

**COMPENDIUM OF TEXAS CONSTRUCTION LAW  
CONSTRUCTION DEFECT LITIGATION, MECHANICS & MATERIALMEN'S LIENS  
& PERSONAL INJURY LITIGATION ARISING OUT OF CONSTRUCTION**

**I. INTRODUCTION**

Construction defect litigation in Texas starts with a consideration of the type of project (residential or non-residential), and a thorough investigation of the cause of the defect. An analysis of the case must be undertaken prior to engaging whatever dispute resolution process may apply.

Since the creation of the Texas Residential Construction Commission ("TRCC"), construction defect litigation for residential projects takes a different path and must be distinguished from defect litigation involving non-residential construction projects. Texas has established an administrative procedure to investigate and attempt to resolve defective work claims on residential projects. The Sunset Commission has recommended that the TRCC be abolished. Additionally, a bill has been introduced in the Texas legislature to abolish the TRCC. But for now, the TRCC still exists.

Non-residential construction defect claims follow the procedure set forth in the contract, if any. If the parties are not in privity, the plaintiff may bring suit in tort for property damages. Beware that if economic damages are sought from a party where there is no privity, then the claim may be barred by the economic loss doctrine.

This compendium will first address construction defect litigation on residential projects, then the pre-litigation considerations applicable to all projects will be summarized. Next, various causes of action and defenses commonly pled in construction defect cases will be discussed. Additionally, insurance and surety issues will be reviewed. The compendium also contains a section on the effort in Texas to limit contingent payment clauses in contracts, which can come into play in defect litigation. Also, the compendium includes a summary of Texas lien law. Finally, this year, a new section on personal injury litigation arising out of construction has been added.

Please note that the law applicable to construction litigation in Texas, particularly insurance coverage issues, is continuing to evolve. Although this compendium attempts to capture the latest cases, statutes and trends, 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**

Residential construction defect claims are governed by the Texas Residential Construction Commission Act ("TRCCA") and the Residential Construction Liability Act ("RCLA"). The TRCCA applies to single family homes, including townhouses and duplexes.

The RCLA applies to single family homes, duplexes, triplexes, quadruplexes, condominium units and units in cooperative systems.

The RCLA was enacted by the Texas Legislature in 1989 to remedy a perceived crisis at the time of irrational judgments in residential construction defect disputes by providing a framework for their timely and efficient resolution. As such, the RCLA provides specific procedures governing notice, inspection and settlement of claims. The RCLA has been amended numerous times since its enactment to respond to evolving case law and, most recently, to interrelate with the TRCCA (which was enacted by the legislature in 2003).

The TRCCA modified the framework originally created by the RCLA by providing an administrative starting point for disputes involving certain alleged residential construction defects. To that end, the TRCCA created the Texas Residential Construction Commission (the "Commission") and initiated the State-Sponsored Inspection and Dispute Resolution Process ("SIRP"), an administrative process designed to encourage the settlement of claims before they progress to the courthouse or arbitration.

While the RCLA and the TRCCA both govern residential "construction defects," the definition of that term is slightly different under the respective statutes. The similarity of the definitions of "construction defect" under the statutes dictates that many defect claims will be governed by both the RCLA and the TRCCA. While the differences in the respective definitions of the term "construction defect" under the RCLA and the TRCCA are minor, they are important. The RCLA applies to claims that arise out of a "construction defect," defined as any "matter concerning the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor." "The term may include any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect."

The definition of "construction defect" under the TRCCA is not quite as expansive as it is under the RCLA, as the TRCCA applies to claims that arise out of: "(1) the failure of the design construction, or repair of a home, an alteration of or a repair, addition, or improvement to an existing home, or an appurtenance to a home to meet the applicable warranty and building performance standards during the applicable warranty period, and (2) any physical damage to the home, or real property on which the home or appurtenance is affixed that is proximately caused by that failure."

Since its creation under the TRCCA, the Commission has adopted various rules, including rules governing the SIRP. The SIRP is mandatory for all claims arising from defects discovered on or after September 1, 2003. The homeowner must exhaust the SIRP before seeking litigation or arbitration relief of any kind on those claims. If the homeowner fails to exhaust the SIRP, the contractor may have the action or arbitration abated until the homeowner does so. However, as a prerequisite to the SIRP, the homeowner must provide the contractor with written notice of alleged construction defects at least 30 days before requesting the SIRP.

