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Texas Construction Project Litigation Issues: What Your Momma Did Not Tell You About Litigation in Texas

1. Growth of Texas construction defect claims and the impact upon claims handling

Texas continues to experience a steady rise in the number of construction defect cases and job site injury cases. Insurers, design professionals, contractors, and attorneys attempt to maneuver through the morass of evolving law. The Texas Anti-Indemnity Statute, the Residential Construction Liability Act, and Texas' lack of formal employment relationships consistently lead to confusion amongst litigants and insurers as to the scope of the party's duties when defect or injury litigation arises. The effect of the confusion is that the issues and law are often misunderstood or improperly applied by all sides, impeding efforts at resolution and creating the potentiality of adverse outcomes and bad law. Further complicating issues, insurers lack guidance from higher courts on the breadth of the duty to defend and duty to indemnify, while at the same time face new cases which serve to interpret, yet often question, previous understanding of the scope of policy language. The intermediate courts consistently take divergent positions on the availability of coverage for both construction defect and injury claims, making consistency in the success of arguments volatile. Manuscript endorsements and unique forms serve to significantly modify coverage under policies and pose the risk of potential peril for any insureds.

2. Liability issues arising from Texas construction defect claims

a. Contractual indemnity and the separate paths to risk transfer

Contractual indemnity

Contractual indemnity is one of the most significant methods of risk transfer utilized in construction contracts. Whether the client or insured is up or downstream, evaluating the indemnity provisions of the contract at issue is key to determining whether there will be an option to either transfer or at least share the risk if the contractor is upstream, or if the insured is downstream, whether the client will have increased exposure.

Tenders of the insured's defense and indemnity under the contract are typically the initial step to triggering a downstream contractor's obligation to share in the risk. However, with the onset of the Texas Anti-Indemnity Statute, the scope of risk being tendered as to certain types of claims has been modified to only the Subcontractor's scope of work, or only for injuries to specific workers downstream. Additionally, a General Contractor may not want to tender or even pursue via litigation its risk to its downstream contractors, often citing to business relationships. Strategy then has to be discussed as to the impact not pursuing implicated downstream contractor may have, which strategy the contractor's insurer may have a differing litigation plan.

Additional Insured Tenders

While contractual indemnity is being pursued, practitioners representing upstream contactors must not forget to pursue separately tenders under additional insured obligations. Finding the client's certificates of insurance and policies is often a challenge and can impact a practitioner's expeditious pursuit of additional insured carriers. Moreover, the impact of the Texas Anti-Indemnity Statute has had a significant impact on certain cases and has left the state of recovery by an upstream contractor for defense fees and costs questionable under the law.

b. Anti-indemnity statute for construction contracts

Application to and impact upon indemnification and additional insured issues

Texas Insurance Code Chapter 151 (aka the Texas Anti-Indemnity Statute), applies to all commercial construction contracts entered into as of January 1, 2012. The application of the anti-indemnity statute is triggered if the primary/original commercial contract was executed on or after January 1, 2012 and is not dictated by the date of the subcontract or related agreement execution.

Chapter 151 is non-waivable and makes an indemnity provision in a commercial construction contract void and unenforceable as against public policy *to the extent* that it requires an indemnitor (downstream) to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault of the indemnitee (upstream), its agent, employee or any third party under the control/supervision of the indemnitee. The impact of this provision is that, for commercial construction contracts, only "limited form" indemnity provisions are allowed. In Texas, a limited form indemnity provision obligates a downstream contractor to indemnify the upstream contractor only to the extent of the downstream contractor's own negligence or fault.

One of the most problematic issues arising from this statute is the language "to the extent of". Some practitioners take the position that the entire indemnity provision is "void" if the language of the contract does not specifically comply with the language of Chapter 151. However, others take the position that the writers of the statute included the language "to the extent of" to allow contracts which are overbroad and exceed the scope of what is allowed by the statute to only provide what is allowed by the statute. However, the Texas Supreme Court has not chimed in yet on this subject and thus this issue is a key discussion in cases in which the statute is applicable.

While the definition of a "construction contract" is broad under Chapter 151, including design, construction, alteration, renovation, remodeling, repair or the furnishing of material or equipment, currently, Texas has not applied the anti-indemnity statute to municipal construction projects nor residential construction contracts (single family home, townhouse, duplex, or land development related to residential projects). One question has arisen as to whether it applies to apartments or to mixed-use buildings which included both residential and commercial businesses. The Texas Supreme Court has not addressed this issue either.

