15TH ANNUAL CONSTRUCTION SYMPOSIUM

JANUARY 31, 2020

Cooper & Scully
A Professional Corporation

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Speakers:

R. Brent Cooper
Elliott Cooper
Summer Frederick
Eric Hines
Shabaz Nizami
Amanda Nogay (*Nelson Forensics*)
R. Douglas Rees
Julie Shehane
Tara Sohlman
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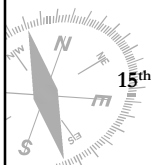
NOTES

TEXAS' CERTIFICATE OF MERIT STATUTE

Elliott Cooper
Shabaz Nizami



15th Annual Construction Symposium

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Texas' Certificate of Merit Statute

WHAT IS IT?

A statutory requirement that a claimant who raises a claim in litigation or arbitration **against a licensed or registered professional** by seeking recovery of damages, contribution, or indemnification*** arising out of the provision of professional services by the licensed or registered professional**, must file contemporaneously a supporting expert affidavit with any petition or other pleading which, for the first time, raises the claim(s) against certain licensed or registered design professionals.

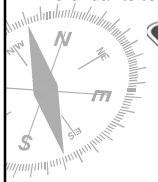
A claimant's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

***** *This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.*

Texas' Certificate of Merit Statute

WHAT IS ITS PURPOSE?

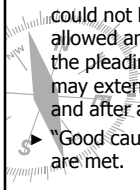
To provide a basis for the trial court to conclude early on in the litigation that the claimant's claims against the design professionals is frivolous or unmeritorious, allowing Defendants to save time and money.



Contemporaneous Filing Requirement

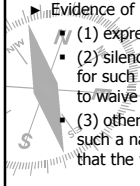
Certificate of Merit must be filed contemporaneously, except:

- Under Section 150.002, a plaintiff may receive an extension if the statute of limitations will expire within 10 days of the date of filing the petition AND, because of such time constraints, the plaintiff has alleged that an affidavit could not be prepared. In such cases, the plaintiff is allowed an extension of 30 days after filing to supplement the pleadings with a certificate of merit. The trial court may extend this deadline beyond 30 days for good cause and after a hearing.
- "Good cause" exception only applies if BOTH requirements are met.



Waiver of Certificate of Merit

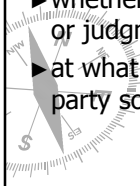
- Because Section 150.002 imposes a mandatory, non-jurisdictional filing requirement, a defendant may waive its right to seek dismissal under the statute.
- Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances.
- Evidence of waiver generally takes one of three forms:
  - (1) express renunciation of a known right;
  - (2) silence or inaction, coupled with knowledge of the known right, for such an unreasonable period of time as to indicate an intention to waive the right; or
  - (3) other conduct of the party knowingly possessing the right of such a nature as to mislead the opposite party into an honest belief that the waiver was intended or assented to.



Waiver of Certificate of Merit

Some factors considered by Courts:

- the moving party's degree of participation in discovery;
- whether the party sought affirmative action or judgment on the merits; and
- at what time during the judicial process the party sought dismissal.



Enacting 2003 Statute

- **Originally enacted in 2003 as part of the Texas Legislature's tort reform efforts.**

§150.002(a): **In any action for damages alleging professional negligence by a design professional,** the plaintiff shall be required to file with the complaint an affidavit of a third-party registered architect or licensed professional engineer competent to testify and practicing **in the same area of practice as the defendant**, which affidavit shall set forth specifically **at least one negligent act, error, or omission claimed to exist and the factual basis for each claim**. The third-party professional engineer or registered architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.

§150.002(d): The plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) **may** result in dismissal with prejudice of the complaint against the defendant.

Enacting 2003 Statute - Scope

- **SCOPE OF STATUTE:**
  - **Claims against registered architects and licensed professional engineers (both were defined as "Design Professionals" under the Code at that time).**
  - **Regarding actions or claims "alleging professional negligence by a design professional"**

2003 Statute – Qualified Affiant and Scope of Affidavit

- **AFFIANT QUALIFICATIONS:**
  - **Third-party registered architect or licensed professional engineer;**
  - **Competent to testify;**
  - **Practicing in the same area of practice as the defendant;**
  - **Licensed in Texas;**
  - **Actively engaged in the practice of architecture or engineering**
- **SCOPE OF AFFIDAVIT:**
  - **Required to "set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each claim"**

Enacting 2003 Statute – Questions Raised

- **What constitutes "the same practice area"?**
  - **Example: Can only a Geo-Tech Engineer provide an affidavit criticizing the work of another Geo-Tech Engineer? Or is it more broadly interpreted so as to allow any of type of engineer who possesses knowledge about Geo-Tech Engineering to offer an opinion on the Defendant's work?**
- **What does "any action" entail?**
  - **Limited only to lawsuits filed in Court or Arbitrations too?**
    - **Arbitration is a widely used form of dispute resolution in the construction industry. Limiting it just to lawsuits filed Court would provide Plaintiff's an escape from the statute's requirement.**
- **Is the Statutory definition of "Design Professional" limited just to individual architects or engineers; or whether it extends to the companies they were working for as well?**

Questions such as these were left to be addressed by through the Texas court's interpretation of the statute

2005 Additions to Statute

- **The Texas Legislature made the following changes to the Statute and provided some clarifications on the questions that arose after the Statute was enacted in 2003:**
  - The 2003 version of §150.002 only applied to negligence actions. In 2005, §150.002 was expanded to any cause of action seeking damages **"arising out of the provision of professional services**."
  - The 2005 version of §150.002 added the requirement that an expert providing the affidavit must hold the **same professional license as the defendant.**
  - "Any Action" included Arbitration under §150.002.
  - "Design professional" changed to "licensed or registered professional" which added registered professional land surveyors to the list of types of Defendants the statue cover. It also applies the certificate of merit requirement to **any firms in which a licensed professional practice in.**
  - Failure to comply with §150.002 resulted in **mandatory** dismissal of the plaintiff's complaint. However, dismissal with prejudice remains within the discretion of the court.

2009 Amendments

- **The most notable change from the 2005 version:**

§150.002(b): Expert Affidavit no longer requires the factual basis for "at least one negligent act, error, or omission", but now for "<u>each theory of recovery</u> for which damages are sought, the negligence, if any, <u>or other action</u>, error or omission of the licensed or registered professional in providing the service…and <u>the factual basis</u> for each such claim."

- **Inclusion of the words "each" and "or" appears to clearly encompass more than just negligence claims, but also those sounding in tort or contract.**

2009 Amendments

DOES THAT MEAN ALL CLAIMS AGAINST LICENSED AND REGISTERED PROFESSIONALS MUST REQUIRE THE STATUTORY AFFIDAVIT TO ACCOMPANY IT?

No, only those claims that ***arises out*** of the provision of **professional services** if the claim ***implicates*** the professional's education, training and experience in applying special knowledge of judgment.

- However, Texas Courts apply a broad interpretation in in its applicability to various causes of action.
  - See *Capital One, N.A. v. Carter & Burgess, Inc.*, 344 S.W.3d 477 (Tex. App.—Fort Worth 2011, no pet.) where Plaintiff sued Defendants for misrepresentation and Court held that Statute applies because Defendants alleged false representations were made as part of Defendant's performing a professional service necessary for the … completion of its engineering services – an activity that expressly constitutes the practice of engineering.

Professional Services

- (2) "Practice of architecture" has the meaning assigned by Section 1051.001, Occupations Code.
- (3) "Practice of engineering" has the meaning assigned by Section 1001.003, Occupations Code.

