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CONSTRUCTION LAW

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THE cases decided during the Survey period did not rewrite existing law in the construction area. There were, however, significant clarifications of Texas law in the areas of liability for construction services on the part of entities not a party to the written contract; the extent of Miller Act sureties' liability for delay damages; and the distinctions between indemnity and release provisions to contracts situations. Additionally, the Dallas court of appeals addressed the application of statutes of limitation and of repose to commercial construction situations. These issues and other topics of interest in construction law are the subject of this Survey Article.

I. STATUTES OF LIMITATION AND STATUTES OF REPOSE

The Dallas court of appeals provided an enlightening discussion of statutes of limitation and statutes of repose in *Dallas Market Center Developing Co. v. Beran & Shelmire*.¹ Dallas Market Center (DMC) brought this action

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1. 824 S.W.2d 218, 220 (Tex. App.—Dallas 1991, writ denied).

for defective masonry work on the Anatole Atria over ten years after construction was completed. The four causes of action DMC alleged were breach of contract, breach of express and implied warranties, negligent design and construction, and fraudulent concealment. In affirming the trial court's grant of summary judgment, the court of appeals addressed whether statutes of repose apply to contract claims.² The court first noted that Texas has two separate statutes of repose; one applies to architects and engineers³, and the other to contractors.⁴ Next, the court explained the difference between statutes of repose and statutes of limitation.⁵ Statutes of limitation run from when an injured party "discovers or reasonably should have discovered a defect."⁶ In contrast, the test for statutes of repose is "when the improvement is substantially completed."⁷ Thus, an injured party can lose the right to bring an action if it does not discover a defect until after the statute of repose has run.⁸ In reaching its conclusion, the court referred to the Code Construction Act⁹, the objectives of the statute, and its legislative history.¹⁰ The court noted that "statutes of repose demonstrate legislative recognition of the protracted and extensive vulnerability to lawsuits of building professionals and contractors."¹¹

2. *Id.* at 220. The tort claims were not raised on appeal.

3. *Id.* The architect and engineer statute reads:

- (a) A person must bring suit for damages for a claim listed in Subsection (b) against a registered or licensed architect or engineer in this state, who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property, not later than 10 years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.
- (b) this section applies to suit for:
 - (1) injury, damage, or loss to real or personal property;
 - (2) personal injury;
 - (3) wrongful death;
 - (4) contribution; or
 - (5) indemnity.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a),(b) (Vernon 1986).

4. The contractors' statute reads:

- (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.
- (b) This Section applies to suit for:
 - (1) injury, damage, or loss to real or personal property;
 - (2) personal injury;
 - (3) wrongful death;
 - (4) contribution; or
 - (5) indemnity.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a),(b) (Vernon 1986).

5. *Dallas Mkt. Ctr. Dev. Co.*, 824 S.W.2d at 221.

6. *Id.*

7. *Id.*

8. *Id.*

9. TEX. CIV. PRAC. & REM. CODE ANN. § 1.002 (Vernon 1986).

10. *Dallas Mkt. Ctr. Dev. Co.*, 824 S.W.2d at 221.

11. *Id.* at 222 (citing *Sowers v. M.W. Kellogg, Co.*, 663 S.W.2d 644, 646 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.)).

As for the fraudulent concealment issue, the court pointed out that DMC pleaded fraudulent inducement as an affirmative defense to explain why it did not discover defects sooner.¹² Because the discovery rule applies only to statutes of limitation, and not to statutes of repose, the court upheld the summary judgment as to fraudulent concealment.¹³

In *Clade v. Larsen*¹⁴ the Dallas court of appeals considered when causes of action accrue for statute of limitations purposes.¹⁵ A restaurant owner brought an action for improper construction of a restaurant against an architect, an architecture firm, and a project manager. The trial court granted summary judgment because all claims were barred by limitations.¹⁶ On appeal, the restaurant owner argued that her claims were timely because they were brought within two years of when she discovered defects. The court of appeals pointed out that the owner had noticed defects and had sent demand letters shortly after completion of the project in 1987, yet had not filed suit until 1990.¹⁷ Because the later defects were merely a later manifestation of defects of which she was aware earlier, she was barred by limitations.¹⁸ The court stated that

