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CONSTRUCTION LAW

by

C. Bennett, Jr.*

DURING the time period covered by this article, the Texas Legislature was not in session, therefore no legislative changes of any type occurred. The most recent legislative changes were the significant revisions to the Property Code enacted by the 71st Texas Legislature.¹ The prior survey article on construction law described these changes.² Since the new laws did not go into effect until September 1, 1989, no cases reached the appellate courts under the new legislative revisions during the prior survey period.

No exceptionally significant appellate court decisions appeared during this review period. The Texas Supreme Court attempted to clarify its express negligence rule in no less than two cases,³ and explored the theory of *quantum meruit* in three cases.⁴ This article canvasses these cases and other recent developments in the broad area of law encompassed by the construction industry.

I. EXPRESS NEGLIGENCE AND INDEMNITY AGREEMENTS

The Texas Supreme Court first dealt with the express negligence rule during the survey period in *Enserch Corp. v. Parker*.⁵ That case involved a wrongful death action brought by the estate of two construction workers employed by contractor A. W. "Bill" Christie, Inc. (Christie), and killed while servicing a pipeline for Enserch Corporation (Enserch). Christie had entered into a contract with Enserch that contained an indemnity agreement.⁶ Enserch argued that the indemnity agreement contained an express

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1. Act of June 16, 1989, ch. 1138, 1989 Tex. Gen. Laws 4693.

2. Thomas & Wilshusen, *Construction Law*, 44 Sw. L.J. 467, 480-87 (1990).

3. See *infra* notes 16-27 and accompanying text (discussing Payne & Keller, Inc. v. P.P.G. Indus., Inc.); *infra* notes 5-15 and accompanying text (discussing Enserch Corp. v. Parker).

4. See *infra* notes 83-89 and accompanying text (discussing Emerson v. Tunnell); *infra* notes 79-82 and accompanying text (discussing Vortt Exploration Co. v. Chevron U.S.A., Inc.); *infra* note 56 (discussing Dobbins v. Redden).

5. 794 S.W.2d 2 (Tex. 1990).

6. The language examined by the court and contained in the contract was as follows: [Christie] assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by [Christie], its agents and employees, and its subcontractors, their agents

assumption of liability by the contractor.

The Texas Supreme Court found that the language was sufficient under the Texas Workers' Compensation Act's bar to indemnity provisions.⁷ The Texas Supreme Court had no difficulty holding that although the language did not specifically refer to employees of the subcontractor, the language in the indemnity agreement, which included persons, sufficiently covered employees.⁸

The court then dealt with whether the language complied with the express negligence rule formulated in *Ethyl Corp. v. Daniel Construction Co.*⁹ This rule states that a party seeking indemnity from the consequences of its own negligence must express that intent in specific terms within the four corners of the contract.¹⁰ Since the Texas Supreme Court set out this rule in broad language, rather than specifically dictating what the indemnificatory language should be, the plaintiffs made the somewhat typical argument that the language in the contract was not clear enough to comply with the rule.¹¹ The Texas Supreme Court held that although the contract separated the indemnity agreement and negligence clauses into separate sentences, the language sufficiently demonstrated the parties' intent to hold Enserch harmless and, therefore, complied with the express negligence rule.¹² The plaintiff also argued that the indemnity language was not conspicuous.¹³ The court held, however, that the language, appearing on the front page and not hidden on the back page among a number of other articles, was sufficiently conspicuous to be enforced.¹⁴ Therefore, the court upheld the indemnity agreement.¹⁵

In *Payne & Keller, Inc. v. P.P.G. Industries, Inc.*¹⁶ the Texas Supreme Court dealt with a somewhat less harsh indemnity provision. The clause contained an exception to indemnity if the sole negligence of the indemnitee

and employees, regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [Enserch], [Enserch's] representative, or the employees, agents, invitee, or licensees thereof. [Christie] further agrees to indemnify and hold harmless [Enserch] and its representatives, and the employees, agents, invitees and licensees thereof in respect of any such matters and agrees to defend any claim or suit or action brought against [Enserch], [Enserch's] representative, and employees, agents, invitees, and licensees thereof . . .

Id. at 6-7 (emphasis in original).

7. These provisions provide that a subscribing employer has no liability to reimburse another person for injury or death to an employee unless specifically set forth in writing. TEX. REV. CIV. STAT. art. 8308-4.01 (Vernon Supp. 1991).

8. 794 S.W.2d at 7.

9. 725 S.W.2d 705 (Tex. 1987).

10. *Id.* at 708.

11. Specifically, one of the plaintiffs argued that "because the actual reference to negligence is made in a separate sentence from the reference to indemnification, the clause conceals Enserch's true intent to be indemnified for its own negligence." 794 S.W.2d at 8.

12. *Id.*

13. *Id.*

14. *Id.* at 9; see also *K & S Oil Well Serv., Inc. v. Cabot Corp.*, 491 S.W.2d 733, 737-38 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.).

15. 794 S.W.2d at 9.

16. 793 S.W.2d 956 (Tex. 1990).

caused the injury.¹⁷ In the trial court, the jury found that the indemnitee's (P.P.G.'s) negligence was the sole and proximate cause of the injury.¹⁸ One may wonder why P.P.G. would even make an argument defending itself against liability in the face of such a jury finding.

The court of appeals, however, found in P.P.G.'s favor,¹⁹ relying on the case of *Lone Star Industries, Inc. v. Atchison, Topeka & Sante Fe Railway Co.*²⁰ The Texas Supreme Court distinguished *Lone Star* because the indemnity clause in that case specifically stated that the sole negligence exception did not apply in any claim arising under the Federal Employers Liability Act (FELA).²¹ In *Payne & Keller* the clause simply relieved Payne & Keller from indemnification upon a finding that P.P.G. was solely negligent.²² Another reason for P.P.G.'s position was that the Texas Supreme Court, in *Singleton v. Crown Central Petroleum Corp.*,²³ held that remarkably similar language did not comply with the court's express negligence rule.²⁴ Nonetheless, the supreme court reversed the court of appeals in *Payne & Keller* and enforced the sole negligence exception in that case.

The *Payne & Keller* appellate court also considered another indemnification case in *Gulf Oil Corp. v. Ford, Bacon & Davis, Texas, Inc.*²⁵ In that case, the court upheld an indemnity agreement when the jury found both the indemnitor and indemnitee concurrently negligent.²⁶ Thus, the holdings in *Payne & Keller* and *Gulf Oil* seem to indicate that the courts strengthened the enforceability of indemnity provisions in the two years following the *Ethyl* decision.²⁷

The case of *Aerospatiale Helicopter Corp. v. Universal Health Services, Inc.*,²⁸ though not involving construction, is instructive in construing and enforcing indemnity provisions. That case involved an indemnity given by

17. Payne & Keller indemnified P.P.G. for claims "arising out of . . . the acts or omissions . . . of [Payne & Keller] or its . . . employees . . . in the performance of the work . . . irrespective of whether [P.P.G.] was concurrently negligent . . . but excepting where the injury or death . . . was caused by the sole negligence of [P.P.G.]." *Id.* at 957.

18. *Id.* at 958.

19. P.P.G. Indus., Inc. v. Payne & Keller, Inc., 793 S.W.2d 26, 27 (Tex. App.—Beaumont 1989), *rev'd*, 793 S.W.2d 956 (Tex. 1990).

20. 666 S.W.2d 376 (Tex. App.—Beaumont 1984, writ *ref'd n.r.e.*).

21. 956 S.W.2d at 958; see 45 U.S.C. §§ 51-60 (1988) (Federal Employer's Liability Act).

22. 956 S.W.2d at 959. Furthermore, the FELA provision contains a different burden of proof than the common law negligence standard applicable in *Payne & Keller*.

23. 729 S.W.2d 690 (Tex. 1987).

24. The appellate court opinion contains the contractual language in *Singleton v. Crown Central Petroleum Corp.* It reads as follows:

Contractor agrees to . . . indemnify . . . Owner . . . from and against . . . all claims, demands, actions . . . and expenses . . . for or in connection with . . . personal injury . . . arising out of . . . the activities of Contractor . . . or in connection with the work to be performed . . . under this contract, *excepting only claims arising out of accidents resulting from the sole negligence of owner.*

Singleton v. Crown Cent. Petroleum Corp. 713 S.W.2d 115, 117-18 (Tex. App.—Houston [1st Dist.] 1985), *rev'd*, 729 S.W.2d 690 (Tex. 1987).

25. 782 S.W.2d 28, 29-30 (Tex. App.—Beaumont 1989, no writ).

26. *Id.* at 30.

27. For cases denying indemnity, see *Monsanto Co. v. Owens-Corning Fiberglas Corp.*, 764 S.W.2d 293 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Singleton*, 729 S.W.2d at 691.

28. 778 S.W.2d 492 (Tex. App.—Dallas 1989, writ denied).

an aircraft lessee to the lessor. The indemnity contained exceptions for latent defects and also excluded loss damages, injuries or claims resulting from the sole negligence of the lessor. Even though the indemnity language was more complex and the fact questions much harder than a typical construction law case,²⁹ the court, after an extensive analysis of the case in light of the *Ethyl v. Daniel* rule, enforced the indemnity agreement.³⁰

A case during the past year in which an indemnitee attempted unsuccessfully to enforce an indemnity provision occurred in the Beaumont federal district court in *Exxon Corp. v. Enstar Engineering Co.*³¹ The court examined an unusual indemnity provision surrounded by difficult facts. In the agreement, the owner and his contractor indemnified each other from injuries caused by the negligent or willful misconduct of the indemnitor. With regard to joint negligence, the indemnification provision allocated liability based on the party's percentage of negligence.³²

The case involved a workers' compensation claim in which the injured employee did not sue the contractor, its employer, but sued the owner directly. The owner settled with the injured employee and, therefore, there was no court finding to indicate which party was negligent in the matter. In addition, the suit for indemnity came after the limitations on the personal injury action accrued, so the court could not make a finding as to the contractor's negligence. The court, even without such findings, held that the language did not clearly indemnify one party for its own negligence and thus, would fail under *Ethyl Corp. v. Daniel Construction Co.*³³ Thus, the parties' attempts at allocating negligence rather than indemnifying against it defeated the validity of the indemnity agreement.

