



# Passing the Buck:

## Risk Transfer Before and After the Anti-Indemnity Act

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# Transferring Risks in Construction Contracts: Two Roads to Risk Transfer



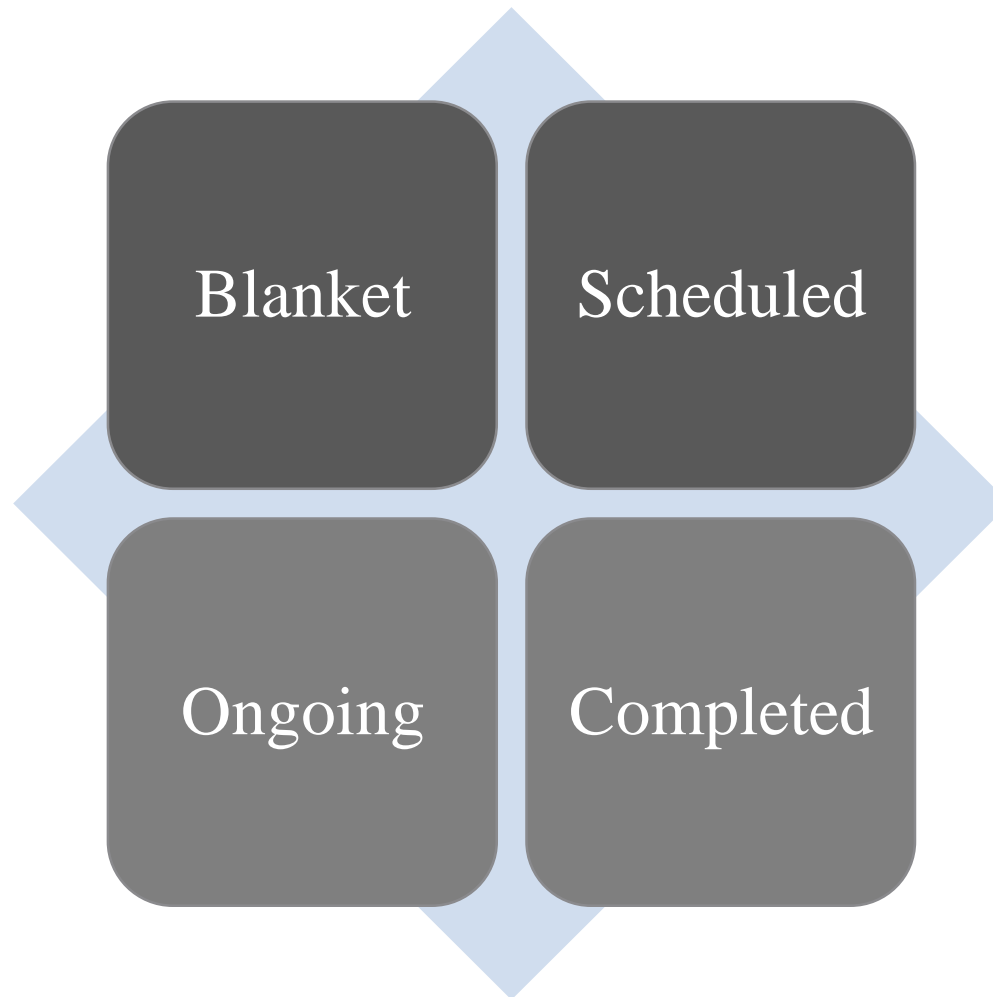
Additional Insured  
Provisions



Contractual  
Indemnity Provisions



# Transferring Risks in Construction Contracts: Additional Insured Endorsements



# Transferring Risks in Construction Contracts: Additional Insured Endorsements

## Blanket

- Applies to any entity that qualifies
- Generally applies “where required by written contract”

## Scheduled

- Only applies to the entity specifically added as an additional insured by endorsement or in the declarations

# Transferring Risks in Construction Contracts: Additional Insured Endorsements

## Caused, in Whole or in Part, by

- Proximate Causation Required
- For duty to defend, **MUST** be allegations that injury/damage was caused (in whole or in part) by NI
- Duty will trigger if NI caused even 1% of injury/damage under *Gilbane*

## Arising Out Of

- Only “But for” Causation Required
- Moderate connection between the named insured and the injury

# Transferring Risks in Construction Contracts: Additional Insured Endorsements

## Ongoing Operations

- Work not abandoned or deemed completed (as defined below)
- Ex: Injuries to people during the construction process

