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THE cases discussed in this Survey Article address the state of the law and trends in areas of particular interest. During the Survey period, certain recurring issues were clarified, issues previously thought settled resurfaced, and new and different directions were taken by the courts on other issues. As the cases indicate, assumptions regard-

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ing the established or static nature of Texas law are not necessarily well founded.

I. DECEPTIVE TRADE PRACTICES ACT

Parkway Co. v. Woodruff,[1] a case decided by the Texas Supreme Court this term, addressed the issue of whether a real estate development company violated the DTPA when it sold a vacant lot in a master planned community and years later negligently caused a home built on that lot to be flooded.

Parkway and its predecessor created the Sugar Creek development in Houston.[2] Harrington Homes bought a lot in 1977, built a house on it, and the house changed hands twice before the Woodruffs acquired it in 1981.[3] Two years later, Parkway began developing adjoining commercial tracts.[4] Part of that development included a wall which Woodruff feared might alter drainage patterns.[5] The Woodruff's house flooded as a result of Hurricane Alicia in 1983, and flooding occurred three more times in subsequent years.[6]

The first question addressed by the supreme court was whether consumers who are injured by substandard services can recover under an implied warranty theory when those consumers neither sought nor acquired those services about which they complain. The court concluded that no such warranty existed in this case.[7] First, no services were included in the underlying transaction.[8] The court interpreted "underlying transaction" to mean the sale of the lot by Parkway to Harrington, although the Woodruffs suggested other possible underlying transactions.[9] Second, the Woodruffs failed to meet their burden of showing that negligence damages would not provide an adequate remedy.[10]

II. STATUTES OF LIMITATIONS AND REPOSE

In *Trinity River Authority v. URS Consultants, Inc.*,[11] the Texas Supreme Court considered whether Texas Civil Practice and Remedies Code section 16.008 violated either the United States or the Texas constitution. In *Trinity River*, a basin wall of a sewage treatment plant collapsed almost fifteen years after it was completed, spilling raw sewage.[12] URS was the consultant with which Trinity River contracted to design the

1. 901 S.W.2d 434 (Tex. 1995).
2. *Id.* at 436.
3. *Id.*
4. *Id.*
5. Woodruff holds a degree in engineering and expressed his concerns about the drainage to Parkway. *Id.* at 435.
6. 901 S.W.2d at 435.
7. *Id.* at 440.
8. *Id.* at 439.
9. *Id.*
10. *Id.* at 440.
11. 889 S.W.2d 259 (Tex. 1994).
12. *Id.* at 260.

improvements in mid-1972.[13] URS brought suit against Trinity River in 1992, alleging negligence in the design of a basin wall.[14] The trial court granted summary judgment in favor of URS, which the Dallas Court of Appeals affirmed, on the basis that Texas Civil Practice and Remedies Code section 16.008 barred suits for defective design of an improvement to real property if not brought within ten years after the improvement was completed.[15]

The supreme court began its analysis with a comparison of statutes of limitation and statutes of repose. A statute of limitation begins to run when a cause of action accrues, while a statute of repose, as in this case, begins to run from a certain date, regardless of when any cause of action might accrue.[16] Trinity River did not contest the fact that URS is a design professional covered by section 16.008; rather, Trinity River questioned whether the statute was constitutional.[17]

Trinity River first argued that section 16.008 abrogated a well-established common law cause of action.[18] While stating that the period of limitations commences as soon as there is an injury,[19] the court noted that under appropriate circumstances the "discovery rule" allows a cause of action to be brought long after an injury occurs, if that injury was not discoverable nor discovered until later.[20] The court held Trinity River's legal injury occurred in 1976 when the improvements were constructed under URS' negligent design specifications.[21] Because the discovery rule had not been adopted for negligent design cases at the time section 16.008 was enacted, no common law right was abrogated.[22] The court added that its ruling was limited to the facts of this case, and that it expressed no opinion on whether, "if squarely presented with the issue" it would adopt the discovery rule in such a case.[23]

The court also dismissed Trinity River's contention that the statute of repose violated substantive due process, stating that the statute serves a legitimate public function in protecting defendants from stale claims.[24] The court similarly held that the statute does not violate equal protection

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13. *Id.*
14. *Id.* at 261.
15. *Id.* Section 16.008 reads, in pertinent part:
> (a) A person must bring suit for damages. . . 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. . . .