[l]imitations runs from the time of the wrongful conduct and bars actions for damages resulting from the wrongful conduct even though the damages are not fully developed during the limitations period A party need only be aware of enough facts to apprise him of his right to seek a judicial remedy.¹⁹

II. STATUTE OF FRAUDS

A 40-lane bowling alley was the project in issue in *Smith, Seckman, Reid, Inc. v. Metro National Corp.*²⁰ The bowling alley was a tenant of Metro National and entered into written agreements with both the architect and the engineer. After the tenant failed to pay, both the architect and the engineering firm sued Metro National, although their contracts were with the tenant, alleging that Metro National's authorized agent orally represented that Metro would pay for the architect's and engineer's work. Metro raised an affirmative defense of statute of frauds,²¹ on which basis the trial court granted summary judgment in favor of Metro.²² The court of appeals stated that

where a promisor accepts primary responsibility for the debt of another and his 'leading object' or 'main purpose' is to serve some interest of his

12. *Id.* at 222.

13. *Id.* The court dismissed a constitutional challenge to the application of statutes of repose because DMC did not raise such a challenge in the trial court. *Id.* at 223.

14. 838 S.W.2d 277 (Tex. App.—Dallas 1992, writ denied).

15. *Id.* at 281.

16. *Id.* at 279-80.

17. *Id.* at 283.

18. *Id.*

19. *Id.* at 282 (citations omitted).

20. 836 S.W.2d 817 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).

21. See TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(2) (Vernon 1987).

22. *Smith, Seckman, Reid, Inc.*, 836 S.W.2d at 818.

own, his oral promise does not come within the Statute of Frauds and is enforceable.²³

The court reversed the summary judgment because it found a fact issue as to whether an oral agreement existed.²⁴ Although Metro National had been making payments to the architect and engineers through a system of dual payee checks, the court did not determine such action to create the oral agreement; rather, the court relied on affidavits regarding statements made to the architect and the engineer by Metro's supervisor.²⁵ The court then set out three factors for the trial court to consider on remand to determine whether or not the promise was enforceable notwithstanding the statute of frauds: (1) did Metro intend to become primarily liable, or merely to become a surety for the original obligor; (2) was there consideration for Metro's promise; and (3) was the consideration primarily for Metro's own use and benefit?²⁶ Affirmative answers to each of these questions will cause the case to come within the exception to the statute of frauds.²⁷

III. SURETIES AND THE MILLER ACT

The Fifth Circuit considered the Miller Act²⁸ in *United States ex. rel. Lochridge-Priest, Inc. v. Con-Real Support Group, Inc.*²⁹ The case involved a contract to renovate two buildings at the Veteran's Administration Medical Center in Waco. The contractor obtained a Miller Act payment bond. The subcontractor responsible for mechanical work substantially completed this work seven months after the date required by contract, but was not paid. The subcontractor sued the contractor and the surety on the Miller Act bond and brought state law breach of contract and quantum meruit claims. The contractor and its surety counterclaimed for breach of contract and delay damages. The district court found for the contractor on the breach of contract counterclaim and for the subcontractor on the failure to pay amounts due under the contract issue. Neither party challenged these findings. At issue on appeal was the trial court's judgment that the subcontractor recover delay claims against the contractor, but not the surety, and recover pre- and post-judgment interest and attorneys' fees.³⁰

The Fifth Circuit found ample evidence of delay in the numerous design changes, and took issue with the district court's conclusion that "claims for delay expenses are not recoverable against a Miller Act surety."³¹ In reversing the judgment as to liability for delay expenses, the court of appeals instructed the district court on remand to consider the conditions set forth in

23. *Id.* at 820-21 (quoting *Haas Drilling Co. v. First Nat'l Bank in Dallas*, 456 S.W.2d 886, 891 (Tex. 1970) (citations omitted)).

24. *Id.* at 822.

25. *Id.* at 820-21.

26. *Id.* at 821.

27. *Id.*

28. 40 U.S.C. § 270(a) (1988).

29. 950 F.2d 284 (5th Cir. 1992).

30. *Id.* at 287.