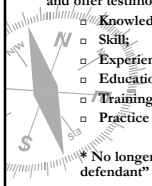
2009 Statute – Covered Parties

- **DEFENDANTS COVERED:**
  - **Licensed architects;**
  - **Licensed professional engineers;**
  - **Registered professional land surveyor;**
  - **Registered landscape architect; or**
  - **Any firm in which such licensed or registered professional practices, including but not limited to a corporation, professional corporation, limited liability corporation, partnership, limited liability partnership, sole proprietorship, joint venture, or any other business entity.**

2009 Statute – Affiant Qualifications

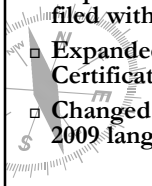
- A third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:
  - Is competent to testify
  - Holds the same professional license or registration as the Defendant*
- Affiant now required to be "knowledgeable in the area of practice of the defendant and offer testimony based on the affiant's:
  - Knowledge;
  - Skill;
  - Experience;
  - Education;
  - Training; and
  - Practice

* No longer required to be "practicing in the same area of practice as the defendant"



2019 Amendments

- Enacted by Senate Bill 1928
- Effective June 10, 2019
- Very impactful on Third-Party practice
- Expanded scope of pleadings that must be filed with a Certificate of Merit
- Expanded the types of parties who must file a Certificate of Merit
- Changed one affiant requirement back to pre-2009 language

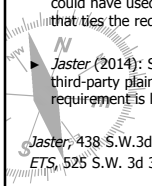


2019 Amendments – Why?

Response to decisions in *Engineering and Terminal Services, L.P. v. TARSCO, Inc. and Orcus Fire Protection, LLC.* and *Jaster v. Comet II Construction, Inc.*

- *ETS* (2017): Trial court dismissal of third-party claims reversed because appellate court reasoned that, had the Texas Legislature intended the certificate of merit requirement to apply to a party filing a third-party claim it could have used the broader term "claimant" instead of the using language that ties the requirement solely to the pleading that initiates the lawsuit.
- *Jaster* (2014): Supreme Court held that section 150.002 does not apply to third-party plaintiffs seeking indemnity and contribution because the affidavit requirement is limited to actions "for damages."

Jaster, 438 S.W.3d 556 (Tex. 2014)
ETS, 525 S.W. 3d 394 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)



2019 Amendments - Definitions

2009 Statute:

In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the **plaintiff** shall be required to file with the **complaint** an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor…

- Courts have construed "plaintiff" to mean the original plaintiff
- "Complaint" has been interpreted to mean the original petition or any amendment or supplement that, for the first time, brings an applicable cause of action
- 2019 Amendments include two new definitions that impact this analysis

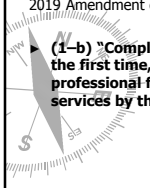
2019 Amendments - Definitions

2019 Amendment replaces "Plaintiff" with "Claimant" and defines "Claimant":

- **(1–a) "Claimant" means a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification.**

2019 Amendment defines "Complaint" for the first time:

- **(1–b) "Complaint" means any petition or other pleading which, for the first time, raises a claim against a licensed or registered professional for damages arising out of the provision of professional services by the licensed or registered professional.**



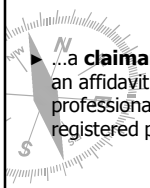
2019 Amendments

OLD

- …the **plaintiff** shall be required to file with the **complaint** an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who…

NEW

- …a **claimant** shall be required to file with the **complaint** an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who…



2019 Amendments – Affiant Qualifications

OLD

- (3) is **knowledgeable** in the area of practice of the defendant…

NEW

- (3) **practices** in the area of practice of the defendant…

2019 Amendments - Summary

- Certificate of Merit requirements expressly applies to Third-Party Plaintiffs, and appears to apply to Counter-Plaintiffs, Cross-Plaintiffs, Intervenors, and any other Party asserting a claim for the first time
- Requirements now apply to "any petition or other pleading"
- Affiant must be actively practicing in the applicable area → no more retirees or professional experts
- Definition of "claimant" includes those asserting claims for indemnification and contribution

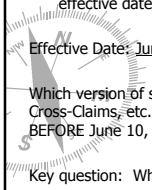
2019 Amendments – Applicability to Existing Cases

Enabling language of Senate Bill 1928:

> The change in law made by this Act applies only to an **action** or arbitration proceeding commenced on or after the effective date of this Act. An action or arbitration proceeding commenced before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued for that purpose.

Effective Date: June 10, 2019

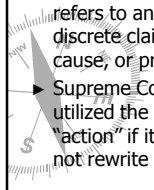
Which version of statute applies to Third-Party Petitions, Counter-Claims, Cross-Claims, etc., filed AFTER June 10, 2019 in cases that were initiated BEFORE June 10, 2019?



Key question: What is an "action"?

2019 Amendments – Applicability to Existing Cases

- Third-Party Defendants filing Motions to Dismiss and using this enabling language to argue that "action" means "claim" or "cause of action" - not the initiation of the lawsuit.
- *Jaster* held that the "common meaning of the term 'action' refers to an entire lawsuit or cause or proceeding, not to discrete claims or causes of action asserted within a suit, cause, or proceeding."
- Supreme Court reasoned that the legislature could have utilized the term "cause of action" or "claim" instead of "action" if it wanted to include third-party claims. Court will not rewrite text that lawmakers chose.



Texas' Certificate of Merit Statute

Best Practices:

- Don't risk it - get a Certificate of Merit before initiating any applicable claim
- If approaching limitations deadline, use diligence in trying to get an affidavit → will help support arguments for application of "good cause" exception
- Conduct discovery and file Motion to Dismiss promptly, or risk waiver

Texas' Certificate of Merit Statute

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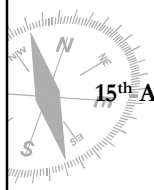

Chapter 151: TEXAS ANTI-INDEMNITY STATUTE

Fred L. Shuchart

2020 Annual Construction Law Symposium

TRANSFER OF RISK

Two Main Risk Transfer Provisions:

1) Contractual Indemnity Provision

2) Additional Insured Provision

CONTRACTUAL INDEMNITY

Contractual Indemnity Agreement is a promise to hold the another party(indemnitee)harmless against damage or bodily injury.

Example:

"General Contractor hereby indemnifies . . . Subcontractor . . . from and against all claims . . whether the same is caused or contributed to by the negligence of General Contractor . . ."

CONTRACTUAL INDEMNITY

3 TYPES

Broad Form Indemnity: Indemnitor indemnifies for any and all liability arising out of specified subject matter.

Intermediate Form Indemnity: Indemnitor indemnifies for any and all liability arising out of a specified subject matter, even if damage/injury is caused by the indemnitee's negligence, but excludes the indemnitor's sole negligence.

Limited Form Indemnity: Indemnitor indemnifies only to the extent of the indemnitor's fault.

ADDITIONAL INSURED PROVISION

Requires that a party be added as an insured in the name insured's liability policy, subject to the terms and conditions of the policy and the additional insured endorsement.

CONTRACTUAL INDEMNITY

Prior to the Anti-Indemnity Act, indemnity agreements were subject to the Fair Notice Test and the Oilfield Anti-Indemnity Act. The Fair Notice Test still applies and is being addressed by Brent later in the program.

TREND

Trend in recent years is to limit or prohibit indemnity agreements in the construction context..

44 states have enacted anti-indemnity statutes.

TEXAS ANTI-INDEMNITY ACT

In 2011, the Texas Legislature enacted the Texas Anti-Indemnity Act, which limits and makes void certain liability shifting agreements.

The Act became effective January 1, 2012.

Codified in Texas Insurance Code Section 151.001 to 151.151.

TEXAS ANTI-INDEMNITY ACT

Prohibits and makes void broad form and intermediate form indemnity agreements (claims involving the sole or concurrent negligence of indemnitee) for construction projects, *if the Act applies to your contract*.

TEXAS ANTI-INDEMNITY ACT

When does the Act Apply?

TEXAS ANTI-INDEMNITY ACT

- **§ 151.101. Applicability**

(a) This subchapter applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to:

- (1) this chapter; or
- (2) Title 10.

TEXAS ANTI-INDEMNITY ACT

- This Chapter means a Consolidated Insurance Program
- "'Consolidated insurance program' means a program under which a principal provides general liability insurance coverage, workers' compensation coverage, or both that are incorporated into an insurance program for a single construction project or multiple construction projects."

TEXAS ANTI-INDEMNITY ACT

- Title 10 (sets out regulations for property and casualty insurance in Texas; includes standard commercial general liability and workers' comp coverage).

POLL

- What is the name of your favorite law firm?

TEXAS ANTI-INDEMNITY ACT

- TO WHAT DOES THE ACT APPLY?

TEXAS ANTI-INDEMNITY ACT

- **§ 151.102. Agreement Void and Unenforceable**
- … 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… a party… against a claim caused by the negligence or fault … 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.

TEXAS ANTI-INDEMNITY ACT

What is a "Construction Contact"?

Includes a contract, subcontract, agreement or performance bond:

Made by or between an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, repair, or maintenance of a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition and excavation connected with the real property.

TEXAS ANTI-INDEMNITY ACT

"An Agreement in a Construction Contract, *Collateral to or Affecting*" a Construction Contract.

