

## **BILL ANALYSIS**

Senate Research Center  
87R17665 AJA-F

H.B. 2116  
By: Krause et al. (Powell)  
State Affairs  
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Engrossed

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Interested parties contend that private owners that include a duty to defend clause in a contract for engineering and architectural services are both uninsurable and unfair. A duty to defend provision in a contract would require an engineer or architect to pay the owner's legal bills before any determination of liability, or even after a finding of no liability.

Duty to defend provisions in a contract for professional services with an engineer or architect are uninsurable. As design professionals, engineers and architects carry professional liability insurance, which protects against any action brought against the engineer or architect arising out of their services and work. While engineers and architects still have access to, and for the majority carry, a commercial general liability insurance policy, it does not protect against an action that arises out of an engineers' or architects' services. Therefore, a professional liability insurance policy does not cover against paying the defense cost for someone other than the engineer or architect, and consequently if an engineer or architect signs such a contract, they would be paying out of pocket for this costly and unfair expense.

H.B. 2116 would prohibit design contracts for engineering and architectural services from including unreasonable, uninsurable, risk-shifting duty to defend provisions in a contract.

H.B. 2116 protects the rights of owners by providing for recovery of reasonable attorney's fees from engineers or architects upon a final determination of liability.

H.B. 2116 would require contracts for engineering or architectural services to include a reasonable and insurable standard of care for professional services.

H.B. 2116 amends current law relating to certain agreements by architects and engineers in or in connection with certain construction contracts.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends the heading to Chapter 130, Civil Practice and Remedies Code, to read as follows:

#### CHAPTER 130. LIABILITY PROVISIONS IN CERTAIN CONSTRUCTION CONTRACTS

SECTION 2. Amends Section 130.002, Civil Practice and Remedies Code, by adding Subsections (c), (d), and (e), as follows:

- (c) Provides that a covenant or promise in, in connection with, or collateral to a construction contract for engineering or architectural services related to an improvement to real property is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect, except as provided by Subsection (d) or (e), to defend a party, including a third party, against a claim based wholly or partly on the

negligence of, fault of, or breach of contract by the owner, the owner's agent, the owner's employee, or another entity over which the owner exercises control. Authorizes a covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services related to an improvement to real property to provide for the reimbursement of an owner's reasonable attorney's fees in proportion to the engineer's or architect's liability.

(d) Authorizes an owner that is a party to a contract for engineering or architectural services related to an improvement to real property, notwithstanding Subsection (c), to require in the contract that the engineer or architect name the owner as an additional insured under the engineer's or architect's commercial general liability insurance policy and provide any defense to the owner provided by the policy to a named insured.

(e) Provides that Subsection (c) does not apply to a contract for design-build services in which an owner contracts with a single entity to provide both design and construction services.

SECTION 3. Amends Chapter 130, Civil Practice and Remedies Code, by adding Section 130.0021, as follows:

Sec. 130.0021. ARCHITECT'S OR ENGINEER'S STANDARD OF CARE. (a) Requires a construction contract for architectural or engineering services or a contract related to the construction or repair of an improvement to real property that contains architectural or engineering services as a component part to require that the architectural or engineering services 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.

(b) Provides that, if a contract described by Subsection (a) contains a provision establishing a different standard of care than the standard described by Subsection (a) the provision is void and unenforceable, and the standard of care described by Subsection (a) applies to the performance of the architectural or engineering services.

(c) Provides that Section 130.004 does not limit the applicability of this section.

SECTION 4. Amends Section 130.004, Civil Practice and Remedies Code, as follows:

Sec. 130.004. OWNER OF INTEREST IN REAL PROPERTY. (a) Provides that, except as provided by Section 130.002(b) (relating to providing that a certain covenant or promise in is void and unenforceable under certain circumstances) or (c) or Section 130.0021, this chapter does not apply to an owner of an interest in real property or persons employed solely by that owner.

(b) Provides that, except as provided by Section 130.002(b) or (c) or Section 130.0021, this chapter does not prohibit or make void or unenforceable a covenant or promise to certain business practices.

SECTION 5. (a) Provides that Section 130.002(c), Civil Practice and Remedies Code, as added by this Act, applies only to a covenant or promise in, in connection with, or collateral to a contract entered into on or after the effective date of this Act.

(b) Provides that Sections 130.002(d) and 130.0021, Civil Practice and Remedies Code, as added by this Act, apply only to a contract entered into on or after the effective date of this Act.

SECTION 6. Effective date: September 1, 2021.