

**CAUSE NO. 08-0544**

**IN THE SUPREME COURT OF TEXAS**

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**IN RE: SCOGGINS CONSTRUCTION COMPANY, INC.,**

*Relator*

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**The 398th Judicial District Court of Hidalgo County, Texas  
The Honorable Aida Salinas Flores, Presiding  
Cause No. C-1473-06-I-1**

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**BRIEF OF AMICUS CURIAE TEXAS BUILDING BRANCH OF THE  
ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
IN SUPPORT OF RELATOR, SCOGGINS CONSTRUCTION COMPANY, INC.**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

This Amicus Curiae Brief is tendered on behalf of the Texas Building Branch of the Associated General Contractors of America (“Texas Building Branch-AGC”) in support of Petitioner’s Petition for Review. The Associated General Contractors of America is a national non-profit association comprised of more than 33,000 companies, including 7,500 general contractors. Texas Building Branch-AGC consists of eleven commercial building chapters of the Associated General Contractors located throughout the State of Texas. The membership of these eleven chapters includes approximately 370 general contractors and 3,890 specialty contractors, subcontractors and suppliers, all doing business in Texas.

Because of its unique perspective as an influential representative of a broad segment of the construction industry, Texas Building Branch-AGC has submitted amicus curiae briefs to this Court on many occasions, including important cases affecting the ability to transfer and insure the risks encountered on Texas construction projects, including *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007), and most recently in Cause No. 06-0418, *HCBeck v. Charles Rice*, currently pending before this Court. This is another of those cases that profoundly affects the ability of Texas contractors to transfer risk. The effect of the trial court’s order denying the motion of Relator, Scoggins Construction Company, Inc. (“Scoggins”), for leave to join its subcontractors as third-party defendants in the construction defect lawsuit filed against it

by Real Party In Interest, Mercedes Independent School District (“MISD”), deprives Scoggins of an effective means, in terms of cost and otherwise, to enforce the contractual risk transfer mechanisms inserted into its subcontracts with the entities that performed the defective workmanship of which MISD complains. Those mechanisms, including the indemnity agreements contained in those subcontracts, bereft of an effective means of enforcement in the same lawsuit in which recovery is sought by the owner against the general contractor, amount to a hollow remedy and deprive these indemnity clauses of any practical value.

Whether AGC members can depend on effective enforcement of the carefully drafted contractual risk transfer mechanisms, particularly indemnity clauses, contained in the contracts pursuant to which billions of dollars of construction work, both public and private, is the issue that is before this Court. As such, this appeal is a matter of continuing and urgent interest to the members of Texas Building Branch-AGC. Consequently, although Texas Building Branch-AGC is not a party to this appeal, this brief has been submitted through the undersigned independent attorneys, who were paid a fee by Texas Building Branch-AGC to prepare it.

## **ISSUE PRESENTED**

Contractual provisions allow the parties involved on a construction project to transfer the risk of defective work to the subcontractors that performed it. Does the refusal to join those subcontractors as third-party defendants to a construction defect lawsuit brought by the owner against the general contractor frustrate the ability to contractually transfer liability for those defects to the responsible subcontractors, exposing the general contractor to unpredictable liability?

## **INTRODUCTION**

Texas Building Branch-AGC members, as well as other businesses engaged in construction within the State of Texas, frequently confront the issues before the Court in managing the considerable risks associated with building construction. It goes without saying that the greater the risks faced by the construction industry, the more elaborate the efforts to control and transfer them. In the event the costs associated with construction risks cannot be predicted, they cannot be managed and minimized. Ineffectively managed risks drive up the cost of construction for owners, including public owners such as MISD. While Texas contractors and subcontractors strive, and usually succeed, in managing considerable risks and providing quality construction services to owners and upper-tier contractors, occasionally inadvertent mistakes occur, mistakes that can result in defects in construction.

Owners and general contractors have always included elaborate provisions in their contracts, as well as in subcontracts with the multitude of subcontractors that are involved on any given project, to transfer the risk of liability, including liability for construction

defects such as those that are alleged to have occurred in this case. The arguments made by short-sighted owners such as MISD ignore these contractual mechanisms that are essential to minimize and transfer risk. At the same time, those arguments call for a radical departure from well-settled Texas law regarding joinder of third parties, the concept of judicial efficiency, and the policy of providing full and adequate judicial relief to the parties when general contractors are sued for defective work performed by subcontractors.

The procedural and public policy arguments in favor of joinder have been presented to the Court by Scoggins and it is not the purpose of Texas Building Branch-AGC, as amicus curiae, to simply replot that field. Rather, Texas Building Branch-AGC submits this brief in support of Scoggins (and other similarly situated contractors)<sup>1</sup> in order to inform the Court of the larger issues that are involved in this proceeding. Of primary concern is the chilling effect on the general contractor's ability to enforce the agreed-upon mechanisms to transfer risk, including indemnity rights against its subcontractors, in an efficient manner by allowing it to defend itself against its accuser before a single trier of fact in a single proceeding.

MISD relies on a transparent argument as to unreasonable delay arising out of the purported untimeliness of the motion to join the subcontractors in the construction defect

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<sup>1</sup> Substantially similar issues to those before this Court are present in Cause No. 08-0660, *In re Satterfield and Pontikes Construction Company*, and the arguments presented in this amicus curiae brief apply with equal force to the severance or consolidation of an action against the responsible subcontractors into the construction defect suit filed by the plaintiff school district against the general contractor.

lawsuit. There is, however, an undercurrent that drives MISD's efforts. Traditionally, owners, in addition to including claims for breach of contract and breach of warranty, also asserted causes of action for negligence against general contractors in construction defect lawsuits on the premise that such a cause of action was essential to trigger the liability insurance coverage of the general contractor. However, as result of this Court's opinion in *Lamar Homes v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007), owners, such as MISD in this case, are now likely to omit any cause of action for negligence against general contractors, relying solely upon a cause of action for breach of contract. Such pleading emboldens those owners, like MISD, to argue that due to the absence of tort allegations, the joinder of the subcontractors as third-party defendants or designation as responsible third parties under TEX. CIV. PRAC. & REM. CODE ch. 33 is improper. The ultimate goal of that scheme is to apparently "cut the general contractor from the herd" so as to isolate it, and particularly its insurers, in order to gain procedural advantage and leverage for settlement.

