



Blueprint for Tomorrow: Lessons Learned in Texas Construction in 2020

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Employee Injuries

Hernandez v. Sun Crane & Hoist, Inc. (2020)

- 600 S.W.3d 485
- 5th Court of Appeals (Dallas)(en banc)
- Currently under review by SCOTX
- **Background:** Worker for subcontractor brings negligence action against general contractor for personal injury alleging, inter alia, that general contractor had a duty to exercise reasonable care in supervision of subcontractor's activity.



Hernandez v. Sun Crane & Hoist, Inc. (2020)

Key Point: While general contractors ordinarily do not owe a duty to ensure subcontractor performs work safely, that duty can arise through conduct of general contractor.

Result: Court reversed SJ as it found some evidence that GC had a duty to supervise sub's work where GC had control over daily schedule, the order of the work and mandatory use of safety equipment and the equipment being used when injury arose.

Key Takeaway: Merely maintaining safety personnel on site does not create a duty. However, exhibiting actual "control" will give rise to a duty even in the face of express contract language to the contrary.

Brazos Contractors Development, Inc. v. Jefferson (2019)



- 596 S.W.3d 291
- 14th Court of Appeals (Houston)
- **Background:** Worker for subcontractor brings negligence action against general contractor for personal injury alleging, inter alia, that general contractor had a duty to exercise reasonable care in supervision of subcontractor's activity.

Brazos Contractors Development, Inc. v. Jefferson (2019)

Key Point: Duty to ensure subcontractor performs work safely can arise from contract terms irrespective of whether actual control was exercised.

Result: Court reversed SJ after finding contract gave GC the right to control the means, methods, or details of sub's work. Offending language: perform the work ... “under the direction of *David Kaszak*”

Key Takeaway: Avoid using language in contracts granting the GC the authority to control or direct the work.

AEP Texas Central Co. v. Arredondo (2020)

- 612 S.W.3d 289
- SCOTX
- **Background:** Property owner falls in hole created by general contractor and brings negligence action against utility for personal injury alleging, inter alia, that utility had a duty to exercise reasonable care in supervision of general contractor's activity.



AEP Texas Central Co. v. Arredondo

Key Point: AEP avoided contractual control over general contractor's work and thus avoided liability.

Result: Court reversed SJ in favor of employee after finding contract did not give AEP right to control the means, methods, or details of general contractor's work.

Court specifically found that language requiring the GC to have an authorized representative at the site and that GC use its "best efforts" to arrange for completion of work "expeditiously" and to restore the premises "immediately" did not give rise to contractual control.

Key Takeaway: Compare with Jefferson. It is ok to set time for performance and to require contractor to minimize interference. Not ok to tell contractor how to do the work.

Summary of Employee Injury Cases



- AVOID directing subcontractors on how to perform the work, or how to “safely” perform the work.
- AVOID including language in the contract that would allow you to direct how the work is performed, or when specific tasks will be performed.
- DO require your subcontractors to comply with laws, including OSHA.
- DO include an indemnity provision for subcontractor’s violation of applicable law, including OSHA.
- DO include a broad form indemnity provision for injury to subcontractor’s employees.
- DO Consider a CCIP – if contractor provides insurance then it can trigger worker’s compensation as exclusive remedy for injured employee.



Construction Claims

D2 Excavating, Inc. v. Thompson Thrift Construction, Inc. (2020)

- 973 F.3d 430
- 5th Cir.
- **Background:** Excavation sub brings breach of contract action against general contractor for non-payment for “excess dirt” removal.



D2 Excavating, Inc. v. Thompson Thrift Construction, Inc.

Key Facts:

- General contractor, Thompson Thrift, represented site was balanced in plans, which was untrue.
- As a result, D2, excavation subcontractor, was forced to remove excess dirt from site.
- Subcontract contained language where D2 represented it had investigated the condition of the site.

D2 Excavating, Inc. v. Thompson Thrift Construction, Inc.

Result:

- Trial Court determined subcontractor was entitled to additional compensation for excess dirt removal.
- On appeal, 5th Circuit reversed finding subcontractor is not so entitled.

Reasoning: In the absence of express language to the contrary, subcontractor bears the risk of inaccurate or incomplete plans. Here was express language in the contract that shifted the risk to the subcontractor to investigate the topography of the site.

