OVERVIEW OF THE TEXAS CONSTRUCTION LAW LANDSCAPE

Texas Construction Law from Start to Finish
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I. Introduction

The construction industry is among the largest and most dynamic in the State of Texas, employing over 850,000 workers as of July 2024.[1] The industry annually contributes more than $1 trillion to the U.S. economy, and accounts for more than $100 billion of the State's gross domestic product.[2] Texas, already the country's second most-populous state, only continues to grow, and it is reasonable to expect that the industry will continue to be an economic powerhouse for the foreseeable future.[3]

Given the magnitude of the industry, it is hardly a wonder that Texas construction law has become a specialized practice unto itself. For those wondering what "construction law" is, a good place to start is the Texas Supreme Court's definition: "Construction law in Texas has been defined as the practice of law dealing with the transactions and relationships among contractors, subcontractors, suppliers, owners, architects, engineers, governmental entities, insurers, sureties and lenders regarding development, design, and construction on public and private projects."[4] It consists of an array of laws and legal theories and principals, including federal and state statutory law, contract and tort law, equity, surety, real estate, and insurance law, and much more,[5] including (at least in Texas) constitutional law.

It would be impossible to adequately capture or explain all of the nuances of Texas construction law in a single paper, and this is by no means intended to serve as a comprehensive guide in that respect. Rather, this presentation is intended to serve as an introductory "primer" to some of the significant statutes, common law doctrines, and legal theories that are particularly relevant to the Texas construction lawyer's practice. Many of these topics could warrant an entire paper on their own, and I suspect that my well-accomplished colleagues will explore many of these topics in further depth in their accompanying presentations during this course. With that, welcome to Texas Construction Law from Start to Finish….

II. The "Players" on a Construction Project

As a starting point, a brief overview of the construction "players" and their roles on a project is warranted. In *LAN/STV v. Martin K. Eby Constr. Co.,* a significant construction law-related opinion discussed later in this paper, the Texas Supreme Court explained that a typical construction project operates on a vertical contractual chain—owners contract with architects and general contractors; architects and general contractors, in turn, contract with sub-consultants and subcontractors; and so on.[6] While that explanation is generally accurate, it is perhaps an oversimplification. There can be many nuanced differences between projects, depending on the particular project type and selected delivery method, some of which are explored in this paper. The Supreme Court's explanation also overlooks other significant construction "players," including lenders, insurers, and sureties, all of whom are vital, and in many instances necessary, to the success of a project.

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[1] Texas Economy at a Glance, U.S. Bureau of Labor Statistics, https://www.bls.gov/eag/eag.tx.htm#eag_tx.f.3.
[2] The Economic Impact of Construction in the United States and Texas, Association of General Contractors of America, https://www.agc.org/sites/default/files/users/user21902/TX-US%20construction%20fact%20sheet_92023.pdf.
[3] U.S Population Trends Return to Pre-Pandemic Norms as More States Gain Population, United States Census Bureau, https://www.census.gov/newsroom/press-releases/2023/population-trends-return-to-pre-pandemic-norms.html.
[4] Texas Supreme Court, Misc. Docket No. 15-9221, Order Adopting Standards for Attorney Certification in Construction Law, Supreme Court of Texas (Oct. 20, 2015), https://www.texasbar.com/AM/Template.cfm?Section=Past_Issues&Template=/CM/ContentDisplay.cfm&ContentID=32036.
[5] Phillip L. Bruner and Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 1.3 (Aug. 2023).
[6] 435 S.W.3d 234, 246 (Tex. 2014).

A. Owners

Construction projects in Texas are generally considered either "public" (also known as "public works") or "private." Public projects are those built in the name, or for the benefit, of a governmental entity.[7] In effect, the governmental entity functions as the "owner" of a public project. In Texas, public projects can be commissioned by the State itself; State governmental agencies, such as the Texas Department of Transportation; political subdivisions, such as counties, cities, municipalities; school districts, public higher education institutions and systems (e.g. the University of Texas system), and public junior colleges; and federal government agencies and branches (there are quite a few military bases in Texas).[8] In contrast, private projects typically refer to a project owned by a non-governmental entity, such as a commercial real estate developer, private university, or even a single-family residential homeowner. Common examples of private projects include commercial retail or office buildings, condominiums and other high-rise developments, and private university facilities.

Another trend in Texas to note is the rise in use of public/private partnerships (sometimes referred to as "PPP" or "P3" projects). P3 projects utilize a unique structure whereby a public and private entity partner together, with the private party utilizing private capital to provide a public service (generally, the construction of a public project). The impetus behind the P3 structure is that many times projects can be delivered in a more cost-effective and efficient manner, sometimes with little or no cost to taxpaying citizens. However, the P3 structure may only be utilized in connection with public infrastructure development, and is not permitted for purely private development.[9]

So, why does the distinction between public and private projects matter? As discussed in more detail in this paper, the classification of a project as public versus private has a direct bearing on the statutes and laws that apply to a given project. For example, Texas public works projects are subject to public procurement requirements that private projects are not. Similarly, private projects are subject to private party lien rights, whereas public projects are not. As a practice tip for the construction law practitioner, the starting point for any problem that comes in the door should be to first determine what type of project you are dealing with.

B. General or Prime Contractors

Contractors are, of course, the builders of the project, and typically contract directly with the owner for the entire delivery of the completed improvements. Depending on the project delivery method (discussed in more detail below), a contractor may or may not have design responsibilities. In a traditional design-bid-build delivery system, the owner usually contracts separately with design professionals and contractors. Once the project design is complete (or has reached a certain stage of design), the owner then selects the contractor and construction commences. Conversely, in a design-build delivery method, the owner enters into a contract with a single entity that is responsible for both the design and construction of improvements. In that scenario, the contractor typically has some level of input in both the design and pre-construction phases, as well as in the construction phase.

No matter the delivery method, though, the general contractor is usually "at risk" for delivering a project on-time and within budget. A general contractor may elect to self-perform some or all of the construction work itself, or, as is more common, subcontract out individual scopes of work to third-party subcontractors. Because the third-party subcontractors do not have direct contractual privity with the owner, the general contractor remains responsible to the owner for its subcontractors'

[7] Joe F. Canterbury and Brad Gaswirth, Texas Construction Law Manual § 4.1 (3d ed. Dec. 2023).
[8] Tex. Gov't Code § 2253.001
[9] P3 for Texas, Inc., About the Public-Private Partnership Act, https://www.p3fortexas.org/files/2023/01/P3-For-Texas-About-the-P3-Act.pdf

performance of their work. Many times, general contractors will seek to impose various contractual obligations under the owner-contractor agreement onto its subcontractors through the use of "flow-down" clauses, which are discussed in further detail later in this program.

C. Design Professionals

The term "design professionals" can encompasses a wide-number of persons. Generally speaking, though, and for purposes of this paper, the use of the term generally refers to architects and engineers. The architect is often the "prime" design professional that creates the overall design concept for the project, and observes the construction of the project through contractual "construction administration" duties. An architect's scope of work may involve multiple phases, including schematic design, design development, construction documents, and construction administration.

Schematic design (or "SD") is the first phase of the architect's work, and this is where the core conceptual design for a project is fleshed out.[10] The initial SD documents are produced before the architect moves to the design development (or "DD") phase. At the DD phase, a project's schematic design is further refined to include additional design details, selection of materials and equipment, and the like. DD documents are similar to SD documents, but contain greater detail in the drawings and specifications.[11] After the DD phase is the construction document (or "CD") phase. The CD phase is where the project design is translated into actual construction documents and the parameters for the building process are set.[12] Once the CD documents are issued for construction and building commences, the architect then moves to the construction administration (or "CA") phase, where it assists in overseeing construction of the project, facilitates the exchange of project information and communications, provides information not readily discernible from the project documents, and resolves any conflicts or ambiguities in the drawings and specifications.[13]

With respect to engineers, the number and type employed on a given project can vary, depending on complexity. Typically, though, construction projects will include at least some component of civil, structural, and mechanical, electrical, and plumbing ("MEP") engineering. Civil engineers are responsible for the design of building structures and facilities, such as roads and bridges. Structural engineers are typically concerned with the design of load-bearing structures, such as roofs and walls.[14] MEP engineers are responsible for the design of the "organs" of a building, including heating and cooling (HVAC) systems, electrical systems, and water and plumbing systems.