No case law defining "collateral to or affecting"

Look to Texas Oil Field Anti-Indemnity Act ("TOAIA"), which has a similar provision:

TOAIA requires some connection between the contract and actual services performed on a well or mine.

TEXAS ANTI-INDEMNITY ACT

Exclusions from the Act

Employee Claims:

The Act specifically excludes agreements in which one party requires indemnity against another for the death or bodily injury of an employee of the indemnitor or its subcontractor. **Tex. Ins. Code § 151.103.**

TEXAS ANTI-INDEMNITY ACT

Contains 12 Exclusions:

- Consolidated insurance programs;
- Breach of contract or warranty actions;
- Loan and financing documents (other than construction contracts to which lenders are a party);
- General agreements of indemnity required by sureties;
- Workers' compensation benefits and protections;
- Agreements subject to Chapter 127 of the Civil Practice & Remedies Code;
- License or access agreements with railroad companies;
- Indemnity provisions apply to copyright infringement claims;
- Construction contracts pertaining to single-family homes, townhouses and duplexes;
- Public works projects of municipalities;
- Joint defense agreements entered into after a claim is made.

TEXAS ANTI-INDEMNITY ACT

Residential Construction Exception:

Construction contracts pertaining to "a single family house, townhouse, duplex, or land development directly related thereto" **Tex. Ins. Code § 151.105(10)(A).**

Are condominiums and apartments intended to included in this exclusion?

Legislative history suggest not covered under the exclusions.

TEXAS ANTI-INDEMNITY ACT

Breach of Contract or Warranty Exception:

To be excluded, it must exist independently of an indemnity obligation. **Tex. Ins. Code § 151.105(2).**

TEXAS ANTI-INDEMNITY ACT

- How Does the Act Affect Additional Insured Provisions?

Any requirement in a construction contract for a party to name another as an AI under a policy of insurance with a scope of coverage that would cover the other party's own negligent conduct would be void to the extent it required coverage for the other party's own negligence. **Tex. Ins. Code § 151.104(a).**

TEXAS ANTI-INDEMNITY ACT

The Act cannot be waived!

TEXAS ANTI-INDEMNITY ACT

Effective Date:

Only applies to an original contract with an owner of an improvement or contemplated improvement that is entered into on or after the effective date of the act – January 1, 2012.

CASE LAW

Maxim Crane Works, LP v. Zurich American Ins.. Co.
392 F. Supp. 713 (SD Tex. 2019)

FACTS:

GC provided CCIP
Sub leased crane from Maxim
Lease contained an Additional Insured requirement
GC's employee hurt on the job when crane fell over
Injured worker received WC through CCIP
Injured worker sues Sub and Maxim
Judgement against Sub and Maxim
Appellate Court determined that Sub is co-employer under WC and reverses judgment against GC and Maxim settles
Maxim sues for AI coverage

CASE LAW

- Arguments:
- Maxim-- Sub determined to be co-employer of injured worker under WC Act , employee exception to Anti-Indemnity Act applies and entitled to AI status
- Zurich-- WC Act doesn't apply to Anti-Indemnity Act and therefore the exception doesn't apply and no AI status

CASE LAW

- Holding: The Anti-Indemnity Act bars Additional Insured status for Maxim. Court reasons that WC definitions do not apply to the Anti-Indemnity Act. Injured worker was not employee of Sub and therefore exception did not apply.

TEXAS ANTI-INDEMNITY ACT

- What to Expect in the Future?

Texas Department of Insurance has express authority under the Act to promulgate regulations to fill in any gaps in the Act.

Courts will continue hearing cases involving the Act, thus interpreting and evolving Texas law of anti-indemnity in construction contracts.

For questions or comments, contact:

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Identifying Construction Defects and Damage through Destructive Testing

Presented to:
Cooper & Scully
15th Annual Construction Symposium
January 31, 2020

About the Presenter

Licensed Professional Engineer in 4 states

B.S. in Architectural Engineering – The University of Texas at Austin

Publications

The Importance of Destructive Testing for Identifying Concealed Resultant Structural Damage

Flashing of Curtainwall and Storefront Systems in Commercial Applications

Amanda R. Nogay, P.E.
Project Director

Goals

- Increase proficiency in the building envelope
- Explore common deficiencies in the building envelope that permit water intrusion
- Evaluate when destructive testing can be beneficial
- Examine case studies for the investigation of claims related to construction defects

Building Envelope

- Components of a building that separate outside from inside
  - Roofing
  - Wall Assembly
    - Cladding and Veneer
    - Water-Resistive Barriers (WRB)
    - Waterproofing
    - Flashing
    - Window Wall Systems
- Prevents air and water flow
- Interior climate control and energy efficiency

Steep-Slope Roofing

Low-Slope Roofing

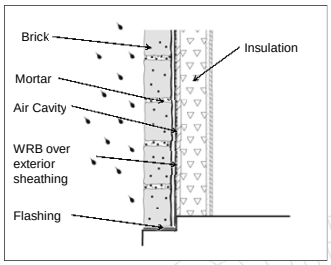
Wall Assemblies

Barrier Systems

Drainage Plane Systems

Wall Assemblies

Cavity Wall Drainage Plane Systems



Cladding and Veneer

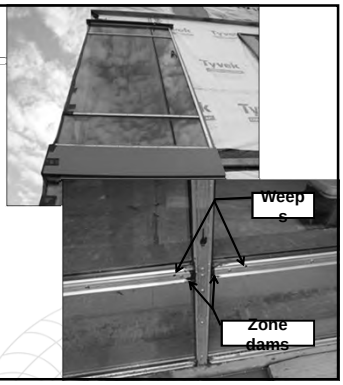
Water-Resistive Barriers

Waterproofing

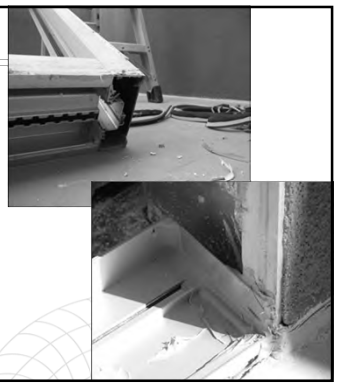
Flashing

Curtainwalls

Photograph by KUT
https://www.kut.org



Storefronts



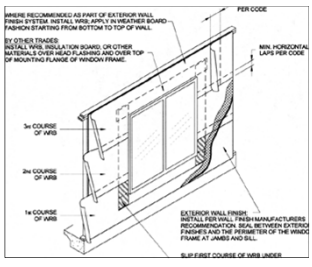
Building Envelope Deficiencies

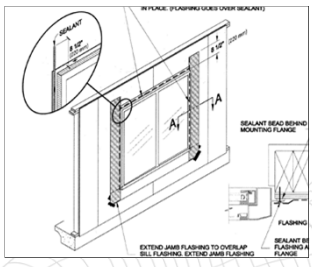
- Building Code
- Industry Standards
- Manufacturer Instructions
- Common Deficiencies and Examples

Building Code

- Minimum requirements to safeguard the public safety, heath, and general welfare
- International Residential Code: Wall construction, wall covering, roof assemblies
- International Building Code: Exterior walls, roof assemblies and rooftop structures, gypsum board, gypsum panel products and plaster
- Flashing is required to divert water to the exterior
- References ASTM standards for product requirements and installation

Industry Standards





ASTM E2112-07

Steep-Slope Roofing Industry Standards

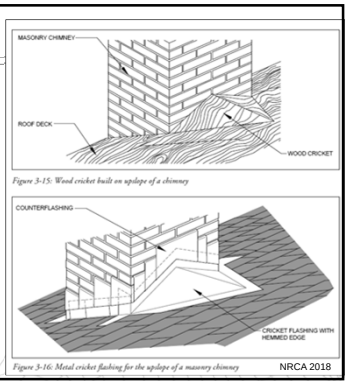


Figure 3-15: Wood cricket built on upslope of a chimney

Figure 3-16: Metal cricket flashing for the upslope of a masonry chimney

NRCA 2018

Low-Slope Roofing Industry Standards

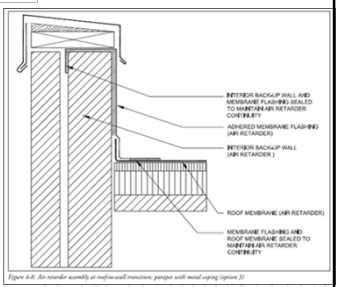
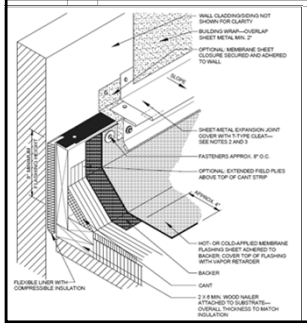
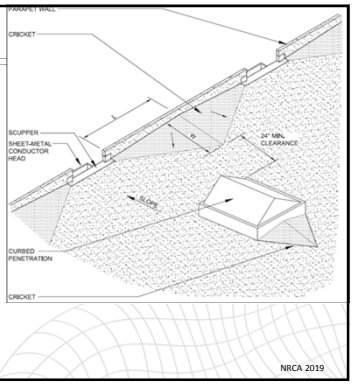