Section 16.009 contains a similar provision for builders.
16. 889 S.W.2d at 261.
17. *Id.*
18. *Id.* at 262.
19. *Id.*
20. *Id.*
21. 889 S.W.2d at 263.
22. *Id.*
23. *Id.*
24. *Id.* at 263-64.

guarantees: first, no fundamental right was at issue;[25] second, the distinction between classes of persons under section 16.008 (i.e., the statute's application to claims against architects and engineers only) was rational and not arbitrary.[26]

The Fourteenth Court of Appeals discussed statute of limitations issues in *Cornerstones Municipal Utility District v. Monsanto Co.*[27] The case involved alleged defects in the construction of a sanitary sewer system.[28] Cornerstones (CMUD) and Turner, Collie & Braden, Inc. (TCB) contracted on March 6, 1978, for TCB to provide design and engineering services.[29] Armco manufactured the plastic pipe used in the sewer system; Monsanto supplied plastic resin used in the manufacture of that pipe.[30]

The sewer system was completed on April 17, 1984.[31] By December 1985, CMUD's Board of Directors learned that settling problems had developed under a street, along a major sewer line.[32] Inspections and testing identified a hole in the pipe, and repairs began in February 1987.[33] Subsequently, additional tests were run, involving additional sections of the sewer system. These tests identified additional defects.[34] CMUD filed suit July 13, 1989, alleging negligence, strict liability, fraud, breach of warranty, and violations of the DTPA.[35] The trial court granted summary judgment on statute of limitations grounds.[36] The court of appeals reversed and remanded, and the supreme court remanded to the court of appeals which rendered this opinion.

The primary issues in the case involved various statute of limitations arguments. CMUD contended that its action was founded on its 1978 contract with TCB, and therefore the statutes of limitation applicable to DTPA claims and action for debt which preceded the August 27, 1979, statutory revisions were applicable. The parties did not contest the two-year statute of limitations for strict liability and negligence[37] or the four-year statute of limitations for breach of warranty.[38] The court concluded that the DTPA claims were governed by a two-year statute of limitations because, notwithstanding the existence of a written contract with TCB, the claims did not arise immediately out of any misrepresentation contained in the written contract (as would have been required under the

25. *Id.* at 265.
26. 889 S.W.2d at 265.
27. 889 S.W.2d 570 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
28. *Id.* at 572.
29. *Id.* at 573.
30. *Id.* Big Southern Construction Company was the general contractor who went out of business and was not a party to the appeal. *Id.*
31. *Id.*
32. 889 S.W.2d at 573.
33. *Id.*
34. *Id.*
35. *Id.* at 574.
36. *Id.* at 572.
37. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).
38. TEX. BUS. & COM. CODE ANN. § 2.725 (Vernon 1968).

version of the Act then in effect for the four-year rather than the two-year limitations period to apply). Rather, the DTPA claims were determined to be "laundry list" violations subject to the two-year period of limitations. As for the fraud claim, it too was subject to a two-year statute of limitations because that was the applicable period of limitations for fraud claims arising prior to the August 27, 1979, amendments.[39]

The key element in the case was CMUD's argument that the statute of limitation was tolled under the discovery rule, and that there was a fact question as to when it discovered or should have discovered the existence of a basis for a cause of action.[40] The court held that the discovery rule imposes a duty to use reasonable diligence to discover the injury.[41] The discovery rule tolled the statute only until such time as the plaintiff had knowledge of facts which through reasonable diligence would lead to the discovery of the injury, rather than discovery of the full extent of the damages.[42] The court determined that CMUD was put on notice to investigate and discover the injury at the time it undertook repair work in February 1987, and that the statute of limitation would not continue to be tolled pending CMUD's subsequent discovery of system-wide problems.[43] Despite the case's factual similarity to other cases reaching different conclusions, the court distinguished those prior decisions and concluded CMUD failed to exercise reasonable diligence. Thus, the statute began running as soon as CMUD knew or should have known of facts giving rise to its cause of action—here, the initial damaged pipe—not when CMUD knew the extent of the damage.[44]