Commonly, architects, as the prime design professional, retain specialized engineers as sub-consultants to assist in the design of particular building systems. Other times, the owner may contract directly with engineers of its choosing. Since many engineering plans can only be stamped by an engineer licensed in Texas, the stamping engineer is typically referred to as the "engineer of record," even if operating as a sub-consultant to the architect. Thus, the term "engineer of record" does not necessarily connote direct contractual privity with the owner, and in cases where the architect retains

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[10] Schematic Design, The American Institute of Architects, https://content.aia.org/sites/default/files/2017-03/EPC_Schematic_Design_2A.pdf

[11] Design Development, The American Institute of Architects, https://content.aia.org/sites/default/files/2017-03/EPC_Design_Development_2E.pdf

[12] Construction Documents, The American Institute of Architects, https://content.aia.org/sites/default/files/2017-03/EPC_Construction_Documents_2F.pdf

[13] Construction Administration, The American Institute of Architects, https://content.aia.org/sites/default/files/2017-03/EPC_Construction_Admin_3B.pdf

[14] Texas A&M University, Structural Engineering, https://engineering.tamu.edu/civil/academics/degrees/undergraduate/specialties/structural-engineering.html

the engineer directly, the architect remains contractually responsible to the owner for the engineer's work. However, it is important to note that on private projects in Texas, architect's consultants may have statutory lien rights directly against the owner's property in the event of non-payment from an upstream party, similar to subcontractors and suppliers. Lienable design services include "professional services used in the direct preparation for the work of a design, drawing, plat, survey, or specification."[15]

D. Subcontractors and Suppliers

As stated above, a general contractor in many instances elects to subcontract out some or all of the construction work to third-party subcontractors, while remaining contractually responsible to the owner for the overall delivery of the project. Depending on size and complexity, a general contractor may elect to subcontract out all of the building work, instead focusing on overall project scheduling, management, supervision, administration, and budgetary concerns. And even where a general contractor chooses to self-perform some of the work, it is still common for the contractor to subcontract out technically complex trades, such as HVAC, plumbing, and electrical work, to specialized subcontractors.

Subcontractors, while responsible for the installation of parts and components within their scopes of work, often times do not actually build or manufacture the necessary equipment or materials themselves. They will, in turn, procure parts and materials from specialized equipment or material suppliers, including such things as drywall, concrete, lumber, steel, and HVAC and electrical components, to name a few. Importantly, while subcontractors and suppliers lack direct contractual privity with the owner, *both* maintain statutory lien rights directly against the owner's property under Texas law in the event of non-payment from an upstream party, which can be a particularly effective tool in securing payment for these lower-tier parties.

E. Lenders

The old adage is that "money makes the world go round." Typically, construction projects are financed with either debt or equity, or some combination of both. At a high-level, debt financing involves the borrowing of money, in many cases in the form of interim financing from a construction lender.[16] Conversely, equity financing essentially involves selling an ownership stake in some portion of a company in exchange for capital, the advantage being that there is typically no obligation on the borrower's part to repay the money. On construction projects, equity financing typically comes from limited partners of the project owner (hence why many owner-entities are structured as limited partnerships).[17]

Typically, a lender's loan is secured by a lien and deed of trust on the project (giving the lender the right to foreclose on the property), and the lender will usually require, as a condition to financing, that its lien take first priority.[18] Generally speaking, beyond tracking payments and reviewing architects' certifications of contractors' payment applications, lenders have relatively little involvement in the actual design or construction of a project. On occasion, however, and especially on larger projects, lenders may have their own inspector independently verify that the contractor's work has reached a sufficient stage to justify the requested payment.[19]

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[15] *See* Tex. Prop. Code § 53.021(3).
[16] *See* David Gregorcyk, Dealing with Construction Lenders, 36th Annual Texas Construction Law Conference (2023).
[17] *Id.*
[18] *Id.*
[19] Robert C. Bass, Jr., Construction Contracts for Owners (2012).

F. Insurers

Insurers are another vital party to a construction project. Often, construction projects require various types of first and third-party insurance coverage. First-party coverage policies generally protect the insured and its assets against loss or damage—in other words, it covers claims where an insured seeks recovery for the insured's own loss.[20] A common example of first-party coverage on construction projects is builder's risk insurance, which protects the owner and/or contractor against risks during the actual course of construction, such as fires, flood damage, and the like.

Third-party insurance coverage, on the other hand, generally protects the insured against claims made by third-parties for injury or damage to the third-party's person or property. The typical Commercial General Liability (or "CGL") policy, seen on virtually all construction projects, is a good example of a third-party coverage policy. For design professionals, third-party coverage would also include professional liability policies (sometimes referred to as "errors and omissions" or "E&O" policies), which insure against errors in design work.

This is by no means an exhaustive recitation of the various types of construction insurance available, and, depending on the project, certain types of insurance may be required by the owner, the lender, or by law. The subject of insurance is rather complex, and there are specialized practitioners in Texas dedicated solely to insurance coverage matters. However, given that insurance is often a critical issue on construction projects, the construction law practitioner is encouraged to develop at least a baseline working knowledge of insurance coverage matters.

G. Sureties

Although "sureties" and "insurers" are sometimes synonymously mentioned together, it is important to note that they are *not* the same thing. As opposed to an insurer, a surety, in essence, functions as a guarantor on a construction project, guaranteeing the debt, obligation, or performance of a party to a construction project, referred to as the "principal" (or "principal debtor"). That is, if the principal fails to fully perform its obligations, the surety becomes legally obligated to fulfill the terms of the agreement.

Sureties issue surety bonds, which create three-party relationships between the principal debtor, the surety, and the obligee—the party requesting or requiring the bond, and for whose benefit the bond is issued. The obligee is typically the owner seeking assurance from the general contractor (or its subcontractors) that the underlying contractual obligations on a project will be performed. Surety bonds are usually issued as either "payment bonds" or "performance bonds." Generally speaking, a payment bond obligates a surety to make certain payments as set forth in the bond or surety contract, if the principal debtor fails to do so. Commonly, these bonds are called upon where a general contractor fails to make payment to downstream contractors.

Performance bonds, on the other hand, obligate the surety to undertake specific actions as stipulated in the bond or underlying surety contract if the principal debtor fails to fulfill those obligations. A common example of a situation where a performance bond is called upon is where a contractor abandons a project prior to completing its work. At that point, the surety would be obligated to step in and complete the abandoned work (usually by hiring a different contractor to complete the work).

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[20] *See Hartman v. St. Paul Fire & Marine Ins. Co.*, 55 F. Supp. 2d 600, 603 (N.D. Tex. 1998); *Universe Life Ins. Co. v. Giles,* 950 S.W.2d 48, 53 n.2 (Tex. 1997).

In Texas, payment and performance bonds are not required for private projects, absent the owner's requirement. For public projects, however, prime contractors are required to procure performance bonds for construction contracts in excess of $100,000, and payment bonds for construction contracts in excess of either $25,000 or $50,000, depending on the governmental entity-owner of the project.[21] When a payment or performance bond is required, the prime contractor must procure said bond in at least the amount of the underlying construction contract.[22]

III. Project Delivery Methods and Responsibilities

Project delivery refers to the how resources for a given project are organized, facilitated, and implemented in order to satisfactorily complete the project, including design, construction, finance, and overall risk management.[23] For Texas construction projects, the delivery method is usually either "design-bid-build" or "design-build," which connote different design responsibilities for the contractor. Other alternatives in Texas are also discussed below.

A. Project Delivery Methods

1. Design-Bid-Build

The traditional design-bid-build model is the more prevalent delivery method in Texas. Under this project delivery system, the owner hires the architect, who, in turn, typically retains sub-consultants to design certain specialized scopes of work, such as civil engineering, MEP systems, and structural (load-bearing) systems. The architect is responsible for the delivery of a complete set of design documents (plans and specifications) to the owner, incorporating the work of its sub-consultants within the final design delivered to the owner. Importantly, in this model, the architect, as the prime design professional, remains contractually responsible to the owner for the work of its sub-consultant engineers, including liability for any deficiencies in the engineering design.

Once the design has been completed (or reached a certain stage of completion), the owner will then retain a general (or prime) contractor under a separate contract that is responsible for construction of the improvements in accordance with the architect's plans and specifications. The contractor will either self-perform the actual construction work itself, or, more often, subcontract out various scopes of work to third-party subcontractors. On a large commercial project, it is not uncommon for a general contractor to hire a dozen or more subcontractors to perform various scopes of work.

As mentioned above, the subcontractors then, in turn, typically procure trade-specific materials from third-party suppliers. Subcontractors may even separately subcontract out certain portions of their scopes of work to their own sub-subcontractors. In that event, the subcontractor remains contractually responsible to the general contractor for its suppliers' and sub-subcontractors' work and materials, and the general contractor, in turn, remains responsible to the owner for the performance of all downstream subcontractors, sub-subcontractors, suppliers, and vendors.

