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# CONSTRUCTION LAW

by

*Richard Gary Thomas\* and Fred D. Wilshusen\*\**

**T**HIS Article represents the first annual review dedicated to the subject of construction law. Construction law has crystallized in recent years as a distinct substantive area best exemplified by the creation of a Construction Law Section by the Texas Bar Association. Notwithstanding this new sense of identity, the field of construction law continues to draw from and cross into a wide number of other substantive areas. The most obvious ones include: (1) general contract law pertaining to building and construction contract clauses; (2) mechanics and material suppliers lien laws; (3) surety law pertaining to bonded construction projects; and (4) the Deceptive Trade Practices Act. Some areas that may not be readily apparent to the practitioner who only occasionally handles construction matters include: (1) bad faith litigation arising from third party bond claims denied by sureties; (2) indemnity law governing indemnity clauses in construction contracts; and (3) arbitration law controlling construction disputes.

This Article separates the significant aspects of construction law into two broad categories. Part I analyzes the recent common law developments. Part II examines the statutory developments, particularly the substantial legislative changes in the state laws. The most significant changes will be highlighted and their potential implications discussed.

## I. COMMON LAW DEVELOPMENTS

### A. Contracts

Construction contracts contain clauses unique to the construction industry. Most construction contracts explicitly exclude extra work outside the scope of the contract. A construction contract, however, may be modified by a written change order expressly stating an agreed price for such work. Much construction litigation involves disputes about extra work that has not been documented in a written change order but that has, in fact, been performed.

In *Uhlir v. Golden Triangle Development Corp.*<sup>1</sup> the court examined the following contractual language:

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1. 763 S.W.2d 512 (Tex. App.—Fort Worth 1988, writ denied).

The Contractor shall perform all the Work required by the Contract Documents for . . . Construction and completion of the home at said address in conformance with plans and specifications attached. *Any changes to said plans and specifications after the effective date of this contract shall be in writing with charges determined prior to making changes.*<sup>2</sup>

At issue was extra work that the contractor had performed without the written agreement required by the contract. The court held that the contractor should recover for the additional work based upon quantum meruit;<sup>3</sup> the lack of written agreements did not defeat the claim.<sup>4</sup>

General contracts commonly specify the necessary insurance coverage and retain for the owner a degree of control over the storage of materials on the job site as well as the completion time for the job. *Pollard v. Missouri Pacific Railroad Co.*<sup>5</sup> illustrates the risks to an owner who retains even this modest amount of contractual control over the contractor. Pollard worked for a general contractor hired by Missouri Pacific (MOPAC) to remove poles and wires from one of MOPAC's right-of-ways. After being injured, Pollard sued MOPAC. The trial court granted summary judgment to MOPAC on the basis that MOPAC had not exercised control over the general contractor's actions under the contract.<sup>6</sup> Reversing the trial court summary judgment, the Texas Supreme Court held that MOPAC was potentially liable despite exercising no actual control over the contractor, because it contractually retained the right to control the contractor.<sup>7</sup> The minimal rights reserved in the general contract created for the owner a duty of care to Pollard.<sup>8</sup>

Pollard also asserted that MOPAC had an affirmative obligation to investigate the general contractor's safety history and work experience prior to entering into the contract. Accordingly, Pollard alleged that MOPAC breached its duty by hiring "an inexperienced contractor without inquiring into his experience and safety record."<sup>9</sup> The court impliedly held that such a duty exists by ruling that the allegations constituted sufficient grounds for reversal of summary judgment.<sup>10</sup>

A typical clause in subcontract agreements authorizes the general contractor to withhold payments from the subcontractor until the subcontractor has paid its suppliers and sub-subcontractors for their work and materials and has provided the general contractor with appropriate releases of liens evidencing such payments. In *Economy Forms Corp. v. Williams Bros. Con-*

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2. *Id.* at 515.

3. *Id.* at 517.

4. The court also held that the requirement for a written change order for extra work can be waived. Here, the contractor did not plead or prove nor was there a jury finding on waiver. Hence, the contractor could not recover on that theory. *Id.*

5. 759 S.W.2d 670 (Tex. 1988).

6. *Id.* at 671.

7. *Id.*

8. *Id.*; see *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417-18 (Tex. 1985).

9. *Id.*

10. *Id.*

*struction Co.*<sup>11</sup> a party supplying concrete-forming equipment to the subcontractor claimed such a provision created a third-party beneficiary contract right to the withheld funds in favor of the supplier. The traditional rule in Texas denies a third-party beneficiary rights of third-party claimants to retained funds.<sup>12</sup> The claimant in this case, however, contended that the retention provision in the subcontract covering any claims against the subcontractor established the intent of the parties to create a third-party beneficiary right. The court rejected this argument and concluded that the retention provision did not demonstrate an intent to benefit the supplier; rather, the language showed an intent to protect the general contractor from claims by third parties.<sup>13</sup>

Often, construction contracts will provide for performance by a contractor to the satisfaction of the other party. In *Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc.*<sup>14</sup> The court held that a party must act in good faith when a contract clause provides for performance to the satisfaction of one of the parties; courts will measure dissatisfaction by an objective standard of whether the performance would satisfy a reasonable person.<sup>15</sup> Interestingly, the *Cranetex* trial court made no express fact finding concerning good faith or whether the work performed would have satisfied a reasonable person. The appellate court, nevertheless, ruled as a matter of law that the trial court finding that the work was substantially complete was tantamount to a finding that the repairs met the reasonable person standard.<sup>16</sup>

### B. Substantial Performance

Generally, a party to a contract cannot recover damages for its breach unless that party shows that it has performed, or that it has offered to perform and was able to do so. The doctrine of substantial performance operates as an exception to this rule.

*Uhler v. Golden Triangle Development Corp.*<sup>17</sup> serves as a good example of the substantial performance rule. The contractor sought payment for labor and materials pursuant to a construction contract. The owner argued that the contractor had failed to meet conditions precedent because the contract provided for final payment only "when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect."<sup>18</sup> The trial court found that while the contractor did not fully and completely perform all of the work stipulated in the contract, the contractor had substantially completed the contract. The owner-defendant

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11. 754 S.W.2d 451 (Tex. App.—Houston [14th Dist.] 1988, no writ).

12. *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 504 (Tex. 1975); *Economy Forms Corp.*, 754 S.W.2d at 456, *Scarborough v. Victoria Bank & Trust Co.*, 250 S.W.2d 918, 922 (Tex. Civ. App.—San Antonio 1952, writ ref'd).

13. 754 S.W.2d at 456.

14. 760 S.W.2d 298 (Tex. App.—Texarkana 1988, writ denied).

15. *Id.* at 301-02.

16. *Id.* at 302.

17. 763 S.W.2d 512 (Tex. App.—Fort Worth 1988, writ denied).

