



Construction Law Update

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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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