LEGISLATIVE UPDATE
AND
CURRENT DEVELOPMENTS

Architect/Engineer Liability and Practice in Texas
Houston, Texas
September 24, 2002

Paul F. Simpson
McGINNIS, LOCHRIDGE & KILGORE, L.L.P.
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010
(713) 615-8506
psimpson@mcginnislaw.com

Paul F. Simpson

Bar Admissions:
Texas (1984)
United States Court of Appeals for the Fifth Circuit
United States Eastern, Southern, and Western District Courts of Texas
Patent Attorney, United States Patent and Trademark Office

Education:
The University of Houston Law Center (J.D., cum laude, 1984)
Rice University (B.A., History, 1976) (B.S., Civil Engineering, 1977)

Memberships:
Member, Texas Bar Litigation and Oil, Gas & Mineral Law Sections
Member, Houston Bar Association
Registered Texas Professional Engineer
Member, Society of Petroleum Engineers
Former Member, American Petroleum Inst. Standardization Committee

Publications:
Author and Speaker, *Interest Due Under Texas Oil and Gas Leases*, American Institute of Business Law, Oklahoma City, Oklahoma (May 2002)
Author and Speaker, *HECI v. Neel: The Discovery Rule, Implied Covenants and the Record*, 27th Annual Ernest E. Smith Oil, Gas & Mineral Law Institute (March 2001)
Author and Speaker, *HECI Exploration v. Neel and Other Royalty Owner Topics*, American Association of Mineral Owners (September 1999)
Speaker, *Royalty: Ongoing and Emerging Issues*, University of Houston Law Center (February 1995)
Author and Speaker, *Melody Homes and Implied Warranties for Services in Texas*, American Corporate Counsel Association (December 1991)

Paul Simpson, a partner in the law firm of McGinnis, Lochridge & Kilgore, L.L.P., has testified before committees of the Texas Senate and the Texas House of Representatives on oil and gas issues and proposed legislation that would affect the oil industry and mineral and royalty owners in Texas. He has spoken numerous times at legal seminars on contracting issues and oil and gas matters, including regular presentations to the Texas Land and Mineral Owners' Association.

Mr. Simpson has an active practice in representing individuals and companies at trial and on appeal in the state and federal courts of Texas, including oil and gas, engineering and construction, intellectual property, and general commercial litigation.
For more detail, see www.mcginnislaw.com.

LEGISLATIVE UPDATE AND CURRENT DEVELOPMENTS

The following summarizes some recent and ongoing developments affecting the practice, regulation, and liability of engineers (and, to a lesser extent, architects) in Texas.

A. Indemnity

The enforceability of contractual provisions governing work rendered by architects and engineers is often the subject of litigation and legislation. One particularly fertile area involves indemnity obligations in construction and design contracts. An indemnity agreement is defined as follows:

> A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person.

Black's Law Dictionary, quoted in *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). For conceptual purposes, indemnity can be divided into two categories: indemnity for prior acts, and indemnity for future acts.

Indemnity for prior acts is a relatively straightforward matter. For example, a party may agree to protect another against claims (known or unknown, asserted or unasserted, etc.) arising from prior acts or occurrences. Such post-act indemnities arise, for example, in litigation settlement agreements (because the settling party is trying to buy peace and resolution of past problems) and asset purchases (with the seller remaining responsible for matters preceding the sale date, before the purchaser had any involvement or responsibility). Texas law has no specific requirements that limit the general enforceability of such post-act indemnification clauses.

However, Texas law does impose various limitations on contractual provisions that attempt to shift risk and liability for future acts. For instance, any indemnity (or similar risk-shifting) provision in a contract that requires a party to assume liability for another's acts must satisfy two "fair notice" requirements. *Littlefield v. Schaefer,* 955 S.W.2d 272, 274 (Tex. 1997); *Dresser Indus., Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1993). (The only exception to the fair notice requirements occurs when it is proven that the indemnifying party had actual notice or knowledge of the indemnification provision. *Dresser,* 853 S.W.2d at 508, n. 2; *Cate v. Dover Corp.,* 790 S.W.2d 559, 561-62 (Tex. 1990).)

