

TEXAS CONSTRUCTION LAW UPDATE '05



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Arbitration	Non-Signatories to Arbitration Agreements	
	<p><i>In re: Kellogg Brown & Root, Inc.</i>, 166 S.W.3d 732 (Tex. 2005).</p> <p>Facts: Two contractors sued each other for breach of contract. A third contractor, KBR, sued for quantum meruit. The contract between two of the contractors contained an arbitration clause. KBR was not a party to that contract. The trial court compelled KBR to arbitrate. The Texas Supreme Court reversed. KBR was not required to arbitrate because it was not a signatory to the arbitration agreement and because it was not suing to enforce or benefit from the contract containing the arbitration clause.</p>	<p>Holding:</p> <p>Non-signatories to a contract containing an arbitration clause cannot be compelled to arbitrate unless the non-signatories attempt to derive a direct benefit from the contract containing the arbitration provision. A claim to recover payment under the theory of quantum meruit is an equitable remedy, not a contract claim and, therefore, does not seek a direct benefit under a contract.</p> <p>Significance: Design professionals and sub-contractors will not be required to participate in arbitration between the plaintiff and GC if the design professionals/sub-contractors are not signatories to the contract containing the arbitration clause and do not seek to enforce or benefit from the contract.</p>
Pass Through Liability	Liability for Defective Plans	
	<p><i>Interstate Contracting Corp. v. City of Dallas</i>, 407 F.3d 708 (5th Cir. 2005). See also the Texas Supreme Court's opinion on certified question from Fifth Circuit at 135 S.W.3d 605 (Tex. 2004).</p> <p>Facts: General contractor sued City of Dallas for breach of contract and breach of warranty arising out of the City's failure to pay for additional costs incurred on project by sub-contractor. The costs were allegedly caused by the City's failure to provide accurate plans and specifications regarding the subsoil conditions at the construction site.</p>	<p>Holding:</p> <p>It was decided for the first time under Texas law that a general contractor (GC) has a right to sue an owner directly to recover payment for a sub-contractor's work even though there is no privity of contract between owner and sub-contractor. The GC can assert the sub-contractor's breach of contract claim directly against the owner. It was also decided for the first time under Texas law that an owner is not liable to the GC for furnishing defective plans or specifications that caused increased construction expense unless the contract expressly and unambiguously shifts to the owner the risk of liability for increased costs incurred by the contractors as a result of the owner providing defective plans or specifications.</p>
Architect & Engineer Liability	Certificate of Merit Statute	<p><i>Palladian Building Co. v. Nortex Foundation Designs, Inc.</i>, 165 S.W.3d 430 (Tex. App.--Fort Worth 2005, no pet.) (Defended by Greg Ziegler, Macdonald Devin, P.C.).</p> <p>Facts: Construction defect case where Palladian sued Nortex for breach of contract, fraud, and breach of warranty alleging soils report from different property used in designing slab. Palladian failed to file expert report, claiming Certificate of Merit statute did not apply to contract, fraud and warranty claims. Trial court dismissed.</p>
	Effective Sept. 1, 2003	

Insurer's Right of Reimbursement

Excess Underwriters at Lloyds v. Frank's Casing Crew & Rental Tools, Inc., 2005 WL 1252321 (Tex. Sup. Ct., May 27, 2005).

Facts: Excess liability insurer sued insured for reimbursement of funds paid to oil company for damages resulting from collapse of drilling platform installed by insured. The insured had demanded settlement within policy limits. The insurer had timely reserved its rights to deny coverage because the claim was not covered by the policy. The trial court granted summary judgment for the insured. The Texas Supreme Court reversed, holding that under the circumstances, the insurer was entitled to seek reimbursement.

Holding:

A liability insurer may obtain reimbursement from its insured for settlement payments made for claims not covered by the policy if:

- (1) there is an express agreement between the insurer and the insured entitling the carrier to reimbursement; or
- (2) the insured has demanded that its insurer accept a settlement offer that is within policy limits and the insured expressly agrees that the settlement offer should be accepted; and
- (3) the insurer
 - (a) has timely asserted its reservations of rights;
 - (b) notified the insured of the carrier's intent to seek reimbursement; and
 - (c) paid to settle claims that were not covered.

Homebuilder's Right to Indemnity from Insurer and Number of Occurrences

Lennar Corp. v. Great American Insurance Co., 2005 WL 1324833 (Tex. App. – Houston [14th Dist.], June 2, 2005).

Facts: Homebuilder sought indemnity from carriers for expenses incurred in replacement and repair costs for defective stucco material applied to several homes. Carriers argued there is no coverage for defective construction because there is no "occurrence" when the only damage was to the builder's own work.

Holding:

Defective construction causing damage to the insured homebuilder's work constitutes an "occurrence" if the damage was unintended and unexpected and not excluded by the policy. However, costs incurred by homebuilders in taking measures to prevent future damage, while good business decisions, are not covered. Builders must apportion costs for preventative measures separately from repair and replacement costs. Also, each sale or home built with stucco material amounted to a separate occurrence. *But see Lamar Homes v. Mid-Continent*, 428 F.3d 193 (5th Cir. 2005) (question of whether defective construction constitutes an "occurrence" certified to Texas Supreme Court – decision pending).

First Manifestation of Defect

Dean v. Frank W. Neal & Assoc., 166 S.W.3d 352 (Tex. App.--Fort Worth 2005).

Facts: Home buyers brought negligence, breach of warranty, fraud, DTPA, and breach of contract action against engineers and home contractor for designing slab-on-ground foundation instead of pier and beam system. Trial court granted summary judgment for defendants based on limitations. Home buyers alleged the discovery rule, fraud, and estoppel, claiming limitations did not begin until they learned the cause of the defect and who was responsible. Home buyers also claimed that limitations were tolled during the time the defendants were conducting an inspection of the residence and during the period of time the defendants attempted to make repairs.

Holding:

In construction defect cases, when the home buyers allege the discovery rule in response to the defense of limitations, the statute of limitations begins to run no later than when the home buyers knew or should have known of the alleged wrongful injury, i.e. when they first became aware there was some movement in the foundation of the home. Architect's and engineer's investigation of the alleged problems and unsuccessful attempts at repair did not toll the running of the statute of limitations or estop the defendants from asserting limitations as a defense. Nor did defendants commit fraud that tolls limitations by concealing the cause of the defects after inspecting the home and assuring homeowners that attempted repairs would take place.

Significance: the statute of limitations begins to run upon the first manifestation of defect, regardless of whether the homeowners have reason to suspect negligence or who may be at fault.