Moreover, the anti-indemnity statute has limited application to controlled insurance programs, only requiring that a controlled insurance program that provides general liability insurance coverage must provide completed operations coverage for a period of not less than three years.

While certain areas are grey under Chapter 151, it is at least clear that the Texas anti-indemnity statute does not apply to direct contractual privity claims between an upstream and downstream (i.e. over-action) for bodily injuries or death to employees of an indemnitor. This exception allows for continued contractual risk transfer by way of an over-action claim to the downstream contractor or employer of the injured party, even if the upstream contractor's sole negligence is involved. This may lead to the drafting of separate indemnity provisions within a construction contract, in order to address the broader scope of indemnification allowed under the law for bodily injury claims versus property damage.

The clarity of Chapter 151 is further compromised by the extension of it to limit the scope of any additional insured endorsement that the downstream is required to obtain. The statute mandates that any provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within an insurance policy providing additional insured coverage, is void and unenforceable *to the extent* that it requires or provides coverage which is prohibited under Chapter 151. Accordingly, in order to comply with Chapter 151, an additional insured endorsement for property damage is limited to that arising from that downstream contractor's own negligence or fault. However, once again, the question has arisen and not yet been addressed by the Texas Supreme Court as to whether a contractual insurance provision that seeks more than that allowed under the statute is void, or merely limited to the extent of the statute's terms.

Contrast to the fair notice doctrine; is it still alive?

With the onset of Chapter 151, confusion over how to interpret contract provisions and whether the fair notice doctrine is still alive has resulted in the filing of dispositive and declaratory relief actions on the subject by some practitioners. Under the fair notice doctrine, a party is required to obtain indemnification for its own negligence in advance. Fair notice has two components: express negligence and conspicuousness test. Whether these components are satisfied is a determination for the court. However, many practitioners are looking to satisfy both the fair notice doctrine *and* Chapter 151, but the courts have not yet addressed whether they are mutually exclusive. For now, contracts which do not fall under the Texas anti-indemnity statute are still evaluated and assessed as to enforceability in line with the fair notice requirements. However, after January 1, 2012, on commercial constructions contracts,

practitioners are watching closely to see if the Texas Supreme Court will answer or provide clarity as to this issue.

Insurance industry's response to the anti-indemnity statute

In an attempt to respond to the complexities of the varying state anti-indemnity laws, ISO issued a new additional insured endorsement form in April of 2013. Form CG 20 38 04 13 (ongoing operations) and CG 20 37 04 13 (completed operations). These endorsements were seen by many as an attempt to avoid the necessity of "state specific" additional insured endorsements in order to comply with respective anti-indemnity laws. ISO's 2013 form reveals an increased focus on aligning scope of coverage with contract terms requiring additional insured coverage. The attempted impact of the new 2013 form is to (1) restrict coverage to the extent permitted by law; and (2) restrict coverage scope to that which is required by contract. This form makes it even more imperative that additional insured requirements be clearly delineated in the contract. However, how those requirements are to be delineated is flagged with caution for those contracts impacted by the anti-indemnity statute.

3. Residential Construction Liability Act "RCLA"

a. Application

The Residential Construction Liability Act, or "RCLA" as it is more commonly referred to, is found in the Texas Property Code Section 27.004. Construction defect is broadly defined as concerning "design, construction or repair of new residence, or alteration or repair to existing residence. RCLA only applies to residential properties and is intended to encourage settlement or repairs.

b. Compliance Deadlines

Practically, the most challenging aspect of the RCLA process is the tight timeline of compliance requirements. While parties can agree to modify the timeline, the following depicts the typical timeline set forth by the statute:

Prior to Filing Suit	Inspection of Property	Settlement Offer	Repairs	Rejection of Settlement Offer	Supplemental Offer