2. Design-Build

Under the design-build delivery system, the owner contracts with a single entity that is responsible for both the design and construction of a project. Generally, this occurs in one of two manners—either the design-builder is a joint venture between a general contractor and design professional, or the design-builder is a contractor that, in turn, subcontracts an architect and other

[21] Tex. Gov't Code § 2253.021.
[22] *Id.*
[23] Bruner and O'Connor, Bruner & O'Connor on Construction Law § 2.14.

appropriate design professionals. With both methods, the design-builder under the contract is directly responsible to the owner for all construction and design professional work.

Often cited advantages to the design-build method include increased efficiency and a reduction in overall project time and cost, since the design and construction contract negotiations effectively occur at the same time (meaning there is no "dead time" between completion of the design and commencement of construction).[24] Also, in theory, because a single entity is responsible for both design and construction, that should result in savings that can be passed on to the owner.[25]

Another advantage from an owner's perspective is that the owner may look to a single entity for responsibility for the entire project.[26] Thus, if a problem arises, the owner is not faced with having to determine whether it is a "construction error" or a "design error." In construction defect litigation, this is many times an issue for the owner, who is often faced with competing defenses between the contractor and design professional with both attempting to shift responsibility for project errors to one-another.[27] This problem is cured with the design-build method.

3. Construction Manager Contracting

Another type of project delivery system is contracting with a construction manager. This comes in two forms: construction manager-agent (or "CMA") and construction manager-at-risk ("CMAR"). The distinction between the two lies at what happens when the project enters the construction phase. CMAs, on the one hand, do not actually perform or assume responsibility for the construction work itself, do not contract with subcontractors, and do not control the means and methods of construction.[28] On the other hand, at the construction phase, CMARs transition into more of a traditional general contractor role and "assume[] the risk for construction, rehabilitation, alteration, or repair of a facility at a contracted price as a general contractor."[29]

Under both methods, the construction manager serves as a consultant to the owner during the design and pre-construction phases. However, under the CMA method, the construction manager represents the owner in a fiduciary capacity,[30] and acts as the owner's representative and assists in management and coordination of all facets of the project, including selection of the design professionals and contractor, and the negotiations of those contracts. In theory, the CMA delivery method is designed to provide a faster delivery schedule, increased flexibility, and promote a non-adversarial relationship between the Owner and CMA, who is intended to serve as the Owner's advocate to the design and construction team.[31] The CMAR, by contrast, is not only intimately involved in the design of the project, but actually assumes the risk of delivering the project on-time and within budget, just as a traditional general contractor. The CMAR provides consultation to the owner both during and after design, including on things such as cost and schedule evaluations, design feasibility, and providing "value engineering" during the design phase.[32]

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[24] Bass, Construction Contracts for Owners.
[25] *Id.;* Bruner and O'Connor, Bruner & O'Connor on Construction Law § 6.15; Canterbury and Gaswirth, Texas Construction Law Manual § 4.5.
[26] Bass, Construction Contracts for Owners.
[27] Bruner and O'Connor, Bruner & O'Connor on Construction Law § 6.15; Canterbury and Gaswirth, Texas Construction Law Manual § 4.5.
[28] Allen V. Wilson, Public Contracting in Texas, The Basic Course in Texas Construction Law (2020); Tex. Gov't Code § 2269.203.
[29] Canterbury and Gaswirth, Texas Construction Law Manual § 4.7.
[30] Tex. Gov't Code § 2269.204.
[31] Canterbury and Gaswirth, Texas Construction Law Manual § 4.6.
[32] Canterbury and Gaswirth, Texas Construction Law Manual § 4.2.

Construction managers are more often utilized on design-build projects, rather than traditional design-bid-build projects. Although design-bid-build projects may characterize the construction contract as a "construction manager" agreement, the contractor is not involved with project design under that delivery system, and, thus, in reality, is simply a traditional general contractor. However, construction manages can provide an invaluable tool to owners in assisting with project design and overseeing cost controls, especially for relatively inexperienced or unsophisticated owners.[33]

4. Multi-Prime Approach

While not often utilized in Texas, the multiple-prime approach is a variation of the traditional design-bid-build method, wherein the owner contracts directly with multiple prime contractors or design professionals for design or construction of discrete portions of a project. Some suggest that the multi-prime approach may help save on a general contractor's mark-up or profit, thereby lowering the cost to the owner; others, however, suggest that the potential savings do not outweigh other considerations, such as coordination issues and the headache that arises in the event of construction defect litigation, as there are now multiple parties to evaluate and to attempt to assign liability to in the event of construction or design deficiencies.[34]

B. Contractor and Design Professional Selection Methods

Once the owner has selected its desired project delivery method, it must then determine how to select the appropriate contractor. For private projects in Texas, an owner is generally free to employ any method it desires, including informal "word of mouth" bidding and up through formal, competitive sealed bids or proposals.[35]

Texas public works projects, on the other hand, are a different story. Governmental entity-owners are usually required to employ either competitive bidding procedures or another statutorily-approved public procurement method in selecting contractors and design professionals.[36] Public contracting in Texas is complex, to say the least, as public contractors are faced with a "hodge-podge of laws," the applicability of which vary depending on the type of governmental entity-owner.[37] For example, different public procurement statutes apply to counties, cities, school districts, and state agencies (and, even then, some agencies are treated differently than others).[38] Similarly, Texas public procurement statutes proscribe different methods that a governmental entity must utilize in selecting design professionals than those that apply to contractors.[39]

An in-depth discussion of public procurement and contracting is beyond the scope of this paper. However, just from the brief description above, one can see that the issue is complex, and there are specialized practitioners in Texas devoted to public contracting matters. Given its significance, though, Texas construction law practitioners and public works contractors should at least have a baseline understanding of the statutes and laws that apply to public contracting, many of which can be found in Chapters 252, 269, and 271 of the Texas Local Government Code, and Chapters 2251-

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[33] Bass, Construction Contracts for Owners.
[34] Bruner and O'Connor, Bruner & O'Connor on Construction Law § 6.14.
[35] Bass, Construction Contracts for Owners.
[36] Canterbury and Gaswirth, Texas Construction Law Manual §4:2; *see also* Tex. Gov't Code §§ 304.001; 791.001-.0006; 2155.062; 2156.121-.122; 2269.151; 2269.201-.258; 2269.301; 2269.401. However, note that an in-depth discussion of the various methods of public bidding and contracting is beyond the scope of this paper.
[37] Wilson, Public Contracting in Texas.
[38] *Id.*
[39] *Id.*

2254 and 2269 of the Texas Government Code. Those would be good starting points for any reader wishing to learn more about the topic.

IV. Applicable Law, Regulations, and Statutes

As described above, Texas construction law consists of different types of law and legal principles, including federal and state statutes, contract law, equity, tort, real estate, insurance, and common law,[40] and constitutional law. The statutes and laws that apply to a given project depend, in large part, on whether a project is (a) public or private and (b) residential or commercial. While it would be impossible to adequately capture every cause of action or relevant statute, this portion of the paper provides an introduction to some common theories of liability seen in construction disputes, as well as select statutes and common law doctrines that we, as construction law practitioners, deal with on a regular basis.

A. Common Theories of Liability

Although the exact causes of action may vary, most construction disputes could generally be categorized as one of the following: (i) payment disputes; (ii) defective design or construction claims; (iii) delay claims; and (iv) injury to person claims. Each category could potentially be further broken down into multiple sub-parts, but for purposes of this paper, a general description of each type of dispute is sufficient.

1. Payment Disputes

These disputes generally refer to different avenues for recovering money, whether by contract, statute, or under common or equitable law. Common scenarios where these types of disputes arise include a contractor or design professional alleging non-payment or improper retention of payment by the owner; a subcontractor alleging non-payment or improper retention of payment by a general contractor; or a design sub-consultant alleging non-payment or improper retention of payment by a prime design professional (architect or engineer).

2. Construction and Design Defects

Construction and design defect claims are another common source of dispute (and litigation) in the Texas construction law realm. As the name suggests, these claims typically involve claims by the owner against the general contractor and/or design professionals alleging errors or omissions in the drawings or construction (or both) of a project. Many times, construction defect claims can turn into complex, expensive, multi-party endeavors, as general contractors and architects will often implicate their subcontractors and consultants that performed the scope of work alleged by the owner to be defective.

The ability of an owner to recover against a prime contractor or design professional (and, in turn, the contractor's and design professional's ability to recover against its subcontractors or sub-consultants) depends upon the various contractual and legal relationships amongst the parties. However, these disputes often can be (and are) resolved through insurance proceeds. Thus, many times, the owner will attempt to plead claims to trigger the prime contractor's and design professional's insurance coverage, and all of the parties, in turn, will generally want to bring as many subcontractors and consultants into the dispute as possible to "deepen the pockets" of available insurance money to remedy the problem.

