MUNSCH HARDT

EXECUTIVE LEVEL CONSTRUCTION LAW SEMINAR

Dallas / Houston / Austin

Presented By

Michael A. Harvey

Thomas (Tom) R. Barber

Adam J. Richie

MARSH & McLENNAN AGENCY

Fair Labor Standards Act / FLSA

I-9s: Practical Advice on Limiting Liability

Selected Updates on Special Problems and Trends in Construction Law and Some Possible Solutions

Fair Labor Standards Act / FLSA

Presented by Michael Harvey

Administrative Law Making this Year

- **A big year for administrative agencies**
  - **August 2015**: The National Labor Relations Board ("NLRB") issued a new interpretation of who qualifies as an "employer" under the National Labor Relations Act (the "NLRA").
  - **May 2016**: The Department of Labor ("DOL") announced new interpretation of which employees are covered by the Fair Labor Standards Act ("FLSA")

- **The ramifications of these decisions for employers are huge.**
  - Under the NLRB's new interpretation of the NLRA, **entities may be considered "employers" even if they have only indirect and unexercised control of employees**.
  - Under the DOL's new interpretation of the FLSA, **an additional 4.2 million employees will be covered under the FLSA**, which means even more exposure for employers regarding the manner with which they compensate their employees.

What is the National Labor Relations Act?

- The NLRA is a federal law that provides employees with the right to organize and to bargain collectively with their employers through representatives of their own choosing (unions).
  - The Act is interpreted and principally enforced by the National Labor Relations Board ("NLRB").
- The NLRA defines certain practices engaged in by employers and unions as "unfair labor practices."
- Until recently, only entities who exercised "direct and immediate control" were considered "employers" under the NLRA and thus required to engage in collective bargaining and refrain from engaging in unfair labor practices.

Recent NLRB decision: *Browning-Ferris Industries*

- In a 3-2 decision, the NLRB changed the standard for determining who is an employer under the NLRA.

- The Board claimed that the old standard was outdated and needed to change to keep up with workplace and economic realities.

Recent NLRB decision: What changed?

- The Board determined that two or more entities are joint employers of a single workforce if:
  - They are both employers within the meaning of the common law, and
  - They share or codetermine those matters "governing the essential terms and conditions of employment."

- This is a drastic departure from the former standard which required "direct and immediate control."

What will courts look at to determine employer status?

- The NLRB, in the *Browning-Ferris* decision, made clear that courts should look at whether the potential employer had the right (even if unexercised) to:
  - Hire/fire;
  - Discipline;
  - Supervise and direct employees;
  - Dictate number of workers to be supplied;
  - Control schedules, seniority, or overtime; or
  - Assign work and determine the manner/method of work performed

Ramifications of the decision

- **Bottom Line: the NLRB's decision makes it easier for unions and regulators to hold companies accountable for the practices of contractors, staffing agencies, etc.**

- Many have argued that the decision may have far-reaching ramifications for many relationships, including:
  - **Contractor/subcontractor**
  - **Parent/subsidiary**
  - **User/supplier**
  - **Lessor/lessee**
  - **Franchisor/Franchisee**
  - **Predecessor/successor**
  - **Creditor/debtor**
  - **Contractor/consumer**

- The full implications of the decision are not yet fully known.

What now?

- The employer, Browning-Ferris Industries ("BFI"), appealed the NLRB's decision to the D.C. Circuit Court of Appeals.
  - BFI argued that the new joint-employer standard is so broad and vague it makes it impossible for employers to structure their business relationships with contractors and robs employers of their due process rights.
  - Even if the Board's decision survives appellate review, it will take many years before we have clear guidance on how businesses can avoid joint employer liability because of the myriad questions left unanswered by the *Browning-Ferris* decision.
- House GOP members also introduced legislation to roll back the decision, stating that the new standard "would wreak havoc on families and small businesses across the country."
- It may be wise to revisit current business practices to eliminate the risk of being found a joint employer under the NLRA.
  - Unfortunately, the NLRB's recent decision gave little to no guidance on how to avoid liability, other than to relinquish all semblance of direct and indirect control over essential terms and conditions of employment.