31. *Id.*

Millers Mutual,³² a case which the Fifth Circuit had decided subsequent to the lower court's ruling in *Lochridge-Priest*. The court stated: "in *Millers Mutual*, we held that a subcontractor can recover 'out-of-pocket costs of delay' from a Miller Act surety;" however the court must "first determine that the subcontractor did not cause the delay, then carefully limit recovery to 'costs actually expended in furnishing the labor or material in the prosecution of the work provided for in the contract.'" ³³

Turning to prejudgment interest, because the Miller Act refers to state law, the question becomes determining when the principal amount becomes due and payable under the subcontract.³⁴ The Fifth Circuit remanded for a recalculation of prejudgment interest.³⁵

A Texas state court in *FMI Contracting Corp. v. Federal Insurance Co.*³⁶ also dealt with Miller Act issues during the Survey period, but ultimately dismissed the suit for lack of jurisdiction.³⁷ The surety issued a performance and payment bond to a general contractor to build improvements on an Air Force plant owned by the United States. When a dispute arose, a subcontractor sued the surety, who in turn moved for summary judgment for lack of jurisdiction, arguing that because the Miller Act governed a United States district court had exclusive jurisdiction. The trial court dismissed, and the court of appeals affirmed.³⁸ The court reasoned that although the construction contract and bond named a private party as the "owner" of the project and stated that suit would be brought in a "state court of competent jurisdiction," the United States actually owned the property and therefore the suit was subject to the Miller Act.³⁹ The court also acknowledged that the Act is to be broadly and liberally construed.⁴⁰

In *Trinity Universal Insurance Co. v. Briarcrest Country Club Corp.*⁴¹ the fourteenth district reversed a summary judgment against a surety based on a default judgment against a contractor.⁴² The contractor finished the project behind schedule, and the owner sued both the contractor and the surety. The surety answered, but the contractor did not. The trial court entered an interlocutory default judgment against the contractor.⁴³ After the court severed the claim against the contractor, it granted summary judgment against the surety, finding that the default judgment against the contractor was

32. United States ex. rel. T.M.S. Mechanical Contractors, Inc. v. Millers Mut. Fire Ins. Co. v. The Craftsman, Inc., 942 F.2d 946 (5th Cir. 1991).

33. *Lochridge-Priest*, 950 F.2d at 287 (quoting *Millers Mut. Fire Ins. Co.*, 942 F.2d at 952 (emphasis in original)).

34. See TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987).

35. *Lochridge-Priest*, 950 F.2d at 290.

36. 829 S.W.2d 907 (Tex. App.—Fort Worth 1992, writ dism'd w.o.j.).

37. *Id.* at 909.

38. *Id.* at 907-08.

39. *Id.* at 908.

40. *Id.* (citing *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 124 (1974)).

41. 831 S.W.2d 453 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

42. *Id.* at 457.

43. *Id.* at 454.

binding on the surety.⁴⁴

The court of appeals reversed, analogizing to a guaranty contract.⁴⁵ In referring to *Mayfield v. Hicks*,⁴⁶ the court noted that a guarantor is not bound by a default judgment against a principal "when the guarantor has notice of the action against the principal and takes part in the suit."⁴⁷ The court then reasoned that "[b]ecause there is no distinction between the liability of a surety and a guarantor where the material question is the conclusive effect of a judgment against a principal debtor," a surety should likewise not be liable.⁴⁸ The court also pointed out that the owner did not follow Texas Rule of Civil Procedure 21 in providing proper notice to all parties.⁴⁹ Unlike an indemnity situation, a surety has no duty to defend on behalf of a principal.⁵⁰

*Heldenfels Brothers, Inc. v. City of Corpus Christi*⁵¹ involved fraudulent payment bonds. The city hired a general contractor to construct a recreation center on city property. The general contractor hired a subcontractor to supply T-beams to support the roof. When the city's inspector found cracks in the T-beams, the city withheld payment. After experts cleared the subcontractor of liability, the general contractor abandoned the project, filed for bankruptcy, and did not pay the subcontractor. The city then learned that the payment bonds were fraudulent and the subcontractor sued the city for payment.

