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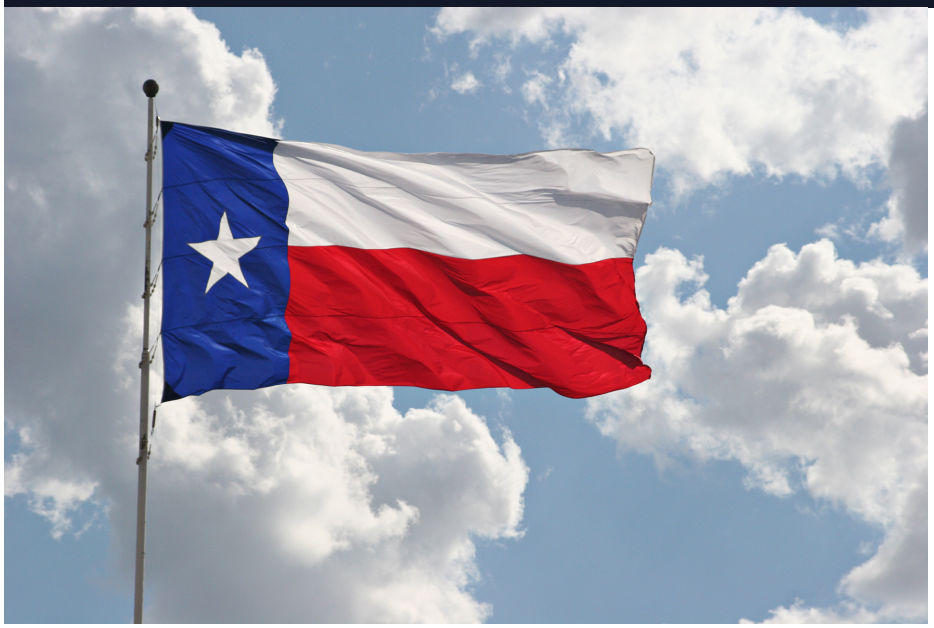

New Texas Legislation Would Reallocate Risk For Design Defects

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Since the Texas Supreme Court's 2012 decision in *El Paso Field Services, L.P. v. MasTec North America*, contractors may be held liable for design defects even if the designs, plans, or specifications were provided by the owner or the owner's design professional. Texas lawmakers are trying to change this outcome.

Senator Bryan Hughes (R-Mineola) and Representative Jeff Leach (R-Plano) have introduced companion legislation for Texas's 87th legislative session, intended to bring Texas back in line with the vast majority of jurisdictions on the issue of risk allocation for design defects. SB 219 and HB 1418 would apply prospectively to shift responsibility for defective plans, specifications, or other design documents to the design professional who prepared the documents as opposed to the contractor who relies upon their accuracy.

Additionally, the bill clarifies that a contractor is not responsible for, and does not guarantee the accuracy, sufficiency, or suitability of design documents. However, the legislation does require a contractor to make known, in writing, the existence of any known defect discovered before or during the construction. If the contractor fails to do so, the liability shield may be lost. The bill also exempts from its protection contracts for the construction or repair of a critical infrastructure facility. Notably, similar legislation has failed to pass before, in both 2017 and 2019, due to resistance from owners, designers, and architects.

In Texas currently, a contractor may be exposed to liability for construction defects arising from flaws in the plans, drawings or specifications. According to the Texas Supreme Court in *MasTec*, where parties to a construction contract agree to allocate the risk of construction defects to one party, the courts will not disturb that agreement and will allocate the risk according to

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the parties' agreement. To do otherwise, the court explained, would vitiate the ability of sophisticated parties to contract as they see fit. As a result, a contractor may be liable for damages in Texas even where the work at issue was performed strictly in accordance with the provided plans or specifications.

This approach runs contrary to the federal rule first enumerated in *United States v. Spearin* in 1918, which recognized that when a contractor is "bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications," and therefore allocates the risk of defects based on faulty plans or specifications to the party who provided those plans. Almost every state has adopted the *Spearin* doctrine, whether through case law or by statute. However, Texas is not the only state that has not fully adopted the *Spearin* doctrine. The Ohio Supreme Court also limited the doctrine's applicability in the 2007 case *Dugan & Meyers Construction Co. v. Ohio Dept. of Administrative Services*, holding that it would not apply to overwrite the parties' contracted "no-damages-for-delay" clause and award damages to the contractor, even where the delays were wholly the fault of the contracting party.

Should this legislation pass, Texas will fall in line with the vast majority of jurisdictions who have adopted the *Spearin* doctrine and shielded contractors from liability when they perform their work in strict conformity with the plans and specifications provided by the owner or its design professional.