. The contract required the general contractor to obtain a building permit from the City of Houston; ultimately, the general contractor spent nearly 50 hours attempting to secure the permit. The owner eventually fired the general contractor and hired another to complete the construction job. The general contractor then

sued the owner for breach of contract and quantum meruit; the owner counterclaimed for breach of contract.

A jury found that neither party breached the contract, but that the owner owed the general contractor damages under the quantum meruit theory. The Fourteenth Court of Appeals affirmed in part the trial court's judgment, holding that only a portion of the general contractor's quantum meruit recovery was proper. On appeal, the owner argued that the jury should not have been presented with a quantum meruit question because an express contract existed between the parties. The Court rejected this argument, explaining that "an express contract does not preclude quantum meruit recovery for services or materials that are not covered by the contract." The Court concluded that recovery in quantum meruit was proper for the cost of materials which the owner requested and were not covered by the contract. However, the Court also concluded that recovery in quantum meruit was improper for (1) the time spent attempting to obtain a building permit from the City of Houston, and (2) the amount withheld by the owner as retainage from the general contractor's pay application. The "plain language" of the contract included the general contractor's work to procure the permit; in fact, the contract required the general contractor "to obtain all licenses and permits" and to "furnish all labor, materials, services, [and] supervision" necessary to perform its duties under the contract. Further, the goods and services to which the retainage related were also covered by the contract; accordingly, the Court concluded that this amount was *not* compensable via quantum meruit.

An express contract does *not* bar recovery in quantum meruit: (1) when the plaintiff has partially performed the contract, but because of the defendant's breach, the plaintiff is prevented from completing the contract; (2) under certain circumstances, when the plaintiff partially performs an express, unilateral contract; and (3) when a contractor under a construction contract breaches the contract and the owner accepts and retains the benefits arising as a direct result of the contractor's partial performance of the contract.

### C. BREACH OF WARRANTY

A warranty can generally be described as an agreement that accompanies the sale or lease of goods and services by which the seller undertakes to vouch for the condition or quality of the goods sold or leased or the services provided. A warranty is an independent promise apart from the contractual obligations of the lease or sale contract. Warranties are created by statute or by common law. *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576-77 (Tex. 1991).

Express warranties arise from an agreement between the parties, and implied warranties arise by operation of law. *LaSara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984). A breach of an express warranty is considered a breach of contract claim, whereas a breach of an implied warranty is considered a tort. *Id.*

### 1. *Express Warranties*

A “warranty” is traditionally a written guarantee with regards to the quality and integrity of a product or service. On a construction project, express warranties may be set forth in the construction contract. There are usually no express warranties in a design contract. The warranties may cover goods and services. The American Institute of Architects (“AIA”) contract documents for construction contemplate an express warranty of one year. On residential projects, an express warranty may be contained in the construction contract and/or in an agreement from a third party warranty company.

### 2. *Implied Warranties*

There are certain warranties that are implied. For the purpose of construction law, there are two implied warranties that are relevant which are: the Implied Warranty of Good and Workmanlike Performance in Service Contracts, and the Implied Warranty of Good and Workmanlike Performance and Habitability in the Sale of a Home. With regards to the first implied warranty, any contract for a service gives rise to a warranty that the service will be performed in a good and workmanlike manner. The second implied warranty asserts that when a home is sold, the seller gives the buyer an implied warranty that the home was constructed in a good and workmanlike manner and it is habitable. In some instances, the warranty of good and workmanlike performance may be waived; however the warranty of habitability may not be waived. In fact, the warranty of habitability imposes strict liability on the developer/contractor, which essentially means that the owner of the building does not need to prove negligence. However, the owner will still need to prove that a defect exists, that there are damages as a result of the defect, and that the developer/contractor proximately caused the defect.

The Texas Business & Commerce Code Chapter 2 (“Texas UCC”) provides statutory warranties for the sale of goods. The Texas UCC addresses warranties that may apply to a construction defect case in the following sections: a) express warranty § 2.213; b) implied warranty of merchantability § 2.314; and c) implied warranty of fitness for a particular purpose § 2.315. For services, Texas recognizes the common law warranty of good and workmanlike performance of services as it applies to the repair or modification of existing tangible goods or property. Common defenses are limitations, disclaimer, proportionate responsibility, lack of notice, no opportunity to cure, limitation of damages, failure to mitigate, and RCLA.

### D. NEGLIGENCE

Negligence is the failure to exercise the ordinary care of a reasonably prudent person. Under a negligence theory, a plaintiff is required to establish three elements:

- (1) The defendant owed a legal duty to the plaintiff;
- (2) The defendant breached the duty; and
- (3) The breach proximately caused the plaintiff's injury.

*Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Common defenses in construction defect litigation are limitations, contributory negligence, release, assumption of risk, and the economic loss rule.

#### E. NEGLIGENCE MISREPRESENTATION

Negligence misrepresentation is a business-related tort. An action for negligent misrepresentation applies only when the defendant has a pecuniary interest in the transaction in which the information is given. The elements of negligent misrepresentation are:

- (1) The defendant made a representation to the plaintiff in the course of the defendant's business or in a transaction in which the defendant had an interest;
- (2) The defendant supplied false information for the guidance of others;
- (3) The defendant did not exercise reasonable care or competence in obtaining or communicating the information;
- (4) The plaintiff justifiably relied on the representation; and
- (5) The defendant's negligent misrepresentation proximately caused the plaintiff's injury.

*McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999). Common defenses are limitations, economic loss rule, and the statute of frauds.

#### F. TEXAS DECEPTIVE TRADE PRACTICES ACT

Section 17.41 of the Texas Business & Commerce Code, commonly known as the Texas Deceptive Trade Act ("DTPA"), protects consumers from false, misleading or deceptive business practices, unconscionable actions and breaches of warranty. TEX. BUS. & COM. CODE § 17.44. A claim for breach of warranty under the Texas UCC and common law can be brought under the DTPA. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995). A DTPA action can be brought in conjunction with common law causes of action for breach of contract, breach of warranty, fraud and negligence. *PPG Indus. v. JMB/Houston Ctrs. Partners*, 146 S.W.3d 79, 80 (Tex. 2004). The DTPA offers remedies that are more favorable than common law actions.

The elements of a DTPA action are:

- (1) The plaintiff is a consumer;
- (2) The defendant can be sued under the DTPA;
- (3) The defendant committed one or more of the following wrongful acts:
  - a) A false, misleading or deceptive act or practice as set forth in 17.46(b) and that was relied upon by the plaintiff to the plaintiff's detriment;
  - b) A breach of an express or implied warranty;
  - c) Any unconscionable action or course of action;
  - d) The use or employment of an act or practice in violation of Chapter 541 of the Texas Insurance Code; or
  - e) A violation of one of the "tie-in" consumer statutes as authorized by TEX. BUS. & COM. CODE § 17.50(h), which are classified as false, misleading or deceptive acts or practices; and
- (4) The defendant's action was a producing cause of plaintiff's damages.

Defenses to a DTPA claim include limitations, plaintiffs conduct, standing, exemptions, claim not available under the DTPA, response to settlement demand, reliance on information from other sources, "as is" contract, waiver, downstream manufacturer status, puffing or opinion, learned intermediary, and mere breach of contract.

#### G. FRAUD/FRAUDULENT INDUCEMENT

Common-law fraud and fraudulent inducement are not necessarily common construction defect litigation causes of action, but when warranted a claimant will assert fraud claims as another means to recover exemplary damages. A cause of action for fraud requires that the following elements exist:

- (1) The defendant made a representation to the plaintiff;
- (2) Representation was material;

- (3) The representation was false;
- (4) When the representation was made the defendant knew that it was false or made it recklessly or without any knowledge of the truth but as a positive assertion;
- (5) The defendant made it with the intention that it should be acted upon by the plaintiff;
- (6) The plaintiff acted in reliance upon the representation; and
- (7) The plaintiff thereby suffered injury.

*Insurance Co. of North America v. Morris*, 981 S.W.2d 667,674 (Tex. 1998); *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 524 (Tex.1998). Common defenses are limitations, immunity, no contract, ratification, knowledge of falsity, and contractual disclaimer.

#### H. CONTRIBUTION AND INDEMNITY

Texas addresses contribution in Chapter 32 and 33 of the Civil Practice and Remedies Code. A party may recover from each co-defendant by way of contribution an amount determined by dividing the number of all liable defendants into the total amount of the judgment. If a co-defendant is insolvent, the party may recover from each insolvent cod-defendant an amount determined by dividing the number of solvent defendants into the total amount of the judgment. Chapter 33 addresses proportionate responsibility as determined by the trier of fact, including the settling defendants.

Chapter 33 also allows a defendant to designate a person who bears some responsibility for the plaintiff's injuries as a responsible third party. For lawsuits filed before September 1, 2011, the plaintiff could join a designated responsible third-party as a defendant up to 60 days after the party is designated, even if limitations period had expired. Under the new statute, which went into effect for suits filed after September 1, 2011, a designation of a party as a responsible third-party does not reopen the statute of limitations.

Common law indemnity is limited to situations where (i) liability is vicarious or (ii) claims are made by innocent retailers in products liability cases.