18. *Id.* at 515.

argued that failure of the contractor to fully perform as expressly required by the contract precluded the contractor from recovery. Rejecting this argument, the appellate court held that "[a] finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects."<sup>19</sup> The court added that the lack of an architect's certificate likewise will not prevent recovery on a theory of substantial performance.<sup>20</sup>

The doctrine of substantial performance allows a contractor to recover the full performance price on the contract less the cost of remedying repairable defects.<sup>21</sup> The burden is upon the contractor to plead and prove the proper measure of deductions and expenses necessary to remedy the defects, deviations, and omissions.<sup>22</sup> This burden forces the claimant-contractor to prove inconsistent theories at trial if the contractor has pled full performance, and in the alternative, substantial performance. The contractor would have to provide evidence of full performance as well as evidence of expenses necessary to remedy defects. Nevertheless, failure by the contractor to introduce evidence of expenses necessary to remedy defects places the contractor in extreme risk of not making a prima facie case for substantial performance.<sup>23</sup>

In *Uhlir* the court held that a pleading of full performance of the construction contract will support the submission of an issue to the jury on its substantial performance.<sup>24</sup> This holding is apparently contrary to *Carr v. Norstok Building Systems, Inc.*<sup>25</sup> In *Carr* the contractor sued the owner and pled full performance but not substantial performance.<sup>26</sup> When the owner cross-claimed against the contractor alleging defective workmanship and materials, the contractor brought third-party actions against subcontractors who supposedly performed the work that was the subject of the owner's cross-claim. The court's opinion implies that the subcontractors introduced evidence of the contractor's substantial performance<sup>27</sup> and that the owner introduced evidence concerning defects and expenses necessary to cure them.<sup>28</sup> Nevertheless, the court ruled against the contractor holding that

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19. *Id.*

20. *Id.*

21. *Id.* at 514.

22. *Carr v. Norstok Bldg. Sys., Inc.*, 767 S.W.2d 936, 940 (Tex. App.—Beaumont 1989, no writ).

23. *Id.*

24. 763 S.W.2d at 514.

25. 767 S.W.2d 936 (Tex. App.—Beaumont 1989, no writ).

26. *Id.* at 939.

27. The court held that certain evidence adduced by the subcontractor/third-party defendants could not inure to the benefit of the plaintiff/contractor because the subcontractors were not parties to the general contract. *Id.* at 942. The court ruled that the limited scope of admissibility of evidence from parties other than the plaintiff/contractor precluded proof of substantial performance. *Id.* Hence, one must deduce that the subcontractors introduced evidence that was supportive of substantial performance by the contractor.

28. The owner introduced evidence to prove credits, deductions, and offsets in an effort to avoid payment of the full contract price. The court concluded that this evidence was offered to rebut the contractor's contention that the contract had been fully performed, thereby limiting its scope of admissibility. *Id.* at 944. Because the court ruled that no evidence supported substantial performance due to the limited scope of admissibility of certain evidence from parties other than the contractor, one must conclude that the evidence of the owner and sub-

neither the pleading nor the evidence supported the trial court's finding that the contractor had substantially performed its contract.<sup>29</sup> Construction attorneys should thus be forewarned that such inadequacies in pleading and proving a contractor's performance risks the same fate as that suffered by the contractor in *Carr*.

To avoid this risk, the contractor should plead full performance and, in the alternative, substantial performance. The contractor's case-in-chief should include evidence of the expense to remedy any defect alleged by the defendant. The *Uhlir* decision is instructive on how to submit both theories in the jury charge.<sup>30</sup>

The owner in the *Uhlir* case also argued entitlement to recover attorneys' fees for its cross-claim based upon breach of contract. The owner premised its breach of contract claim upon the defects found by the jury that supported the contractor's action for substantial performance. The court held that the evidence of offsets for incomplete or defective work that the contractor must present to make a prima facie case for substantial performance does not justify an award of attorneys' fees against the contractor on the owner's breach of contract claim.<sup>31</sup>

### C. Indemnity

Parties to construction contracts frequently define liability for personal injuries and property damage occurring during the construction process in an indemnity clause. Such an indemnity clause is sometimes known in the industry as a hold-harmless clause. Drafters of indemnity clauses in construction contracts should be acutely aware of the express negligence doctrine requiring a party seeking indemnity from the consequences of its own negligence to express that intent in specific terms<sup>32</sup>

*Atlantic Richfield Co. v. Petroleum Personnel, Inc.*<sup>33</sup> involved a personal injury claim by a contractor's employee against the owner. The court held that the following indemnity provision in the construction contract met the express negligence test and allowed indemnity by the owner against the

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contractors would have been sufficient to support a substantial performance finding if that evidence had been considered for all purposes.

29. *Id.* at 940, 944-45.

30. 763 S.W.2d at 514 (substantial performance jury question was submitted conditionally). *Uhlir* also provides a good definition of substantial performance for a residential construction case:

The term, "substantial completion," as used in this charge, means that the improvements contemplated in the construction agreement must be so completed that the premises is capable of being utilized for its intended purposes as a home even though there may be incompleteness aspects of the construction. The term, "substantial completion," contemplates a degree of completeness such that a reasonable person would be willing and able to make their home in the building. The term does not require that every aspect of the construction contract be fully completed.

31. *Id.* at 517.

32. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987) (replacing the less strict clear and unequivocal rule stated in *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972)).

33. 768 S.W.2d 724 (Tex. 1989).

contractor.<sup>34</sup>

CONTRACTOR [PPI] agrees to hold harmless and unconditionally indemnify COMPANY [ARCO] against and for all liability, cost, expenses, claims and damages which [ARCO] may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons or property or both, of [PPI], or of the workmen of either party, or of any other parties, or to the property of [ARCO], in any matter arising from the work performed hereunder, including but not limited to any negligent act or omission of [ARCO], its officers, agents or employees . . .<sup>35</sup>

The court thus rejected the employee's contention that the express negligence test requires specification of the kind, character, or degree of negligence that is to be indemnified in the clause.<sup>36</sup>

In *Monsanto Co. v. Owens-Corning Fiberglas Corp.*<sup>37</sup> an employee of the subcontractor, Owens-Corning, brought a personal injury claim against the general contractor, Monsanto. As the employee had collected worker's compensation from Owen-Corning's insurance carrier, Monsanto could not seek indemnity against Owens-Corning absent a contractual indemnity provision. The indemnity provision in Monsanto's subcontract with Owens-Corning stated:

Contractor agrees to indemnify and save Monsanto and its employees harmless against any and all liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including costs of defense, settlement and reasonable attorneys' fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out . . . as a result of bodily injuries . . . to any person or damage . . . to any property occurring to or caused in whole or in part by, Contractor (or any of his employees), any of his Subcontractors (or any employee thereof), or any person, firm or corporation (or any employee thereof) directly or indirectly employed or engaged by either Contractor or any of his Subcontractors.<sup>38</sup>

The court held that this hold-harmless clause did not support Monsanto's indemnity suit against Owens-Corning because it does not qualify under the express negligence doctrine without including the term "negligence."<sup>39</sup>

A curious development in the express negligence doctrine occurred in *Continental Steel Co. v. H.A. Lott, Inc.*<sup>40</sup> Continental, the subcontractor, appealed from a judgment in favor of Lott, the general contractor, indemnifying Lott for attorneys' fees generated in successfully defending against a personal injury claim based on negligence brought by one of Continental's employees. Continental contended that the indemnity provision in its contract with Lott did not meet the requirements of the express negligence doc-

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34. *Id.* at 726.