Figure 4-8: Air retarder assembly at roof-to-wall transition: parapet with metal coping (option 3)

NRCA 2018

Low-Slope Roofing Industry Standards





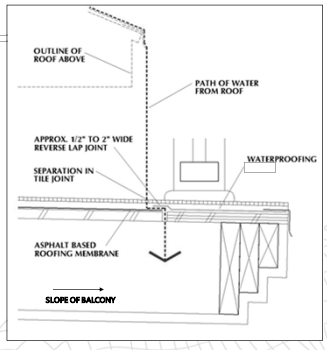
NRCA 2019

Indications of Distress

Indications of Distress

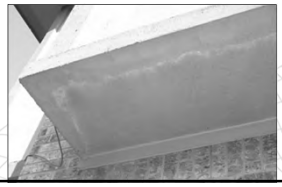
Improper Drainage Path

- Flashing and waterproofing concealed by finishes
- Discontinuity of the drainage path
- Water infiltration at the reverse-lapped joint from the roofing membrane to the waterproofing at the edge of the balcony



Lack of Drainage Provisions

- Weepholes
- Weep screeds
- Clearance above impermeable surfaces



Improper Installation of Materials

Improper Installation of Materials

Improper Installation of Materials

Improper Installation of Materials

Degradation of the Building Envelope

Displacement of Building Envelope

Resultant Damage

- 58 mph winds
- Pattern of distress below window

Resultant Damage

Why Perform Destructive Testing

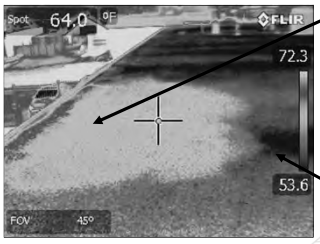
- To pinpoint cause of moisture distress
- Corroborate non-destructive testing results
- Determine the extent of damage
- Evaluate as-constructed conditions

Unknown Specific Location of Water Infiltration

Non-Destructive Testing

Corroborating Non-Destructive Testing

Corroborating Non-Destructive Testing



Why Perform Destructive Testing?

Why Perform Destructive Testing?

Other Issues Identified through Destructive Testing

Mandatory Poll Question!!

When is destructive testing beneficial?

a) Determine the source of water intrusion
b) Evaluate the WRB and flashing
c) Corroborate non-destructive testing results
d) All of the above

Case Studies

- Mid-rise Condominium Building
- Multi-Building Condominium Development
- Single-Family Terrace

Mid-Rise Condominium Structure

- Southeast Texas
- Four-story condo building
- Podium construction
- Built 2008
- Stucco and cementitious siding

Interior Moisture Distress

Window Observations

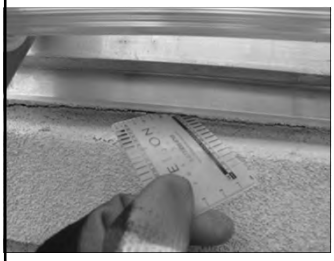
- No deterioration of the stucco
- Some areas of staining and cracking
- Suspected organic growth between the stucco and EIFS banding

Deterioration at the OSB Sheathing

Stucco-Clad Balconies and Columns

- Limited fractures at corners
- No pattern of deterioration visible at the stucco
- No possible resultant interior moisture staining

Limited Separations and Staining at Balcony Perimeters

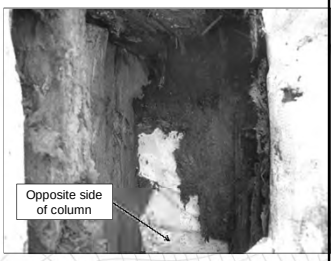


Destructive Testing Results

- One layer of building paper
- Deteriorated wood sheathing
- Deteriorated wood framing

Deteriorated Sheathing and Framing

Complete Deterioration of Balcony Framing



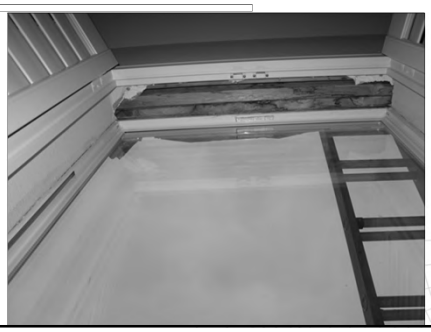
Life-Safety Concerns at the Balcony Framing

Determining the Extent of Damage

Multi-Building Condominium Complex

- North Texas
- Varying design/layout
- Built in phases
- Adhered stone veneer, stucco, and composite siding

Moisture Intrusion at the Interior



Deterioration at the Windows

- One layer of building paper behind the stucco and adhered stone veneer
- Incomplete flashing around the windows
- Deteriorated sheathing
- Moisture-stained framing
- Isolated areas of deteriorated framing

Crushed Stucco at the Balcony Columns

Building Envelope Deficiencies

- One layer of building wrap
- Discontinuous weather barrier
- Incomplete flashing
- Reverse-lapped flashing

Destructive Testing at Multiple Conditions

Additional Testing and Temporary Shoring

Varying Degrees of Damage

Central Texas Terrace

- Built in 1929 with multiple renovations since
- Reported moisture distress around the terrace

Moisture Distress and
Replaced Framing Below
Terrace

Removed Slate Pavers to View Wall
and Terrace Interface

Openings Above Replaced Framing

Discontinuous Flashing and Negative Drainage

Closing

- Construction defects may not correlate with visible distress at the interior or exterior
- Distress to the sheathing or framing may occur before distress manifests at the finishes or cladding
- Water intrusion can be related to multiple factors
- Some conditions conducive to interior or framing distress are visible without removing any finishes
- Construction defects can lead to unsafe conditions
- Destructive testing can be necessary to determine sources of water infiltration

Thank you!

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Peeking Behind the Curtain: Use of Extrinsic Evidence in the Duty to Defend

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1

EIGHT CORNERS RULE

- Duty to defend in Texas is generally based upon the four corners of the lawsuit and four corners of the insurance policy.
- Is this an inflexible rule?
- Exceptions for extrinsic evidence?

2

EARLY SUPREME COURT AUTHORITY

- Early Texas Supreme Court authority made no mention of and did not consider the use of extrinsic evidence The earliest case, *Heyden Newport Chem. Ins. Co. v. Southern Gen'l Ins. Co.* (1965), referred only to the eight-corners rule implying that only the pleadings and the policy could be considered.

4

TEXAS COURTS PERMIT EXTRINSIC EVIDENCE IN LIMITED CIRCUMSTANCES

- *International Service Ins. Co. v. Boll*, 392 S.W.2d 158 (Tex. Civ. App.--Houston [1st Dist.] 1965, writ ref'd n.r.e.)
- *Cook v. Ohio Cas. Ins. Co*., 418 S.W.2d 712 (Tex. Civ. App.--Texarkana 1967, no writ)
- *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448 (Tex. App.--Corpus Christi 1992, writ denied)

5

EXCEPTION IN FEDERAL COURTS

- "When it is initially impossible to discern whether coverage is potentially implicated and when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004).

6

EXCEPTION IN FEDERAL COURTS

- *Ooida Risk Retention Grp v. Williams*, 579 F.3d 469 (5th Cir. 2009) (allowing extrinsic evidence in the absence of sufficient allegations to determine application of fellow employee exclusion)
- *Star-Tex Resources, LLC v. Granite State Ins. Co*., 553 F. Appx 366 (5th Cir. 2014) (allowing consideration of extrinsic evidence to in absence of sufficient allegations to determine application of auto exclusion)
- *Evanston Ins. Co. v. Kinsale*, 7:17-cv-327(S.D. Tex. July 12, 2018) ("[T]he Court also agrees with Defendant that this is a situation in which the extrinsic evidence exception applies. The alleged date of construction goes solely to a fundamental issue of coverage and does not implicate the merits or depend on the truth of the facts alleged.)

