

The New Rules (Part 2): Restrictions on the Duty to Defend for Architects and Engineers

Update

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In part two of our series on Texas' recently passed construction law legislation, we focus on risk shifting provisions relating to construction engineering and/or architectural services. The new risk shifting provisions in HB 2116, now codified in the amended Chapter 130 of the Texas Civil Practices and Remedies Code, provide additional protections for construction engineers and architects and directly impact how project owners should negotiate their construction contracts. Proponents of HB 2116 argued it was necessary to curtail project owners' demands for contract provisions that imposed an unreasonable, uninsurable, and unfair duty to defend. Opponents of the legislation maintained that architects and engineers were free to negotiate their contracts as they saw fit, and that the existing Chapter 130 provided sufficient protections by invalidating contract provisions that required architects or engineers to indemnify an owner for the owner's own negligence. The bill that ultimately passed undoubtedly expands protections for architects and engineers by making void any construction contract provision that imposes upon an architect or engineer a duty to defend a party for liability based in whole or in part on a project owner's negligence or breach of contract. The amendment also contains certain limitations and exceptions for the benefit of project owners. Chapter 130's amendments went into effect on September 1, 2021 and apply to construction contracts entered into on or after September 1, 2021.

Limits on Risk-Shifting Provisions and the Duty to Defend

Under Section 130.002(c), any construction contract provision that imposes upon an architect or engineer a duty to defend a claim based in whole or in part

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on a project owner's negligence, fault, or breach of contract is void and unenforceable. See Tex. Civ. Prac. & Rem. Code Ann. § 130.002(c). Interestingly, Section 130.002(c) also expressly allows contractual provisions requiring reimbursement of an owner's attorneys' fees so long as the reimbursement is in proportion to the engineer's or architect's liability. *Id.* And, Section 130.002(d) expressly allows contract provisions that require an architect or engineer to name the project owner as an additional insured on the architect's or engineer's professional liability insurance policy (and to provide a defense, if needed) to the extent additional insureds are allowed under the policy. *Id.* § 130.002(d).

Section 130.002(c)'s restrictions on a contractual duty to defend do not apply to construction contracts in which an owner contracts with an entity to provide both design and construction services. *Id.* § 130.002(e). And, there is no prohibition against contract provisions imposing a duty to defend on an architect or engineer if the claim being defended is for negligent hiring of the architect or engineer. *Id.* § 130.002(f).

New Standard of Care for Engineers and Architects

Section 130.0021(a) creates a new and specific standard of care for architectural or engineering services related to the repair or construction of improvements to real property. Architectural or engineering services must be "performed with the professional skill and care ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license." *Id.* 130.0021(a). For contracts entered into on or after September 1, 2021, provisions containing a standard of care deviating from this new statutory definition are deemed void and unenforceable. *Id.* § 130.0021(b). Readers may recall that this standard of care was also adopted by Chapter 59 with respect to design-build and EPC arrangements.

Conclusion

Chapter 130 as amended clearly offers construction architects and engineers broader protections against risk-shifting provisions. But the amendments also provide some balance by preserving a project owner's right to require contract provisions allowing for reimbursement of a proportionate amount of the owner's attorneys' fees or requiring an architect or engineer to add the owner as an additional insured on relevant professional liability insurance policies. Owners can also still negotiate for contract provisions requiring engineers and architects to indemnify and defend for their own actions. Through the amendments, the Texas legislature took steps to eliminate the uninsurable duty to defend often shouldered by engineers and architects in circumstances where they are not at

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fault, while also preserving a means of recovery and protection for owners when architects and engineers are wholly or partially at fault.