35. *Id.* at 724 (emphasis added by court).

36. *Id.* at 726.

37. 764 S.W.2d 293 (Tex. App.—Houston [1st Dist.] 1988, no writ).

38. *Id.* at 295.

39. *Id.*

40. 772 S.W.2d 513 (Tex. App.—Dallas 1989, writ denied).

trine and therefore did not authorize indemnity for attorneys' fees expended in defending against a claim asserting Lott's negligence. The appellate court rejected Continental's argument because the jury found Lott was not negligent, thereby rendering the express negligence doctrine inapplicable.<sup>41</sup> The majority therefore required Continental to pay Lott's attorneys' fees for defending against a negligence suit in which Continental presumably would not have had to pay either attorneys' fees or damages had Lott been found negligent.<sup>42</sup> The dissent points out the similarity between indemnity and insurance contracts, noting that if an insurance policy excludes coverage for a particular claim, it also excludes any coverage for the cost of defending against such claims.<sup>43</sup> The better reasoned approach is to hold that when an indemnity provision does not meet the express negligence doctrine it does not allow for a recovery of attorneys' fees for defending successfully against a negligence claim.

Construction contracts are not the only types of agreements involving indemnification. The complexity of commercial construction and the large number of parties involved in construction litigation produces partial settlements with some litigants and not others. Often, these partial settlements involve agreements to indemnify one of the parties. Attorneys should carefully draft such settlement agreements considering the requirements of the express negligence doctrine and avoiding all outstanding liability to non-participating defendants.

In *Manhattan Construction Co. v. Hood Lanco, Inc.*<sup>44</sup> the plaintiff sued the contractor for flooding caused by construction on an adjoining land owner's tract. The contractor settled with the plaintiff and received an indemnity agreement against anyone "claiming by, through or under [the plaintiff]."<sup>45</sup> The codefendant, the adjoining landowner who had hired the contractor, cross-claimed against the contractor under a provision in the general contract whereby the contractor indemnified the owner against any damage or injury claim. The contractor sued the plaintiff under the settlement indemnity provision to indemnify him from the cross-claim. The court rejected the contractor's argument concluding that the cross-claim was not by, through or under the plaintiff.<sup>46</sup> Hence, the court granted summary judgment against the general contractor.<sup>47</sup>

#### *D. Mechanics and Material Suppliers Lien and Bond Claims*

*Gill Savings Association v. International Supply Co., Inc.* addresses several propositions regarding lien claims.<sup>48</sup> First, the *Gill* case validated a lien affidavit signed by Gill's attorney who lacked personal knowledge of the facts

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41. *Id.* at 516.

42. *Id.* at 517.

43. *Id.* at 523.

44. 762 S.W.2d 617 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

45. *Id.* at 619.

46. *Id.*

47. *Id.*

48. 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).



stated therein.<sup>49</sup> The better practice is to obtain the signature of someone who has personal knowledge of the claim and who is connected with the claimant itself. Occasionally, a construction attorney may face time and distance limitations that preclude obtaining such signature on the affidavit by the filing deadline. To prevent the loss of valuable rights, counsel may rely upon this ruling and sign the affidavit to meet the filing deadline. This practice should be used sparingly and only when absolutely necessary to preserve valuable rights. When counsel has signed the lien affidavit, he may want to consider filing at the earliest possible date a corrected or supplemental affidavit signed by one with personal knowledge of the facts.

Second, the opinion in *Gill* addresses the problem presented when a lien affidavit overstates the amount of the claim. At the time lien affidavits are filed, it is often difficult to establish with precision the exact amount due for the claimant's labor and materials. In addition to routine accounting errors, the value of extra work outside the scope of the contract and offsets or backcharges for incomplete or poor quality work often are not conclusively determined until a trial on the merits. If the fact finder concludes that the amount of the claim is less than the amount stated in the lien affidavit the *Gill* court strongly suggests that such discrepancy does not invalidate the entire lien.<sup>50</sup> The lien affidavit in *Gill* stated that Gill Savings Association currently owed \$75,986.03. At trial, the lien claimant's representative admitted that the amount shown in the lien affidavit was incorrect and that the correct amount due was \$57,365.32. The court held that under the facts of the case, the lien affidavit was in substantial compliance with the property code.<sup>51</sup> Therefore, the discrepancy between the amount claimed in the lien affidavit and the lien claimant's evidence did not invalidate the lien.

*Gill* also reasserted an important procedural requirement for a defendant to raise successfully an improper notice defense. Pursuant to the Texas Rules of Civil Procedure<sup>52</sup> a plaintiff who pleads that all conditions precedent have been met to perfect a lien claim need not prove the intricate notice deadline requirements to establish his prima facie case unless and until the defendant specifically denies timely or proper notice. In *Gill* the defendants failed to deny specifically inadequacy of notice and, therefore, certain amounts of the lien that apparently were claimed untimely were validated.<sup>53</sup>

The primary issue in *Occidental Nebraska Federal Savings Bank v. East End Glass Co.*<sup>54</sup> was whether the claimant gave adequate notice of its intent to file a lien. The claimant sent its notice to the contractor rather than to the actual owner of the property. The court found that the claimant's notice

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49. *Id.* at 699.

50. *Id.* at 700.

51. (Citing TEX. PROP. CODE ANN. § 53.054(a)(1) (Vernon 1984), requiring claimant in lien foreclosure action to file sworn affidavit that includes amount of outstanding debt).

52. TEX. R. CIV. P. 54.

53. 759 S.W.2d at 701; *see also*, *BC & S Constr., Inc. v. Action Elec. Co.*, 753 S.W.2d 841, 842 (Tex. App.—Fort Worth 1988, no writ) (noting that Tex. R. Civ. P. 54 allows claimant to aver generally that all conditions precedent occurred; claimant need only prove those conditions precedent that respondent specifically denies were performed).

54. 773 S.W.2d 687 (Tex. App.—San Antonio 1989, no writ).

substantially complied with the notice requirements of the statute.<sup>55</sup> The court gave several reasons for its decision: the same individuals were involved in an interlocking relationship between the contractor and the owner, the owner and the contractor were listed at the same address, and the construction deed of trust indicated the same address for the owner and the notice delivery.<sup>56</sup>

The *Occidental* court also identified two important factors applicable to less clear cases involving the issue of substantial compliance with property code requirements. First, the court observed that the purpose of the notice was to allow the owner self-protection by withholding funds from the contractor.<sup>57</sup> That purpose was not defeated in this case because the owner defaulted not only on its payment to the claimant, but also on its payments to the lender. Apparently, the court relied upon the owner's inability to make payments as evidence that the notice would have been futile; the court thus willingly relaxed statutory notice requirements.<sup>58</sup> Second, the court held that the owner actually received written notice and therefore the method of delivery was immaterial.<sup>59</sup> Significantly the court does not recite any evidence to reflect actual delivery of the notice to the owner. The court could have more properly reached the same result by invoking the sham contract provisions in the property code<sup>60</sup> that authorize the court to ignore a sham entity standing between the owner and second-tier claimants.