While there appears to be nothing wrong with such a strategy in the abstract, it fails miserably by driving up costs and it is diametrically opposed to the contractual risk transfer mechanisms to which the owner has agreed in the contract documents for the project. Those documents clearly and unambiguously provide for the allocation of fault for losses, including construction defect claims, to the responsible parties. Joinder of the subcontractors alleged by MISD itself to bear responsibility for the defects is the logical and proper means to effect that allocation. MISD's continued opposition to that joinder

contravenes the spirit and intent of the contract it entered into with Scoggins. That opposition to lawful joinder also contravenes all notions of judicial efficiency and the public policy of the State of Texas.

The trial court and the court of appeals abused their discretion. This Court can cure that abuse of discretion by giving effect to the contractual provisions, while at the same time promoting judicial economy and basic fairness by granting the writ of mandamus and ordering the joinder of the subcontractors as third-party defendants in this lawsuit.

### **SUMMARY OF THE ARGUMENT**

The trial court abused its discretion in refusing to grant the motion of Scoggins to join the responsible subcontractors as third-party defendants in the lawsuit filed by MISD against Scoggins. The refusal of the trial court warrants this Court's issuance of its writ of mandamus directing it to grant that motion. MISD's arguments in opposition to that motion suffered from a fatal flaw in that they contravened the contractual risk transfer provisions contained in the general contract between MISD and Scoggins (the "MISD Contract"), as well as the subcontracts between Scoggins and its subcontractors, upon which MISD demanded express third-party beneficiary status. The MISD Contract and the subcontracts included express indemnification provisions requiring the allocation of fault among the responsible parties, and that fault can only be allocated in a single proceeding involving MISD, Scoggins and the responsible subcontractors.

The impetus for MISD's novel approach in dismissing all tort claims against Scoggins and proceeding only on a breach of contract theory of recovery is based primarily upon considerations of insurance coverage for the alleged defective work. Insurance coverage essentially drives construction defect litigation, and a prime example is this Court's opinion in *Lamar Homes v. Mid-Continent*, 242 S.W.3d 1. In that case, this Court rejected a tort versus contract analysis of "occurrence" under a commercial general liability policy, in favor of analyzing whether the property damage arising from a construction defect was expected or intended from the standpoint of the insured. While this clear and correct analysis cannot be faulted, owners such as MISD are emboldened by it to drop tort claims from their lawsuits against general contractors in an attempt to prevent the joinder of subcontractors to the lawsuit. In this manner, the general contractor and its insurers are "cut from the herd" and the owner attempts to gain additional leverage against the general contractor's insurers, particularly in terms of settlement.

When owners such as MISD are called on this strategy, their simplistic response is that the general contractor can file a second lawsuit against the subcontractor for reimbursement. This position not only violates the spirit and intent behind the contract documents entered into by the parties on a project, it grossly misconstrues the nature of construction defect claims and the construction industry. Insurance coverage for construction defect claims is often hotly contested by the general contractor's insurers, and even though that general contractor may be defended in the construction defect

lawsuit, the insurers may deny coverage for any ultimate judgment and expensive insurance coverage litigation may ensue. An uncovered construction defect judgment or expensive coverage litigation may simply drive the contractor out of business and prevent it from pursuing recovery from the responsible subcontractors.

In addition, the inability to spread the risk from the outset among the responsible subcontractors may result in increased premiums or contraction of coverage for the general contractor – as well as all contractors and subcontractors throughout the construction industry – when the increased costs of construction defect litigation resulting from the necessity of multiple lawsuits are spread among all policyholders. The increased costs of insurance will, in turn, be passed on to owners as part of the project price. Moreover, even if the liability insurance of the general contractor covers the claim, its limits may be inadequate to fund the entire judgment. Thus, the ability to join subcontractors in the same proceeding in order to tap their insurance is critical for all concerned, including owners such as MISD, despite their short-sighted strategies.

If allowed to stand, the trial court's refusal to allow Scoggins to designate as responsible third parties or join as third-party defendants the subcontractors that actually performed the allegedly defective work is the height of judicial inefficiency. The same arguments and defenses, the same evidence, indeed the very same issues will be presented in the owner's suit against the general contractor as would be presented in the general contractor's subsequent suit against its subcontractors. In the construction law context, an owner's claim of breach of contract seldom involves only two parties.

Instead, it involves all parties, particularly, the subcontractors, that actually performed the construction work. These responsible parties can and should be brought before the trier of fact in a single proceeding, so that liability can be fully and fairly apportioned among them at one time. Requiring the general contractor to sue its subcontractors in a separate proceeding is a waste of money and judicial resources. When liability for construction defects can be fully and fairly apportioned among the subcontractors by the trier of fact in the owner's suit against the general contractor, why require the judicial system at large and the general contractor in particular to throw away additional time and money? This result is nonsensical.

If Scoggins is not allowed to join those subcontractors as third-party defendants in MISD's suit, the judicial system at large and Scoggins in particular will suffer. Texas law and public policy will be subverted, and Scoggins' very business will be at risk. MISD's convenience in facing a single defendant in its suit, instead of the parties that are actually responsible for the work being challenged, is not worth such a hefty price.

## **ARGUMENT**

### **I. THE DENIAL OF THE JOINDER OF THE RESPONSIBLE SUBCONTRACTORS DEFIES COMMON SENSE IN THE REAL WORLD IN WHICH GENERAL CONTRACTORS OPERATE**

The inability of a general contractor to join the responsible subcontractors creates many practical difficulties, and accompanying hardship, for a general contractor such as Scoggins. It is not clear whether the trial court considered such practical difficulties and their effects on the construction industry in denying joinder of the subcontractors as third-

party defendants in the construction defect lawsuit filed by MISD. The inability of a general contractor to rely upon contractual risk transfer mechanisms, such as the indemnity clauses in subcontracts, creates much uncertainty and makes it difficult for a general contractor to predict and plan for its risks. In fact, such a denial places the general contractor's own insurance coverage at risk and, in light of the amount of damages involved in major construction defect lawsuits, there is the potential that absent that insurance, the general contractor will be put out of business.