Key Takeaway: Include language allowing reliance on plans; beware the scope of the investigation required by the contract.

James Const. Group v. Westlake Chemical Corp. (2019)

- 594 S.W.3d 722
- (Tex App. Houston 14th Dist)
- **Background:** General contractor terminated by Owner for safety violations after providing notice, but not in the manner prescribed by the contract



James Const. Group v. Westlake Chemical Corp. (2019)

Key Facts:

- General contractor, James Construction Group, entered into contract with Westlake, to construct a chemical plant.
- Westlake terminated James for performing work in unsafe manner and sued for breach of contract to recover completion costs.
- Contract contained a notice provision that allowed Westlake to terminate James for serious safety violations upon notice and opportunity to cure.
- James counterclaimed for breach because Westlake did not give proper notice of termination.

James Const. Group v. Westlake Chemical Corp. (2019)

Legal Background:

- Texas courts have strictly enforced contractual notice requirements in contracts.
- There are, however, exceptions that pre-date the James case.
 - Prior material breach by owner
 - Actual/constructive notice
 - Modification/waiver through parties' course of conduct

New Rule From the *James Case*: Need only “*substantial compliance*” with notice provision for notice to be effective.

James Const. Group v. Westlake Chemical Corp. (2019)

What is the definition of Substantial Compliance?

- Actual notice is received; and
- The notice provided does not severely impair the notice provision's purpose.

Avoiding “Severe Impairment”

- Issue of both timing and scope to avoid undue prejudice to the other party.
- Make notice sufficiently detailed so that other party may act on it.
- Provide notice in sufficient time so that other party may act on it.
 - bring a claim of its own against upstream party or other party.
 - Before that party waives rights against upstream party or other party.

Beltway Park Baptist Church v. Bolton (2020)

- 2020 WL 868069
- Court of Appeals of Texas, Eastland
- **Background:** Owner discovers leaking roof during construction which was completed in 2010 ; contractor investigates leak and recommends owner repair it – blaming the leak on defective design. Owner brings suit in 2015 asserting causes of action for negligence, breach of contract and DTPA. In 2013, prior to bringing suit, contractor stated a crew would be sent out to fix the roof.



Beltway Park Baptist Church v. Bolton (2020)

Holding: Exceptions to limitations defense not applicable.

- Discovery rule not applicable because owner knew of alleged defects before completion of the roof;
- No fraudulent concealment for same reason;
- No equitable estoppel related to promise of repair because repair efforts do not extend statute of limitations;
- Continuing tort exception not applicable because owner knew of injury and its cause.

Key Takeaway: Look at warranty obligations and timeline before committing to make repairs.

Pioneer Energy Services Corp. v. Burlington Ins. Co. (Houston [14th Dist.] Oct. 29, 2020)

- **Background:** Employee of buyer of coiled-tubing unit sued manufacturer (seller) for negligence, gross negligence and strict products liability. The seller sought indemnity and defense from buyer based on purchase agreement “Warranty Terms and Conditions:”

INDEMNITY (INCLUDING FOR NEGLIGENCE): BUYER HEREBY ASSUMES AND AGREES TO INDEMNIFY, DEFEND, PROTECT, SAVE, KEEP, AND HOLD HARMLESS SELLER, ITS AGENTS, EMPLOYEES, SUBCONTRACTORS, AND INVITEES FROM AND AGAINST ANY AND ALL LOSSES, DAMAGES, INJURIES, CLAIMS, CAUSES OF ACTION, LIABILITIES, DEMANDS AND EXPENSES (INCLUDING ATTORNEY FEES AND OTHER LEGAL EXPENSES) OF WHATSOEVER KIND AND NATURE, FOR INJURY TO, OR ILLNESS OR DEATH OF ANY PERSON AND FOR ALL DAMAGE, LOSS OR DESTRUCTION OF PROPERTY (COLLECTIVELY LOSSES), RELATED TO, CONNECTED WITHIN IN ANYWAY, ARISING OUT OF, OR ON ACCOUNT OF THE GOODS OR SERVICES PURCHASED HEREUNDER, INCLUDING, WITHOUT LIMITATION, ANY SUCH LOSSES CAUSED OR OCCASIONED BY ANY NEGLIGENT ACT OR OMISSION OF SELLER, ITS OFFICERS, AGENTS, EMPLOYEES, SUBCONTRACTORS, INVITEES, OR LICENSEES. The foregoing is a material part of this transaction, supported by an in consideration of a reduction in purchase price and is intended to apply notwithstanding the joint or concurrent negligence of Seller.