#### I. THE TEXAS ANTI-INDEMNITY STATUTE

In construction contracts, owners require general contractors to assume liability for the owner's negligence, and those contractors require any subcontractors under them to do the same. Therefore, in the case of an accident for which the owner is responsible, a general contractor is responsible for any damages incurred, including the defense costs of the owner

and a subcontractor will be responsible for the same due to the general contractor's negligence and be required to pay for the negligence of the owner as well. Most construction contracts also require a contractor or subcontractor to purchase an "additional insured" endorsement to its insurance policy, which effectively requires its insurance company to provide coverage for the other entities involved in the contract. Many construction contracts also make the subcontractor liable for a breach of contract and warranty by the general contractor or make the subcontractor responsible for any fines or penalties assessed by a governmental entity directly against an indemnitee. This system created a concern that subcontractors were becoming the "insurers" of entire projects, placing the subcontracting company and its insurance carrier at risk for the negligent acts of those entities above them.

Based upon the perceived inequities discussed above, the 81st Texas Legislature proposed Senate Bill 555 (and its companion, House Bill 818) to make each party to a construction contract liable for its own negligence, prohibiting the transfer of liability by contract or other means in actions involving property damage. As of January 1, 2012, any provision of a construction contract that requires one party to indemnify another for a claim caused by the negligence or fault of the indemnitee, or any party under the control of the indemnitee, will be void and unenforceable.

There are a number of exceptions to this bar, however. First, the statute specifically excluded contracts for single family dwellings, duplexes and townhomes, and public work projects. Second, in third-party-over actions (where an injured employee sues a third party for contribution after collecting worker compensation benefits) the new law preserves the ability to transfer liability. This exception allows an indemnitee to seek indemnification for injury to an employee of the indemnitor or those acting on its behalf. This will provide significant protection for upstream parties.

The new legislation also imposes these same limitations on additional insured requirements. Starting on January 1, 2012, upstream parties cannot require additional insured coverage that exceeds the allowable scope of indemnity. The contract cannot require the indemnitor to "defend" the indemnitee for claims based upon the indemnitee's negligence.

The loss of the "Additional Insured" status will, in all likelihood, force owners and general contractors to look at other risk-shifting options. A popular option is a consolidated insurance program, known in the industry as "wrap policies." An OCIP (owner controlled insurance policy) or CCIP (contractor controlled insurance policy) provides coverage for all named insureds. These policies effectively serve the same purpose as an additional insured endorsement to one party's insurance policy. OCIP and CCIP policies are commercially available but owners and contractors should watch out for limits of coverage that might be inadequate, high deductibles (\$50,000 or more) and exclusions, limitations, and conditions that vary greatly from policy to policy. It is important that an attorney and an insurance broker/agent read over an OCIP/CCIP before an owner or contractor agrees to the terms.

## V. LIMITATIONS AND STATUTE OF REPOSE

### A. LIMITATIONS

Limitations for various causes of action are set forth in Chapter 16 of the Texas Civil Practice and Remedies Code. For claims of negligence, negligent misrepresentation and products claims, claims must be brought within two (2) years of the time the defect was discovered or should have been discovered. TEX. CIV. PRAC. & REM. CODE § 16.003(a). Claims for breach of contract and breach of warranty must be filed within four (4) years of the breach. TEX. CIV. PRAC. & REM. CODE § 16.004(a),(c), 16.051. Note – parties can reduce the limitations period by agreement to a lesser period, not less than two (2) years. TEX. CIV. PRAC. & REM. CODE § 16.070(a).

#### 1. *Discovery Rule*

The “discovery” rule defers a cause of action until the plaintiff knows, or by exercising reasonable diligence should know, of the facts giving rise to the claim. It is an exception to the legal injury rule and only applies in circumstances where “it is difficult for the injured party to learn of the negligent act or omission.” The applicability of the discovery rule is a question of law. The discovery rule has been limited to rare cases where: (1) the injury is “inherently undiscoverable” and (2) the evidence of injury is “objectively verifiable.”

An injury is “inherently undiscoverable” if, by nature, it is unlikely to be discovered during the limitations period, despite due diligence. The issue is whether the injury, not the defendant’s identity, was inherently discoverable.

An injury is “objectively verifiable” if the injury’s existence and the defendant’s wrongful act cannot be disputed and the facts on which liability is asserted are demonstrated by direct physical evidence.

#### 2. *Fraudulent Concealment*

Fraudulent concealment defers an action’s accrual period until the plaintiff discovers or should have discovered the deceitful conduct or facts giving rise to the cause of action. It defers a cause of action’s accrual because a party cannot be allowed to avoid liability for its actions by deceitfully concealing wrongdoing until the limitations period has run.

### B. STATUTES OF REPOSE

Statute of repose bars suit against a registered or licensed architect, engineer, interior designer, or landscape architect in Texas who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property after (10) years from the date of substantial completion of the improvement or the date the equipment which is

attached to the real property begins to operate. TEX. CIV. PRAC. & REM. CODE § 16.008(a) and 16.009(a). Claims must be brought against a manufacturer of a product within fifteen (15) years of sale of product by the defendant, or within the life of the product if the manufacturer warrants that the product has a useful life of more than fifteen (15) years. TEX. CIV. PRAC. & REM. CODE § 16.012(b) and (c). In the event that multiple subcontractors are responsible for the construction of different parts of a project, the statute of repose applies to each subcontractor only for the portion of the project which the subcontractor completed. The statute of repose does not bar an action based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair.

In *Jenkins v. Occidental Chemical Corp.*, a Texas appellate court considered whether either of two statutes of repose barred a negligence claim against the former owner of a chemical plant, and whether Section 33.004(e) of the Texas Civil Practices and Remedies Code (which the Legislature repealed in 2011) allowed the former owner to be joined as a defendant *after* the applicable limitations period has expired. — S.W.3d — , 2011 WL 6046527, at \*2–11, 14 (Tex. App.—Houston [1st Dist.] 2011, no pet.). In *Jenkins*, an owner installed an acid addition system at its chemical plant; the system was designed by one of the owner’s employees, who collaborated with a team of employees under the supervision of a team leader. The designer was not a licensed engineer, but the team leader and other members of the design team were. The owner hired a third party engineering firm to create the system’s design drawings. It also ordered some of the system’s components and hired an independent contractor to install the system. The owner then sold the plant with the system in place. Years later, the system sprayed acid at a worker, partially blinding him.

During trial and upon review, the courts considered the defenses that the worker’s claims were barred by two statutes of repose — one governing claims against registered or licensed professionals who design improvements to real property, and the other governing claims against those who construct such improvements. The reviewing appellate court held that neither Section 16.008 nor Section 16.009 of the Texas Civil Practices and Remedies Code barred the worker’s negligence claim against the former owner. The Court explained Sections 16.008 and 16.009 as follows:

Sections 16.008 and 16.009 of the Civil Practice and Remedies Code are ten-year statutes of repose. Section 16.008 provides that a suit “against a registered or licensed architect, engineer, interior designer, or landscape architect \* \* \* who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property” may not be brought more than ten years after substantial completion of the improvement or the beginning of operation of the equipment. Section 16.009 provides that a suit “against a person who constructs or repairs an improvement to real property” may not be brought more than ten years after substantial completion of the improvement.

Thus, as clarified by the *Jenkins* court, sections 16.008 and 16.009 “differ in who they protect and the object of the work protected.” Section 16.009 relates only to improvements to real property but protects a broader class of person: anyone who constructs or repairs such an improvement. Section 16.008 protects only registered or licensed design professionals, but applies to a broader category of work: improvements to real property and equipment attached to real property.

The Court concluded that supervision by a licensed engineer does not, alone, implicate the provisions of Section 16.008. Section 16.008 expressly limits its scope to claims “against a registered or licensed \* \* \* engineer \* \* \* who designs, plans, or inspects” the construction of an improvement to real property. Thus, the jury’s finding that the system was designed under the supervision of a registered or licensed engineer was immaterial to the application of Section 16.008, “which makes no reference to one who supervises the design of an improvement.” Section 16.008 applied only if the system was designed, planned, or inspected by a registered or licensed engineer, and the offered this protection to unlicensed persons performing the same work (as it did in Section 16.009, the “sister statute” to Section 16.008), but chose not to do so.

The Court likewise concluded that an owner-operator who prepares a conceptual design and hires and pays a third-party to construct an improvement, without more, is not “a person who constructs or repairs an improvement” within the meaning of Section 16.009. A person who merely constructs a product that is later annexed to real property is not a person who “constructs or repairs an improvement.” It is the *annexation* that transforms the product from personalty to an improvement, and the performance of that task by a third party does not transform the product’s designer and manufacturer into one who “constructs” an improvement. Thus, for the same reason that a manufacturer whose product is later annexed to real property is not a constructor under Section 16.009, “the construction and installation of the acid addition system by a third party contractor does not transform [the former owner] into an entity that ‘constructs \* \* \* an improvement to real property.’”

The *Jenkins* court also refused to liberally construe Section 16.009 in a way that would allow a property owner who hires a third-party contractor to construct an improvement to be considered a constructor for the purposes of this repose statute. Section 16.009 is expressly not intended to protect owners, because they have control over the realty and have “authority to go onto the premises to inspect the improvement for unsafe conditions” and “to check for any defective alterations.” The former owner was not an “entity in the construction industry,” did not conclusively prove that it was a “direct actor” in the construction or repair of the acid addition system, and its liability did not stem from any purported involvement in the construction process. The former owner did not establish involvement in the construction work beyond that consistent with its role merely as a property owner; thus, the Court refused to apply Section 16.009 to bar the worker’s negligent design claim by way of the defense of repose. It bears noting that the manner in which the owner is involved in the construction

process would, seemingly, afford protection under the statute under the dicta of the *Jenkins* court.