Petro Shopping Centers, Inc. v. Owens-Corning Fiberglass Corp.,[45] another significant case involving Texas statutes of repose, was decided by the El Paso Court of Appeals. The case involved damages and claims resulting from a fire in 1989 which destroyed the Petro Shopping Center. The facility was originally constructed in 1975 using an insulation product manufactured by Owens-Corning. Additions constructed in 1980 and 1988 also used the same type of Owens-Corning insulation. The 1989 fire which destroyed the Petro Shopping Center broke out during the renovation of the center's restaurant kitchen when the exposed Owens-Corning insulation caught fire when ignited by a workman's welding sparks.[46]

Appellants sued Owens-Corning on December 28, 1990. Owens-Corning sought and obtained summary judgment holding that the suit was barred by the ten-year statute of repose.[47] On appeal, the sole issue was

39. CMUD had argued that the statute, TEX. CIV. PRAC. & REM. CODE § 16.004 had been amended on June 13, 1979, but failed to recognize that the effective date was August 27, 1979.
40. 889 S.W.2d at 576.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. 906 S.W.2d 618 (Tex. App.—El Paso 1995, no writ).
46. *Id.* at 619.
47. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (Vernon 1986).

whether or not section 16.009 applied to materialmen, the category into which the court determined Owens-Corning fell. The court first identified Texas' case law definition of materialmen:

> one not engaged in the business of building or contracting to build homes for others, but who manufactures, purchases or keeps for sale materials which enter into buildings and who sells or furnishes such materials without performing any work or labor in installing or putting them in place.[48]

In examining section 16.009, the court found the statute's language to refer to suit against a person who "constructs or repairs an improvement to real property."[49] The court examined the history of the statute of repose, its original limitation to "registered or licensed engineers and architects," and its current expanded coverage. The legislative change to the statute was intended to provide contractors the same protection afforded architects and engineers under section 16.008, declared the court, but only those who actually constructed or installed an improvement on the premises.[50] Although the Owens-Corning product was part of the improvements, Owens-Corning was not directly involved in the actual construction or renovations. The statute only grants repose to those directly involved, and not to materialmen, manufacturers, or producers.[51]

III. UPON FURTHER REVIEW

This term, the Texas Supreme Court reviewed a court of appeals decision in *Fisk Electric Co. v. Constructors & Assoc., Inc.*[52] Last year's Survey Article addressed the appellate case and commented on the issue of whether, under an indemnification agreement, an obligation to indemnify for attorneys' fees and costs was separate from an obligation to indemnify for negligence. The Houston court held that the agreements were separate, but the supreme court disagreed.

Plaintiff, an employee of Fisk, a subcontractor, sued Constructors, the contractor, for negligence as a result of injuries he sustained during the course of his employment with Fisk. Constructors in turn filed a third party claim against Fisk seeking indemnity under the subcontract. The trial court granted summary judgment in favor of Fisk and severed the third party action. Fisk had argued that the indemnity agreement was required to meet the express negligence doctrine set forth in *Ethyl Corp. v. Daniel Construction Co.*,[53] in order for the party indemnified (Constructors) to recover its defense cost incurred in a negligence action.[54]

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48. 906 S.W.2d at 619.
49. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 1986).
50. 906 S.W.2d at 620, citing Texas House of Representatives Committee on the Judiciary Minutes, 64th Leg. R.S. ch 269, § 2 (April 22, 1975).
51. 906 S.W.2d at 620.
52. 888 S.W.2d 813 (Tex. 1994), reversing 880 S.W.2d 424 (Tex. App.—Houston [14th Dist.] 1993).
53. 725 S.W.2d 705 (Tex. 1987).
54. 888 S.W.2d at 814.