60 days written notice of the claim	**35 days to make a written request to inspect the property**	**45 days to make a written offer of settlement to claimant after receipt of claimant's notice**	**45th day after the date the contractor receives written notice of acceptance of the settlement offer**	**25th day after the date claimant receives the offer, the claimant shall advise the contractor in writing and in reasonable detail of the reasons why the claimant considers the offer unreasonable**	**10th day after the date the contractor receives notice of claimant's rejection, the contractor may make a supplemental written offer of settlement**

c. Damages

If Claimant rejects what the trier of fact determines to be a "reasonable" offer, recovery under RCLA is limited to the either the (1) the fair market value of the contractor's last offer, or the amount of reasonable and necessary costs and attorneys' fees incurred before the offer was rejected. Moreover, the damages under RCLA are limited to the reasonable costs of repair to cure the defect(s); the cost to repair and/or replace the damaged personal property; the engineering and consulting fees; the temporary housing the reduction in current market value if due to structural failure; and attorney's fees. An important practice tip is to remember that inclusion of a "release" can be evaluated in the analysis of whether an offer by the contractor was "reasonable". If a contractor fails to make a reasonable offer under Subsection (b), the limitations on damages provided for in Subsection (e) shall not apply.

4. Coverage issues for Texas jobsite claims (property damage and bodily injury)

a. Additional insured coverage and the Eight Corners Rule

The Anti-Indemnity Act severely restricts additional insured obligations in the construction context. There are still cases, however, where the exceptions apply or the prime contract precedes application of the Act.

Duty to defend based on allegations

Texas applies a fairly strict complaint allegation or "eight corners" rule, looking solely to the petition and the policy to determine if there is a duty to defend. Where additional insured coverage is at issue, however, the court will also look to the contract, if the policy coverage is dependent on a contractual obligation. *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015).

Additional insured endorsements vary, but most blanket endorsements—providing coverage where required by contract—require some connection to the named insured's work for coverage to obtain, whether "caused by," resulting from" or "arising out of." When the insured and its work are not referenced in the pleadings, The Texas Supreme Court has held there is no duty to defend. *D.R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 740, 744 (Tex. 2009) In *D.R. Horton*, D.R. Horton had subcontracted part of the work and asserted it was an additional insured under the Markel policy issued to the subcontractor. The additional insured endorsement in the Markel policy limited coverage to those claims arising out of work the named insured performed for D.R. Horton. While there was no dispute that a subcontractor relationship existed, there was no allegation of a subcontractor relationship, and no allegation regarding the subcontractor or its work. Accordingly, the Court held there was no duty to defend. In *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009) the Court extended its reasoning to the subcontractor exception of exclusion l (completed operations). Again, if there was no reference to the subcontractor or its scope of work, there was no duty to defend.

A similar result was reached by the Fifth Circuit in *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589 (5th Cir. 2011). The additional insured endorsement in Gilbane required that damage be "caused, in whole or in part, by the named insured's work or operation". The court held Admiral was not required to defend the additional insured if the petition did not affirmatively allege facts that would trigger the duty under the policy. Thus, defense was owed to the additional insured only if the pleadings alleged that the named insured, or someone acting on its behalf, proximately caused the alleged injuries.

The Fifth Circuit recently issued an opinion which arguably expands the scope of the eight-corner's rule with regard to coverage for additional insureds. *Lyda Swinerton Builders, Inc. v. Oklahoma Surety Co.*, 877 F.3d 600, 612 (5th Cir. 2017). In *Lyda Swinerton*, the Fifth Circuit found that a general contractor qualified as an additional insured on the insured subcontractor's CGL policy based on general allegations of defects in the work completed by the subcontractor. *Id.* at 613.

The lines are not clear. An insurer may want to review whether there are allegations specifically related to the insured's scope of work. In addition, since the lack of a duty to defend does not preclude an indemnity obligation, the actual facts may impact whether an insurer chooses to defend, regardless of the lack of a specific allegation regarding the named insured or its work.

No duty to defend unless insured request defense

Under Texas law, there is no duty to defend any insured until that insured provides notice and tenders suit papers. *Nat'l Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008). Therefore, an insurer has no obligation for pre-tender fees. And tender by one insured is not sufficient as to another insured. There is an open question, however, as to whether tender by a subrogated insurer is sufficient to trigger a defense obligation.

Duty to indemnify based on actual facts

Even where the pleadings do not invoke a duty to defend an additional insured there can still be a duty to indemnify, based on the actual facts established in the case. The Texas Supreme Court emphasized that distinction in *D.R. Horton*. In *Gilbane*, the District Court found a duty to

indemnify the additional insured. In *Gilbane*, the court determined that a jury would have found the claimant or his employer 1% or more responsible for causing the accident and/or injuries at issue. Accordingly, the insurer owed indemnity for the entire amount of the settlement the additional insured reached with the claimant. This issue was not directly addressed on appeal.