## VI. INSURANCE AND SURETY BONDS

### A. INSURANCE

#### 1. Commercial General Liability Insurance

Significantly, in 2007, the Texas Supreme Court held in *Lamar Homes v. Mid Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007) that allegations of unintended construction defects may constitute an accident or occurrence under a CGL policy, and allegations of damages to, or loss of use of, the home itself may constitute “property damage” sufficient to trigger the duty to defend under a CGL policy. Additionally, the Court held that the prompt pay provisions of sections 542.051- 542.061 of the Texas Insurance Code may be applied when an insurance company refuses to promptly pay defense benefits owed an insured.

The Texas Supreme Court also issued a significant ruling in 2008 in *One Beacon Ins. Co. v. Don’s Building Supply, Inc.*, 267 S.W.3d 20 (Tex. 2008), on certified question from the 5th Circuit, that property damage under an occurrence based CGL policy is deemed to have occurred, for purposes of triggering coverage, when actual physical damage to property occurred and the date that the physical damage is or could have been discovered is irrelevant under the policy. The Court also held that as long as the plaintiff pleads property damage during the policy period, the insurer has a duty to defend, regardless of whether the property damage was undiscoverable or not readily apparent or manifest until after the policy period.

On January 13, 2011, a federal judge of the Northern District of Texas issued an opinion addressing the “contractual liability” exclusion in a standard-form CGL policy. *See Crownover v. Mid- Continent Cas. Co.*, Civil Action No. 3:09-CV-2285 (N.D. Tex. Jan. 13, 2011) (unpublished opinion). In doing so, the federal court applied the holding in *Gilbert Texas Construction, LP v. Underwriters at Lloyds*, 327 S.W.3d 118 (Tex. 2010), finding that an arbitration award was not covered under a CGL policy because the award was based on a breach of contract claim.

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arbitration proceeding against Arrow for damages to their home arising out of the HVAC system and foundation design defects. Under a reservation of rights, Mid-Continent defended Arrow in the arbitration in which the arbitrator awarded the Crownovers over \$600,000 because the HVAC system was not “installed properly, did not perform as required, and exhibited numerous deficiencies” and “the foundation failed.” *Crownover*, slip op. at 5. Arrow never paid the arbitration award and Mid-Continent refused to do so, contending that the “contractual liability” exclusion, the “your work” exclusion and exclusions j(5) and j(6) precluded coverage.

Mid-Continent contended that the entire arbitration award was “based solely on liability Arrow assumed in its contract with Plaintiffs.” *Id.* at 10. At the outset, the federal court reviewed the *Gilbert* decision at length, noting that the Supreme Court of Texas found in *Gilbert* that “the contractual liability exclusion and its two exceptions provide that the policy does not apply to \* \* \* property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement \* \* \* except for instances in which the insured would have liability apart from the contract.” *Id.* at 11 (quoting *Gilbert*, 327 S.W.3d at 126). Moreover, the federal court noted that the Texas Supreme Court had held that the liability assumed did not have to be that “of another,” but the exclusion applied when the insured assumed liability independent of its non-contractual obligations. *Id.* (citing *Gilbert*, 327 S.W.3d at 126). Turning to the facts before it, the court in *Crownover* analyzed whether Arrow would have had liability to the Crownovers “absent its contractual undertakings.”

First, the court found that the arbitration award clearly was based on the Crownovers’ breach of contract claim against Arrow. The court rejected the Crownovers’ argument that the award was made for reasons other than the breach of contract claim and that Arrow was liable independent of the contractual liability. *Id.* at 13–14. In doing so, the federal court noted that even the Crownovers acknowledged that the arbitrator never reached their negligence and breach of implied warranty claims. Thus, Mid-Continent had satisfied its burden to prove the exclusion applied. *Id.* at 14.

## 2. *Property and Builders Risk Insurance*

Property insurance is first-party coverage that protects the insured from loss to property in which the insured has an insurable interest when the loss is caused by certain covered causes of loss or perils. Property insurance policies generally cover the building and the property inside the building. Property insurance may be either on an “all risk” basis or a “named peril” basis.

Builders risk insurance is property insurance which protects those that have an insurable interest in a building that is under construction, repair or renovation. *Republic Ins. Co. v. Hope*, 557 S.W.2d 603, 607 (Tex. App.—Waco 1977, no writ). Builders risk policies in Texas contain several standard exclusions, such as loss due to “faulty design.” *National Fire Ins. Co. v. Valero Energy Corp.*, 777 S.W.2d 501, 505 (Tex. App.—Corpus Christi 1989, writ denied). Losses under the builders risk policy are calculated based on the actual value of the building. *Thompson v. Trinity Univ. Ins. Co.*, 708 S.W.2d 45, 47 (Tex. App.—Tyler 1986, writ ref’d n.r.e.). Coverage ceases when the building is occupied, in whole or in part, or is put to its intended use.

Insurance policies may impose conditions on the insured, such as the duty to give prompt notice of a claim and the duty to cooperate with the insurer. The policy may require the insured to file a proof of loss as a condition precedent to enforcement of the policy. Many property insurance policies contain appraisal clauses that set forth the process for determining the value of the damaged property.

The content of homeowners insurance policies are regulated by the Texas Department of Insurance. The HO-A policy provides coverage on both the dwelling and contents on a “named peril” basis. The HO-B policy provides “all risk coverage” on the dwelling, and the contents on a “named peril” basis. Both policies have certain exclusions.

### 3. *Subrogation Issues.*

Last year, the Fifth Circuit decided *Maryland Casualty Co. v. Acceptance Indemnity Insurance Co.*, 639 F.3d 701 (5th Cir. 2011), finding that the fact that a common insured had been fully indemnified did not bar one insurer from recovering another insurer’s pro rata share. An insured was sued by a homeowner for which he had built a pool, who contended that the pool was designed and built inadequately, resulting in damage to and loss of use of the pool, as well as damages due to leaks from the pool. *Id.* at 703. One insurer, Maryland, agreed to defend the insured, but Acceptance, holding CGL policies for years included in the allegations, refused. Maryland ultimately settled the lawsuit on behalf of the insured and then sought reimbursement from Acceptance under theories of contribution and subrogation. Acceptance moved for summary judgment on the grounds that the holding in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W.3d 765 (Tex. 2007), barred the claims for contribution and subrogation. *Maryland Cas.*, 639 F.3d at 704.

The district court determined that Acceptance was obligated to defend Guidry and, therefore, Maryland was entitled to recover a pro rata portion of its defense costs. While the court granted Acceptance’s summary judgment as to the contribution claim, it denied summary judgment on the subrogation claim, distinguishing *Mid-Continent* on the grounds that Acceptance wholly refused to defend Guidry and Maryland and Acceptance were not co-insurers because they issued separate, consecutive policies without any overlapping coverage. On appeal, the Fifth Circuit also reviewed the holding in *Mid-Continent*, noting that the insured in that case had been fully indemnified, and Liberty Mutual did not have a contractual right to recover a pro rata portion of the settlement from at issue from Mid-Continent. *Id.* In that case, Mid-Continent and Liberty Mutual both provided a defense to their common insured, but disputed the settlement value of the case. *Id.*

In reliance upon the evolution of subrogation and contribution in these competing insurance scenarios, the Fifth Circuit found that Maryland did indeed possess a contractual subrogation claim for Acceptance’s pro rata share of the settlement. *Id.* The Court further held that *Mid-Continent* did not operate to bar Maryland’s recovery of a pro rata share of defense costs from

a co-insurer who violated its duty to defend their common insured. *Id.* (citing *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687, 694 (5th Cir. 2010) (noting that *Mid-Continent* did not address that defense costs issue)).

## B. PERFORMANCE BONDS

The performance bond terms and the contract between the obligee and principal define the duties of the surety. The Surety only guarantees what the contractor agrees to do. A claim against the surety is generally enforceable only if the claim would be enforceable against the contractor. The surety generally will cover a warranty period up to one year if such warranty is in the contract being bonded. Bonds are available to cover long-term warranties, such as roof and window warranties. The claimant must comply with the terms of the bonded contract and the bond when making a claim.

## VII. MECHANICS LIENS

Texas has one of the most complicated processes for securing lien rights and can be a “trap for the unwary” – even for those who are familiar with, and routinely work with securing lien claims. The two sources of Texas legal authority which create the right to a mechanics' and materialmen's lien are Chapter 53 *et seq.* of the Texas Property Code, as well as the Texas Constitution (only for a general contractor). Chapter 53 of the Texas Property Code also provides protections for property owners who comply with the Property Code's provisions and sets forth some potentially harsh penalties for those who make improper lien claims.

### A. ROLE ON THE PROJECT MATTERS

One of predominant reasons in Texas preventing a lien claimant from properly perfecting a mechanics' lien stems from an unfamiliarity with how the Property Code defines a particular type of contractor's “role” on a project and the correlating deadlines and notices required for each role. Although the Property Code allows a party to “substantially comply” with some of its requirements, there is no such provision for filing a lien after a statutorily imposed deadline. In Texas, there are three types of claimants:

1. An original contractor;
2. A subcontractor (“first tier subcontractor”); and
3. A sub-subcontractor (“second tier subcontractor”).

An “original contractor” is defined as a person who has a contract directly with an owner, either directly or through the owner's agent. Given this definition, there can be more than one original contractor on the project. A “subcontractor” is defined as a person who has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor to perform all or part of the work required by an original contract. As set forth below, it is critical to understand how the claimant will be classified to ensure compliance with the necessary deadlines.

