

**More Than Meets the AIA:**  
**The A201 General Conditions' Conflicts with Texas Law**

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As we all know, standard form contracts such as the AIA A201-1997 (cited as “A201” throughout this paper) can save a great deal of time and effort in drafting construction contract documents. Just the same, it is essential that practitioners watch for statutory and common law principles that can profoundly affect the enforceability of these standard form agreements.

In addition to other elements of Texas law that have been around for years, recent changes in the construction law arena, including the Texas Residential Construction Commission Act, demand a careful re-examination of how these contracts should be adapted for use in Texas. The discussion in this paper is aimed at helping construction industry members understand how and why certain parts of the A201 document should be modified to protect and clarify the rights of the parties under current Texas law.

## Owner's Right to Carry Out the Work

Article 2.4.1 of A201 states, in relevant part, as follows:

“If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period, give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor, within such three-day period after receipt of such second notice, fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct the deficiencies.”

This article can, at a minimum, compel the Contractor to commence and continue to correct the deficiencies in as few as ten days. According to A201, if the Contractor does not comply with the written notices, the Owner may correct the deficiencies without fear of relinquishing any rights the Owner may have against the Contractor.

A potential problem with this clause is that a claimant under Texas law might waive available statutory relief if it adheres to this formula by continuing the work itself after the ten-day period, but before certain statutory time periods expire. For instance, the Residential Construction Liability Act, Texas Property Code § 27.004, mandates a sixty-day notice from a claimant seeking relief from a contractor. That statute reads, in part:

### § 27.004. Notice and Offer of Settlement

“(a) Before the 60<sup>th</sup> day preceding the date a claimant seeking from a contractor damages arising from a construction defect files suit, the claimant shall give written notice by certified mail, return receipt requested, to the contractor, at the contractor's last known address, specifying in reasonable detail the construction defects that are the subject of the complaint.”

Similarly, DTPA § 17.505 requires a sixty-day notice before filing suit. This section states, in part:

§ 17.505. Notice; Inspection

“(a) As a prerequisite to filing a suit for damages... against any person, a consumer shall give written notice to the person at least 60 days before filing suit advising the person in reasonable detail of the consumer’s specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorney’s fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.”

Section 17.42 of the DTPA provides that any waiver of the provisions of the DTPA is void as a violation of public policy, unless the waiver complies with the requirements of section 17.42.<sup>1</sup> Therefore, the conflict created by § 2.4.1 does not serve to nullify the DTPA’s applicability.

The Texas Residential Construction Commission Act,<sup>2</sup> created by the legislature last year and still in its formative stages, contains a less stringent time period for the claimant to give notice relative to the RCLA and DTPA. Under the TRCCA, a claimant is required to give notice to the contractor of any claim submitted to the commission at least thirty days prior to filing the claim. The relevant section states:

§ 428.001. Request for Resolution

“(c) Not later than the 30th day before the date a homeowner submits a request under this section, the homeowner must notify the builder in writing of each construction defect the homeowner claims to exist. After the notice is provided, the builder must be provided with a reasonable opportunity to inspect the

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<sup>1</sup> For a discussion of section 17.42’s effect, *see, e.g., Arthur’s Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 811 (Tex.App.—Dallas 1999, no pet.); *see also S.W. Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991) (both holding that limitation of liability clauses in the contracts at issue were ineffective).

<sup>2</sup> TEX. PROP. CODE. § 401.001 *et seq.*

home or have the builder's designated consultants inspect the home.”

### Warranty

Section 12.2.2.1 of A201 creates a one-year period during which the Owner may notify the Contractor that its work is not in accordance with the requirements of the Contract Documents. During this period, if the Owner fails to notify the Contractor and give it an opportunity to make the correction, the Owner waives the right to require correction by the Contractor and to make a claim for breach of warranty.

The newly enacted TRCCA features specific warranty periods for claims brought under the Act, based on the type of alleged residential construction defect, and these periods certainly differ from those provided in A201 and the Civil Practice & Remedies Code. Section 430.001 provides, in part:

“(a) The commission by rule shall adopt limited statutory warranties and building and performance standards for residential construction that comply with this section.

