

# Construction Law Update

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AUGUST 2023

Gordon & Rees' Construction Group is pleased to publish the latest issue of our Construction Law Update, a quarterly take on trends of interest to design professionals, contractors, and developers throughout the country.

First Quarter 2021

- I. [When Mediating in Colorado, Sign a Settlement Memorandum During the Mediation](#)
- II. [Texas Legislation Filed to Relieve Contractors of Liability Resulting From Design Defects](#)
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By **Daniel E. Evans** and **Colleen M. Kwiatkowski**

In *Tuscany Custom Homes, LLC v. John B. Westover, et al.*, No. 2020CA1724, the Colorado Court of Appeals held that post-mediation communications from a mediator memorializing the parties' agreement reached during mediation (but not executed by the parties) and an unsigned settlement agreement formalizing those settlement terms were "mediation communications" under Colorado's dispute resolution statute (C.R.S. § 13-22-302(2.5) & -307) and thus inadmissible evidence of a settlement agreement. While the Court's holding does not necessarily set new law or change our understanding of Colorado's mediation statutes, it serves as a cautionary tale to those engaged in mediation that the extra effort to solidify the parties' agreements before ending the day is the safest bet. Clients can sometimes walk away from mediations and, having time to mull over their decision, change their minds even though it seemed to everyone that a deal was reached. Regardless of whether an oral agreement to settle was reached during mediation, without a signed agreement it will be an uphill battle to prove the existence of the settlement that occurred during mediation.

To read a full, expanded version of this article, [click here](#).

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By **Brian J. Comarda** and **Allison K. Wells**

Currently, Texas is one of only two states where a

contractor may be held liable for defects related to construction designs, plans, or specifications – even if provided by the hiring party (*i.e.*, the owner, owner’s agent or design professional). However, new legislation in Texas (SB 219 and HB 1418) has been filed to square Texas in line with other states, to grant contractors protection, and to reverse, in part, the 2012 Texas Supreme Court holding in *El Paso Field Services, L.P. v. MasTec North America*,<sup>[1]</sup> which led to this current situation.

To read a full, expanded version of this article, [click here](#).

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By **Kimberly A. Blake**

In celebration of the New Year, attached are the 50 State Surveys for 2021. Below are summaries of the changes made since 2020. Click on a chart to download.

### **(1) Statute of Limitations**

There have not yet been any changes enacted to existing statutes of limitation. However, Missouri has a pending piece of legislation (SB No. 633) that appears to have been held up due to the Senate’s focus on COVID-19 related issues. SB No. 633, if passed, will reduce the existing statute of limitations for personal injury claims from five years to two years. It has already passed through the Senate’s Government Reform Committee, which is typically the primary hurdle such legislation must clear before passage by the full senate. Based on the commentary available online, the general

belief among legal professionals in the state is that it has a high likelihood of being enacted. At present, the bill is listed as being on the “informal calendar,” but it is unclear if passage/enactment is possible before the new session. For the purposes of the chart, a footnote has been added so that users will be aware of this possibility.

## **(2) Statutes of Repose**

The only notable update to the Statutes of Repose chart is in Massachusetts where a very recent case (*D’Allesandro v. Lennar Hingham Holdings, LLC*, 486 Mass. 150, 156 N.E.3d 197, 202 (2020)) clarified its application for multi-unit condominium developments. Pursuant to this holding, the statute is not tolled for claims of defects in common areas until the entire project has been completed.

## **(3) Right to Repair Statutes**

No notable changes with regard to state-specific rights to repair since 2020.

## **(4) Anti-Indemnity Statutes**

While there does not appear to have been any notable changes to anti-indemnity statutes, the chart for 2021 has been supplemented with additional case law and a code section.

For Maine, additional language and supporting case law (*International Paper Co. v. A & A Brochu*, 899 F.Supp. 715, 719 (D.Me. 1995)) has been added to clarify the “disfavor” articulated by the courts with regard to agreements indemnifying a party for its own negligence.

In the Construction & Design section for Texas, Tex. Civ. Prac. & Rem. Code Ann. Section 130.002 has been added. This code section provides that contracts requiring an architect or engineer to indemnify an owner for the owner’s sole negligence is void and unenforceable.

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### **Las Vegas Construction Team Obtains Supreme Court Affirmation of Summary Judgment of Multi-Million Dollar Construction Defect Claim at Trial Court**

The case was filed in the Eighth Judicial District, Clark County, Nevada (Las Vegas) and involved alleged construction defects related to an 11,255 square foot custom home located in the ultra-exclusive McDonald Highlands golf course community. The plaintiff is a well-known attorney who frequently represents contractors and subcontractors in Nevada, California and Arizona. Gordon Rees Scully Mansukhani Las Vegas Managing Partner **Robert Schumacher** and Las Vegas Partner **Brian Walters** represented Lands West Builders, Inc. ("Lands West"). Lands West was one of two developers/general contractors responsible for building the home. [Read More](#)