## B. STATUTORY NOTICES AND NOTICE DEADLINES

In addition to the statutory requirement for timely filing a mechanics' lien affidavit, a lien claimant must also give the appropriate notices of its lien claims. These are commonly referred to as the "second" and "third" month notice requirements.

### 1. *Notice Requirements for Original Contractors.*

In Texas, an original contractor, does not have to provide any predicate notice in order to perfect its lien. Rather, an original contractor simply must:

- \* timely file a lien affidavit with the required statutory information; and
- \* timely provide the owner with a copy of the lien affidavit.

### 2. *Notice Requirements for Subcontractors and Sub-subcontractors*

A subcontractor or material supplier who has a contract with an original contractor, must give the owner written notice of an unpaid claim by the **fifteenth** (15th) day of the **third** (3rd) calendar month following each month in which labor was performed or material delivered for which the subcontractor or material supplier has not been paid. Further, the lien claimant must send this "third month" notice by certified mail, return receipt requested. A subcontractor or sub-subcontractor must calculate this deadline for each and every month for which it has delivered labor or materials to the job and has not been paid.

A sub-subcontractor, a person who does not have a contract with an original contractor, must also provide an additional "second month notice." A sub-subcontractor or material supplier must give the original contractor written notice of an unpaid claim by the **fifteenth** (15th) day of the **second** (2nd) calendar month following each month in which labor was performed or material delivered for which the subcontractor or material supplier has not been paid. This notice must also be sent by certified mail, return receipt requested. Again, sub-subcontractors and suppliers must calculate this deadline for each and every month when the claimant has delivered labor or materials to the job for which it has not been paid.

### 4. *"Trapping" the Money*

The Property Code also sets forth a "fund trapping" system whereby a claimant, who does not have a direct contract with the owner, can otherwise alert the owner that the claimant is not being paid and that past due payments are due and owing. The purpose of the statutory provision is to "trap" construction project funds in the hands of the owner. If an owner receives the applicable statutory notice within the time prescribed by statute, the owner may immediately withhold from payments to the original contractor in an amount necessary to pay the claim for which the owner receives notice. The process "freezes" funds in the hands of the

owner, as well as creates individual liability for the owner who proceeds with paying the original contractor in light of the notice that subcontractors and others are not being paid. Subcontractors include this “trapping” language in the “third month” notice, but sub-subcontractors and suppliers should include this “trapping” language in their “second month” notice.

C. DEADLINES TO FILE AFFIDAVIT CLAIMING A MECHANICS’ LIEN

1. *Lien Affidavit Deadlines for the Original contractor.*

An original contractor’s deadline to file an affidavit claiming a mechanics’ lien is: **the fifteenth day of the fourth calendar month after *indebtedness accrues for non-residential construction***. “Indebtedness accrues” for an original contractor on one of the following:

1. on the last day of the month in which a written declaration by the original contractor or the owner is received by the other party to the original contract stating that the original contract has been terminated; or
2. on the last day of the month in which the original contact has been completed, finally settled, or abandoned.

2. *Lien Affidavit Deadlines for Subcontractors & Suppliers.*

A subcontractor’s (or a sub-subcontractor) or supplier’s deadline to file a lien affidavit is: **the fifteenth day of the fourth calendar month after the last month when a subcontractor or supplier furnishes labor or materials for non-residential construction**. Additionally, a subcontractor’s (or a sub-subcontractor) or supplier’s “accrual of indebtedness” occurs on the last day of the last month in which the subcontractor (or sub-subcontractor) or supplier performed labor or provided materials.

D. CONTENTS OF THE AFFIDAVIT

The Property Code requires that the following be including in the lien affidavit:

1. a sworn statement of the amount of the claim;
2. the name and last known address of the owner or reputed owner;
3. a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested;
4. the name and last known address of the person by whom the

claimant was employed or to whom the claimant furnished the materials or labor;

5. the name and last known address of the original contractor;
6. a description, legally sufficient for identification, of the property sought to be charged with the lien;
7. the claimant's name, mailing address, and if different, physical address; and
8. for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.

The affidavit must contain substantially the above and be signed by the person claiming the lien or by another person on the claimant's behalf. A claimant may also attach to the lien affidavit, a copy of any applicable written agreement or contract and a copy of each notice sent to the owner. However, the claimant does not have to include in the affidavit individual items of work done or material furnished or specially fabricated. It is also appropriate to use any abbreviations or symbols customary in the trade. Finally, once the affidavit has been drafted, the claimant (or an authorized representative of the claimant, if it is a business entity) must sign the affidavit in the presence of a notary public, who should sign, date, verify the identity of the person signing the affidavit (if necessary), and then stamp it with the notary block or seal. This notary requirement is important as Texas law requires the affidavit to be a "subscribed and sworn" to, thus the affidavit must contain the statement "subscribed and sworn to" in the Notary Public's declaration.

#### E. MAILING THE LIEN AFFIDAVIT

Once filed, the claimant has 5 calendar days to send a copy of the lien affidavit by registered or certified mail to the owner.

#### F. THE CONSTITUTIONAL LIEN

Original contractors in Texas, as defined above, are entitled to a lien under the Texas Constitution which states: "Mechanics, artisans and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or materials furnished therefore; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

However, the lien created by the Texas Constitution is only for the benefit of original contractors and does not inure to the benefit of subcontractors or suppliers. Further, based on the language of the constitution, a lien may only exist on "buildings" and "articles." Therefore,

even if the contractor meets the terms of the article regarding a contractual relationship with the owner, the provision excludes those who perform landscaping work, underground utility lines, etc.

As opposed to the lien created under the Property Code, the constitutional lien is “self-executing.” Therefore, the lien exists, and is enforceable, without the need to file any of the previously discussed affidavits or notices. However, if the property is sold to a person who, in good faith, takes possession without notice of the constitutional lien, the original contractor will lose its right to enforce this claim.

## G. RETAINAGE AND RETAINAGE AGREEMENTS

### 1. *Notice for Statutory Retainage*

In Texas, on virtually every private construction project, an owner must retain until thirty (30) days after the project is complete, ten percent (10%) of the overall contract price for the job (or 10% of the value of the work). TEX. PROP. CODE §53.101 (Vernon Supp. 2011). The retained funds secure the payment of artisans and mechanics that perform labor or service and the payment of other persons who furnish material, material and labor, or specially fabricated material for any contractor, subcontractor, agent, or receiver in the performance of the work. TEX. PROP. CODE §53.102 (Vernon Supp. 2011). An owner who fails or refuses to comply with this mandatory retainage provision exposes themselves to risk in that claimants who comply with these provisions are entitled to a lien, at least to the extent of the amount that should have been retained from the original contract at issue, against the house, building, structure, fixture, or improvement and all of its properties and against the lot or lots of land necessarily connected. TEX. PROP. CODE §53.105 (Vernon Supp. 2011); *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720 (Tex. 2003). However, the lien claimants will only have a proportionate share to the lien on the retainage. TEX. PROP. CODE §53.104 (Vernon Supp. 2011).

### 2. *Notice for Contractual Retainage*

The retainage described above and withheld by the owner pursuant to Chapter 53 of the Texas Property Code is separate and distinct from retainage that a contractor might withhold from its subcontractors pursuant to a contract. This contractual retainage is not required by statute and is solely a creature created by contract.

Recognizing the tension created by the notice and filing deadlines for retainage provided by Chapter 53 of the Texas Property Code, the Legislature substantially revised section 53.057 to alleviate the difficulties for claimants for notice and filing of contractual retainage claims. Now, for contracts signed after September 1, 2011, the deadline for a claimant to provide notice to the owner of its claim for contractual retainage is the earlier of (1) the 30<sup>th</sup> day after the

claimant's work is completed terminated or abandoned or (2) the 30<sup>th</sup> day after the date the prime contract between the owner and contractor is terminated or abandoned. TEX. PROP. CODE §53.057 (Vernon Supp. 2011). Further, the claimant is only required to include in its notice (1) the "existence of a requirement for retainage," (2) the name and address of the claimant, (3) the name and address of the subcontractor if the claimant's agreement is with a subcontractor rather than the original contractor. *Id.*

### 3. *Filing Deadlines for Contractual and Statutory Retainage*

In addition to now moving the claimant's contractual retainage notice to the end of the project, the Texas Legislature also extended the claimant's deadline to file a lien affidavit for both statutory and contractual retainage. Generally, the old law required that a claimant file its lien affidavit no later than the 30<sup>th</sup> day following final completion, termination, or abandonment of the original contract. TEX. PROP. CODE §53.103(2). Under the new law, on a non-residential construction project, a claimant must now file its lien affidavit by the earlier of (1) the 15<sup>th</sup> day of the 4<sup>th</sup> month after the claimant's last month of work or delivery of materials to the project, (2) the 40<sup>th</sup> day after the date stated in an Affidavit of Completion for the original contract so long as the owner sends the claimant notice of the affidavit (Tex. Prop. Code §53.106), (3) the 40<sup>th</sup> day after the date of termination or abandonment of the original contract if notice of the termination or abandonment was sent by the owner (Tex. Prop. Code §53.107), or (4) the 30<sup>th</sup> day after the day the owner sends written notice to the claimant demanding that the claimant file its mechanic's lien affidavit. TEX. PROP. CODE §53.057(f), 53.103(2) (Vernon Supp. 2011).