(b) The warranty periods shall be:

- (1) one year for workmanship and materials;
- (2) two years for plumbing, electrical, heating, and air-conditioning delivery systems; and
- (3) 10 years for major structural components of the home.”

Moreover, the TRCCA establishes a statutory warranty of habitability. Once the statutory periods under § 430.001 have expired, the claimant may bring a breach of warranty of habitability action. Section 430.002 reads:

§ 430.002. Warranty of Habitability.

“(a) The construction of each new home or home improvement shall include the warranty of habitability.

(b) For a construction defect to be actionable as a breach of the warranty of habitability, the defect must have a direct adverse effect on the habitable areas of the home and must not have been discoverable by a reasonable prudent inspection or examination of the home or home improvement within the applicable warranty periods adopted by the commission under Section 430.001.”

While parties may agree to extend the warranty periods provided by the TRCCA, the construction contract may not waive the statutory warranty periods or the warranty of habitability.<sup>3</sup>

Additionally, Texas Civil Practice & Remedies Code §§ 16.004 and 16.051 provide for a four-year statute of limitations on breach of contract claims, while §§ 16.008-16.009 impose a ten-year statute of repose. Contractors and owners should be aware of the differences between breach of warranty and breach of contract claims, and the effect of these differences on claims under A201.

Indemnity

Under A201 §§ 3.18.1-3.18.2, the Contractor agrees to indemnify the Owner and Architect as follows:

“To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor . . . the Contractor shall indemnify and hold harmless the Owner [and] Architect . . . from and against claims, damages, losses and expenses . . . arising out of or

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<sup>3</sup> Texas Residential Construction Commission Act § 430.007.

resulting from performance of the work . . . but only to the extent caused by the negligent acts or omissions of the Contractor . . . .”

The language of this provision fails to meet the fair notice requirements under Texas law, including the “express negligence” and “clear and conspicuous” tests, to cover a party’s future negligence.<sup>4</sup> For this provision to comply with Texas law, it must be reworded and must be underlined or otherwise made conspicuous to be enforceable.

Moreover, Texas Civil Practice & Remedies Code § 130.002 forbids a contractor from assuming liability for damages stemming from an architect’s negligence that is caused by or is the result of defects in the plans, designs and specifications. However, according to the phrasing of A201 § 3.18.1, the Contractor is only liable for its own negligence.

Another provision that deals with indemnity is A201 § 10.3.3, which addresses hazardous materials encountered at (but not brought to) the jobsite. Although the sole negligence of the indemnitee is excluded from the scope of indemnity imposed, this section fails to meet the fair notice requirements of *Ethyl* and *Dresser*.

### Time Limits on Claims

A201 § 4.3.2 states:

“Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later...”

Sections 4.3.4 (claims for concealed or unknown conditions) and 4.3.8 (injury or damage to person or property) both contain a similar 21-day requirement for notice of claims.

These provisions present another, and multifarious, conflict with Texas law. Various Texas statutes mandate a longer notice period than the 21 days provided

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<sup>4</sup> See *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987); see also *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

in § 4.3.2. For example, and as noted earlier in this paper, both § 17.505 of the DTPA and § 27.004 of the RCLA require that notice be given sixty days before filing a claim.

The TRCCA allows for an even greater amount of time to initiate a claim. The first step in bringing a claim under the TRCCA is to request an inspection:

§ 426.006. Time for Requesting Inspection and Dispute Resolution.

“The state-sponsored inspection and dispute resolution process must be requested on or before the second anniversary of the date of discovery of the conditions claimed to be evidence of the construction defect but not later than the 30th day after the date the applicable warranty period expires.”

After the inspection has taken place and the inspector’s recommendation has been submitted, the claimant may then file suit. Section 426.005 provides, in part:

Sec. 426.005. Prerequisite to Action.