First, to be enforceable, a provision that indemnifies (or releases) a party against liability for its own future negligence – and shifts that liability to another party – must be expressed clearly and unambiguously within the four corners of the contract. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). Known as the "express negligence" rule, this requirement means contracting parties must be completely clear and explicit when they intend to exculpate a party for its own negligence. *Atlantic Richfield Co. v. Petroleum Personnel, Inc.,* 768 S.W.2d 724, 726 (Tex. 1989).

Second, the indemnity clause must be "conspicuous" (as defined by the Unified Commercial Code ("UCC")) in order to be enforceable. *Littlefield,* 955 S.W.2d at 274; *Dresser,* 853 S.W.2d at 510-11 (adopting the UCC definition of conspicuousness); TEX. BUS. & COM. CODE ANN. § 1.201 (10). The UCC defines "conspicuous" as follows:

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the

> body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

TEX. BUS & COM. CODE ANN. § 1.201 (10) (Vernon Supp. 2002).

These "fair notice" principles remain applicable in the context of agreements involving architects or engineers. A provision that shifts liability for the negligence of another person or entity to the architect/engineer, as well as a clause purporting to shift the architect/engineer's liability for future negligence to others, will both be subject to the fair notice requirements of express negligence (i.e., the intent to indemnify must be expressed in specific terms within the four corners of the contract) and conspicuousness (as defined by the UCC test) under Texas law.

However, the Texas Legislature in 2001 strengthened the protection for architects and engineers against contractual provisions that would shift liability for other's negligence onto them. Senate Bill 561 – which was passed, signed into law, and effective September 1, 2001 (as to contracts entered into or after that date) – added the following provision to the Texas Civil Practice & Remedies Code:

> A covenant or promise in, in connection with, or collateral to a construction contract other than a contract for a single family or multifamily residence is void and unenforceable if the covenant or promise provides for a *registered architect* or *licensed engineer* whose engineering or architectural design services are the subject of the construction contract to indemnify or hold harmless an owner or owner's agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner's agent or employee.

TEX. CIV. PRAC. & REM. CODE ANN. § 130.002(b) (Vernon Supp. 2002) (emphasis added). Therefore – at least for non-residential construction – an attempt to shift risk for the negligence of an owner (or the owner's agent or employee) onto registered architect or licensed engineer will be void and unenforceable.

In addition, the same bill (SB 561) eliminated statutory provisions that had allowed a governmental agency to extract certain indemnities from registered architects and licensed engineers, so that such indemnities are now void and unenforceable. In particular, SB 561 deleted provisions and exceptions in the Texas Government Code that had allowed enforcement of a registered architect or a licensed engineer's indemnity of a governmental agency against liability arising from personal injury or death of the architect or engineer, or their employees, under or in connection with a contract for architectural or engineering services to which the governmental agency was a party. The amended statute now reads as follows:

> INDEMNIFICATION.
>
> (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 a governmental agency against liability for damage that is caused by or results from the negligence of the governmental agency or its agent or employee.

TEX. LOC. GOV'T CODE ANN. § 271.904(a) (Vernon Supp. 2002) (applicable to construction contracts entered into on or after September 1, 2001) (emphasis added).

B. Sovereign Immunity

Contracting with the government can be hazardous to your business.

In 1997, the Texas Supreme Court affirmed that the doctrine of sovereign immunity applies to contract disputes with the state. *See Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401 (Tex. 1997). In *Federal Sign*, the court held that the state, when it enters into a contract with a private citizen, waives immunity from liability on that contract, but does not waive its immunity from being sued in court for that liability. *Id.* at 408. However, in a footnote, the court noted there "may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts." *Id.* at 408 n.1. With this 1997 footnote, the court left the door open to contentions that the state waived its sovereign immunity by other actions, such as, e.g., accepting the benefits of a contract.

However, in 2001, the court slammed that door shut. *See General Serv. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001). The legislature in 1999 had adopted a procedure for contract dispute resolution via the State Office of Administrative Hearings ("SOAH"). TEX. GOV'T CODE ANN. § 2260.001-108 (Vernon 2000 & Supp. 2002). The SOAH statute provides a complex and cumbersome method for addressing contractual disputes with the state, but still preserves sovereign immunity. In *Little-Tex* the Texas Supreme Court found this SOAH procedure (adopted by the legislature after *Federal Sign)* to be the exclusive remedy for resolving contract disputes with the state, absent consent to suit being granted by the legislature. *Little-Tex*, 39 S.W.3d at 597.