[40] Bruner and O'Connor, Bruner & O'Connor on Construction Law § 1.3.

3. Delay Claims

Delay claims typically involve claims by the owner against the prime contractor (but sometimes the prime design professional as well) for failure to comply with contractual scheduling requirements. That is, they typically involve complaints by the owner as to late delivery of some or all portions of a given construction project. As with construction and design defect claims, many times prime contractors or design professionals will also implicate their subcontractors or sub-consultants that performed certain trades alleged to be at-issue.

Delay claims are also often heavily expert-witness driven, making them somewhat nuanced and difficult to prosecute and defend, and usually fairly expensive endeavors as well. Also, unlike construction defect claims, insurance proceeds are typically not a source of resolution for delay claims. Generally speaking, most third-party coverage construction policies, such as CGLs and E&O policies, are triggered by unintentional property damage or injury. However, these policies typically exclude breach of contract claims against the insured from their coverage, absent an appropriate policy rider or endorsement. Because project scheduling requirements are purely creatures of contract (after all, the schedule is part of the contract), then a parties' failure to comply with those requirements is a breach a contract, meaning that many times parties are left defending against delay claims out-of-pocket.

4. Personal Injury Claims

Personal injury claims sometimes also arise on construction projects, given the inherently dangerous nature of the work itself, and typically involve a construction worker being injured on a jobsite. In many instances, the viability of a personal injury claim hinges on the application (or lack thereof) of the workers' compensation bar, which is discussed in more detail below.

B. Select Construction-Related Statutes

1. Mechanic's Liens and Bond Claims

Mechanic's liens and bond claims are perhaps the most common methods for contractors and other downstream parties to pursue outstanding payment owed on construction projects. While a detailed discussion of each could merit their own presentation, a brief overview of the mechanics of both is discussed below—but first, an important distinction needs to be made. Contractors cannot lien public projects in Texas.[41] Thus, mechanic's liens are limited to private projects, and the requirements to perfect a lien vary depending on whether the project is residential or commercial, and where the particular contractor claiming the lien falls in the "contractual food chain." Most public works contracts, on the other hand, require prime contractors to provide payment bonds for the benefit of downstream contractors, who, in turn, are relegated to pursuing a bond claim as their sole remedy to recoup payment.

With respect to private projects, Chapter 53 of the Texas Property Code affords both original contractors and subcontractors a statutory mechanic's lien.[42] Original contractors on private projects—that is, those in direct contractual privity with the owner—are also entitled to a constitutional lien pursuant to Article 16, Section 37 of the Texas Constitution. Note, however, that

[41] However, where a prime contract for a public works project is less than either $25,000 or $50,000, depending on the governmental entity-owner, a subcontractor may have a right to a limited statutory lien. However, unlike private projects, the lien does not attach to the property itself, but rather to the money due to the general contractor. Thus, there is no right of foreclosure on the property, as there could exist with private projects. *See* Tex. Prop. Code § 53.231.
[42] *See* Tex. Prop. Code § 53.001 *et seq.*

entitlement to a constitutional lien extends only to an original contractor, and not to subcontractors, suppliers, or any other party lacking direct contractual privity with the owner.

The requirements for perfecting a statutory mechanic's lien are set forth in Texas Property Code Chapter 53, Subchapter C. Subcontractors wishing to perfect a statutory lien must comply with the statutorily prescribed pre-lien notice requirements and lien affidavit filing deadlines, which vary depending on whether the claim is for unpaid labor/materials or retainage, and whether the project at-issue is residential or commercial.[43] On the other hand, there are no pre-lien notice requirements for original contractors wishing to perfect a statutory lien;[44] however, original contractors still must comply with statutory lien affidavit filing deadlines that also vary depending on the type of project.[45]

Conversely, the constitutional lien for original contractors is "self-executing."[46] That is, no affidavit is required to be filed to perfect the lien. However, a constitutional lien is limited to covering buildings and articles and the land necessary to their enjoyment. Thus, many view the constitutional lien as a slightly "less effective" way to enforce payment obligations. Moreover, while the constitutional lien is self-executing, if an original contractor fails to record an affidavit evidencing the lien, then the lien is not effective against a bona fide purchaser of the property unless the purchaser has actual or constructive notice of the lien.[47]

Again, as discussed above, public projects (whether State or Federal) cannot be liened. Subcontractors, suppliers, and other downstream parties, then, are typically relegated to seeking payment via the payment bond that prime contractors are required to supply on most public works projects. For federal public works projects, Congress enacted the Miller Act, which requires prime contractors to provide payment and performance bonds for any construction contract in excess of $100,000.[48] For State public works projects, the Texas Legislature enacted Chapter 2253 of the Texas Government Code (sometimes referred to as the "Little Miller" Act), which sets forth the requirements and procedures to perfect and enforce a bond claim on a State-owned project.

2. Residential Construction Liability Act

The Residential Construction Liability Act ("RCLA"), found in Chapter 27 of the Texas Property Code, applies to any action seeking damages or other relief arising from a residential construction defect, except for: (i) claims for personal injury, survival, wrongful death; (ii) claims for damage to goods; (iii) a violation of Texas Business and Commerce Code Section 27.01 (fraud in a real estate transaction); (iv) a contractor's wrongful abandonment of an improvement project before completion; or (v) a violation of Texas Property Code Chapter 162 (Texas Construction Trust Fund Act).[49] For purposes of the RCLA, a "construction defect" means "a deficiency in 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."[50]

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[43] *See* Tex. Prop. Code §§ 53.052, 53.056-.057.
[44] Tex. Prop. Code §§ 53.056(a), 53.057(a).
[45] Tex. Prop. Code § 53.052(a).
[46] *First Nat'l Bank v. Whirlpool Corp.,* 517 S.W.2d 262, 267 (Tex. 1974).
[47] *See, e.g., Tex. Wood Mill Cabinets, Inc. v. Butter,* 117 S.W.3d 98, 105 (Tex. App.—Tyler 2003, no pet.).
[48] 40 U.S.C. §§ 3131-3134.
[49] Tex. Prop. Code § 27.002.
[50] *Id.* § 27.001(3).

The purpose of the RCLA is to "promote settlement between homeowners and contractors and to afford contractors the opportunity to repair their work in the face of dissatisfaction."[51] While the RCLA is not a cause of action in-and-of-itself, it is a framework that overlays most claims seeking damages arising from a residential construction defects. In that respect, the RCLA has two main features: (1) a pre-suit inspection and opportunity to cure procedure; and (2) it provides a limited "menu" of damages recoverable to a claimant.

The specifics of the RCLA are beyond the scope of this paper; however, it is important for contractors in the single-family and residential construction business to be aware of the statute and its scope and application. And even those not directly in the single-family business should still be aware of the statute, as the RCLA's definition of "construction defect" has been construed by Texas courts to extend the statute's application to condominium and multi-family projects in some instances.[52]

3. Certificates of Merit

Another important statute to note is the Certificate of Merit statute found at Texas Civil Practice and Remedies Code Section 150.002. Except for certain third-party claims and cross-claims in an already pending arbitration or lawsuit, this statute requires that a claimant seeking damages "arising out of the provision of professional services by a licensed or registered professional" file a statutorily-compliant affidavit from a third-party licensed architect, engineer, registered landscape architect, or registered professional land surveyor along with the claimant's original petition or complaint.[53] The statute requires that the affiant not only be competent to testify, but also hold the same professional license or registration as the defendant and practice in the same area of practice as the defendant.[54]

Critically, the failure to timely file a proper affidavit mandates dismissal of the complaint by the court; however, the court retains the discretion to dismiss the plaintiff's claims with or without prejudice as to re-filing.[55] The bottom line from a practitioner's perspective, though, is that you do not want to find yourself in the position where you have failed to comply with the statute and are simply hoping the court bails you out and dismisses your client's claims without prejudice. Instead, practitioners should be aware of the statute and provide themselves plenty of time to not only find a qualified expert, but also to ensure that the expert drafts a quality, statutorily-compliant affidavit.