Pioneer Energy Services Corp. v. Burlington Ins. Co. (Houston [14th Dist.] Oct. 29, 2020)

- **Indemnity and the Fair Notice Doctrine:**
 - Express Negligence Rule
 - Conspicuousness
- **Duty to Defend:** no duty to defend where no indemnity obligation



Payment and Performance

Alvarez v. Shepard (Amarillo Feb. 12, 2020)

- **Background:** Homeowner sues contractor when contractor walks the job after being paid 94% of contract price. Contractor promised he would return, but never did.
- **At issue:** Was there evidence the contractor acted knowingly, entitling the homeowner to treble damages under the DTPA?



Alvarez v. Shepard (Amarillo Feb. 12, 2020)

- **Holding:** Evidence sufficient to support treble damages:
 - Leaving job incomplete → evidence of breach of implied duty to act in good and workmanlike manner.
 - Promised, in response to homeowner, to return and finish the renovations → evidence of actual awareness of his breach.
- **Key Takeaways:** Representations about breach may show that you acted “knowingly,” which often increases damages.

EM Bldg. Contractors Services, LLC v. Byrd Bldg. Services, LLC (Dallas Aug. 11, 2020)

- **Background:** Contractor (Byrd) hired subcontractor EM for drywall work on two projects and framing work on one project. Byrd contended EM breached the contracts by (1) failing to complete the work, (2) subcontracting the work without consent, and (3) failing to maintain required insurance. After sending notices of default, EM abandoned its work on the projects.
- **Trial Court:** Summary judgment in favor of Bryd's breach of contract claim against EM and dismissed EM's counterclaims.

EM Bldg. Contractors Services, LLC v. Byrd Bldg. Services, LLC (Dallas Aug. 11, 2020)

- **Issue 1:** Existence of enforceable contract
 - The Kyle project contract referenced the McKinney project and describes the project as have four, not three floors.
 - Contract as a whole establishes a meeting of the minds to install framing on Kyle project → enforceable contract.
- **Issue 2:** Impossibility
 - Do delays excuse performance?
- **Issue 3:** Mutual Mistake
 - Does belief that delays would not occur excuse performance?

Turner v. Ewing (Houston [14th Dist.] Nov. 24, 2020)

- **Background:** Framing contractor (Ewing) brought suit against homeowners for non-payment after homeowners' failed to pay full amount and sent a letter forbidding Ewing from the project. Homeowners brought counterclaims to recover cost to complete unfinished job. Jury found in favor of contractor.



Turner v. Ewing (Houston [14th Dist.] Nov. 24, 2020)

Substantial Compliance:

- Breach of contract claim by contractor were brought under substantial compliance doctrine to “allow a contractor who has substantially completed a construction contract to sue on the contract rather than being relegated to a cause of action for quantum meruit.”
- Elements:
 - Substantial performance
 - Amount unpaid under the contract
 - Cost of remedying the defects due to his errors or omissions

Turner v. Ewing (Houston [14th Dist.] Nov. 24, 2020)

Attorneys' Fees and Prevailing Party:

- Homeowner is not prevailing party based on substantial compliance findings.
- Third element of substantial compliance claim is offset proven by prevailing party, not prevailing claim by homeowner.

Satisfaction Clause:

