14TH ANNUAL CONSTRUCTION SYMPOSIUM

JANUARY 25, 2019

Cooper & Scully
A Professional Corporation

14TH ANNUAL CONSTRUCTION SYMPOSIUM

JANUARY 25, 2019

Speakers:

R. Brent Cooper
Diana Faust
Wes Johnson
Doug Rees
Jana Reist
Michelle Robberson
Julie Shehane
Fred Shuchart
Tara Sohlman
Aaron Stendell
Rob Witmeyer
Gordon K. Wright

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AGENDA

Time	Topic	Speaker
8:30-8:45 A.M.	**Session 1 - Sign-On**	
8:50 A.M.	Welcoming Remarks	R. Douglas Rees
9:00 A.M.	Dual Breaches	Doug Rees Michelle Robberson
9:30 A.M.	Recovery of Medical Expenses	Brent Cooper Diana Faust Gordon Wright
10:15 A.M.	**Break**	
10:30 A.M.	The Certificate of Merit Statute	Gordon Wright
11:00 A.M.	Joint and Several Contractual Liability and Settlement Credits: A Look at the "One Satisfaction Rule" in Texas	Brent Cooper Doug Rees Fred Shuchart
11:30 A.M.	Chapter 151 - Issues Encountered	Julie Shehane
12:00 P.M.	**End of Session 1**	
12:30-12:45 P.M.	**Session 2 - Sign-On**	
12:45 P.M.	Welcoming Remarks	R. Douglas Rees
12:50 P.M.	Arbitration: Challenges to a Motion to Compel	Tara Sohlman
1:20 P.M.	Managing A Worksite Accident	Jana Reist
2:05 P.M.	**Break**	
2:20 P.M.	Understanding Sovereign Immunity	Wes Johnson
2:50 P.M.	Insurance Coverage for Rip and Tear Costs	Aaron Stendell Rob Witmeyer
3:20 P.M.	Closing Remarks	R. Douglas Rees
3:20 P.M.	**End of Session 2**	

DUAL BREACHES

Doug Rees & Michelle Robberson
Cooper & Scully, P.C. 2019

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Competing Breach Claims

- Who can recover?
- Can anyone recover?
- If recovery is available, what are the limitations on that recovery?

2

Competing Breach Claims

- When both parties assert claims for breach of contract, questions arise regarding:
  - Who breached first
  - Whether the breaches were material
  - Whether performance continued after a breach
  - Whether substantial performance occurred, and, if so, whether it makes a difference

3

Breach

- Options / considerations when a breach occurs:
  - Terminate relationship
  - Continue relationship and performance
- Consequences of each

4

First Breach is Material

- If the first breach is material:
  - Non-breaching party is no longer required to perform
  - Second breach by non-breaching party is excused

5

Material Breach + Continued Performance

- If first breach is material but non-breaching party continues to perform:
  - Non-breaching party's performance is not excused
  - Second breach by non-breaching party is not excused
  - Claim for damages for first breach is not waived

6

First Breach Immaterial

- If the first breach is *im*material:
  - Are damages available for the immaterial breach?
  - Does the first material breach following the immaterial one negate the immaterial breach?

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Bartush-Schnitzius Foods v. Cimco Refrigeration

- Bartush hired Cimco to build refrigerated storage for seafood dips.
- The refrigerated storage could not maintain the temperature necessary for the dip without ice forming on the fan motors.
- When Bartush discovered the problem, it had already paid Cimco $306,758, but still owed $113,400.

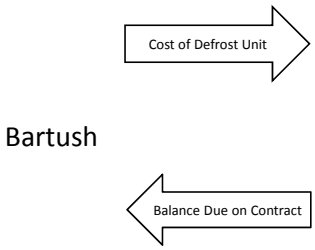
8

Bartush-Schnitzius Foods v. Cimco Refrigeration

- The parties did not agree on how to proceed, and the manufacturer hired an engineer.
- The engineer recommended a warm-glycol defrost unit, and Bartush hired another contractor, Jax Refrigeration, to install the unit at a cost of $168,079.
- After the warm glycol defrost unit was installed, the system was able to maintain a temperature of 35 degrees.

9

Competing Breach Claims



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Jury's Findings

1. Both parties breached the contract
2. Cimco breached first
3. Bartush's breach was not excused
4. Bartush was entitled to $168,079 (the cost of installing the warm-glycol defrost unit)
5. Cimco was entitled to $113,400 (the contract balance)

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Trial Court's Judgment

- Although the jury found both parties breached the contract and that Bartush's breach was not excused, the trial court stated in its judgment that "it appears to the Court" that the verdict favored Bartush and was against Cimco
- Thus, the trial court rendered judgment in favor of Bartush for $168,079 and awarded zero to Cimco

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Fort Worth Court of Appeals

- Cimco appealed
- The Court of Appeals held that, because the jury found Bartush breached the contract, and then expressly found Bartush's breach was not excused, this necessarily included an implied finding that Cimco's prior breach was non-material
- Bartush's failure to pay was a material breach as a matter of law, rendering irrelevant the jury's finding that Cimco breached first and precluding Bartush's recovery

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Court of Appeals' Reversal

Breach 1 – Cimco's failure to perform (immaterial)

Breach 2 – Bartush's non-payment (material as a matter of law)

= Cimco wins and Bartush gets nothing

Both Bartush and Cimco appealed to the Texas Supreme Court

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Texas Supreme Court

- "It is a fundamental principle of contract law that when one party to a contract commits a ***material breach*** of that contract, the other party ***is discharged or excused from further performance."***
- By contrast, when a party commits a *nonmaterial breach*, the other party ***"is not excused from future performance but may sue for the damages*** caused by the breach."

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Texas Supreme Court

- Generally whether a breach is material should be determined by the trier of fact (court or judge)
- Here, the jury appropriately determined materiality, unlike in *Mustang Pipeline*, where materiality was determined as a matter of law (involved breach of time-is-of-the-essence clause, with conclusive evidence)
- Materiality was determined by the jury in connection with finding that Bartush's breach was not excused (not in the initial questions regarding who breached and which breach was first)
  - Resulted in implied finding that Cimco's breach was immaterial

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Immaterial Breach is Relevant

- "While a party's nonmaterial breach does not excuse further performance by the other party, neither does the second breach excuse the first."
- "[A] material breach excuses *future* performance, not *past* performance."
- Court seems to imply that Bartush's non-payment was material even though it was not discussed by the court or decided by the jury

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Immaterial Breach is Relevant

- The Texas Supreme Court held:
- Jury's findings that Cimco breached first and its breach was immaterial means
- Bartush still liable for its later breach (failure to pay)
- Thus, Bartush must continue to perform (pay the balance due) but also is entitled to damages for Cimco's immaterial breach
- Result: Bartush's damages offset by amounts owed to Cimco

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Materiality as a Matter of Law

- While materiality is typically determined by the fact finder, some breaches are material as a matter of law
- Typically, an issue is decided as a matter of law because the evidence supports only one conclusion
- When a breach can be determined as a matter of law, you can recommend a client cease its performance without worrying about whether a fact finder will also determine that the client breached

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Materiality as a Matter of Law

- Example: *Hooker v. Nguyen* - material breach by contractor relieved owner of remaining payment obligations
- *Mustang Pipeline* - contractor breached as a matter of law because:
  - the contract contained a hard deadline, a time-is-of-the-essence clause, and contemplated avoidance of delays, and
  - an objective inability to cure existed

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Substantial Performance

- Prevents a party from claiming "breach" to get out of obligation
- Makes breach immaterial
  - Can bring claim if other party fails to fulfill its obligations under contract

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Jury Charge Issues

Texas Pattern Jury Charge 101.2 (2016) includes the following comment with respect to competing claims of material breach:

Disjunctive question for competing claims of material breach. If both parties allege a breach of contract against one another, the court can ask the breach-of-contract question disjunctively, together with an appropriate instruction directing the jury to decide who committed the first material breach. An alternative way to submit competing claims of breach of an agreement is set forth below.