## Completed Operations

- “Your work” will be deemed completed at the earliest of (1) when work called for in the contract is completed, (2) when all work at the job site is completed (if multiple sites), or (3) when work at a job site is put to intended use
- Ex: alleged defect claims brought by the end owner

# Transferring Risks in Construction Contracts: Additional Insured Endorsements

## Ongoing Operations

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

- Exclusions j(6) applies to work not within “products-completed operations hazard”
- The exclusion only applies to “that particular part” of the work that must be repaired because insured’s work was incorrectly performed on it. *Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 557 F.3d 207, 217 (5th Cir. 2009).
- Where insurer’s defective damages insured’s non-defective work, exclusion j(6) does not apply because the non-defective work was severable from the defective work and not “that particular part” that required repair

# Transferring Risks in Construction Contracts: Additional Insured Endorsements

## I. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

## Completed Operations

- Exclusion 1, the “your work” exclusion, applies to work within the “products-completed operation” hazard
- The “your work” exclusion excludes both (1) damage to specific parts of the insured’s work that were defective, and (2) damage to parts of the insured’s work that were non-defective. *Am. Home Assur. Co. v. Cat Tech L.L.C.*, 660 F.3d 216, 221 (5th Cir. 2011).



# Transferring Risks in Construction Contracts: Additional Insured Endorsements

- Combination Endorsements
  - Covering both ongoing and completed operations
  - Limiting coverage to the contract, even though the entity is Scheduled

1. **WHO IS AN INSURED (Section II)** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability caused, in whole or in part, by your performance of "your work" for that insured. However:
  - A. The insurance afforded to such additional insured only applies to the extent permitted by law; and
  - B. If coverage provided to the additional insured is required by written "insured contract", the insurance afforded to such additional insured will not be broader than that which you are required by the written "insured contract" to provide for such additional insured.

# Transferring Risks in Construction Contracts: Additional Insured Endorsements

- What Does the Contract Require?
  - Does it require that the Insured be added as an Additional Insured?
  - Does it specify AI status for ongoing and completed operations?
  - Is there a timeline on the amount of completed operations coverage the Insured is required to provide?

# Transferring Risks in Construction Contracts: Additional Insured Endorsements

- What about the “eight-corners” rule
  - Where endorsement references contract, it is “incorporated by reference”
  - Limitations in contract can apply limitations on additional insured coverage where the contract is referenced.

*See In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), *opinion after certified question answered*, No. 12-30230, 2015 WL 13918242 (5th Cir. June 9, 2015)

# Transferring Risks in Construction Contracts: Additional Insured Endorsements

- Does the Entity qualify as an Additional Insured?
  - Scope of coverage in contract
  - “Caused by” or “Arising out of”
  
- Does the Entity qualify under the Insuring Agreement?
  - “Property Damage” or “Bodily Injury”
  - Caused by an “Occurrence”

# Transferring Risks in Construction Contracts: Contractual Liability

- Insuring Agreement
- Contractual Liability Exclusion
- Insured Contract Provision

# Transferring Risks in Construction Contracts: Contractual Liability

## 1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- The insured is legally obligated to pay
- Because of bodily injury/property damage
- To which this insurance applies

# Transferring Risks in Construction Contracts: Contractual Liability

## b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

"Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

# Transferring Risks in Construction Contracts: Contractual Liability

## ➤ Insured Contract Provision

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

- Contract related to business of Insured
- Assume the Tort Liability of a third-party
- Tort liability is liability imposed in absence of a contract



# Transferring Risks in Construction Contracts: Contractual Liability

- Based on Named Insured's indemnity obligation
- No immediate duty to defend
- May ultimately owe indemnity and defense costs
- May strategically defend to control losses and defense

# Transferring Risks in Construction Contracts: Contractual Liability

- Insured Contract Provision
  - Contract related to business of Insured
  - Assume the Tort Liability of a third-party
  
- Insuring Agreement:
  - Is the risk otherwise covered?
  - Do other exclusions apply?
  
- What type of indemnity is owed?

# Transferring Risks in Construction Contracts: Contractual Indemnity Provisions

## Broad Form Indemnity

- Full indemnification regardless of fault.

## Intermediate Form Indemnity

- Full indemnification so long as any fault rests with the indemnitor.

## Limited Form Indemnity

- Indemnification only to the extent of the indemnitor's own fault in contributing to the loss.