The trial court allowed the subcontractor to recover under theories of quantum meruit, unjust enrichment, and negligence. The court of appeals reversed each of these findings and the Texas Supreme Court affirmed.⁵² The court declined recovery under quantum meruit because no evidence existed which demonstrated that the subcontractor notified the city that it expected to be paid by the city.⁵³ The court also held that "[u]njust enrichment is not a proper remedy merely because it 'might appear expedient or generally fair that some recompense be afforded for an unfortunate loss' to the claimant, or because the benefits to the person sought to be charged amount to a windfall."⁵⁴ Next, the court held that the city's failure to ensure that the general contractor post a valid payment bond was not actionable against the city.⁵⁵ The relevant statute, former article 5160, while imposing a duty on the city to require a sufficient bond of the contractor, imposes no liability for a breach of that duty, and therefore no tort action

44. *Id.*

45. *Id.* at 457.

46. 575 S.W.2d 571 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

47. *Id.* at 574.

48. *Trinity Universal Ins. Co.*, 831 S.W.2d at 455.

49. *Id.* at 456.

50. *Id.* at 456-57.

51. 832 S.W.2d 39 (Tex. 1992).

52. *Id.* at 42.

53. *Id.* at 41.

54. *Id.* at 42 (quoting *Austin v. Duval*, 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied)).

55. *Id.*

arises from the city's failure to obtain a bond from the general contractor.⁵⁶ The dissenters found evidence that the subcontractor did expect to be paid by the city, that the city was unjustly enriched, and that the subcontractor was "defeated under the very statutory provision the court concedes was designed to protect subcontractors."⁵⁷

IV. INDEMNITY

*Dresser Industries, Inc. v. Page Petroleum, Inc.*⁵⁸ addressed the question of whether certain contract provisions constituted indemnity agreements or releases.⁵⁹ While not a construction case, the court's holding regarding indemnities and release is important and illustrative. During the drilling of an oil well, the owner, Page Petroleum, retained Dresser Industries to log and test the well. Subsequently, the owner retained Houston Fishing Tools Company to retrieve equipment used by Dresser which had become stuck in the well bore. While trying to retrieve the equipment, Houston lost wire line and drill pipe in the well bore which could not be dislodged, forcing the owner to abandon the well. Page sued Dresser and Houston for negligently damaging the well. Both Dresser and Houston argued for a take-nothing judgment, each claiming their contracts precluded liability for negligence. The court of appeals held that the Dresser contract contained an indemnity agreement, whereas the applicable provisions of the Houston contract constituted a release.⁶⁰ In distinguishing an indemnity from a release, the court pointed out that a release surrenders legal rights or obligations, extinguishes a claim, and is an absolute bar to an action.⁶¹ An indemnity provision, in contrast, creates a potential cause of action between an indemnitee and an indemnitor, accruing when an indemnitee incurs liability or pays a loss.⁶² The Dresser agreement clearly expressed an intent to create indemnity in favor of Dresser, as evidenced by the use of the word indemnify.⁶³ Such a provision protects Dresser against claims of third parties.⁶⁴ Because the provision is an indemnity and not a release it does not, however, extinguish negligence claims which the well owner may have against Dresser.⁶⁵ Consequently, the court overruled Dresser's points of error which contended that the provision in question was an affirmative defense to the well owner's cause of action against Dresser.⁶⁶

Turning to the well owner's contract with Houston, the court found the agreement to have "all of the characteristics of a release and none of indemnity: it creates no cause of action, refers only to a surrender of claims be-

56. *Id.*

57. *Id.* at 42-43 (Gammage, J., dissenting).

58. 821 S.W.2d 359 (Tex. App.—Waco 1991, writ granted).

59. *Id.* at 363.

60. *Id.* at 361-62.

61. *Id.* at 362.

62. *Id.*

63. *Id.* at 363.

64. *Id.*

65. *Id.* at 363-64.

66. *Id.* at 364.

tween the parties to the agreement, and contains no promise of protection against claims of third parties."⁶⁷ The court therefore rejected Page's interpretation of the provisions of the Houston contract as constituting merely an indemnity agreement and held it to be a release of any claims which Page might otherwise have against Houston.⁶⁸ Because Page had the burden of obtaining a finding that would avoid the release's effect, the court found without merit his argument that the release provision was unenforceable as lacking fair notice and conspicuousness.⁶⁹ In addition, the court refused to apply the express-negligence test applicable to indemnity agreements to a release context, stating, "We, likewise, decline to extend the express-negligence test to a release which absolves a party of liability for his own negligence."⁷⁰

V. PREJUDGMENT INTEREST AND USURY

The Texas Supreme Court has had two opportunities to rule on cases involving prejudgment interest and usury this past year. In *Tubelite, Inc. v. Risica & Sons, Inc.*⁷¹ the trial court found that the course of dealing between a supplier and a subcontractor created an implied agreement to pay interest.⁷²

67. *Id.*

68. *Id.*

69. *Id.* at 364-65.