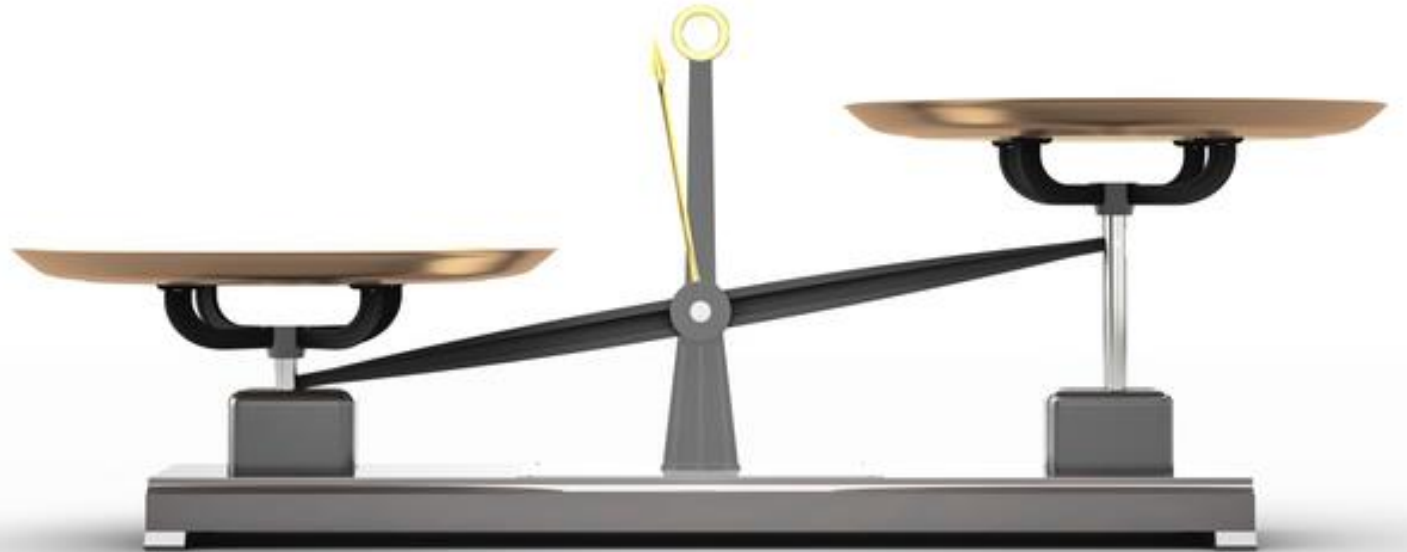
- “Generally, a construction contract that allows an owner to pass upon the adequacy of the builder’s performance requires the owner to make his judgment in good faith.”
- **Objective, not subjective standard.**
 - “This standard does not seek to determine the actual mental satisfaction of the party making the determination; rather it examines whether the performance would satisfy a reasonable person.”



Arbitration

The Arbitration Dilemma

- Do you want to arbitrate at all?
- Considerations
 - Privacy/publicity
 - Complexity of issues
 - The other side
 - Appeal options



Barriers to Entry

- Does your agreement require you to do something you would rather not *have* to do?
 - “The parties agree to negotiate in a good faith effort to resolve the dispute within 90 days”
 - “If negotiations are unsuccessful, the parties agree to engage in a one-day mediation within 30 days of”

Khancepts, LLC v. Lopez (2020)



- 2020 WL 6278573
- 14th Court of Appeals (Houston)
- **Background:** Lopez and Khancepts entered into a settlement agreement that required Khancepts to pay \$30,000 to Lopez over six months. Khancepts stopped paying after several months.

Khancepts, LLC v. Lopez (2020)

- Lopez filed motion with Texas court to enforce the agreement. Khancepts moved to compel arbitration.
- Agreement at issue required (1) phone conference; and then (2) half day of mediation prior to returning to arbitration.
- The trial court denied the motion to compel arbitration. The conditions precedent to arbitration—mediation in particular—had not been met.
- **HOWEVER** – the fact that Lopez went to the trial court before mediating prevented her from complaining that Khancepts had done the same.

Khancepts, LLC v. Lopez (2020)



Takeaway: Courts will enforce conditions precedent.

But if YOU ignore them, do not expect to use them to your advantage!

So you don't like what happened . . .

- What can be done? Depends on applicable statutory framework, rules of the arbitration services you use, law of the state you choose.
- Good news! You can choose most of those.
- **CAUTION:** Choose wisely!



Caution: Choose Wisely



Ortiz v. Builders First Source – South Texas LP (2020)

- 2020 WL 7711294
- 14th Court of Appeals (Houston)
- **What happened:** Worker for injured while working for employer. Arbitration required under the injury benefit plan.
- After arbitration, employer happier than employee, asked Texas court to confirm the award.
- Award included amount for interest from date of judgment until date judgment was paid—but not interest for any time before that.