## H. SUMMARY PROCEEDING TO DECLARE A LIEN INVALID OR UNENFORCEABLE

The Property Code provides a mechanism for obtaining a court proclamation that such a lien is, as a matter of law, invalid or unenforceable. TEX. PROP. CODE §53.160 (Vernon Supp 2011). In a suit brought to foreclose a lien or to declare a claim or lien invalid or unenforceable, a party objecting to the validity or enforceability of the claim or lien may file a motion to remove the claim or lien. *Id.* The motion must be verified and state the legal and factual basis for objecting to the validity or enforceability of the claim or lien and may be accompanied by supporting affidavits. *Id.*

The grounds for objecting to the validity or enforceability of the claim or lien for purposes of this motion are limited to the following:

1. notice of the claim was not furnished to the owner or original contractor as required;
2. an affidavit claiming a lien failed to comply with applicable sections of the Property Code;

3. notice of the filed affidavit was not furnished to the owner or original contractor as required;
4. the deadline for perfecting a lien claim for retainage under this chapter have expired and the owner complied with the retainage requirements and paid the retainage and all other funds owed to the original contractor before:
  - a. the claimant perfected the lien claim; and
  - b. the owner received a notice of the claim as required by the Property Code;
5. all funds subject to the notice of a claim to the owner and a notice regarding the retainage have been deposited in the registry of the court and the owner has no additional liability to the claimant;
6. when the lien affidavit was filed on homestead property:
  - a. no contract was executed or filed as required;
  - b. the affidavit claiming a lien failed to contain the notice as required; or
  - c. the notice of the claim failed to include the statement required; and
7. the claimant executed a valid and enforceable waiver or release of the claim or lien claimed in the affidavit.

See TEX. PROP. CODE §53.160 (Vernon Supp 2011).

At the hearing on the motion, the burden is on the claimant to prove that the notice of claim and affidavit of lien were furnished to the owner and original contractor as required by the Property Code. *Id.* The party arguing against the lien has the burden to establish that the lien should be removed for any other ground authorized by the statute. *Id.*

Due to recent amendments to Chapter 53, the Court is now required to award the prevailing party its costs and attorneys' fees in such a proceeding. TEX. PROP. CODE §53.156 (Vernon Supp. 2011).

#### I. PERIOD TO BRING SUIT TO FORECLOSE LIEN

For a non-residential construction project, suit must be brought to foreclose upon lien within two years after the last day a claimant may file the lien affidavit or within one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed, whichever is later. For a claim arising from a residential construction

project, suit must be brought to foreclose the lien within one year after the last day a claimant may file a lien affidavit or within one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed, whichever is later.

#### J. SPECIAL RULES FOR DESIGN PROFESSIONALS

The Texas Property Code also provides rights for design professionals, as opposed to traditional contractors and suppliers. Specifically, “an architect, engineer, or surveyor who prepares a plan or plat under or by virtue of a written contract with the owner or the owner's agent, trustee, or receiver in connection with the actual or proposed design construction, or repair of improvements on real property or the location of the boundaries of real property, has a lien on the property. However, one noticeable difference/requirement that design professionals have over traditional contractors is the requirement for a written contract. A design professional is not entitled to a lien if there is not a written contract with the owner or the owner’s agent. Further, the lien rights created under this provision of the Property Code take a lower priority than those filed by contractors and materialmen (i.e., date of filing as opposed to date when the work begins).

#### K. FRAUDULENT LIENS

As discussed above, there are some harsh penalties for those who would improperly use a lien to force payment where payment is not otherwise due. Although the statute was recently amended to soften the blow from some of the court decisions interpreting this statute, as discussed below, a lien claimant must still be cautious, as well as meticulous in calculating and preparing a mechanics’ and materialmens’ lien in Texas.

Chapter 12 of the Texas Civil Practice and Remedies Code, or the Fraudulent Lien Statute, was enacted in 1997 to combat persons and organizations that were filing fraudulent judgment liens and fraudulent documents purporting to create liens on personal and real property and were done for the sole purpose of harassing public officials and ordinary citizens. Now, under the Fraudulent Lien Statute, entities and persons against whom fraudulent liens or claims have been made are entitled to bring a private cause of action for civil remedies, including exemplary damages.

Under the relevant sections of the Fraudulent Lien Statute, it is clear that the provisions apply to mechanics’ and materialmens’ liens. Specifically, a “Lien” is defined as “a claim in property for the payment of a debt and includes a security interest.” Further, a person may not make, present, or use a document or other record with:

1. knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;

2. intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in the Texas Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and
3. intent to cause another person to suffer:
  - a. physical injury;
  - b. financial injury; or
  - c. mental anguish or emotional distress.

A person who violates the aforementioned provisions is liable to each injured person for:

1. the greater of \$10,000 or the actual damages caused by the violation;
2. court costs;
3. reasonable attorney's fees; and
4. exemplary damages in an amount determined by the court.

However, the Texas Legislature amended the statute to provide that: "A person claiming a lien under Chapter 53, Property Code, is not liable under this subsection for the making, presentation, or use of a document or other record in connection with the assertion of the claim unless the person acts with the intent to defraud." See TEX. CIV. PRAC. & REM. CODE §12.002(c). In the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property, the obligor or debtor, or a person who owns an interest in the real or personal may bring an action to enjoin violation of the Fraudulent Lien statute or to recover damages.

The statute indicates that document or instrument is presumed to be fraudulent if:

1. the document is a purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:
  - a. a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States; or
  - b. a purported judicial officer of a purported court or purported judicial entity described by Paragraph (A); or

2. the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and:
  - a. is not a document or instrument provided for by the constitution or laws of this state or of the United States;
  - b. is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person; or
  - c. is not an equitable, constructive, or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.

Before the statute was amended, several Texas courts used this statute to impose harsh penalties and come down hard on claimants who wrongfully file liens or assert liens for the incorrect amounts. *See Centurion Planning Corp. v. Seabrook Ventures II*, 176 S.W.3d 498 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2004, no pet); *Taylor Elec. Servs., Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522 (Tex. App.—Forth Worth 2005, no pet); *but see Walker & Assoc. Surveying, Inc. v. Roberts*, 306 S.W.3d 839 (Tex. App.—Texarkana 2010 no pet.).

When adding the new subchapter L to Chapter 53 of the Texas Property Code, the Legislature further provided that “the filing of a lien rendered unenforceable by a lien waiver under Subsection (a)(3) does not violate Section 12.002, Civil Practice and Remedies Code, unless (1) an owner or original contractor sends a written explanation of the basis for nonpayment, evidence of the contractual waiver of lien rights, and a notice of request for release of the lien to the claimant at the claimant's address stated in the lien affidavit; and (2) the lien claimant does not release the filed lien affidavit on or before the 14th day after the date the owner or the original contractor sends the items required by Subdivision (1).” TEX. PROP. CODE §53.282(b) (Vernon Supp. 2011).

Because lien affidavits falls squarely under the terms of the statute and the penalties and damages under the same can be large, a lien claimant must still pay extra attention and ensure that they have strictly complied with the terms of Chapter 53 of the Property Code.

While not as harsh as the Fraudulent Lien Statute, the Property Code also provides for certain penalties for false and/or incorrect information. The statute provides that:

A person, including a seller, commits an offense if the person intentionally, knowingly, or recklessly makes a false or misleading statement in an affidavit under this section. An offense under this section is a misdemeanor. A person adjudged guilty of an offense under this

section shall be punished by a fine not to exceed \$4,000 or confinement in jail for a term not to exceed one year or both a fine and confinement. A person may not receive community supervision for the offense.

Moreover, a person signing an affidavit under this section is personally liable for any loss or damage resulting from any false or incorrect information in the affidavit. Regardless of the enforcement provision, the message is clear, lien claimants must pay close attention to that for which they seek a lien. Further, lien claimants must pay extra special attention to the details and requirements in the foregoing Property Code provisions or face paying out money in penalties instead of collecting monies they are owed.

#### L. STATUTORILY PRESCRIBED LIEN RELEASES

In 2011, the Texas Legislature addressed what had become a contentious issue between the parties on a construction project by adding a new Subchapter L to Chapter 53 of the Texas Property Code. TEX. PROP. CODE §§53.281-.287 (Vernon Supp. 2011). For the first time, parties to a construction contract signed after January 1, 2012 must use the statutorily prescribed language in their lien release documents. *See id.* The Texas Legislature has mandated both conditional and unconditional lien releases for progress payments and final payment on a project. *Id.* Further, lien releases are unenforceable unless (1) they contain the exact statutory language in the statute and (2) the lien claimant has actually received payment in good and sufficient funds for an unconditional lien release. For the most part, no party can now require an unconditional release unless the claimant has actually collected funds for payment for its work. *See id.*

The Texas Legislature has now also prohibited parties from requiring a claimant to prospectively waive its rights to a mechanic's lien or claim on a bond. TEX. PROP. CODE §53.286 (Vernon Supp. 2011)

#### VIII. CONTINGENT PAYMENT CLAUSES

A contingent payment clause, also known as a “pay-if-paid” clause, provides that the receipt of payment from one party (i.e., the owner or another contractor) is a condition precedent to the obligation to make payment for work performed or materials furnished by another party.

In 2007, the Texas Legislature enacted section 35.521 of the Texas Business and Commerce Code as a non-waivable provision governing the application of these clauses after September 1, 2007. A few months later, the Legislature repealed section 35.521 by repealing all of chapter 35, effective April 1, 2009. To correct this faux pas, the Legislature passed Senate Bill 1969 re-codifying section 35.521 as new chapter 56, effective September 1, 2009. This error caused the following complexities in determining which statute, if any, applies in a given circumstance – if the claim arose between September 1, 2007 and April 1, 2009, it is governed by section 35.521.