Once the homeowner provides its notice of defects to the builder, he or she must provide the builder and/or the builder's designated consultants with a reasonable opportunity to inspect

the home. This right to inspect on the part of the builder continues, on the builder's written request, until the conclusion of the SIRP.

After a SIRP request is made, the Commission appoints a third-party inspector, who issues a report with recommendations addressing the alleged defects. Either party may appeal the inspector's recommendations to the Commission. However, after the inspection, there is a rebuttable presumption as to the existence or nonexistence of a defect or the reasonable manner of repair.

The RCLA and the TRCCA provide hefty incentives for the parties to settle their dispute. For example, if the contractor makes an unreasonable offer to settle claims governed by the SIRP and/or the RCLA, or the contractor "refuses to initiate repairs under the accepted offer," the contractor is exposed to greater liability in the sense that the limitations on damages recoverable under the RCLA do not apply. On the other hand, if a claimant rejects a reasonable offer made by the contractor to settle claims governed by the RCLA, or if a claimant does not permit the contractor or an independent contractor a reasonable opportunity to inspect or repair the defect pursuant to an accepted offer, the claimant: (1) may not recover an amount in excess of the fair market value of the contractor's last settlement offer or the amount of a reasonable monetary settlement or purchase offer; and (2) may recover only the amount of reasonable and necessary costs and attorney's fees incurred before the offer was rejected or considered rejected.

### **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 "Certificate of Merit" with the complaint against a design professional. The Certificate of Merit is an affidavit of a third-party registered architect, engineer, or land surveyor competent to testify and practice in the same area as the defendant. The certificate of merit must specifically set forth at least one negligent act, error, or omission claimed to exist and the factual basis for such claim. TEX. CIV. PRAC. & REM. CODE ANN. § 150.002. Therefore, the practitioner must retain an expert to evaluate claims against a design professional prior to litigation.

### C. WARRANTY ISSUES

Prior to litigation, counsel should determine if an express warranty applies to the defect. If so, the notice provisions of the warranty should be followed. On a residential project, there may be a third-party warranty company approved by the TRCC that has provided an express homeowners warranty. The terms of such warranty may govern the handling of a claim after discovery of a construction defect.

### D. INSURANCE AND PERFORMANCE BOND ISSUES

Counsel should determine the potential insurance coverage available and the type of policy involved. The owner's property damage policy, the contractor's builder's risk and/or general liability policy, and the design professional's liability policy should be reviewed. Additionally, counsel should attempt to confirm additional insured status. Compliance with notice provisions is important to preserving a claimant's rights.

If there is a performance bond, and the project is within the warranty period covered by the bond, counsel must ensure that a claim is perfected against the surety.

## **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 (be it damages or equitable relief), but for the sake of brevity this will serve as general outline of the most common causes of actions in construction cases:

### 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.

*West v. Triple B Servs., LLP*, 264 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2008, no pet.)(elements 1, 3-5); *Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 862 (Tex.App. – San Antonio 2003, no pet.)(element 2).

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.

### 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. *Glockzin v. Rhea*, 70 S.W.2d 665, 669 (Tex. App.—Houston [1st Dist.] 1988, writ denied). A warranty is an independent promise apart from the contractual obligations of the lease or sale contract. *Id.* 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 – 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 – 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. For residential projects commenced after June 1, 2005, the TRCCA warranties and standards apply. Projects commenced prior to June 1, 2005 are subject to the common law implied warranty of good and workmanlike performance and implied warranty of habitability. The TRCCA warranties and standards are referenced in Sections 401.002(6), 408.001(2), and 430.001 of the Texas Property Code and in Sections 301.1(12), (20), and (25) of the Texas Administrative Code.