II. CONTRACTS

A. Construction of a Contract/Intention of Parties for Home Improvements

In *First Victoria National Bank v. Briones*³⁴ the court dealt with the construction of several documents making up a mechanic's and materialman's lien contract for home improvement, and resolved a dispute between the homeowner, the general contractor and the lender.³⁵ The mechanic's lien

29. The case involved the crash of a helicopter in which all aboard died and in which the helicopter was totally consumed in the wreckage.

30. *Id.* at 501.

31. 732 F. Supp. 718 (E.D. Tex. 1990); see also *City of Houston v. Goings*, 795 S.W.2d 829 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (owner sought immunity when no clause providing for such indemnity appeared in its contract).

32. The indemnification provision stated that "[w]here personal injury, death or loss of or damage to property is the result of joint negligence or willful misconduct of Exxon and Contractor, the indemnitor's duty of indemnification shall be in proportion to its allocable share of such joint negligence or willful misconduct." 732 F. Supp. at 719.

33. *Id.* at 20.

34. 788 S.W.2d 632 (Tex. App.—Corpus Christi 1990, writ denied).

35. Typical home improvements accomplished on borrowed money in Texas afford ripe situations for contract disputes to arise because of multiple parties to the transaction, the different type laws that apply to the transaction, and the number of technical documents re-

contract totaled \$20,000 for home improvement to the home of Mr. and Mrs. Charles Waters, Jr. It appeared from parol evidence, however, that the Waters used at least \$4,244.02 of the initial advance to pay delinquent taxes on the property and closing costs, pursuant to oral agreements. The contractor, Briones, received only \$14,000 of the original contract price and, after completion of the improvements, sued the owner and the bank for the \$6,000 difference. The trial court instructed a verdict favorable to the general contractor and against the bank.³⁶

In addition, the evidence revealed that the contractor and the owner signed an affidavit as to debts and liens in connection with the closing of the permanent loan. In the affidavit, both swore that they had fully paid and satisfied all sums of money due for the erection of the improvements. Furthermore, both indemnified the bank for any subsequent claims or liens. Although the trial court instructed a verdict for the contractor, the court of

quired. The typical home improvement loan involves an owner contracting with a general contractor for improvements to his homestead, with the improvements to be financed by a third party lender. For a detailed discussion of this and related transactions, see STATE BAR OF TEXAS, LEGAL FORM MANUAL FOR REAL ESTATE TRANSACTIONS, ch. 500 (1986). The law governing the transaction because of its homestead nature is found in TEX. CONST. art. XVI, § 50 (1869). The technical requirements of a mechanic's lien on a homestead are found in the Texas Property Code. TEX. PROP. CODE ANN. § 53.059 (Vernon 1984 & Supp. 1991). Other provisions of Texas and federal law apply when the transaction is financed by a lender. See 15 U.S.C. §§ 1601-67(e) (1988) (disclosure and consumer protection laws); 12 U.S.C. §§ 2601-17 (1988) (Federal Real Estate Settlement Procedure Act); 12 U.S.C. § 1735f-7 (1988) (federal usury laws); TEX. REV. CIV. STAT. ANN. arts. 5609-1.02-.12 (Vernon 1987) (Texas Consumer Credit Act); 12 C.F.R. § 226 (1989) (Regulation Z of the Federal Reserve Board). In the typical home improvement transaction secured by a mechanic's lien, the contractor and owner sign a mechanic's lien contract prior to the commencement of construction. The parties file the lien with the county clerk in the county where the property resides. The owner then executes a mechanic's lien note, payable to the contractor, for the contract amount of construction. The contractor then endorses the note and gives it to a third party lender, along with an assignment and transfer of the mechanic's lien, and sometimes a renewal note. The lender files a deed of trust contained in the original contract or another document on the property to secure payment of the note. Generally, there is a tri-party agreement between and among the lender, the general contractor and the owner, providing for progress payments to the general contractor from the lender for labor performed and materials furnished during the progress of the job. The construction commences and continues to completion with the contractor being paid by progress payments and a final payment of retention following completion of the job. After completion, the owner, either under the original deed of trust or under renewal document, begins to make payments on the note to the lender, and the contractor steps out of the transaction. Because of the complexity of the transaction, if a job does not go according to the intentions and plans of the parties, any number of factual situations can cause disputes between and among the parties to the transaction. For example, if the contractor is not paid, the issue might arise as to who actually holds the mechanic's lien, the contractor or the lender. The inevitable extras or change orders to the job raise the issue of whether or not the lender is required to finance them. Lien and real estate issues apply as between the owner and lender after the job is complete, as well as priority of liens. Thus, it is surprising that there are not more lawsuits arising from such transactions. The only clear way to aid in the avoidance of unnecessary conflicts seems to be a tri-party agreement between and among the lender, the owner and the contractor regarding everyone's rights, duties and obligations between and among themselves. Otherwise, the courts must necessarily resort to parol evidence. See *First Nat'l Bank of Amarillo v. Janigan*, 794 S.W.2d 54 (Tex. App.—Amarillo 1990, writ denied); *First Victoria Nat'l Bank v. Briones*, 788 S.W.2d 652 (Tex. App.—Corpus Christi 1990, writ denied).

36. 788 S.W.2d at 634. The contractor and the owner apparently settled their differences prior to trial. *Id.*

appeals reversed and rendered judgment, stating that the general contractor take nothing against the bank.³⁷ In formulating its opinion, the court relied upon excluded parol evidence regarding the intention of the parties for utilization of the initial advance and the payment of taxes and closing costs.³⁸ The court did not deal with the fact that, even taking the payment for taxes and closing costs into account, the numbers still did not balance, leaving unaccounted a total of \$1,755.98. Instead, the court seemed to base its opinion on the affidavit of completion executed by the general contractor and the owner. This case is instructive to owners, general contractors, lenders and title companies in home improvement situations to document carefully the disbursements of all monies and not to rely upon customary or industry-wide practices of leaving certain aspects of the parties' intentions with respect to money application unexplained.

B. Oral Changes and Modifications of Contracts/Ratification by Actions

In *Preferred Heating & Air Conditioning Co. v. Shelby*³⁹ a construction subcontractor and supplier contracted with the general contractor for the placement of large heating and air conditioning units. While the general contractor received initial progress payments, the subcontractor collected no payments at all. Therefore, the subcontractor refused to install the equipment. According to oral testimony, an owner's representative promised to pay the subcontractor for the equipment directly if the subcontractor would install it.⁴⁰ The Texas Supreme Court held that evidence supported a jury award to the subcontractor on an oral contract theory and remanded the case to the court of appeals for further consideration.⁴¹ The finding in this case suggests that practitioners utilize the theory of a new and independent oral contract for completion if their client deals with a contracting party who defaults for some reason and the next responsible party desires the material supplier or subcontractor to complete what the defaulting party already started.⁴²

Although a non-construction case, *Robbins v. Warren*⁴³ presents an interesting interpretation of the parol evidence rule. The first district of the

37. *Id.* at 636.

38. *Id.* at 635.

39. 778 S.W.2d 67 (Tex. 1989).

40. A somewhat more common instance in which this type of situation occurs is one in which a general contractor becomes insolvent and goes out of business, whereupon the owner literally guarantees payment if a supplier or subcontractor will perform. The question then arises whether such a guarantee is in violation of the Statute of Frauds, thereby prohibiting the supplier or subcontractor from recovering because of lack of a signed guaranty agreement. TEX. BUS. & COM. CODE ANN. § 2.201 (Tex. UCC) (Vernon 1968). The court failed to mention the guaranty aspect of the dispute in *Preferred*.

41. 778 S.W.2d at 68.

42. See *Circle Double "C" Enter. v. Wisco Elec., Inc.*, 782 S.W.2d 299, 301-02 (Tex. App.—Beaumont 1989, no writ) (analogous case in which appellate court held written agreement for completion valid in face of general contractor's argument that agreement was void as assignment of contract).

43. 782 S.W.2d 509 (Tex. App.—Houston [1st Dist.] 1989, no writ) (involving dispute between buyer and seller of stock in which appellate court reversed summary judgment in favor of seller based solely on written contract).

Houston court of appeals held not only that the parol evidence rule does not apply to agreements made after a written agreement, but also that the rule does not prevent the written agreement from being later modified by the parties by oral agreement.⁴⁴ Furthermore, the court found that a written contract not required by law to be in writing may be modified by subsequent oral agreement even though it provides that it cannot be modified except by written agreement.⁴⁵

The fourteenth district of the Houston court of appeals, in the case of *Zieben v. Platt*,⁴⁶ dealt with the theory of contract ratification and estoppel by contract in a case analogous to those arising in a construction setting. In the *Zieben* case a purchaser of real estate bought certain properties on a note and deed of trust. The purchaser was a developer who intended to build apartment units on one of the tracts of property after the area sewage plant had been expanded. The promissory note matured in 1982, and the parties extended it for two more years. When the note became due in 1984, the sewage treatment plant still had not been expanded. The purchaser attempted to obtain another extension on the note, but the seller refused. The purchaser then attempted to rescind the contract and his obligations under the note because the property did not have the necessary utility capacity. The court dealt with whether the purchaser specifically assumed the risk of the plant's expansion in the initial contract before renewal.⁴⁷ The court stated, however, that this fact was immaterial because the purchaser ratified the contract when he obtained his first renewal.⁴⁸ The court stated that ratification occurs when a party performs some act under the contract or affirmatively acknowledges its validity; that ratification may either be express or implied from a course of conduct; and that a party can utilize the estoppel by contract theory in order to prevent an opponent from taking a position inconsistent with its contractual provisions to the prejudice of the other contracting party.⁴⁹

The parties in *Zieben* signed an initial contract which they not only acted, but also extended the original time limitations. The issue for the construction industry would be whether the ratification and estoppel by contract theories apply in cases in which the parties performed the provisions of a construction contract prior to the executing a written contract. Presumably, ratification could apply whether or not the party established a written contract, although estoppel would seem to apply only in a situation where the parties formulated an oral or written contract.