Some practical advice

- Take a hands-off approach
  - Try conveying your ultimate goals to the subcontractor/temp agency, and letting that entity determine the best means of achieving those goals.
  - Avoid being involved in the interviewing, hiring, firing, training, scheduling, disciplining, approving overtime, or otherwise reserving control over temporary workers.
  - Report inappropriate temp worker behavior to the subcontractor/temp agency, but refrain from suggesting that the worker be disciplined.
  - Consider eliminating contractual provisions that reserve partial or complete control over temporary workers, such as retaining the unilateral right to discontinue the use of a temporary worker.
- Educate management (or in the case of franchisors, franchisees) on the cost and liability ramifications of a "joint employer" relationship.
- Re-examine contracts with subcontractors/temp agencies to ensure they include favorable language, including:
  - Language specifying that the business is not a co-employer of the subcontractor/temp agency workers
  - An indemnification clause providing that the subcontractor/temp agency assumes any and all liability for costs or damages stemming from the temp workers' relationship with the business.
- Re-examine whether mandatory pre-assignment drug test policies are truly necessary, given the NLRB's finding that doing so demonstrates "significant control" over temp workers.

What is the Fair Labor Standards Act ("FLSA")?

- The FLSA is a federal law which establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards affecting full-time and part-time workers in the private and public sectors.

- It:
  - Differentiates between **employees** and **independent contractors**.
  - Differentiates between **exempt** and **non-exempt employees**.
  - Mandates wage rates and **overtime wages** for employees.
  - Provides **penalties** for non-compliance (misclassification).

Why should you care about the FLSA?

- In this jurisdiction alone, FLSA case filings have nearly doubled from 2014 to 2015, and continue to rise in 2016.
- The Department of Labor recently updated these regulations, effectively extending FLSA coverage to an **additional** 4.2 million workers across the country.
- The FLSA provides a mechanism for a collective action, which permits the aggregation of hundreds or thousands of claims requiring only that employees be "similarly situated."
  - Claims can be filed by the Department of Labor or privately enforced (by plaintiffs' attorneys)

Liability is Costly

- The FLSA allows employees to recover damages in the amount of their unpaid wages or overtime for up to two or three years before the date they filed a lawsuit.
  - Depending on whether the employer acted "**willfully**"
  - If the employer involves counsel and seeks advice regarding compliance with the FLSA *before* litigation ensues, it may help eliminate any finding of a willful violation

- Damages may be doubled if the court finds the employer acted in **bad faith**.

Personal Civil and Criminal Liability

- Directors, officers, and even (rarely) supervisors can be held personally liable for employee wages owed under the FLSA where the employer-company is insolvable.
- The FLSA also authorizes criminal prosecutions as to any person who violated the FLSA **intentionally**, **deliberately**, **and voluntarily**, or with reckless indifference to or disregard for the FLSA's requirements.
- FLSA criminal liability can also extend to owners, partners, directors, officers, shareholders, managers, supervisors, and even others.
- The penalties include a fine of up to $10,000, imprisonment for up to six months, or both.
  - A person cannot be imprisoned for the first FLSA criminal conviction.

How do I get into compliance?

Ask yourself these questions:

- Am I properly classifying employee vs. independent contractor?
- Am I properly classifying employees as exempt and non-exempt?
- Am I paying my employees for all compensable hours?
  - Suffered or Permitted
  - Waiting Time
  - On-Call Time
  - Meal and Rest Periods
  - Training Time
  - Travel Time
  - Sleep Time
- Am I correctly calculating my employees' overtime pay?