Common defenses are limitations, disclaimer, proportionate responsibility, lack of notice, no opportunity to cure, limitation of damages, failure to mitigate, TRCCA 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. NEGLIGENT 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, plaintiff's conduct, standing, exemptions, claim not available under the DTPA, response to settlement demand, reliance on information from other sources, "as is" contract, waiver, down stream 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 Chapters 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. TEX. CIV. PRAC. & REM. CODE § 32.003(a). If a co-defendant is insolvent, the party may recover from each insolvent co-defendant an amount determined by dividing the number of solvent defendants into the total amount of judgment. TEX. CIV. PRAC. & REM. CODE § 32.003(b). Chapter 33 addresses proportionate responsibility of co-defendants based on a percentage of responsibility as determined by the trier of fact, including settling defendants.

Common law indemnity is limited to situations where (i) liability is vicarious or (ii) claims are made by innocent retailers in products liability cases. *Equitable Recovery L.P. v. Health Ins. Brokers of Texas, LP*, 235 S.W. 3d 376 (Tex. App.—Dallas 2007, pet. dism'd.

## I. TEXAS LEGISLATURE'S PROPOSED ANTI-INDEMNITY LEGISLATION

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, according to some lawmakers, makes subcontractors the "insurers" of the entire project, placing the subcontracting company and its insurance carrier at risk for the negligent acts of those entities above them.

To purportedly remedy what it feels is an unfair allocation of liability, the 81<sup>st</sup> Texas Legislature has proposed Senate Bill 555 (and its companion, House Bill 818) which would make each party to a construction contract liable for its own negligence and prohibits transferring liability by contract or other means in actions involving property damage. For "construction contracts" falling within the legislature's definition, the proposed statute would render void and unenforceable any indemnity agreement, which requires the indemnitor to indemnify another

party to the construction contract, or a third party, against a claim, to the extent that the claim is caused by the conduct of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor, its agent, employee, or subcontractor of any tier. The proposed statute would also nullify (a) any requirement in a construction contract that requires a party to purchase additional insured coverage and (b) any additional insured coverage in an insurance policy.

The Senate passed the bill to the House on a 30 to 1 vote. At the time of this writing the bill is out of the House committee and was read once in the House.

## **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).

#### **(a) 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.

#### **(b) 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.

## **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 5<sup>th</sup> 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.

#### 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.

## 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 construction 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:

1. timely file a lien affidavit with the required statutory information; and
2. 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** (15<sup>th</sup>) day of the **third** (3<sup>rd</sup>) 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** (15<sup>th</sup>) day of the **second** (2<sup>nd</sup>) 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.

### 3. “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 an 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**

In Texas, on virtually every private construction project in Texas, 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). 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. 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. However, the lien claimants will only have a proportionate share to the lien on the retainage.

A claimant has a lien on retained funds if the claimant:

1. sends the required notices (fund-trapping and lien) under Chapter 53 (described above); and
2. files an affidavit claiming the lien not later than the thirtieth (30<sup>th</sup>) day after the earlier of:
  - a. the work is completed;
  - b. the original contract is terminated; or
  - c. the original contractor abandons performance under the original contract.

If the claimant does not have a contract directly with the owner of the project but does have a contractual agreement that retainage will be withheld from progress payments, the claimant can avoid having to file monthly fund-trapping notices to the owner (and upstream contractor) by sending a notice of a retainage agreement to the owner. This notice of the retainage agreement

must be sent to the owner on or before the fifteenth day of the second month following the date when the claimant begins its performance on the job. Regardless of what happens on a project, a subcontractor or any lower-tier claimant should keep a close eye on the project to be sure to file a lien for the retained funds before thirty (30) days have passed after completion of the work. This thirty-day period is when retained funds must be withheld to satisfy (in whole or in part) any remaining claimants who step forward.

Further, the Property Code allows for a certain type of notice to eliminate the need for further retainage notices. Specifically, under an agreement with an original contractor or a subcontractor providing for retainage, a claimant may give notice to the owner or reputed owner of the retainage agreement not later than the 15th day of the second month following the delivery of materials or the performance of labor by the claimant that first occurs after the claimant has agreed to the contractual retainage. If the agreement is with a subcontractor, the claimant must also give notice within that time to the original contractor. The notice must contain:

1. the sum to be retained;
2. the due date or dates, if known; and
3. a general indication of the nature of the agreement.