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Jury Charge

QUESTION 1

Did *Don Davis* fail to comply with *the agreement?*

[Insert instructions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

QUESTION 2

Did *Paul Payne* fail to comply with *the agreement?*

[Insert instructions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

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Jury Charge

If you answered "Yes" to Question 1 and Question 2, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Who failed to comply with *the agreement* first?

Answer "*Don Davis"* or "*Paul Payne."*

Answer: _____

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Jury Charge

PJC 101.21 Defenses-Basic Question

If you answered "Yes" to Question [*101.1*], the answer the following question. Otherwise, do not answer the following question.

QUESTION ___

Was *Don Davis's* failure to comply excused?

PJC 101.22 Defenses-Instruction on Plaintiff's Material Breach (Failure of Consideration)

Failure to comply by *Don Davis* is excused by *Paul Payne's* previous failure to comply with a material obligation of the same agreement.

Answer "Yes" or "No."

Answer: _____

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Jury Charge

- List of factors to consider whether breach is material:
- 1. the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- 2. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- 3. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- 4. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances;
- 5. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

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Attorneys' Fees

- Competing breach claims complicate the analysis of attorneys' fee awards
- Analysis frequently depends upon whether the parties' contract has a "prevailing party" clause

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Attorneys' Fees Under CPRC § 38.001

- Recovery for claimant from individuals and corporations when:
  - Claimant prevails on a breach of contract action; and
  - Recovers damages.
- Zero damages = Zero fees, per *Green v. Solis*
- Attorneys' fees may be awarded even if the damages award by one party is completely offset by the other award, per *McKinley v. Drozd*

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Main Issue?

- Main issue analysis rejected in part by the Texas Supreme Court in *KB Home*
- Some courts continue to apply it
- Would seem to make sense that there is one prevailing party in a dispute BUT…

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Two Prevailing Parties?

- No case specifically addresses the issue
- Parties can alternatively request fees against individuals and corporations under section 38.001 *[Alta Mesa Holdings, LP v. Ives,* 488 S.W.3d 438, 455 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)].
- Consider defining the prevailing party in your contract to ensure certainty of any result you want to achieve.

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Thank you!

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1

Recovery of Medical Expenses

14th Annual Construction Symposium
January 25, 2019

R. Brent Cooper
Diana L. Faust
Gordon K. Wright

Cooper & Scully
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2

Topics

- The Problem
- Implications
  - CPRC 41.0105
  - Claimant Submits to Health Insurer
  - Claimant Has No Health Insurance
  - Claimant's Health Insurance Not Used
  - Health Insurer Delays Submission of Claim

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TEX. CIV. PRAC. & REM. CODE 41.0105

- Evidence Relating to Amount of Economic Damages
- In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

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Claimant Submits to Health Insurer

- Chapter 18, Civil Practice & Remedies Code
- *Gunn v. McCoy*

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Claimant Submits to Health Insurer

- TEX. CIV. PRAC. & REM. CODE Ch. 18
- 18.001: Affidavit Concerning Cost & Necessity
- 18.002: Form for Affidavit

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Claimant Submits to Health Insurer

- *Gunn v. McCoy*, 554 S.W.3d 645 (Tex. 2018)
  - Affidavits from subrogation agents for health insurers who paid claimant's medical expenses, reflecting amounts actually paid
  - Medical providers and their records custodians do not have to sponsor evidence sufficient to support awards at trial as reasonableness and necessity of expenses (plain language of 18.001 does not limit proper affiant)
  - Affidavit is legally sufficient evidence of reasonableness and necessity of past meds

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Claimant Has No Health Insurance

- *In re North Cypress Med. Ctr.*
- *Big Bird Tree Services v. Gallegos*

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Claimant Has No Health Insurance

- *In re North Cypress Med. Ctr.*, 559 S.W.3d 128 (Tex. 2018)
  - Issue: production of reimbursement rates from private insurers and public payers for services provided to uninsured patient
  - Patient sent demand letter to tortfeasor's liability insurer listing $11,000 (amount charged) as reasonable medical bills
  - Hospital files medical lien; patient settles with tortfeasor
  - Tries to reach agreement on lien

9

Claimant Has No Health Insurance *North Cypress*

- Production Ordered
  - Hospital's negotiated rates with Aetna, First Care, United Healthcare, BCBS, Medicare & Medicaid
  - Lien issue – reasonableness of charges comprising hospital lien (reasonable and regular rate)
  - Hospital's reimbursements from private insurers and public payers are relevant to the reasonableness of its charges to other patients for the same services

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Claimant Has No Health Insurance

- *Big Bird Tree Services v. Gallegos*,
  - 365 S.W.3d 173 (Tex. App.—Dallas 2012, pet. denied)
  - Medical services provided gratuitously to patient are recoverable from tortfeasor in the amount billed
  - Not limited by CPRC 41.0105

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Claimant's Health Insurance Not Used

- *In re Travis County*, No. 03-17-00619-CV, 2017 WL 5078006 (Nov. 2, 2017, orig. proceeding)
  - Whether Private Payer Information is Discoverable to Support Failure to Mitigate Defense
  - P has private insurance, but does not seek benefits for treatment and provider bills unadjusted rates
  - In lawsuit, D seeks payment agreements/provider contracts reflecting amounts P would have paid or incurred had he acted reasonably and mitigated
  - Mandamus Denied

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Delayed Submission to Health Insurer

- Tex. Civ. Prac. & Rem. Code Ch. 146: Certain Claims by Health Care Service Providers Barred

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Legislation

14

Thank You!

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THE CERTIFICATE OF MERIT STATUTE

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Key provisions in current statute

Texas Civil Practice and Remedies Code (CPRC) §§ 150.001-150.002

- "In any action … arising out of the provision of professional services by a licensed or registered professional . . ."

Key provisions in current statute

Texas Civil Practice and Remedies Code (CPRC) §§ 150.001-150.002

- "In any action … 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"

Key provisions in current statute

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- "In any action … 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"
- "(1) is competent to testify;
  (2) holds the same professional license or registration . . .; and
  (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
    (A) knowledge;
    (B) skill;
    (C) experience;
    (D) education;
    (E) training; *and*
    (F) practice."

Key provisions in current statute

The affidavit needs to specifically set out

- "For *each theory* of recovery …the negligence, if any, or other action, error, or omission of the licensed or registered professional . . . and the factual basis of each such claim."
- The affiant "shall be licensed or registered *in this state* and actively engaged in the practice . . . ."

Key provisions in current statute

- The failure to file the affidavit "shall result in dismissal . . . ." Such dismissal may be with prejudice.
- An order granting or denying the dismissal may be immediately appealed.
- The court, after hearing, may for good cause "extend such time [to file the affidavit] as it shall determine justice requires" when limitations comes into play.