**A. Insurance Coverage Drives the Dispute Before this Court**

In order to appreciate the true nature of the issue before this Court, it is useful to provide the Court with a description of the more likely motives of owners, such as MISD, in opposing the joinder of the responsible subcontractors in the construction defect suits they file against their general contractors. MISD's attempt to cut the general contractor from the herd of potential defendants by opposing the joinder of the subcontractors appears to be rooted in available insurance coverage for construction defect claims. In *Lamar Homes v. Mid-Continent*, 242 S.W.3d 1, this Court held that the proper inquiry as to the existence of an "occurrence" of "property damage," for purposes of a contractor's commercial general liability insurance policy, is not whether the ultimate remedy lies in contract or in tort, but rather on the fortuitous nature of the event – that is, whether the damage was expected or intended from the standpoint of the insured. *Id.* at 16. This holding paved the way for owners to omit allegations of negligence from their

construction defect lawsuits against contractors such as Scoggins and to rely primarily upon breach of contract causes of action in their pleadings.<sup>2</sup>

The sole reliance on a breach of contract theory by owners such as MISD is apparently intended to facilitate the recovery of insurance proceeds by isolating the general contractor and its insurers from the subcontractors and their insurers. As discussed below, it is the general contractor that maintains the highest limits of insurance. Just as a steer that is cut from the herd falls easier prey to the rope, a general contractor and its insurers are easier targets in a construction defect lawsuit, particularly for settlement. A sole party's insurer may be more likely to settle due to the threat of the general contractor facing the possibility of a large judgment without *any* possibility of contribution of the insurers of the subcontractors.

Moreover, the leverage gained by the owner employing such a tactic raises the additional possibility of overreaching settlement arrangements where the owner may extract, through devices such as assignment of contract rights from the general contractor, some or all of the general contractor's rights against the subcontractors. For example, a general contractor that settles a tort claim loses its contribution rights against the subcontractors, but the general contractor may maintain its indemnity rights against the subcontractors where the general contractor that has settled breach of contract claims with the owner. An owner that has successfully isolated the general contractor may be

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<sup>2</sup> By raising this issue, Texas Building Branch-AGC does not intend any criticism of the Court's holding in *Lamar Homes v. Mid-Continent* as to the determination of "occurrence" under Texas law. In fact, Texas Building Branch-AGC argued for the Court's resolution of the occurrence issue as amicus curiae to the Court in that appeal.

able to obtain an assignment of the general contractor's contractual rights against the subcontractors, perhaps in exchange for a lower settlement payment. Therefore, the owner, by obstructing proper joinder of the subcontractors, may preserve its rights to pursue the subcontractors, even after settling the general contractor's liability. When all is said and done, the owner may obtain double and overlapping payment from the general contractor and the subcontractors *for the same allegedly defective work*. The overreaching of owners such as MISD can be avoided by simply allowing proper joinder of the subcontractors in the owner's breach of contract suit.

This unanticipated fallout of the *Lamar Homes* opinion has paved the way for the circumstances before this Court, in that an insurer whose general contractor-insured has been singled out will have a tendency to settle a lawsuit even though that tendency is based on procedural maneuvering and not necessarily on the merits. There certainly is nothing wrong with the reasoning of *Lamar Homes*, or even the use of that reasoning to gain a procedural advantage; nevertheless, what is wrong is the reliance on that reasoning to support a refusal to join the subcontractors into a single proceeding. That refusal is clearly at odds with the control and transfer of risk set out in the contractual agreements between the parties on the project, including MISD itself.

**B. The Uncertainties Associated with Multiple Proceedings has the Potential to Place a General Contractor's Ongoing Business at Risk**

Many construction defect lawsuits involve millions of dollars of damages that are sought from the general contractor and subcontractors involved on the project. For example, MISD seeks damages from Scoggins in excess of \$10,000,000. As discussed

immediately above, insurance plays a major role in transferring and funding these potentially huge liabilities. Nevertheless, many general contractors are unable to maintain that level of liability coverage, whether through commercial general liability, umbrella/excess, or a combination of both, for their business. For example, the certificate of insurance provided by Scoggins to MISD pursuant to the MISD Contract indicated that Scoggins maintained \$1,000,000 in commercial general liability coverage and \$5,000,000 in umbrella coverage. Many general contractors simply lack adequate limits to fund major construction defect judgments. For that reason, general contractors (and owners) look to the insurance provided by the responsible subcontractors to contribute toward a loss. In that regard, the standard commercial general liability policy issued to subcontractors, provides insurance coverage for property damage caused by a subcontractor to work performed by other parties on the project, including other subcontractors and Scoggins.

Compounding the difficulty is the fact that construction defect claims usually involve complex insurance coverage issues, so that even where adequate coverage in terms of limits is available, these claims generate strict reservation of rights letters from the insurers of general contractors. Particularly, coverage for construction defect lawsuits involving defects in the work itself is hotly contested. This Court's recent opinion in *Lamar Homes, Inc. v. Mid-Continent*, 242 S.W.3d at 1, is illustrative of those disputes.

Moreover, MISD's position does not take into account the fact that even where the general contractor has been defended by its insurer, coverage for the judgment itself may

be the subject of litigation between the general contractor and its insurer. That litigation over coverage for the judgment is usually every bit as complex and expensive as litigating the underlying construction claims themselves.

In the event a general contractor faces an uninsured or potentially uninsured judgment in a construction defect lawsuit, its ability to file a second lawsuit against its subcontractors is greatly reduced where the judgment against the general contractor is completely or partially uninsured. The general contractor may simply lack the financial wherewithal to retain counsel to file suit and litigate the subcontractors' responsibility for the construction defects in yet another expensive piece of litigation, litigation in which its insurance carrier will not be involved due to the denial of coverage. As such, there is a major fallacy in MISD's argument that once it obtains a large judgment against Scoggins, Scoggins will automatically be able to pursue recovery from its subcontractors in yet another legal proceeding. Therefore, MISD's cavalier assertion that Scoggins, after suffering a judgment against it, can routinely file a second lawsuit against its subcontractors is disingenuous and lacks credibility. Successful "pay and chase" actions may be the exception rather than the rule.

On the other hand, even if a general contractor does have sufficient insurance to fund a judgment or settlement in a construction defect case, a vicious circle is nevertheless created if the subcontractors are not effectively joined in the litigation. That vicious circle prompts the general contractor's insurer that has paid a construction defect judgment to cancel the policies, substantially increase premiums for the insured general

contractor, or even reduce the coverage available under the policies as a result of the increased exposure absent the subcontractors' participation. For example, this Court noted the fact that the insurance industry is already promulgating endorsements to reduce coverage for a general contractor as to construction defect claims. *Lamar Homes v. Mid-Continent*, 242 S.W.3d at 12.

The increase in premiums and limitations on coverage are obviously driven by litigation costs associated with construction defect lawsuits, and those litigation costs are logically increased when multiple lawsuits are required, as advocated by MISD. The higher premiums and litigation costs can only be passed on to owners in the increased cost of construction, including the cost to public owners such as MISD, despite its short-sighted view of the construction litigation process.