44. *Id.* at 512.

45. *Id.*; see also *Ambassador Dev. Corp. v. Valdez*, 791 S.W.2d 612, 619-20 (Tex. App.—Fort Worth 1990, no writ) (opponent waived error by failing to object to evidence of oral modification for allowance of extras).

46. 786 S.W.2d 797 (Tex. App.—Houston [14th Dist.] 1990, no writ).

47. *Id.* at 801-02.

48. *Id.* at 802.

49. *Id.*

C. Substantial Performance

This year's review, as usual, includes several cases dealing with the subject of substantial performance, a Texas rule concerning the measure of damages in a building contract dispute. Theoretically, this rule applies when a contractor sues for payment, although he has not completed his contract. The Texas Commission of Appeals first enunciated this doctrine in 1925 in the case of *Atkinson v. Jackson Bros.*⁵⁰ and the Texas Supreme Court most recently discussed its elements in *Vance v. My Apartment Steak House of San Antonio, Inc.*⁵¹ Since the contractor had not completed his contract and thus could not sue for performance, the contractor utilized the substantial performance rule. Under the rule, the contractor has the burden and must prove the following three elements: (1) that it did substantially perform; (2) the amount of consideration that is due under the contract; and (3) the cost of remedying defects due to its errors or omissions.⁵²

In *Ambassador Development Corp. v. Valdez*⁵³ an excavation subcontractor plead substantial performance against the owner who claimed that the subcontractor's work was incomplete. There is no indication in the opinion as to why the contractor did not plead full performance. The case apparently went to the jury solely under a substantial performance theory; and the jury found "none" when asked the cost of remedying the defects due to non-completion or to contractors errors and omissions.⁵⁴ The owner argued that this finding, on the third element of proof under substantial performance, fatally conflicted with an award under the substantial performance theory.⁵⁵ The court of appeals considered the issue as one of first impression, that being whether a party seeking recovery on a substantial performance theory must secure a jury finding of more than "none" regarding costs of remedying or correcting alleged defects or omissions in that party's work. The Fort Worth court of appeals held that a finding of "none" regarding costs of completion and correction does not preclude a claimant from recovering under a theory of substantial performance and, in fact, does not create a fatal conflict between a jury's finding of substantial performance and its findings of zero cost of completion and correction.⁵⁶

In another case involving, as a minor issue, substantial performance of a contract between a contractor and an owner, a jury returned a verdict that the contractor substantially performed under the contract, finding the cost of completion to be \$289,000 on a \$4 million contract.⁵⁷ The jury further

50. 270 S.W. 848 (Tex. Comm'n App. 1925, opinion adopted).

51. 677 S.W.2d 480 (Tex. 1984).

52. *Id.* at 482-83.

53. 791 S.W.2d 612 (Tex. App.—Fort Worth 1990, no writ).

54. *Id.* at 615.

55. *Id.*

56. *Id.* at 617; see also *Dobbins v. Redden*, 785 S.W.2d 377 (Tex. 1990) (providing more typical fact situation in which breaching contractor failed to recover under contract because did not prove that substantially performed; court found contractor should have plead *quantum meruit*).

57. *Mancorp, Inc. v. Culpepper*, 781 S.W.2d 618, 628 (Tex. App.—Houston [1st Dist.] 1989), *rev'd on other grounds*, 802 S.W.2d 226, 231 (Tex. 1990).

found that although the contractor did not fully perform the contract, he did not breach the contract.⁵⁸ Although the owner/appellee argued that a finding that the contractor did not fully perform was in conflict with a finding that the contractor did not breach the contract, the court of appeals apparently found no irreconcilable conflict between the jury verdict and the *Vance* holding.⁵⁹ Thus, from a reading of the appellate cases in this review period on substantial performance, it appears that the courts will not overturn jury findings that technically do not comply with the equitable rules of substantial performance as set out in *Vance* and *Atkinson*.⁶⁰

*Garcia v. Kastner Farms, Inc.*⁶¹ is an instructive case regarding the original concepts of substantial performance and the type of pleading and proof required if the theory were unavailable. In *Garcia* the appellate court refused to allow a contractor who had breached a contract by failing to complete the project on time to recover under a contract theory of substantial completion, yet permitted the contractor to recover on an alternative theory of *quantum meruit*.⁶² *Quantum meruit* allows the contractor the reasonable value of his services, on the basis that the owner should not be unjustly enriched by retaining benefits without compensation.⁶³

D. Conditions Precedent

Only one court of appeals discussed contingent payment clauses during the review period, a subject with which the Texas Supreme Court has not dealt. In *Sheldon L. Pollack Corp. v. Falcon Industries, Inc.*⁶⁴ the Corpus Christi court of appeals dealt with a contingent payment schedule clause between a contractor and subcontractor.⁶⁵ The court then quoted its position in *Gulf Construction Co. v. Self*⁶⁶ in holding that the language, like that

58. *Id.*

59. *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984). The *Vance* holding, however, specifically states that "[b]y definition, this doctrine recognizes that the contractor has not totally fulfilled his bargain under the contract—he is in breach." *Id.* Perhaps one justification for the *Mancorp* ruling is that, as the court points out, the appellee failed to cite any support for their theory. 781 S.W.2d at 628.

60. For an example of holdings and instructions pertinent to both a theory of full performance and a theory of substantial performance, see *Uhlir v. Golden Triangle Dev. Corp.*, 763 S.W.2d 512 (Tex. App.—Fort Worth 1988, writ denied).

61. 789 S.W.2d 656 (Tex. App.—Corpus Christi 1990, no writ).

62. *Id.* at 660-61.

63. *Id.* at 661; *cf.* *Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex. 1990) (court refused to grant compensation to contractor who failed to alternatively plead *quantum meruit* theory).

64. 794 S.W.2d 380 (Tex. App.—Corpus Christi 1990, writ denied).

65. Specifically, the clause read as follows:

2. Payment Schedule: Contractor will pay subcontractor the sum of \$2,352,000.00 in installments as follows: lump sum of TWO MILLION THREE HUNDRED FIFTY-TWO THOUSAND AND NO/100 DOLLARS (\$2,352,000.00) ninety percent on or about the 30th day of each month for work incorporated or materials suitably stored as acceptable to owner and contractor and for which payment has been made by owner or lender to contractor, ten percent to be paid following completion of the subcontractor's work and acceptance by owner and release to contractor of retainage.

Id. at 383.

66. 676 S.W.2d 624 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

in *Gulf Construction*, did not transfer the risk of non-payment to a subcontractor because of the owner's insolvency.⁶⁷ The court went on to hold that, in general, the owner's insolvency does not defeat a subcontractor's claim against the general contractor in a dispute focusing on the subcontractor and general contractor's agreement.⁶⁸ In order to shift the risk of insolvency, the court suggested that the contractor's contract with the subcontractor should explicitly state the parties' intention to alter the normal chain of liability.⁶⁹ Presumably, some courts would hold language as forming a condition precedent, such as that in *North Harris County Junior College District v. Fleetwood Construction Co.*,⁷⁰ wherein the court upheld a condition precedent to the payment of the subcontractor.⁷¹

In 1990, the Texas Supreme Court considered the condition precedent theory in one unusual construction-related case, *Criswell v. European Crossroads Shopping Center*.⁷² In *Criswell* the supreme court considered a case in which a professional engineer prepared plans to convert a shopping center into condominium units in exchange for a percent of the proceeds from the sale of the center on a condominium basis or, at the time of closing, as a whole project. The owner argued that since he did not sell the project on a condominium basis, the engineer was not entitled to payment because the condition of a sale as condominium units was a condition precedent to payment. The Texas Supreme Court disagreed, finding in part that to make performance of a contract conditional, the contract language must normally contain contingent terms such as if, provided that, on condition that, or some other similar phrase of conditional language.⁷³ The court does not favor conditions precedent for several reasons including their harshness and the policy to avoid forfeiture when another reasonable reading is possible or when the intent of the parties is doubtful. The Texas judiciary thus prefers to interpret the agreement as creating covenants rather than conditions.⁷⁴

E. Duty to Read

In *Nautical Landings Marina, Inc. v. First National Bank in Port Lavaca*⁷⁵ the court once again recited the fundamental principal that, absent fraud, the law imposes an obligation upon individuals who sign documents to read and comprehend the provisions contained in the agreement as a protection

67. *Id.* at 629-30.

68. 794 S.W.2d at 384.

69. *Id.*

70. 604 S.W.2d 247 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

71. *Id.* at 255. In *North Harris* the court recognized that they may only ignore the condition precedent clause, requiring full payment to the contractor before payment to the subcontractor, if the parties clearly intended this result. *Id.* In this case, however, the court found no such intent. *Id.*

72. 792 S.W.2d 945 (Tex. 1990).

73. *Id.* at 948; see also *Callaway v. Overholt*, 796 S.W.2d 828, 833 (Tex. App.—Austin 1990, writ denied) (discussion of words denoting condition precedent).