“(b) An action... must be filed:

- (1) on or before the expiration of any applicable statute of limitations or by the 45th day after the date the third-party inspector issues the inspector's recommendation, whichever is later; or
- (2) if the recommendation is appealed, on or before the expiration of any applicable statute of limitations or by the 45th day after the date the commission issues its ruling on the appeal, whichever is later.”

Section 16.071 of the Civil Practice & Remedies Code presents yet another challenge to A201 § 4.3.2. It reads, in part:

“A contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the

stipulation is reasonable. A stipulation that requires notification within less than 90 days is void.”

In *American Airlines Employees Federal Credit Union v. Martin*,<sup>5</sup> the Texas Supreme Court addressed the applicability of § 16.071 in a dispute between a depositor and its credit union over deposit agreements. The credit union required depositors to give notification of payment of any unauthorized items within sixty days of such payment. The depositor argued that this violated CPRC § 16.071. The Court held that this section was not applicable since the notice was not a claim for damages, but rather one for notice of unauthorized transactions. Two years later, the Court affirmed *Martin* in *Community Bank & Trust, S.S.B. v. Fleck*,<sup>6</sup> holding that § 16.071 does not apply to bank deposit agreements when the notice to be given is not a notice of a claim for damages, but rather a notice of unauthorized transactions.

Likewise, in *Komatsu v. United States Fire Insurance*,<sup>7</sup> the court declined to apply § 16.071 to the notice requirements in a legal malpractice policy. Again, the Court reasoned that the notice was not for a claim of damages; in this case, notice was regarding the submission of a claim made to the carrier.

The authors were unable to find a case specifically addressing the applicability of CPRC § 16.071 to A201 § 4.3.2 or any other similar contract notice provisions. Therefore, it is uncertain how the Court will address such notice provisions with respect to section 16.071. To the extent that a § 4.3.2 “claim” is one for damages by its very logic and nature, however, this will probably provide fertile ground for disputes over timely notice in A201 contracts. Black’s Law Dictionary weighs in as follows:

**Damages.** A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another. Restatement, Second, Torts, § 12A. Money

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<sup>5</sup> 29 S.W.3d 86 (Tex. 2000).

<sup>6</sup> 107 S.W.3d 541 (Tex. 2002) (per curiam).

<sup>7</sup> 806 S.W.2d 603 (Tex.App.—Fort Worth 1991, writ denied).



compensation sought or awarded as a remedy for a breach of contract or for tortious acts.

This is not to be confused with the term “damage,” which is defined by Black’s as follows:

**Damage.** Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter’s person or property. The word is to be distinguished from its plural, “damages,” which means a compensation in money for a loss or damage. An injury produces a right in them who have suffered any damage by it to demand reparation of such damage from the authors of the injury. By damage we understand every loss or diminution of what is a man’s own, occasioned by the fault of another. The harm, detriment, or loss sustained by reason of an injury.

#### Waiver of Consequential Damages

A201 § 4.3.10 reads:

“The Contractor and Owner waive all claims against each other for all consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.”

This clause leaves parties to A201 contracts with the liberty to specify liquidated damages through the other members of the AIA “family of documents.” Generally speaking, a liquidated damages provision will be valid only if the amount is a reasonable approximation of the probable loss that will be caused by delayed performance and if the damage caused by the delay is difficult or impossible to determine.<sup>8</sup> Thus, liquidated damages may not be used as a contractual penalty in Texas.<sup>9</sup>

There is a potential conflict between § 4.3.10 (as well as §§ 9.10.5 and 11.4.3, both of which involve other waivers) and DTPA § 17.50. The DTPA allows a consumer to recover what would be consequential damages in a breach of contract action under a DTPA cause of action:

§ 17.50. Relief for Consumers.

“(b) In a suit filed under this section, each consumer who prevails may obtain:

- (1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic

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<sup>8</sup> *Stewart v. Basey*, 245 S.W.2d 44 (Tex. 1952); *see also Loggins Constr. Co. v. Stephen F. Austin State Univ.*, 543 S.W.2d 682 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

<sup>9</sup> *See Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991) for a discussion of the difference between an enforceable liquidated damages provision and an unenforceable penalty.

damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages;

- (2) an order enjoining such acts or failure to act;
- (3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and
- (4) any other relief which the court deems proper...”