This retainage notice must be sent by registered or certified mail to the last known business or residence address of the owner or reputed owner or the original contractor, as applicable. If a claimant gives this retainage notice, the claimant is not required to give any other notice as to the retainage. Although a claimant who gives this retainage notice is not otherwise required to provide any other notices for retainage, the owner is not otherwise authorized to withhold any additional funds as it would be without a fund trapping notice. This retainage notice also does not authorize an owner to retain the retainage funds longer than the thirty (30) days past completion of the project/contract.

#### **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. 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. 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.

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 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 the perfection of a claim against the statutory 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.

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. 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. A prevailing party is entitled to recover its costs and attorneys' fees in such a proceeding.

#### **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. Thus, as discussed below, a lien claimant must 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.

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 property 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.

Several Texas courts have 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). 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 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.

### **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 in May of this year re-codifying section 35.521 as new chapter 56, effective September 1, 2009. What all of this means is that if the claim arises between September 1, 2007 and April 1, 2009, it is governed by section 35.521. If the claim arises after September 1, 2009, it will be governed by new chapter 56. If the claim arises between April 1, 2009, and September 1, 2009, it will not be 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).

This Legislation does not impact the enforceability or perfection of statutory mechanic's liens. TEX. BUS & COM. CODE § 35.521(i); 56.055.

## **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.<sup>1</sup> This paper will focus on issues related to causes of action asserted by injured construction workers, and the most common legal defenses utilized by those who are sued.

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.<sup>2</sup> 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.<sup>3</sup> 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.

##### 2. Deceased Employee

The exception to the Exclusive Remedy Doctrine arises when an employee is fatally injured.<sup>4</sup> 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

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<sup>1</sup> There are others, however, who could also be injured at a construction site such as safety inspectors, delivery personnel and even unwanted trespassers.

<sup>2</sup> See TEX. LAB. CODE ANN. § 408.001(a).

<sup>3</sup> 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).

<sup>4</sup> See TEX. LAB. CODE ANN. § 408.001(b).

intentional or grossly negligent.<sup>5</sup> The exception does, however, limit the recovery to exemplary damages.<sup>6</sup>

### 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

### 4. Borrowed Servant Doctrine

The Borrowed Servant Doctrine is an established legal doctrine in Texas law.<sup>11</sup> The doctrine recognizes that a general employee of one employer may become the borrowed servant

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<sup>5</sup> *See Id.*

<sup>6</sup> *See Id.*

<sup>7</sup> *See* TEX. LAB. CODE ANN. § 406.123.

<sup>8</sup> *See Id.*

<sup>9</sup> *See Id.*

<sup>10</sup> *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 sub- contractors 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).

<sup>11</sup> *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).

of another.<sup>12</sup> Prior to 2003, Texas appellate courts varied as to the application of the Exclusive Remedies Doctrine to borrowed servants.<sup>13</sup> 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.<sup>14</sup>

#### 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.<sup>15</sup>

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.<sup>16</sup>

### 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.<sup>17</sup>

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<sup>12</sup> *See Id.*

<sup>13</sup> *See Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 146-47 (Tex. 2003).

<sup>14</sup> *See Id.* at 134-35.

<sup>15</sup> *See* TEX. LAB. CODE ANN. § 406.033(a), (e).

<sup>16</sup> *See* TEX. LAB. CODE ANN. § 406.033(e), (f).

<sup>17</sup> *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.<sup>18</sup>
- Duty to use ordinary care in establishing rules and regulations for an employees safety when the business is complex or hazardous, or when the dangers incident to the work are not obvious or of common knowledge.<sup>19</sup>
- Duty to use ordinary care in furnishing reasonably safe machinery or instrumentalities.<sup>20</sup>
- Duty to use ordinary care in supervising an employee's activities.<sup>21</sup>
- Duty to use ordinary care in providing employees adequate help in performance of work.<sup>22</sup>

## 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.<sup>23</sup>

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.<sup>24</sup>

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<sup>18</sup> *See Id.*

<sup>19</sup> *See Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d 145, 149 (Tex. App.--Houston [14th Dist.] 1999, no pet.)

<sup>20</sup> *See Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712 (Tex. 1987).