74. 792 S.W.2d at 948; see also *Mar-Len of Louisiana, Inc. v. Gorman-Rupp Co.*, 795 S.W.2d 880, 883, 886-87 (Tex. App.—Beaumont 1990, writ denied) (dealing with words pending submitted approval as claimed condition precedent).

75. 791 S.W.2d 293 (Tex. App.—Corpus Christi 1990, writ denied).

against misdealings.⁷⁶ Thus, although various types of construction contracts may be long and complex, the law continues to presume that the contracting parties read and know what is in their contract. For example, the court in *Peters v. Gifford-Hill & Co., Inc.*⁷⁷ held the guarantor of an open account with a concrete supplier liable for the amount of the account, even though he claimed not to have read the guaranty agreement.

III. QUANTUM MERUIT

This article has already examined the theory and manner of pleading *quantum meruit* as an alternative ground of recovery to substantial performance.⁷⁸ The Texas Supreme Court in *Vortt Exploration Co. v. Chevron U.S.A., Inc.*⁷⁹ clearly and concisely set forth the following elements that a claimant must prove to recover under *quantum meruit*: (1) that the party rendered valuable services or furnished materials; (2) that the person sought to be charged received the services or materials; (3) that the person who received the services and materials accepted, used and enjoyed them; and (4) that the circumstances prove that the rendering party reasonably notified the person sought to be charged that he expected payment for the services or materials.⁸⁰

The court, in its discussion, pointed out that *quantum meruit* is an equitable remedy, independent of contract theory.⁸¹ Therefore, a party may only recover when no express contract, covering the labor or materials furnished, exists, because the remedy relies upon a promise implied by law to pay for services or materials knowingly accepted when non-payment would result in unjust enrichment to the party benefitted.⁸²

The Texas Supreme Court issued a *per curiam* opinion in the construction case of *Emerson v. Tunnell*.⁸³ In that case a homebuilder sued homeowners for breach of contract and *quantum meruit*, but failed to prove a contract. The trial court granted a judgment for the contractor, but based the amount of the judgment on the contractor's contract claim.⁸⁴ In making its determination, the trial court took the erroneous position that it would be inequitable to allow the contractor to recover a greater sum than the price for which he contracted to perform the work.⁸⁵ The supreme court disagreed, holding that when the fact finder fails to find that a contract existed, the court need not limit *quantum meruit* recovery to the alleged breach of contract damages.⁸⁶ Therefore, the supreme court allowed recovery of more than the contract amount under the *quantum meruit* doctrine. Practitioners must af-

76. *Id.* at 298.

77. 794 S.W.2d 856, 857, 861 (Tex. App.—Dallas 1990, writ denied).

78. See *supra* notes 61-63 and accompanying text.

79. 787 S.W.2d 942 (Tex. 1990).

80. *Id.* at 944.

81. *Id.*

82. *Id.*

83. 793 S.W.2d 947 (Tex. 1990).

84. *Id.* at 947.

85. *Id.* at 948.

86. *Id.*

firmatively decide whether to plead in contract or in *quantum meruit*, remembering that sometimes a *quantum meruit* claim will result in more damages than a contract claim.⁸⁷ Attorneys must also keep in mind the general rule that if a valid express contract covering the subject matter exists, then there can be no implied contract and thus, no recovery in *quantum meruit*.⁸⁸ Of course, the rule is subject to exceptions, such as invalidity of contract, abandoned contract, partial performance and substantial performance.⁸⁹

The theory of *quantum meruit* necessarily involves the submission of key fact issues to the jury. If a claimant can show such fact issues exist, the claimant should clearly present these issues to a jury and thus avoid a summary judgment.⁹⁰ The Houston court of appeals discussed this proposition in *Ramirez Co. v. Housing Authority of City of Houston*,⁹¹ in which a developer brought breach of contract and *quantum meruit* actions against the City of Houston Housing Authority, seeking to recover for work performed at two low-income housing projects. The trial court granted a summary judgment for the housing authority, but the court of civil appeals reversed this judgment. The appellate court found that the theory of *quantum meruit* operates to award the claimant reasonable compensation for his or her exerted labors.⁹² Since the court believed that the amount of reasonable compensation is a determination for the fact-finder, the trial court improperly granted summary judgment because the claimant failed to meet his burden of proof showing that no material issues existed.⁹³

The decision in *Ramirez* indicates that the claimant either established or the opposition did not dispute the elements of *quantum meruit* described in *Vortt*.⁹⁴ Instead, the owner argued that *quantum meruit* should not apply because he did not use the benefits or the fruits of the contractor's work.⁹⁵ In reaching its conclusion, the court found that the owner did own the pro-

87. See, e.g., *McCracken Constr. Co. v. Urrutia*, 518 S.W.2d 618 (Tex. Civ. App.—El Paso 1974, no writ). The court cited the following Texas rule in support of this proposition:

Where an owner wrongfully interferes with a contractor and prevents his completion of the contract, the proper measure of damages where the contractor sues on the contract is the contract price less what would have been the cost to the contractor of completing the work, but that this is not the sole measure of damages since the contractor may treat the contract as rescinded and recover under *quantum meruit* the full value of the work done.

Id. at 621-22 (citing *Kleiner v. Eubank*, 358 S.W.2d 902 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.)).

88. *W & W Oil Co. v. Capps*, 784 S.W.2d 536, 537 (Tex. App.—Tyler 1990, no writ) (referring to doctrine as *Woodard* rule, cited in *Woodard v. Southwest States, Inc.*, 384 S.W.2d 674, 675 (Tex. 1964)); see also *Noble Exploration v. Nixon Drilling Co.*, 794 S.W.2d 589 (Tex. App.—Austin 1990, no writ) (preclusion of implied in fact or law contract argument due to subject matter's coverage in expressed contract).

89. 784 S.W.2d at 537-38.

90. *Ramirez Co. v. Housing Authority of City of Houston*, 777 S.W.2d 167, 171 (Tex. App.—Houston [14th Dist.] 1989, no writ).

91. *Id.*

92. *Id.*

93. *Id.* at 172.

94. See *supra* note 80 and accompanying text.

95. 777 S.W.2d at 171-72.

ject where the contractor performed his work and, even though the owner had not used the product of the work in question, that fact did not establish that the owner received no benefit from the contractor's labors.⁹⁶

IV. MECHANIC'S LIEN

A. Notices

The case of *Don Hill Construction v. Dealers Electrical Supply*⁹⁷ involved a classic mechanic's lien fact situation with attendant issues. The plaintiff, Dealers Electrical Supply, supplied an electrical subcontractor, performing work for general contractor Don Hill Construction Company, on a project for Brookshire Brothers, Inc., owner. The electrical supplier did not pay the material supplier, therefore the material supplier sent its ninety-day notices pursuant to the appropriate Property Code provisions.⁹⁸ The subcontractor, however, did not send the required thirty-six day notice to the general contractor.⁹⁹ In addition to these facts, the parties stipulated that after receiving timely notice, the owner did not withhold any money from the general contractor, but proceeded to pay out all but \$1,722.69 on a \$1,836,951 contract. The subcontractors lien totalled the sum of \$10,638.60. The owner contended that he should not be liable for funds not withheld by him. The owner relied on the funds trapping statute because the materialman failed to comply with the thirty-six day notice to the general contractor.¹⁰⁰

The court of appeals, however, disagreed with the owner's theory.¹⁰¹ Instead, the appellate court held that the ninety-day notice provided the owner with an adequate and sufficient warning.¹⁰² Therefore, although the material supplier failed technically to comply with the funds trapping statute's thirty-six day notice requirement, the owner could not escape his payment responsibilities.¹⁰³ The court of appeals also held the general contractor, Don Hill Construction Co., liable under the trust fund section of the Property Code¹⁰⁴ for receiving funds and/or payments which clearly belonged to

96. *Id.* at 172.

97. 790 S.W.2d 805 (Tex. App.—Beaumont 1990, no writ).

98. TEX. PROP. CODE ANN. § 53.056(b) (Vernon 1984), amended by Act of June 16, 1989, ch. 1138, 1989 Tex. Gen. Laws 4693. The amended statute now requires the ninety-day notices to the owner and the general contractor "not later than the 15th day of the third month following each month in which all or part of the claimant's labor was performed or material . . . was delivered." TEX. PROP. CODE ANN. § 53.056(b) (Vernon Supp. 1991).

99. TEX. PROP. CODE ANN. § 53.056(b) (Vernon 1984), amended by Act of June 16, 1989, ch. 1158, 1989 Tex. Gen. Laws 4693. Section 53.056(b), as amended, provides the following:

If the lien claim arises from a debt incurred by subcontractor, the claimant must give to the original contractor written notice of the unpaid balance. The claimant must give the notice not later than the 15th day of the second month following each month in which all or part of the claimant's labor was performed or material delivered.

TEX. PROP. CODE ANN. § 53.056(b) (Vernon Supp. 1991).

100. *See supra* note 99.

101. 790 S.W.2d at 809.

102. *Id.*

103. *Id.*

104. TEX. PROP. CODE ANN. §§ 162.001-163.009 (Vernon Supp. 1991).

the beneficiary's, Dealers Electrical Supply, trust fund.¹⁰⁵ Interestingly, the appellate court developed the case on the trial court's stipulations and findings of fact.¹⁰⁶ There is no indication whatsoever of whether the general contractor paid the electrical subcontractor, the plaintiff's supplier, from the funds it received from the owner. If the general contractor had not paid the electrical subcontractor when it received notice of the materialman's lien claim and did not subsequently pay the electrical contractor, the court's holding is correct. The opposite result, however, seems to accrue if the electrical subcontractor, not a party to the appeal, received payment. Presumably, the stipulations available to the court of appeals must have shown that the electrical subcontractor had not received payment from Don Hill Construction Co., the general contractor. It seems that the court made a more or less implicit finding that the owner and the general contractor knew of the material supplier's mechanic's and materialman's lien claim in ample time to take care of it.