70. *Id.* at 365. See also *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987); *Whitson v. Goodbody's, Inc.*, 773 S.W.2d 381, 383 (Tex. App.—Dallas 1989, writ denied).

71. 819 S.W.2d 801 (Tex. 1991).

72. *Risica & Sons, Inc. v. Tubelite*, 794 S.W.2d 468, 470-71 (Tex. App.—Corpus Christi 1990), *aff'd*, 819 S.W.2d 801 (Tex. 1991); the usury statute at issue states:

- (1) Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor three times the amount of usurious interest contracted for, charged or received, such usurious interest being the amount the total interest contracted for, charged, or received exceeds the amount of interest allowed by law, and reasonable attorney fees fixed by the court except that in no event shall the amount forfeited be less than Two Thousand Dollars or twenty percent of the principal, whichever is the smaller sum; provided, that there shall be no penalty for any usurious interest which results from an accidental and bona fide error.
- (2) Any person who contracts for, charges or receives interest which is in excess of double the amount of interest allowed by this Subtitle shall forfeit as an additional penalty, all principal as well as interest and all other charges and shall pay reasonable attorney fees set by the court; provided further that any such person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by fine of not more than One Thousand Dollars. Each contract or transaction in violation of this section shall constitute a separate offense punishable hereunder.
- (3) All such actions brought under this Article shall be brought in any court of this State having jurisdiction thereof within four years from the date when the usurious charge was received or collected in the county of the defendant's residence, or in the county where the interest in excess of the amount authorized by this Subtitle has been received or collected, or where such transaction had been entered into or where the parties who paid the interest in excess of the amount authorized by this Subtitle resided when such transaction occurred, or where he resides.

TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1987).

The supreme court affirmed.⁷³ The subcontractor received a price quote from the supplier on the supplier's form, signed by the supplier's representative. Terms for late payment were not a part of this quote. After receiving the subcontractor's written acceptance, the supplier sent an acknowledgment which included, on the back, a provision for a service charge of 1-1/2% for late payments. Every subsequent invoice and statement contained a similar notice. The supplier did not actually begin charging interest until about a year after the quotation; the subcontractor never paid any interest. Almost two years later, the supplier sued for outstanding principal and prejudgment interest in a petition tracking the language of article 5069-1.03.⁷⁴ The subcontractor counterclaimed under the usury statute.⁷⁵ The court looked to the time of the formation of the contract in reaching its conclusion.⁷⁶ The contract was formed at the time the subcontractor *accepted* it; therefore, the later acknowledgment, statements, and invoices which contained the 1-1/2% interest provision were of no effect.⁷⁷ Section 2.207 of the Uniform Commercial Code⁷⁸ (battle of the forms) and Section 2.204⁷⁹ (conduct of the

73. *Tubelite*, 819 S.W.2d at 805.

74. This statute provides:

When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable.

TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987).

75. *Tubelite*, 819 S.W.2d 801.

76. *Id.* at 804-05.

77. *Id.*

78. Section 2.207 reads:

- (a) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (b) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (1) the offer expressly limits acceptance to the terms of the offer;
 - (2) they materially alter it; or
 - (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (c) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this title.

TEX. BUS. & COMM. CODE ANN. § 2.207 (Vernon 1968).

79. Section 2.204 reads:

- (a) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
- (b) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
- (c) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

parties) only apply to contract *formation*.⁸⁰ In addition, mere failure to object to interest charges does not establish a course of dealing which would create or support an obligation to pay interest.⁸¹ Because there was no agreement to pay interest, six percent is the maximum allowable under Texas law.⁸² The subcontractor was thus able to recover on its counterclaim for usury penalties.⁸³

Another case involving prejudgment interest and usury issues was *George A. Fuller Co. v. Carpet Services, Inc.*⁸⁴ In this case, a subcontractor sued the general contractor when the general contractor failed to pay for finished work. The contract had a pay when paid provision, allowing the subcontractor payment and interest only after the owner paid the contractor. Despite this provision, the subcontractor pleaded for prejudgment interest for a period which included time before the contractor was paid; hence before any money was owed. The trial court found that the pleadings charged a usurious rate of interest. The court of appeals reversed in a published opinion.⁸⁵

