

Impacts on the Construction Industry from Texas' 86th Legislative Session (Part 1 of 3)

Construction Defects, Texas' 86th Legislative Session / February 1, 2020 / David H. Fisk

Once again, reforms to Texas lien law were not enacted into law following the 2019 Texas legislative session. Bills seeking to shorten the statutes of repose applicable to claims against design professionals and contractors and to broadly limit a contractor's liability for defects in plans and specifications also failed to pass. However, a chapter limiting a contractor's liability for defects in plans and specifications for transportation projects was enacted into law, along with several other significant bills affecting construction defect claims brought by school districts and other public entities. The certificate of merit statute applicable to claims brought against design professional was also amended for the fourth time since being enacted in 2003.

Liability for Defects in Plans and Specifications on Transportation Projects

In *Loneragan v. San Antonio Loan & Trust*, the Texas Supreme Court held in 1907 that a general contractor should be responsible for a building collapse during construction due to a defect in the design plans and specifications that were prepared by the owner's architect and provided to the builder by the owner. Under *Loneragan*, in the absence of language to the contrary, a general contractor is responsible for insufficient plans and specifications that result in a construction failure prior to completion of the project. If the failure happens after completion of the project, then the owner is responsible.

In 1918, the U.S. Supreme Court in *United States v. Spearin* ruled on a question similar to the one at issue in *Loneragan* and came to a different conclusion, holding that the owner impliedly warrants the sufficiency of plans and specifications. The *Spearin* decision has become the majority rule, but some Texas courts continued to follow *Loneragan*, while others followed *Spearin*. In 2012, the Texas Supreme Court in *El Paso Field Services v. Mastec* cited to *Loneragan* and appeared to reaffirm the decision in *Loneragan*, but it did not expressly overrule or disapprove of the Texas cases that followed the rule announced in *Spearin*.

With the passage of HB 2899, Chapter 473 has been added to the Texas Transportation Code effective June 2, 2019. Chapter 473 is applicable to contracts entered into after June 2, 2019 with a governmental entity for the construction of a road, highway, bridge, interchange, parking area or structure, or other improvement or amenity related to the operation of a road or highway. Under the new law, a contractor is not responsible for insufficient plans and specifications "and is not liable for any damage to the extent caused by: (1) a defect in those project specifications; or (2) the errors, omissions, or negligent acts of a governmental entity, or of a third party retained by a governmental entity under a separate contract, in the rendition or conduct of professional duties arising out of or related to the project specifications." Conflicting language in the contract is void and unenforceable.

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