Another case, *Ambassador Development Corp. v. Valdez*,¹⁰⁷ involved the liability of an owner for funds trapped under the funds trapping statute¹⁰⁸ and his portion of the ten percent retainage.¹⁰⁹ The court in *Ambassador* held that the contractor met his burden of proof of establishing entitlement to lien under both the funds trapping and the ten percent retainage statutes, thus allowing stacking or cumulating the liens for each.¹¹⁰ The *Ambassador* court also dealt with whether a contractor has a burden of proof under the retainage statute to show the amount of other lien claimants with which he should share proportionately. The court did not have to decide this issue since, in *Ambassador*, evidence did not indicate other lien claimants, therefore the court awarded the claimant the full ten percent retainage.¹¹¹

Additionally, the *Ambassador* court dealt with whether a lien claim should include pre-judgment interest.¹¹² The court found that the Texas Property Code does not make any provision for the inclusion of pre-judgment interest in a statutory lien.¹¹³ The court of appeals, in making its finding regarding interest, analyzed the holdings of *Palomita, Inc. v. Medley*¹¹⁴ and *Hayek v. Western Steel Co.*¹¹⁵ The court found no guidance in these cases, stating that it was impossible to tell the holding regarding interest in the *Hayek* case, and that the court in the *Palomita* case refused to include pre-judgment interest without analyzing its holding.¹¹⁶ The court then conducted an extensive analysis of the legislative history and case law and con-

105. 790 S.W.2d at 811.

106. *Id.* at 806.

107. 791 S.W.2d 612 (Tex. App.—Fort Worth 1990, no writ).

108. TEX. PROP. CODE ANN. §§ 53.081-.085 (Vernon 1984 & Supp. 1991).

109. TEX. PROP. CODE ANN. §§ 53.101, 53.105 (Vernon 1984 & Supp. 1991).

110. 791 S.W.2d at 622.

111. *Id.*

112. *Id.* at 624.

113. *Id.*

114. 747 S.W.2d 575 (Tex. App.—Corpus Christi 1988, no writ).

115. 469 S.W.2d 206 (Tex. Civ. App.—Corpus Christi 1971), *aff'd*, 478 S.W.2d 786 (Tex. 1972).

116. 791 S.W.2d at 623.

cluded that if the legislature intended to include pre-judgment interest in the statute, the statute would reflect this intent. Since the Texas legislature had not inserted pre-judgment interest, the court refused to include it as part of the lien.¹¹⁷

B. Priority of Mechanic's Lien

The case of *MBank El Paso National Association v. Featherlite Corp.*¹¹⁸ involved a priority of lien between a material supplier, with a claim against a subcontractor validly secured by a mechanic's lien, and a bank, with a recorded security interest in the subcontractor's accounts receivable. In an interesting twist of facts, the evidence showed that the material supplier released the mechanic's lien in return for a promise from the general contractor that he would issue joint checks to the subcontractor and supplier. Because of the release, the material supplier lost as to the priority of his lien.¹¹⁹ Furthermore, the court opined that a mechanic's and materialman's lien will always precede an accounts receivable security interest because the inception of the mechanic's lien occurs when the supplier first delivers the materials to a construction site. Since the first delivery will generally take place before the creation of any account receivable, the lien claimant always wins.¹²⁰ Under the cases of *Robbins v. Warner*¹²¹ and *Preferred Heating*,¹²² the supplier conceivably could have recovered on an oral contract basis against the general contractor.

C. Creation of Residential Mechanic's Liens

The only other cases to arise during the review period on mechanic's liens involved the creation of mechanic's liens for the construction of residences and for the improvement of homesteads. In *First National Bank of Amarillo v. Jarnigan*¹²³ the court considered the complexities of a documented builders and mechanic's lien contract with accompanying documents in a lawsuit by the owners of the residence against the lender. The owner claimed that the bank could not be a holder in due course under its renewal promissory note, executed in customary form in the usual manner of perfecting a mechanic's and materialman's lien contract, in a three-party situation involving the owners, the general contractors and a lender. Since the owners had defenses available under the original mechanic's lien note, the trial court directed a verdict for the debtors, stating that the bank was not a holder in due course on its renewal note for construction of the property.¹²⁴ The ap-

117. *Id.* at 624.

118. 792 S.W.2d 472 (Tex. App.—El Paso 1990, writ denied).

119. *Id.* at 476.

120. *Id.* at 475. Interestingly, the material supplier apparently did not bring suit against the general contractor on the general contractor's promise to cut a joint check in order to pay the supplier directly.

121. 782 S.W.2d 509 (Tex. App.—Houston [1st Dist.] 1989, no writ). See *supra* notes 43-45 and accompanying text.

122. 778 S.W.2d 67 (Tex. 1989). See *supra* notes 39-42 and accompanying text.

123. 794 S.W.2d 54 (Tex. App.—Amarillo 1990, writ denied).

124. *Id.* at 56.

pellate court reversed, holding that the trial court should not have considered the document as a single instrument.¹²⁵

V. MASTER AND SERVANT - INDEPENDENT CONTRACTOR

A. *Employee or Independent Contractor*

The question often arises on job sites and in construction businesses whether an individual constitutes an employee or an independent contractor. The classification of an individual often determines whether construction company employers must withhold FICA wages, pay unemployment taxes to the Texas Employment Agency, provide overtime wages, or contribute towards workers' compensation coverage. In certain instances, the determination governs the various duties that the employers or contractors owe to the individuals as either employees or independent contractors. The relevant cases during this review period were personal injury cases arising primarily under the workers' compensation statutes.¹²⁶

*Wasson v. Stracener*¹²⁷ involved a personal injury lawsuit brought by an employee of a construction company for injuries received when his supervisor's truck was in an accident while in route between job sites. For the employee to recover, he needed to show that he was not an employee at the time of the accident, but that the supervisor, Freeman, for whom Wasson worked, was an employee of the construction company, Stracener.¹²⁸ The evidence conflicted as to whether Freeman, whose vehicle was involved in the accident, was an independent contractor or an employee of the construction company.¹²⁹ Since the appeal arose from a summary judgment, the court did not decide the issue. It itemized in detail, however, the factors considered in determining whether an individual is a worker or an employee. As set forth by the court, the factors focus on the worker's relative independence in performing his job; obligation to furnish necessary tools, supplies and materials to complete the task; ability to control the project's progress, except with regards to final results; employment duration; and compensation, whether by time or by the job.¹³⁰

The Texas Supreme Court, in a case involving an injured jockey, stated that the test to determine whether a worker is an employee or independent contractor is whether the employer maintains control over the progress, details, and methods of operations of the employees' work.¹³¹ In its holding, the supreme court cited certain examples of the type of control normally exercised by an employer.¹³² Obviously, the court could use the same or

125. *Id.* at 59. The second case to arise in the review period on this subject was *First Victoria Nat. Bank v. Briones*, 788 S.W.2d 632 (Tex. App.—Corpus Christi 1990, writ denied). See *supra* notes 34-37 and accompanying text.

126. TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-8309 (Vernon Supp. 1991).

127. 786 S.W.2d 414 (Tex. App.—Texarkana 1990, writ denied).

128. *Id.* at 419.

129. *Id.* at 420-21.

130. *Id.* at 420.

131. *Thompson v. Travelers Indem. Co. of R.I.*, 789 S.W.2d 277, 278 (Tex. 1990).

132. The Texas Supreme Court included the following as determinative factors: "when

similar tests in issues involving payment of FICA or other withholding taxes, unemployment taxes, workers' compensation, overtime pay, or other similar questions.

B. Duty Owed to Independent Contractor

With regard to tort law, a contractor or owner owes a legal duty of care of safety if the contractor or owner maintains any control at all over the independent contractor's employees. In *Lawson-Avila Construction Inc. v. Stoutamire*¹³³ a subcontractor's employee and the estate of a deceased employee brought suit against the general contractor on a school project for injuries incurred when the employees fell from a joist lifted by the subcontractor. The court considered in detail the responsibilities of the general contractor, including the use of proper construction methods, the responsibility for the actions and omissions of subcontractors, the maintenance of discipline, ensuring compliance of the project with laws, the employment of competent supervision, the maintenance of safety programs, and the designation of a safety director for the job.¹³⁴ The court found sufficient evidence to hold that the general contractor had sufficient control over the subcontractors to justify the imposition of legal duty of care.¹³⁵

VI. STATUTES OF LIMITATION AND STATUTE OF REPOSE

The Dallas court of appeals dealt with the ten year statute of repose¹³⁶ in *Lambert v. Wansbrough*,¹³⁷ a case in which a homeowner sued a roofing contractor for defective installation approximately six years after the defects in performance first manifested themselves. The court found that the limitations period begins to run not later than the time when the injured party first sustains damage or injury, and, thus, the four year statute barred the

and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work and the physical method or manner of accomplishing the end result." *Id.* at 279; *see also* *Ross v. Texas One Partnership*, 796 S.W.2d 206, 210 (Tex. App.—Dallas 1990), *writ denied per curiam*, No. D-0425, (Tex. Jan. 23, 1991) (WESTLAW State library, TX-CS file) (holding that primary test is which party to relationship possesses "the right of control over the details of the work").

133. 791 S.W.2d 584 (Tex. App.—San Antonio 1990, *writ denied*).

134. *Id.* at 589.

135. *Id.* at 591. The Texas Supreme Court, in *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985), stated the legal duty of care as follows:

An owner or occupier of land has a duty to use reasonable care to keep the premises under his control in a safe condition . . . A general contractor on a construction site, who is in control of the premises, is charged with the same duty as owner or occupier . . . This duty to keep the premises in a safe condition may subject the general contractor to direct liability for negligence in two situations: (1) those arising from a premises defect, (2) those arising from an activity or instrumentality.