The Texas Supreme Court affirmed that judgment, emphasizing the use of the word charge in the usury statute.⁸⁶ The court found no indication in the legislative history that the legislature intended to apply usury statutes to pleadings.⁸⁷ While earlier cases held that pleadings asking for usurious amounts of interest constitute usury, the court distinguished those cases on their facts.⁸⁸ Ultimately, the court recognized the purpose of the usury laws and reconciled that with the purpose of pleadings:

Usury statutes are designed to correct abusive practices in consumer and commercial credit transactions, not to serve as a trap for the unwary pleader . . . Pleadings . . . only demand that the court grant judgment. There is no demand on the opposing party . . . Pleadings that allege prejudgment interest in excess of the lawful rate are best dealt with in the context of the judicial process that the pleadings are part of rather than through the Texas usury laws.⁸⁹

VI. ARBITRATION

In a mandamus proceeding, the Supreme Court of Texas considered vari-

TEX. BUS. & COMM. CODE ANN. § 2.204 (Vernon 1968).

80. *Tubelite*, 819 S.W.2d at 804.

81. *Id.* at 804-05.

82. *Id.* at 805.

83. *Id.* at 803.

84. 823 S.W.2d 603 (Tex. 1992).

85. *Carpet Serv., Inc. v. George A. Fuller Co.*, 802 S.W.2d 343 (Tex. App.—Dallas 1990), *aff'd*, 823 S.W.2d 603 (Tex. 1992).

86. *George A. Fuller Co.*, 823 S.W.2d at 604.

87. *Id.* See Act of May 23, 1967, 60th Leg., R.S., ch. 274, § 1, 1967 TEX. GEN. LAWS 608, 608-09.

88. See, e.g., *Butler v. Holt Mach. Co.*, 741 S.W.2d 169 (Tex. App.—San Antonio 1987, writ denied); *Moore v. White Motor Credit Corp.*, 708 S.W.2d 465, 468 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Nationwide Fin. Corp. v. English*, 604 S.W.2d 458 (Tex. Civ. App.—Amarillo 1980, writ dism'd); *General Motors Acceptance Corp. v. Uresti*, 553 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

89. *George A. Fuller Co.*, 823 S.W.2d at 605.

ous arbitration issues in *Jack B. Anglin Co. v. The Honorable Arthur Tipps*.⁹⁰ A contract dispute arose between the City of Jacksboro and the builder of a dam for the city when a mud slide occurred during construction. The builder claimed the balance of the contract price plus sums for extra work. The city countered with causes of action for negligence, breach of contract, and, later, claims under the Texas Deceptive Trade Practices Act (DTPA).⁹¹ The builder then filed an application to compel arbitration under the terms of the contract. The trial court allowed arbitration only as to the breach of contract issue. After the court of appeals overruled the builder's petition for writ of mandamus, the supreme court granted the mandamus.⁹²

The supreme court first stated that the Federal Arbitration Act⁹³ applied to the dispute because performance of the contract involved interstate activity.⁹⁴ As for the DTPA claims, the city argued that they were not arbitrable, asserting that the DTPA claims were beyond the scope of the arbitration provision because they did not arise out of the contract. The city also contended that under Texas Business & Commerce Code Section 17.42,⁹⁵ the city may not waive judicial determination of the DTPA issues. The supreme court held that the Federal Act preempts any state laws that are contrary to the act.⁹⁶ The court recognized that "[t]he primary purpose of the Federal Act is to require the courts to compel arbitration when the parties have so provided in their contract, despite any state legislative attempts to limit the enforceability of arbitration agreements."⁹⁷ Because the purpose of arbitration is to provide a swift and inexpensive resolution of claims, the court conditionally granted the writ of mandamus and ordered that all claims proceed to arbitration.⁹⁸

The issue in *Lost Creek Municipal Utility District v. Travis Independent Painters, Inc.*⁹⁹ was whether a contract between a contractor and an owner mandated arbitration in a warranty dispute. The owner hired the contractor to paint a water reservoir interior. The contract included a warranty that the work would be free of defects in material and workmanship for a period of two years after completion. Also included was a designation of the American Arbitration Association as the organization which would resolve disputes. In May 1988, the project was completed and paid in full. In December of that year, however, the reservoir coating was leaking. The contractor performed the repair work under protest. It was later discovered that the contractor was not at fault and the contractor subsequently attempted to recover its repair costs. The owner was not cooperative, so the

90. 842 S.W.2d 266 (Tex. 1992).