## **II. THE DENIAL OF THE JOINDER OF THE RESPONSIBLE SUBCONTRACTORS FRUSTRATES THE RISK TRANSFER MECHANISMS ROUTINELY RELIED UPON IN THE CONSTRUCTION INDUSTRY**

The considerable risks associated with the construction of buildings, infrastructure and other works, both public and private, are the subject of elaborate risk transfer mechanisms set out in the contracts between the parties. This includes the contract between the owner of the project and the general contractor, including the MISD Contract. Since a general contractor such as Scoggins performs little of the contracted work with its own forces, it enters into subcontracts with numerous other entities to

perform specific parts of the work, such as the roof, heating, ventilation air conditioning (HVAC) system, masonry and concrete, to name but a few.

Due to the complexity of the relationships among the parties and, of course, the work itself, standard contractual provisions have been developed and are used throughout the industry. The most popular suite of standard contract documents has been promulgated by the American Institute of Architects (“AIA”). Here, not only were the AIA forms chosen by MISD for use on the Kennedy Elementary Project, but Scoggins also used the standard AIA form for its subcontracts on the project. These documents provide a coordinated approach to documenting the relationships, rights and obligations of the parties, including, as stressed above, the means to reduce or transfer project risks to the party responsible for reducing them. Scoggins sought to do exactly that, by transferring the risk and liability for defective construction to its subcontractors, the parties that were responsible for that work. It did so in the most efficient manner possible through seeking to join the responsible subcontractors in the lawsuit filed against it by MISD. Moreover, despite MISD’s arguments as to breach of contract versus tort for purposes of Chapter 33 of the Texas Civil Practice and Remedies Code, alleged timeliness of joinder and its self-serving appeal of “fairness,” Scoggins’ joinder of its subcontractors into the MISD lawsuit is grounded firmly upon the intent of the parties and the agreed-upon terms of the MISD Contract and the numerous subcontracts, most particularly the indemnity clauses in those agreements.

**A. The Comparative Indemnity Clauses in the Contracts Dictate Allocation of Fault Among All Project Participants in a Single Judicial Proceeding**

The MISD Contract and the subcontracts for the project were all written on standard AIA document forms. The indemnity clauses contained in them are substantially similar, particularly as to the type of indemnity contemplated, i.e., that Scoggins was obligated to indemnify MISD to the extent of Scoggins' own fault, and the subcontractors, in turn, were obligated to indemnify Scoggins to the extent of their own fault.

**1. The Indemnity Clauses in the MISD Contract and the Subcontracts Call for Comparative Fault Indemnity**

In that regard, Paragraph 3.18.1 of AIA Document A201, the 1997 edition, the General Conditions of the MISD Contract, states as follows:

**3.18.1** 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 in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the owner, architect, architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate,

abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.<sup>3</sup>

At the same time, the subcontracts used by Scoggins on the project were on AIA Document A401, the Standard Form of Agreement Between Contractor and Subcontractor. That subcontract form contains a similar indemnity clause that was modified in Attachment “A” to the subcontracts so as to comply with the fair notice requirements under Texas law. That indemnity clause states as follows:

To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney’s fees, arising out of or resulting from the performance of the Subcontractor’s Work provide (sic) that:

- a) any such claim, damages, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor’s work itself) including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor or any for whose acts the Subcontractor may be liable.
- b) Such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation or indemnity, which would otherwise exist as to any party or person.<sup>4</sup>

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<sup>3</sup> MISD attached a copy of the 1987 edition of AIA Document A201 to its response to Scoggins’ petition for writ of mandamus to this Court, representing that document as the General Conditions to the MISD Contract. That representation is incorrect and Paragraph 8.1.2 of AIA Document A101 states that the 1997 AIA Documents, including A201, the General Conditions, are incorporated into the MISD Contract. For the Court’s convenience, a copy of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101, the General Conditions of the Contract for Construction, AIA Document A201, and the Supplementary Conditions containing modifications to both of those documents are attached at Tabs A, B and C, respectively, to this brief.

The types of indemnity clauses found in the AIA Documents are regarded in the construction industry as “limited form” indemnity clauses since they limit the indemnity obligation of the indemnitor to indemnify the indemnitee only to the extent of the indemnitor’s own negligence. They are also referred to as “comparative fault” clauses within the construction and insurance industries. The Construction Industry Institute at the University of Texas at Austin describes this type of indemnity as follows:

A limited form hold harmless agreement (also referred to as a comparative fault form) is one where the indemnitor accepts all responsibility for the negligence of himself or his agents.

Robert C. Witt, Paul R. Aird, Yaron Brook, *THE OPTIMAL ALLOCATION OF INSURANCE RELATED RISKS AND COSTS IN CONSTRUCTION PROJECTS*, p. 183 (Construction Industry Institute 1993), hereinafter referred to as the “*CII Report*.” *See also* Justin Sweet and Jonathon J. Sweet, *SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS* § 19.02 (4th ed. 1996 and Supp. 2007) (limited indemnity clauses require a comparison of the negligence of the parties).

**2. The Indemnity Clauses in the MISD Contract and the Subcontracts Amount to Contractual Contribution**

As previously stated, indemnity clauses such as those that serve as the basis for Scoggins’ third-party action for indemnity, are a critical element of the efforts within the construction industry to control and transfer risks, including risks associated with defective workmanship on a project. These contractual risk transfer mechanisms,

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<sup>4</sup> A true and correct copy of a representative subcontract between Scoggins and its subcontractors on the project is attached at Tab D.

particularly indemnity clauses, represent an effort to allocate risk on the front end of a construction project. The Report of the Construction Industry Institute states that “a hold harmless agreement can be viewed as an ex-ante attempt to reduce some of the potential ex-post costs associated with future disputes arising from various contingencies. In certain circumstances, these agreements may be efficient in an economic sense because they can dramatically reduce legal expenses.” *CII Report*, at 204. At the same time, the limited form indemnity clause is basically a recognition of the existing tort system and contemplates the necessity of resort to the courts or other type of dispute resolution in order to allocate fault. *Id.* Nevertheless, the clause is intended to foster predictability over simple reliance on the tort system. *Id.* at 212.

The indemnity clauses can only serve their salutary economic purpose if they are properly applied by the parties and in the courts or arbitration proceedings. Since the comparative fault indemnity clauses before this Court obligate the indemnitor to indemnify the indemnitee only to the extent of the indemnitor’s fault or negligence, as stated above, they require an allocation of fault. Therefore, they operate as contractual contribution provisions. For example, in *Kansas City Southern Railway Co. v. Missouri Pacific Railroad*, 2008 WL 2759084 (Tex.App.—Beaumont July 17, 2008), the court applied various indemnity clauses in a joint track agreement between two railroads that sought to allocate liability according to various factors, including the employment status of the employees that contributed to the loss. The court considered the indemnity clauses to provide for contractual contribution, but ultimately denied contractual contribution

since the indemnitee had failed to request findings of fact as to its entitlement to contractual contribution. *See also American International Industries, Inc. v. Surgicare, Inc.*, 2008 WL 275661 (Tex.App.—Houston [1st Dist.] July 17, 2008) (provision obligating indemnitor to pay attorneys fees analyzed as a contractual contribution clause in real property sales contract).