If the claim arose after September 1, 2009, it is governed by new chapter 56. If the claim arose between April 1, 2009, and September 1, 2009, it is not covered by any statute. For ease of reference, citations to both pieces of legislation follow.

Contingent payment clauses are enforceable in Texas as an affirmative defense to an action for payment under a contract. TEX. BUS & COM. CODE § 35.521(q); 56.056. Importantly, this legislation does not apply to “pay-when-paid” clauses, design services, most residential construction, and certain civil engineering projects. TEX. BUS & COM. CODE § 35.521(r),(u); 56.003, 56.002.

Typically, the owner will be the “obligor” or “primary obligor;” the prime contractor will be the “contingent payor;” and a subcontractor or material supplier will be the “contingent payee.” These terms, however, are defined broadly enough to apply when any party agrees to be obligated to pay one party only “if” paid by another party. See TEX. BUS & COM. CODE § 35.521(a); 56.001.

The heart of the legislation consists of four exceptions that defeat the contingent payment clause. First, a contingent payment clause is unenforceable if nonpayment is caused by a dispute with the obligor that is not a result of a breach of contract by the contingent payee. TEX. BUS & COM. CODE § 35.521(b); 56.051. Second, if a contingent payee gives notice at least 46 days *after* a submitted but unpaid pay application, the contingent payment clause *may* become ineffective until payment is made of all amounts owed. TEX. BUS & COM. CODE § 35.521(c)-(g); 56.052. This exception does not apply if the non-payment by the obligor is caused by the contingent payee’s breach of contract, or the primary obligor successfully asserts sovereign immunity. TEX. BUS & COM. CODE § 35.521(e),(f); 56.052(c),(d).

Third, a contingent payment clause is not enforceable if the relationship between the contingent payor and the obligor (i.e., prime contractor and owner) is a “sham contract.” TEX. BUS & COM. CODE § 35.521(h); 56.053. Finally, a contingent payment clause is not enforceable if it is unconscionable. TEX. BUS & COM. CODE § 35.521(j); 56.054(a). While the legislation does not define “unconscionable,” it does define “not unconscionable.” TEX. BUS & COM. CODE § 35.521(k); 56.054(b).

A contingent payment clause is “not unconscionable” if the contingent payor is “diligent” in ascertaining the financial viability of the primary obligor, communicates the financial viability in writing to the contingent payee before the contingent payee’s contract becomes enforceable, and makes reasonable efforts to collect amounts owed or assigns his claims to the contingent payee. TEX. BUS & COM. CODE § 35.521(k); 56.054(b). What financial information is required to satisfy the “diligence” standard depends upon what type of project is the subject of the prime contract. TEX. BUS & COM. CODE § 35.521(m)-(o); 56.054(d)-(f). Importantly, if a primary obligor fails to supply the contingent payor with the required information within 30 days of a written request, the contingent payor and contingent payee are excused from performing under their contracts. TEX. BUS & COM. CODE § 35.521(p); 56.054(g).

Recently, in *Paul Morrell, Inc. v. Kellogg Brown & Root Services, Inc.*, the Fourth Circuit considered whether, under Texas law, a “pay-when-paid” clause precluded a subcontractor’s recovery for a general contractor’s fraudulent inducement of a settlement and release. No. 10-1253, 2011 WL 5438533, at \*5–6 (4th Cir. Nov. 10, 2011) (per curiam) (unpublished). In *Paul Morrell, Inc.*, a general contractor contracted with the federal government to provide logistical support, including dining facilities and food services, to American troops in Iraq. The general contractor subcontracted certain of those services to a subcontractor. The Master Agreement between the general contractor and subcontractor contained a “pay-when- paid” clause.

Concerns regarding overbilling led the governmental defense agency to investigate the invoices the general contractor submitted for payment from its subcontractors. The agency later announced that it would begin to withhold and/or recoup a portion of the total payments made to the general contractor due to a discrepancy between the invoiced meal amounts and the actual number of meals served. This caused the general contractor to withhold money from its subcontractors. The general contractor later reached a negotiated settlement with the government, in which the general contractor agreed to a \$55 million decrement from the invoice amounts it had submitted, and released the government from all claims relating to the invoices.

The general contractor did not consult with the subcontractor regarding the settlement, nor did it disclose any of the settlement details to the subcontractor. The general contractor then met with the subcontractor to resolve its outstanding invoices which had been subject to the decrement. The general contractor convinced it to accept a reduced payment on its invoiced amounts (approximately \$24 million) and to release the general contractor from any additional claim for payment.

The subcontractor later sued the general contractor for fraudulent inducement in the negotiated release. The district court found that the general contractor fraudulently induced the subcontractor to agree to the reduced payment and the release, and that the subcontractor was entitled to damages in the amount it released in the settlement. On appeal, the general contractor attacked the award of damages, arguing that the subcontractor could not have recovered any more than what it received in exchange for the release, due to the “pay-when-paid” clause in the Master Agreement. The Fourth Circuit rejected this argument, concluding that, even if the “pay-when-paid” clause was a condition precedent to the general contractor’s obligation to pay the subcontractor, and even if the condition was not satisfied by the partial payment by the government to the general contractor (both issues the Court did not decide), the “prevention doctrine” would not allow the general contractor to rely on that condition to avoid payment to the subcontractor of the amounts due. The “prevention doctrine” in Texas is an equitable principle which bars a party from relying on a condition precedent where that party’s own wrongful conduct has prevented the condition from being met.

This Legislation does not impact the enforceability or perfection of statutory mechanic’s liens.

TEX. BUS & COM. CODE § 35.521(i); 56.055.

Before moving on in this survey of significant concepts, another recent case regarding conditions precedent and lien-releases bears discussion. In *Gulf Liquids New River Project, LLC v. Gulsby Engineering, Inc.*, the Texas First Court of Appeals considered whether an all-bills-paid and lien-release provision in a construction contract was a condition precedent to general contractor's right to receive payment. — S.W.3d — , 2011 WL 662672, at \*4–7 (Tex. App.—Houston [1st Dist.] Feb. 17, 2011, no pet. h.). An owner and a general contractor had entered into two contracts for the engineering and construction of industrial cryogenic and chemical processing plants. These contracts included provisions regarding monthly evidence of payments to all subcontractors, and such provision included the use of the term “pre-requisite” for the owner's subsequent payment. During performance of the contracts, the owner discovered that the general contractor owed over \$15 million to its subcontractors, and that there were millions of dollars in liens being filed against the project. The general contractor claimed that it had not been able to pay the subcontractors because it had not been paid by the owner. Later, due to the general contractor's default, the owner formally terminated the contracts. The general contractor then sued the owner, its lender, and its insurer.

The jury returned a verdict in favor of the general contractor, and the trial court entered judgment awarding actual damages to the general contractor on its breach of contract and quantum meruit claims. On appeal, the owner argued that the above provisions of the contract created a condition precedent to payment, which the general contractor failed to fulfill. The general contractor countered that these clauses were merely *covenants* of the contract, and that another contract provision required the owner to *request evidence* of subcontractor payments before withholding its performance under the contract. The First Court of Appeals agreed with the general contractor, holding that the general contractor's obligation to provide the owner with evidence that the subcontractors had been paid was merely a *covenant* under the contract — *not* a condition precedent to performance.

## **IX. PERSONAL INJURY ACTIONS**

Construction projects offer vast financial benefits to their surrounding community; those benefits include employment opportunities, profits boost for local retailers, increased business for suppliers of heavy equipment...the list can practically go on and on. The financial impact continues well after the construction workers have hung their hard hats and gone home since that newly constructed shopping center or new factory will create jobs, profit revenues from the sale of goods and even sales tax revenues which convert into funding for new schools, public libraries and roads and highways. On the other hand, a construction project can also spawn what no individual or business wants to find themselves having to defend - the personal injury suit. And despite the measures taken to promote “safety” as the number one goal, the reality is that on-the-job injuries, unfortunately, do happen.

The key player who is always at risk of finding himself on the offensive side of a personal injury suit is, by far, the labor construction worker; a great majority of personal injury suits arising from construction projects are filed by injured construction workers. On the defensive side of the personal injury-litigation-playing field are: the premises owner or occupier, general contractor, subcontractor, architect/engineer and safety and project managers. A serious injury incurred on the construction site can trigger and set in motion the necessary events which lead to the filing of a personal injury suit against all involved parties.

By virtue of the danger and hazardous risks inherent in construction work, Texas law has developed a wide array of legal layers of protection not only for the construction worker, but also, for the workers' employer. The three main forces which have molded personal injury suits arising from Texas construction accidents are statutes, the common law and contracts.

#### A. STATUTORY IMMUNITY FROM SUIT

##### 1. *Workers' Compensation: Exclusive Remedy Doctrine*

From a statutory standpoint, in Texas, a construction worker who is injured in the course and scope of his employment and who is provided workers' compensation coverage is legally barred from suing his employer pursuant to the Exclusive Remedy Doctrine. See TEX. LAB. CODE ANN. § 408.001(a). The rationale underlying the doctrine is that since the injured employee is afforded timely compensation through workers' compensation without having to prove his employer's negligence for the injury, then the employee waives his common law remedies against his employer, his employers agents, servants and employees. See *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 142 (Tex. 2003); see also *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 207 (Tex. 2000). Thus, generally, if an injury occurs at a construction site, and the injured employee is covered by workers' compensation, then the employer cannot be sued for the injury; however, as with most rules, there exists an exception to the general rule. *Valadez v. MEMC Pasadena, Inc.*, No. 01-09-00778-CV, 2011 WL 743099, at \*3 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.); TEX. LAB. CODE ANN. § 408.001(b).