The scope of a mechanic's lien can be the subject of a construction dispute. In *H.B. Zachry Co. v. Wallercreek, Ltd. (In re Waller Creek Ltd.)*<sup>61</sup> the court considered whether the perfection of a mechanic's lien on a parking garage extended to a hotel that had been constructed on top of the parking garage. The garage and the hotel were constructed independently under separate contracts. The court perceived the legal issue to be whether simply by negotiating separate contracts for different segments of the final completed project can limit a mechanic's lien.<sup>62</sup>

The court held that the parking garage lien did not extend to the hotel,<sup>63</sup> basing its ruling upon *Lyon v. Logan*,<sup>64</sup> which held that the owner controls the scope of a mechanic's lien. The *Waller Creek* court reasoned that the contractor could not have been deceived regarding the scope of its lien on the garage because the parties treated the garage and hotel construction contracts as separate and distinct projects.<sup>65</sup> Hence, if the legal structure of a

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55. *Id.* at 689 (TEX. PROP. CODE ANN. § 53.003(d) satisfied by actual receipt of notice regardless of method of delivery).

56. *Id.* at 688.

57. *Id.* at 688.

58. *Id.* at 688-89.

59. *Id.* at 689 (court relying on Tex. Prop. Code Ann. § 53.0031d) (Vernon 1984)).

60. TEX. PROP. CODE ANN. § 53.026 (Vernon 1984) amended by TEX. PROP. CODE ANN. § 53 (Vernon Supp. 1990).

61. 867 F.2d 228 (5th Cir. 1989).

62. *Id.* at 235.

63. *Id.* at 236.

64. 68 Tex. 521, 5 S.W. 72 (1887).

65. 867 F.2d at 235.

total project involves multiple and distinct construction contracts, the scope of the mechanic's liens are limited to the real property covered by each contract.

The contract limitation principle will likely apply to second tier claimants as well. Subcontractors and material suppliers on the project, however, may not possess the same degree of knowledge as the general contractor regarding the legal structure of the construction contracts. The danger of deception as to the scope of their mechanic's lien is greater than existed for the general contractor in the *Waller Creek* case. If deception is possible, a court may conclude that the scope of the lien is not limited by the terms of a single contract.

The use of construction bonds on commercial construction projects is commonplace. Contractors frequently employ payment bonds and performance bonds on both private and public projects. For publicly owned projects involving the state of Texas, performance and payment bonds are statutorily required when the prime contract exceeds \$25,000.<sup>66</sup> Payment bonds are also statutorily authorized for privately owned construction projects.<sup>67</sup> Likewise, when a claimant on a privately owned construction project attempts to fix a mechanic's and materialman's lien, the owner may obtain a bond to indemnify against the lien pursuant to specific provisions of the property code.<sup>68</sup>

The authorizing statutes contain specific bond requirements.<sup>69</sup> In *Sheldon Pollack Corp. v. Pioneer Concrete, Inc.*<sup>70</sup> the general contractor-defendant posted a bond to indemnify against a mechanic's lien. The contractor intended to comply with the requirements of the statute, but the bond contained a limitation of liability that was not included in the statute.<sup>71</sup> The court refused to enforce the limitation of liability because it exceeded the limitations expressed in the statute.<sup>72</sup>

### E. Condominiums

In *Burton v. Cravey*<sup>73</sup> the court held that dissident condominium owners have full access to condominium records and the association's attorney's records.<sup>74</sup> A liberal view of such discovery in many condominium construction cases can radically undermine the attorney-client privilege. For example, typical condominium construction cases involve design and construction

66. TEX. REV. CIV. STAT. ANN. art. 5160A (Vernon Supp. 1990).

67. TEX. PROP. CODE ANN § 53.201 (Vernon 1984).

68. *Id.* §§ 53.171-.174 (Vernon 1984 & Supp. 1990).

69. *Id.* § 53.172 (Vernon Supp. 1990) (payment bonds on privately owned projects); *Id.* § 53.202 (bonds to indemnify on privately owned projects); TEX. REV. CIV. STAT. ANN. art. 5160A (Vernon Supp. 1990) (publicly owned projects with the State of Texas).

70. 765 S.W.2d 843 (Tex. App.—Dallas 1989, writ denied).

71. See TEX. PROP. CODE ANN., § 53.171 (Vernon 1984 & Supp. 1990).

72. (Citing TEX. PROP. CODE ANN. § 53.171 (Vernon 1984), amended by 765 S.W. 2d at 846 TEX. PROP. CODE ANN. § 53.172 (Vernon Supp. 1990)).

73. 759 S.W.2d 160 (Tex. App.—Houston [1st Dist.] 1988, no writ).

74. *Id.* at 161-62. The court relied on TEX. PROP. CODE ANN. § 81.209 (Vernon 1984) and TEX. REV. CIV. STAT. ANN. art. 1396-2.23 (Vernon 1980).

disputes against the original development-owner and delinquency cases for nonpayment of assessment fees against the owner. The developer-owner who still owns one or more condominium units or the condominium owner being sued for delinquent payment may thus possess the right to inspect traditionally privileged attorney's records of the condominium association bringing suit against them. Hopefully, courts will not apply this rule in a way that discourages free and frank exchanges of information and ideas between attorneys and their clients, especially during adversary proceedings.

#### F. Good Faith and Fair Dealing

The complexity of construction projects, the degree of cooperation required for their successful completion, and the frequent issuance of payment bonds by sureties has quickly brought the implied duty of good faith and fair dealing to the forefront of construction litigation. In *City of San Antonio v. Forgy*<sup>75</sup> the general contractor sued the city for breaching the duty of good faith and fair dealing and for failing to pay some \$400,000 in repair costs on a water well whose metal casing had ruptured while being set. Relying on *English v. Fischer*<sup>76</sup> the *Forgy* court examined whether the special relationship necessary to find an implied covenant of good faith and fair dealing arose from either the element of trust essential to accomplish the goals of the contractual undertaking or an imbalance in bargaining power.<sup>77</sup>

The city engineers in *Forgy*, following the pre-bid conference, made calculations that revealed the vulnerability of the casing to collapse if constructed as designed. The general contractor contended that the city's failure to warn him of its discovery of the flaw in the casing design constituted a breach of trust within the special relationship between the parties. The court rejected the general contractor's argument because the contract obligated the general contractor to examine the specs and to accept sole responsibility for the "safety, adequacy and efficiency of his plant, equipment and methods".<sup>78</sup> The court thus held that the city's failure to warn did not give rise to a claim for a breach of the duty of good faith and fair dealing, but only created the possibility of a negligence claim.<sup>79</sup>

The court also held that an imbalance in bargaining power, one element of a claim for a breach of the duty of good faith and fair dealing, "is limited to an imbalance of bargaining power conferred upon the parties by the terms of the contract with respect to performance or enforcement and not with respect to original formation of the contract."<sup>80</sup> The court therefore also denied the claim on the basis of an imbalance of bargaining power because "[t]he record fails to reveal any evidence or provision of the contract which gave the City the right or opportunity, with little or no injury to itself, to

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75. 769 S.W.2d 293 (Tex. App.—San Antonio 1989, writ denied).

