PAYING AND CHASING

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PAYING AND CHASING

I. INTRODUCTION

The vast majority of construction defect claims involve multiple parties whose work is called into question. It is far more likely that the issue or issues involve the work and obligations of more than one contractor and may very well involve the work and obligations of one or more design professionals. There are usually several scopes of work involved. Seldom does the issue or problem involve the work of only one contractor, and even then the guilty contractor may be a subcontractor to a general contractor on the project. It is indeed the rare case where the only issues are between the claimant, typically the owner of the property, and one defendant.

Owners quite naturally look to the general contractor and/or their primary design professional, typically the architect, to resolve any problems that may arise. This is true whether the problems arise during the course of construction or after construction has been completed. Those are the parties that the owner hired to construct their building and are generally the only parties with whom the owner has a contractual relationship. Owners typically take the position, and understandably so, that any problems with the subcontractors' or consultants' work is something that the general contractor and/or the primary design professional should deal with, as those are the parties that typically hire and contract with the subcontractors and subconsultants on any particular project.

There are often pressures to resolve a claim early, before all of the relevant parties are prepared to do so. This pressure most often comes from owners who want their building fixed and do not understand why their general contractor and/or their architect will not simply fix their building or pay to have it fixed. Quite often this is because the subcontractors and subconsultants whose work is called into question and their insurance carriers are not prepared to accept responsibility and pay for the damages. They may believe, perhaps legitimately, that their work is not the cause of the problem or is not the cause of all of the problems.

The general contractor, and to a lesser extent the architect, may be tempted to take care of the owner's problem and then seek to recover the damages they expended from the responsible subcontractors and/or subconsultants. The rationale for doing this may be very sound. The owner's problems are taken care of, the building is fixed, client relations are repaired and preserved, and contractual obligations with the owner are fulfilled. However, there are perils in resolving the claims of the owner and then seeking to recover the monies expended in doing so by seeking reimbursement from subcontractors and subconsultants. Parties need to be aware of those perils before they pay and chase. Just because a subcontractor or subconsultant is responsible for errors or defects in their work does not mean that the party who has paid to have those errors or defects fixed will be able to recover from them.

II. SETTLING TORTFEASORS/WRONGDOERS

The first problem with settling a claim and then pursuing claims against other allegedly responsible parties is that Texas law prohibits joint tortfeasors from doing so. Virtually all construction defect claims are a combination of tort and contract claims. Texas law prohibits a party from settling claims against it and then seeking reimbursement in the form of a contribution claim. While contribution claims are claims sounding in tort, this concept has also been extended to claims sounding in contract.

A. A Settling Party Cannot Pursue a Claim for Contribution.

Texas law prohibits a party who has settled claims against it from pursuing contribution from other parties. This has long been the law in Texas and is reflected in the various contribution schemes under Texas law. There are actually three distinct contribution schemes under Texas law, two based on statute and one created at common law. All three of the contribution schemes prohibit a party from settling the claims against it and then seeking contribution from other parties to satisfy all or a portion of the claims paid by the settling party.

The applicable contribution scheme is determined by the liability theories asserted or adjudged against the joint tortfeasors. If liability is based exclusively in negligence, the comparative negligence statute applies. Tex. Civ. Prac. & Rem. Code and Ann. §33.001 et seq. (Vernon 1997). If liability is based on a products liability theory or mixed theories, the common law scheme applies. *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 20 (Tex. 1987); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 415 (Tex. 1984). Any remaining tort action that is not covered by the common law or the comparative negligence statute falls within the domain of the original contribution statute. *Jinkins*, 739 S.W.2d at 20; Tex. Civ. Prac. & Rem. Code Ann. §32.001(a), (b) (Vernon 1997).

Each of the contribution schemes under Texas law essentially prohibit a settling party from seeking contribution. The original contribution statute requires that a person seeking contribution have a judgment against it finding the party seeking contribution to be a joint tortfeasor and a payment by

that party of a disportionment share of the common liability. *Jinkins*, 739 S.W.2d at 20-21. The comparative negligence statute creates no right of contribution in favor of a settling party. A joint tortfeasor who settles a lawsuit is not entitled to contribution from other alleged tortfeasors. *Jinkins*, 739 S.W.2d at 21; *see also International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988). Finally, a tortfeasor is likewise prohibited from seeking contribution under the common law scheme pursuant to *Duncan*.