##### 2. *Deceased Employee*

The exception to the Exclusive Remedy Doctrine arises when an employee is fatally injured. In such a circumstance, the surviving spouse or children of the deceased employee can file suit against the employer and seek to recovery damages if the employer's conduct was intentional or grossly negligent. The exception does, however, limit the recovery to exemplary damages.

##### 3. *Blanket Workers' Compensation Coverage*

Worth mentioning is that a general contractor can, through implementation of a written agreement with its subcontractors, create an umbrella of workers' compensation coverage

extending to all employees working at the construction site. This is accomplished when a general contractor and the subcontractor enter into an agreement in which the general contractor provides workers' compensation insurance coverage to the subcontractor and its employees. See TEX. LAB. CODE ANN. § 406.123. By providing the insurance coverage, Texas law will then treat the general contractor as the employer of both the subcontractor and the subcontractor's employees. The immunity protections provided by the Exclusive Remedy Doctrine will then apply and equally protect the general contractor from being sued by any injured employee of the participating subcontractor. Through this same process, a general contractor can create a complete umbrella of immunity covering the entire construction project by providing insurance coverage to all of the project's subcontractors; in such a scenario, all participating employers/subcontractors become immune from suit. See *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764, 768 (Tex. App.--Houston [1st Dist.] 2004, pet. denied) (holding that the Act's "deemed employer/employee relationship extends throughout all tiers of subcontractors when the general contractor has purchased workers' compensation insurance that covers all of the workers on the site. All such participating employers/subcontractors are thus immune from suit."); see also *Brown v. Aztec Rig Equip., Inc.*, 921 S.W.2d 835, 840, 847 (Tex. App.-Houston [14th Dist.] 1996, writ denied); see also *Cherry v. Chustz*, 715 S.W.2d 742, 743-44 (Tex. App.-Dallas 1986, no writ) (holding that independent contractor could assert the exclusive remedy bar in a suit by its employee even though the company that retained the contractor paid the workers' compensation premiums).

#### 4. *Borrowed Servant Doctrine*

The Borrowed Servant Doctrine is an established legal doctrine in Texas law. See *Exxon Corp. v. Perez*, 842 S.W.2d 629,630 (Tex.1992); see also *Sparger v. Worley Hosp., Inc.*, 547 S.W.2d 582, 583-84 (Tex. 1977). The doctrine recognizes that a general employee of one employer may become the borrowed servant of another. Prior to 2003, Texas appellate courts varied as to the application of the Exclusive Remedies Doctrine to borrowed servants. See *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 146-47 (Tex. 2003). As a result, in 2003, the Texas Supreme Court held, in *Wingfoot Enters. v. Alvarado*, that there could be more than one employer for purposes of the Workers' Compensation Act and its Exclusive Remedy Doctrine.

#### 5. *Defendant is a Nonsubscriber*

In the event that a construction worker is injured and his employer is nonsubscriber to the Texas Workers' Compensation Act, then the injured employee will not be barred by the Exclusive Remedy Doctrine to assert his common law claims against his employer, and the employer will be statutorily precluded from asserting the following defenses: (1) the employee was guilty of contributory negligence; (2) the employee assumed the risk of injury or death; (3) the injury or death was caused by the negligence of a fellow employee; or (4) pre-injury waiver of liability. See TEX. LAB. CODE ANN. § 406.033(a), (e).

The employer, however, can assert as legal defenses: (1) the employee's injury was caused by an act of the employee intended to bring about the injury; (2) the employee's injury was caused while the employee was in a state of intoxication; or (3) the employee entered into an enforceable post-injury waiver. See TEX. LAB. CODE ANN. § 406.033(e), (f).

## B. COMMON LAW CAUSES OF ACTION

### 1. Legal Duties

On the other end of the spectrum, if a construction employee is injured and there is no workers' compensation insurance coverage being provided by his employer, then the construction site owner, general contractor, subcontractor, architects/engineers and safety and project managers are all potential targets, and are subject to being sued.

The evolution of Texas common law or case law has produced a long list of legal duties which any party to a construction project must comply with in order to avoid becoming liable to an injured employee. The following is not an exhaustive list, but rather, are examples of legal duties which if breached could result in exposure to a personal injury suit:

- Duty to exercise ordinary care in providing a reasonably safe workplace. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 754 (Tex. 1975).
- Duty to use ordinary care in warning employees of the hazards of employment. *Id.*
- Duty to use ordinary care in establishing rules and regulations for an employee's safety when the business is complex or hazardous, or when the dangers incident to the work are not obvious or of common knowledge. See *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d 145, 149 (Tex. App.--Houston [14th Dist.] 1999, no pet.).
- Duty to use ordinary care in furnishing reasonably safe machinery or instrumentalities. See *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712 (Tex. 1987).
- Duty to use ordinary care in supervising an employee's activities. See *Farley*, 529 S.W.2d at 754.
- Duty to use ordinary care in providing employees adequate help in performance of work. See *Matherne*, 987 S.W. 2d at 149.

### 2. Negligence

Breach of any of the aforementioned legal duties, or any other foreseeable legal duty, will open the door to an injured employee to assert a negligence cause of action against any party

involved in a construction project. The negligence cause of action is, by far, the most widely alleged common-law-tort cause of action; to succeed, the injured employee must satisfy the following elements: (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached the duty, and (3) the breach proximately caused the plaintiff's injury. *See Western Invs. v. Urena*, 162 S.W.3d 547, 550 (Tex.2005).

If negligence is the tree, then two branches emanating from that tree - that can equally be used as causes of action in a personal injury suit - are premises liability (premises defects) and negligent activities. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997)(There are two types of premises defect cases: 1] defects that exist on the premises when the business invitee entered for business purposes or that are created through some means unrelated to the activity of the injured employee or his employer, or 2] defects the independent contractor (or its injured employee) created by its work activity.); *see also Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex. 1985).

### 3. Premises Liability

Premises liability is a branch of negligence law that categorizes a construction site owner's legal duty in relation to the injured individual's purpose for having entered the site. *See Western Invs.*, 162 S.W.3d at 550; *see also Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex.1992). The underlying purpose for entering onto another's property produces three legal categories of plaintiffs: invitee, licensee, and trespasser which are defined as follows:

Invitee: Is a person who enters on another's land with the owner's knowledge and for the mutual benefit of both.

Licensee: Is a person who is privileged to enter or remain on land only by virtue of the possessor's consent; therefore, a licensee is one who enters or remains on land with permission of the landowner, but does so for his own convenience or on business for someone other than the owner.

Trespasser: Is one who enters upon the property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in the performance of any duty to the owner but merely for his own purposes, pleasure or convenience.

*See Wong v. Tenet Hospitals. Ltd.*, 181 S.W.3rd 532, 537 (Tex.App.-El Paso 2005, no pet.).

Most suits involving an injury caused by a premises defect at a construction site will involve an invitee as a plaintiff; of the three categories, the invitee is afforded the highest duty of care because most individuals - like employees, safety inspectors and delivery personnel - enter the construction site at the general contractor's invitation and for the mutual benefit of both parties. *See Olivo*, 952 S.W.2d at 527 (an employee of a subcontractor is an invitee); *see also*

*Houston v. Northwest Vill., Ltd*, 113 S.W. 3d 443, 445-46 (Tex.App.-Amarillo 2003, no pet.) (newspaper delivery persons are considered invitees); RESTATEMENT (SECOND) OF TORTS 345 cmt. c (safety inspectors who enter business premises to perform their public duties are invitees). The rule of thumb is: if an individual is invited for a mutual business reason, then she is classified as an invitee. See *McClure v. Rich*, 95 S.W.3d 620, 625 (Tex.App.-Dallas 2002, no pet.). The owner, general contractor or project manager who is in possession of the construction site owe an invitee the duty to keep the property safe, and must use reasonable care to protect the invitee from reasonably foreseeable injuries.

As to the other two categories - licensee and trespasser - a personal injury suit for these types of individuals will, generally, not be a viable legal option given that the legal standard of care owed is relatively low; these cases, thus, are much more difficult to prove. For example, the duty of care owed by an owner to a licensee is the duty not to injure the licensee through willful, wanton, or grossly negligent conduct or to make safe a dangerous condition of which the owner is aware. See *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). A owner or premises occupier will be liable to a licensee only if the owner or occupier has "actual knowledge" of the condition that injured the plaintiff. See *City of El Paso v. Zarate*, 917 S.W.2d 326, 331 (Tex. App.--El Paso 1996, no writ). Thus, from the perspective of a general contractor in possession of the construction cite which finds itself defending a premises liability action, a tantamount factor in evaluating its legal exposure is whether the plaintiff is an invitee or merely a licensee. Lastly, another significant factor regarding the differences relative to the burden of proof of an invitee and licensee is that the invitee's knowledge of the injuring causing condition is not an issue; not so for the licensee, who must prove she did not have knowledge of the condition.