# Transferring Risks in Construction Contracts: Fair Notice Requirements

These risk-shifting provisions have to pass the Fair Notice Doctrine:

1. Express Negligence Test:

*Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987). A party seeking indemnity from the consequences of his/her own negligence must express that intent in specific terms

2. Conspicuousness Requirement:

*Dresser Industries, Inc. v. Page Petroleum*, 853 S.W.2d 505 (Tex. 1993). “[A] provision is ordinarily conspicuous when a reasonable person against whom it is to operate ought to have noticed it.”

# Transferring Risks in Construction Contracts: *After the Texas Anti-Indemnity Act*



Additional Insured  
Provisions under Act



Contractual Indemnity  
Provisions under Act



# Texas Anti-Indemnity Act: When Does the Act Apply?

➤ STATED PURPOSE:

- Old construction landscape – general contractors were “essentially “essentially making subcontractors the ‘insurers’ of the entire project, project, placing the subcontracting company and its own insurance insurance carrier at risk for negligent acts of those entities above above them.” *See* Bill Analysis, Tex. S.B. 361, 82<sup>nd</sup> Leg., R.S. (2011).
- Legislature proposed a solution: “[M]ake each party liable for its own negligence and prohibit transferring liability by contract or other means in actions involving property damage, bodily injury, or death . . . .” *See* Tex. H.B. 2093, 82<sup>nd</sup> Leg., R.S. amended (2011).

# Texas Anti-Indemnity Act

- [A] provision in a construction contract, or in an agreement collateral to or affecting a construction contract, *is void and unenforceable* as against public policy *to the extent* that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.

Tex. Ins. Code § 151.102

# Transferring Risks in Construction Contracts: Contractual Indemnity Provisions under Act

## Broad Form Indemnity

- Full indemnification regardless of fault.

## Intermediate Form Indemnity

- Full indemnification so long as any fault rests with the indemnitor.

## Limited Form Indemnity

- Indemnification only to the extent of the indemnitor's own fault in contributing to the loss.



# Texas Anti-Indemnity Act

[A] provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an agreement to **indemnify, hold harmless, or defend.**

Tex. Ins. Code § 151.104

# Transferring Risks in Construction Contracts: Additional Insured Endorsements after Act

## Caused, ~~in Whole or in Part~~, by

- Proximate Causation Required
- For duty to defend, MUST be allegations that injury/damage was caused (in whole or in part) by NI
- ~~Duty will trigger if NI caused even 1% of injury/damage under *Gilbane*~~

## ~~Arising Out Of~~

- ~~Only “But for” Causation Required~~
- ~~Moderate connection between the named insured and the injury~~

# Texas Anti-Indemnity Act: Duty to Defend Obligation After the Act

Under Section 151.104, an additional insured provision “is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an agreement to indemnify, hold harmless, or defend.”

- Sub’s insurer defends entire suit against GC for a single covered allegation. *See Lyda Swinerton Builders, Inc. v. Oklahoma Sur. Co.*, 903 F.3d 435, 448 (5th Cir. 2018)
- Section 151.104 specifically uses the word *defend*
- No clear answer from the Courts how the Act changes the “defend one, defend all” requirement of the duty to defend.

# Texas Anti-Indemnity Act: When Does the Act Apply?

- Only applies to an original contract with an owner of an improvement or contemplated improvement that is entered into on or after the effective date of the act – January 1, 2012.
  - Date of subcontracts do not control
  - Cannot be waived!

# Texas Anti-Indemnity Act: When Does the Act Apply?

## What is a “Construction Project”?

- **Tex. Ins. Code § 151.001(2)** – means construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents.

# Texas Anti-Indemnity Act: When Does the Act Apply?

- Exception for Employee Claims Tex. Ins. Code § 151.103
  - The Act specifically does not cover agreements in which one party requires indemnity against another for the death or bodily injury of an employee of the indemnitor or its subcontractor

# Texas Anti-Indemnity Act: When Does the Act Apply?

➤ **Section 151.105 Contains 11 Exclusions:**

1. Consolidated insurance programs;
2. Breach of contract or warranty actions that exists independently of an indemnity obligation;
3. Loan and financing documents (other than construction contracts to which lenders are a party);
4. General agreements of indemnity required by sureties;
5. Workers' compensation benefits and protections;
6. Benefits and protections under the governmental immunity laws of the state;
7. Agreements subject to Chapter 127 of the Civil Practice & Remedies Code (Texas Oilfield Anti-Indemnity Act);
8. License or access agreements with railroad companies and a person that permit person to enter RR co's property;
9. Indemnity provisions apply to copyright infringement claims;
10. Indemnity provision in construction contract or collateral to/affecting:
  1. single-family homes, townhouses and duplexes;
  2. Public works projects of municipalities;
11. Joint defense agreements entered into after a claim is made