7

EXTRINSIC EVIDENCE ALLOWED

- Who Is An Insured
- Who Is An Additional Insured
- Exclusions
- Date of Loss

8

TEXAS SUPREME COURT TRILOGY

- *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006)
- *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487 (2008)
- *Pine Oak Builders v. Great American Lloyds*, 279 S.W.3d 650, 655 (Tex. 2009)

9

RULE #1

- Rule #1-Extrinsic evidence will not be allowed to contradict specific allegations in the pleading. In both *GuideOne* as well as *Pine Oak*, there were specific pleadings that went to the coverage issue that was involved. In *GuideOne* it was the dates of employment of Evans. In *Pine Oak*, it was allegations that the home had been built by *Pine Oak* and not by subcontractors. In *GuideOne* the court noted that "the extrinsic evidence here concerning Evans' employment directly contradicts the plaintiff's allegations that the Church employed Evans during the relevant coverage period." In *Pine Oak*, the supreme court noted that "the extrinsic fact Pine Oak seeks to introduce in this coverage action contradicts the facts alleged in the Glass suit." Therefore, it is clear that extrinsic evidence will not be allowed to contradict specific pleadings to the contrary.

10

RULE #2

- Rule #2-Extrinsic evidence will be allowed only when relevant to independent and discrete coverage issue, not touching on the merits of the underlying third-party claim. In the *GuideOne* decision, the supreme court also referenced the rule announced in *Northfield Ins. Co. v Loving Home Care, Inc*. That decision referenced the rule set out above plus added another requirement: "when it initially impossible to discern whether coverage is potentially implicated." However, when the Texas Supreme Court was reiterating its *GuideOne* decision holding in the *Pine Oak* decision, it omitted this element. This distinction is important. The Supreme Court seems to say that extrinsic evidence may be allowed if it does not touch on the merits of the underlying case, even if the parties are initially able to discern whether coverage is implicated.

11

RULE #3

- Rule #3-Extrinsic evidence will be admitted to both create coverage as well as to defeat coverage. Pine Oak argued that a different rule should apply when a party was trying to use extrinsic evidence to create coverage than when extrinsic evidence was being used to defeat coverage. The court held that "[t]his distinction is not legally significant."

12

RULE #4

- Rule #4-Extrinsic evidence may be used if collusion can be shown. This exception was referenced in both *GuideOne* ("the record before us does not suggest collusion. . . ") and *Pine Oak* ("Our analysis in *GuideOne Elite* did not consider whether an exception to the eight-corners rule might exist where the parties to the underlying suit collude to make false allegations that would invoke the insurer's duty to defend, because the record did not indicate collusion.") It should be pointed out that collusion does not equate to false allegations in the petition. The plaintiff may try to plead the case in the coverage and allege facts that are known to be false. The insurer in this case still has a duty to defend even if the allegations are false or fraudulent. Collusion in the context of *GuideOne* and *Pine Oak* means an agreement between the plaintiff and the insured in the underlying case. The involvement of the insured is essential to trigger the collusion exception.

13

RULE #5

- Rule #5-The traditional burden of proof issues will apply. The insured initially has the burden of showing that the case falls within the coverage. The insurer will have the burden of showing the application of an exclusion or breach of a condition. What does this mean? In a case where there is no date alleged as to the bodily injury or property damage, the insured would have the burden of bringing forth evidence showing the date of the bodily injury. Similarly, if the injured plaintiff is an employee of the insured but there are no allegations in the petition, the insurer should have the burden of bringing forth extrinsic evidence showing the application of the employee exclusion. If the party with the burden of proof fails to bring forth the evidence where the pleading is silent, summary judgment will be appropriate against that party for failing to carry their burden.

14

RULE #6

- Rule #6-If the pleadings are silent, there will be no duty to defend until the insured brings forward evidence establishing that bodily injury occurred within the policy period. The insured cannot wait until the end of the case and then present the evidence to the insurer and argue that there was a duty to defend from the initial tender even though the extrinsic evidence had not been tendered. If the pleadings are silent, no duty to defend will commence until the extrinsic evidence has been proffered. Likewise, if there are no allegations regarding whether the injured plaintiff was an employee of the insured, the insurer would have an obligation to defend until it presented evidence regarding the plaintiff's employment status.

15

Rule #7

- Rule #7-What if the insurer and insured produce extrinsic evidence that is contradictory? It is not the policy where the rules of construction would apply. No Texas court has addressed this particular situation. However, consistent with the rules governing the duty to defend, if there is credible extrinsic evidence that would arguably create a duty to defend, the insurer must defend.

16

RULE #8

- Rule #8-Under Texas law, an insurer has no duty to attempt to search out extrinsic evidence that would potentially create a duty to defend. However, the issue arises as to what is the duty of the insurer if it discovers credible extrinsic evidence that would trigger a duty to defend, even if the burden of producing such evidence is not on the insurer. Under the duty to defend Texas law has imposed no such duty on the part of the insurer. However, consistent with the duty to defend if there is potentially a cause of action stated, the insurer would have a duty to defend if the evidence was credible.

17

EXAMPLE #1

- Worker suffers tragic death on construction project in 2016.
- Estate sues general contractor in 2018 and does not allege DOL.
- General contractor had Insurer A from 2010-2014, Insurer B from 2015-17, and Insurer C from 2018-present.
- All three insurers receive a tender from general contractor/insured.
- Texas is an actual injury/injury-in-fact trigger state (i.e., when the injury actually happens).
- Which carrier(s) should defend?

18

EXAMPLE #2

- Petition alleges that Plaintiff was injured on worksite.
- Plaintiff sues general contractor and employer/subcontractor/insured who is a non-subscriber to workers compensation in Texas.
- The policy contains the standard employer's liability exclusion (no coverage for bodily injury that occurs in the course and scope of employment).
- Can we use extrinsic evidence if the petition alleges (incorrectly) that the general contractor is the employer and not the subcontractor?

19

EXAMPLE #3

- Petition alleges property damage to a single-family house. No dates of property damage alleged.
- Plaintiff sues general contractor. GC sues subcontractor/insured.
- The policy contains prior completed work exclusion.
- Job file establishes sub completed work in 2014.
- Certificate of occupancy for project issued in 2015.
- Insurer comes on the risk in 2016.
- Can we use extrinsic evidence to deny defense?

20

TWO NEW TXSC CASES – *State Farm v. Richards*

- Jayden Meals was killed in an all-terrain vehicle accident while under the temporary care of his grandparents, the Richards. Jayden's mother sued the Richards in Texas state court, essentially alleging they were negligent in failing to supervise and instruct Jayden. The Richards sought a defense from State Farm Lloyds pursuant to their homeowner's insurance policy.

21

Richards

- Insurance policy required State Farm to provide a defense "[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury . . . to which this coverage applies, caused by an occurrence."
- State Farm initially defended this suit pursuant to a reservation of rights, but later sought a declaration that it had no duty to defend or indemnify the Richards. In a summary judgment motion, State Farm argued that two exclusions barred coverage.

22

Richards

- The first, the "motor-vehicle exclusion," exempts coverage for bodily injury "arising out of the . . . use . . . of . . . a motor vehicle owned or operated by or loaned to any insured." The policy defines "motor vehicle" to include an "all-terrain vehicle . . . owned by an insured and designed or used for recreational or utility purposes off public roads, while off an insured location." The policy defines "insured location" to mean "the residence premises."

23

Richards

- In support of its summary judgment motion, State Farm attached a vehicle crash report showing that the accident occurred away from the Richards' premises, as well as the Richards' admissions that the accident occurred off an insured location.

24

Richards

- The district court permitted extrinsic evidence and granted summary judgment for State Farm. The district court also held that State Farm had no duty to indemnify.

25

Richards

- According to the district court, the eight-corners rule does not apply if a policy does not include language requiring the insurer to defend "all actions against its insured no matter if the allegations of the suit are groundless, false or fraudulent."
- Fifth Circuit certified to TXSC based upon policy language.

26

Loya Insurance Company v. Avalos

- Loya issued policy to wife but specifically excluded husband.
- Claimants and husband got into an accident.
- Claimants and husband agreed that Claimants would file suit that alleged wife caused accident.
- Wife agreed to plot, until after her husband died and shortly before her deposition.