91. TEX. BUS. & COMM. CODE ANN. § § 17.50(a), 17.565 (Vernon 1968).

92. *Jack B. Anglin Co.*, 842 S.W.2d at 269-70.

93. 9 U.S.C.A. §§ 1-16 (West 1970 & Supp. 1991).

94. *Jack B. Anglin Co.*, 842 S.W.2d at 269-70.

95. TEX. BUS. & COMM. CODE ANN. § 17.42 (Vernon 1987).

96. *Jack B. Anglin Co.*, 842 S.W.2d at 271 (citing *Volt Informational Sciences v. Board of Trustees*, 489 U.S. 468, 474 (1989) (citations omitted)).

97. *Id.* (citing *Volt Informational Services*, 489 U.S. at 474 (citations omitted)).

98. *Id.* at 273.

99. 827 S.W.2d 103 (Tex. App.—Austin 1992, writ denied).

contractor filed a demand for arbitration as provided in the contract. The owner argued that under another contract provision the contractor had waived all claims by accepting final payment.

The court of appeals first held that the Federal Arbitration Act¹⁰⁰ applied, because the project involved interstate commerce.¹⁰¹ That the interstate connections might have been insubstantial was of no consequence, as the Act is broadly construed to favor arbitration.¹⁰² In addition, broad arbitration clauses create "a presumption of arbitrability."¹⁰³ Because the court found no evidence that the parties meant to exclude warranty disputes from arbitration, the court ordered arbitration to continue.¹⁰⁴ The court resolved the payment/waiver issue by reading the exception "to exclude arbitration only after an *existing* dispute has been resolved by the acceptance of final payment, without affecting the arbitrability of *future* disputes that have not yet arisen."¹⁰⁵

VII. OTHER

A contract dispute between a general contractor and a subcontractor arose in *D.E.W. Inc. v. Depco Forms, Inc.*¹⁰⁶ The contract provided that time was of the essence and that the general contractor could terminate the subcontractor if the work was too slow, if the subcontractor did not provide enough labor, or if materials were improper. The subcontractor rarely had sufficient men on the job, the materials were of poor quality and sometimes previously used, and the job was several days behind schedule. Pursuant to the contract, the contractor terminated the contract with the subcontractor and completed the work itself at a loss.

A jury found that both parties had materially breached the contract and awarded the contractor no damages. The court of appeals reversed, holding that the subcontractor defaulted and thus could not maintain a breach of contract action.¹⁰⁷ Because the jury's award of no damages was against the great weight and preponderance of the evidence, the court remanded for a determination of the damage amount.¹⁰⁸

CONCLUSION

The foregoing cases indicate the continuing interplay between traditional construction law remedies and other areas of statutory and common law.

100. See *supra* note 93.

101. *Lost Creek Mun. Util. District*, 827 S.W.2d at 105. The paint was made in another state, and the headquarters of the surety company involved was in a state other than Texas.

102. *Id.* (citing *Del E. Webb Const. v. Richardson Hosp. Auth.*, 823 F.2d 145, 148 (5th Cir. 1987); *Snyder v. Smith*, 736 F.2d 409, 417 (7th Cir.), *cert. denied*, 469 U.S. 1037. (1984).

103. *Id.* (citing *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986)).

104. *Id.* at 106.

105. *Id.* (emphasis in original).

106. 827 S.W.2d 379 (Tex. App.—San Antonio 1992, n.w.h.).

107. *Id.* at 383.

108. *Id.*

This trend should be expected to continue and consequently the practitioner must be ever mindful of statutory¹⁰⁹ and similar common law sources of claims or defenses.

109. See, e.g., TEX. BUS. & COMM. CODE ANN. § 1 (Vernon 1968); TEX. BUS. & COMM. CODE ANN. § 17 (Vernon 1987); TEX. REV. CIV. STAT. ANN. art. 5182 (Vernon 1987).