76. 660 S.W.2d 521, 525 (Tex. 1983).

77. 769 S.W.2d at 296.

78. *Id.* at 297.

79. *Id.*

80. *Id.*

take advantage of Mr. Forgy's want of information or diligence, lack of resources or inability to protect his own interests."<sup>81</sup> Essentially, because the contract gave Forgy the opportunity to protect himself, no imbalance in bargaining power apparently existed.

### G. *Deceptive Trade Practices-Consumer Protection Act*

Two significant construction dispute cases occurred under the Deceptive Trade Practices-Consumer Protection Act (DTPA)<sup>82</sup> during the survey period. In *Ludt v. McCollum*,<sup>83</sup> a case involving damages to a building, the court specifically held that a DTPA claimant can recover both the cost of repairs and the amount of reduction in the building's value without obtaining a double recovery if the damages question specifically limits the amount of reduction in value to a period after repairs have been completed.<sup>84</sup> In *Eckman v. Centennial Savings Bank*,<sup>85</sup> a case in which a real estate development group sued a bank for failing to provide financing as represented, the court established the procedural rules for applying the \$25 million assets exception to business consumer status. Specifically, the court held that the defendant must raise the issue through a special exception and request an in-camera inspection of the evidence relating to the plaintiff's assets.<sup>86</sup> If the court determines that a genuine issue of material fact exists, then the plaintiff must prove to the fact finder that it does not fall within the exception.<sup>87</sup>

### H. *Insurance*

Contractors routinely carry comprehensive general liability coverage. In *Gar-Tex Construction Co. v. Employers Casualty Co.*<sup>88</sup> the court examined the liability of the insurance carrier on a comprehensive general liability policy. Gar-Tex, the subcontractor who constructed an underground concrete water storage tank, was responsible for protecting the tank against water damage while construction was in progress. During a heavy rain, pumps installed to keep the excavation site dry failed to prevent accumulation of water which damaged the tank forcing repairs of approximately \$50,000.

The court upheld a summary judgment that barred Gar-Tex's claim as a matter of law under a faulty workmanship exclusionary provision in the liability policy.<sup>89</sup> The court essentially interpreted Gar-Tex's contract obligation to keep the excavation site dry as an absolute requirement of performance; any failure to keep the site dry thus equated to faulty workmanship as a matter of law. If the court had not viewed the specification as

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81. *Id.* at 298.

82. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon 1987).

83. 762 S.W.2d 575 (Tex. 1988).

84. *Id.* at 576.

85. 32 Tex. Sup. Ct. J. 46 (October 26, 1988) (motion for rehearing pending).

86. *Id.* at 47-48.

87. *Id.* at 48.

88. 771 S.W.2d 639 (Tex. App.—Dallas 1989, writ denied).

89. *Id.* at 643.

creating absolute performance obligations for the contractor but rather as creating a duty to perform in a good and workmanlike manner, the court would have probably found a question of material fact rendering the summary judgment improper.

The Court agreed that Gar-Tex's alternative argument that defective work performed by it causing damage to other nondefective Gar-Tex work would not exclude coverage for the latter under the faulty workmanship provision of the insurance policy.<sup>90</sup> The court found, however, that the water pumps which failed could not be considered divisible from the damaged water tank.<sup>91</sup> Therefore, the damage was not to other nondefective work; rather, to the entire job, thereby relieving the insurer of liability for any damage caused by Gar-Tex's faulty workmanship.<sup>92</sup>

### I. Statute of Repose

*Johnson v. City of Fort Worth*<sup>93</sup> raised the question of whether the ten year statute of repose<sup>94</sup> regarding design claims applies to claims by a city. The city sued the architects of a city water park for contribution to damages arising out of injuries to a park visitor. The city contended that the publisher of the codified statute of repose inadvertently omitted a provision that excluded the application of the statute to the city and thereby substantively changed the law. The court rejected this argument as it was based on the unofficial actions of the publisher and thus held that the statute of repose does apply to cities.<sup>95</sup>

### J. Arbitration

In *Wylie Independent School District v. TMC Foundations, Inc.*<sup>96</sup> the court significantly extended the common law of arbitration. It enforced an otherwise unenforceable arbitration clause under the common law by holding that "an agreement to arbitrate future contractual disputes is specifically enforceable even in the face of one party's attempted revocation of that agreement prior to an arbitration award."<sup>97</sup> This decision is less significant than it would have been a few years ago; the legislature removed the greatest stumbling block to the enforcement of arbitration agreements under statute by eliminating a technical notice requirement.<sup>98</sup> Nonetheless, the new law only

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90. *Id.*

91. *Id.* at 644.

92. *Id.*

93. 774 S.W.2d 653 (Tex. 1989).

94. TEX. CIV. PRAC. & REM. CODE ANN. § 16.008 (Vernon 1986) (providing ten-year statute of limitation from date of substantial completion or initial operation of facility or equipment in suit against architect or engineer).

95. 744 S.W.2d at 655.

96. 770 S.W.2d 19 (Tex. App.—Dallas 1989, no writ).

97. *Id.* at 23.

98. See TEX. REV. CIV. STAT. ANN. § 224-1 (Vernon Supp. 1990) (removing provision providing arbitration agreement would not be enforced unless contract contained prominent notice of arbitration on its first page).

applies to contracts effective on or after August 31, 1987,<sup>99</sup> and the extension of the common law of arbitration will substantially impact contracts entered prior to that date.

Counsel should note that an enforceable arbitration right can be waived. In *Bramcon General Contractors, Inc. v. Wigley Construction Co.*,<sup>100</sup> the general contractor, Bramcon, delayed moving to compel arbitration of its disputes with its subcontractor, Wigley, until after Wigley had filed a motion for summary judgment. The court found that, among other things, the following actions by Bramcon constituted a waiver of its right to arbitration: filing an answer; failing to plead the arbitration clause in its answer; allowing Wigley to request a trial date before requesting arbitration; and allowing Wigley to file a motion for summary judgment before requesting arbitration.<sup>101</sup>

## II. STATUTORY DEVELOPMENTS

The Seventy-First Texas Legislature enacted substantial revisions to the mechanic's lien and construction bond laws.<sup>102</sup> The changes encompass housekeeping changes effecting greater clarity in the meaning of the statutes as well as substantive changes substantially altering rights under the former statute. Highlights of the amendments will be discussed.

### A. *Effective Date*

Because the recent changes to the mechanic's lien and construction bond laws restrict the time limits for perfecting claims and the statute of limitations for suing on claims, whether a claim is governed by the old law or by the revised law affects its validity. The changes take effect September 1, 1989.<sup>103</sup> The revised law applies "only to matters relating to an original contract that is entered into on or after the effective date of this Act."<sup>104</sup> This provision may create difficulties for some parties. Lower tier contractors or suppliers will not necessarily have immediate access to information regarding the date that the parties entered into the original contract, thereby creating uncertainty as to which law applies. Additionally, when a general contract is oral, parties will encounter more difficulty in ascertaining the date it became enforceable.