27

Loya

- Based on the wife's admission that she knowingly lied about driving the insured vehicle to secure coverage and avoid the named driver exclusion, Loya considered any coverage forfeited, denied the claim, and withdrew its defense of Guevara in the underlying lawsuit.

28

Loya

- Despite their complicity in the fraud, Claimants pursued their claim against wife and obtained a default judgment awarding them $450,343.34, prejudgment interest, and costs. Wife assigned her rights against Loya to Claimants.
- Claimants filed suit against Loya.

29

Loya

- Claimants, as assignees, alleged (1) negligent claims handling, (2) breach of contract, (3) breach of the duty of good faith and fair dealing, and (4) violations of the Texas Deceptive Practices Act.
- Trial court granted summary judgment in favor of Loya.
- But appellate court reversed, relying upon eight corners rule. Loya appeals to TXSC.

30

QUESTIONS?

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31

ASSUMPTION AGREEMENTS IN CONSTRUCTION CONTRACTS

Cooper & Scully PC

15th Annual Construction Symposium
January 31, 2020

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Example

- Now, therefore, the subcontractor agrees as follows: . . . to be bound to the general contractor by the terms of the general contract, to conform to and to comply with the provisions of the general contract, and to assume toward the general contractor all the obligations and responsibilities that the general contractor assumes in and by the general contract toward the owner, insofar as they are applicable to the subcontract. Where any provisions of the general contract between the general contractor and the owner is inconsistent with any provision of this subcontract, the subcontract shall govern.

Sec. 272.0001

- DEFINITION. In this chapter, "construction contract" means a contract, subcontract, or agreement entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, or repair of, or for the furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property. The term includes an agreement to which an architect, engineer, or contractor and an owner's lender are parties regarding an assignment of the construction contract or other modifications thereto.

Sec. 272.0001

- VOIDABLE CONTRACT PROVISION. (a) This section applies only to a construction contract concerning real property located in this state.
- (b) If a construction contract or an agreement collateral to or affecting the construction contract contains a provision making the contract or agreement or any conflict arising under the contract or agreement subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by a party obligated by the contract or agreement to perform the work that is the subject of the construction contract.

Sec. 151.102

- AGREEMENT VOID AND UNENFORCEABLE. Except as provided by 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.

Sec. 151.104

- UNENFORCEABLE ADDITIONAL INSURANCE PROVISION. (a) Except as provided by Subsection (b), a 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 the scope of which is prohibited under this subchapter for an agreement to indemnify, hold harmless, or defend.
- (b) This section does not apply to a provision in an insurance policy, or an endorsement to an insurance policy, issued under a consolidated insurance program to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy.

LONERGAN V. SPEARIN

A Tale of Two Cases

Doug Rees

15th Annual Construction Symposium

Allocation of Liability Between Owner and Contractor for Defective Plans and Specifications

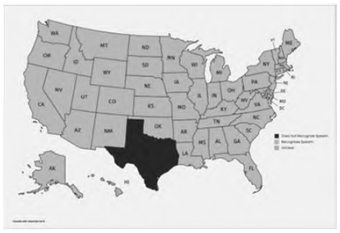
- **Who is responsible? Who bears the burden?**
- **Does the Owner warrant the plans?**
- **Or does the Contractor warrant to deliver a building free of defects**
- **Often comes up when "differing site conditions" are encountered**

Two Different Approaches

Texas

Everyone else

States Recognizing *Spearin*



The Cases

U.S. v. Spearin **- SCOTUS**

Contractor not responsible for defects in plans and specs

Lonergan v. San Antonio Loan & Trust **– TX. S. Ct.**

Contractor responsible to deliver building free from defects

Freedom / sanctity of contract

Spearin

Justice Louis Brandeis

Photo from Library of Congress

Lonergan

Justice Thomas Jefferson Brown

Tarlton Law Library, The University of Texas

Spearin

Dry dock project for Navy

- **Based on government's plans**

Parties were at odds from the beginning

Flooding during construction causing a newly installed sewer line to fail

- **Adjacent sewer line with dam diverted water to new sewer line – causing it to fail**
- **Existence of dam and area being prone to flooding not disclosed**

Spearin

Gov. demanded Spearin repair the sewer and complete the project

Spearin refused

Gov. annulled the contract

- **Claimed Spearin had underbid contract**

Second Contractor encountered serious soil issues and could not complete contract

Third Contractor completed

- **After government took remedial measures on sewer in original plans**
- **Total cost ended up being 3X original contract**

Spearin Holding/Doctrine

"[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications"

The Owner "imparted a warranty that if the specifications were complied with, the sewer would be adequate"

Duty of contractor to check the plans and inform itself of requirements of the work didn't impose an obligation to confirm adequacy of plans.

Lonergan

Prior to Spearin

Bank building in San Antonio

Owner – San Antonio Loan & Trust Co. (SALT)

Contractor (Lonergan) from Chicago

Lonergan

Building collapsed near completion of construction

Defect in architect's plans

- **Dispute over whether corrected plans ever delivered to contractor**

Collapse occurred after a violent storm

"The Trust building … caught the full blasts of all the combined furies."

The Bastrop Advertiser, Vol. 48, No. 20, Ed. 1 Saturday, May 19, 1900

"The steel pillars and girders … were swept by the angry hand of the storm demon…."

"…the Trust building swayed, trembled for a moment, turned from its sills and collapsed rapidly"

"It was an awful sight and I shall never forget it, … the weirdness, grandeur and terrible features of it…"

Lonergan **Holding**

Owner does not impliedly warrant plans

Contractor not relieved of responsibility by defects in plans and specifications

Matter of contract (sanctity of contract)

- **". . . [T]his is a matter of contract in which the parties are at arm's length."**
- **"Liability of the builder does not rest upon a guaranty of the specifications, but upon his failure to complete and deliver the structure."**

Lonergan **- Trial and Procedural Issues**

Directed Verdict case

- **Jury never determined what caused collapse**
- **Storm?**
- **Defect in plans and specifications?**
- **Jury never determined whether plans in fact defective**

Issue on appeal became who's responsible when plans are defective

Lonergan – The Legal Back Story

Lonergan broke – didn't even appear for trial

Failed to get Builders' Risk insurance

Surety was the target

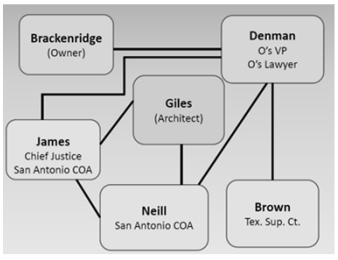
- **Fashioned a strategy that had best chance to result in recovery**
- **Ultimately, failed due to ambiguity or changes to the underlying bonded contract**

Lonergan – The Political Backstory

Lonergan branded as a deadbeat ne'er-do-well

- **Insolvent**
- **AWOL**
- **Yankee**

Claimant (SALT) involved powerful high society people



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The *Lonergan* File

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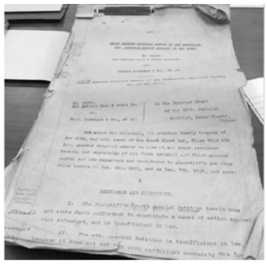

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Efforts to Get Around Lonergan

* **Suing for Misrepresentation – *City of Dallas v. Shortall*, 131 Tex. 368. 114 S.W. 536 (TEX. 1938).**
  - **City contracted for construction of tunnel**
  - **Suit for additional expense due to unexpected soil conditions**

Suing for Misrepresentation – *City of Dallas v. Shortall*, 131 Tex. 368. 114 S.W. 536 (TEX. 1938).

- **Must be a positive assertion of fact with justifiable reliance without any investigation on the plaintiff's part**
- **No "affirmative" misrepresentation found by jury**

IMPLIED WARRANTY?