Likewise, the limitation on the indemnity obligations of the subcontractors to the extent of their own negligence contemplates an allocation of fault among the parties, and that allocation is most efficiently made in a single proceeding to which all potentially liable parties are joined. The inclusion of the similarly limited Paragraph 3.18.1 in the General Conditions of the MISD Contract also indicates that MISD and Scoggins contemplated a similar allocation, an allocation that requires a determination by a trier of fact where the parties, as here, cannot agree upon one. Nevertheless, resort to a court in order to allocate fault is a procedure that is in and of itself expensive, and requiring Scoggins to obtain indemnity from the responsible subcontractors in yet a second procedure is clearly out of line with the intent behind the contractual risk management mechanisms provided for in the MISD Contract and the subcontracts.

In fact, the contractual contribution/limited indemnity arrangements among the parties mirror the provisions of Chapter 33 of the Texas Civil Practice and Remedies Code as to the third party practice that applies to tort claims. Simply because MISD chooses to pursue only a breach of contract recovery, rather than tort, that choice should not impede Scoggins from pursuing the subcontractors that performed the defective work

according to the contractual arrangements that have been agreed upon not only by the subcontractors, but also by MISD in the MISD Contract.

As a final note with regard to Scoggins' rights of contractual indemnity against the subcontractors, MISD mischaracterizes them as not being "ripe" for pursuit until liability is fixed, citing *Underwriters at Lloyd's of London v. Gilbert Texas Construction, L.P.*, 245 S.W.3d 29 (Tex.App.-Dallas 2007, pet. filed) in support of that proposition. That case makes a distinction between indemnification for liability versus indemnification for damages.

Here, the indemnity clauses in the subcontracts are not limited to indemnification for liability, i.e., only after it has been fixed and certain, as by rendition of a judgment. Rather, they obligate the subcontractors to indemnify Scoggins, and Scoggins to indemnify MISD, for "all claims, damages, loss and expenses" arising out of performance of the work by the subcontractors of Scoggins. This type of formulation is the hallmark of indemnity for damages, entitling indemnitees such as Scoggins to indemnity upon being damaged, and not only after a judgment is rendered. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203 (Tex. 1999); *T. C. Tubb v. Bartlett*, 862 S.W.2d 740, 750 (Tex.App.-El Paso 1993, writ denied). General contractors such as Scoggins are entitled to indemnification upon being damaged under the terms of indemnification clauses such as those contained in its subcontracts for the project, and Scoggins has already been damaged by the construction defect suit filed by MISD.

Under these circumstances, and under Texas law, Scoggins is not obligated to wait for any liability to MISD to be fixed by a judgment before pursuing its subcontractors.

**B. Other Provisions of the MISD Contract Establish the Necessity of Including the Subcontractors in One Proceeding**

The MISD Contract includes numerous other provisions that indicate that MISD specifically contemplated an active role as to the subcontractors on its project. For example, MISD had the right to exercise control over the selection of Scoggins' subcontractors. In that regard, Paragraph 5.2.1 of the Supplementary Conditions states as follows as to the modification of the similarly numbered paragraph of the General Conditions:

5.2.1 Delete the first sentence of Paragraph 5.2.1 and substitute the following language:

'Within a reasonable time after the full execution of the Agreement, the Contractor shall furnish the Owner and the Architect, in writing, (1) the name, trade and subcontract amount for each Subcontractor and (2) the names of all persons or entities proposed as manufacturers of the products identified in the Specifications (including those who are to furnish materials or equipment fabricated to a special design) and, where applicable, the name of the installing Subcontractor.'

Delete the first sentence of Paragraph 5.2.2 and substitute the following language:

'Owner reserves the right to object reasonably to any proposed Subcontractor. Such reasonable and timely objection will be tantamount to an immediate disqualification of the proposed Subcontractor, provided that the Owner notifies the Contractor in writing within fourteen (14) days of Contractor's written notice. By way of illustration and not limitation, a reasonable objection may take into account the proposed Subcontractor's professional reputation in the community, its relative ability to honor its maintenance agreements, and other factors rationally related to possible performance.'

*See* Tab C to this brief. In addition, in Paragraph 5.3 of those same Supplementary Conditions, MISD inserted a provision making it a specific and intended third-party beneficiary of all subcontracts entered into by Scoggins on the project. That paragraph provides as follows:

5.3 Add the following paragraph to the end of Paragraph 5.3:

‘5.3.2 All subcontracts will be in writing and will specifically provide that the Owner is an intended third-party beneficiary of such subcontract.’

*See* Tab C to this brief.

Furthermore, the subcontracts themselves establish the agreement among the parties that the rights and obligations between Scoggins and MISD under the MISD Contract flow down and require the subcontractors to assume those same obligations. In that regard, Paragraph 2.1 of the subcontracts between Scoggins and its subcontractors provides as follows:

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under the Prime Contract, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under the Prime Contract, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, under the Prime Contract, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, under the Prime Contract, has against the Owner, insofar as applicable to this Subcontract. Where a provision of the Prime Contract is inconsistent with a provision of this Agreement, this Agreement shall govern.

*See* Tab D to this brief.

All of these provisions demonstrate that MISD intended to, and did, maintain control and involvement in the work performed by subcontractors on the project and that the work of the subcontractors and Scoggins were inextricably linked under the MISD Contract and the subcontracts, including the allocation of risk and remedies related to that allocation.

These provisions fly in the face of MISD's arguments in opposition to the proper joinder of the subcontractors as third-party defendants in the construction defect lawsuit it filed against Scoggins. Instead, MISD in its brief on the merits strenuously argues that Paragraph 3.3.2 of the General Conditions, providing that Scoggins shall be responsible to MISD for acts and omissions of Scoggins' subcontractors, provides a contractual basis to deny joinder of the responsible subcontractors in the same proceeding.<sup>5</sup> No party in the construction industry can contest the proposition that a general contractor remains liable to the owner for the defective work of its subcontractors, and neither does Texas Building Branch-AGC. That premise does not lead to the conclusion that the subcontractors, regardless of timing, should not be added as third-party defendants to the lawsuit filed by the owner against the general contractor so as to allocate liability within the intent of the contract documents executed for the project. MISD's compulsion to cut

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<sup>5</sup> MISD cites to the 1987 edition of AIA Document A201, again implying that that document constitutes the applicable General Conditions for the MISD Contract. As previously stated, the 1987 edition of that document was replaced by the 1997 edition of A201 in the MISD Contract. *See* fn. 3, *supra*. However, for purposes of this argument, the two provisions are substantially identical. *See* Tab B to this brief.