Any attempted waiver of the consumer’s DTPA rights must comply with that statute’s stringent waiver requirements. The relevant section states, in part:

§ 17.42. Waivers: Public Policy

“(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:

- (1) the waiver is in writing and is signed by the consumer;
- (2) the consumer is not in a significantly disparate bargaining position; and
- (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

...

(c) A waiver under this section must be:

- (1) conspicuous and in bold-face type of at least 10 points in size;
- (2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and
- (3) in substantially the following form:

‘I waive my rights under the Deceptive Trade Practices - Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver.’”

Clearly, the language of an unamended A201 fails to meet the DTPA waiver requirements. If the contracting parties want to waive consequential damages between themselves on a project that is subject to the DTPA, they should modify the contract to meet § 17.42’s strict mandate—though some might view this as a possible “deal-killer” at the outset, when contractual terms are under negotiation.

### Attorney’s Fees

A201 does not address the awarding of attorneys’ fees. However, the Civil Practice & Remedies Code and a host of other statutes—including Chapter 53 of the Property Code (for enforcement and for summary removal of liens), the DTPA, the RCLA, and others—clearly define the circumstances when fees will be available. CPRC § 38.001, the baseline statutory provision on the topic in Texas, provides:

“A person may recover reasonable attorney’s fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

- (1) rendered services;
- (2) performed labor;

- (3) furnished material;
- ...
- (7) a sworn account; or
- (8) an oral or written contract.”<sup>10</sup>

Claimants bringing an action under the RCLA also need to be aware of the possibility of attorney’s fees being awarded to the defendant. Section 27.0031 states that:

“A party who files a suit under this chapter that is groundless and brought in bad faith or for purposes of harassment is liable to the defendant for reasonable attorney’s fees and court costs.”

Likewise, the DTPA contains a similar provision at § 15.50(c):

On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

Since A201 calls for arbitration of all disputes arising between the parties to the contract, it is important to review with a client the possibility of (a) waiving the arbitration provision, (b) deleting it from the outset, during negotiations, and/or (c) inserting a clause in the contract providing for a “prevailing party” (a term replete with its own questions) to recover its costs and fees in the event of a dispute.

If the matter does proceed to arbitration, bear in mind that while arbitrators’ decisions may be overturned for certain statutorily defined (and judicially interpreted) reasons,<sup>11</sup> courts will generally be loath to intrude upon and change arbitration results. A prevailing party will not be guaranteed an award of fees unless the contract is modified to include such a definitive provision.

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<sup>10</sup> Cf. *Green Int’l., Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1997) ( limiting the scope of § 38.001 to where the party seeking attorney’s fees “(1) prevail[s] on a cause of action for which attorney’s fees are recoverable; and (2) recover[s] damages.”

<sup>11</sup> See Civil Practice & Remedies Code § 171.088 for the legislative statement on grounds for vacating an arbitration award.

If a claim is brought under the rubric of the TRCCA, A201 may not need to be altered. Section 438.001 reads:

“In addition to grounds for vacating an arbitration award under Section 171.088, Civil Practice and Remedies Code, on application of a party, a court shall vacate an award in a residential construction arbitration upon a showing of manifest disregard for Texas law.”

### Architect’s Withholding of Payment

A201 § 9.5.1 allows the Architect to withhold funds for various reasons, mostly for the protection of the Owner. Regardless of the reason for withholding payment, a mistaken withholding could place the Owner at risk of violating Texas’ Prompt Pay Statute.<sup>12</sup> The penalty for such a violation includes interest at 1.5% per month. In addition, if an owner in certain federal construction projects erroneously withholds payment, the owner may incur penalties under 31 U.S.C.A. §§ 3902(a) and 3905, the “Prompt Payment” provisions applicable to certain federal construction projects.