Constructors asserted before the court of appeals that the express negligence doctrine did not apply because it was not seeking indemnification for its *own* negligence and that Fisk, as a matter of law, failed to prove that Constructors was negligent.[55] In holding that any obligation to indemnify for attorneys' fees and costs was separate from any obligation to indemnify for negligence, the court of appeals cited cases from other courts of appeals which it found persuasive.[56] Essentially, absent a finding of negligence, the issue of whether or not the indemnity provision was valid was simply not relevant.[57] Because Fisk did not prove that Constructors was negligent, the court of appeals held that summary judgment based solely on the express negligence doctrine was improper.[58]

In reversing the court of appeals, the supreme court reasoned that absent a duty to indemnify, there was no duty to pay any attorneys' fees in connection with the defense of claims.[59] Further, a determination of the enforceability of an indemnity agreement should be established from the pleadings, rather than depending on the outcome of the underlying suit.[60]

In a remand from a Texas Supreme Court case included in last year's Survey, the Fourteenth Court of Appeals revisited *Sage Street Assocs. v. Northdale Construction Co.*[61] The case involved a construction contract dispute which resulted in an award of prejudgment interest. Property owner Sage Street engaged Northdale to build a luxury high-rise condominium.[62] The contract with Northdale was for the "nominal" price of $13.5 million, the maximum amount of HUD money available for the project. Sage Street assured Northdale a profit of $760,000, even if costs exceeded $13.5 million. As the project progressed, disagreements ensued over the actual nature of the agreement, and how payments for extra work and design defects should be handled. Ultimately, Northdale walked off the project and its contract was terminated, but not before Northdale had received $11 million and completed approximately 90% of the project.[63]

At trial, the jury found for Northdale on its wrongful termination claim and awarded damages for work performed, overhead, and profit. The court of appeals affirmed, finding that the evidence was more than sufficient to support the award.[64] The supreme court found that the court of appeals used an improper standard of review for the sufficiency of the

55. 880 S.W.2d at 425.
56. *Id.* at 426.
57. *Id.*
58. *Id.*
59. 888 S.W.2d at 815.
60. *Id.*
61. 889 S.W.2d 400 (Tex. App.—Houston [14th Dist.] 1994, no writ), on remand from 863 S.W.2d 438 (Tex. 1993). Given the broader discussion of this case in the prior Survey Article, the facts of the case are set forth only briefly.
62. Like the supreme court, the court of appeals refrained from considering the propriety of using funds intended for low-income housing for this purpose.
63. 889 S.W.2d at 441-42.
64. 889 S.W.2d at 401.

evidence and remanded to the court of appeals to determine whether the evidence supported the damage award "under the theory submitted to the jury."[65] The court of appeals found the evidence sufficient.[66]

IV. MECHANICS' LIENS AND QUANTUM MERUIT

Industrial Structure and Fabrication, Inc. v. Arrowhead Industrial Water, Inc.[67] addressed the perfection of mechanics' lien claims asserted by subcontractors. Air Products, the project owner, engaged Arrowhead as general contractor, who in turn subcontracted a portion of the work to Industrial on a project for improvements to Air Products' facility in Pasadena.[68] The contract provided that all prices were firm, but could be changed in writing, if mutually agreed, as an addendum to the contract.[69] One such amendment was made, and Arrowhead paid Industrial the full amount.[70] After the project was completed and the subcontract amount paid in full, Industrial demanded an additional amount that was not reflected in the addendum.[71] Subsequently, Industrial filed a mechanics' and materialmen's lien for the amount claimed, and a lawsuit against both Arrowhead and Air Products seeking, among other things, foreclosure of the mechanics' lien.[72]

Each defendant filed a motion for summary judgment, Air Products on the ground that Industrial did not comply with Texas Property Code section 53.001,[73] and Arrowhead on the basis that it had fully performed under the contract. The trial court granted both summary judgment motions.[74]

In affirming the summary judgments, the court of appeals emphasized that Industrial failed to notify the property owner, Air Products, of the unpaid balance which it claimed to be owed, as required by section 53.056.[75] Industrial did not, in opposition to the motions for summary judgment or on appeal, allege that it gave Air Products proper notice, arguing instead that it was not required to furnish such notice since it believed Arrowhead to be the owner or reputed owner and itself to be the original contractor.[76] The court held that while the Property Code did not require prospective lien holders to search the property records in order to determine actual ownership, it did not absolve the lien holder

65. *Id.*
66. *Id.*
67. 888 S.W.2d 840 (Tex. App.—Houston [1st Dist.] 1994, no writ).
68. *Id.* at 842.
69. *Id.*
70. *Id.*
71. *Id.*
72. 888 S.W.2d at 842.
73. 1984 version.
74. 888 S.W.2d at 842.
75. *Id.*
76. *Id.* at 843.

from its duty to make an effort to determine ownership.[77] Here, the record contained numerous references to Air Products as the owner, and Industrial failed to assert any basis for its alleged belief that Arrowhead was the owner of the property. Consequently, the court found the lien to be invalid and affirmed the summary judgments.