Overview: Independent Contractor vs. Employee

Courts typically consider the following factors – **REMEMBER**, you **do not have to win them all**:

1. The extent to which the work performed is an **integral part** of the employer's business;
2. The degree of **control or supervision** exercised or retained by the employer;
3. Whether the work performed requires special **skills and initiative**;
4. The extent of the **relative investments** of the employer and the worker;
5. The **permanency of the relationship**; and
6. The worker's opportunity for **profit or loss** depending on his or her managerial skill.

Overview: Exempt versus non-exempt employees

To apply **most** exemptions, an employee must pass three tests, the:

1. Salary Level Test;

- **Currently**: $455/week
- **December 1, 2016** (with the updates): $913/week

2. Salary Basis Test; and

- Predetermined amount of compensation each pay period
- Cannot be reduced because of quality or quantity of work performed by the employee
- Must receive full salary for any week in which the employee performs any work, regardless of days or hours worked
  - Does not need to be paid for any workweek in which employee performs no work

3. Job Duties Test

- Executive employees
- Administrative employees
- Professional employees

Overview: What hours are compensable?

- Work not requested but "**suffered or permitted**."
- "**Waiting time**" when the employee is unable to use the time effectively for his or her own purposes and the time is controlled by the employer.
- **On call time** when the employee has to stay on the employer's premises or so close to the employer's premises that the employee cannot use that time effectively for his/her own purposes.
- **Rest periods** of short duration (normally 5-20 minutes)
- Training time (meetings, lectures, etc.) unless:
  - Attendance is outside regular working hours;
  - Attendance is voluntary;
  - The course, lecture, or meeting is not job related; **and**
  - The employee does not perform any productive work during attendance
- **Travel time** between job sites during the normal work day.
- **Time spent sleeping** when an employee is on duty for less than 24 hours (if an employee is on duty for more than 24 hours, the parties can agree to exclude "bona fide sleep periods")

Overview: Calculating Overtime Pay

- Covered, **non-exempt employees** must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek.
- Compliance is determined by workweek, and each workweek stands by itself
- Workweek is 7 consecutive 24 hour periods (168 hours)
- The **Regular Rate** is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
  - The Regular Rate may not be less than the applicable minimum wage.
  - There are some exclusions that apply to the regular rate.

What now?

- The DOL's new salary test for exempt employees is set to take effect December 1, 2016. The new test raises the salary level to qualify for certain exemptions from $455/week to $913/week.
- BUT, two lawsuits, filed September 20, 2016, may delay or outright stop the rules from taking effect.
  - Texas joined 20 states in a lawsuit against the DOL, its secretary, and other federal officials seeking to halt the new overtime rules.
    - The other states are Alabama, Arizona, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, New Mexico, Nevada, Ohio, Oklahoma, South Carolina, Utah, and Wisconsin
  - Separately, but in the same Texas federal court, a coalition of more than 50 business groups filed a similar lawsuit.
    - These groups include the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, National Automobile Dealers Association, and the National Federation of Independent Business

Some practical advice

- Take advantage of your resources:
  - Legal blogs and forums, trade organizations, seminars
- Get educated
- If you think you might be out of compliance, conduct an audit.
  - Law firms consult with companies regularly to audit their pay practices and employee classifications and work with employers to get them in compliance.
  - A legal advisor can help you stay on top of changing developments in the law. Which may be especially important in the coming year.
  - Remember, hiring an attorney before litigation ensures a court will not find you acted willfully, and you will be liable for less in damages.

Selected Updates on Special Problems and Trends in Construction Law

and

Some Possible Solutions

Presented by Tom R. Barber and Adam J. Richie

Liquidated Damages

- In a construction context, liquidated damages (LDs) are damages specified in a contract to be paid in the event of an unexcused delay.
- LD clauses, to be enforceable, must not be written to penalize, but as a reasonable approximation of the probable loss that will be caused by delayed performance.
- Texas applies the "second-look" approach to reasonableness, which allows courts to retrospectively invalidate LD clauses if actual damages are disproportionately less than the specified LDs.
- An additional requirement is that the actual damages caused by delay would be difficult or impossible to determine.

