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Claims Against Design Professionals By Contractors: Recent Developments

C.A. (Joe) Davis, Elizabeth G. (Heidi) Bloch, and Daniel R. Smith

C. A. (Joe) Davis
Brown McCarroll, L.L.P.
111 Congress Avenue, Ste. 1400
Austin, Texas 78701

cadavis@brownmccarroll.com
512-703-5780

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I. INTRODUCTION

In virtually all construction projects, the participants have the freedom and opportunity to allocate among themselves, by the terms they negotiate into their contracts, the risk of damages resulting from an error by the design professional. But in cases where the contract between owner and contractor is silent, or less than precise, as to the allocation of that risk, and where, as in traditional design-bid-build projects, there is no contractual relationship between the contractor and the design professional, it is left to the courts to determine the outlines of the legal responsibilities, if any, of the design professional to the contractor. And where the contactor is barred from recovery against the owner, whether by the express language of their contract, by the application of the old *Lonergan* case and its progeny, or by notions of sovereign immunity, the contractor may perceive that asserting claims against the design professional is its best chance for a remedy.[1] The line of cases addressing these claims is crooked at best, and the law has been largely developed in cases examining the allocation between the contractor and owner of the risk of design errors. Recent cases, such as *CCE v. PBS&J* and *Martin Eby v. LAN/STV*, have considered direct claims by contractors against design professionals, and have raised new questions about the boundaries and contours of such claims.[2] This paper will discuss the current status of Texas law on some categories of those claims, proceeding from claims only remotely likely to survive summary judgment to theories more likely to be viable.

II. PARTICULAR CLAIMS

A. Breach of Contract (as a Third-Party Beneficiary)

[1] *Lonergan v. San Antonio Trust Co.,* 104 S.W. 1064 (Tex. 1907), holding that, "the specifications are, as a matter of law, not guaranteed by either party to the other", and generally understood to place the risk of faulty plans on the contractor (as opposed to the owner) unless the contract provides otherwise. In attempting to apply *Lonergan* to the differing language of construction contracts through the years, Texas Courts of Appeals have reached inconsistent results. *See, e.g., Newell v. Mosely,* 469 S.W.2d 481 (Tex. App.—Tyler 1971, writ ref'd n.r.e.), *Bd of Regents of the Univ. of Tex. v. S&G Const. Co,* 529 S.W.2d 90 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), *N. Harris Cty Jr. Coll. Dist. v. Fleetwood Constr. Co.,* 604 S.W.2d 247 (Tex. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.), *Emerald Forest Util. Dist. v. Simonsen Constr. Co.,* 679 S.W.2d 51 (Tex App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), and *Shintech v. Group Constructors, Inc.,* 688 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1985, writ denied). For a thorough and detailed discussion of the development of Texas law on the allocation, as between owner and contractor, of the risk of design errors, see Jeffrey A. Ford, R. Carson Fisk, and Danielle N. Senn, *Current and Emerging Issues in Litigation involving Design Professionals,* University of Texas School of Law, 2010 Construction Law Conference, Dallas Texas. The authors of this paper are greatly indebted to the authors of the previous article for their analysis, but those learned lawyers share none of the blame for the reasoning, arguments or conclusions expressed herein.

[2] *CCE, Inc. v. PBS&J Constr. Servs.*, 2011 Tex. App. LEXIS 809 (Tex. App. —Houston [1st Dist.] Jan. 28, 2011, pet. filed), *Martin K. Eby Constr. Co. v. Lan/STV,* 350 S.W.3d 675 (Tex. App.—Dallas 2011, pet. filed). The authors are counsel for the appellee engineering firm in *CCE, Inc., v. PBS&J Constr. Servs.*

Texas courts have long held that to maintain a claim for breach of contract under a third-party beneficiary theory, the plaintiff must overcome a heavy burden. In *MCI Telecommunications Corp. v. Texas Utilities Electric Co.,* the Texas Supreme Court held:

> In determining whether a third party can enforce a contract, the intention of the contracting parties is controlling. A court will not create a third-party beneficiary contract by implication. The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. Consequently, a presumption exists that parties contracted for themselves unless it "clearly appears" that they intended a third party to benefit from the contract.[3]

The Supreme Court has also confirmed, in *S. Tex. Water Auth. v. Lomas,* that, where the third party was not specifically identified in the contract, and there was nothing more in the contract itself upon which third-party-beneficiary status might have been based, the mere description of a product's intended use could not confer third-party-beneficiary status on intended users.[4] Therefore, individual water customers of the City of Kingsville had no right as third-party beneficiaries to enforce the City's contract with a water supply company.[5] In the construction context, the Supreme Court also recently stated, in *Sharyland v. City of Alton* , that "(i)mportantly, 'the fact that a person is directly affected by the parties' conduct, or that he may have a substantial interest in a contract's enforcement, does not make him a third-party beneficiary.'"[6] Thus, where the City of Alton agreed with a contractor to construct sanitary sewer lines adjacent to pre-existing water lines according to certain plans and specification (which presumably required compliance with applicable regulations for distances and clearances), the owner of the water line (not identified or directly mentioned in the construction contract for the sewer lines) was held not to be a third party beneficiary of the construction contract, and had no right to sue the contractors for contractual remedies.[7]

In another construction case, the Austin Court of Appeals, in *M.D. Thomson v. Espey Huston & Associates, Inc.*, held that the developer of an apartment complex is not a third-party beneficiary to an engineering design contract between the contractor and the engineering firm.[8] Although the engineering contract required the developer to provide certain information about the apartment complex's design to the engineering firm and indicated that construction would take place on the developer's property, it did not establish that the contractor and engineer contracted primarily and directly for the developer's benefit. Summary judgment was affirmed in favor of the engineering firm on the third-party beneficiary claim.[9]

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[3] *MCI Telecommunications Corp. v. Texas Utilities Electric Co,*. 995 S.W.2d 647, 652 (Tex. 1999).
[4] *S. Tex. Water Auth. v. Lomas* ,223 S.W.3d 304, 306-07 (Tex. 2007).
[5] *Id.*
[6] *Sharyland Water Supply Corp. v. City of Alton,* 354 S.W.3d at 421 (Tex. 2011) (citations omitted).
[7] *Id.*
[8] *M.D. Thomson v. Espey Huston & Associates, Inc.*, 899 S.W.2d 415 (Tex. App.—Austin 1995, no writ).
[9] *Id.*

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