The last category of plaintiff is the trespasser who is entitled to the lowest standard of care: a landowner or premises occupier owes a trespasser only the duty not to injure him willfully, wantonly, or through gross negligence. As a result of the very low standard of care afforded to trespassers, a great minority of premises liability cases involve injured trespassers; a heed of caution, however, is warranted - be weary of young children attracted to the construction cite - because a child who is injured at a construction site may be treated as an invitee under the Attractive Nuisance Doctrine.

Texas law recognizes the Attractive Nuisance Doctrine. This doctrine can subject any owner or general contractor to liability for a child's injury if the child of tender years was attracted to the construction site because of some unusually attractive nature maintained by the owner or general contractor. In this situation, Texas law treats the child not as a trespasser, but rather, as an invitee.

Recently, in *Echartea v. Calpine Corp.*, the Fourteenth Court of Appeals held that a general contractor did *not* owe a duty to warn a subcontractor's employee of an allegedly dangerous condition on the construction premises because there was no evidence that the general contractor had actual knowledge of the condition. No. 14-10-00019-CV, 2011 WL 2684889, at

\*5 (Tex. App.—Houston [14th Dist.] July 12, 2011 no pet.) (mem. op.). A general contractor was hired to construct a power plant on the owner’s property. The general contractor, in turn, contracted with a subcontractor to provide construction services on the project. One evening, an employee of the subcontractor fell into a hole or rut on the project site and injured his ankle. The employee sued the owner and the general contractor for negligence and premises liability. Both the owner and the general contractor moved for summary judgment, which the trial court granted.

The Fourteenth Court of Appeals affirmed the trial court’s grant of summary judgment, holding that the general contractor did *not* owe a duty to warn the subcontractor’s employee of the allegedly dangerous condition. Chapter 95 of the CPRC “applies equally” to claims against a general contractor or a subcontractor; thus, under Section 95.003, a general contractor is *not* liable for personal injury, death, or property damage to a subcontractor’s employee unless it (1) exercises or retains some control over the manner in which the work is to be performed; *and* (2) had actual knowledge of the danger or condition resulting in the personal injury, and failed to adequately warn. The requisite control may be a contractual right of control, or an exercise of actual control; if contractual, the control must be more than a “general right,” and must extend to the “operative detail” of the contractor’s work. Further, *actual* knowledge of the allegedly dangerous condition is required; constructive knowledge is insufficient.

Although a provision of the subcontract stated that the general contractor “will provide overall site coordination and make assignments and decisions that best effect overall safety and overall progress of the project,” the Court concluded that this provision demonstrated a right of control that was “merely general in nature” and therefore insufficient to raise a fact issue, in light of case law establishing that a general contractor “does not owe the independent contractor’s employee a duty to ensure that the employee does nothing unsafe” when it requires the independent contractor to follow its safety rules and regulations. Instead, the general contractor “assumes only a narrow duty to ensure that its rules or requirements do not unreasonably increase the probability and severity of injury.”

#### 4. *Negligent Activities*

Another cause of action - which can arise from a construction project injury - based in the law of negligence is the cause of negligent activity. The theory of negligent activity requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity. For example, a subcontractor who is operating a tractor at a construction site accidentally crushes the left index finger of a plumbing subcontractor’s employee; such a series of events would give rise to a negligent activity cause of action since the injury was caused by the operation of the tractor itself. In the case of *Redinger v. Living, Inc.*, such an injury actually took place.

### C. LEGAL DEFENSES

## 1. *Independent Contractor Defense*

In *Redinger v. Living, Inc.*, the injured employee, Louis Redinger, filed suit against the general contractor, Living, Inc., and Bobby Baird, an independent contractor, for damages resulting from an injury to Redinger's hand. Though Redinger was awarded compensation by a jury at the trial court level, on appeal, the court of appeals remanded the case for a new trial because of jury misconduct. On writ of error to the Texas Supreme Court, the court took notice of the general rule that an owner or occupier does not have a duty to see that an independent contractor performs work in a safe manner. In deciding the case, however, the court adopted §414, Restatement of Torts (1977) which provides:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The court noted that Living, Inc.'s superintendent was preparing the construction site for a subcontractor to pour concrete; however, as the concrete trucks arrived, piles of dirt, which were placed by Baird, were blocking the truck's route to the work area. As a result, the superintendent ordered Baird to remove the dirt to another location. As Baird was operating the back-hoe, he crushed Redinger's index finger.

The court found that Living, Inc. - through Yargo - exercised supervisory control by coordinating both the work of Baird and of the concrete pour trucks; thus, Living, Inc., "retained the power to direct the order in which the work was to be done and to forbid the work being done in a dangerous manner." As such, Living, Inc., owed a duty to Redinger to exercise reasonable care, but since Yargo allowed Baird to operate his back-hoe in such a close proximity to Redinger, and failed to warn him, there was sufficient evidence to support the jury finding that Living, Inc., negligently exercised its control.

*Redinger* is illustrative of a failed attempt, on the part of a general contractor, to defend allegations of negligence with the independent contractor defense; regardless, other contractors have succeeded in utilizing such a defense. Specifically, in *Dow Chem. Co. v. Bright*, Dow Chemical Company was sued by Larry Bright the employee of an independent contractor, Gulf States, Inc, for injuries received at a construction site in Freeport, Texas. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602 (Tex. 2002). As Bright was working with plywood, he was injured by a falling pipe. Bright, in his suit, alleged that Dow retained contractual and actual control of the premises, and as such, had a duty to exercise reasonable care to keep the premises in a safe condition. Dow argued that Gulf States was an independent contractor and that it had no duty to protect Gulf States's employees from hazards arising from the work Gulf States was hired to perform. Although Dow prevailed at the trial court level, the appeals court reversed concluding that a fact issue existed regarding the supervisory control retained by Dow; as a result, Dow filed a petition for review to the Texas Supreme Court.

In reviewing the case, the Supreme Court noted that Bright's injury involved a premise defect created by Gulf States's work at the site; the court cited *Redinger* for the general rule that "an owner or occupier does not have a duty to see that an independent contractor performs work in a safe manner....However, when the general contractor exercises some control over a subcontractor's work he may be liable unless he exercises reasonable care in supervising the subcontractor's activity." In determining whether Dow owed a duty to Bright, the Court looked to Dow's contractual or actual control of the premises.

As to Dow's contractual control, the court found that Dow did not retain such control since the construction agreement clearly treated Gulf States as an independent contractor who assumed all such liabilities; it also expressly provided that Gulf States would follow Dow's desire in the results of the work only. The court, therefore, found that the construction agreement simply did not allocate the right of control for Bright's work to Dow.

Further, as to Dow's retention of actual control over Gulf States' work, Bright's entire argument relied on the mere existence of safety regulations - for example: the right to stop work because of a safety hazard, refusal to issue safe work permits and issuing a safety procedure manual - but as the Court held in *Koch Refining Co. v. Chap*: "mere promulgation of safety policies does not establish actual control." *Koch Refining Co. v. Chap*, 11 S.W.3d 153, 156 (Tex.1999); *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357-58 (Tex. 1998). In conclusion, the Court held there was no evidence of the extent of contractual or actual control retained by Dow, and rendered judgment that Bright take nothing. *See Bright*, 89 S.W.3d at 611.

As shown by *Redinger* and *Bright*, the independent contractor defense is a widely used common law defense available to premises owners and general contractors. There does exist, however, another defense originating not from the common law, but rather, as a product of the Texas legislature.

## 2. Chapter 95, Texas Civil Practice & Remedies Code

The legislature's motivation for passing Chapter 95 was its concern that property owners usually hire contractors to build or renovate real property, but in the process, property owners would sometimes find themselves being sued by a contractor's employee for injuries incurred on their own property. *See Dyll v. Simpson Pasadena Paper Company*, 152 S.W.3d 688, 699 (Tex. Civ. App.--Houston [14th Dist.] 2004, pet. denied). The legislature recognized the desire of property owners to hire a contractor with expertise especially in situations where the work itself is dangerous, or the work remedies a hazardous condition. As a result, in 1996 the legislature adopted Chapter 95 which provides:

A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property,

including personal injury death, or property damage arising from the failure to provide a safe workplace unless:

1. The property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
2. The property owner had actual knowledge of the danger or condition resulting in the personal injury or death, or property damage and failed to adequately warn. See TEX. CIV. PRAC. & REM. CODE ANN. § 95.003.

The first prong of the exception is a codification of the common law's independent contractor defense as adopted by the Supreme Court in *Redinger v. Living, Inc.*; however, Chapter 95 goes much further in protecting business and commercial property owners since before liability can attach, the claimant must not only show that the property owner retained control over the work, but also, that the owner had actual knowledge of the injury causing condition. See TEX. CIV. PRAC. & REM. CODE ANN. § 95.003. In comparing Ch. 95 to the common law independent contractor defense, Ch. 95 offers a more rigorous legal defense mainly because of the "actual knowledge" element contained by the second prong of the exception. A plaintiff's standard of proof, therefore, is significantly higher when prosecuting a negligence claim against a premises owner who is able to invoke the statutory immunity afforded by Chapter 95 of the Texas Civil Practice and Remedies Code.

## **X. CONCLUSION**

Construction law in Texas continues to evolve - major changes to Texas law seem to be made every time the legislature meets. There are numerous pitfalls that can derail the prosecution or defense of a construction defect case. The key to handling one of these cases in Texas is proper pre-litigation investigation and preparation by the plaintiff, and consideration by the defendant of whether all conditions precedent have been performed, the proper forum as well as proper notification of the carrier and surety (if applicable).

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