Seemingly lost in the court's discussion of whether or not Industrial should have known Air Products was the owner of the property is any attention to the other facts in the case and other cases addressing perfection of liens. First, the court stated that the "fund trapping" language under section 53.056(d) was a necessary element of the subcontractor's notice.[78] While the issue as to the inclusion of such provision as an element of a valid subcontractor notice has in the past created a split of authority, most commentators believed the matter resolved and that the notice to owner of unpaid balances required by section 53.056(b) or (c), as applicable, need not include the statutory fund trapping warning set forth in section 53.056(d) to be effective notice. In *St. Paul Fire & Marine Ins. v. Vulcraft*,[79] the court of appeals stated:

> We conclude that a derivative claimant's failure to include the statutory warning now provided by section 53.056(d) does not invalidate his lien, though it does bring about a reduction of the amount of his lien claim against the owner and his property, measured by the aggregate sum of the payments thereafter made by the owner to the original contractor.[80]

The court in this present case also cited *First National Bank v. Sledge*[81] as support for its contention that the failure to include the statutory warning in the notice rendered the subcontractor's lien invalid. That is, unfortunately, a misreading of that case. The Texas Supreme Court in *Sledge* did in fact state that the failure to include the statutory warning to the effect that "unless the claim is paid or otherwise settled you may be personally liable and your property subjected to a lien" did preclude the subcontractor's perfection of a lien against *trapped funds*.[82] However, the court in *Sledge* went on to say that the notice requirements applicable to *retainage funds* were different from those applicable to *trapped funds*:

> Because 5469 (now section 53.101) fixes a duty on the owner to retain 10% of the contract price regardless of notice of the claim, there is no requirement that the statutory warning be given to perfect a lien under article 5469. . . . We hold the copy of the lien affidavit timely received by the owner satisfies this requirement.[83]

In the instant case, the court stated that Industrial did furnish Air Products a copy of the lien, which is the same "notice" afforded under

77. *Id.* at 844. *See also* Valdez v. Diamond Shamrock Refining and Marketing Co., 842 S.W.2d 273 (Tex. 1992).
78. 888 S.W.2d at 842-43.
79. 748 S.W.2d 290 (Tex. App.—Tyler 1988, no writ).
80. *Id.* at 295.
81. 653 S.W.2d 283 (Tex. 1983).
82. *Id.* at 287.
83. *Id.* at 287.

Sledge.[84] What is not known in the instant case is the timeliness of the notice, the court not choosing to address this believing the other basis of its decision being dispositive. What is known is that an issue, once confused then clarified, may have just been clouded once more.

The Beaumont Court of Appeals also addressed mechanics' liens and quantum meruit in *Crest Construction, Inc. v. Murray*.[85] Jim Murray was a concrete sub-subcontractor under Crest on three jobs referred to as the "Beaumont Job", the "Borden Job" and the "Cooper Job." CCI was the general contractor on the Beaumont Job only, and acting as general contractor engaged Crest on that job.[86] Jim Murray signed a waiver of all mechanics' and materialmen's liens[87] and entered into a settlement with Crest regarding the Beaumont Job.[88] After Murray's death, his wife, Judy, took over the company, ignored the waiver, and filed a lien claim affidavit on the Beaumont job[89] which prevented Crest from receiving any payment from CCI, its general contractor.[90]

Crest filed suit contending that Judy Murray had filed a "groundless" and "forbidden" lien claim on the Beaumont Job.[91] CCI filed an interpleader and deposited $71,509.51 with the court, which represented the entire retainage from the Beaumont Job, and asked the court to declare that the Beaumont Job be "judicially deemed satisfied, paid, and released."[92]