The language of the additional insured endorsement matters

There are myriad of different forms of additional insured endorsements. "Arising out of" is still construed broadly, and requires only some causal nexus. "Caused, in whole or in part," is slightly narrower, and should afford no coverage for the sole negligence of the additional insured. Other endorsements have attempted to limit coverage to the extent caused by the named insured, or to purely vicarious liability. So, the ultimate indemnity obligation will depend on both the actual facts and the specific policy language. Where more than one insurer has an additional insured obligation, as in the case of multiple subcontractors, the indemnity obligation may vary among insurers.

b. Extrinsic evidence and the duty to defend

The limited exception for "coverage only" facts

Outside of the additional insured context, the Texas Supreme Court has never recognized an exception for extrinsic evidence, and has refused to consider extrinsic evidence when it contradicts the allegations in the underlying claimant's pleadings and goes to the "merits of that underlying claim," but has acknowledged a potential exception for "coverage only" facts. *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006) In the context of construction litigation, the extrinsic evidence exception becomes significant when the petition omits significant and potentially coverage-determinative dates, such as when the damage occurred, when the project was complete or when the subcontractor's work was performed.

A number of courts have found a duty to defend when the dates are inconclusive or non-existent, broadly construing the complaint allegation rule and concluding that a reference to extrinsic evidence is inappropriate. In a few cases, however, where the date is likely determinative of coverage, not contested, and not otherwise material to liability, courts have allowed reference to extrinsic evidence, such as a certificate of occupancy. *Boss Mgmt. Servs v. Acceptance Ins. Co.*, 2007 U.S. Dist. LEXIS 69666 (S.D. Tex., Sept. 19, 2007) (certificate of occupancy established date of completion) *Canopius U.S. Ins., Inc. v. A1 Home Repair and Constr.*, 2016 U.S. Dist. LEXIS 181545 (S.D. Tex., Dec. 2, 2016) (extrinsic evidence established known loss).

c. An insured's entitlement to independent counsel

In Texas, if a conflict of interest actually exists between the insurer and the insured, the insured has the privilege of rejecting the representation offered by the insurer and hiring counsel of its own choosing to be paid for by the insurer. An insurer's issuance of a reservation of rights can create a potential conflict of interest, but it does not by itself create such a conflict. "Instead,

the test to apply is whether 'the facts to be adjudicated in the [underlying] lawsuit are the same facts upon which coverage depends.'" *Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388, 392 (5th Cir. 2014) (citing *N. Cnty. Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004)). Moreover, a conflict of interest does not arise just because facts that could be *developed* in the underlying litigation are the same facts upon which coverage depends.

d. Tender and allocation issues

Application of other insurance provisions for consecutive policies

In Texas, "other insurance" clauses in insurance policies apply only when the coverages at issue are concurrent. Generally, for multiple insurance policies to provide concurrent coverage, the policies must cover the same risk and the same period of time. Therefore, a primary policy and additional insured policy will be subject to other insurance clause comparison, but consecutive policies will not. In addition, "other insurance" clauses do not typically apply to the duty to defend.

Targeted tenders, spiking, and "all sums" allocation

Texas allows an insured to target the policy, or policies, that will best cover its claim. This method of allocation is based on the Insuring Agreement provision which states that "[w]e will pay *all sums* that the insured becomes legally obligated to pay as damages…" With this language, an insurer becomes jointly and severally liable with other triggered insurers.

Where there is excess coverage, the insured can "spike" in the targeted year, vertically exhausting the entire line of coverage without regard to other primary coverage that may exist for other periods of time. While not entirely clear, Texas Supreme Court dicta indicates the targeted insurers could still exercise rights of subrogation and seek horizontal exhaustion.

In the construction defect arena, the Supreme Court of Texas applied the "all sums" allocation method in *Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750 (Tex. 2013). In that case, Lennar underwent a program of removing EIFS on hundreds of homes after water damage was discovered. While Lennar litigated coverage with many of its insurers, by the time of trial, only Markel was left, with an umbrella policy for a single year. Most of the damage to the homes likely began before or during Markel's policy period and continued after the policy expiration. The Court reasoned that, while coverage under Markel's policy was limited to property damage that occurred during the policy, the policy also covered damage from a continuous exposure to the same harmful conditions. Therefore, if any damage occurred during the policy period, coverage extended to the "total amount" of loss suffered as a result, not just the loss incurred during the policy period.