The effective date of the revised law also means that the old law will not quickly fall into disuse. With the substantial duration of larger construction projects, lien or bond claims may be governed by the old law up to several years in the future.

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99. *Id.*

100. 774 S.W.2d 826 (Tex. App.—El Paso 1989, no writ).

101. *Id.* at 827.

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

103. *Id.* § 41, at 4707.

104. *Id.* § 40, at 4707. The act further states: "Matters relating to an original contract that is entered into before that date [September 1, 1989] are governed by the law as it existed on the date the contract was entered into, and the prior law is continued in effect for that purpose." *Id.*

### B. Architects, Engineers or Surveyors

The statutory revision added a new provision entitling an architect, engineer, or surveyor to a lien for preparation of plans or plats in connection with proposed construction or repair of improvements on real property.<sup>105</sup> Most significantly, this provision apparently allows design professionals to claim a lien under certain conditions for work despite no on-site supervision.<sup>106</sup> Inexplicably, the legislature not only passed this revision in the comprehensive amendments to the lien and bond laws but also included a similar provision in a separate act,<sup>107</sup> which provides for a different manner for determining which work the revised law affects.<sup>108</sup> The separate act applies to "contracts executed by an architect, engineer, or surveyor on or after the effective date [September 1, 1989] of this Act."<sup>109</sup> In attempting to show the applicability of the new law, the design professional presumably can therefore look to the date of its contract for preparatory design work.

Traditionally, liens, regardless of when the work was performed, had their inception at some common time at the beginning of the project.<sup>110</sup> The inception date determines the priority between mechanic's liens and other competing liens.<sup>111</sup> Allowing lien claims for pre-construction design work raises the question of whether the inception date for all liens is now moved back to a time prior to the commencement of actual construction. The revisions, however, provide that the design professional's work will not affect the inception date of any lien and will be governed by the same provisions<sup>112</sup> regarding the inception of other liens.<sup>113</sup>

### C. Filing of the Affidavit of Lien

Another significant revision under the new law alters the filing deadline

105. TEX. PROP. CODE ANN. § 53.021(c) (Vernon Supp. 1990).

106. Prior to the adoption of this provision, the trend in Texas had been to require an architect to perform on-site supervisory work before claiming a lien. See, e.g., *Branecy v. Seaman*, 688 S.W.2d 117, 120 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *Lancaster v. McKenzie*, 439 S.W.2d 728, 729 (Tex. Civ. App.—El Paso 1965, no writ). Both cases cite *Sanguinett & Staats v. Colorado Salt Co.*, 150 S.W. 490, 491 (Tex. Civ. App.—Fort Worth 1912, no writ) as precedent for the on-site supervision requirement. In *Sanguinett & Staats* the court simply held that "in preparing the plans and specifications, as well as in superintending the construction of the improvements . . . [the architect] furnished 'labor' 'to erect' those improvements, within the meaning of our [lien] statute."

107. TEX. PROP. CODE ANN. § 53.021 (Vernon Supp. 1990).

108. *Id.* (Compare Act of June 14, 1989, Ch. 395, § 2, 1989 TEX. GEN. LAWS 1527, 1528 (applying to contracts executed by architect, engineer or surveyor on or after September 1, 1989) with Act of June 16, 1989, Ch. 1138, § 40, 1989 TEX. GEN. LAWS 4693 (applying to matters relating to original contracts entered into on or after September 1, 1989)).

109. *Id.*

110. See *Id.* § 53.124 (Vernon 1984), amended by *Id.* § 53.124 (Vernon Supp. 1990) (repealing provision that inception of lien occurs when contract for construction executed).

111. See TEX. PROP. CODE ANN. § 53.123(b) (Vernon 1984) (any lien, encumbrance or mortgage on the land at the time of the inception of the mechanic's lien is not affected by the lien).

112. See *Id.* § 53.124 (Vernon Supp. 1990) (defining "time of inception" as "commencement of construction of improvements or delivery of materials").

113. *Id.* § 53.021(d).



for notices to perfect lien and bond claims as well as for the lien affidavit.<sup>114</sup> The general scheme under the prior law set a certain number of days for the claimant to take the required action.<sup>115</sup> The time periods usually ran from the tenth day of the month following the month in which a specified activity took place. For example, for one other than a general contractor,<sup>116</sup> the lien affidavit filing deadline ran from the time on which the indebtedness accrued;<sup>117</sup> the indebtedness accrued "on the 10th day of the month following the last month in which the labor was performed or the material furnished."<sup>118</sup>

Because of the varying numbers of days in different months, the deadline for taking action under the former law never fell on a uniform day during every month.<sup>119</sup> The statutory revisions now provide that deadlines will uniformly fall on the fifteenth day of a month.<sup>120</sup> Consistent with former law, the amendments trigger the running of the time period for filing a lien affidavit from the day on which the indebtedness accrues.<sup>121</sup> Although the date on which the indebtedness accrues differs for a general contractor and other claimants,<sup>122</sup> the statutory revisions stipulate a uniform filing date as the fifteenth day of the fourth calendar month after the day on which indebtedness accrues.<sup>123</sup> This provision extends the filing deadline for a lien affidavit of subcontractors and suppliers by a few days.<sup>124</sup> Nevertheless, these additional days will mean little for subcontractors and suppliers whose lien rights

114. *Id.* § 53.052(a).

115. *See, e.g., Id.* § 53.052(b), (c) (Vernon 1984), (120 days from accrual of indebtedness for original contractor to file affidavit of lien and 90 days for other claimants to file affidavit of lien), *amended by Id.* § 53.052(a) (Vernon Supp. 1990).

116. For purposes of this article the terms "general contractor" often will be used but should be understood to mean "original contractor" which is the term used in the statute for any person in a direct contractual relationship with the owner. TEX. PROP. CODE ANN. § 53.001(7) (Vernon 1984).

117. *Id.* § 53.052(c) (Vernon 1984), *amended by Id.* § 53.052(a) (Vernon Supp. 1990).

118. TEX. PROP. CODE ANN. § 53.053(a)(2) (Vernon 1984), *amended by Id.* § 53.053(a) (Vernon Supp. 1990).

119. For example, if indebtedness accrued for a subcontractor during the month of January, the deadline for filing his lien affidavit during a leap year would be May 10th, but in a non-leap year would be May 11th.

120. TEX. PROP. CODE ANN. § 53.052(a) (Vernon Supp. 1990).

121. *Compare Id.* § 53.052(a) (Vernon Supp. 1990) ("The person claiming the lien must file an affidavit . . . not later than the 15th day of the fourth calendar month after the day on which the indebtedness accrues.") with *Id.*, § 53.052(b) (Vernon 1984) ("An original contractor must file the affidavit not later than the 120th day after the day on which the indebtedness accrues.") *amended by Id.* § 53.052(a) (Vernon Supp. 1990).