Under the Texas Trust Fund Statute,<sup>13</sup> funds paid to a general contractor for the benefit of downstream subcontractors and suppliers are considered “trust funds (see below), but so are funds borrowed by an Owner for use in a construction project. The wrongful withholding of trust funds by an Architect could impose liability on the Owner. Although there are ‘good faith’ and other affirmative defenses to the statutes that can fairly easily be met, it should be noted that these various code provisions increase the potential liability associated with a decision to withhold funds.

### Trust Funds

A201 § 9.6.7 reads, in part:

“Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract

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<sup>12</sup> TEX. PROP. CODE § 28.001 *et seq.*

<sup>13</sup> TEX. PROP. CODE § 162.001 *et seq.*

sum, payments received by the Contractor for work properly performed by Subcontractors and Suppliers shall be held by the Contractor for those Subcontractors and Suppliers who performed work or furnished materials, or both, under the contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create a fiduciary duty or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.”

The Texas Trust Fund Statute stipulates that a contractor or subcontractor who receives construction project funds is a trustee of the funds on behalf of those downstream who have supplied materials and/or labor to the Project. Owners who secure loans for property improvement where there is a lien, as well as individuals who have control or exercise direction over the funds, are also trustees under the Texas Trust Fund Act.

The statute supplies an affirmative defense for circumstances where funds are used to pay actual expenses directly related to the work, and where a “reasonable” dispute is involved over the amounts claimed or owed. The withholding party bears the burden of proving that the expenses were related to the work. A potential consequence of wrongful withholding or misapplication of trust funds is criminal prosecution for misapplication of fiduciary property,<sup>14</sup> as well as possible non-dischargeability of debts in bankruptcy.<sup>15</sup>

The portion of § 9.6.7 that states, “Nothing contained herein shall require money to be placed in a separate account ...” may lull an unsuspecting residential contractor into a false sense of security. Texas Property Code § 162.005 requires a contractor who has entered into a written contract to construct a residential homestead to maintain a separate construction account for each separate residential homestead project. Section 162.032 states that a failure to maintain such an account is a Class A misdemeanor.

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<sup>14</sup> TEX. PENAL CODE § 32.45

<sup>15</sup> See 11 U.S.C. § 327(a)(2).

Another source of concern for homebuilders with respect to the use of funds is found in the TRCCA, which subjects the builder to the commission's disciplinary power. The section reads, in part:

§ 418.001. Grounds for Disciplinary Action.

A person is subject to disciplinary action under this chapter for:

- ... .
- (2) misappropriation of trust funds in the practice of residential construction.

The discipline that the commission may administer can have a significant impact on the homebuilder's business. The section states that:

§ 419.002. Disciplinary Powers of the Commission.

On a determination that a ground for disciplinary action under Section 418.001 exists, the commission may:

- (1) revoke or suspend a registration or certification;
- (2) probate the suspension of a registration or certification; or
- (3) formally or informally reprimand a registered or certified person.

In the case of *Fisk Allied v. Manhattan Constr.*, 835 F. Supp. 334 (E.D. Tex. 1993), the court noted that the Texas Trust Fund Statute did not create a classic trust, and so the subcontractor could not use the Texas Trust Fund Statute to obtain a prejudgment injunction to freeze money held by the general contractor that it had received from the owner for the claim. This AIA provision appears to disclaim such liability, yet it places an affirmative duty on the contractor. Indeed, this provision could therefore be interpreted to expand the duties that a contractor may have under the Texas Trust Fund Statute.



## Usury

Section 13.6.1 of A201 states that:

“Payments due and unpaid under the Contract document shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or in the absence thereof at the legal rate prevailing from time to time at the place where the Project is located.”

TEXAS FINANCE CODE § 302.002 states that if the parties do not agree upon an interest rate, a 6% rate may be charged thirty days after the date on which the amount is due. In *Commerce, Crowds, and Canton v. DKS Construction, Inc.*, 776 S.W.2d 615 (Tex.App.—Dallas 1989, no writ), the parties employed a similar AIA contract provision and had not agreed upon an interest rate. The Court held that any charging within the first thirty-day “interest-free” period constituted a “double charging” of interest barred by the Texas usury statutes. At the time of the decision, the penalty included the forfeiture of all principal on which the interest had been charged.