4. Texas Trust Fund Act

The Texas Trust Fund Act is found in Texas Property Code Chapter 162,[56] and applies to all public and private construction contracts for the improvement of real property in Texas.[57] The Trust Fund Act provides that any payments to a contractor, subcontractor, or supplier made in payment of labor or materials supplied to a construction project are considered "trust funds" held in trust for all parties in the construction chain.[58] This can also include loan funds advanced by a construction lender if the loan is secured, in whole or in part, by a lien on the property.[59] Note, however, the statute does

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[51] *Bruce v. Jim Walters Home,* 942 S.W.2d 121, 123 (Tex. App.—San Antonio 1997, writ denied).
[52] Tex. Prop. Code § 27.003(4)(A)(iii) (post-September 1, 2023).
[53] *See* Tex. Civ. Prac. & Rem. Code § 150.002(a), (b). Note that Tex. Civ. Prac. & Rem. Code § 150.002(i) provides certain limited exceptions to the Certificate of Merit requirement.
[54] *Id.* §§ (a)(1)-(3).
[55] *Id.,* § 150.002(e).
[56] *See* Tex. Prop. Code § 162.001 *et seq.*
[57] *Id.* §162.004(c).
[58] *Id.* §§ 162.002-.003
[59] *Id.* § 162.001(b).

not apply to a fee payable to a contractor under a written contract with the owner specifying a reasonable fee and that fee is earned as provided by the contract and paid to the contractor.[60]

Contractors, subcontractors, and suppliers who provide labor or materials to a construction project are considered "beneficiaries" of any "trust funds" paid on a project, and, on residential projects, owners are considered "beneficiaries" as well.[61] Under the Act, a trustee (parties receiving construction or loan payments) has misapplied trust funds if she or he "intentionally or knowingly or with the intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds."[62] A trustee that misapplies trust funds may be subject to civil liability to a beneficiary of the funds, and may also be subject to criminal penalties, which range in severity depending on the amount misappropriated.[63]

5. Contingent Payment Provisions

Many general contractors are reluctant to assume the risk of the owner's non-payment, and thus look to include contingent payment clauses in their subcontractors to shift some of this financial risk downstream to subcontractors. In a nutshell, contingent payment clauses provide that a general contractor's obligation to pay a subcontractor for work performed arises only *if* the general contractor receives payment from the owner. This is commonly referred to as a "pay-if-paid" clause, and, if enforceable, releases the general contractor from its payment obligation in the event of payment failure by the owner. Juxtaposed to this is a "pay-when-paid" clause, which relates only to the timing of the payment, but does not release the contractor from its ultimate obligation to pay the subcontractor for its work.

Typically, Texas courts will enforce a "pay-if-paid" clause only if the contract language is absolutely clear that a subcontractor is assuming the risk of an owner's non-payment to the general contractor.[64] Any lack of clarity on this point results in courts construing the clause as a "pay-when-paid" clause instead, thereby not discharging the general contractor from its ultimate payment obligation. And even if a contract contains a valid "pay-if-paid" clause, it is still subject to the statutory scheme set forth in Texas Business and Commerce Code Chapter 56,[65] which restricts enforcement of contingent payment clauses in certain contracts and under certain circumstances[66] (and parties may not waive the statute by contract or other means).[67]

Under Business and Commerce Code Chapter 56, a contingent payor (*i.e.* the general contractor) and its surety may not enforce a contingent payment clause if:

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[60] *Id.* § 162.001(c).
[61] *Id.* § 162.003.
[62] Id. § 162.031.
[63] *Id.* § 162.032.
[64] *See, e.g., Gulf Const. Co., Inc. v. Self*, 676 S.W.2d 624, 630 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *Sheldon L. Pollack Corp. v. Falcon Indus., Inc.*, 794 S.W.2d 380, 384 (Tex. App.—Corpus Christi 1990, writ denied); *C&C Rd. Constr., Inc. v. SAAB Site Contractors, L.P.*, 574 S.W.3d 576, 589 (Tex. App.—El Paso 2019, no pet.).
[65] *See* Tex. Bus. & Comm. Code §§ 56.001-.057.
[66] Business and Commerce Code Chapter 56 does not apply to contracts solely for: (1) design services; (2) the construction or maintenance of a road, highway, street, bridge, utility, water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, wharf, dock, airport runway or taxiway, drainage project, or related type project associated with civil engineering construction; or (3) improvements to or the construction of a structure that is: (A) detached single-family residence; (B) duplex; (C) triplex; or (D) quadruplex. Tex. Bus. & Comm. Code § 56.002.
[67] *Id.* § 56.004.

(i) the owner fails to pay the general contractor because of the general contractor's conduct or work, unless the non-payment is the result of the contingent payee's (*i.e.* the subcontractor or supplier) failure to meet the requirements of its contract;[68]

(ii) enforcement would be unconscionable;[69]

(iii) if the subcontractor or supplier is considered to be in a direct contractual relationship with the owner by virtue of the "sham contract" provision in Texas Property Code Section 53.026;[70] or

(iv) to invalidate the enforceability or perfection of an otherwise valid statutory mechanic's lien under Texas Property Code Chapter 53.[71]

Additionally, a contingent payment clause may be invalidated or suspended during a project.[72] If a subcontractor or supplier subject to a contingent payment clause has not been paid for 45 days following submission of a written request for payment substantially in compliance with its contractual payment requirement, it may send written notice to the general contractor objecting to the further enforceability of the contingent payment clause.[73] The notice becomes effectives as soon as 10 days after the contractor's receipt of same, and the contractor and its surety may not be able to rely on the contingent payment clause for any work or material supplied by the subcontractor after the notice becomes effective.[74]

Note, however, that if the owner's non-payment is due to the subcontractor's failure to perform its contractual obligations, then a general contractor may send written notice back to the subcontractor stating that the subcontractor's notice does not prevent enforcement of the contingent payment clause.[75] Provided that the subcontractor receives the notice within five days of the general contractor receiving the subcontractor's notice or five days prior to the subcontractor's written notice taking effect (whichever is later), the contingent payment clause will remain enforceable.[76] Also, written notice from a subcontractor does not affect the enforceability of a contingent payment clause if the funds are not collectible due to the owner's successful assertion of sovereign immunity (think public project owners).[77] Finally, a subcontractor's notice only applies to the extent of the unpaid funds that are the subject of the particular notice and, once paid, the contingent payment clause will be reinstated and enforceable as to future payments.[78]

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[68] *Id.* § 56.051.
[69] *Id.* § 56.054. Note that the Tex. Bus. & Comm. Code § 56.054 provides a list of information that a general contractor should provide in writing to subcontractors and suppliers prior to the execution of a contract to minimize the risk of a contingent payment clause being deemed unconscionable.
[70] In essence, the "sham contract" provision in Texas Property Code § 53.026 elevates a subcontractor or supplier to an original contractor where the original contractor, although a separate entity, is, in reality, no more than the "alter ego" of the owner. For further discussion on this provision, see *Trinity Drywall v. Toka Gen. Contrs.,* 416 S.W.3d 201 (Tex. App.—El Paso 2013, pet. denied).
[71] Tex. Bus. & Comm. Code § 56.055.
[72] *Id.* § 56.052.
[73] *Id.* § 56.052(a).
[74] *Id.,* §6 56.052(a), (b).
[75] *Id.* § 56.052(c).
[76] *Id.*
[77] *Id.* § 56.052(d).
[78] *Id.* § 56.052(e).

6. Texas Prompt Pay Acts

Texas requires prompt payment to contractors and subcontractors on both public and private projects. For private projects, the Texas Prompt Payment Act, found in Texas Property Code Chapter 28,[79] governs. For public projects, Texas Government Code Chapter 2251 governs.[80]

Under the Prompt Payment Act, contractors have the right to be paid within 35 days after an owner receives a written request for payment from the contractor.[81] Likewise, a subcontractor or sub-subcontractor has a right to payment within seven days from the prime contractor's or first-tier subcontractor's receipt of payment.[82] As a remedy, the Prompt Payment Act provides that contractors or sub-contractors are entitled to interest on any overdue payments in the amount of one-and-a-half percent (1.5%) per month on the unpaid amount, which accrues from the day after the date payment is due up through the date of delivery of payment (or the date a judgment is entered, if collection litigation is pursued).[83]

The Prompt Payment Act provides an exception to the accrual of interest in the event of a good faith dispute concerning the amount owed, including whether the work was performed in a proper manner.[84] In the event of a good-faith dispute on a residential project, an owner, contractor, or sub-contractor disputing payment may withhold up to one-hundred ten-percent (110%) of the difference between the amount sought by the requesting contractor and the amount the payor believes is due.[85] In the event of a good-faith dispute on a commercial project, the party disputing payment may not withhold more than one-hundred percent (100%) of the difference between the amount the requesting party claims is due and the amount the payor party believes is due.[86] Note, too, that the provisions of the Prompt Payment Act may not be waived by any party.[87]

For public projects, Texas Government Code Chapter 2251 requires governmental entities to make payments to contractors before the 31st day after the later of: (i) the date the governmental entity receives the goods under the contract; (ii) the date the performance of the service under the contract is completed; or (iii) the date the governmental entity receives an invoice for the goods or service.[88] General contractors, in turn, are required to make payments to subcontractors within 10 days of receiving payment from the owner,[89] and subcontractors are required to pay their vendors and suppliers within 10 days of receiving payment from the general contractor.[90]

Late payments on public projects begin to accrue interest on the date the payment becomes overdue, and the rate at which interest accrues is "the rate in effect on September 1 of the fiscal year in which the payment become overdue," which Government Code Section 2251.025 defines as "equal to the sum of: (1) one percent; and (2) the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday."[91] As with the

[79] Tex. Prop. Code §§ 28.001-.010.
[80] *See* Tex. Loc. Gov't Code §§ 2251.0010.055.
[81] Tex. Prop. Code § 28.002(a).
[82] *Id.* § 28.002(b).
[83] *Id.* § 28.004.
[84] *Id.* § 28.003.
[85] *Id.* § 28.003(a).
[86] *Id.* § 28.003(b).
[87] *Id.* §28.006.
[88] Tex. Gov't Code § 2251.021(a).
[89] *Id.* § 2255.022(a).
[90] *Id.* § 2251.023(a).
[91] *Id.* § 2251.025(a), (b).