Scoggins from the herd so as to gain procedural advantage and settlement leverage cannot be allowed in light of the risk management structure of the documents among all tiers – owner, general contractor and subcontractors – on the project. If MISD is allowed to do so, the elaborate attempts set out above to lend a modicum of predictability to construction defect litigation will be totally lost and costs will soar.

### **III. THE DENIAL OF THE JOINDER OF THE RESPONSIBLE SUBCONTRACTORS CONTRAVENES WELL-SETTLED TEXAS LAW AND PUBLIC POLICY**

The trial court’s refusal to grant leave to join the subcontractors that actually performed the allegedly defective construction work as third-party defendants in the MISD lawsuit contravenes well-settled Texas law and public policy: judicial efficiency and the policy of providing full and adequate relief to the parties.

#### **A. Texas Law and Public Policy Emphasize the Concept of Judicial Efficiency and the Policy of Providing Full and Adequate Relief to the Parties**

The concept of judicial efficiency and the policy of providing full and adequate relief to the parties are both recognized and accorded considerable weight in Texas jurisprudence, particularly in the context of joinder of third parties. *See, e.g., In re Martin*, 147 S.W.3d 453, 457 (Tex. App.—Beaumont 2004, orig. proceeding) (“Joinder rests on the concept of judicial efficiency and the policy of providing full and adequate relief to the parties.”); *In re Arthur Andersen, LLP*, 121 S.W.3d 471, 484 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (“Based on judicial efficiency and the policy of providing full and adequate relief to the parties, [the third-party plaintiff] has

the right to have the entire case tried at one time and have one jury apportion liability among all responsible parties.”); *OKC Corp. v. UPG Inc.*, 798 S.W.2d 291, 293 (Tex. App.—Dallas 1984, no writ) (“Both severance and joinder rest on judicial efficiency as well as on the policy of providing full and adequate relief to the parties.”).<sup>6</sup> Necessarily implicated in this discussion are concerns over judicial economy and convenience, as well as the danger of unfair prejudice to one or more of the parties if joinder is not allowed. *See In re Arthur Andersen, LLP*, 121 S.W.3d at 483–85 (examining the effect of joinder on judicial efficiency and the unfair prejudice that would result if joinder were not allowed); *see also Fireman’s Fund Ins. Co. v. McDaniel*, 327 S.W.2d 358, 373 (Tex. Civ. App.—Beaumont 1959, no writ) (explaining that the trial court’s decision on joinder “is generally based on practical considerations with a view to fair, orderly and timely prosecution and disposal of pending litigation”).

Not surprisingly, judicial efficiency is of paramount concern to Texas courts. In fact, while it is true that *all* systems of jurisprudence actively seek to avoid a “multiplicity of suits” by providing procedural mechanisms to resolve multiple claims between multiple parties in a single proceeding, Texas courts pursue this end with particular fervor. *See Barrientos v. Nava*, 94 S.W.3d 270, 277 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Texas has a strong public policy to avoid a multiplicity of suits, and for that purpose favors the joinder of all causes of action and parties thereto in a single

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<sup>6</sup> While much of the case law in this area addresses joinder and third party issues in terms of TEX. R. CIV. P. ch. 33, the reasoning of those cases as to the conceptual underpinnings of joinder applies in general, including under applicable Texas Rules of Civil Procedure. This is particularly true as to *In re Arthur Andersen*, 121 S.W.3d 471.

proceeding. *See Massey v. Massey*, 807 S.W.2d 391, 397 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *see also Marange v. Marshall*, 402 S.W.2d 236, 241 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d n.r.e.). When joinder of third parties is not allowed under the appropriate circumstances, this strong public policy is thwarted, and valuable judicial resources are needlessly expended.

The fact that Texas law and public policy accord significant weight to the concept of judicial efficiency – and thus highly favor the resolution of related claims involving multiple parties in a single proceeding – is exemplified through numerous Rules of Civil Procedure and sections of the Civil Practice and Remedies Code that specifically govern joinder and other similar means of having the rights and liabilities of multiple parties simultaneously considered by the court. *See* TEX. R. CIV. P. 37 (providing that either the plaintiff or defendant may bring in additional “necessary or proper” parties to the suit before a case is called for trial); TEX. R. CIV. P. 38 (explaining third-party practice); TEX. R. CIV. P. 39 (governing the inclusion of necessary and indispensable parties to suit); TEX. R. CIV. P. 40 (governing the “permissive” joinder of parties); TEX. R. CIV. P. 41 (providing that parties may be added and suits may be consolidated at any stage of the action before submission of the case to the jury or the court); TEX. R. CIV. P. 42 (explaining procedure related to class actions); TEX. R. CIV. P. 43 (providing that persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims may expose the plaintiff to “double or multiple liability”); TEX. R. CIV. P. 60 (providing that *any* party may “intervene” in a suit by filing a pleading); TEX. R.

CIV. P. 174 (governing consolidation of actions involving “a common question of law or fact”); TEX. CIV. PRAC. & REM. CODE § 33.004 (explaining procedure for designation of “responsible third party” status by the defendant); *see also* TEX. CIV. PRAC. & REM. CODE ch. 33 (providing for determination of proportionate responsibility and contribution). The common theme running through the above rules and statutory provisions is simple and straightforward: Texas law strongly favors the joint resolution of multiple claims in a single proceeding to prevent multiple determinations of the same matter. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992); *In re Prudential Securities, Inc.*, 159 S.W.3d 279, 283 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding).

**B. The Purported Lack of Timeliness Does Not Justify Denial of Joinder**

However, judicial efficiency is not the sole concern when a party seeks leave to join a third-party defendant. Rather, the potential for unfair prejudice must also be examined. *See In re Arthur Andersen, LLP*, 121 S.W.3d at 483–85 (weighing the prejudice to the plaintiff and defendant that would result if joinder were allowed/not allowed). This involves consideration of whether joinder will *unreasonably* delay the trial, as well as whether jury confusion will result if the defendant is allowed to assert a third-party claim. *See* TEX. R. CIV. P. 37; *see also Arthur Andersen*, 121 S.W.3d at 484–85.