In May 2002, the court further locked the door on overcoming sovereign contractual immunity, clarifying that the same protection applies to counties, as well as the state. *See Travis County v. Pelzel & Assocs., Inc.,* 77 S.W.3d 246, 669 (Texas 2002). In *Pelzel,* the Texas Supreme Court ruled that Travis County was immune from suit over a construction contract for an office building that the county accepted and occupied. The county withheld sums under a liquidated damages clause for delay, and the contractor sued. Ruling the suit was barred by the doctrine of sovereign immunity, the court noted, "When a governmental unit adjusts a contract price according to the contract's express terms, it does not, by its conduct, waive immunity from suit, even if the propriety of that adjustment is disputed." *Id*. at 252.

C. Asbestos: Survey vs. Certification

In 2001, the Texas Legislature adopted Senate Bill 509 (effective September 1, 2001) that amended the Texas Asbestos Health Protection Act ("TAHPA") by adding Section 13 to that Act. *See* Tex. Rev. Civ. State. Ann. art. 4477-3a, § 13 (Vernon Supp. 2002). Although the TAHPA already required a survey for asbestos-containing building materials in public and commercial buildings and abatement of any asbestos before demolition or renovation, Section 13 was adopted to help of enforce compliance with this requirement. Section 13 reads as follows:

> Survey Required
>
> Sec. 13. (a) In this section, "permit" means a license, certificate, approval, registration, consent, permit, or other form of authorization that a person is required by law, rule, regulation, order, or ordinance to obtain to perform an action, or to initiate, continue, or complete a project, for which the authorization is sought.

> (b) A municipality that requires a person to obtain a permit before renovating or demolishing a public or commercial building may not issue the permit unless the applicant provides:
>
> > (1) evidence acceptable to the municipality that an *asbestos survey*, as required by this Act, of all parts of the building affected by the planned renovation or demolition has been completed by a person licensed under this Act to perform a survey; or
> >
> > (2) a *certification* from a licensed engineer or architect, stating that:
> >
> > > (A) the engineer or architect has reviewed the material *safety data sheets* for the materials used in the original construction, the subsequent renovations or alterations or all parts of the building affected by the planned renovation or demolition, and by asbestos surveys of the building previously conducted in accordance with this Act; *and*
> > >
> > > (B) in the engineer's or architect's professional opinion, all parts of the building affected by the planned renovation or demolition *do not contain asbestos*.

TEX. REV. CIV. STAT. ANN. art. 4477-3a, § 13 (Vernon Supp. 2002) (emphasis added). Therefore, since September 1, 2001, a prerequisite to obtaining a permit for demolishing or renovating any part of a public or commercial building has been either a completed asbestos survey, or a certification from a registered architect or a licensed engineer that all parts of the building to be affected by demolition or renovation do not contain asbestos. With the obvious desire of any owner to reduce costs, it can be seen that a certification by an engineer or architect would be perceived as being more cost- and time-effective than conducting a full asbestos survey. However, providing such certification is highly risky for the architect or engineer.

The TAHPA requires the "applicant" to provide the asbestos survey. TEX. REV. CIV. STAT. ANN. art. 4477-3a, § 13 (Vernon Supp. 2002). Therefore, the owner – not the architect or the engineer – should apply for the permit, because that permit application triggers the survey requirement.

More pertinently, the statutory language requires the engineer or architect to review all "safety data sheets" for materials in the original construction – and any subsequent renovations or alterations – that may be affected by the planned renovation or demolition. It is highly unlikely that all such information could be obtained for any existing structure. Moreover, the certification requires the engineer or architect to opine that all parts of the building affected by the renovation or demolition "do not contain asbestos." Without an asbestos survey or a collection of often unavailable information, the ability to make such a certification reliably for many buildings is highly dubious.

Therefore, in the vast majority of situations, an architect or engineer should not agree to provide the requested asbestos-free certification for demolition or renovation of public or commercial buildings. Instead, the owner should bear the burden of paying for an asbestos survey to be conducted, in accordance with the Act.