Although the jury found that Judy Murray was justified in filing the lien, the court of appeals disagreed.[93] The parties were bound by the prior agreement and release of lien on the Beaumont Job, regardless of any disputes on the Borden Job or the Cooper Job, under the provisions of the settlement agreement.[94] Part of the settlement also included a promissory note payable to Murray by Crest.[95] Crest attempted to offset part of its claim against the promissory note, which the court held to be a breach of the settlement agreement.[96] In examining the conduct of both parties the court determined that Murray had by the terms of the settlement agreed to accept an unsecured note in full complete substitution of all claims, liens, or rights to file such on the Beaumont Job. Consequently, Murray had no lien rights. Regardless of the wisdom in surrendering its lien rights or disputes on the Borden Job or Cooper Job, neither Murray's estate nor his administratrix, Judy, received any rights to assert

84. *Id.* at 286.
85. 888 S.W.2d 931 (Tex. App.—Beaumont 1994, writ requested).
86. *Id.* at 935.
87. *Id.* at 935, n.1.
88. *Id.* at 935.
89. *Id.* at 936, n.2.
90. 888 S.W.2d at 935.
91. *Id.*
92. *Id.* at 935-36.
93. *Id.*
94. *Id.* at 942, 944.
95. 888 S.W.2d at 951.
96. *Id.* at 951-52.

mechanics' liens against the Beaumont Job.[97] The court also determined that Crest had breached the settlement agreement, had failed to pay the money due thereunder, and had demanded that Judy Murray accept a sum materially less than that agreed to under the terms of the Beaumont Job settlement agreement.[98] Thus, Judy Murray could sue for amounts owing, if any, on the Borden Job and Cooper Job, could sue Crest on the note given as part of the Beaumont settlement, and could sue for breach of the settlement agreement.[99] The breach of the settlement agreement did not, however, restore the right to assert mechanics' liens, such having been waived. Though not expressly stated, it appears the court's position is that breach of the settlement agreement allows an action for damages, but not for recision.

Murray also made a quantum meruit claim, even though the parties had stipulated the contract prices of the Borden and Cooper Jobs.[100] The court pointed out that quantum meruit is available only rarely in cases where there is a contract.[101] As a result, submission of a quantum meruit theory to the jury was improper.[102] The correct measure of Murray's damages on the Borden Job and the Cooper Job was the difference between the cost of completion and the remaining contract price, if the contract price was greater.[103] If the completion cost was greater than the remaining contract price, Crest would be entitled to the excess amount.[104]

In *Southwestern Underground Supply & Environmental Servs., Inc. v. Amerivac, Inc.*,[105] the Fourteenth Court of Appeals discussed quantum meruit recovery arising in an unusual context. Southwestern contracted with the City of Houston to provide underground sewer cleaning services.[106] Amerivac was a subcontractor under Southwestern.[107] Although the City did not pay Southwestern under its contract until the work was approved (typically sixty to seventy days after performance), Amerivac's contract specified that Southwestern would pay Amerivac immediately upon Amerivac's completion of the work, minus a ten percent retainage to be paid when the City paid Southwestern.[108] The contract between Amerivac and Southwestern also provided, in a noncompete clause, that Southwestern could revert to a "pay when paid" method of paying Amerivac if Amerivac began working for other contractors.[109] When Amerivac violated the noncompete clause, Southwestern began making payments on a "pay when paid" basis and held the then pending $42,000

97. *Id.* at 950.
98. *Id.* at 951.
99. *Id.* at 950.
100. 888 S.W.2d at 952.
101. *Id.*
102. *Id.*
103. *Id.* at 953.
104. *Id.*
105. 894 S.W.2d 15 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
106. *Id.* at 17.
107. *Id.*
108. *Id.*
109. *Id.*

retainage.[110] Southwestern also used the withholding of the $42,000 retainage to induce Amerivac into entering a renewal agreement: once Amerivac signed the second contract, Southwestern released the payment of the $42,000.[111] Despite the noncompete and exclusivity provisions of the contracts, Amerivac worked for other contractors following the renewal of the contract and soon ceased work for Southwestern completely.[112] Amerivac sued Southwestern for breach of contract, fraud, and unlawful restraint of trade.[113]

Both parties stipulated that the contract was void and the court dismissed all contract claims with Amerivac proceeding on a quantum meruit theory.[114] The trial court rendered judgment in favor of Amerivac in quantum meruit.[115]