Questions about § 150.002

- Does the statute apply to third-party claims?

  No – see *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556 (Tex. 2014)

  but see, Macina, Bose, Copeland and Associates v. Yanez, 2017 WL 4837691 (Tex. App. – Dallas 2017)

Questions about § 150.002

- What must be included in the affidavit?

Texas Supreme Court Cases

- *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017)
  - Purported expert needs to be shown to be qualified to render certificate of merit.
  - Knowledge requirement not the same as licensure requirement under § 150.002.
  - Language indicates the affidavit ***or*** the record can show qualification and knowledge.

Texas Supreme Court Cases

- *Pedernal Energy, LLC v. Bruington Engineering, Ltd.*, 2017 WL 1737920 (Tex. 2017)
  - Statute allows dismissal without prejudice.
  - In this case, not an abuse of discretion.

Query: When is it an abuse of discretion?

Texas Supreme Court Cases

- *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*, 520 S.W.3d 887 (Tex. 2017)
  - Registered engineer qualified to provide affidavit.
  - Statute does not require affidavit to address elements of various causes of action.

Other Texas Cases Raise Questions

- *Jaster-Quintanilla & Associates, Inc. v. Prouty*, 2018 WL 455508 (Tex. App. – Austin – 2018)
  - Are conclusory affidavits enough?
- *Macina, Bose, Copeland and Associates v. Yanez,* 2017 WL 4837691 (Tex. App. – Dallas 2017)
  - When is affidavit sufficient for multiple defendants?
  - When is 3rd party plaintiff obligated to get affidavit?

Other Recent Cases

- *SSOE, Inc. v. Tokio Marine America Ins. Co.*, 2018 WL 6793627 (Tex. App. – San Antonio 2018, no writ)
- *Kayne Anderson Capital Advisors, L.P. v. Hill & Frank, Inc.,* 2018 WL 6613656 (Tex. App. – Houston (1st Dist.) 2018, no writ)
- *Gignac & Associates, LLP v. Hernandez,* 2018 WL 898144 (Tex. App. – Corpus Christi – Edinburg, 2018) (R'hg *en banc* denied)
- *TIC N. Cent. Dallas 3, LLC v. Envirobusiness, Inc. v. Perkins & Will, Inc., et al.*, 463 S.W.3d 71 (Tex. App. – Dallas 2014, pet. denied)

Thank you.

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NOTES

Chapter 151: Issues Encountered

Julie A. Shehane

14th Annual Construction Symposium
January 25, 2019

TEXAS ANTI-INDEMNITY ACT

Two Main Risk Transfer Provisions:

Contractual Indemnity Agreements
&
Additional Insured Provisions

2

TEXAS ANTI-INDEMNITY ACT

Contractual Indemnity Agreement is a promise or safeguard to hold the 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 . . ."

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TYPES OF CONTRACTUAL INDEMNITY AGREEMENTS

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.

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CONTRACTUAL INDEMNITY AGREEMENTS

In the past, the risk shifting agreements that passed Fair Notice Doctrine were enforceable:

Express Negligence Test:

Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987): A party "seeking to indemnity the indemnitee from the consequences of its own negligence must express that intent in specific terms."

Conspicuousness Requirement:

Dresser Indus., Inc. v. Page Petroleum, 853 S.W.2d 505, 511 (Tex. 1993): 'A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it.'

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ADDITIONAL INSURED PROVISIONS

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.

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RISK TRANSFER PROVISIONS IN CONSTRUCTION CONTRACTS

Trend in recent years to limit or prohibit indemnity agreements.

44 states have enacted anti-indemnity statutes.

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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.

8

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*.

9

TEXAS ANTI-INDEMNITY ACT

Chapter 151 of Texas Insurance Code

When does the Act Apply?

Chapter 151 is titled "Consolidated Insurance Program."

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TEXAS ANTI-INDEMNITY ACT

Chapter 151 of Texas Insurance Code

* "'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." **Tex. Ins. Code § 151.001(1).**

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TEXAS ANTI-INDEMNITY ACT

Chapter 151 of Texas Insurance Code

Section 151.101 states that the Anti-Indemnity Statute "applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to:"

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TEXAS ANTI-INDEMNITY ACT
Chapter 151 of Texas Insurance Code

Chapter 151 (Consolidated Insurance Programs); or

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

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TEXAS ANTI-INDEMNITY ACT

- **Texas Insurance Code Section 151.102**

* "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."

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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. **Tex. Ins. Code § 151.001(5).**

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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.

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TEXAS ANTI-INDEMNITY ACT

The Act Could Apply to Contracts Not Typically Considered to be in the Construction Field

***Target Corp. v. All Jersey Janitorial Serv.*,** 916 F. Supp. 2d 909 (D. Minn. 2013):

The district court found that "maintenance of real property" in the context of the statute failed to cover a contract for housekeeping services.

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TEXAS ANTI-INDEMNITY ACT

The Act Could Apply to Contracts Not Typically Considered to be in the Construction Field

***Thompson v. Pizza Hut*, 1992 WL 142318 (N.D. Ill. 1992):**

The district court held that a contract to computerize cash registers at Pizza Hut restaurants was within the scope of the Illinois Anti-Indemnity Act.

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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.**

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TEXAS ANTI-INDEMNITY ACT

Section 151.105 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.

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TEXAS ANTI-INDEMNITY ACT

Exclusions from the 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.

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TEXAS ANTI-INDEMNITY ACT

Exclusions from the Act

Breach of Contract or Warranty Exception:

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

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TEXAS ANTI-INDEMNITY ACT

Exclusions from the Act

Public Projects of a Municipality Exclusion:

This exclusion acknowledges and preserves governmental immunity protections. **Tex. Ins. Code § 151.105(10)(B).**

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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).**

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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.

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TEXAS ANTI-INDEMNITY ACT

The Act cannot be waived!

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TEXAS ANTI-INDEMNITY ACT

Will the Fair Notice Doctrine Peter Out?

An indemnity provision will need to satisfy the fair notice requirements for the exceptions to the statute (i.e., residential contracts or claims involving employee injuries or death).

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TEXAS ANTI-INDEMNITY ACT

How will the Act impact insurance companies?

If companies interpret the Act broadly, they risk losing business, as they can no longer offer AI status or obtain indemnity agreements from other insurance companies;

Premiums may increase for GCs and Owners;

If companies interpret the Act narrowly, they may offer the same coverage to later argue that they are prohibited from paying out on policies issued.

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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.

29

For questions or comments, contact:

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30

ARBITRATION: CHALLENGES TO A MOTION TO COMPEL

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1

What Is Arbitration?

2

Do You Have a Choice?

- Parties to a contract with an arbitration clause do not have to arbitrate if both parties agree to proceed with litigation.
- If only one party wants to arbitrate and the dispute is subject to the arbitration agreement, the willing party can compel the other party to arbitrate.
- There is a strong presumption in favor of arbitration under Federal and Texas law.

3

Basic Arbitration Clause

- Basic arbitration clause from the AAA:
- Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

4

Federal Arbitration Act or Texas' General Arbitration Act?