<sup>21</sup> *See Farley*, 529 S.W.2d at 754.

<sup>22</sup> *See Matherne*, 987 S.W. 2d at 149.

<sup>23</sup> *See Western Invs. v. Urena*, 162 S.W.3d 547, 550 (Tex.2005).

<sup>24</sup> *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.<sup>25</sup> The underlying purpose for entering onto another's property produces three legal categories of plaintiffs: invitee, licensee, and trespasser which are defined as follows<sup>26</sup>:

Invitee: Is a person who enters on another's land with the owner's knowledge and for the mutual benefit of both.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup> The rule of thumb is: if an individual is invited for a mutual business reason, then she is classified as an invitee.<sup>31</sup> The owner, general contractor or project manager who is in

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<sup>25</sup> See *Western Invs.*, 162 S.W.3d at 550; see also *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex.1992).

<sup>26</sup> See *Id.*

<sup>27</sup> See *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex.1975).

<sup>28</sup> See *Allen v. Albright*, 43 S.W.3d 643, 646 (Tex.App.-Texarkana 2001, no pet.).

<sup>29</sup> See *Wong v. Tenet Hospitals. Ltd.*, 181 S.W.3rd 532, 537 (Tex.App.-El Paso 2005, no pet.).

<sup>30</sup> 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.)(news paper delivery persons are considered invitees); Restatement (2d) of Torts 345 cmt. c (safety inspectors who enter business premises to perform their public duties are invitees).

<sup>31</sup> See *McClure v. Rich*, 95 S.W.3d 620, 625 (Tex.App.-Dallas 2002, no pet.).

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.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> Thus, from the perspective of a general contractor in possession of the construction site 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<sup>35</sup>; not so for the licensee, who must prove she did not have knowledge of the condition.<sup>36</sup> Examples of licensees are the following:

- A property owner’s friends or family are generally treated as licensees.<sup>37</sup>
- Boyfriend of property owners' daughter invited to property and helped cut down tree for New Year's bonfire.<sup>38</sup>
- Minor child invited to property to attend birthday party.<sup>39</sup>
- Adult invited to friend’s house for lunch and swim.<sup>40</sup>
- Brother-in-law of ranch’s foreman injured during visit to ranch.<sup>41</sup>

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<sup>32</sup> See *Rosas*, 518 S.W.2d at 537.

<sup>33</sup> See *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

<sup>34</sup> See *City of El Paso v. Zarate*, 917 S.W.2d 326, 331 (Tex. App.--El Paso 1996, no writ).

<sup>35</sup> See *Payne*, 838 S.W.2d at 237.

<sup>36</sup> See *Id.*

<sup>37</sup> See *Knorpp v. Hale*, 981 S.W.2d 469, 472 (Tex. App.-Texarkana 1998, no pet.); see also *Dominguez v. Garcia*, 746 S.W.2d 865, 866-67 (Tex. App.-San Antonio 1988, writ denied).

<sup>38</sup> See *Knorpp*, 981 S.W.2d at 471-72.

<sup>39</sup> See *Dominguez*, 746 S.W.2d at 866.

<sup>40</sup> See *Buchholz v. Steitz*, 463 S.W.2d 451, 452 (Tex. Civ. App.-Dallas 1971, writ ref'd n.r.e.).

- An off-duty employee is a licensee.<sup>42</sup>

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.<sup>43</sup> 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 wary of young children attracted to the construction site - because a child who is injured at a construction site may be treated as an invitee under the Attractive Nuisance Doctrine.<sup>44</sup>

Texas law recognizes the Attractive Nuisance Doctrine.<sup>45</sup> 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.<sup>46</sup> In this situation, Texas law treats the child not as a trespasser, but rather, as an invitee.<sup>47</sup>

#### 4. Negligent Activities

The second cause of action - which can arise from a construction project injury - based in the law of negligence is the cause of negligent activity.<sup>48</sup> 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.<sup>49</sup> 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

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<sup>41</sup> See *Crum v. Stasney*, 404 S.W.2d 72, 73-74, 75 (Tex. Civ. App.-Eastland 1966, no writ).

<sup>42</sup> See *Peerenboom v. HSP Foods, Inc.*, 910 S.W.2d 156, 163 (Tex.App.-Waco 1995, no writ).