### **Arbitration Victory in Boston**

The firm's client, a general contractor, specializes in the construction of high end homes. He contracted with owners to build a \$4 million+ home on 18 acre site located on the Connecticut shore. The contract was for a lump sum, set cost. The owner's brother (a well-known Boston architect) designed the project and provided construction administration services. The construction phase was notable for the owners executing 181 change orders increasing the cost of the project by more than \$1 million. The project was not completed within the contractor's original estimated schedule of 14 months. After the owners moved into the home, they held back money and ignored the contractor's final payment application. The contractor, despite not getting paid, remained on the project for six months addressing an evolving punch list. He understood from the owners that they would pay him after he completed the punch list. When only a handful of items remained on the punch list, the contractor learned from the architect that the owners were not going to pay him even if he completed the punch list. He stopped work and retained Gordon Rees Scully Mansukhani to represent him in a fee claim against the owners. After Gordon Rees Scully Mansukhani attorney **Jay Gregory** sent a demand letter to the owners, they hired counsel who filed a Demand for Arbitration. The owners claimed to

have suffered more than \$750,000 in out-of-pocket and delay damages as a result of the contractor's allegedly bad work. Gregory filed a counterclaim seeking to recover the balance left on the contractor's agreement. If the owners prevailed, the contractor would have to file for bankruptcy. During a 10 day Zoom arbitration the owners testified as to the contractor's alleged shortcomings and also presented evidence from two architectural experts and three construction experts supporting their claim against the contractor. Gregory presented no outside experts to support the contractor's position but relied on: (1) the lay testimony of the contractor and two subcontractors; and (2) cross-examination of the owner's witnesses. In his Decision and Order the AAA Arbitrator rejected the owners' claim in total and awarded the contractor more than \$50,000 on his contract balance claim. The contractor was happy to get some money in his pocket but even more pleased to be vindicated and have his good reputation remain intact.

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Los Angeles Partner **Brenda Radmacher** was honored as a nominee for 2020 Leaders in Law by the Los Angeles Business Journal. She has also been selected by Construction Dive as an honoree for the 2021 Women in Construction Spotlight and will be featured in the Construction Dive website and newsletter during the March 8th Women in Construction Week recognizing the construction industry's top female leaders. In December 2020, Radmacher authored an article entitled, "Four Tips for Remote Construction Arbitrations: Distance Does Not Have to Mean Poor Communication," published by the American Bar Association's newsletter on Construction Law, *Under Construction*. The article describes various aspects of remote procedures and provides four key considerations for an effective remote arbitration. [Read More](#)

On February 25, 2021, Seattle Partner **Meredith Thielbahr** and San Francisco Senior Counsel **Matt Peng** served as panelists at the American Bar Association's ("ABA") Forum on Construction Law's first virtual conference. Thielbahr participated in a session entitled "When the Feds Come Knocking: Anatomy of an Internal Investigation and Managing Risk under the False Claims Act." The session addressed recent developments

under the False Claims Act that drive procurement fraud prosecutions and related investigations, the anatomy of internal investigations, commencing with a target's receipt of a Civil Investigative Demand or federal raid, managing risk related to government stimulus funds under the CARES Act. Peng participated in a session entitled, "Fundamentals: Termination, Job Completion, and Contractor Payment." The session addressed the legal implications of terminating a project or a party from a project, legal requirements for project completion, and general issues regarding payment.

On March 2, 2021, **Angela Richie** and Of Counsel **Denise Motta** presented a client webinar entitled, "14 Contract Terms You Should Look for in Every Contract Before You Bid (Or Sign) so That You Can Avoid Saying, 'I've Got a Bad Feeling About This!'" A link to the presentation can be found [here](#).

On February 2, 2021, **Angela Richie** and Senior Counsel **Angelo DiBartolomeo** presented a client webinar entitled, "No Good Deed Goes Unpunished: What You Need to Know About Design-Assist Projects Before You Bid and Sign the Contract in Order to Prevent a Bet the Company Mistake." A link to the presentation can be found [here](#).

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The Gordon & Rees Construction Law Blog continues to post new content addressing topical issues affecting the construction industry throughout the country. From analysis of new court decisions, discussions of timely legislation, and commentary on real-world, project-specific issues, Gordon & Rees' Construction Law Blog provides insight on the issues that affect the construction industry now.

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Gordon & Rees' Construction Group consists of more than 150 lawyers in offices nationwide. In 2019, the firm opened its 68th office, creating the world's first 50-state law firm. The full list of Gordon & Rees' offices and local contacts can be found [\*\*here\*\*](#).

Gordon & Rees' construction attorneys focus their practice on the comprehensive range of legal service required by all participants in the construction industry – architects, engineers, design professionals, design joint ventures, owners, developers, property managers, general contractors, subcontractors, material suppliers, product manufacturers, lenders, investors, state agencies, municipalities, and other affiliated consultants and service providers.

We serve clients who design, develop, or build all types of structures, including commercial buildings, single and multifamily residential projects, industrial facilities, universities, hospitals, museums, observatories, amusement parks, hotels, shopping centers, high-rise urban complexes, jails, airports, bridges, dams, and power plants. We also have been involved in projects for tunnels, freeways, light rail, railway stations, marinas, telecom systems, and earth-retention systems. Our experience includes private, public, and P3 construction projects.

If you have questions about this issue of the Construction Law Update or our nationwide construction practice, [\*\*click here\*\*](#) to visit our practice group page or contact partner [\*\*Daniel Evans\*\*](#).

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