Id. at 417; *Lawson-Avila Constr. Inc. v. Stoutamire*, 791 S.W.2d at 588 (quoting *Redinger*, 689 S.W.2d at 417); *see also* *Ross*, 796 S.W.2d at 216; *City of Houston v. Goings*, 795 S.W.2d 829, 834 (Tex. App.—Houston [14th Dist.] 1990, *writ denied*) (one who retains control over any part of work, may incur liability for failure to use reasonable care).

136. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 1986).

137. 783 S.W.2d 5 (Tex. App.—Dallas 1990, *writ denied*).

claim.¹³⁸ The owner then attempted to bring the claim under the ten year statute of repose. The court held that the legislature intended this statute to bar suits ten years after the completion of improvements, even with respect to losses manifesting themselves after ten years.¹³⁹ In other words, the court held that under the law, prior to the enactment of the statute of repose, the two and four year statutes did not commence to run until the cause of action accrued (i.e., the damage manifested itself) and the statute of repose cut off such claims after ten years.¹⁴⁰ The court held that the statute of repose does not extend or affect the period prescribed for bringing an action under any law of the state, and that the two and ten year statutes barred the six year old claim as if the legislature never enacted the ten year statute.¹⁴¹

In *Rodarte v. Carrier Corp.*¹⁴² the court discussed the applicability and the constitutionality of the statute of repose. In that case the estate of an individual electrocuted while attempting to repair a heater/air conditioner unit installed in 1965 brought a wrongful death claim approximately seventeen years after installation. The court classified the heating and air conditioning unit as an improvement to the property, thus falling under the statute of repose.¹⁴³ Since the estate brought the suit more than ten years after the accident, the statute of repose absolutely barred the claim.¹⁴⁴ With regard to a claim that the statute of repose violated the constitutional rights of due process, equal protection and open access, the court considered numerous cases and found no violation of constitutional rights.¹⁴⁵

*El Paso Associates Ltd. v. J.R. Thurman & Co.*¹⁴⁶ involved an action by a purchaser of certain real property against a seller for defects in the building project built on an old landfill. Although the purchase occurred on July 30, 1981, evidence indicated discovery of the defect occurred in 1981. There was an inspection report in 1984 and 1985. Although not stated, the claimant apparently brought the lawsuit some years later and the court granted defendant's summary judgment based on its defense of limitations.¹⁴⁷ The court set out the following laundry list of the basic limitations applicable to various causes of action: (1) two years from the perpetration of fraud or, if concealed, from the time of discovery; (2) two years from breach or discovery of breach of a fiduciary duty; (3) two years from actions or discoveries of actions under the deceptive trade practice acts; (4) four years from breach of contract or from the time when the injured party obtained knowledge of the breach; and (5) four years from actions or discovery of actions of breach of express or implied warranty.¹⁴⁸ The court of appeals went on to find suffi-

138. *Id.* at 6.

139. *Id.* at 7.

140. *Id.*

141. 783 S.W.2d at 7.

142. 786 S.W.2d 94 (Tex. App.—El Paso 1990, writ dismissed by agreement).

143. *Id.* at 95-96.

144. *Id.*

145. *Id.* at 96.

146. 786 S.W.2d 17 (Tex. App.—El Paso 1990, no writ).

147. *Id.* at 18.

148. *Id.* at 20-21; see also *Allen v. Roddis Lumber & Veneer Co.*, 796 S.W.2d 758, 761 (Tex

cient evidence regarding a conflict in the facts of discovery with regards to the use of reasonable diligence so as to remand the case for trial.¹⁴⁹

Lastly, in the case of *Commercial Union Insurance Co. v. La Villa Independent School District*¹⁵⁰ the court of appeals, in a lawsuit on a payment and performance bond under the McGregor Act,¹⁵¹ considered whether the limitations period for suit on the bond fell one year after the contract's final date of completion, as provided in the McGregor Act,¹⁵² or two years from the contract's final date of payment, as provided in the general contractor's bond.¹⁵³ The court, however, did not have to decide whether the non-statutory bond actually extended the limitations period of the McGregor Act because, even under the extended period, the lawsuit would have been barred.¹⁵⁴

VII. PUNITIVE DAMAGES

The Beaumont court of appeals, in *Jim Walter Homes, Inc. v. Youngtown, Inc.*,¹⁵⁵ restated the long-established Texas law that pleadings sounding in contract will not support a punitive damage recovery claim.¹⁵⁶ This case, which involved a suit by a developer as plaintiff against a homebuilder and an owner of a home for violation of deed restrictions, resulted in a jury verdict of \$7,200 for contractual damages and \$25,000 in punitive damages. The damages included the homebuilder's failure to comply with the square footage foundation and brick veneer requirements of the subdivision building restrictions. Since the plaintiff's pleadings only contained the contract action, the court reversed and rendered the case, repeating the damage rule that requires an independent tort finding to recover damages for breach of contract.¹⁵⁷

*HOW Insurance Co. v. Patriot Financial Services of Texas, Inc.*¹⁵⁸ involved a deceptive trade practices lawsuit by an owner of a condominium who successfully recovered punitive damages against the builders and owners of the condominium complex and against their insurance company. The insurance company provided the homeowner's warranty and insurance. The plaintiff had purchased a luxury condominium and experienced numerous problems with the finish-out, including water intrusion resulting from faulty construction that led to wood rot. When the original builders and developers would not remedy the problem, the insurance company assured the homeowner they would solve the situation but, after becoming aware that the difficulties

App.—Corpus Christi 1990, no writ) (defining rule of discovery as “when the plaintiff discovers the injury *and its cause.*”) (emphasis added).

149. 786 S.W.2d at 21.

150. 779 S.W.2d 102 (Tex. App.—Corpus Christi 1989, no writ).

151. TEX. REV. CIV. STAT. ANN. art. 5160 (Vernon Supp. 1991).

152. *Id.* at 5160(G).

153. 779 S.W.2d at 105.

154. *Id.*

155. 786 S.W.2d 10 (Tex. App.—Beaumont 1990, no writ).

156. *Id.* at 12.

157. *Id.*

158. 786 S.W.2d 533 (Tex. App.—Austin 1990, no writ).

extended throughout the entire construction project, failed to do so. The court examined all the evidence, including the jury's unconscionability finding of egregious conduct on the part of the insurance company in not remedying the homeowner's problems.¹⁵⁹ The court then found that the plaintiff could recover damages for mental anguish, even in the absence of other economic or physical harm.¹⁶⁰ The court stated that in order to establish such mental anguish the plaintiff must show more than mere worry, anxiety, embarrassment or anger, and should include mental sensations of painful emotions, such as grief, severe disappointment, wounded pride, shame, despair or public humiliation.¹⁶¹ The court further upheld the award of exemplary damages in this case because the builders and developers, while representing the condominiums to be meticulously constructed, had, as found by the jury, accepted disproportionately low bids. Furthermore, a construction supervisor testified that contractors who give such disproportionately low bids may not perform quality work.¹⁶² Other evidence showed that the builder had changed design specifications in order to make the project more economical.

Two other rather unusual cases based on trover and conversion allowed punitive damages in the context of construction contracts for material supply. In *Transfer Products, Inc. v. TexPar Energy, Inc.*¹⁶³ the plaintiff, TexPar Energy, contracted to buy asphalt from the seller, Transfer Products. Prior to delivery, the seller arbitrarily declared a storage charge on the goods and, before purchaser had a chance to remove the goods, actually started reselling the asphalt to third parties. The court found that the attempt to collect unreasonable storage charges and the actual and intentional selling of purchaser's goods without just cause or excuse under the guise of the Uniform Commercial Code remedy constituted implied or legal malice.¹⁶⁴ The court further found that it was unnecessary to find malice if hatred, dislike, spite or resentment existed since the court could infer malice from unlawful actions without reasonable grounds.¹⁶⁵ The court held that such action was so egregious that it amounted to trover and conversion under common law, and that exemplary damages were proper.¹⁶⁶

In another case on trover and conversion, *Vickery v. Texas Carpet Co.*,¹⁶⁷ the facts more clearly resembled a typical construction case. In this case, defendant Vickery contracted with Texas Carpet Co. to furnish and install carpet for a bank project. After Texas Carpet commenced construction, Vickery did not allow it to complete installation. Vickery sold the building and Texas Carpet never received payment for the padding and carpet that it installed. The plaintiff brought a case for breach of contract and conver-

159. *Id.* at 539-42.

160. *Id.* at 543.

161. *Id.* at 542.

162. 786 S.W.2d at 545.

163. 788 S.W.2d 713 (Tex. App.—Corpus Christi 1990, no writ).

164. *Id.* at 715-16.

165. *Id.* at 715.

166. *Id.* at 717.

167. 792 S.W.2d 759 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

sion.¹⁶⁸ The court awarded damages to the plaintiff for breach of contract and for conversion because the owner sold the building without allowing the carpet company to either recover their carpet or receive payment for it.¹⁶⁹ The court found this to be a showing either of willful and knowing conversion or of reckless disregard of the rights of others and sufficient to sustain an assessment of exemplary damages.¹⁷⁰

VIII. LIQUIDATED DAMAGES

In *Commercial Union Insurance v. La Villa School District*¹⁷¹ an owner/school district brought suit against a general contractor (Tocon) for, among other things, the payment of one hundred dollars per day in liquidated damages for the general contractor's failure to complete the project on the date set forth in the contract. The general contractor objected, stating that liquidated damage provision constituted a penalty provision and should not be allowed. The appellate court set out the usual rule for liquidated damages, stating that the court will enforce such a provision if the harm caused by the breach is difficult to estimate and the amount of liquidated damages is reasonable.¹⁷² The court then astutely pointed out that the rule puts the burden on the party asserting that a liquidated damages clause constitutes a penalty to prove the amount of the other party's actual damages, if any, to show that the liquidated damages are not an approximation of the stipulated sum.¹⁷³ The evidence in this case, as in most cases, did not indicate the actual damages. Since the general contractor did not carry its burden of proof, the appellate court had no choice but to presume that the trial court found the damages caused by the general contractor's breach were either impossible or difficult to estimate, and that the liquidated damages constituted just compensation.¹⁷⁴ Therefore, the general contractor failed to prove that liquidated damages were a penalty by failing to prove the adversary's actual damages.