Prompt Payment Act, the provisions of Texas Government Code Chapter 2251 may not be waived by any party.[92]

Importantly, too, both the Prompt Payment Act and Government Code Chapter 2251 authorize recovery of attorneys' fees to a prevailing party in connection with any action to collect invoice payments or interest due under either statute.[93]

7. Workers' Compensation

With limited exceptions, Texas does not require employers to carry workers' compensation insurance. Note, however, that one of those "limited exceptions" is contractors and subcontractors performing public works in Texas, whom are required by the Texas Labor Code to provide workers' compensation coverage for each employee of the contractor or subcontractor employed on a public project, and to certify such in writing to the governmental entity owner.[94] Contractors and subcontractors on private projects, however, are not subject to the same requirement.

Employees of a Texas employer that obtains workers' compensation coverage (known as a "subscriber") are afforded state-regulated benefits and protections under the Texas Workers' Compensation Act[95] for injuries occurring "in the course and scope of employment."[96] The Workers' Compensation Act is intended to provide "prompt and certain renumeration to injured employees,"[97] and provides benefits according to a set schedule of compensation without the employee having to prove the negligence of its employer.[98] That is, the Texas Workers' Compensation Act is essentially a "no fault" system providing the benefits specified in the statute. Employees of a subscriber employer automatically come within the workers' compensation system unless the employee specifically elects to opt-out in writing at the time the employee is hired.[99]

Workers' compensation benefits under the Act provide the injured employee's exclusive remedy for a work-related injury, and the injured employee relinquishes the right to sue its employer, except in cases of gross negligence.[100] Thus, subscriber employers are generally protected from later suits by their injured employees for the same injuries by what is sometimes referred to as the "workers' compensation bar." Conversely, if an employer does not choose to obtain workers' compensation coverage (referred to as a "non-subscriber"), or if an employee of a subscriber employer opts-out of coverage, then the employee retains the common law right to sue its employer for injuries sustained on the job. However, in that situation, an employee then has the burden to prove the employer's negligence (which it does not have to do to obtain workers' compensation benefits under the Act), and a non-subscriber employer loses the right to assert certain common law defenses, including contributory negligence and assumption of the risk.[101]

General contractors on private projects may use subcontractors that are non-subscribers without risk of exposure from a claim by an injured employee of the subcontractor, provided that the subcontractor is not an "employee" of the general contractor as defined by the Workers'

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[92] *Id.* § 2251.004; Tex. Prop. Code § 28.005.
[93] *Id.* § 2251.043.
[94] Tex. Lab. Code § 406.096(a), (b).
[95] *See id.* §§ 401.001 *et seq.*
[96] *Payne v. Galen Hosp. Corp.,* 28 S.W.3d 15, 18 (Tex. 2000).
[97] *Id.*
[98] *See* Tex. Lab. Code §§ 408.001 *et seq.*
[99] *Id.* § 406.034.
[100] *Id.* § 408.001.
[101] *Id.* § 406.034(d).

Compensation Act.[102] The Act provides that a subcontractor and its employees are not employees of the general contractor if the subcontractor is (i) operating as an independent contractor;[103] (ii) has entered into a written contract with the general contractor evidencing a relationship in which the subcontractor assumes the responsibilities of an employer for the performance of work.[104] For residential projects and commercial projects that do not exceed three stories in height or 20,000 square feet in area, a general contractor and subcontractor may also elect to file a joint agreement with the Workers' Compensation Division of the Texas Department of Insurance stipulating that the subcontractor is an independent contractor, which establishes that fact as a matter of law, in the event that a contractor otherwise finds itself in a situation where it has retained a non-subscriber subcontractor.[105]

8. Anti-Indemnity Act

Given the inherent disparity in bargaining power on the construction "food chain," owners and general contractors have, in the past, routinely imposed indemnity and additional insured agreements on subcontractors that shifted virtually all liability for owners' and general contractors' own negligence and fault downstream. In an effort to level the playing field, the Texas Legislature enacted the Texas Anti-Indemnity Act ("TAIA") at Texas Insurance Code Section 151.102 that purports to void indemnity and additional insured agreements that have the effect of indemnifying owners and general contractors for their own negligence or fault. The TAIA provides:

> Sec. 151.102. AGREEMENT VOID AND UNENFORCEABLE. Except as provided by [Insurance Code] Section 151.103, a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.

Although the language is somewhat convoluted, the Texas Supreme Court recently provided a summary of the Act and its practical effect in *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.,* in which the Court explained:

> In the construction context, the TAIA generally prohibits one party (the indemnitor) from indemnifying another party (the indemnitee) against a claim caused by the negligence or fault of the *indemnitee* or its employees or agents. But an exception permits the indemnitor to indemnify or insure the indemnitee against a claim for the bodily injury or death of the *indemnitor's* employee, agent, or subcontractor.
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> In practice, this provision prohibits Entity A from requiring Entity B to indemnify Entity A against the consequences of the negligence of Entity A, Entity A's agents, or Entity A's employees. But the provision leaves Entity A free to provide voluntarily

[102] *See id.* §§ 406.121-.123.
[103] Tex. Lab. Code § 406.121(2) provides the definition of "independent contractor" under the Act.
[104] *Id.* § 406.122.
[105] *Id.* § 406.145

> what it is precluded from requiring of Entity B. In other words, section 151.102 does not prevent Entity A from providing the same indemnification—indemnification against the consequences of the negligence of Entity A, Entity A's agents, or Entity A's employees—to Entity B.[106]

Said differently, the primary purpose of the TAIA is to "block[] enforcement of an obligation to indemnify another party or its employees for their fault."[107] The TAIA likewise limits the enforceability of contractual additional-insured requirements for the same claims to the same extent that indemnity agreements under the TAIA would be void.[108] Thus, the Legislature sought to preclude parties attempting to sidestep the TAIA by securing through additional-insured coverage what they could not receive via an indemnity agreement.

A limited exception exists under the TAIA that allows for indemnity or additional-insured coverage against claims for the bodily injury or death of an employee of the indemnitor, its agents or its subcontractors.[109] In other words, the employee injury exception allows for broad or intermediate form indemnity (that is, the indemnitor indemnifying for the indemnitee's own fault or negligence) where an indemnitee is faced with a "third-party over action" in which a subcontractor's employee, after recovering workers' compensation benefits, sues third-parties (*i.e.* the owner, general contractor, or other subcontractors) claiming their negligence or fault contributed to the employee's injury (notwithstanding the worker's compensation bar against such claims under Texas law).