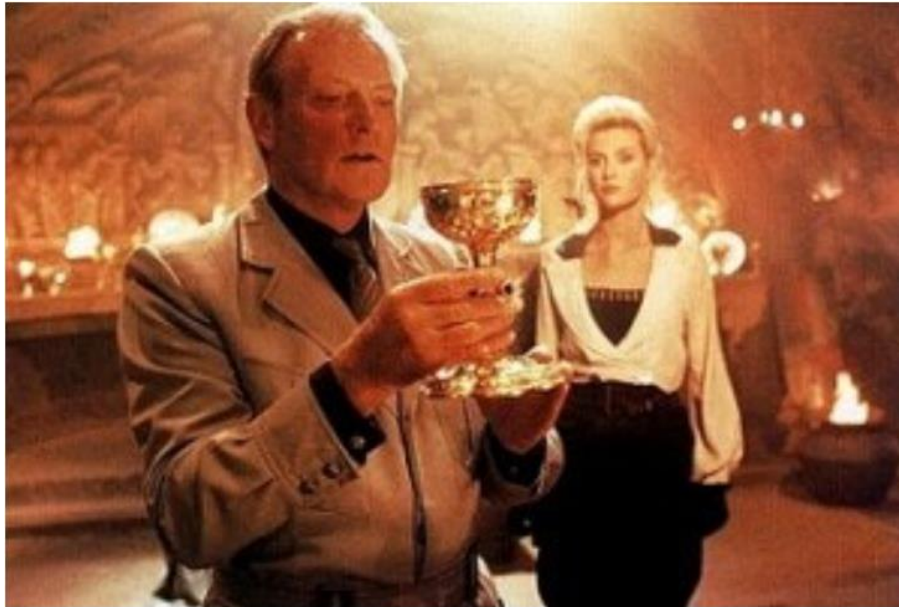


Ortiz v. Builders First Source – South Texas LP (2020)



- Employee was entitled to pre-judgment interest, asked arbitrator to modify the award to add it.
- Under applicable rules (AAA’s Employment Arbitration Rules) – only changes the arbitrator could make:
 - correction of clerical, typographical, technical, or computation errors in the award.*
- Trial Court could not alter the award, Court of Appeals agreed.

Ortiz v. Builders First Source – South Texas LP (2020)



Ortiz v. Builders First Source – South Texas LP (2020)

- **Takeaway:** Engage in serious consideration of the rules/Arbitration groups you choose in your agreements.
- Can affect
 - Default options
 - Fee structure
 - Appeal options



Conn Appliances v. Puentes (2020)

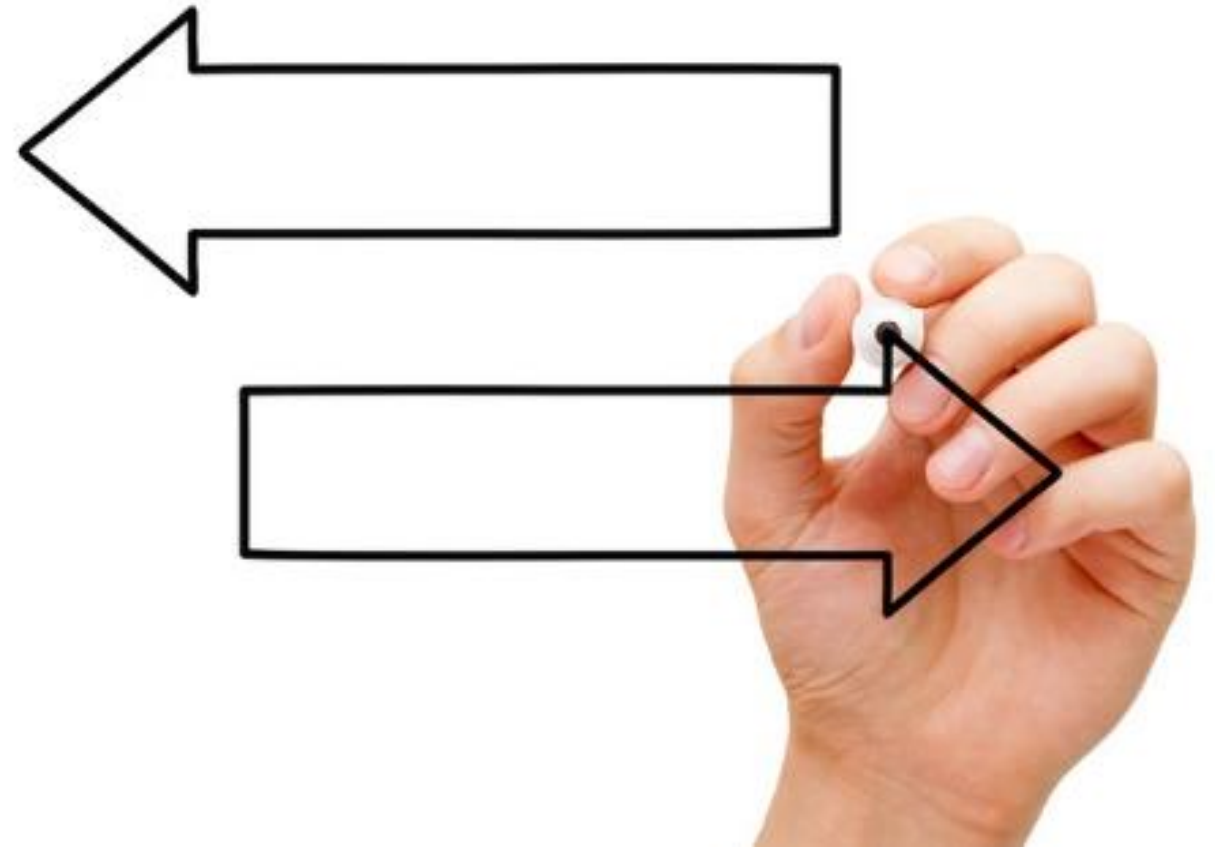
- 2020 WL 4680283
- Beaumont Court of Appeals
- **At issue:** Parties' agreement required arbitration under the Federal Arbitration Act (FAA). The agreement permitted appeal for statutory (FAA) grounds, or "manifest disregard of the law."