5

Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et. seq.*

- "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2

6

FEDERAL ARBITRATION ACT

- Under the FAA, a court must compel arbitration if a party shows that there is an enforceable arbitration clause encompassing the dispute. 9 U.S.C. § 4.
- The litigation must be stayed until the arbitration is completed. 9 U.S.C. § 3

7

Texas General Arbitration Act ("TAA"), TEX. CIV. PRAC. & REM. CODE § 171.001 *et. seq*

- (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:
  (1) exists at the time of the agreement; or
  (2) arises between the parties after the date of the agreement.

Tex. Civ. Prac. & Rem. Code § 171.021(a).

- When arbitration is ordered, the court must stay the litigation. Tex. Civ. Prac. & Rem. Code § 171.025

8

Does the FAA or TAA Apply?

- The arbitration clause can specify whether the FAA or TAA will apply.
- Contract may contain a choice of law clause. *See e.g. ASW Allstate Painting & Constr. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999) (TAA applied when choice of law clause specified Texas law).
- If the arbitration clause does not specify, both could apply, if the dispute involves interstate commerce. *In re Devon Energy Corp.*, 332 S.W.3d 543, 547 (Tex. App. – Houston [1st Dist.] 2009, orig. proceeding).

9

Can a Party Be Compelled to Arbitrate?

- Two Questions:
  1. Did the parties agree to arbitrate?
  2. Does the arbitration clause encompass the dispute?

10

Did the Parties Agree to Arbitrate?

- Examine the arbitration clause. Did the parties form a valid agreement to arbitrate?
  - Question of law for the court.
  - Apply ordinary contract principles.
  - Examine the entire writing to harmonize and give effect to all provisions of the contract.
- What is beyond the trial court's discretion: determining what the law is and applying the law to the facts.

Southern Green Builders, LP v. Cleveland, 558 S.W.3d 251, 255 (Tex.App.—Houston [14th Dist.] 2018).

11

Valid Arbitration Clause

- A party who has the opportunity to read and arbitration agreement and signs it is charged with knowing its contents. *EZ Pawn v. Mancias,* 934 S.W.2d 87, 90 (Tex. 1996).
- Presumption favoring arbitration does not arise until after the court determines that a valid arbitration agreement exists. *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182, 185 (Tex. 2009).

12

Does the Arbitration Clause Encompass the Dispute?

- Who decides the question of arbitrability?
- Question of law unless the contract delegates this power to the arbitrator.
- If the contract contains a delegation clause, then the court must determine if the delegation clause is valid.

See RSL Funding, LLC v. Newsome, No. 16-0998, 62 Tex. Sup. Ct. J. 253, ___ S.W.3d ____, 2018 WL 6711316 (Tex. Dec. 21, 2018).

13

DELEGATION CLAUSES

14

Texas Supreme Court

- *RSL Funding, LLC v. Newsome,* No. 16-0998, ___ S.W.3d ____, 2018 WL 6711316 (Tex. Dec. 21, 2018).
- Contract to transfer a payee's structured-settlement-payment to another party in exchange for payment of $53,000.00 was approved by a court. The payment was never made. The original payee, Newsome, filed a petition that sought enforcement of the original order or, in the alternative, to vacate the original order.

15

RSL Funding, LLC v. Newsome

- The transfer contract contained an arbitration clause:

Disputes under this Agreement of any nature whatsoever ... shall be resolved through demand by any interested party to arbitrate the dispute.... **The parties hereto agree that the issue of arbitrability shall likewise be decided by the arbitrator, and not by any other person. That is, the question of whether a dispute itself is subject to arbitration shall be decided solely by the arbitrator and not, for example by any court.**

16

RSL Funding, LLC v. Newsome

- The trial court denied the motion to compel arbitration filed by RSL Funding.
- The Court of Appeals determined that the facts of the dispute allowed it to disregard the parties' agreement. It determined that the nature of the case made the matter non-arbitrable.
- Should the Court of Appeals have decided the issue of arbitrability?

17

RSL Funding, LLC v. Newsome

- Default Rule: Arbitrability is a threshold matter for the court to decide.
- A contract that requires the issue of arbitrability to be decided by the arbitrator, not the court, is valid and must be treated like any other arbitration agreement.

18

RSL Funding, LLC v. Newsome

- "When faced with such an agreement, courts have no discretion but to compel arbitration unless the clause's validity is challenged on legal or public policy grounds. So the proper procedure is for a court to first determine if there is a binding arbitration agreement that delegates arbitrability to the arbitrator. If there is such an agreement, the court must then compel arbitration so the arbitrator may decide gateway issues the parties have agreed to arbitrate."

RSL Funding, LLC, No. 16-0998, 2018 WL 6711316 , *3 (citations omitted).

19

RSL Funding, LLC v. Newsome

- Was there a valid agreement to arbitrate?
- Three ways to challenge the validity of an arbitration clause: : "(1) challenging the validity of the contract as a whole; (2) challenging the validity of the arbitration provision specifically; and (3) challenging whether an agreement exists at all." *RSL Funding, LLC,* No. 16-0998, 2018 WL 6711316 , *6.
- Contract formation defenses are to be decided by a court. *See* 9 U.S.C. § 4; TEX. CIV. PRACT. & REM. CODE § 171.021(b).

20

RSL Funding, LLC v. Newsome

- Newsome challenged the entire transfer agreement. He argued that the transfer agreement never came into existence or was not enforceable because the court's approval orders were void.
- *Prima Paint* separability doctrine: the arbitrator decides any challenge to the enforceability of an existing contract.

21

RSL Funding, LLC v. Newsome

- Issue: does the challenge go to the contract's formation or to its enforcement?
- Newsome's voidness argument may provide a basis for revoking the agreement; however, it does not mean the contract was never formed.
- Voidness on public policy grounds is a defense to a contract's enforcement, not its formation.
- Under the doctrine of separability, this is an issue for the arbitrator to decide.

22

"Wholly Groundless" Exception

- "Wholly Groundless" Exception:

  "The wholly groundless exception is a doctrine applied by some federal appellate courts to deny arbitration even in the face of an arbitral delegation clause. Under the wholly groundless exception, the court may decline to enforce an arbitral delegation clause when no reasonable argument exists that the parties intended the arbitration clause to apply to the claim before it."

RSL Funding, LLC, No. 16-0998, 2018 WL 6711316 , *5.

- The Texas Supreme Court determined the validity of the wholly groundless exception was not properly before it.

23

"Wholly Groundless" Exception

- Disagreement amongst Federal Courts of Appeals over whether this exception is consistent with the FAA.
- The United States Supreme Court decided the issue in *Henry Schein, Inc. v. Archer and White Sales, Inc.,* No. 17-1272, ___ U.S. ____, ___ S.Ct. ___ , ___ L.Ed.2d ____, 2019 WL 122165 (U.S. 2019).

24

Henry Schein, Inc. v. Archer and White Sales, Inc.

- Distribution agreement between Archer and White and Henry Schein, Inc. contained an arbitration clause:

"*Disputes*. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA) . . ."

25

Henry Schein, Inc. v. Archer and White Sales, Inc.

- Archer and White filed a petition alleging violating of federal and state antitrust law and seeking monetary damages and injunctive relief.
- Henry Schein, Inc. moved to compel arbitration arguing the incorporation of the AAA's rules meant the parties incorporated a delegation provision into their contract.
  - Issues of arbitrability should be decided by an arbitrator.
- Archer and White asserted the "wholly groundless" exception arguing the question of arbitrability should be decided by an arbitrator as it sought injunctive relief in its petition.