Typical Liquidated Damages Clause:

Liquidated Damages Not a Penalty. Each Party agrees that Owner's actual damages for delay under the circumstances contemplated herein would be difficult or impossible to ascertain and that the Delay Liquidated Damages provided for herein with respect to each such specific circumstance are intended to place Owner in the same economic position as it would have been in had the particular circumstance not occurred. Specifically, the Parties agree the Delay Liquidated Damages provided herein are not a penalty, are fair and reasonable, and payment thereof would represent a reasonable estimate of the damages that may reasonably be anticipated from the specific circumstance associated with the Delay Liquidated Damage.

In the event that Substantial Completion occurs subsequent to the Scheduled Date of Substantial Completion, the Design-Build Firm shall pay Owner Delay Liquidated Damages in the amount of $_____.00 for each Day that Substantial Completion is delayed beyond the Scheduled Date of Substantial Completion and continuing until the earlier of (i) the actual achievement of the Substantial Completion, or (ii) termination of this Agreement for default.

Key Points for Consideration:

- Include explicit recitals in the clause.
  - ". . . actual damages are uncertain and would be difficult or impossible to ascertain"
  - " . . . intended as liquidated damages and not a penalty."
- Perform a calculation of estimated delay damages to establish the daily LD rate.
- Possibly include a non-exhaustive list of general categories of losses.
- Flow-down the LDs to lower-tier contractors and suppliers.

What is the Statute of Repose?

- A statute enacted by the Legislature for the purpose of insulating persons involved in the construction business from endless liability on projects long since completed.
- It establishes a definitive time period during which all lawsuits must be filed, and, if not, such lawsuits are barred forever.

Statute of Repose

Where can I find it? Texas' statute of repose for **DESIGN PROFESSIONALS** is codified as §16.008 of the Tex. Civ. Prac. Remedies Code

- It applies to architects, engineers, interior designers and landscape architects.
- A person must bring suit for damages for property damage, bodily injury (including death), contribution or indemnity not later than **10 years** after substantial completion of the Project or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.
- If the claimant presents a written claim for damages, contribution, or indemnity to the design professional within the 10-year limitations period, the period is extended for 2 years from the day the claim is presented.

Statute of Repose

Texas' statute of repose for **CONTRACTORS** is codified as §16.009 of the Tex. Civ. Prac. Remedies Code

- It applies to persons who construct or repair improvements to real property.
- A person must bring suit for damages for property damage, bodily injury (including death), contribution or indemnity not later than **10 years** after substantial completion of the Project in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.
- If the claimant presents a written claim for damages, contribution, or indemnity to the design professional within the 10-year limitations period, the period is extended for 2 years from the day the claim is presented.
- If the damage, injury, or death occurs during the 10th year of the limitations period, the claimant may bring suit not later than two years after the day the cause of action accrues.

Key Points for Consideration:

- Some contracts require completed operations coverage for additional insureds under a CGL policy through the statute of repose.
- Accrual clauses such as the one found in the AIA B151-1997 or clauses shortening the statute of limitations would most likely not be applicable to claims brought under the statute of repose.
- It is good practice to keep project records for 10 years after substantial completion.