Along those lines, MISD claims that the primary basis for its opposition to joinder of the responsible subcontractors is that joinder was sought by Scoggins on an untimely

basis, which would result in unreasonable delay and expense. Despite MISD's contention of untimeliness, Scoggins' motion to join the subcontractors was made within the trial court's own designated time frame for joinder. As a result, it clearly comports with the trial court's administration of justice and the Texas Rules of Civil Procedure. Undaunted, MISD points to the number of parties sought to be joined by Scoggins, again, claiming that the joinder would result in unreasonable delay and expense. Once again, MISD's untimeliness argument ignores the fact that much of the discovery implicating the subcontractors' defective work has already been done so as to identify a particular subcontractors' work as defective.

Moreover, as of the date of joinder, the parties still had four months in which to conduct additional discovery prior to trial. Therefore, MISD's tongue-in-cheek observation that joinder would delay MISD from providing its students the school that it was supposed to provide years ago rings truly hollow. This is especially true where there is no demonstration as to delay on the part of Scoggins, especially since the Kennedy Elementary School was substantially completed years before MISD filed its construction defect claims against Scoggins in August, 2007.

As such, any delay to MISD in pursuing its claims cannot be viewed as unduly prejudicial to MISD, or unreasonable, particularly where MISD's efforts to block joinder contravene the contractual relationships between the parties.

Also related to the issue of unfair prejudice, and of particular relevance to Scoggins' motion, is whether the defendant/third-party plaintiff is stripped of a

“substantial right” when the trial court denies it leave to designate a responsible third party or join a third-party defendant. *See Arthur Andersen*, 121 S.W.3d at 486; *see also Jones v. Ray*, 886 S.W.2d 817, 822 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding). In fact, in the context of mandamus proceedings, Texas courts have held that a third-party defendant has a “substantial right to present the complete set of intertwined facts and issues germane to his claims to *one* factfinder, in *one* proceeding, rather than in two separate suits.” *See Arthur Andersen*, 121 S.W.3d at 486; *see also Jones*, 886 S.W.2d at 822. Arguably, the purpose of this “substantial right” is to (1) prevent the presentation of the parties’ respective claims and defenses from being compromised; (2) minimize the risk of inconsistent judgments; and (3) avoid any otherwise unjust results. *See Arthur Andersen*, 121 S.W.3d at 486; *see also Jones*, 886 S.W.2d at 822.

MISD’s opposition to joinder “in the name of the students” lacks traction, as does its bald appeal to fairness that rings hollow for much the same reasons. MISD’s motives have little to do with notions of fairness in light of the contract documents into which it entered and which contemplate full participation and accountability from subcontractors. In light of those contractual provisions, notions of fairness clearly tip in favor of Scoggins in that Scoggins would be deprived of substantial rights, including the right to rely on the contractual mechanisms to transfer and control risk.

**C. The Trial Court’s Refusal to Allow Joinder of the Subcontractors Exemplifies and Promotes Judicial Inefficiency**

If allowed to stand, the trial court’s refusal to allow Scoggins to designate as responsible third parties or join as third-party defendants the subcontractors that performed the allegedly defective work will exemplify judicial inefficiency. Failure to grant Scoggins the relief it seeks will ensure that “an enormous waste of [judicial] resources” is guaranteed to result. *See Arthur Andersen*, 121 S.W.3d at 486.

In the construction law context, an owner’s claim of breach of contract never involves merely the owner and the general contractor, as MISD short-sightedly suggests. *See Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d at 22–23 (Brister, J., dissenting) (noting that modern construction “is often *entirely* the work of subcontractors”) (emphasis added); *see also* Ronald J. Mann, *The First Shall be Last: A Contextual Argument for Abandoning Temporal Rules of Lien Priority*, 75 TEX. L. REV. 11, 25 (1996) (explaining that the majority of actual construction work is “provided by a general contractor through one or more tiers of subcontractors”). Instead, and as the foregoing authorities indicate, allegations of defective construction necessarily involve the subcontractors that actually performed the allegedly defective work. Texas law provides several procedural mechanisms to effortlessly bring these additional parties before the trier of fact in a single proceeding, so that liability can be fully and fairly apportioned among them at one time. *See* TEX. R. CIV. P. 37, 38, 39, 40, 41, 43, and 174; *see also* TEX. CIV. PRAC. & REM. CODE ch. 33. Where the owner’s suit against the general contractor implicates the same facts, the same evidence, indeed the very same

issues as the general contractor's suit against the subcontractors, requiring the general contractor to sue its subcontractors in a separate proceeding is the epitome of judicial inefficiency.

The underlying issue in any suit involving construction defects is the same: whether the construction work is, in fact, defective. Thus, because the actual construction work being considered by the respective triers of fact is the same in both suits, the same facts and evidence necessarily will be presented by the parties in each. *See Arthur Andersen*, 121 S.W.3d at 485 (explaining that the plaintiffs would introduce the same facts and evidence to the jury regardless of whether joinder was allowed); *see also Jones*, 886 S.W.2d at 822 (noting that the same facts and issues would be involved in separate suits involving the same injuries). In no sense can it ever be more efficient to require the general contractor to sue its subcontractors in a separate proceeding, when the facts, evidence, and issues in that suit are identical to those involved in the owner's suit against the general contractor. *See Arthur Andersen*, 121 S.W.3d at 486 (concluding that a separate suit against the third-party defendants "would result in an enormous waste of [judicial] resources"); *see also Jones*, 886 S.W.2d at 823 n.9 (concluding that separate suits involving the same facts and evidence "would indeed constitute such a waste [of judicial resources]"). Forcing a multiple-suit scenario is equivalent to asking the second court to essentially duplicate the work performed by the first. Liability for construction defects can only be fully, fairly, and equally as important, *efficiently*, apportioned among

the various subcontractors by the trier of fact in the owner's suit against the general contractor. Any other result defies common sense.

Likewise, MISD's arguments regarding judicial efficiency are devoid of common sense. Under MISD's unrealistic view of construction defect claims, forcing the general contractor to sue its subcontractors in a subsequent proceeding is only more efficient when the owner loses its suit against the general contractor. Surely, neither owners in general, nor MISD in particular, sue general contractors in expensive construction defect lawsuits with the expectation that their suits lack merit or are otherwise destined to fail. Thus, in a more realistic scenario – when the owner prevails on at least some of its construction defect claims – it is actually less efficient to require the general contractor to sue its subcontractors in a separate proceeding.