The court of appeals affirmed.[116] Southwestern argued that a party cannot recover at law or in equity for services rendered under a contract that was void for illegality.[117] The court of appeals agreed that the noncompete agreement rendered the contract illegal, but held in favor of Amerivac on the quantum meruit claim. The court's opinion provided that had Amerivac voluntarily entered into an illegal contract, no recovery under equity would be permitted. However, because (1) Amerivac never followed the noncompete agreement and therefore never violated the law, and (2) the jury could reasonably have concluded that Amerivac entered into the contract under duress, Amerivac was not voluntarily acting under an illegal contract. Hence equitable recovery was not barred.[118]

V. ARBITRATION

The First Court of Appeals decided two interesting cases dealing with different aspects of arbitration. The first case, *Belmont Constructors Inc. v. Lyondell Petrochemical Co.*,[119] addressed a denial of a motion to compel arbitration. The contract at issue involved a chemical plant, the Flex Expansion Project, which Lyondell hired Belmont to build.[120] The contract contained an arbitration provision, which provided that in the event of any dispute the parties would seek resolution through techniques such as mediation, mini-trials, and other techniques of alternative dispute resolution, and that "[i]f the parties could not agree within 10 days on a different method of resolving the matter, the matter will be submitted by the

110. 894 S.W.2d at 17.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. 884 S.W.2d at 17.
116. *Id.* at 18.
117. *Id.*
118. *Id.*
119. 896 S.W.2d 352 (Tex. App.—Houston [1st Dist.] 1995, no writ).
120. *Id.* at 355.

parties to and be decided by binding arbitration."[121] After disputes arose, the parties unsuccessfully mediated the case.[122] Lyondell subsequently sued Belmont for negligence, fraud, and negligent misrepresentation. Belmont responded by (1) initiating arbitration proceedings, (2) filing a plea in abatement on the grounds that the contract mandated arbitration, and (3) filing a motion to compel arbitration.[123] The trial court denied Belmont's motion to compel arbitration.[124]

The court of appeals first had to decide whether the Texas or the Federal Arbitration Act applied.[125] For several reasons, the court concluded that the contract related to interstate commerce and therefore the Federal Act applied.[126] Although the court recognized the federal policy favoring arbitration,[127] that policy did not extend to impose arbitration where no agreement to arbitrate existed.[128] The court held that the parties agreed to arbitrate *if they could not agree on another method of resolution*.[129] Here, the parties had agreed on another method, mediation.[130] Whether the other method chosen or not was successful was irrelevant; arbitration was simply a "fall-back" procedure should the parties be unable to agree on an alternative.[131] Accordingly, the court of appeals dismissed Belmont's interlocutory appeal and overruled its petition for mandamus.[132]

In another arbitration case, *City of Baytown v. C.L. Winter, Inc.*,[133] the First Court of Appeals discussed confirmation of an arbitration award. Baytown, as Owner, contracted with Winter for Winter to construct a waste water collection system and lift stations on a state highway.[134] Winter contended that it incurred additional costs because the site conditions were not as Baytown represented them.[135] Ultimately, after Winter tried but failed to collect on the additional work or to obtain change orders, an arbitration proceeding was held.[136] The arbiters found in favor of Winter on the changed conditions issue, awarding fees for damages,

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121. *Id.* at 357.
122. *Id.* at 355.
123. *Id.*
124. 896 S.W.2d at 355.
125. *Id.* Because the trial court did not specify which Act governed, Belmont correctly initiated parallel proceedings: writ of mandamus for denial under the Federal Act, and interlocutory appeal of the denial under the Texas Act. *Id.*
126. *Id.* at 356; 9 U.S.C. § 2 (1987). For example, component parts of the project were produced in other states, and subcontractors' principal places of business were out of state. 896 S.W.2d at 356.
127. *Id.* (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
128. 896 S.W.2d at 356-57.
129. *Id.* at 357.
130. *Id.*
131. *Id.* at 358.
132. *Id.*
133. 886 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
134. *Id.* at 517.
135. *Id.*
136. *Id.* The arbitration took place only after much effort on Winter's part. First, Winter had to obtain an order compelling arbitration. Then, Baytown was uncooperative in

experts, claim preparation, and attorneys, and awarded Baytown damages, in a smaller amount, because Winter did not complete the contract.[137]