Indemnity Clauses

- § 3.18 INDEMNIFICATION
- § 3.18.1 .THE CONTRACTOR AGREES TO INDEMNIFY, SAVE, PROTECT, DEFEND, AND HOLD HARMLESS THE OWNER, OWNER'S PROJECT MANAGER, ARCHITECT, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, TRUSTEES, AGENTS, BOARD MEMBERS, VOLUNTEERS, INVITEES, AND EMPLOYEES ("INDEMNIFIED PARTIES") FROM AND AGAINST ANY AND ALL LIABILITY, COST, DAMAGE, EXPENSES, FINES AND ALL REASONABLE LEGAL FEES AND COURT COSTS, CLAIMS, LOSSES, CAUSES OF ACTION, SUITS, AND LIABILITY OF ANY KIND, INCLUDING ALL EXPENSES OF LITIGATION AGAINST THE INDEMNIFIED PARTIES, WHETHER OR NOT CAUSED IN PART BY ANY ACT OR OMISSION OF A PERSON OR ENTITY INDEMNIFIED HEREUNDER, ARISING FROM OR OUT OF THE CONTRACTOR'S ACTS OR OMISSIONS, INCLUDING, BUT NOT LIMITED TO CONTRACTOR'S NEGLIGENT OR GROSSLY NEGLIGENT PERFORMANCE OF THE WORK; NEGLIGENT OR GROSSLY NEGLIGENT USE OR MISUSE OF OWNER'S PROPERTY; NEGLIGENT OR INTENTIONAL ACTIONS, ERRORS OR OMISSIONS AND THOSE OF ITS EMPLOYEES, OFFICERS, DIRECTORS, AGENTS OR SUBCONTRACTORS; CONTRACTOR'S OR ITS SUBCONTRACTOR'S USE OF PROPERTY, EQUIPMENT, VEHICLES, OR MATERIALS; DEFECTIVE WORKMANSHIP; NEGLIGENT OR GROSSLY NEGLIGENT USE OR MISUSE OF UTILITIES; OR SUBCONTRACTORS', EMPLOYEES', AGENTS', OFFICERS', OR DIRECTORS' NEGLIGENCE OR INTENTIONAL TORTS. IT IS THE EXPRESSED INTENT OF CONTRACTOR TO INDEMNIFY OWNER FROM THE CONSEQUENCES OF OWNER'S JOINT AND/OR CONCURRENT NEGLIGENCE BUT NOT OWNER'S SOLE NEGLIGENCE.

Indemnity Clauses

- THIS INDEMNIFICATION SHALL NOT BE LIMITED TO DAMAGES, COMPENSATION OR BENEFITS PAYABLE UNDER INSURANCE POLICIES, WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.

Indemnity Clauses

- § 3.18.1.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE INDEMNITY PROVISIONS INCLUDED HEREIN SHALL BE LIMITED SUCH THAT CONTRACTOR SHALL NOT BE REQUIRED TO INDEMNIFY, HOLD HARMLESS OR DEFEND OWNER OR ANY THIRD PARTIES AGAINST A CLAIM CAUSED BY THE NEGLIGENCE OR FAULT, THE BREACH OR VIOLATION OF A STATUTE, ORDINANCE, GOVERNMENTAL REGULATION, STANDARD, OR RULE, OR THE BREACH OF CONTRACT OF THE INDEMNITEE, ITS AGENT OR EMPLOYEE, OR ANY THIRD PARTY UNDER THE CONTROL OR SUPERVISION OF THE INDEMNITEE, OTHER THAN CONTRACTOR OR ITS AGENT, EMPLOYEE, OR SUBCONTRACTOR OF ANY TIER EXCEPT THAT CONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND THE INDEMNITEES AGAINST ANY CLAIMS FOR THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF SUBCONTRACTOR, ITS AGENTS, OR ITS SUBCONTRACTORS OF ANY TIER

Indemnity Clauses

- § 3.18.2 It is agreed with respect to any legal limitations now or hereafter in effect and affecting the validity or enforceability of the indemnification obligations hereunder, such legal limitations are made a part of the indemnification obligation and shall operate to amend the indemnification obligation to the minimum extent necessary to bring the provision into conformity with the requirements of such limitations, and as so modified, the indemnification obligations shall continue in full force and effect.
- § 3.18.3 It is understood and agreed that Article 10 of the Agreement is subject to, and expressly limited by, the terms and conditions of Texas Civ. Prac. & Rem. Code Ann. Sec. 130.001 to 130.005, as amended. In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.
- § 3.18.4 Contractor's obligations of indemnity shall survive completion of the Work, abandonment and/or termination of the Contract.