9. Forum Selection/Choice of Law Clauses

Under Texas Business and Commerce Code Section 272.001, any provision in a construction contract making the contract, or any disputes arising thereunder, subject to another state's law, or litigation or arbitration in another state, is "voidable by a party obligated by the contract or agreement to perform the work that is the subject of the construction contract."[110] Texas courts have interpreted Section 272.001's use of the term "voidable" to mean that a forum-selection or choice-of-law clause in a construction contract is valid unless and until a party obligated under the contract exercises its right to void the provision.[111]

However, note that while Section 272.001 appears to facially provide contracting parties with a right to void forum-selection and choice-of-law clauses, one court found that the statute does not preempt the Federal Arbitration Act ("FAA") and may not be used to invalidate forum-selection or choice-of-law provisions in contracts subject to the FAA.[112]

10. Statutes of Repose

In Texas, a 10-year statute of repose governs construction or design defects claims against architects and engineers who design, plan, or inspect construction of private projects, which runs from the date of substantial completion of the improvements.[113] Contractors also enjoy the protection of a similar 10-year statute of repose that runs from the date of substantial completion of the

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[106] *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.,* 642 S.W.3d 551, 552, 555 (Tex. 2022).
[107] *Id.* at 559.
[108] *Id.* at 556.
[109] Tex. Ins. Code § 151.103.
[110] Tex. Bus. & Comm. Code § 272.001.
[111] *In re MVP Terminalling, LLC,* No. 14-21-00399-CV, 2022 WL 3592303, at *6 (Tex. App.—Houston [14th Dist.] Aug. 23, 2022, no pet.).
[112] *See Global Indus. Contrs., LLC v. Red Eagle Pipeline, LL,* 617 F. Supp.3d 633 (S.D. Tex. 2022).
[113] Tex. Civ. Prac. & Rem. Code § 16.008(a).

improvements.[114] In both cases, however, if a claimant presents a written claim for damages, contribution, or indemnity to the contractor or design professional within the 10-year limitation period, the statute of repose is extended for two years from the date the claim is presented.[115]

Also, the Texas Legislature recently amended the statute of repose for residential projects for contractors, whereby a contractor that provides a written warranty complying with Texas Civil Practice and Remedies Code Section 16.009(a-3) can shorten the statute of repose for a project to six years from the date of substantial completion.[116] To be statutorily compliant, the written warranty must provide a minimum period of: (i) one year for workmanship and materials; (ii) two years for MEP systems; and (iii) six years for major structural components.[117] This is sometimes referred to as a "1-2-6 warranty."

The statute of repose operates slightly differently with public projects. Governmental entities must bring design or construction defect claims against contractors or design professionals within eight years of the date of substantial completion of the improvements.[118] Both statutes of repose can be extended by one year if the governmental entity presents a written claim to the contractor or design professional within the original eight-year statute of repose.[119] Note, however, that the above-cited statutes of repose do not apply to: (i) Texas Department of Transportation contracts; (ii) projects that receive money from the State highway fund or a federal fund designated for highway and mass transit spending; or (3) civil works projects, as that term is defined by Texas Government Code Section 2269.351.[120]

11. Building Permits

Building permits are typically required for any public or private construction project in Texas, and almost all cities in Texas require a contractor to obtain such permits from the city prior to commencing a project within the city's jurisdictional limits.[121] Additionally, many projects also require permits from state agencies, such as the Texas Commission on Environmental Quality.[122] Owners and contractors performing work in Texas should be aware of any requirements of state or local authorities prior to commencing work on any public or private project in Texas.

12. Licensing Requirements.

Texas does not require commercial general contractors to hold any particular license in order to perform public or private construction work.[123] On the other hand, Texas does require the licensing and/or registration of both architects and engineers.[124] The Texas Board of Architectural Examiners is the administrative body that regulates the practice of architecture, and the Texas Board of Professional Engineers oversees the licensing and practice of engineering in Texas. Specific licensing and examination requirements are beyond the scope of this paper. For more information, readers should visit the websites of the Texas Board of Professional Engineers and Texas Board of Architectural Examiners.

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[114] *Id.* § 16.009(a).
[115] *Id.* §§ 16.008(c), 16.009(c).
[116] *Id.* § 16.009(a-2).
[117] *Id.* § 16.009(a-3).
[118] *Id.* §§ 16.008(a-1), 16.009(a-1).
[119] *Id.* §§ 16.008(c)(2), 16.009(c)(2).
[120] *Id.* §§ 16.008 (a-1), 16.009(a-1).
[121] Canterbury & Gaswirth, Texas Construction Law Manual § 3.3.
[122] *Id.*
[123] *Id.* § 2.25.
[124] *Id.* §§ 2.27, 2.29.

C. Important Construction-Related Common Law Principles and Doctrines

1. Indemnity

Common law indemnity in Texas has largely been abolished.[125] However, parties are still free to contract for indemnity. As discussed above, however, contractual indemnity agreements in construction contracts are subject to the statutory limitations imposed by the Texas Anti-Indemnity Act.

Additionally, because indemnity agreements, by nature, involve an "extraordinary shifting of risk," contractual indemnity agreements must satisfy Texas's "fair notice requirements."[126] Traditionally, the fair notice requirements include both the "express negligence doctrine" and the "conspicuousness requirement."[127] The latter requires that "something must appear on the face of the contract to attract the attention of a reasonable person when he looks at it."[128] This could be, for example, that indemnity provisions are written in larger, bold, or all-capitalized font. The former requires that "a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract."[129] In light of the Legislature's relatively recent enactment of the TAIA, however, it is not yet clear if and to what extent the express negligence doctrine still applies to indemnity agreements in Texas construction contracts.

2. Sovereign and Governmental Immunity

The doctrines of sovereign and governmental immunity many times prevent the State and its political subdivisions from being sued for damages in state court. The original justification for the doctrine of immunity arose from the English legal fiction that "the King can do no wrong,"[130] although it has evolved over time to various other rationales, including preserving the dignity of the State and protection of State resources.[131] Regardless of the rationale, however, the concept of sovereign immunity remains an important consideration to any construction or design professional contemplating entering into a public works contract in Texas.

In Texas, sovereign and governmental immunity protect the State and its agencies and political subdivisions against suit and legal liability, absent an express waiver of immunity by the State Legislature.[132] This involves two distinct concepts: (i) immunity from suit; and (ii) immunity from liability.[133] Immunity from suit prevents a contractor or design professional from even bringing suit against the State, absent a Legislative waiver of immunity.[134] Immunity from liability, on the other hand, prevents the recovery of damages from the State or its political subdivisions and agencies even where immunity to suit is waived.[135] In other words, even if a contractor or design professional could *bring* suit against the State, they may still be precluded from recovering *damages* in that suit unless immunity from liability for that particular political entity is also waived.

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[125] The only remaining vestiges of common law indemnity involve purely vicarious liability or the innocent product retailer situation. *Gunn v. McCoy,* 554 S.W.3d 645, 677 (Tex. 2018); *Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc.*, 751 S.W.2d 179, 180 (Tex. 1988).

[126] *Dresser Indus., Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1993).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Wasson Interests, Ltd. v. City of Jacksonville,* 489 S.W.3d 427, 431 (Tex. 2016).

[131] *Id.* at 432; *accord Tooke v. City of Mexia,* 197 S.W.3d 325, 332 (Tex. 2006).

[132] *Dohlen v. City of San Antonio,* 643 S.W.3d 387, 392 (Tex. 2022).

[133] *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.,* 571 S.W.3d 738, 746 (Tex. 2019).

[134] *Id.*

[135] *Id.*

It is important to note that the Legislature has provided express waivers of immunity from suit and liability for certain construction-related claims in Texas Civil Practice and Remedies Code Chapter 114, which applies to state agencies, and Texas Local Government Code Chapter 271, Subchapter I, which applies to local government agencies. The Texas Legislature has also set out a specific statutory procedure for resolving other construction-related contract claims against the State in Texas Government Code Chapter 2260.

Again, given the limited nature of this paper, this discussion is intended to be an introduction on the topic, rather than a comprehensive discussion of all of its nuances. However, contractors and design professionals would be well-served to be cognizant of the concept and, at a minimum, contemplate its potential implications in evaluating future public works contracts.

3. Economic Loss Rule

As a general premise, if damages are purely economic in nature and the duty allegedly breached arises from contract, then Texas common law limits recovery of damages to contract and not in tort.[136] In other words, if a complaint is solely for damages arising out of the failure to perform a contract, and there are no other personal injury or property damages, then the claim sounds in contract alone.[137] This is what is referred to in Texas as the economic loss rule.

This rule is particularly applicable in the construction context, where parties almost always operate on a vertical chain of contractual privity. The Texas Supreme Court has explained this philosophy:

> Construction projects operate by agreements among the participants. Typically, those agreements are vertical: the owner contracts with an architect and with a general contractor, the general contractor contracts with subcontractors, a subcontractor may contract with a sub-subcontractor, and so on. Th architect does not contract with the general contractor, and the subcontractors do not contract with the architect, the owner, or each other.
>
> We think it beyond argument that one participant on a construction project cannot recover from another…for economic loss caused by negligence. If the roofing subcontractor could recover from the foundation subcontractor damages for extra costs incurred or business lost due to the latter's negligent delay of construction, the risk of liability to everyone on the project would be magnified and indeterminate….[138]

It would be an oversimplification and incorrect to say that the economic loss rule bars all tort claims arising out of a contractual setting. It does not. As even the Texas Supreme Court has noted, the lack of a bright-line rule has led (and continues to lead) courts to much confusion about the rule's applicability.[139] For example, if a tortious act outside the contract leads to "other" property damage outside of the subject matter of the contract, the economic loss rule may not operate as a bar to tort claims.