Currently, TEXAS FINANCE CODE § 305.002 provides that if a party charges interest greater than authorized, the creditor is liable for the greater of (1) three times the amount of excessive interest, or (2) \$2,000 or 20% of the amount of the principal, whichever is less. If the interest charged is greater than twice the amount authorized, § 305.002 authorizes the forfeiture of all principal. Presently, the TEXAS FINANCE CODE states that a charging within the “interest-free” period is no longer a “double charging” as a matter of law.

## Payment of Retainage

Article 9.8.5 of AIA A201-1997 reads:

“The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such work or designated portion thereof. Such payments shall be adjusted for work that is incomplete or not in accordance with the requirements of the Contract Documents.”

This section is problematic when compared to the statutorily imposed duties on Owners to withhold ten percent of construction funds as retainage, and withhold trapped funds on private non-bonded projects for periods specified in the TEXAS PROPERTY CODE.<sup>16</sup> Owners and their attorneys should give strong consideration to amending this provision to account for the need to retain ten percent of project payments until thirty days after job completion, as well as the need to obey the fund-trapping provisions. After all, protection of the owner is one of the central purposes of these elements of the Property Code.

### The Discovery Rule and Accrual of a Cause of Action

Article 13.7 of A201, entitled “Commencement of Statutory Limitation Period,” provides as follows:

- .1 **Before Substantial Completion.** As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.
- .2 **Between Substantial Completion and Final Certificate for Payment.** As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
- .3 **After Final Certificate for Payment.** As to acts or failures to act occurring after the relevant date of issuance of the Final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of the actual commission of any other act or failure to

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<sup>16</sup> See §§ 53.081-53.084 and § 53.101.

perform any duty or obligation by the Contractor or Owner, whichever occurs last.

In Texas, the general rule is that a cause of action accrues “as soon as the defendant’s wrongful act effects some injury,” and this has been held to apply to actions based on negligent design and construction of an improvement to real property.<sup>17</sup>

The above-cited *Trinity River* case observed directly that Texas courts had “not previously [adopted the discovery rule] for actions based on negligent design or construction of an improvement to real property.”<sup>18</sup> The *Trinity River* opinion demonstrates that the Supreme Court is still cautious in its extension of the discovery rule, and that it is hesitant to adopt it absent compelling reasons to show that a whole class of cases is being unjustly served by the general rule of accrual.<sup>19</sup>

Various courts of appeal in Texas have held, however, that the discovery rule applies in the construction context. For example, the Corpus Christi Court of Appeals, in a 1993 case,<sup>20</sup> adopted the discovery rule in a suit for negligent design and construction. In *Dallas Market Center*, leaks appeared in a building immediately after completion of the project, and a series of repair efforts were undertaken to remedy apparent masonry defects. Six years after the project’s completion, the owner hired an engineer to undertake a comprehensive analysis of the building, and suit was filed soon thereafter.

Despite the passage of time, the court stated that the owner’s cause of action accrued when it knew—or when a reasonable person should have known—of the facts giving rise to the cause of action. A dismissal of the case on limitations grounds was denied, with the court holding that there was a fact issue as to whether the statute should have commenced during the initial repair efforts or once a design professional was hired to evaluate the structure. A writ of error was denied in this case.

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<sup>17</sup> See *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994) (citing *Murray v. San Jacinto Agency, inc.*, 800 S.W.2d 826, 828 (Tex. 1990)).

<sup>18</sup> See *Trinity River*, 889 S.W.2d at 262.

<sup>19</sup> *Diesel Fuel Injection Serv. v. Gabriel*, 893 S.W.2d 610 (Tex. App.—Corpus Christi 1994, no writ).

<sup>20</sup> *Dallas Mrt. Ctr. Hotel Co. v. Beran & Shelmire*, 865 S.W.2d 145 (Tex.App.—Corpus Christi 1993, writ den’d).