Continuing occurrences and the impact of endorsements limiting coverage

Texas employs an injury-in-fact trigger, but recognizes that an occurrence can continue through multiple policy terms. *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). Even if there is a continuing trigger, and multiple insurers are implicated, the respective defense and indemnity obligations are often impacted by standard and manuscript

endorsements that may eliminate coverage for an otherwise implicated period. These include exclusions for work on projects that began prior to policy inception, pre-existing or continuing injury exclusions—that may or may not require knowledge on the part of the insured--and elimination of the subcontractor exception to exclusion l. If additional insured coverage is at issue, the scope of that coverage may also vary. Where one or more insurers have eliminated coverage, the other insurers will still likely have an obligation to defend, and to indemnify for the periods with no coverage.

e. Contribution between insurers

The Mid-Continent rule

Contribution claims against co-insurers were cast in doubt by the Texas Supreme Court's decision in *Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co*., 346 S.W.3d 765 (Tex. 2007). Liberty insured the general contractor on a highway project for the State of Texas. One of the subcontractors was responsible for the signs and dividers on the project. Liberty issued a $1 million primary policy and a Liberty affiliate issued a $10 million excess policy to the general contractor. Mid-Continent insured the subcontractor under a nearly identical $1 million policy under which the general contractor was an additional insured. Both primary policies had identical "other insurance" clauses providing for pro rata sharing.

During construction of the highway, a driver crossed over the center barrier into oncoming traffic and hit another car head-on. Liberty Mutual and Mid-Continent both accepted defense of the general contractor. At mediation, Liberty Mutual agreed to settle for $1.5 million and demanded that Mid-Continent contribute half, but Mid-Continent only paid $150,000. Liberty paid $1.35 million, $350,000 over its primary policy limits, and retained the right to seek recovery from Mid-Continent for Mid-Continent's pro rata share. Additionally, Mid-Continent settled the claims against the subcontractor for $300,000, leaving $550,000 in available limits. The district court awarded Liberty Mutual the remaining $550,000 limit of Mid-Continent's $1 million policy. On appeal, the Fifth Circuit certified questions to the Texas Supreme Court, regarding the subrogation and contribution rights between the insurers.

In responding to the certified questions, the Texas Supreme Court concluded that there was no right of reimbursement. The court determined that Liberty Mutual was actually seeking a right of contribution from Mid-Continent. Under Texas law, a right of contribution exists when two or more insurers bind themselves to pay an entire loss, but one pays the whole loss. *General Ins. v. Hicks Rubber*, 169 S.W.2d 142 (Tex. 1943). The right of contribution requires that several insurers share a common obligation or burden and that the insurer seeking contribution has made a compulsory payment of more than its fair share of that common burden. When "other insurance" is "pro rata", however, the direct claim for contribution between co-insurers disappears because the "pro rata" clause makes the contracts several and independent from each other; each co-insurer contractually agrees with the insured to pay its pro rata share of the loss, but does not contractually agree to pay another co-insured's pro rata share. Since the Liberty Mutual and Mid-Continent policies contained pro rata other insurance clauses, the two insurers agreed with their common insured to pay a proportionate share of the insured's loss up to $1 million. But the co-insurers did not create a similar contract between themselves.

Liberty Mutual also asserted a right to subrogation. The court found however, that because the insured had been fully indemnified for its $1.5 million loss, it had no right to enforce Mid-Continent's duty to pay its pro rata share of the loss.

The limitations of the Mid-Continent rule

In subsequent cases, the Fifth Circuit has restricted the scope of *Mid–Continent* to apply only to the specific facts of that case. In *Trinity Universal Insurance Co. v. Employers Mutual Casualty Co.,* the Fifth Circuit made it clear that *Mid–Continent* does not apply to defense costs. 592 F.3d 687 (5th Cir. 2010).