Within a week, Winter filed an application to confirm the arbitration award, and, approximately three weeks later, Baytown filed its objection.[138] The trial court confirmed the award on the same day Baytown filed its objection.[139] On appeal, Baytown argued that the arbitrators exceeded their authority and miscalculated damages, that the "neutral" arbiter was not impartial, and that the court's confirmation of the award was premature.[140]

On the first point, the court of appeals focused on the contract language which clearly stated that "all questions of dispute" were to be submitted to arbitration.[141] That broad provision covered any dispute which arose under the contract, which clearly applied to this case.[142] Next, the court saw through Baytown's "partiality" argument because the only evidence of "bias" was that the neutral arbiter voted against Baytown.[143] Finally, as to the timing argument, the court held that although the statute[144] required any motions to vacate, correct, or modify an arbitration award to be filed within 90 days, if a party files a motion to confirm, then the other party is "put to his objections" at that time.[145] In this case, Baytown filed its motion, which the court considered in confirming the award.[146] The court of appeals therefore upheld the trial court's confirmation.[147]

VI. FIFTH CIRCUIT

In a case of first impression, *Millgard Corp. v. McKee Mays*,[148] the Fifth Circuit has made new law with respect to unforeseen underground conditions as well as the applicability of an "equitable adjustment" provision. Following a jury determination of facts in favor of Millgard, the district court entered a judgment in favor of Millgard and against McKee Mays, which in turn was given a judgment against Dallas County. Mill-

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the arbitrator selection process. After another court order, each party selected an arbiter who in turn selected a neutral third arbiter. *Id.*

137. *Id.*

138. 886 S.W.2d at 517.

139. *Id.*

140. *Id.* at 518-21.

141. *Id.* at 518.

142. *Id.*

143. 886 S.W.2d at 520. Baytown never claimed bias when the arbiter was selected nor during the arbitration proceeding itself. Rather, it waited until after the proceedings. Moreover, Baytown did not submit a statement of facts from the arbitration with the appeal. *Id.*

144. TEX. REV. CIV. STAT. ANN. art. 237 and 238 (Vernon 1973).

145. 886 S.W.2d at 521.

146. *Id.*

147. *Id.* The court denied Winter's request for damages because of its assertion that Baytown's sole basis for appeal was to delay paying Winter. *Id.*

148. 49 F.3d 1070 (5th Cir. 1995).

gard's claim was based upon unforeseen underground conditions and a contract provision which provided for equitable adjustment of the contract price in the event that such unexpected conditions were encountered. The Fifth Circuit, interpreting Texas law, found that the owner's contractual disclaimer of responsibility for the accuracy, true location, and extent of the soils investigation was a more specific provision and therefore negated, or "trumped" as the court put it, the terms of the equitable adjustment provision. Consequently, neither the owner nor the general contractor bore any responsibility for the unforeseen underground conditions (referred to as a "Type I" change) that Millgard encountered.

In arriving at its decision, the Fifth Circuit returned to basic principles of contract interpretation and ignored the literally hundreds of cases that have been decided to the contrary in other states, in other circuits, and by the Contract Board of Appeals, that an equitable adjustment provision overrides the disclaimer of responsibility for soils information and that an equitable adjustment must be granted in these circumstances. The opinion is even more difficult to understand in light of the fact that the disclaimer given precedence was set forth in the instruction to bidders, which was specifically excluded from the contract documents.

As to whether or not this case and the opinion rendered will be persuasive enough to bring about a change in the law of the magnitude that this case represents is at the moment anyone's guess, but the opinion will certainly be persuasive with respect to any case originating in Texas or elsewhere in the Fifth Circuit. Contractors, subcontractors, and their lawyers should be aware of the interpretation and should attempt to obtain more favorable contract language rather than rely on the body of case law heretofore existing elsewhere.

VII. CONCLUSION

While each of the cases is significant in its own right, certain of them are particularly likely to foster discussion and debate and to be the subject of subsequent decisions. The cases dealing with the discovery rule and its application in the construction context should be of continuing interest and importance. Only time will tell whether the holdings in *Industrial Structure* and *Millgard* can be reconciled with other existing decisions on their respective issues.