Another case, from the Waco Court of Appeals, involved a homebuilding contractor who was held liable nine years after it conveyed the home and surrounding land to the buyer, on a theory of implied warranty of the home's fitness and habitability.<sup>21</sup> The court in this case allowed a tolling of the statute until the home buyer discovered or should have discovered the existence of the problem, which in this case was only when a visible defect had manifested itself. Other reported cases exist that feature delayed accrual for latent construction defects for breach of warranty.<sup>22</sup>

It is unclear whether the discovery rule or the accrual rubric set forth in A201 § 13.7 will control. The author was unable to locate authority discussing the enforceability of the section 13.7 provisions under Texas law.

However, even if these provisions superseded case law that allows for the discovery rule in construction cases, it does conflict with the limitations clause provided in DTPA § 17.565, which expressly adopts the discovery rule. As discussed above, a contract must satisfy DTPA § 17.42's stringent requirements to waive DTPA rights. Because the discovery rule favors the plaintiff-consumer, it would presumably be a right that would not be waived absent compliance with DTPA § 17.42's requirements.<sup>23</sup> A201 § 13.7 does not comply with these requirements.

As an additional matter, §§ 4.4.5 and 4.4.6 of A201 state that the Architect will rule on claims by written decision, and that – if the Architect so states in his or her decision – the losing party has thirty days to file for mediation or arbitration. If this purports to bar claims not made within this period, these terms may run afoul of Texas Civil Practice & Remedies Code § 16.070, which states that parties cannot contract for a limitations period that is shorter than two years.

### Certificate of Merit

As many construction lawyers by now know, the 2003 session of the Texas Legislature added a new Chapter 150 to the Civil Practice & Remedies Code,

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<sup>21</sup> *Richman v. Watel*, 565 S.W.2d 101 (Tex.Civ.App.—Waco 1978), *aff'd*, 576 S.W.2d 779 (Tex. 1978).

<sup>22</sup> *See, e.g., Vaughn Bldg. Corp. v. Austin Co.*, 620 S.W.2d 678 (Tex.Civ.App.—Dallas 1981), *aff'd*, 643 S.W.2d 113 (Tex. 1982).

<sup>23</sup> In addition, the statute calls for the DTPA to be liberally construed to protect the consumer. TEX. BUS. & COMM. CODE § 17.44.

requiring claimants against architects and engineers to obtain a “Certificate of Merit” before they may file suit against those design professionals. While the authors have not identified a direct conflict between Chapter 150 and A201, article 4.4 of A201 deals with “Resolution of Claims and Disputes,” and this includes a provision on how claims against the Architect for errors or omissions will initially be addressed.

Because A201 discusses claims against the Architect but does not discuss the Certificate of Merit requirement, the pertinent language of the new Chapter 150 is attached below. Parties would be well advised to meet the terms of this statute, both to avoid embarrassment, and because the failure to do so allows the court—with permissive, not mandatory, language—to dismiss the case with prejudice. The language of this new statute reads as follows:

§ 150.002. Certificate of Merit.

“(a) In any action for damages alleging professional negligence by a design professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party registered architect... competent to testify and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party... registered architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.”

(b) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party registered architect... could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

...

(d) The plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) may result in

dismissal with prejudice of the complaint against the defendant.

(e) This statute shall not be construed to extend any applicable period of limitation or repose.

### Conclusion

As the discussion in this paper demonstrates, the A201 document contains a wide array of conflicts with Texas law. Lawyers involved from the very outset of a project, when negotiations are still underway, can deal with these issues by clever and timely draftsmanship, but so can individuals with a grasp of the potential conflicts at hand. Otherwise, given that very few construction projects end without claims of some sort, the parties will likely find themselves spending time and energy resolving interpretation and enforceability issues after a dispute has arisen. Understanding these problems at any point in a project, even after claims arise, may give you a serious strategic advantage in negotiating with your opponent. Draft, analyze, and argue accordingly.