Applicable Law

- Chapter 151 of the Texas Insurance Code
- Sec. 151.102. AGREEMENT VOID AND UNENFORCEABLE. Except as provided by Section 151.103, a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.
- Sec. 151.103. EXCEPTION FOR EMPLOYEE CLAIM. Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

Carve Outs

- Sec. 151.105. EXCLUSIONS. This subchapter does not affect:
  - (4) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;
  - (9) an indemnity provision pertaining to a claim based upon copyright infringement;
  - (10) an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to:
  - (A) a single family house, townhouse, duplex, or land development directly related thereto; or
  - (B) a public works project of a municipality

Design Professionals

- **271.904 of the Texas Local Government Code**

- Sec. 271.904. ENGINEERING OR ARCHITECTURAL SERVICES CONTRACTS: INDEMNIFICATION LIMITATIONS; DUTIES OF ENGINEER OR ARCHITECT. (a) A covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services to which a governmental agency is a party is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect whose work product is the subject of the contract must indemnify or hold harmless the governmental agency against liability for damage, other than liability for damage to the extent that the damage is caused by or results from an act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier committed by the indemnitor or the indemnitor's agent, consultant under contract, or another entity over which the indemnitor exercises control.

Design Professionals

- (b) Except as provided by Subsection (c), a covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services to which a governmental agency is a party is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect whose work product is the subject of the contract must defend a party, including a third party, against a claim based wholly or partly on the negligence of, fault of, or breach of contract by the governmental agency, the agency's agent, the agency's employee, or other entity, excluding the engineer or architect or that person's agent, employee, or subconsultant, over which the governmental agency exercises control. A covenant or promise may provide for the reimbursement of a governmental agency's reasonable attorney's fees in proportion to the engineer's or architect's liability.
- (c) Notwithstanding Subsection (b), a governmental agency may require in a contract for engineering or architectural services to which the governmental agency is a party that the engineer or architect name the governmental agency as an additional insured under the engineer's or architect's general liability insurance policy and provide any defense provided by the policy.

Contractors Do Not Have To Indemnify Designers

- Sec. 130.002. COVENANT OR PROMISE VOID AND UNENFORCEABLE. (a) A covenant or promise in, in connection with, or collateral to a construction contract is void and unenforceable if the covenant or promise provides for a contractor who is to perform the work that is the subject of the construction contract to indemnify or hold harmless a registered architect, licensed engineer or an agent, servant, or employee of a registered architect or licensed engineer from liability for damage that:
- (1) is caused by or results from:
- (A) defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or
- (B) negligence of the architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract; and
- (2) arises from:
- (A) personal injury or death;
- (B) property injury; or
- (C) any other expense that arises from personal injury, death, or property injury.

Manufacturer Indemnity of Seller

Section 82.002(a) of the CPRC:

A manufacturer shall indemnify and hold harmless a ***seller*** against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

Manufacturer Indemnity of Seller

Is a General contractor (or subcontractor) a "seller"?

Centerpoint Builders GP, LLC v. Trussway, Ltd., No. 14-0650 (Tex. June 17, 2016)

- The Texas Supreme Court held that a general contractor who is neither a retailer nor a wholesale distributor of any particular product is not necessarily a "seller" of every material incorporated into its construction projects for statutory-indemnity purposes.

Section 82.001(3) of the CPRC:

A "seller" is "a person who is ***engaged in the business of*** distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof."

- Centerpoint was hired as the general contractor to build an apartment complex. It purchased wooden roof trusses directly from their manufacturer, Trussway. One of the trusses failed and injured party sued Centerpoint.
- Centerpoint argued that it was entitled to statutory indemnity from Trussway under Chapter 82.
  - The Court disagreed: Centerpoint, like most builders, is "engaged in the business of" selling construction services, not building materials.
  - The Court held that "one is not 'engaged in the business of' selling a product if providing that product is incidental to selling services."