Subsequent cases have further restricted *Mid-Continent*, holding it does not apply to an insurer who has denied defense, or where the coverage is consecutive, where insurance applies at different levels.

f. Confusion over "rip and tear"

In contrast to a number of states, Texas has recognized coverage for at least some costs to access defective work or products. In *U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2015), the Texas Supreme Court issued an opinion based on certified questions from the Fifth Circuit. At issue was the coverage for the cost to replace defective flanges. To access the flanges, it was necessary to destroy welds, gaskets, insulation and coating on the diesel units. Liberty denied coverage. The Fifth Circuit certified questions regarding the meaning of "physical damage" and "replacement" in the exclusions related to "your product" and impaired property. The Court held that incorporation of a defective product was not property damage. The damage to the flanges, including cutting out the welds, and the downtime, were excluded by the impaired property exclusion. The damage to the insulation and gaskets, however, involved replacement, not restoring a product to use, and was not excluded. The Court's analysis had been difficult to apply as the line between repair and replacement is not always clear. In subsequent cases, courts have held that the cost of repouring a foundation was not covered, but the cost to reinstall the forms, reinforcing bar, and angle iron that secured was, *Lauger Cos. v. Mid-Continent Cas. Co.*, 2017 U.S. Dist. LEXIS 121709 (S.D. Tex. Aug. 2, 2017); and that destruction of partial construction to correct problems in a slab was excluded, *Vinings Ins. Co. v. Byrdson Servs*., LLC, 2016 U.S. Dist. LEXIS 92533 (E.D. Tex. June 17, 2016). On the other hand, downtime from a faulty generator was not covered. *Colony Ins. Co. v. Rentech Boiler Sys*., 2018 U.S. Dist. LEXIS 46780 (N.D. Tex., Mar. 1, 2018). In addition, the Court in *U.S. Metals* did not address the issues of trigger or occurrence, which can often affect construction defect claims.

5. <u>Economic Loss Rule and the impact upon risk transfer to design professionals</u>

The economic loss rule is one of the tools that courts use to determine when a defendant's conduct gives rise to a tort cause of action or a contract cause of action, or both. In general terms, the economic loss rule states that if the damage caused by a defendant's conduct amounts to nothing more than purely "<u>economic loss</u>" to the "<u>subject matter of a contract</u>" then the defendant can be held liable under a contract theory (such as breach of contract or breach of warranty) but not under a tort theory (such as negligence or strict liability).

Economic loss has been defined as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits – without any claim of personal injury or damages to other property." *ALS 88 Design Build LLC v MOAB Constr. Co.*, No.04-15-00096-CV, 2016 WL 2753915, at *2 (Tex.App.- San Antonio May 11, 2016, pet. filed (quoting *Bass v. City of Dallas*, 34 S.W.3d 1,9 (Tex.App.-Amarillo 2000, no pet.))

The Texas Supreme Court has applied the economic loss rule to construction cases, but the question is still being litigating when the question is whether there is damage due to negligence beyond the subject matter of the contract and whether the defects caused "physical harm" to the consumer or his property, other than the subject matter of the contract itself. One prime example of this ongoing battleground is the pursuit of design professionals by general contractors.

In the *LAN/STV* case, also called the *Eby Construction* case, the Texas Supreme Court held that an architect was not directly liable to the general contractor for negligent misrepresentation based on alleged inaccuracies or inconsistencies in the architect's plans and specifications. *LAN/STV v. Eby Construction Co., Inc.*, 435 S.W.3d 234, 241 (Tex. 2011). The plaintiff in that case was the general contractor for the construction project but was not the architect's client. The general contractor asserted claims for delay damages and other costs it incurred during the on-going construction. *Id.*, at 236-37. The general contractor fell under the traditional economic loss rule because the general contractor alleged only that it had suffered purely economic losses, in the form of delay damages, did not allege property damages to the underlying construction project, and did not own a property interest in the underlying construction project. Additionally, the Court noted that any negligent misrepresentations in the architectural designs were made to the architect's client, the owner of the building, and not to the general contractor. *Id.*, at 247.