A good example of such a situation is *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*,[140] a case in which a plumbing subcontractor was hired to install new plumbing in a home, but the subcontractor's faulty work eventually led to extensive water damage to the home's structure—

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[136] *LAN/STV v. Martin K. Eby Constr. Co., Inc.*, 435 S.W.3d 234, 238 (Tex. 2014).
[137] *Id.* at 235.
[138] *Id.* at 246.
[139] *Id.* at 241.
[140] 445 S.W.3d 716 (Tex. 2014).

property that was outside of the actual plumbing work installed by the subcontractor.[141] The builder sued the plumbing subcontractor in negligence, and the Texas Supreme Court held that the economic loss rule did not bar the builder's claim because the plumber had a duty to avoid flooding or otherwise damaging the home, which was independent of any obligation undertaken in its plumbing subcontract.[142] In other words, the economic loss rule did not apply because the damages caused by the subcontractor extended beyond the economic loss of any anticipated benefit under the plumbing subcontract.[143]

What should be clear from the above is the lack of clarity that still exists with the economic loss rule. Because of the limited scope of this paper, the above description is intended only as a primer on the subject, and not a comprehensive dissertation. However, given the significance of the doctrine in Texas construction law, readers are encouraged to undertake a more comprehensive study of the doctrine in order to thoroughly understand its implications on construction and design professionals. As a starting place, readers would be well served to look to the Texas Supreme Court's opinions in *Chapman,* cited above, as well as *Sharyland Water Supply Corp. v. City of Alton,*[144] *Jim Walter Homes, Inc. v. Reed*,[145] and *Barzoukas v. Foundation Design, Ltd.*[146]

4. Liquidated Damages

Time is almost always of the utmost importance on a construction project. From the owner's perspective, every day that a project is delivered late is lost income, in addition to other expenses that an owner may incur such as interim loan and finance costs. These difficulties can sometimes be hard to quantify, and the owner and contractor may elect to stipulate to a liquidated damages clause that estimates the amount of damages to which the non-breaching party is entitled to in the event of delay.

Contractual liquidated damages clauses are enforceable under Texas law if: (i) "the harm caused by the breach is incapable or difficult of estimation"; and (ii) "the amount of liquidated damages called for is a reasonable forecast of just compensation."[147] In determining the above, courts look to the circumstances that existed at the time the contract was made, and the party seeking liquidated damages bears the burden of showing that the liquidated damages provision, as drafted, accounts for these considerations.[148] However, even in the event that a liquidated damages provision is found to be unenforceable, there is still a possibility that a party may pursue that actual damages instead.

However, even a properly designed liquidated damages clause can still be rendered an unenforceable penalty clause if a significant difference exists between the actual damages incurred by the non-breaching party and the liquidated damages in the contract.[149] Unlike the first two factors, this third factor must be measured and determined at the time of the breach of contract.[150] Where an "unbridgeable discrepancy" exists between "liquidated damages provisions as written and the unfortunate reality in application," a liquidated damages clause is not enforceable.[151]

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[141] *Id.* at 717.
[142] *Id.* at 718-19.
[143] *Id.*
[144] 354 S.W.3d 407 (Tex. 2011).
[145] 711 S.W.2d 617 (Tex. 1986).
[146] 363 S.W.3d 829 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).
[147] *Atrium Med. Ctr., LP v. Houston Red C LLC,* 595 S.W.3d 188, 192 (Tex. 2022).
[148] *Id.*
[149] *Id.* at 192-93.
[150] *Id.* at 193.
[151] *Id.*

As to what constitutes an "unbridgeable discrepancy," unfortunately there is no bright line rule. However, curious readers can look to Texas case law for guidance, including the Texas Supreme Court's opinions in *Atrium Med. Ctr., LP v. Houston Red C, LLC*[152] and *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*[153]

5. No Damages for Delay Clauses

No damages for delay clauses are generally enforceable in Texas. As the moniker suggests, these clauses generally provide that, in the event of a delay to a construction project, the contractor's sole remedy is an extension of time to the construction schedule, and the contractor is not entitled to damages or additional payment of any kind. Thus, the contractor assumes the risk of construction delays and waives any claim for damages related thereto.

The seminal case in Texas on no damages for delay clauses is the Texas Supreme Court's opinion in *Zachry Construction Corp. v. Port of Houston Authority*.[154] In that case, the Supreme Court considered the following clause (which is fairly representative of a typical no damages for delay clause):

> Contractor shall receive no financial compensation for delay or hindrance to the Work. In no event shall [Owner] be liable to Contractor or any Subcontractor or Supplier, or any other person or any surety for or any employee or agent of any of them, for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance, including events of Force Majure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF [OWNER]. Contractor's sole remedy in any such case shall be an extension of time.[155]

Although generally valid, Texas courts have recognized five exceptions to the enforcement of no damages for delay clauses, including:

(i) when the delay was not intended or contemplated by the parties to fall within the scope of the provision;

(ii) when the delay resulted from bad faith acts of the one seeking the benefit of the clause;

(iii) when the delay has been extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract;

(iv) when the delay is not within the specific delays enumerated by the contract; and

(v) when the delay was caused by arbitrary or capricious acts, including active interference[156] with performance of the contract by the owner or contractor.[157]

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[152] *See supra* n. 145.
[153] 426 S.W.3d 59 (Tex. 2014).
[154] 449 S.W.3d 98 (Tex. 2014).
[155] *Id.* at 103.
[156] "Active interference" means causing delay "willfully, by unreasoning action, without due consideration and in disregard of the rights of other parties." *Zachry,* 449 S.W.3d at 104 n. 7.
[157] *Zachry,* 449 S.W.3d at 115-18 & n. 7 (citing *Green Int'l Inc. v. Solis,* 951 S.W.2d 384, 387 (Tex. 1997); *City of Houston v. Ball,* 570 S.W.2d 75 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.)).

Note also that the Texas Supreme Court has held that, unlike indemnity clauses, no damages for delay clauses are not extraordinary risk shifting provisions and, therefore, do not have to be conspicuously set forth in a construction contract.[158]

6. Warranty of Plans and Specifications

For many years, Texas went against the majority of states concerning which party—the owner or contractor—warrants the sufficiency of plans and specifications. Most states traditionally followed what is known as the *Spearin* doctrine, which holds that if a contractor is bound to build according to the plans and specifications, the contractor will not be responsible for defects in the plans and specs.[159] Texas, on the other hand, long followed the *Lonergan* doctrine, which held that the owner is only the guarantor of plans and specifications if there was express contractual language to that effect; otherwise, the contractor bore the risk for deficient plans and specs.[160]

In 2021, the Texas Legislature enacted Texas Business and Commerce Code Section 59.051, which changed the law and shifted liability away from the general contractor for defective plans and specifications. The new law states that a contractor is not responsible for the consequences of design defects, and may not warranty the accuracy or sufficiency of design documents provided by a person other than the contractor's agents, contractors, fabricators, suppliers, or consultants of any tier.[161] Thus, save and except for certain limited circumstances, a contractor no longer assumes the risk of defects in the design documents prepared by a party other than one associated with the contractor.

Despite this, however, the contractor still has an obligation to notify the owner in writing of any "known defect in the plans, specifications, or other design documents that is discovered by the contractor, or that reasonably should have been discovered by the contractor using ordinary diligence, before or during construction" "within a reasonable time of learning of a defect, inaccuracy, inadequacy, or insufficiency" in the design documents."[162] However, "ordinary diligence" does not require a contractor to engage a licensed or registered engineer or architect to review the plans, and a contractor's review and disclosure obligations are limited to "contractor's capacity as a contractor."[163] Contractors should be cautioned, though, that the failure to disclose any known design defects may subject the contractor to liability for the consequences of the defect.[164]

CONCLUSION

Construction is an intricate process that requires the diligence and coordination of numerous parties to reach a successful end result. All parties on a project, including lenders, owners, developers, contractors, subcontractors, and design professionals, play a valuable role, no matter where they fall on the "food chain." If even one party fails to adequately perform his or her responsibilities, the ramifications could be catastrophic. With so much at stake, it is critical that construction lawyers properly advise their clients of the requirements and risks involved, from the beginning through the end of a project, which, as one can tell from this paper, can be quite extensive in Texas.

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[158] *Green Int'l, Inc. v. Solis,* 951 S.W.2d 384, 386 (Tex. 1997).
[159] *U.S. v. Spearin,* 248 U.S. 132, 135-36 (1918).
[160] *Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W.1061, 1065-66 (Tex. 1907).
[161] Tex. Bus. & Comm. Code § 59.051(a).
[162] *Id.* § 59.051(b).
[163] *Id.*
[164] *Id.* § 59.051(c).