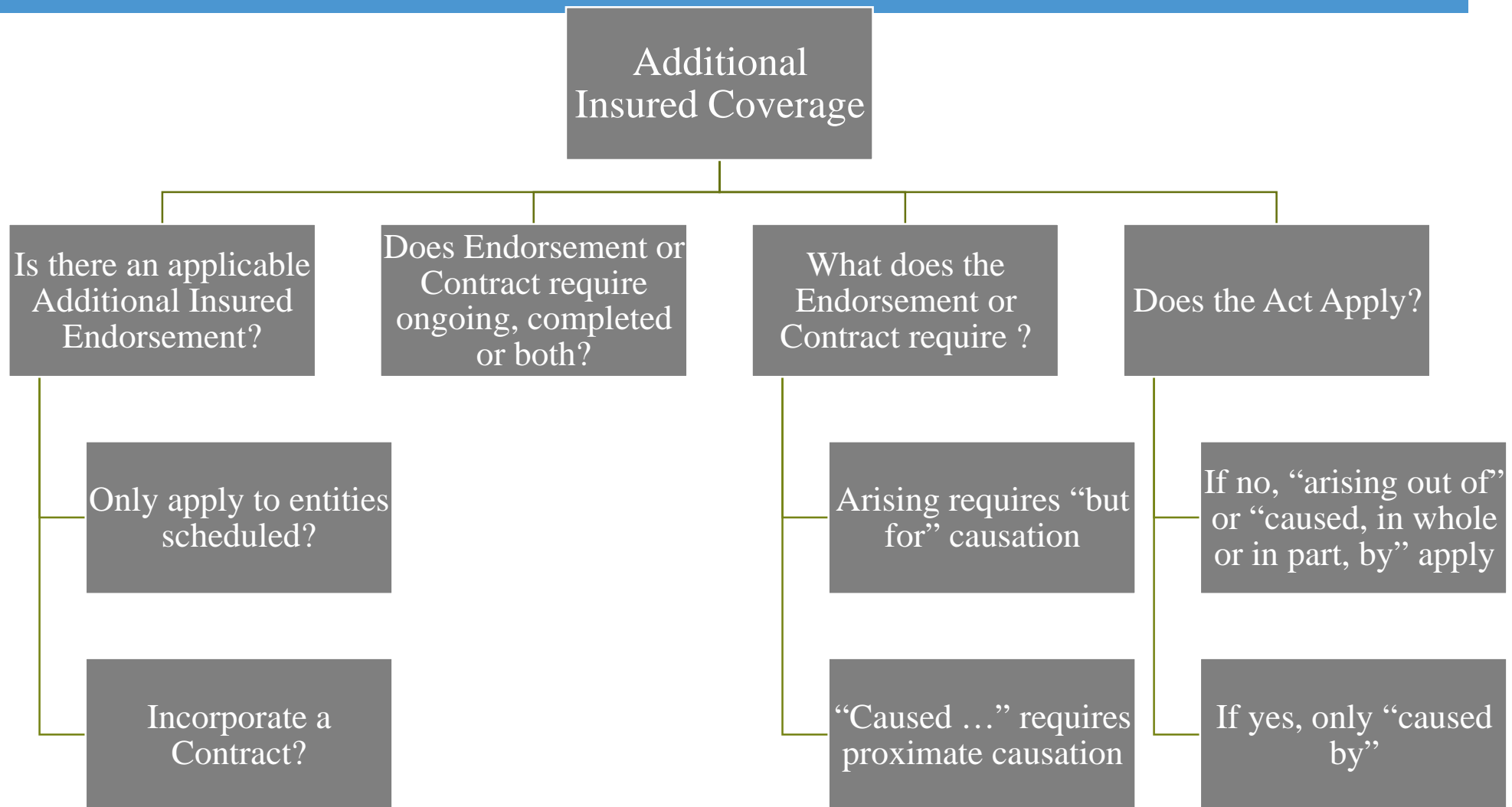
# Texas Anti-Indemnity Act: When Does the Act Apply?