- "By way of example, consider a hair salon that offers haircuts that include a wash and style. When the client walks out of the salon, she has shorter hair, but she also has a head full of hair product. The price of the haircut will inevitably include the cost of the product that was used. Still, a hairdresser is in the business of selling haircuts, not selling handfuls of mousse. One does not go to the hair salon to acquire a dollop of moisturizing serum and a few spritzes of hairspray, just as a person does not retain a general contractor to acquire trusses."

- Although the quantity of materials used is not dispositive, the fact that Centerpoint used innumerable building materials supported the conclusion that any single material was incidental to its provision of construction services.

- Chapter 82 defines "seller" not simply as "a person who sells" or "a person who places a product in the stream of commerce," but as a person "engaged in the business of" commercially distributing products.

Possible Solutions

- Strong indemnity clause in Purchase Orders.
- Are there insurance products the manufacturer can provide to cover the liability if it refuses to enter into an indemnity?
- Are endorsements or policy language changes available to cover defective products included in general contractors construction services?
- Have material broken out and sold to end user under separate contracts by an affiliated entity to attempt to qualify as a "seller".

Owner Controlled Insurance Program (OCIP)

- CIP's (Wraps) are insurance provided on construction projects, arranged by the owner or general contractor in such a way that all interests involved (those of the owner, general contractor, subcontractors, and, in some cases architects and engineers) are combined and insured under one policy with a single insurer, usually, to the extent of Workers Comp., CGL and Umbrella/Excess. The guys here at Marsh could stock a good sized closet with brochures and coverage documents on CIP"s, so the purpose here is not to sell insurance, but talk briefly about a recent development that has resolved an important issue relative to the certainty of common comp coverage under a CIP.

Independent Contractor But Employees???

- Labor Code Definition of Independent Contractors
- Sec. 406.122. STATUS AS EMPLOYEE. (a) For purposes of workers' compensation insurance coverage, a person who performs work or provides a service for a general contractor or motor carrier who is an employer under this subtitle is an employee of that general contractor or motor carrier, unless the person is:
  - (1) operating as an independent contractor; or
  - (2) hired to perform the work or provide the service as an employee of a person operating as an independent contractor.
  - (b) A subcontractor and the subcontractor's employees are not employees of the general contractor for purposes of this subtitle if the subcontractor:
  - (1) is operating as an independent contractor; and
  - (2) has entered into a written agreement with the general contractor that evidences a relationship in which the subcontractor assumes the responsibilities of an employer for the performance of work.
- Ok, so what happens when you have a subcontractor sign a subcontract that says they are an independent contractor, but you want the subcontractor's employees are employees of the owner or general contractor for the purposes of workers comp. How can that be?

Independent Contractor But Employees???

- Poof!…insurance lobby and lawyers strike again. 406.123 of the Labor Code:
- Sec. 406.123. ELECTION TO PROVIDE COVERAGE; ADMINISTRATIVE VIOLATION. (a) A general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.
- (b) …covering a sub without employees (sole proprietorship)
- (c) A motor carrier and an owner operator may enter into a written agreement….
- (d) …the actual premiums, based on payroll, that are paid or incurred by the general contractor or motor carrier for the coverage may be deducted...
- (e) An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state.
- (f) A general contractor shall file a copy of an agreement entered into under this section with the general contractor's workers' compensation insurance carrier not later than the 10th day after the date on which the contract is executed.

Independent Contractor But Employees???

- The concept was challenged in two cases, taking each side of the argument and both positions win at the court of appeals!

Ok, what happened to those discounts I gave the General Contractor to be covered by its W.C.??

Result

- Texas Supreme Court holds anything is possible in Texas when the legislature is in session and this one is easy enough:
- 406.123 (section allowing subs employee to be GC's employee) is an express exception to the independent contractor section, but only for the purposes of workers compensation insurance.
- So, you can be both an independent contractor and employee in Texas and CIP's can continue, but Tom misses a great contingency fee boondoggle.

QUESTIONS?