D. Public Use of Title "Engineer"

In July 2002, Texas Attorney General John Cornyn issued an opinion concluding that the Texas Engineering Practice Act ("TEPA") forbids any private employee who is not a licensed engineer from using the title "engineer" on "business cards, stationery, and other forms of correspondence which would represent to the public that the employee is a licensed engineer." Op. Tex. Att'y Gen. No. JC-0525 (2002) at 4 (copy attached as

Appendix "A" to this paper). The propriety of using the term "engineer" as a title will likely be the topic of statutory proposals in the upcoming 2003 Texas Legislative Session.

In sum, the attorney general focused on the overall limitation under the TEPA that only licensed persons may "call themselves or be otherwise designated as any kind of an 'engineer' or in any manner make use of the term 'engineer' as a professional, business or commercial identification, title, name, representation, claim or asset . . ." TEX. REV. CIV. STAT. ANN. art. 3271a, § 1.1. While the TEPA exempts certain persons from these requirements, the attorney general found these exemptions do not apply. For example, TEPA Section 20(a)(5) allows certain exemptions from the licensing requirement, including "the use of job titles and personnel classifications by such persons not in connections with any offer of engineering services to the public, providing that no name, title, or words are used which tend to convey the impression that an unlicensed person is offering engineering services to the public." However, the attorney general contends this exemption applies only if – as stated in the preamble Section 20(a) – "such persons are not directly or indirectly represented or held out to the public to be legally qualified to engage in the practice of engineering." Therefore, because the attorney general believes the exemption for in-house-only "engineers" does not overcome the primary prohibition against those persons publicly holding themselves out as "practicing engineering," he believes any non-licensed person "may not represent to the public that he or she is an engineer, i.e., by using that title on business cards, stationery, and other forms of correspondence that are made available to the public." Op. Tex. Att'y Gen. No. JC-0525 (2002) at 4.

The attorney general issued Opinion JC-0525 in response to a request by representative Warren Chisum, Chair of the Texas House of Representatives Committee on Environmental Regulation. According to Representative Chisum's office, his request arose in response to the governor's veto of Senate Bill 697, which the legislature had passed in the 2001 session. SB 697 would also have – among other things – imposed mandatory continuing education requirements for engineers. According to the Texas Council of Engineering Companies, Governor Perry vetoed SB 697 due to an amendment added on the floor of the House that would have allowed the Texas Board of Professional Engineers ("TBPE") authority to require non-licensed persons practicing engineering to register with the TBPE and to pay up to a $25 fee.

The issue of mandatory continuing professional education programs will likely arise again in the next session, as well as use of the title "engineer," along with numerous other issues outlined below.

E. Public Works Construction

One issue that has recently arisen in litigation concerns the statutory requirement for a licensed engineer to directly supervise construction of certain public works projects. Pursuant to the Texas Engineering Practice Act ("TEPA," originally enacted in 1937), "It is unlawful for this State or for any of its political subdivisions, including any county, city, or town, to engage in the construction of any public work involving professional engineering, where public health, public welfare, or public safety is involved, unless the engineering plans and specifications and estimates have been prepared by, *and the engineering construction is to be executed under the direct supervision of a licensed*

professional engineer." TEX. REV. CIV. STAT. ANN. art. 3271a, § 19(a) (Vernon Supp. 2002) (emphasis added). This requirement generally applies to such projects that exceed certain cost thresholds, as defined in the statute. *Id*., § 19(b).

Therefore, the TEPA requires that construction of public works must be "done under the 'direct supervision' of a licensed engineer," including, for example, construction of public schools. Given this statutory requirement, who is obligated to hire the engineer? (Note that typical form contracts from the American Institute of Architects ("AIA") do not require – although they certainly do allow – engaging an engineer to provide "direct supervision" of construction. *Compare, e.g.*, AIA Form B141-1997, *Standard Form of Architect's Services: Design and Contract Administration,* § 2.6.1.1 ("The architect shall provide administration of the Contract between the Owner and the Contractor . . . ") and AIA Form B141-1997, *Standard Form of Agreement between Owner and Architect with Standard Form of Architect's Services,* § 1.1.3.3 (blanks to identify the "Owner's other consultants and contractors").) Does a public entity's failure to engage a licensed engineer with "direct supervision" over the construction of a public work project give bonding companies or sureties a basis to claim that they are not obligated to perform?