26

Henry Schein, Inc. v. Archer and White Sales, Inc.

- The district court agreed with Archer and White holding Henry Schein, Inc.'s argument was wholly groundless. The Fifth Circuit affirmed.
- U.S. Supreme Court rejected the wholly groundless exception finding it was inconsistent with the text of the FAA and the Court's own precedent.

27

Henry Schein, Inc. v. Archer and White Sales

- "The 'wholly groundless' exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court's precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also ' 'gateway' questions of 'arbitrability.' ' Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless. That conclusion follows also from this Court's precedent."

  Id., __ U.S. at __, __ S.Ct.__, slip op. at 1 (citations omitted).

28

NON-SIGNATORIES AND ARBITRATION CLAUSES

29

Non-Signatories to an Arbitration Agreement

- Generally, non-signatories to an arbitration agreement cannot be forced to arbitrate and cannot force a party to an arbitration agreement to arbitrate.

30

Exceptions

- Six scenarios where a non-signatory may be required to arbitrate:
  1. Incorporation by reference;
  2. Assumption;
  3. Agency;
  4. Alter ego;
  5. Equitable estoppel; and
  6. Third-Party Beneficiary.

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Jody James Farms, JV v. Altman Group, Inc.

- *Jody James Farms, JV v. Altman Group, Inc.,* 547 S.W.3d 624 (Tex. 2018).
- Issue: can an arbitrator determine whether a non-signatory can compel a non-signatory to arbitrate?

32

Jody James Farms, JV v. Altman Group, Inc.

- Jody James Farms, JV purchased a Crop Revenue Coverage Insurance Policy from Rain & Hail, LLC, through the Altman Group, an independent insurance agency. The policy contained an arbitration clause. Altman Group was not expressly named in the policy and did not sign the policy.
- The carrier denied coverage for a claim. One basis for the denial was failure to provide notice. Jody James Farms asserted it had promptly called its agent at Altman Group to report the loss.

33

Jody James Farms, JV v. Altman Group, Inc.

- The arbitrator found in favor of the carrier.
- Jody James Farms then sued Altman Group and its agent. The trial court granted the agency's motion to compel arbitration. At arbitration, Jody James Farms continued to assert its right to proceed against the agency in court. The arbitrator determined the agency could compel arbitration and ruled on the merits of the dispute in favor of the agency.

34

Jody James Farms, JV v. Altman Group, Inc.

- The agency asked the trial court to confirm and enforce the arbitrator's award, and Jody James Farms requested that the award be vacated arguing no valid arbitration agreement exists between the parties. The trial court confirmed the award and denied Jody James Farms' motion.
- The Court of Appeals affirmed.

35

Jody James Farms, JV v. Altman Group, Inc.

- The arbitration clause incorporated the AAA's rules. Texas courts have differed on whether the incorporation of the AAA's rules evidence a clear intent for the arbitrator to decide the issue of arbitrability.
- When the dispute arises between a signatory to the contract and a non-signatory, questions pertaining to the existence of an arbitration agreement with a non-signatory are to be decided by the court, not the arbitrator.

36

Jody James Farms, JV v. Altman Group, Inc.

- A valid arbitration agreement exists between Jody James Farms and the carrier. The dispute with the agency does not arise from a disagreement between the carrier and Jody James Farms. The arbitration clause does not require that Jody James Farms arbitrate this disagreement.
- Examined some of the exceptions for when a non-signatory can be compelled to arbitrate.

37

Jody James Farms, JV v. Altman Group, Inc.

- Incorporation by reference: the arbitration clause did not incorporate any other disagreements (i.e. such as a disagreement between Jody James Farms and the Agency).
- Agency: an agent of a signatory can sometimes invoke an arbitration clause against another signatory. Here: the agency was an insurance agency, but the carrier did not exercise control over it. Agency cannot be the basis to compel arbitration.

38

Jody James Farms, JV v. Altman Group, Inc.

- Third-Party Beneficiary: a third-party beneficiary can enforce an arbitration clause as long as the signatories intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit. The benefit must be direct, not incidental, and must be clearly set forth in the contract.
- Here: the agency was not a third-party beneficiary of the policy. The contract did not directly benefit the agency. At most, the agency received indirect and incidental benefits.

39

Jody James Farms, JV v. Altman Group, Inc.

- Direct-Benefits Estoppel: a signatory cannot seek to hold a non-signatory liable under a contract that contains an arbitration clause while simultaneously asserting the provision cannot be enforced by the non-signatory.
- Not applicable. Jody James Farms' claims against the agency are independent of the insurance policy. Its claims are based on the agency's tort and DTPA duties, which are generally non-contract obligations.

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Waiver of Arbitration: Express and Implied

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Waiver of Arbitration

- Parties subject to an arbitration clause can choose to arbitrate rather than litigate. If a party initiates or participates in litigation, how far can one proceed in the litigation process before the right to arbitrate the dispute is waived?
- Texas has a strong presumption against waiver of arbitration, but it is not irrebuttable.

42

Express Waiver of Arbitration

- Express waiver: a party must expressly waive arbitration or revoke the arbitration demand.
- Requesting a trial continuance and then agreeing to a new trial did not expressly waive a party's arbitration rights.

G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 511. (Tex. 2015)

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Implied Waiver of Arbitration

- "A party asserting implied waiver as a defense to arbitration has the burden to prove that (1) the other party has 'substantially invoked the judicial process,' which is conduct inconsistent with a claimed right to compel arbitration, and (2) the inconsistent conduct has caused it to suffer detriment or prejudice. Because the law favors and encourages arbitration, 'this hurdle is a high one.'"

G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 511-12. (Tex. 2015) (citations omitted).

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Implied Waiver: First Part of the Test

- Has the party substantially invoked the litigation process?
- Question of law for the court.
- Decide on a case-by-case basis, and courts should look to the totality of the circumstances.

Perry Homes v. Cull, 258 S.W.3d 580, 588-92 (Tex. 2008).

45

Substantially Invoking the Litigation Process: *Perry Homes'* Factors

- How long the party moving to compel arbitration waited to do so;
- The reasons for the movant's delay;
- Whether and when the movant knew of the arbitration agreement during the period of delay;
- How much discovery the movant conducted before moving to compel arbitration, and whether that discovery related to the merits;
- Whether the movant requested the court to dispose of claims on the merits;

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Substantially Invoke the Litigation Process: *Perry Homes'* Factors

- Whether the movant asserted affirmative claims for relief in court;
- The extent of the movant's engagement in pretrial matters related to the merits (as opposed to matters related to arbitrability or jurisdiction);
- The amount of time and expense the parties have committed to the litigation;
- Whether the discovery conducted would be unavailable or useful in arbitration;
- Whether activity in court would be duplicated in arbitration; and
- When the case was to be tried.

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Perry Homes v. Cull: Example of Substantially Invoking the Litigation Process

- Seeking to compel arbitration four days before trial.
- Originally objecting to arbitration and then seeking to compel arbitration 14 months later.
- Propounding discovery.
- Filing five motions to compel.
- Ten Depositions
  - Noticing the depositions of six designees of Perry Homes on nine issues and including an attachment with 57 categories of documents.
  - Noticing the depositions of three of Perry Homes' experts and requesting 24 categories of documents from each.