Design Professionals are also citing to *CBI NA-CON, Inc. v. UOP Inc.* to argue that they are immune from liability under Chapter 33 of the Texas Civil Practice & Remedies Code when no privity exists with the party bringing the suit against them. *CBI NA-CON, Inc. v. UOP Inc.*, 961 S.W.2d 336, 339 (Tex.App.-Houtson [1st Dist.] 1997, pet.denied). In CBI, Fina the owner filed suit against its contractor to recover damages for a defective catalyst cooler. Fina did not sue the design professional. The contractor argued the design professional was liable and thus sued under a third-party petition, alleging contribution due to the engineer's defective or negligent design. *Id.* at 338. The engineer filed a motion for summary judgment on the ground that Fina as the owner would have no cognizable claim under contribution and as such the contractor had no viable claim. The court found that in order for a contractor to have a right to seek contribution against the engineer, the engineer must have some real or potential liability to the owner. Because the contractor's claim is derivative of Fina's as the owner, the contractor so too is limited. The CBI court found that because Fina only asserted claims of purely economic losses, the design professional cannot be liable in negligence. When the loss suffered is only the economic loss to the subject of the contract itself the action sounds in contract only. *LAN/STV v. Martin K. Eby Constr. Co., Inc.*, 435 S.W.3d 234, 235, 242 n.35 (Tex.2014); *Goose Creek Consol. Indep. Sch. Dist. V. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486, 494 (Tex. App. – Texarkana 2002, pet. denied).

In contrast, the Texas Court of Appeals in Beaumont upheld a jury verdict which found that an architectural firm had committed negligence, describing the case as one of "architect

malpractice." *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805, 809-816 (Tex. App.—Beaumont 1990, writ denied). In that case, an architect recommended use of a particular type of tile to its client, the owner/developer of a shopping center. The tile eventually came loose throughout the project and had to be replaced. The client sued the architect for the cost to replace the tile as well as other economic damages. Based on expert testimony about the architectural standard of care, the jury found that the architectural firm was negligent in its preparation of plans and specifications, recommendation of using the tile, and subsequent inspection of the installation of the tile. *Id.*, at 807-808. The jury found that the architect was liable for 80% of the client's damages while the general contractor, who settled prior to trial, was liable for only 20%. *Id.*, at 808. In addition to honoring the jury's finding that the architect had been negligent, the Court of Appeals also held that the architect violated the implied warranty of good and workmanlike performance and that the implied warranty applied to professional architectural services. *Id.*, at 813-14.

6. Venue Issues

a. Challenges that arise from having the most counties of any state in the Union

With 254 counties, the inconsistencies of rulings based upon jurisdiction is challenging. One court in one city may have a reputation for never granting a motion for summary judgment, while the court system in the town next door may opt to entertain and rule upon dispositive motions regularly. One court may be known to be more favorable to insurers while the court in the next county over may have historically favor insureds. Practitioners in Texas are also challenged with differing Appellate Court rulings that can significantly impact the global posture of litigation including split authority in case law. One of these areas of impact relate to design professionals.

b. Challenges that arise from being a large but also culturally diverse state

Texas is big, but it's also very diverse. Contrary to what some may think, not everybody in Texas is a gun-tottin' cowboy living on a ranch. The state has a large population, is geographically large and is socially arguably the most diverse state in the Union. It's important to understand these jurisdictional issues when handling claims in Texas.

c. Challenges that arise from straight-ticket judicial elections

In Texas, judges are elected. Up through the 2018 mid-term elections, Texas also allowed for a single party voting option – in other words, push one button to vote along party lines all the way down the ballot. In 2018 alone this saw over 700 years' worth of judicial experience off the bench. This has led to some wild outcomes – judges with 40+ years of experience on the bench being replaced by attorneys with less than five years of practice experience and no experience on the bench.

7. Trending Issues

a. Third Party Attorney's Fees

A new Texas Supreme Court Case has placed into question whether third party attorney's fees are covered by a commercial general liability policy. *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 2019 Tex. LEXIS 53. The Texas Supreme Court opined:

> "We have explained that, in the insurance context, 'liability insurance' generally covers 'damage the insured does to others.' *Members Mut. Ins. Co. v. Hermann Hosp.*, 664 S.W.2d 325, 327-28 (Tex. 1984) (holding that uninsured-motorist coverage did not protect the insured from liability for damages cause to others). We have also held that an insured's defense expenses are not 'damages' a third party sustains and 'claims.' *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 17 (Tex. 2007). Even in the broader common, ordinary sense, 'damages' are '[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury.' *In re Xerox Corp.*, 555 S.W.3d 518, 529 (Tex. 2018) (quoting *Damages*, Black's Law Dictionary (10th ed. 2014)), thus 'attorney's fees are generally not damages, even if compensatory,' *Id*. (citing *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013)). The policy at issue here consistently uses the terms liability, damages, and defense expenses consistent with these common legal meanings. *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 2019 Tex. LEXIS 53, HN 6.