F. Other Past and Future Legislation Proposals

In addition to the bills discussed above, the following table outlines some of the legislation that did and did not become law in the 2001 session.

Bill	Status	Description
SB 1797	Signed into law; effective 6/17/01	Engineering professors are exempt from licensing
SB 736	Signed into law; effective 9/01	TBPE granted extension on SDSI pilot project, granting the board greater autonomy
SB 509	Signed into law effective 9/01	Amended Asbestos Health Protection Act (see above)
SB 510	Signed into law effective 9/01	Regulated procurement process for political entities and some schools under the Professional Services Procurement Act
SB 561	Signed into law effective 9/01	Amended various statutes concerning indemnities in architects/engineer contracts (see above)
SB 697	Passed legislature but vetoed by governor	Mandatory continuing professional education (continuing professional competency) programs and mandatory registration of non-licensed engineers
SB 1451 (HB 3372)	Did not pass	Would have exempted small engineering firms (less than 6 engineers) from paying firm engineering registration fee
HB 3077	Did not pass	Would have exempted sole proprietorships from paying firm engineering registration fee
HB 1338	Did not pass	Would have exempted scientists in polymeric sciences from licensing

G. Texas Board of Professional Engineers Sunset Review and Legislative Recommendations

The Texas Board of Professional Engineers ("TBPE") is up for Sunset Review in the 2003 Legislative Session (as is the Texas Board of Architectural Examiners). In connection with that review, the TBPE has presented its goals for future legislation. The following table summarizes some of the more significant and pertinent published TBPE legislative goals:

1. Licensing Issues:

Affected TEPA Section	Issue/Recommendation
Section 12(a)(1)	Allow pre-graduation engineering experience to count toward engineering experience for licensing
Section 13(a)(5)	Eliminate "character only" reference requirements, or allow the TBPE to determine the number of references required
Section 12.1	Change title "Engineer-in-Training" to "Engineer Intern"
Section 13(a)(4)	Change application requirement from describing any criminal offense to describing only those that relate to the duties and responsibilities of being a licensed engineer, pursuant to § 53 of Texas Occupations Code
	Create category of "inactive" licensed engineers who no longer offer engineering services to the public, but wish to maintain license (like Rule 1.68 of Texas Board of Architectural Examiners)
Section 14(c)	Eliminate the ability for a failed applicant to request analysis of examination performance, because most (and soon all) examinations are nationally standardized, multiple-choice tests
Section 20	Change exemptions for licensure to one of various alternatives: a. Clarify the statute; b. Remove unclear, outdated, or vague exemptions (e.g., §§ 20(f) and 20(g)); c. Require registration of all exempted persons (as was attempted with the floor amendment to SB 697 in 2001 Legislative Session); or d. Remove all exemptions to licensure (which the TBPE acknowledges to be not practical and too burdensome)
Section 21	Eliminate the residency requirement for "original" engineering registration in Texas

2. Practice Issues:

Affected TEPA Section	Issues/Recommendations
Section 19(b)(1)	Change existing requirement for employing licensed engineering services on public works exceeding $8,000 (last adjusted in 1989) to let the TBPE determine the criteria (in addition to a cost threshold), or let the TBPE set appropriate cost thresholds
	Grant immunity to engineers who participate in enforcement in peer-review matters before the TBPE
	Impose mandatory Continuing Professional Competency (Continuing Education) programs (as adopted by the legislature in 2001 in SB 697, but subsequently vetoed)
	Implement practice review by TBPE of engineers, as a "proactive enforcement tool to randomly select licensed professional engineers to review for compliance with applicable codes and competency and discipline"
	Implement board certification programs for specialty areas within each engineering discipline (as in law and medicine)

Prior and pending legislation can be reviewed and tracked on the "Texas Legislature Online" website at www.capitol.state.tx.us. The websites for the state professional agencies regulatory for engineers (www.tbpe.state.tx.us) and architects (www.tbae.state.tx.us) are also ready sources of information concerning pending and proposed legislation, as are those for various trade associations.