The prohibitions against a settling party pursuing contribution from other alleged responsible party also applies when a party settles a claim prior to a lawsuit even being filed. *Filter Fab, Inc. v. Delauder*, 2 S.W.3d 614, 617 (Tex.App.—Houston [14th Dist.] 1999, no pet.). In *Filter Fab*, an employer settled one of its employee's claims against it before the employee resorted to litigation and then sought contribution from the forklift manufacturer that allegedly caused the accident that injured the employee. The court treated the employer as a settling party and denied any claims for contribution against the forklift manufacturer. *Id*. at 617. The courts reason that a settlement extinguishes any claim for contribution or reimbursement from other alleged responsible parties. As one court has described it, the voluntary settlement "destroys" the forum for determining fault and therefore bars any claim for reimbursement. *MAN GHH Logistics, GMBH v. Emscor, Inc.*, 858 S.W.2d 41, 43-44 (Tex.App.—Houston [14th Dist.] 1993, no writ).

B. Do The Prohibitions Against Settling and Then Seeking Contribution or Reimbursement Apply to Non-Tort Claims?

A claim for contribution is a tort related claim and does not apply to a claim based in contract. *CTTI Prismeyer, Inc. v. R&O Ltd. Partnership*, 1645 S.W.3d 675, 684 (Tex.App.—Austin 2005, no pet.); *CBI NA-Con, Inc. v. UOP, Inc.*, 961 S.W.2d 336, 341 (Tex.App.—Houston [1st Dist.] 1998, pet. denied). Comparative negligence is also inapplicable to breach of contract claims. *Sassen v. Tanglegrove Townhouse Condominium Assoc*., 877 S.W.2d. 489, 493 (Tex.App.—Texarkana 1994, writ denied).

Some Texas courts, however, have extended the principals prohibiting a joint tortfeasor from seeking contribution to joint "wrongdoers." Joint wrongdoers have been defined as "those who were found to have caused the plaintiff's injury from any basis other than, or in addition to, negligence." *Trevino v. Lightning Laydown, Inc.*, 782 S.W.2d 946, 969 (Tex.App.—Austin 1990, writ denied). Such cases have applied the rule barring a contribution claim by a settling person against a non-settling party "not solely to joint 'tortfeasors' but also to joint wrongdoers, regardless of whether the claim sounds in tort or contract theories, if the parties are alleged to have caused one indivisible injury to the plaintiff." *Coronado Paint Co. v. Global Drywall Systems, Inc.*, 47 S.W.3d 28, 32 (Tex.App. Corpus Christi 2001, pet denied).

It can therefore be argued that even a breach of contract or breach of warranty claim made by a party to recover as damages monies it has paid to settle claims against it from third parties are simply recast contribution claims. In doing so, a defendant can potentially prevent a party who has settled a claim from seeking reimbursement under most theories since virtually all parties who have felt compelled to settle a claim can be considered joint wrongdoers. The only exception would be a valid and enforceable indemnity agreement which almost by its very nature contemplates reimbursement.

C. Legislative Exceptions To Prohibitions Against Settling and Chasing

Public policy in Texas generally favors settlement. The prohibitions under Texas law against settling and chasing fly somewhat in the face of that public policy. Restrictions on prohibitions against a party being able to settle claims against it when there is a potential that another party or parties is actually responsible for some or all of the damages makes parties less likely or willing to settle. Recognizing this, the Legislature has effectively carved out an exception to the prohibitions against settling claims and then seeking reimbursement from third parties in the context of residential claims.

In enacting the Residential Construction Liability Act ("RCLA"), the Legislature specifically provided that a builder can settle a claim by a homeowner and then pursue reimbursement from the responsible subcontractor or subcontractors so long as it provides notice to the subcontractor(s). Section 27.004(p) of the RCLA provides: "If the contractor provides written notice of a claim for damages arising from a construction defect to a subcontractor, the contractor retains all rights of contribution from the subcontractor if the contractor settles the claim with the claimant." Tex. Prop. Code Ann. §27.004(p) (Vernon Supp. 2005). This provision is broadly worded and applies to all types of claims asserted in a residential construction setting.

This is a legislatively created exception, however, and only applies to residential construction claims, all of which are governed by the RCLA With regard to construction defect claims in a commercial setting, however, Texas law remains the same as discussed above and claims for contribution by a settling party are prohibited. That is precisely why the Legislature created the exception in §27.004(p) of the RCLA to encourage resolution of claims by homeowners. The Legislature was obviously hoping

to encourage builders to resolve such claims instead of waiting for a subcontractor or subcontractors to acknowledge their responsibility for part or all of the problem. In the non-residential context, however, a settling party proceeds at its own peril.