48

Implied Waiver: Second Part of the Test

- Second part of the test: The party arguing waiver must show that it suffered prejudice.
- "[P]rejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue."
- "[A] party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party".

Perry Homes v. Cull, 258 S.W.3d 580, 597 (Tex. 2008).

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G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502 (Tex. 2015)

- GT Leach, the general contractor, sought to compel arbitration after participating in the lawsuit initiated by Sapphire, the developer of the project at issue.
- GT Leach did not substantially invoke the litigation process to Sapphire's detriment.
- May 2011 – May 2012: GT Leach filed counterclaims, filed motions for relief, and participated in pretrial discovery. Merely taking part in litigation is not enough.
- "A party's litigation conduct aimed at defending itself and minimizing its litigation expenses, rather than at taking advantage of the judicial forum, does not amount to substantial invocation of the judicial process." *Id. at* 513.

50

G.T. Leach Builders, LLC v. Sapphire V.P., LP: Analysis of the Factors

- GT Leach was sued by Sapphire.
- GT Leach filed a motion to transfer venue to defend Sapphire's claims in a single venue.
- GT Leach filed counterclaims, but these were defensive in nature and did not seek affirmative relief.
- GT Leach did seek summary judgment or dismissal of Sapphire's claims on the merits.
  - Seeking disposition on the merits is a key factor.
- GT Leach designated experts and responsible third parties. These actions were defensive in nature and necessary to preserve its rights .

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G.T. Leach Builders, LLC v. Sapphire V.P., LP: Analysis of the Factors

- GT Leach served requests for disclosure as part of its answer and responded to discovery propounded by other parties.
  - Responding to discovery is not waiver.
- GT Leach filed a motion to quash.
- 2-3 month delay between the denial of GT Leach's motion to transfer venue and the filing its motion to compel: 2 – 3 months.
  - This is not a substantial delay when compared to the timeline of this case as a whole.
  - Other cases: 8 month delay and two year delay were not waiver.

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G.T. Leach Builders, LLC v. Sapphire V.P., LP

- Sapphire did not suffer prejudice.
  - GT Leach could have moved for arbitration sooner, but Sapphire is the party that chose litigation over arbitration.

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1

Managing a Worksite Accident

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2

Considerations When Managing a Worksite Accident

1) Be Prepared
2) The Site Investigation
3) Communicating with Media
4) Working with OSHA
5) Reporting
6) Follow Up

3

Be Prepared

1) Prevention is best: have clearly communicated and documented policies for workplace safety and prevention of accidents.
2) Have a clear policy for what to do when an accident occurs and educate your employees.

4

Be Prepared

Have Clearly Communicated Workplace Safety Policies

OSHA considers the GC the "controlling employer, on multiple employer jobsites" and is responsible for job site safety.

GCs are required to make "reasonable efforts" →

1. Have a written safety program;
2. Must have employees who are trained to manage, maintain and enforce that program;
3. Must routinely inspect the site to identify and then correct any safety hazards; and
4. Coordinate with subs to correct their violations.

5

Be Prepared

Will Safety Policies Subject GC to more liability?

- Violations of OSHA are not enough to prove negligence as a matter of law, but can be used as evidence. Likewise, compliance with OSHA may not be enough to avoid lawsuit, but can be used as evidence.
- OSHA Regulations do NOT expand a state's common law duties
- A GC owes a "narrow duty": the GC's safety requirements and procedures must not unreasonably increase the probability and severity of injury. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354 (Tex. 1998).

6

Be Prepared

Have a Plan When an Accident Does Occur

- Who should handle immediate response;
- Who will handle controlling site and investigation;
- Who will be media point of contact;
- Create immediate crisis response plan;
- Provide employees with a resource of accurate information;

7

Be Prepared

Have a Plan When an Accident Does Occur

- Create list of what to be investigated and information to be collected;
- Create investigation and interview forms;
- Create procedure on documenting investigation;
- Select and train investigators;
- Have list of outside third parties (i.e., safety investigators, attorneys, etc.) to bring them in early on in process.

8

The Site Investigation

1) RESPOND IMMEDIATELY

- Notify emergency responders and attend to injuries and damages.
- Secure site to ensure safety - goal is to prevent workers/public to additional hazards.
- Shut down/secure site to conduct investigation – goal is to prevent tampering with evidence.
- Notify company's response team – goal to determine depth of investigation needed.
- Notify personnel and workers' family members.

9

The Site Investigation

1) RESPOND IMMEDIATELY

- Notify insurance carrier
  - Claims reported during the second week after an occurrence had an average settlement value that was 18 percent higher than that for claims reported during the first week;
  - Waiting until the third or fourth week resulted in claims costs that were 30 percent higher;
  - Claims not reported until one month after occurrence were typically 45 percent higher.

10

The Site Investigation

2) GATHER INFORMATION

- Witness Statements:
  - Get statements in writing and signed (even if witness says that he did not see anything);
  - Ask open ended questions;
  - Conduct interviews in a quiet place;
  - Ask who, when, what, why and how questions;
  - Get phone numbers, addresses, any other details on witness.

11

The Site Investigation

2) GATHER INFORMATION

- Gather/preserve records/documents that would be helpful;
  - Equipment logs, daily reports, videos on scene, onsite training materials, etc.
- Take photos and videos of scenes;
- Gather additional documents that are relevant;
- Collect necessary data, measurements or conduct testing (this may require expert);

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The Site Investigation

2) GATHER INFORMATION

- Find out information on injured worker:
  - age, department, job title, experience level, tenure in company and job, training records, and whether they are full-time, part-time, seasonal, temporary or contract

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The Site Investigation

2) GATHER INFORMATION

- Document the details of incident: location; objects or substances involved in event; conditions such as temperature, light, noise, weather; how injury occurred; whether preventive measure had been in place; events leading up to injury; what happened after injury.
- Document Characteristics of Equipment/Machinery or Work being performed at time of incident

14

Communicating with Media

- This should be analyzed on case by case basis.
- When talking to media:
  - Appoint one person to discuss with media;
  - Do not run away, push cameras away or seem angry;
  - Do not accept responsibility, instead focus on empathy for victims and what you are doing to help.

15

Communicating with Media

Examples of BAD interviews/handling of events:

BP CEO: "there is no one that wants this thing over more than I do. You know, I'd like my life back."

16

Examples of BAD interviews/handling of events:

April 10, 2017 – Chief Executive in written statement:
"This is an upsetting event to all of us here at United. I apologize for having *to re-accommodate these customers."*

17

Working With OSHA

- When do you have to report to OSHA?
  - When an employee is killed on the job OR
  - Employee suffers a work-related hospitalization, amputation, or loss of an eye.
- A fatality must be reported within 8 hours.
- An in-patient hospitalization, amputation, or eye loss must be reported within 24 hours.

18

Working With OSHA

- Determine who will communicate and work with inspector;
- Know your safety procedures and rules in place;
- Organize OSHA logs and know and provide evidence of safety inspections to show that you were following safety protocols;
- Hire legal counsel or OSHA expert to help work with OSHA and any other governmental entity investigating incident;

19

Working With OSHA

- Consult counsel before allowing OSHA to take photos or videos.
- Conduct mock OSHA inspection;
- Honestly provide information that is requested, but do not volunteer and keep tabs on what is provided.
- Prepare employees for OSHA interview and maintain attorney-client privilege.