**D. Multiple Proceedings Guarantee Inconsistent Results, Denying Full and Adequate Relief to the Parties**

By no means is judicial efficiency the only thing that is needlessly sacrificed when a general contractor is denied leave to join as third-party defendants the subcontractors that performed the allegedly defective work. Unfair prejudice to the general contractor is also guaranteed to result. Multiple proceedings virtually guarantee inconsistent results, denying full and adequate relief to the parties. The piecemeal apportionment of liability among the parties actually responsible for the alleged construction defects, by virtue of a separate suit brought by the general contractor against its subcontractors, contravenes the fundamental fairness that Texas law and public policy seek to maximize.

As explained above, concerns over whether joinder will unreasonably delay the trial, as well as whether jury confusion will result if the defendant is allowed to assert a third-party claim, are necessarily implicated in this analysis. *See* TEX. R. CIV. P. 37; *see also Arthur Andersen*, 121 S.W.3d at 484–85. However, “the key is whether a delay is reasonable under the facts and circumstances of the suit, keeping in mind the history of the suit, *and not simply that a delay will occur.*” *Arthur Andersen*, 121 S.W.3d at 483 (emphasis added). While MISD is fixated on the notion that some delay will occur, it wholly fails to argue, much less allege, that any such delay is unreasonable under the facts and circumstances of this case.

Indeed, in the construction industry, claims of allegedly defective construction involve multiple parties that are or may be responsible for the owner’s damages because, pointed out above, general contractors rarely perform the actual construction work on any given project. Instead, that work is performed by subcontractors. Thus, the facts and circumstances of most, if not all, construction defect claims demand consideration of the liability of the subcontractors who actually performed the allegedly defective work. Any delay associated with joining them as third-party defendants in the owner’s suit cannot be considered unreasonable in any sense of the term.

Moreover, when the owner’s pleadings implicate the very work performed by the subcontractors, and when the owner’s suit against the general contractor involves the same facts, evidence, and issues as would the general contractor’s suit against the subcontractors, any claim that the jury will be confused if the trial court grants the

general contractor leave to join the subcontractors that performed the allegedly defective work is without merit. Such confusion would result regardless of whether leave to designate or join is granted. *See Arthur Andersen*, 121 S.W.3d at 485 (rejecting the plaintiff’s argument that jury confusion would result if joinder were allowed because the same facts and evidence would be presented “even without joinder”).

Furthermore, and more importantly, general contractors in general, and Scoggins in particular, have a “substantial right to present the complete set of intertwined facts and issues germane to [their] claims to *one* factfinder, in *one* proceeding, rather than in two separate suits.” *See Arthur Andersen*, 121 S.W.3d at 486; *see also Jones*, 886 S.W.2d at 822. Thus, Scoggins has a substantial right to join the subcontractors that performed the allegedly defective work. If Scoggins is stripped of this substantial right, and instead forced to sue its subcontractors in a separate proceeding, the presentation of Scoggins’ claims and defenses will be compromised, and an unjust result involving potentially inconsistent judgments will be “all but foreordained.” *See Arthur Andersen*, 121 S.W.3d at 486; *see also Jones*, 886 S.W.2d at 822.

In a multiple-suit scenario, the following is a distinct possibility:

Suit #1 (owner v. general contractor): the trier of fact finds for the owner, meaning that there are defects in construction for which the general contractor is responsible.

Suit #2 (general contractor v. subcontractors): the trier of fact finds for the subcontractors, meaning that there are no defects in construction, or that there are defects in construction, but the general contractor is somehow responsible for them (and not the subcontractors).

Based on allegations similar to those contained in MISD's live petition, however, the general contractor can only be liable for the defects in construction alleged by the owner if one or more of the subcontractors have, in fact, performed defective work. In the multiple-suit scenario that MISD advocates and attempts to oversimplify in its briefing to this Court, this obviously inconsistent result is a distinct possibility. On the other hand, this result would be impossible if the subcontractors were joined as third-party defendants in the owner's suit against the general contractor.

It is fundamentally unfair to deny the general contractor leave to join as third-party defendants the subcontractors that performed the allegedly defective work in the owner's suit against the general contractor. Any delay associated with joinder is not unreasonable under the facts and circumstances of most, if not all, suits involving construction defects, including this one. Nor is the potential for jury confusion any greater if joinder is allowed. Because inconsistent judgments and unjust results are "all but foreordained" if general contractors are forced to sue their subcontractors in separate proceedings, this Court should grant Scoggins the relief it seeks. *See Arthur Andersen*, 121 S.W.3d at 486; *see also Jones*, 886 S.W.2d at 822.

**E. The Inability to Join the Subcontractors as Third-Party Defendants Under Chapter 33 is Immaterial**

MISD implies throughout its brief that its dismissal of its tort claims deprives Scoggins of the ability to seek joinder on any basis, even under theories of contractual indemnity or breach of contract. TEX. R. CIV. P. 38 sets out the relevant standard for joining a third party as one who is "not a party to the action who is or maybe liable to him

or to the plaintiff for all or part of the plaintiff's claim against him." This standard makes no distinction between contract and tort, and certainly, the contractually required allocation of fault set out in the subcontracts not only meets this standard, it demands the joinder of the subcontractors under Rule 38.

Nevertheless, MISD accuses Scoggins of advocating a rule that every time a party seeks joinder of additional parties in a breach of contract case, that joinder should be automatically granted. Such a rule would rob the trial court of its discretion in determining whether to join a third party who is or may be liable to the defendant or to the plaintiff for all or part of the plaintiff's claim. That is not the argument of Scoggins, neither does Texas Building Branch-AGC advocate such a far-fetched notion. Rather, the trial court, facing a motion to join responsible subcontractors as third-party defendants, should exercise its discretion, including the giving of great deference to the contractual arrangements between the parties as to the allocation of risks on the construction project. The failure of the trial court below to do so amounted to an abuse of discretion.

At the same time, it is MISD, through its conscious disregard of the elaborate contractual arrangements between the parties, that advocates the opposite rule, i.e. that joinder of third party claims in a breach of contract action cannot be allowed under any circumstances. While it seeks to clothe its argument in terms of unreasonable delay and timeliness, the refusal to lend credence and effect to its own contract documents, as well as those between Scoggins and its subcontractors, of which MISD is an intended third-

party beneficiary, renders its position extreme. The adoption of that position by the trial court was an abuse of discretion.

**PRAYER**

Amicus Curiae, Texas Building Branch of the Associated General Contractors of America, requests that the Court issue its Writ of Mandamus directing the trial court to grant Scoggins' Motion for Leave to Join Third-Party Defendants and to Alternately Designate Responsible Third Parties.

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**CERTIFICATE OF SERVICE**

I certify that on January 13, 2009, a true and correct copy of this brief was served by certified mail, return receipt requested, on the following counsel of record:

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