III. OTHER POTENTIAL PROBLEMS WITH SEEKING REIMBURSEMENT AFTER SETTLEMENT

A. Waivers of Subrogation

Construction contracts, whether they be between owners and general contractors or design professionals or between general contractors and/or design professionals and subcontractors or subconsultants, often contain waivers of subrogation. These provisions are designed to waive to some degree claims between parties for problems arising on a particular project. Most often they are designed to prevent an insurance carrier who pays a claim on behalf of one or more parties involved in a project from pursing claims against other allegedly responsible parties in an effort to recoup some of the monies they paid on a claim. The principal or rationale behind the clause is that the parties agree up front who will bear the cost of a certain risks or perils and obtain insurance to cover such perils so that the parties can avoid the cost, expense, and often delay caused by arguing over and litigating who is responsible for a particular problem.

The purpose of this paper is not to discuss waivers of subrogation in detail. Such clauses are, however, another vitally important issue to identify and address when considering settlement of a claim and potential sources of reimbursement following a settlement. Waivers of subrogation are often limited in scope, the classic example being a clause directed at waiving all claims between parties during the course of a project, with one of the parties buying a builders risk or all risk policy to cover any claims that arise during the course of the project. Just because the waiver of subrogation clause appears to have a fairly defined scope and application does not mean that a party defending against a later claim made against it will not try to assert the waiver as a defense to such claims. A thorough review of the contracts of the potentially responsible parties is advisable before resolving a claim with the idea of trying to get your money back from other parties.

B. Potential Application of the Statute of Limitations

Another potential issue for consideration when contemplating pursuing claims for reimbursement following a settlement is the statute of limitations. "The general rule in construction defect cases is that limitations begin to run when the [claimant] becomes aware of property damage." *Hickman v. Dudensing*, 2007 Tex.App. LEXIS 4053 (Tex.App.—Houston [1st Dist.] May 24, 2007, pet. denied), citing *Tenowich v. Sterling Plumbing, Co.*, 712 S.W.2d 738, 740 (Tex.App.—Houston 14th Dist.] 1986, no writ); *see also Dean v. Frank W. O'Neil & Assoc.*, 166 S.W.3d 352 (Tex.App.--Fort Worth 2005, no pet.) (statute of limitations in construction defect case began to run when homeowners first became aware of distress in home regardless of whether homeowners had reason to suspect negligence or who was at fault).

In general terms, the applicable statute of limitations depends on the theory of recovery. With respect to a claim for contribution or indemnity, however, limitations does not begin to run until the party seeking contribution or indemnity becomes liable on the claim that forms the basis of the claim for contribution or indemnity. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 210 (Tex. 1999). If such a claim for contribution or indemnity is not otherwise prohibited, limitations will begin to run following the date of judgment or any settlement.

With respect to other claims such as ones for breach of contract or breach of warranty, the time at which the statute of limitations begins to run is not quite so clear. Generally, a cause of action for breach of contract accrues at the time of the breach. *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006); *Heron Fin. Corp.v. U.S. Testing Co.*, 926 S.W.2d 329, 331 (Tex.App.—Austin 1996, writ denied). The discovery rule applies to breach of contract actions if the nature of the plaintiff's injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence. *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998). The statute of limitations on a claim for breach of warranty is generally different and may depend on the type of warranty. The statute of limitations on a breach of warranty claim is four years. *Certain-Teed Products Corp. v. Bell*, 422 S.W.2d 719, 721 (Tex. 1968). It generally runs from the date of discovery. *See Richman v. Watel*, 565 S.W.2d 101, 102 (Trx. Civ. App.—Waco, writ ref.'d n.r.e.). Implied warranties, however, may not be subject to the discovery rule. *Safeway*, 710 S.W.2d 544, 47-48 (Tex. 1986). Further, the breach may not occur until the party refuses to comply with the warranty. *See McCrea v. Cunilla Condominium Corp., N.V.*, 685 S.W.2d 755 (Tex.App.—Houston 1985, writ ref'd. n.r.e.) If the warranty is on a product, on the other hand, the warranty may run from the date of delivery. *Safeway* at 546.

When a party such as a general contractor pursues claims for reimbursement against a subcontractor under theories of breach of contract or breach of warranty following a judgment against or settlement by the general contractor the question becomes when does the statute of limitations begin to

run. The answer is that it depends on the claim. Such claims generally do not run from the date of any judgment or settlement like a claim for contribution or indemnity does. When such claims accrue and when limitations could potentially run is another issue that must be taken into account.

IV. CONCLUSION

There are obviously many things to consider when determining if it is advisable to settle claims and then seek reimbursement from other parties. There can be a variety of well founded and rational reasons for pursuing and consummating such a settlement. Recovering some or all of your money from other responsible parties, however, is far from guaranteed. General contractors and other similarly situated parties would be well advised to fully evaluate all of the issues if they have any notion or desire of trying to recoup any monies expended in settling claims. Subcontractors and other similarly situated parties, on the other hand, should fully consider all of the potential defenses to a claim for reimbursement.