<sup>43</sup> See *Weaver v. KFC Management, Inc.*, 750 S.W.2d 24, 26 (Tex. App.--Dallas 1988, writ denied).

<sup>44</sup> See *Texas Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex.1997).

<sup>45</sup> See *Id.*

<sup>46</sup> See *Id.*

<sup>47</sup> See *Id.*

<sup>48</sup> See *Redinger*, 689 S.W.2d at 417; see also *Olivo*, 952 S.W.2d at 527.

<sup>49</sup> See *Keetch*, 845 S.W.2d at 264; see also *Redinger*, 689 S.W.2d at 417.

action since the injury was caused by the operation of the tractor itself.<sup>50</sup> In the case of *Redinger v. Living, Inc.*, such an injury actually took place.<sup>51</sup>

## 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

The court noted that David Yargo, who was 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.<sup>56</sup> As a result, Yargo ordered Baird to remove the dirt to another location.<sup>57</sup> Redinger and other workers were approximately one to five feet from the area where Baird was operating his back-hoe.<sup>58</sup> As Baird was operating the back-hoe, he crushed Redinger's index finger.<sup>59</sup>

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<sup>50</sup> See *Redinger*, 689 S.W.2d at 417.

<sup>51</sup> See *Id.*

<sup>52</sup> See *Id.*

<sup>53</sup> See *Id.*

<sup>54</sup> See *Redinger*, 689 S.W.2d at 418.

<sup>55</sup> See *Id.*

<sup>56</sup> See *Redinger*, 689 S.W.2d at 417.

<sup>57</sup> See *Id.*

<sup>58</sup> See *Redinger*, 689 S.W.2d at 418.

<sup>59</sup> See *Redinger*, 689 S.W.2d at 417.

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.”<sup>60</sup> 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.<sup>61</sup>

*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*,<sup>62</sup> 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.<sup>63</sup> As Bright was working with plywood, he was injured by a falling pipe.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

In reviewing the case, the Supreme Court noted that Bright’s injury involved a premise defect created by Gulf States’s work at the cite; 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

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<sup>60</sup> See *Redinger*, 689 S.W.2d at 418.

<sup>61</sup> See *Id.*

<sup>62</sup> See *Dow Chem. Co. v. Bright*, 89 S.W.3d 602 (Tex. 2002).

<sup>63</sup> See *Id.* at 605.

<sup>64</sup> See *Id.*

<sup>65</sup> See *Id.*

<sup>66</sup> See *Id.*

<sup>67</sup> See *Id.*

subcontractor's activity.”<sup>68</sup> In determining whether Dow owed a duty to Bright, the Court looked to Dow's contractual or actual control of the premises.<sup>69</sup>

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.<sup>70</sup> The court, therefore, found that the construction agreement simply did not allocate the right of control for Bright's work to Dow.<sup>71</sup>

Further, as to Dow's retention of actual control over Gulf States's 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 *Kock Refining Co. v. Chapa*: “mere promulgation of safety policies does not establish actual control.”<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> 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

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<sup>68</sup> *See Id.* at 606.

<sup>69</sup> *See Id.*

<sup>70</sup> *See Id.* at 607.

<sup>71</sup> *See Id.*

<sup>72</sup> *Kock 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).

<sup>73</sup> *See Bright*, 89 S.W.3d at 611.

<sup>74</sup> *See Dyall v. Simpson Pasadena Paper Company*, 152 S.W.3d 688, 699 (Tex. Civ. App.--Houston [14th Dist.] 2004, pet. denied).

remedies a hazardous condition.<sup>75</sup> 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.<sup>76</sup>

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.*<sup>77</sup>; 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.<sup>78</sup> 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.<sup>79</sup> 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

When it comes to construction, Texas law can be rather quirky. Additionally, 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

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<sup>75</sup> *See Id.*

<sup>76</sup> *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.003.

<sup>77</sup> *See Redinger*, 689 S.W.2d at 418.

<sup>78</sup> *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.003.

<sup>79</sup> *See Id.*

performed, the proper forum as well as proper notification of the carrier and surety (if applicable).

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