122. *Compare* TEX. PROP. CODE ANN. § 53.053(b) (Vernon Supp. 1990):

"Indebtedness to an original contractor accrues: (1) on the last day of the month in which a written declaratin by the original contractor or the owner is received by the other party to the original contract stating that the original contract has been terminated; or (2) on the last day of the month in which the original contract has been completed, finally settled, or abandoned."

with *Id.* § 53.053(c):

"Indebtedness to a subcontractor, or to any person not covered by Subsection (b) or (d), who has furnished labor or material to an original contractor or to another subcontractor accrues on the last day of the month in wich the labor was performed or the material furnished."

123. TEX. PROP. CODE ANN. § 53.052(a).

124. For example, under the prior law if indebtedness accrued for a subcontractor in Au-

are jeopardized not by the filing deadline for the lien affidavit, but rather by the much shorter deadlines for sending notice letters to perfect such claims.<sup>125</sup>

#### D. Contents of a Lien Affidavit

The statutory revisions now require the lien affidavit to include the claimant's business address.<sup>126</sup> Additionally, the statute deletes the words "if known" after the requirement that the affidavit include the name of the owner or reputed owner.<sup>127</sup> Claimants must therefore now make some attempt to state the name of an owner in the lien affidavit. Permitting a claimant to name a reputed owner may nevertheless provide the margin of safety necessary to protect the claimant when confusion arises regarding the actual owner.<sup>128</sup>

#### E. Notice of the Filed Affidavit

As with the old law, the statutory revisions require notice of the filing of the lien affidavit to be sent to the owner.<sup>129</sup> The new law, however, now engrafts onto the notice requirement a ten-business-day deadline subsequent to filing.<sup>130</sup> In addition, the claimant must send a copy to the general contractor within the same period.<sup>131</sup> An issue left unanswered is whether failure to comply with this requirement will effectively avoid liens properly perfected in all other respects.<sup>132</sup>

#### F. Notice Requirements

Perhaps the most significant practical change of the statutory revisions was the alteration of a subcontractor's time limits for giving notice of an intent to file a lien.<sup>133</sup> A subcontractor under the prior law had ninety days from the tenth day of the month following the month in which it had furnished labor and material to send a notice of intent to file a lien.<sup>134</sup> Under the statutory revisions the subcontractor must send the notice letter by the

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gust, the filing deadline for the lien affidavit would be December 9. Under the statutory revisions the filing deadline would be December 15.

125. See *infra* Section II.F.

126. TEX. PROP. CODE ANN. § 53.054(a)(7) (Vernon Supp. 1990).

127. Compare *Id.* § 53.054(a)(2) (Vernon 1984) with *Id.* § 53.054 (a)(2) (Vernon Supp. 1990).

128. TEX. PROP. CODE ANN. § 53.054(a)(2) (Vernon Supp. 1990).

129. *Id.* § 53.055.

130. *Id.*

131. *Id.*

132. See generally *First Nat'l Bank v. Sledge*, 653 S.W.2d 283, 287-88 (Tex. 1983) (subcontractor who only sent one copy of affidavit rather than required two copies satisfied notice requirement); *Cabintree, Inc. v. Schneider*, 728 S.W.2d 395, 397 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd) (notice of filing sent two months after last day on which affidavit could have been filed held not to be timely).

133. Subcontractor is used to mean anyone in a direct contractual relationship with the general contractor.

134. TEX. PROP. CODE ANN. § 53.056(b)-(c) (Vernon 1984), amended by *Id.* § 53.056(b)-(c) (Vernon Supp. 1990).

fifteenth day of the third month following the month in which it furnished the labor or material.<sup>135</sup> The effect of this amendment is to reduce the time limit for a subcontractor to send its notice letter to the owner by approximately one month.<sup>136</sup> Because the lien claim's validity depends upon the giving of timely notice, the subcontractor must be particularly diligent to avoid losing part or all of his lien claim under the newly reduced notice periods.

### G. *Lien on a Homestead*

A claimant traditionally has to meet more stringent requirements to perfect a lien on a homestead than on non-homestead property.<sup>137</sup> The recent statutory changes require an additional bold-faced notice at the top of the homestead lien affidavit: "NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN."<sup>138</sup> Not only must a homestead lien comply with the notice requirement for any other lien, the notices of intent to lien now must also contain a lengthy notice aimed specifically at the homestead owner.<sup>139</sup> The failure to include this specific language arguably voids the effect of an otherwise adequate notice letter to a homestead owner.<sup>140</sup>

### H. *Affidavits of Commencement and Completion*

The statutory revisions created two concepts. The new law now allows the owner and general contractor to file jointly an affidavit of commencement<sup>141</sup> and the owner alone to file an affidavit of completion.<sup>142</sup> Both affidavits constitute prima facie evidence of their contents, namely commencement<sup>143</sup> and completion;<sup>144</sup> both affidavits may be rebutted if they incorrectly reflected the actual date of the respective events.<sup>145</sup> The affidavit of commencement is significant in establishing the inception of liens and clarifies for the construction lender the date before which it must file its deed of trust.<sup>146</sup> By filing the lender's deed of trust prior to commencement of construction, the deed of trust lender thus prevents its lien from becoming

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135. TEX. PROP. CODE ANN. § 53.056(b)-(c) (Vernon Supp. 1990).

136. For example, if the subcontractor furnished work during the month of June, the deadline for the notice letter would be October 8 under the old law and September 15 under the new law.

137. See TEX. PROP. CODE ANN. § 53.059 (Vernon 1984 & Supp. 1990) (contract must be in writing and must be signed prior to furnishing of labor or material).

138. *Id.* § 53.059(h) (Vernon Supp. 1990).

139. *Id.* § 53.059(i).

140. *Cf. Id.* § 53.056(d).

141. *Id.* § 53.124(c)-(d).

142. *Id.* § 53.106(a).

143. *Id.* § 53.124(d).

144. *Id.* § 53.106(d).

145. *Id.* § 53.106(d) and § 53.124(d) (both affidavits constitute prima facie evidence, and therefore, by implication may be rebutted).

146. *Id.* § 53.124(d) (affidavit of completion is prima facie evidence of date of commencement).

subordinated to mechanic's liens.<sup>147</sup>

The affidavit of completion allows the owner to release the statutorily required ten percent retainage to the general contractor thirty days after completion.<sup>148</sup> Once such funds are properly disbursed the claimant will no longer have a fund against which to claim a lien.<sup>149</sup> Claimants should therefore routinely send a written request for a copy of any notice of the filing of an affidavit of completion.

### I. Attorney's Fees

In addition to the changes in the notice scheme<sup>150</sup> and the statute of limitations,<sup>151</sup> attorney's fees were changed significantly in the statutory amendments. Under the old law, the jury could award attorneys' fees to prevailing claimants;<sup>152</sup> the defense could also recover attorneys' fees to a limited extent.<sup>153</sup> The new law provides for recovery of attorneys' fees when deemed equitable and just by the court.<sup>154</sup> Furthermore, prevailing defendants may recover attorneys' fees not clearly recoverable under the former statute.<sup>155</sup>

### J. Statute of Limitations

Because the old law provided no limitations period for pursuing lien claims, it fell under the residual limitations period allowing four years to bring suit after the cause of action accrued.<sup>156</sup> The statutory amendments state an express statute of limitations requiring commencement of suits to foreclose a mechanic's lien within two years of the filing date of the lien affidavit or within one year after completion of the work under the original contract, whichever is later.<sup>157</sup> Reducing the statute of limitations by half places an additional pressure on claimants to proceed with suit and creates a greater likelihood that procedural errors will have limitation consequences.