IX. MITIGATION OF DAMAGES

The Dallas court of appeals, in *F & P Builders v. Lowe's of Texas, Inc.*,¹⁷⁵ dealt with a creative argument of a buyer of construction materials who did not desire to pay for the materials. The buyer argued that the seller, who

168. Interestingly, instead of the case being one of a filed mechanic's and materialman's lien with evidence presented on substantial performance or for materials delivered, the case turned on conversion.

169. 792 S.W.2d at 763.

170. *Id.* at 763.

171. 779 S.W.2d 102 (Tex. App.—Corpus Christi 1989, no writ). See *supra* notes 150-54 and accompanying text.

172. *Id.* at 106.

173. *Id.* at 106-07; see also *Lacy v. Tigor Title Ins. Co.*, 794 S.W.2d 781, 792 (Tex. App.—Dallas 1990) (enforcing forfeiture of \$200,000 in earnest money on earnest money real estate contract as liquidated damages based on parties' agreement), *writ denied per curiam*, 803 S.W.2d 265 (Tex. 1991).

174. 779 S.W.2d at 107.

175. 786 S.W.2d 502 (Tex. App.—Dallas 1990, no writ).

had delivered the materials, had a common law duty to mitigate damages by accepting a return of the materials. This argument ignores the Texas Business and Commerce Code provision that states that a seller may recover the price of goods accepted by the buyer.¹⁷⁶ The court had no difficulty in finding that the statutory provision supplants the common law duty for a seller to mitigate damages by accepting return of the goods.¹⁷⁷

X. DECEPTIVE TRADE PRACTICES

Unhappy homeowners typically bring the cases that arise in a construction context against a contractor who contracted to build their house or to perform home improvements to their residence or against a lender who finances the project under the Texas Deceptive Trade Practices-Consumer Protection Act.¹⁷⁸ Homeowners who enter into agreements with contractors for construction of home improvements are consumers.¹⁷⁹ Generally, the lender financing the construction is not liable for deceptive trade practices actions for bad construction unless the lender committed its own deceptive trade practices act violation or was vicariously liable. The case of *Home Savings Association Service Corp. v. Martinez* discusses this point.¹⁸⁰ In that case, homeowners contracted with the contractor, Gershenson, to do renovation work on their residence. Home Savings Association financed the project. Home Savings delivered two checks, apparently in the full amount, to pay for the renovation. Both checks were endorsed on or about the date of delivery and sent to the contractor. In the subsequent suit for deceptive trade practices, the homeowner sued the general contractor and the lender. The general contractor did not appeal.¹⁸¹ The court of appeals held that the lender incurred no liability under the Deceptive Trade Practices Act in this case because of its innocent involvement in the business transaction.¹⁸² The homeowners attempted to argue that the lender and the contractor were inextricably intertwined, because they had relied on statements made by the closing agent for the lender that the contractor was reputable. Neither the trial court nor the court of appeals could find any actionable misrepresentation by the lender in this case.¹⁸³

In *J.B. Custom Design and Building v. Clawson*¹⁸⁴ the egregious conduct of a construction contractor resulted in a jury's award of damages that was subsequently *increased* by the trial court. In that case, the homeowners/consumers hired a contractor, Clawson, to design and install foundation repairs to prevent their house from subsiding. Testimony showed that the

176. TEX. BUS. & COM. CODE ANN. § 2.709(a)(1) (Tex. UCC) (Vernon 1968).

177. 786 S.W.2d at 503.

178. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Tex. UCC) (Vernon 1987 & Supp. 1991).

179. See *Briercroft Service Corp. v. De Los Santos*, 776 S.W.2d 198 (Tex. App.—San Antonio 1988, writ denied).

180. 788 S.W.2d 52 (Tex. App.—San Antonio 1990, writ requested).

181. *Id.* at 53.

182. *Id.* at 54.

183. *Id.* at 58.

184. 794 S.W.2d 38 (Tex. App.—Houston [1st Dist.] 1990, no writ).

attempted leveling left wrinkles in the linoleum, damaged molding around doors, damaged patio doors and sewer lines, and caused structural damage creating an unlevel situation. The homeowners recovered \$8,000 in actual damages, which the trial court increased by \$6,000. In addition, the husband recovered \$5,000 and the wife recovered \$3,000 in mental anguish damages. In response to an attack on the mental damage award based on a lack of showing of high degree of mental pain and stress, the court found that the homeowners' testimony showed that they had experienced a tremendous amount of embarrassment and distress. This finding raised a sufficient factual issue to go to the jury, which the court found best suited to determine whether the homeowners' suffered mere worry, not entitling them to damages for mental anguish, or relatively high degree of pain and suffering compensable in mental anguish damages.¹⁸⁵ The court of appeals upheld the jury's verdict for mental anguish, although it reduced the trial court's discretionary award and reinstated the jury's original award for actual damages.¹⁸⁶

XI. CONSTITUTIONAL LAW AND SET ASIDES

A new and developing area of construction jurisprudence in the United States in the last several years includes the issue of set aside programs, whereby a government agency, acting as owner, designates a certain percentage of work done on the governmental projects to be performed only by qualified groups, such as minority business enterprises, women business enterprises or some other qualified group, such as residents of a particular city or state. *City of Richmond v. J.A. Croson Co.*¹⁸⁷ represents one of the most significant cases decided by the United States Supreme Court in the construction area in the last several years. In that case, the Court struck down a City of Richmond ordinance requiring that qualified minority business enterprises perform thirty percent of the dollar amount of general contractors' contracts on city work.

The issue of minority set asides and other set asides arose in two very unusual cases in Texas in 1989 and 1990. The first case, *Rodriguez v. Universal Fastenings Corp.*,¹⁸⁸ was a death case brought by the surviving spouse and children of a construction worker killed on a construction project when he fell from a concrete slab. The plaintiffs sued all of the subcontractors on the project at the time of the accident, including a minority business enterprise, Pro-Kote. Apparently the plaintiff elicited testimony, not allowed in the trial of the case, with the intent of showing that Pro-Kote was a minority contractor that received the contract because of a minority set aside. The plaintiff also alleged that the minority business enterprise was a sham. The trial court did not allow this evidence and defendants tried to raise the mat-

185. *Id.* at 43; see *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 653-54 (Tex. 1987) (Texas Supreme Court test for mental anguish damages).

186. 794 S.W.2d at 44.

187. 488 U.S. 469 (1989).

188. 777 S.W.2d 513 (Tex. App.—Corpus Christi 1989, no writ).

ter on appeal.¹⁸⁹ The appellate court affirmed the actions of the trial court in disallowing the evidence, agreeing with the trial court that the evidence would be irrelevant and immaterial and tend to confuse and potentially prejudice the jury.¹⁹⁰

The only other case involving set asides was the curious *Baytown Construction Co. v. City of Port Arthur* decision.¹⁹¹ That case involved an ordinance of the City of Port Arthur, Texas called the "Residence Jobs Policy Ordinance," which required construction contractors dealing with the City of Port Arthur to employ Port Arthur residents to perform sixty percent of the hours worked in each craft required to perform the contracted job. Baytown Construction Company was awarded a contract to construct a landfill for the City of Port Arthur and was later sanctioned in the amount of a one percent penalty, \$4,878.59, and issued a three year ban on bidding for future construction projects for the city for its failure to comply with the ordinance. The court granted partial summary judgment to the City of Port Arthur in its action for a declaratory judgment.¹⁹² The Beaumont court of appeals held that the ordinance would probably be constitutional,¹⁹³ but the fact that the city changed the definition of residents and the application of the ordinance's procedures after Baytown received its contract and began work violated the Texas and United States Constitutions. The court found a constitutional violation because Baytown did not receive notice before a summary forfeiture and a hearing prior to any finding on a violation of the ordinance.¹⁹⁴ Thus, the court found Baytown's rights under its original contract to be property rights protected by the due process and due course of law requirements of the Texas and United States Constitutions.¹⁹⁵ As various governmental agencies of the State of Texas, federal government, and private owners enact different set aside programs, more litigation will arise regarding minority, women and other set aside programs.

XII. MISCELLANEOUS CASES

A. Attorney & Client-Attorney Conflict

*Insurance Co. of North America v. Westergren*¹⁹⁶ provides an example of what can happen when an attorney represents a contractor and the contractor's payment and performance surety when a case arises on a payment or performance bond. There is always a potential, inherent conflict if the surety and contractor ever have disputes with each other. In this case, the same attorney represented a general contractor and its surety, INA, against claims by subcontractors against the general contractor on a school project in Harlingen. The attorney signed pleadings on behalf of the surety and the

189. *Id.* at 517.

190. *Id.* at 517-18.

191. 792 S.W.2d 554 (Tex. App.—Beaumont 1990, no writ).

192. *Id.* at 556.

193. *Id.* at 563.

194. *Id.* at 559.

195. 792 S.W.2d at 559.