Conn Appliances v. Puente (2020)

- After arbitration, one party asked to overturn for “manifest disregard of the law.”
- Court of Appeals decided that, under the FAA, manifest disregard of the law was not a proper basis for setting aside an award under the FAA. Such a non-statutory ground could not overturn the award, regardless of the parties’ agreement to the contrary.
- **Takeaway:** Choose carefully. Have your attorney explain the available grounds for appeal under the arbitration framework identified in your agreement.

Allcapcorp, Ltd. Co. v. Sloan (2020)

- 2020 WL 6054339
- Dallas Court of Appeals
- **At issue:** What decisions are delegated to the arbitrator versus a state court judge?



Allcapcorp, Ltd. Co. v. Sloan (2020)

- The arbitration clause required that any arbitration be conducted per the rules of the AAA.
- The clause also identified specific claims that were not subject to the arbitration clause.
- Relying on the “narrow” form of the clause, the Court reasoned that the agreement did not give the arbitrator the authority to decide the initial issue of whether certain issues were subject to arbitration.

Allcapcorp, Ltd. Co. v. Sloan (2020)

- **Takeaways:**

- Are there issues you do NOT want subject to arbitration?
- Does your contract make clear what issues are subject to arbitration?
- Who do you want to decide those issues?



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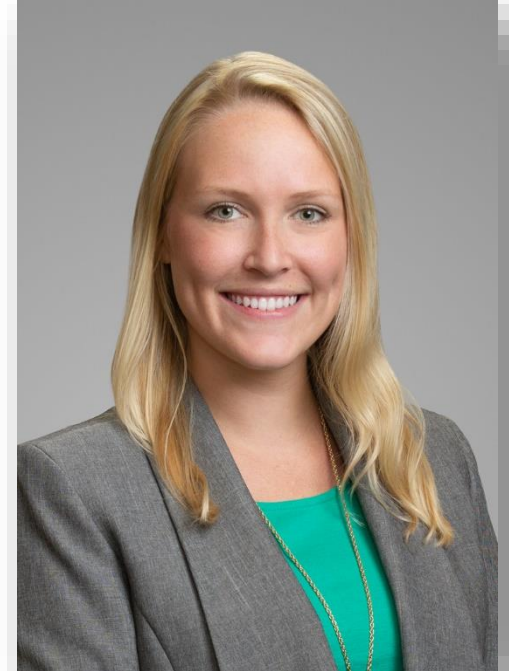
Questions?



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