20

Reporting

1) Recount incident and facts gathered;
   - Include background information of events leading up to accident;
   - who was at job site before, during and after;
   - include incident timeline;
   - follow up events;
   - witness interviews and contact information;
   - summary of evidence, including photos, videos, documents reviewed, etc.;
   - details of equipment involved;
   - any history of injured employee;
   - details of actual injury;
   - details of any interviews with first responders.

21

Reporting

2) Include theories of immediate and underlying causes;
   - Typically multiple causes for an accident involving equipment, environment, and people (procedures not understood or followed) or management (allowed shortcuts).

3) Include list of backup documentation, witness interviews, photographs, and other evidence gathered and reviewed;

4) Consider follow up interviews necessary, even with first responders;

22

Reporting

5) Include summary of who and when you reported incident (workers comp carrier, other ins. carrier, OSHA, etc.);

6) Preserve any attorney-client privileges for reporting;

- Must be able to demonstrate that the internal investigation was conducted for the purpose of obtaining legal advice;
- Attorneys should direct and initiate internal investigation;
- Investigative work can be delegated to non-attorneys' agents, as long as an attorney is directing and overseeing their work;
- Consult legal counsel before sharing information;
- Clearly mark/designate document "Attorney-Client Privileged"

23

Follow Up

1) Follow up with injured employee
2) Make necessary changes to safety policies and procedures for future prevention;
3) Assess need for training employees;
4) Provide resource for employees to ask questions after catastrophic event;
5) Make necessary changes to site to ensure handling of future;

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Follow Up

6) Research past OSHA violations;

7) Make sure workers' comp carrier is on notice and other relevant carriers;

8) Follow up on your coverage available and coverage of subs or other players.

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Understanding Sovereign Immunity

Cooper & Scully Construction Seminar 2019

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What is Sovereign Immunity?

- The concept of the "sovereign" being immune from suit extends back into the Middle Ages and the English Crown

What is Sovereign Immunity

- The Crown could not arbitrate or adjudicate all disputes amongst the subjects of the realm, so judges and "courts" were established to extend royal authority to the countryside
- While it was no longer the King hearing disputes, the Court was still representing royal authority

What is Sovereign Immunity?

- Thus, no one would ever walk into the King's Court and accuse the King of wrongdoing – that is essentially the root of immunity
- Over the centuries it took hold that the sovereign could not be held to account in its own Courts

American and Texan Adoption

- Hamilton spoke in favor of preserving sovereign immunity in the Federalist Papers
- The Texas Supreme Court held in 1847 that "no state can be sued in her own court without her consent and then only in the manner indicated by that consent…"

Hosner v. De Young, 1 Tex. 764 (Tex. 1847)

Modern Views

- As such, under the common law, the State of Texas is immune from all liability
- Only a statute passed by the Texas Legislature may abrogate the immunity
- Modern policy makers believe there remains a purpose in limiting litigation against the State

Who Is The Sovereign?

- State Agencies
- State Universities
- Political Subdivisions
  - Counties
  - Cities
  - School Districts
  - Special Use Districts
    - Ex. River Authorities, Water Boards, Utility Districts

Who Is The Sovereign

- Texas Courts have extended immunity very broadly
- "When performing governmental functions, political subdivisions derive governmental immunity from the State's sovereign immunity."

City of Houston v. Williams, 353 S.W.3d 128 (Tex. 2011)

Who Is The Sovereign?

- This interpretation has lead to expansive uses of governmental immunity for various special use districts, even governmental group risk pools and self-insurance pools
- Even charter schools and quasi-public academic institutions, such as Baylor Medical School in Houston have been extended immunity

Who Is Not

- One of the most litigated questions has been, if a state agency such as TxDOT is immune for their function, would a contractor also be immune for performing that function on behalf of the agency?

Brown and Gay Engineering

- In this case the Fort Bend County Toll Road Authority contracted with B&G for design on the Westpark Tollway
- In 2007, a drunk driver entered an exit ramp on the toll road and drove on the wrong side of the roadway for eight miles before finally hitting an oncoming vehicle, killing two.

Brown and Gay Engineering

- Decedent's family sued the Toll Authority and B&G alleging design failures that failed to prevent the driver from entering the roadway
- Toll Authority was dismissed from suit based upon sovereign immunity considerations
- B&G argued that it should be granted derivative sovereign immunity as it was an employee of the Authority

Brown and Gay Engineering

- Texas Supreme Court disagreed holding that extending immunity to a contractor did not fulfill the rationale behind sovereign immunity, which is ostensibly to protect the public funds and treasury
- Court also found a private party such as B&G can manage liability exposure through insurance
- Found that B&G, while given parameters, carried out its work with independent discretion

Mechanisms for State Liability

- As mentioned above, the state agency can only be liable through some statutory authority that abrogates the immunity
- The most common statute associated with abrogating immunity is the Texas Tort Claims Act

Texas Tort Claims Act

- First, the TCA is a limited waiver of liability, not a blanket waiver – any ambiguity of intent is construed in favor of immunity
- TCA applies to state and all agencies of the state; political subdivisions; emergency services organizations; any other institution who has status from constitutional or statutory authority.

Tex. Civ. Prac. & Rem. Code 101.001

Employees of Agencies

- TCA extends the limited waiver of immunity to employees of covered units, whom are subject to the control of any officer, agent or elected official of the governmental unit

Liability Under the TCA

- A governmental unit is liable for:
  - Property damage, personal injury and death proximately caused by the wrongful act or omission or negligence of an employee acting within the scope of his employment if:
    - The injury or damage arises from the use of a motor vehicle and the employee would be personally liable under Texas law

Liability Under the TCA

- A governmental unit is also liable for personal injury and death so caused by a condition or use of tangible personal property or real property, such that would subject the unit to personal liability were it a private person.

Exemptions from the TCA

- Legislative functions
- Judicial functions
- Actions in collection of taxes
- Actions of emergency responders, EMS, Police, Fire
- Does not apply to injury or death arising from civil disobedience, riot, rebellion
- Arising from an intentional tort
- Suits involving traffic control devices

Premises Liabilty and Special Defect

- If a premises claim is made against a covered entity, the entity only owes the claimant a duty that a private person would owe a licensee on private property
- Exception is a "special defect"
- Limitation of duty does not apply to duty to warn of special defects such as excavations or obstructions on roadways

Liability Limits

- $250,000 for each person
- $500,000 for occurrence for injuries or death
- $100,000 per occurrence for property damage

Notice Provisions

- A covered unit is entitled to receive notice of a claim not later than six months after the day that the incident giving rise to claim occurred
  - Notice must describe:
  - Damage claimed
  - Time and place of incident;
  - Facts of the incident

Municipal Proprietary Functions Not Covered

TCA applies only to "governmental functions" imposed on a city by law and given to a city by the state as part of state sovereignty.