196. 794 S.W.2d 812 (Tex. App.—Corpus Christi 1990) (overruling *mandamus* motion).

contractor during the pendency of these claims, all of which were consolidated into one lawsuit and settled. After these claims were settled, another materialman filed a lawsuit against the general contractor and surety. The same attorney once again entered his appearance, representing both the general contractor and the surety. Soon thereafter, the surety filed a lawsuit against the general contractor to recover adjusted premiums on a liability policy, and the general contractor counterclaimed against the surety company for a declaratory judgment and on a bad faith claim. The attorney, who had previously represented the surety and the general contractor, withdrew in the remaining bond claim action and attempted to represent the general contractor against the surety company. The surety subsequently filed a motion to disqualify the attorney because of his previous representation of the bond company. The trial court denied the motion and the surety brought a *mandamus* action to have him removed.¹⁹⁷ The attorney argued on appeal that his representation of the surety was a mere accommodation or *pro forma* relationship.¹⁹⁸ The appellate court found nothing in the disciplinary rules that permits a *pro forma* representation of a client and instructed the trial judge to disqualify the attorney from representation of the general contractor client against the surety.¹⁹⁹

B. Arbitration

The court of appeals in *USX Corp. v. West*²⁰⁰ dealt with a party greatly frustrated with arbitration procedures. In this case, Energy Buyers Service Corporation, a seller of natural gas, sued USX Corporation, a purchaser of natural gas, for breach of contract. Judge David West, the respondent in this *mandamus* action, heard this breach of contract action in Harris County, Texas. In the case in chief, the plaintiff sought \$158,000 for contractual damages and \$75,000,000 for lost profits and punitive damages. The contract in question contained a provision that any controversy arising under the agreement would be determined by arbitration in Columbus, Ohio, under the rules of the American Arbitration Association. .

The parties appealed this case to the appellate court twice. In the first appeal,²⁰¹ the appellate court granted *mandamus* relief, directing the trial court to grant a plea in abatement and refer the case to arbitration.²⁰² On December 14, 1989, the same appellate court once again heard disputes regarding the arbitration. In this appeal, USX Corporation complained that the other party to the action did not properly submit all of its claims to the arbitrator, including a claim for actual damages and punitive damages. Apparently, Energy Buyers, the other party to the arbitration, simply submitted a claim to the American Arbitration Association alleging breach of contract resulting in damages and including a counterclaim for damages arising from

197. *Id.* at 814.

198. *Id.*

199. *Id.* at 815.

200. 781 S.W.2d 453 (Tex. App.—Houston [1st Dist.] 1989, no writ).

201. 759 S.W.2d 764 (Tex. App.—Houston [1st Dist.] 1988).

202. *Id.* at 768.

the alleged breach. Energy Buyers further alleged that the arbitrator's duties did not include a determination on the damage issue.

The court of appeals' opinion is interesting in that it does not grant USX Corporation's petition to *mandamus* the judge to direct that all of the issues be submitted to arbitration. It does hold, however, that Texas courts have the power to compel arbitration under the Federal Arbitration Act²⁰³ and that a proper controversy subject to arbitration includes all claims for any type of damages that the parties have against each other, including breach of contract, actual damages and punitive damages.²⁰⁴ Furthermore, the court found that all issues in the controversy were before the arbitrator and, therefore, the enforcement of any pleading requirement, such as that sought by USX Corporation, is a procedural matter for determination by the arbitrator.²⁰⁵ Therefore, the court announced that since the arbitrator receives the entire case and becomes the judge for legal matters and fact finding on all issues that come before him, the courts will stay out of the dispute.²⁰⁶

C. Garnishment

In *Industrial Indemnity v. Texas American Bank—Riverside*²⁰⁷ the court dealt with an unfortunate, but common, scenario in the construction industry: a dispute involving insolvent subcontractors and contractors leaving litigation between the creditor of a subcontractor and a surety of a general contractor. The subcontractor, Shaw, performed work on a project for a general contractor, Hambrick-Craig, that was bonded by Industrial Indemnity, the surety company. The subcontractor was not paid on the job and obtained a judgment against Hambrick-Craig and the surety for \$17,120.12 plus interest. The surety appealed the judgment. In the meantime, a creditor of the subcontractor, Texas American Bank, obtained a judgment against the subcontractor, Shaw, and attempted to garnish the judgment amount that Industrial Indemnity Company owed Shaw. After the bank filed the writ of garnishment and the surety answered, but before trial of the matter, the surety settled its claim with Shaw and paid Shaw an agreed amount in compromise and settlement of the claim. In exchange, Shaw released the surety company.

In the garnishment proceeding, the trial court found that the surety violated the command of the garnishment and rendered a \$21,003.98 judgment against the surety from which the surety appealed. The surety took the position that the writ of garnishment did not reach its obligation to Shaw because the obligation was contingent and uncertain, on appeal, and without a

203. 9 U.S.C. § 4 (1988).

204. 781 S.W.2d at 455.

205. *Id.* at 456.

206. It is instructive to note the long time period involved and the fact that two appeals involving this arbitration have now been before the court of appeals, with no resolution, at least as of December, 1989. The goals of arbitration, economy and efficiency in the resolution of disputes, apparently have not been met in this case.

207. 784 S.W.2d 114 (Tex. App.—Fort Worth 1990, no writ).

final judgment.²⁰⁸ The court of appeals extensively reviewed the issue of whether Shaw's judgment against the surety was liquidated or unliquidated.²⁰⁹ The court also analyzed the wording of the writ of garnishment in connection with the state's procedural rules²¹⁰ and held that, in light of the words of the rule of civil procedure and writ of garnishment, the surety violated the order whether the judgment in favor of Shaw on appeal was liquidated or unliquidated.²¹¹ Therefore, the appellate court affirmed a trial court judgment in favor of the creditor against the surety,²¹² thus requiring the surety to pay twice.

D. Usury

It seems that some of the most onerous usury cases, holding sellers of goods or services liable for the penalties for usury, arise in disputes between suppliers in the construction industry and their vendees.²¹³ The review period did not go by without a typical suit arising on this subject. The facts in *White v. Groco Corp.*²¹⁴ are not unusual. White, an oil field service contractor, performed certain services for Groco Corporation (Groco), operator of an oil and gas lease. Groco's invoice to its customer contained a clause which allowed Groco to add one and one half percent per month to any remaining balance overdue by thirty days or more. Since this amount constituted more than twice the sum allowed by statute on open accounts without an agreement as to interest, the customer made a counterclaim of usury when sued for the unpaid balance due.²¹⁵ The trial court found usury, rendered a judgement that the contractor take nothing on its \$10,715.44 claim for services rendered, and allowed the customer to recover a judgment on its \$17,500.65 counterclaim for usury, plus attorney's fee.²¹⁶ The court of civil appeals reversed and rendered because of the fact that although the invoice language provided for usurious interest, neither the contractor nor his attorney ever made any demand for the payment of usurious interest.²¹⁷ In fact, the appellate court found that in the contractor's demand letter, its attorney asked for the proper statutory amount of interest at the rate of six percent

208. *Id.* at 119.

209. *Id.* at 119-21.

210. Texas Rule of Civil Procedure 661 commands the garnishee "NOT to pay to defendant any debt or to deliver to him any effects pending further order of this court." TEX. R. CIV. P. 661 (emphasis in original).

211. 784 S.W.2d at 122.

212. *Id.*

213. See, e.g., *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979) (declaring supplier's term of sale, which provided for 12% interest on unpaid accounts, usurious because statute sets cap of 10%).

214. 783 S.W.2d 24 (Tex. App.—Eastland 1990, writ denied).

215. If the parties have not agreed to an interest rate, the courts read the statutory rate of six percent per annum into the agreement 30 days after the sum lapses. TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987). "A party charging more than six percent under such circumstances is subject to the statutory penalties provided in TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1987)." *Risica & Sons, Inc. v. Tubelite*, 794 S.W.2d 468, 470 (Tex. App.—Corpus Christi 1990, no writ).

216. 783 S.W.2d at 25.

217. *Id.* at 26.

per annum commencing on the thirtieth day from and after the time when the sums become due and payable.²¹⁸

E. Insurance

The case of *T.C. Bateson Construction Co. v. Lumbermens Mutual Casualty Co.*²¹⁹ stands for the rule of exclusion under comprehensive general liability insurance policies customarily held by general contractors on projects. This rule allows coverage for injury or property damage to third parties or property of others that the insured's product may have damaged, but does not permit coverage for replacement and repair of the insured's property. This rule of exclusion is known as the business risk exclusion and the court of appeals in this case observed that parties widely recognize such business risk exclusions.²²⁰

In *Bateson* the general contractor installed certain marble sheets on the outside of a library for the University of Texas. When cracks appeared in the marble sheets, the University requested Bateson to make the repairs, which he refused to do. The University retained another contractor who made the repairs, and the University subsequently filed suit against Bateson for the cost of repairs. Bateson then made demand upon its insurance comprehensive liability carrier, Lumbermens, which denied coverage under the business risk rule. The trial court rendered a summary judgment in favor of the insurance company.²²¹ The court of appeals, after an extensive analysis, held the exclusions valid and affirmed the summary judgment against the general contractor.²²²

XIII. CONCLUSION

Since the Texas Legislature remained dormant during this review period, the courts mainly attempted to reaffirm and clarify prior legislative acts and current common law principles. Under basic contract law concepts, the courts dealt with fact-specific cases in order to analyze the intent of parties with regards to expressed negligence, home improvements and oral modifications. Also, the courts clarified the distinction between pleading in *quantum meruit* and substantial performance. Finally, the courts reaffirmed certain basic rules with particular significance to the construction industry, such as mechanic's liens, the master-servant relationship, and the various damage options available in the construction industry.

218. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987).

219. 784 S.W.2d 692 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

220. *Id.* at 695.

221. *Id.* at 694.

222. *Id.* at 700.