## Residential Construction Exception

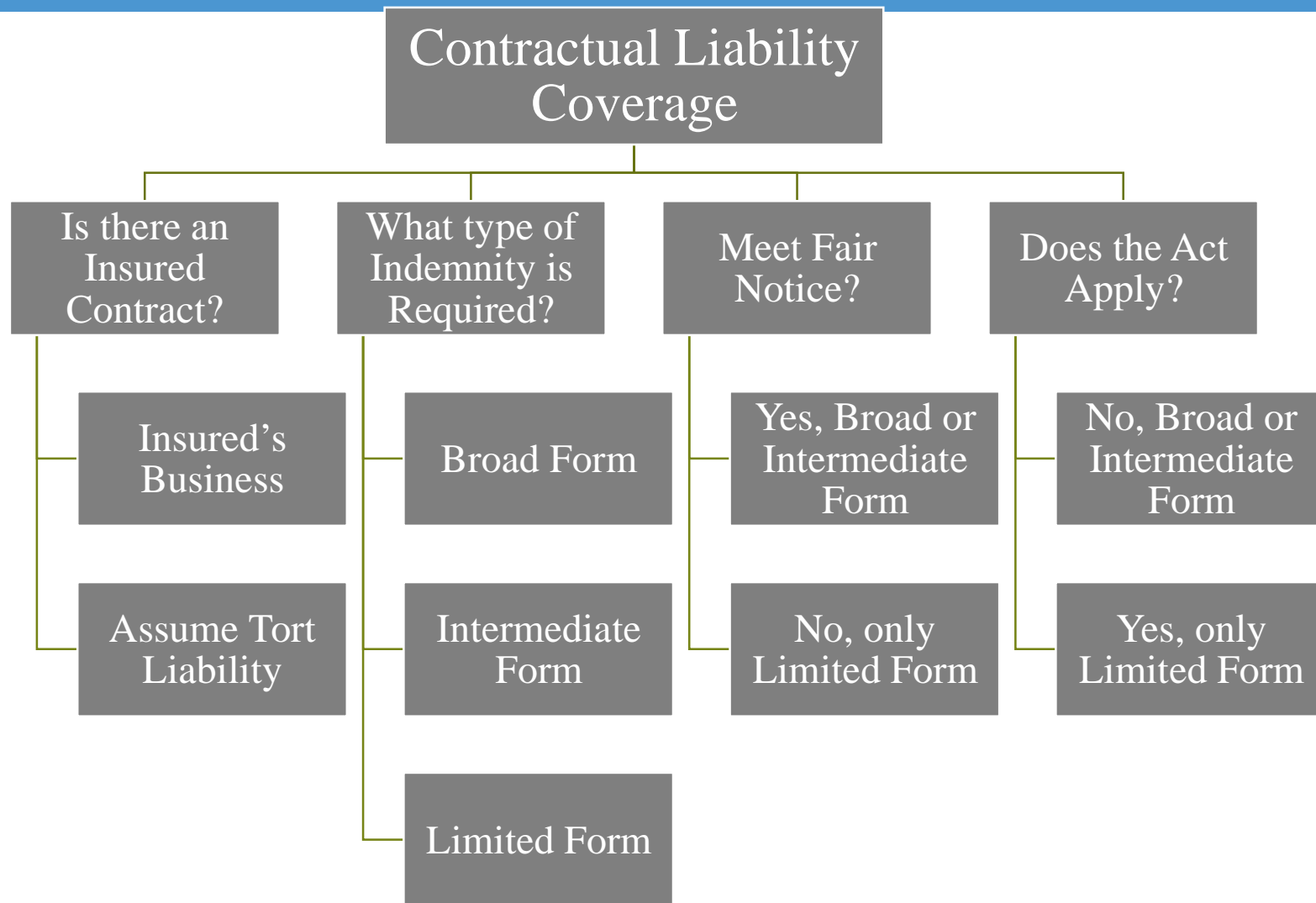
- Construction contracts “pertaining to single-family homes, townhouses and duplexes”
- Are condominiums and apartments intended to be included in this exclusion?
- Plain language and legislative history suggest not covered under the exclusion.



# Transferring Risks in Construction Contracts: Additional Insured Coverage



# Transferring Risks in Construction Contracts: Contractual Liability Coverage





# 30<sup>TH</sup> ANNUAL INSURANCE LAW SYMPOSIUM

Thank you for Joining Us!

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