NO – *Interstate Contracting Corp. v. City of Dallas*, 407 F.3d 708 (5th Cir. 2005) –

- **No justifiable reliance given contract disclaimers to inspect and test**

YES – *Shintech, Inc. v. Group Constructors, Inc.*, 688 S.W. 2d 144 (Tex. App. – Houston [14th Dist.] 1985, no writ) -

- **Where contract is silent, there is an implied warranty that plans and specs are accurate and sufficient**

Representations / Duties

Plans and Specs as an Affirmative Representation – *Newell v. Mosley*, 469, S.W. 2d 481 (Tex. Civ. App. – Tyler 1971, writ ref'd n.r.e.) -

Plan and Specs Create Contract Duties – *City of Baytown v. Bayshore Constructors, Inc.*, 615 S.W. 2d 792 (Tex. Civ. App. – Houston [1st Dist] 1980, writ ref'd n.r.e.) -

- **Owner breached contract by supplying inaccurate plans and specifications**

Representations / Duties

***Turner, Collie & Braden, Inc. v. Brookhollow, Inc*., 624 S.W. 2d 203 (Tex. Civ. App. – Houston [1st Dist. 1981, rev'd o.g., 642 S.W. 2d 160 (Tex. 1982) –**

"Our courts have recognized . . . cause of action . . . in favor of a contractor against an owner or architect who furnishes defective plans and specifications."

Texas Supreme Court Reaffirms *Lonergan*

***El Paso Field Services, LP v. Mastec North America, Inc*., 389 S.W.3d 802 (Tex. 2012).**

- **Numerous pipeline crossings encountered during construction**
- **Owner was to exercise due diligence in locating pipeline and crossings and notify Owner before excavation**
- **Owner failed to locate and disclose 85-90% of crossings**
- **Contractor included mark-up pricing for encountering unidentified crossings/pipelines**

The Contract Controls the Result

Supreme Court Follows *Lonergan* -

- **Contract must 'fairly imply' a guarantee of accuracy**
- **Parties shifted risk – "where one agrees to do, for a fixed sum, a thing possible . . . he will not . . . become entitled to additional compensation, because unforeseen difficulties are encountered."**
- **"The Court's role is not to redistribute these risks and benefits but to enforce the allocations that the parties previously agreed upon."**

- **"Sophisticated parties, like all parties to a contract, have 'an obligation to protect themselves by reading what they sign.'"**
- **"… long recognized Texas' strong public policy in favor or preserving the freedom on contract."**

Contract Language Dictates

***Alamo Community College District v. Browning Const. Co.*, 131 S.W.3d 146 (Tex. App. – San Antonio 2004, Pet. Denied) – Contract created Owner Liability**

"The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions discovered [in the contract documents]."

***Millgard Corp v. McKee/Mays*, 49 F.3d 1070 (5th Cir. 1995) – Contract language shifted risk to contractor**

Owner disclaimed responsibility for accuracy by contract

Read the Contract — It Matters

- **Be very explicit when negotiating contracts**
- **If going to assume any responsibility for plans – do your due diligence**
- **Act right – treat people fairly**
- **It never hurts to have powerful people in your corner**

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Contractual Liability

- "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
  (1) That the insured would have in the absence of the contract or agreement; or
  (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
     (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract", and
     (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

"Insured contract"

- "Insured contract" means:
- ***

  f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Construction Law Update

Eric Hines

15th Annual Construction Symposium

School District Litigation

- **Several new statutes passed to address "crisis"**
- **More oversight of litigation**
- **Notice and opportunity to cure**
- **Does not apply to personal injury claims**

HB 1999

- New provision of Gov't. Code
- Works much like RCLA and Condo Statute
- Have to provide notice and opportunity to make an offer of repair
- Applicable to basically any governmental entity
  - Any public building or public work
  - TX DOT and highway projects excluded

HB 1999

- Applicable to design professionals too — any party with whom a governmental entity has a contract
- Enforcement mechanism works differently
- Notice is statutorily required to be treated as a "suit" for purposes of the relevant policy terms

HB 1999

- Notice — requires report
  (different from RCLA – more like Condo Act)
  - To each party with whom government entity has a contract

HB 1999

- Contents of Report
  - Identifies the specific construction defect(s)
  - Describe the present physical condition of the affected structure
  - Describe any modification, maintenance or repair made by the gov't entity since structure in use
- Contractor has five days to provide report to each subcontractor whose work is subject to the claim

HB 1999

- Inspection within 30 days of the report
- Opportunity to Repair/Cure
  - Within 120 days
  - May correct defect or enter into separate agreement to correct
- Governmental entity cannot refuse to allow the repair or reject offer of repair

HB 1999

- Exceptions
  - If cannot provide payment and performance bonds;
  - If cannot get liability or workers' comp insurance;
  - If previously terminated for cause by the entity;
  - If convicted of a felony; or
  - The entity has already complied with the process before.

HB 1999

- If attempted repair fails, can bring suit
  - Apparently only have to let them try once
- Timely report and inspection period toll SOL for 1 year
- Dismissal for failure to comply
  - First time — without prejudice
  - Second time — with prejudice
- The Government can recover the cost of the report if they are correct on the defect complaint.

Other Statutes to Address School District Litigation

Education Code (HB 1734)

District must notify Commissioner of any CD lawsuits

- Failure to do so provides grounds for dismissal (without prejudice)
- Must use proceeds for repair — or get written approval from Commissioner to use otherwise
- Must send any portion of proceeds not used for repair to the Comptroller
- Attorney General will enforce if believes district has violated the statute

Other Statutes to Address School District Litigation

Government Code (HB 2826)

Contingency fee agreements with government entities

Other Statutes to Address School District Litigation

Public Statement (Notice – written/published)

- Reason for pursuing matter and hiring attorney
- Qualifications of attorney
- Nature of relationship
- Reasons why cannot pursue with in-house attorney or regular (on retainer) outside counsel
- Reasons why hourly fee cannot be used
- Why contingent fee contract is in best interests of government entity
- Must have Attorney General approval

TX DOT Contracts

Transportation Code (HB 2899)

- Contractor is not liable for defects in plans or specifications
  - Any provisions of agreement to the contrary is void
- Cannot elevate design of professional's standard of care
  - Normal standard of care — ordinary prudent professional under same or similar circumstances

Implied Warranty

Nghiem v. Sajib

- Common law cause of action
  - Separate and apart from DTPA
- Implied warranties can be tort or contract
  - "a freak hybrid born of the illicit intercourse of tort and contract"
- In construction it grows out of contract
  - 4-year statute of limitations

Attorneys' Fees under the RCLA

- Long debated
- Usually involving subsequent purchaser
- Attorneys' fees one of limited form of damages available under RCLA
- RCLA does not provide a cause of action
  - Must have separate basis for attorneys' fees

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Construction Insurance Law Update

Julie A. Shehane
Summer L. Frederick
15th Annual Construction Symposium

CONSTRUCTION INSURANCE LAW UPDATE

New cases in the last year, mostly the same law

***Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, LLC.*, -- S.W.3d -- (Tex. App. – Dallas 2020, no pet. h.)**

FACTS

- **Builder purchased 4 CGL policies from two insurers for consecutive policy years**
- **Between 1998 and 2002 it built a house, which it sold in 2000**
- **Homeowner sued for defects in 2003, claiming that in late 2000 the windows in the master bath sank, and in 2001 cracks in other rooms appeared**
- **Both insurers refused to defend, and builder sued insurers in 2010**
- **Homeowner's claims were arbitrated and resulted in $2.5 million award**
- **After suit was filed, the Texas Supreme Court decided *Don's Building*, and held that the actual injury trigger applies to determine when "property damage" occurs**

Vines-Herrin

* **ISSUE:**
* **Is "time on the risk" theory of allocation correct?**

* **HOLDING**:
* Dallas court of appeals says yes, at least under the facts before it

Vines-Herrin

* **Why the Court got it Wrong:**

- "Time on the risk" is not consistent with other Texas allocation cases

Liberty Ins. Underwriters, Inc. v. First Mercury Ins. Co.
3:17-cv-03029-M

FACTS

- JWCC and Roma ISD entered into a construction contract in April 2005
- JWCC had a primary policy with Travelers from 8/2010 – 8/2013
- JWCC had an excess policy with Liberty from 8/2006 – 8/2007, and a primary policy with First Mercury
- Roma ISD sued in 2014 for various construction defects
- Just before trial Roma made $3 million demand
- First Mercury paid $1 mil and Liberty paid $2 mil.
- Liberty sought to recover $2 mil from First Mercury, alleging there were multiple "occurrences" and First Mercury owed multiple payments

Liberty Ins. Underwriters

ISSUE:
How many "occurrences?"

Liberty argued that there were multiple "occurrences" and First Mercury should have paid the entire claim. It sought reimbursement from First Mercury

First Mercury argued the defects were one "occurrence" and the payment was appropriate as between the carriers

Liberty Ins. Underwriters

HOLDING:
One occurrence.

Number of occurrences determined by events causing injuries and giving rise to liability. If all injuries stem from continuous cause, there is one "occurrence." If the injuries stem from multiple causes, there are multiple "occurrences."