### K. Obligation to Furnish Information

The statutory revisions now require various parties involved in a construction project to provide information upon proper demand.<sup>158</sup> Certain categories of information such as the legal description of the real property being

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147. See *Id.* § 53.123(b) (Vernon 1984) (prior liens unaffected by mechanic's lien).

148. *Id.* § 53.101(a) (Vernon Supp. 1990).

149. See *Id.* § 53.105.

150. See *infra* Section II.F.

151. See *infra* Section II.J.

152. TEX. PROP. CODE ANN. § 53.156 (Vernon 1984), amended by *Id.* § 53.156 (Vernon Supp. 1990).

153. *Id.*

154. TEX. PROP. CODE ANN. § 53.156 (Vernon Supp. 1990).

155. *Id.* § 53.156 (Vernon 1984), amended by *Id.* § 53.156 (Vernon Supp. 1990) does not necessarily support an award of attorneys' fees to a surety defending under a statutory payment bond on privately owned projects. Nor did the old law provide attorneys' fees for a declaratory action to invalidate a lien as is authorized by the amendments.

156. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986).

157. TEX. PROP. CODE ANN. § 53.158 (Vernon Supp. 1990).

158. *Id.* § 53.159.

improved and the name and last known address of the payment bond surety will facilitate lower tier contractors in protecting their lien and bond rights.<sup>159</sup> The owner and general contractor may also avail themselves of this information provision. Significant information may be obtained from a subcontractor including the names of all sub-subcontractors or suppliers furnishing the subcontractor labor or materials<sup>160</sup> and an estimate of the amount due for each calendar month in which the subcontractor has provided labor or materials.<sup>161</sup>

#### L. Bonds to Indemnify Against Lien

Under the old and new laws, a lien claim could be "bonded around" by filing a bond to indemnify against a lien.<sup>162</sup> Apparently, the old law permitted the claimant to pursue simultaneously a lien claim and a claim based upon the indemnifying bond as long as the claimant filed suit on the lien claim within thirty days after the service of notice on the bond.<sup>163</sup> The statutory amendments, however, provide that filing a bond to indemnify discharges the lien.<sup>164</sup>

#### M. Payment Bonds

Both the old<sup>165</sup> and new<sup>166</sup> laws specify the same notice schemes for payment-bond claims as for lien claims. Consequently, the alterations to the notice time-table adopted by the amendments for perfecting lien claims also affect the time-table for perfecting payment-bond claims. In addition, other changes similar to those in the amendments regarding lien claims have also been made regarding payment-bond claims including allowance of defensive attorneys' fees<sup>167</sup> and a reduction in the statute of limitations.<sup>168</sup>

#### N. McGregor Act

The McGregor Act<sup>169</sup> requires contractors to provide payment bonds for public works projects involving the State of Texas when the general contract is in excess of \$25,000.<sup>170</sup> The amendments to the act include the same three significant alterations to the private lien and bond laws: (1) adopting the same notice scheme as that under the private bond laws;<sup>171</sup> (2) allowing, for

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159. *Id.* § 53.159(a)(1)-(2).

160. *Id.* § 53.159(c)(1).

161. *Id.* § 53.159(d).

162. *Id.* §§ 53.171-53.176 (Vernon 1984), amended by *Id.* §§ 53.171-176 (Vernon Supp. 1990).

163. TEX. PROP. CODE ANN. § 53.171(c) (Vernon 1984).

164. *Id.* § 53.157(4) (Vernon Supp. 1990).

165. Compare *Id.* § 53.206 (Vernon 1984), amended by *Id.* § 53.206 (Vernon Supp. 1990), with *Id.* § 53.056 (Vernon 1984), amended by *Id.* § 53.056 (Vernon Supp. 1990).

166. Compare TEX. PROP. CODE ANN. § 53.206 (Vernon Supp. 1990) with *Id.* § 53.056.

167. TEX. PROP. CODE ANN. § 53.156.

168. *Id.* § 53.208(d) (reduced from 14 months to one year).

169. TEX. REV. CIV. STAT. ANN. art. 5160 (Vernon 1987 & Supp. 1990).

170. *Id.* art. 5160A(b).

171. *Id.* art. 5160B(a), (b)(2).

the first time, defensive attorneys' fees and shifting the award of attorneys' fees to the court as it deems equitable and just;<sup>172</sup> and (3) reducing the statute of limitations from fourteen months to one year.<sup>173</sup> In addition, the McGregor Act revisions create an obligation to furnish information<sup>174</sup> comparable to that required under the amendments to the payment bond laws for privately owned projects.<sup>175</sup>

One substantial gap in the original McGregor Act insulated the state from liability even if the state failed to require the general contractor to post the required payment bond.<sup>176</sup> The amendments to the McGregor Act expressly provide that in the event the governmental authority fails to obtain from the general contractor the required bond, the claimant shall have a lien against funds "due the prime contractor in the same manner and to the same extent as if the contract were subject to the provisions governing state public work contracts under \$25,000."<sup>177</sup> The difficulty in applying the principles governing state public work contracts under \$25,000 to larger jobs is that those provisions require "notice before any payment is made to the contractor."<sup>178</sup> To benefit from the advantages gained by this amendment, the contractor must diligently determine at the beginning of the job the nonexistence of the required bond and send the required notice to the appropriate public authority within the extremely short time frame allowed.

### III. CONCLUSION

Although significant common law developments occurred in the field of construction law during the survey period, the sweeping revision of the lien and bond statutes is the most significant development in the field. What practical consequences the revisions have and what new common law questions will arise due to these changes remains to be seen.

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172. *Id.* art. 5160H.

173. *Id.* art. 5160G. (Under the old law the statute of limitations expired one year after suit may be brought. TEX. REV. CIV. STAT. ANN. art. 5160G (Vernon 1987). Because suit could not be brought until the expiration of sixty days after the filing of the claim, this effectively created a fourteen month statute of limitations, TEX. REV. CIV. STAT. ANN. art. 5160B (Vernon 1987). Limitations under the revised law, however, is one year after the filing of the claim).

174. TEX. REV. CIV. STAT. ANN. art. 5160I (Vernon Supp. 1990).

175. TEX. PROP. CODE ANN. § 53.159 (Vernon Supp. 1990). For discussion of obligation to furnish information, see *supra* Section II.K.

176. See *Greenville Indep. School Dist. v. B & J Excavating, Inc.*, 694 S.W.2d 410, 414 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

177. TEX. REV. CIV. STAT. ANN. art. 5160A(b) (Vernon Supp. 1990).

178. TEX. PROP. CODE ANN. § 53.234 (Vernon Supp. 1990).