Ex. Police, Fire, Sanitation, Parks, Zoning, etc

Proprietary functions are discretionary

- . Ex. Municipally owned utilities, amusements

TCA Only Applies to Torts

- For years, claimants and contractors have been frustrated by the application of immunity to contract claims against state agencies and cities

Limited Waiver of Immunity for Contract Involving Municipalities

- Chapter 271of the Local Government Code provides a limited waiver against local governments, cities (not counties)
- Must have a written contract stating the essential terms of the agreement (time of performance and payment, services rendered
- Must directly perform service for governmental entity

Mechanisms to Sue Agency for Breach of Contract

- In City of New Braunfels v. Carowest Land, the Austin Court of Appeals held that immunity extended to a claim for declaratory relief seeking an end run to establish a contractual breach

City of New Braunfels v. Carowest Land, Ltd., 549 S.W.3d 163 (Tex. App. – Austin 2017)

Cities Can Be Liable for Proprietary Functions

- Wasson Interests, Ltd. v. Jacksonville
- 2016 Texas Supreme Court
- Much as with tort claims, cities do not enjoy immunity from suit for proprietary acts, even regarding contract breaches
- Civic action in this case involved leasing lakefront lots around a municipally owned lake

Specific Performance

- Chapter 271 of the Local Government Code has been held by the San Antonio Court of Appeals to not waive immunity from suit seeking specific performance.
- Surprising outcome – specific performance only seeks the contract be performed
- Court ruled that the damages limitation sets out the relief – specific performance not included

City of San Antonio v. Hays Street Bridge Restoration Group, 551 S.W3d 755 (Tex. App. – San Antonio 2017, pet. granted).

Questions?

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Insurance Coverage for Rip & Tear Costs

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Rip and Tear

- "Rip and tear" costs are those costs required to access defective work or property damage.
- Does a CGL policy provide coverage for these costs?

Policy Language of CGL Insuring Agreement

- A CGL insuring agreement states that an insurance carrier is obligated to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies."

Lennar Corp. v. Markel American, 413 S.W.3d 750 (Tex. 2013)

- A homebuilder made a claim for the cost to repair its homes that had been damaged because of EIFS siding that had been installed on the homes. *Id.* at 751.
- Claim involved the removal of EIFS to inspect for wood rot damage.
- Lennar removed forty-eight homes that had not incurred covered property damage from its proof at trial.

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Lennar Corp. v. Markel American, 413 S.W.3d 750 (Tex. 2013)

- Court awarded the costs Lennar incurred to determine which areas of the homes had water damage.
- The Court noted the importance that Lennar was seeking these "because of" damages for only houses that suffered covered 'property damage,' by stating, 'We are not confronted with a situation in which the existence of damage was doubtful.' Markel concedes that each of the 465 homes for which Lennar sought to recover remediation costs was actually damaged."

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U.S. Metals, Inc. v. Liberty Mut. Group, Inc., 490 S.W.3d 20 (Tex. 2016).

- U.S. Metals, Inc. sold ExxonMobil about 350 weld-neck flanges to be installed into diesel processing units at two Exxon refineries.

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U.S. Metals Facts

- Several flanges leaked in post-installation testing.
- Extensive investigation revealed that the flanges did not meet industry standards. ExxonMobil decided to replace them to avoid the risk of fire and explosion.
- For each flange, the replacement process involved:
  1) stripping the coating and insulation (destroyed in the process),
  2) cutting the flange out of the pipe,
  3) removing the gaskets (destroyed in the process),
  4) grinding the pipe surfaces smooth for re-welding,
  5) replacing the flange and gaskets,
  6) welding the new flange to the pipes, and
  7) replacing the temperature coating and insulation.
- This process delayed operation of the diesel units for several weeks.

U.S. Metals Facts

- ExxonMobil sued U.S. Metals for:
  a) $6,345,824 for the cost of replacing the flanges and
  b) $16,656,000 for the lost use of the units during the replacement process.
- U.S. Metals settled with ExxonMobil for $2.2 million
- U.S. Metals claimed indemnification from its CGL carrier, Liberty Mutual.
- Liberty Mutual denied coverage.

U.S. Metals, Inc. v. Liberty Mut. Group, Inc., 490 S.W.3d 20 (Tex. 2016).

- Exclusion K precluded coverage for damages to the flanges themselves.
- Exclusion M precluded coverage for the loss of use of the diesel units because they were restored to use by replacing the flanges.

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U.S. Metals, Inc. v. Liberty Mut. Group, Inc., 490 S.W.3d 20 (Tex. 2016).

- "But the insulation and gaskets destroyed in the process were not restored to use; they were replaced. They were therefore not impaired property to which Exclusion M applied, and the cost of replacing them was therefore covered by the policy."

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U.S. Metals, Inc. v. Liberty Mut. Group, Inc., 490 S.W.3d 20 (Tex. 2016).

- Thus, under the Court's *U.S. Metals* analysis, the destruction of the insulation and gaskets in order to "get to" and repair the defective flanges generated new property damage that triggered the CGL policy.

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Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC, 2017 WL 5202891 (W.D. Tex. Sept. 7, 2017)

- The Western District of Texas considered rip & tear damages after *U.S. Metals*
- This case involves the construction of a residential development
- D&D, the GC, subbed out utility work to Cruz (sewer and water systems)

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Cruz FACTS

- After Cruz's utility work was completed, D&D and other subs performed road work above Cruz's work
- Nearing completion, it was discovered that Cruz's defective work necessitated the removal of the roadway which damaged other subs' work

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Prior to discovery of utility leaks - this is how the Woods of Boerne looked.

EXHIBIT 7A

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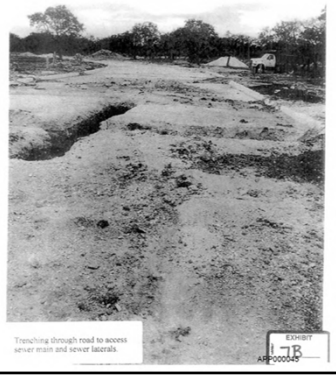

Trenching through road to access sewer main and sewer laterals.

EXHIBIT 7B

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Cruz MEANING

- The Court held that there was coverage for the rip and tear costs to access the defective utility work.
- Seems to be creating insurance coverage when there was no coverage prior to the rip and tear.
- Other courts may follow suit and permit the insured to recover rip and tear expenses even though the defective work is not covered

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Future Issues

- A. Can Rip and Tear Be an “Occurrence”?
- B. Which Policy is Triggered?
- C. Applicability of Exclusion A?
- D. Carriers Respond with Rip and Tear Endorsements

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Occurrence

- CGL policy requires that the property damage is caused by an occurrence
- An “occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
- Is ripping and tearing really an accident?

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Which Policy is Triggered?

- In *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008), the Supreme Court adopted what is known as the "actual injury" approach—property damage “occurs” when the property is *actually damaged*, not the date when the physical damage is discovered or could have been discovered.
- But how about fortuitous loss?

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Exclusion a.

- Expected or Intended Injury

  “Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

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Carriers Respond with Endorsements

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FAULTY WORK EXCLUSION WITH RESULTING DAMAGE COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

In regard only to "your work" in connection with residential structures, **Exclusion l. Damage to Your Work** of **Section I - Coverages, Coverage A. Bodily Injury and Property Damage Liability, 2. Exclusions** is deleted and replaced with:

l. Faulty, Defective or Poor Workmanship in Your Work

This insurance does not apply to any claim or "suit" for the cost of repair, replacement, adjustment, removal, loss of use, inspection, disposal, or otherwise making good any faulty, defective or poor workmanship in "your work" for which any insured or any insured's employees, contractors, or subcontractors may be liable.

This exclusion does not include "property damage" sustained by any other property that is caused by the faulty, defective or poor workmanship in "your work".

This exclusion applies only to residential structures for which coverage is not otherwise excluded under this insurance.

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Questions?

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