Court noted split authority with respect to multiple construction defects in single project. It determined that here, cause analysis was most appropriate. All property damage was caused by defective construction by JWCC or its subcontractors. Defective construction and delivery of building was event that damaged Roma.

Employers Mut. Cas. Co. v. Amerisure Ins. Co.,
No. 4:18-cv-00330, 2019 WL 3717634 (E.D. Tex. Aug. 7, 2019)

FACTS

- EMC insured Mycon (general contractor) under primary policy
- Amerisure insured Hatfield (subcontractor) under primary policy
- Hatfield was hired by Mycon pursuant to a written contract and work order
- Hatfield agreed in a contract to defend and indemnify Mycon against certain claims and procure liability insurance naming Mycon as an additional insured
- Chavez was injured at the construction site and sued Mycon and Lloyd Plyer Construction Company (a third party). He did not sue Hatfield

Emplrs Mut. v. Amerisure

ISSUE:

How should defense be apportioned?

Amerisure argued that the "other insurance" provisions in the Amerisure and EMC policies were mutually repugnant, and each carrier owed a pro-rata share of Mycon's defense

Employers Mutual argued that Amerisure owed 100% of Mycon's defense based on the terms of the agreement between the parties

Emplrs Mut. v. Amerisure

HOLDING:

Each carrier owed a pro-rata share of defense. There was no specific allegation in the underlying petition regarding Hatfield's negligence such to trigger the indemnity agreement.

For additional insured coverage, the subcontract between Mycon and Hatfield did not require Hatfield to obtain primary and non-contributory coverage for Mycon.

Liberty Surplus Ins. Co. v. Century Surety Co.,
No. H-18-1444, 2019 WL 3067504 (S.D. Tex. July 12, 2019)

FACTS

- Dispute arose out of construction of public library in Edinburg
- Descon contracted with McAllen Steel for roofing work. The roof leaked, and damaged interior ceiling tiles
- $1.5 million awarded to City of Edinburg in arbitration
- Descon sought coverage under 4 policies issued by Liberty, but it declined to pay
- Liberty filed a declaratory judgment action against Descon, the City of Edinburg McAllen Steel, and Century Surety Company, which was McAllen's insurer

Liberty Surplus

ISSUE:

Do the Liberty policies cover only "property damage" caused by the defective roof and stucco, or do they cover "property damage caused by the defective roof and stucco AND the cost to repair the defective roof and stucco?

Liberty Surplus

HOLDING:

The Liberty policies cover the cost of repairing ceiling tiles. They do not cover the costs associated with removal or replacement of the stucco or the roof, including loss of use and rip and tear damages.

***Bitco Gen. Ins. Corp. f/k/a Bituminous Cas. Corp. v. Monroe Guar. Ins. Co.*, No. 5:18-cv-00325, 2019 WL 3917045 (W.D. Tex. Feb. 7, 2019)**

FACTS

- BITCO and Monroe both insured 5D Drilling and Pump Service, Inc.
- In an underlying lawsuit, it was alleged that a drill bit became stuck in an aquifer and that the insured failed to properly case a well, which resulted in additional damage
- Bitco defended 5D in the underlying lawsuit, and Monroe declined. Bitco sought contribution from Monroe after the underlying lawsuit settled

Bitco v. Monroe

ISSUE:

Did Monroe have a duty to defend?

Monroe argued that extrinsic evidence was appropriate for the court's consideration, because the underlying petition did not allege a date the drill bit became stuck. Based upon this date, Monroe argued it had no duty to defend. It also alleged that its duty was precluded by exclusions j.5 and j.6.

Bitco argued that extrinsic evidence was not appropriate, but even if it was considered, it was not dispositive. The date the drill bit lodged in the ground only addressed the issue of negligence with respect to the drill bit, and not the resulting damage and application of exclusions j.5 and j.6.

Bitco v. Monroe

HOLDINGS:

Even if the court considered extrinsic evidence, it would not address all of the issues. The evidence bearing upon the date the drill bit became lodged did not dispense with the issue of the negligently installed casing and whether exclusions j.5 and j.6 applied

It was alleged that damage extended to parts of the aquifer upon which the insured did not work. The damage was not only to "that particular part" of the aquifer upon which the insured performed work. As a result, the court determined that exclusions j.5 and j.6 did not preclude Monroe's duty to defend

Lloyd's Syndicate 457, et al. v. Floatec LLC,
921 F.3d 508 (5th Cir. 2019)

FACTS

- Chevron contracted with Floatec to engineer tendons for a floating platform called Big Foot. The tendons failed and caused Chevron to sustain massive losses
- Underwriters insured Big Foot, and paid $500 million. It sought to recover from Floatec – it asserted it was subrogated to Chevron's rights to sue Floatec
- Floatec moved to dismiss the suit and alleged it was an "other insured" under the policy Underwriters issued to Chevron, and the Underwriters' policy waives subrogation for its insureds
- Underwriters argued that the subrogation issue should be decided in arbitration and that in any event, Floatec's interpretation of "waiver of subrogation" was incorrect
- The district court agreed with Floatec on both poitnts

Lloyd's Syndicate 457

ISSUES:

Is the insurer's claims of mandatory arbitration for the court?

Does the policy's anti-subrogation waiver bar underwriter's claims?

Lloyd's Syndicate 457

HOLDINGS:

The insurer's claims of mandatory arbitration are for the court

The insurer's claims against an "other insured" firm were barred by policy's anti-subrogation waiver

***Mt. Hawley Ins. Co. v. Huser Constr. Co., Inc*., No. H-18-0787, 2019 WL 1255757 (S.D. Tex. Mar. 19, 2019)**

FACTS

- Huser was a general contractor for EHP in the construction of an apartment complex. Huser hired several subcontractors
- There were alleged construction defects at the complex after construction was completed and EHP blamed Huser. Huser blamed Schaffer. So EHP sued both
- EHP sued Huser for breach of contract and negligence, and alleged separate causes of action against Schaffer
- Mt. Hawley refused to defend Huser based on the policy's breach of contract exclusion and filed a complaint for declaratory judgment
- Mt. Hawley disagreed that the breach of contract exclusion applied, but argued that even if it did, coverage was reinstated by the policy's "your work" exclusion and subcontractor exception

Huser Constr. Co.

The Breach of Contract exclusion in the Mt. Hawley policy provided that

"This Insurance does not apply, nor do we have a duty to defend, any claim or "suit" for "bodily injury," "property damage," or "personal and advertising injury" arising directly or indirectly out of:

a. Breach of express or implied contract;

b. Breach of express or implied warranty;

c. Fraud or misrepresentation regarding formation, terms, or performance of a contract; or

d. Libel, slander, or defamation arising out of or within the contractual relationship.

Huser Constr. Co.

ISSUES:

Does the breach of contract exclusion preclude Mt. Hawley's duty to defend Huser?

Does the "your work" exclusion and separate subcontractor exception reinstate coverage?

Huser Constr. Co.

HOLDINGS:

The breach of contract exclusion precludes Mt. Hawley's duty to defend

Coverage is not reinstated by the "your work" exclusion

***AIG Specialty Ins. Co. v. ACE Am. Ins. Co.*,**
No. 2:18-cv-16, 2019 WL 1243911 (S.D. Tex. Mar. 18, 2019)

FACTS

- Turner contracted with Sherwin to provide services pursuant to an MSA. It agreed to maintain control of the worksite, and make sure the work was done in a safe manner in compliance with the MSA
- AIG insured Sherwin
- ACE insured Turner
- AIG sued ACE and Turner for reimbursement for costs AIG expended defending a personal injury suit brought by one of Turner's employees against Sherwin
- AIG's claims were based on breach of contract and breach of the MSA, in which Sherwin agreed to indemnify Turner, and ACE's responsibility to provide policy proceeds to Sherwin as an additional insured on Turner's policy

AIG Specialty Ins. Co.

ISSUES:

- Do certificates of insurance evidence an intent to limit additional insured coverage?
- Should the court look to an incorporated contract for purposes of limiting coverage when there is no express provision?

AIG Specialty Ins. Co.

HOLDINGS:

Certificates do not evidence the scope of disputed insurance coverage

Although terms of external contracts can modify the terms of insurance policies, courts look to the language of the policy and then look elsewhere to the extent required by the policy. If the policy does not limit coverage, an insurer is not given the benefit of a limitation

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