The Texas Anti-Indemnity Act's Impact on the Duty to Defend

Cooper & Scully
A Professional Corporation

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Robert J. Witmeyer and Aaron G. Stendell

TEXAS ANTI-INDEMNITY ACT
FREQUENT ISSUES

- Date of Prime Contract controls
- Does not apply to single-family homes, but does apply to apartments and condos
- Does not apply to injury to indemnitee's (or indemnitee's sub's) employee
- Cannot be waived
- Impact on Duty to Defend

CONTRACTUAL INDEMNITY

- Contractual Indemnity Agreements – promise or safeguard to hold the indemnitee harmless against damage or bodily injury.

CONTRACTUAL INDEMNITY AGREEMENTS

Three main types of indemnity agreements :

1. Broad form indemnity – Full indemnification regardless of fault.
2. Intermediate Form Indemnity – Full indemnification so long as some fault rests with the indemnitor.
3. Limited form Indemnity – Indemnification only to the extent of the indemnitor's own fault in contributing to the loss.

TRANSFERRING RISK IN CONSTRUCTION CONTRACTS

- Trend in recent years to limit or prohibit indemnity agreements

- Current count - 44 states have enacted anti-indemnity statutes

TEXAS ANTI-INDEMNITY ACT

- In 2011, the Texas Legislature enacted the Texas Anti-Indemnity Act, which limits and makes void certain liability shifting agreements.
- Went into effect on January 1, 2012
- Codified in Texas Insurance Code Section 151.001 to 151.151

TEXAS ANTI-INDEMNITY ACT

- AGREEMENT VOID AND UNENFORCEABLE (151.102)

  ". . . 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."

TEXAS ANTI-INDEMNITY ACT

How Does it Affect Additional Insured Provisions?

- 151.104: [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.

TEXAS ANTI-INDEMNITY ACT

- Prohibits and makes void broad and intermediate form indemnity agreements (claims involving the negligence of indemnitee) and additional insured provisions for construction projects.

“. . . to the extent . . .”

What types of indemnification are affected?

What if only the indemnitee’s wrongdoing is alleged, i.e., the pleading is silent as to the indemnitor's fault? Does the Act bar limited-form indemnification?

POLL QUESTION

When will the Dallas Cowboys win the Super Bowl?

a) 2022
b) 2023
c) Never again with Jerry Jones as Owner
d) Who Cares?!?

Maxim Crane Works, LP v. Zurich American Ins., Co. 392 F. Supp. 713 (S.D. Tex. 2019)

A subcontractor leased a crane from Maxim.

Lease agreement had an Additional Insured requirement wherein sub was required to add Maxim as an AI.

Crane overloaded and fell over, amputating GC's employee's leg.

Maxim Crane

Injured worker sues Sub and Maxim (WC from GC)

Maxim sought coverage under sub's policy issued by Zurich; Zurich denied coverage, citing Act's prohibition on AI coverage.

At trial, Plaintiff awarded >$35 million; ~$3m on Maxim

Maxim sues for AI coverage

Undisputed that Act applies to lease agreement

Maxim Crane

Underlying lawsuit alleges that Maxim was independently liable for its own negligence and not for any negligence of the subcontractor.

Act states that an indemnification provision "is void and unenforceable . . . ***to the extent*** that it requires an indemnitor to indemnify . . . a party . . . against a claim caused by the negligence or fault . . . of the indemnitee"

Here, the lease required Zurich to cover Maxim against a claim caused by Maxim's negligence or fault. Therefore, Act voids this AI requirement.

Maxim Crane

Maxim held that the Act bars any indemnity obligation owed by the indemnitor for claims brought directly against an indemnitee for the indemnitee's own separate conduct.

What about alleged wrongdoing on behalf of the indemnitee AND the indemnitor?

How may carriers address this conundrum?

The "to the extent" bars indemnification for the indemnitee's sole negligence but also bars indemnification for the indemnitee's part when the indemnitor is partly at fault (i.e., only indemnity for limited form indemnity).

Any allegations of fault on the part of the indemnitee voids defense obligations too, right?

How may carriers address this conundrum?

The Act negates the entire defense obligation if there are any allegations against the indemnitee for its own active negligence or breach, even if indemnitor's work is implicated.

Otherwise, the indemnitee is receiving a defense for its own negligence—which the Act expressly states you cannot do.

Use of the word "defense" is meaningless and the Act would not impact duty to defend as insurers are back to defending entire lawsuit any time the indemnitee's negligence is alleged.

How will policyholders interpret this conundrum?

Carriers' position ignores the "to the extent" limitation. The carrier is obligated to defend the indemnitee "to the extent" of the indemnitor's negligence. And under Texas law, an insurer must defend the entire suit if at least one cause of action falls within the policy terms. *Heyden Newport Chem Corp. v. Southern Gen. Ins.*, 387 S.W.2d 22. 26 (Tex. 1965) ("if the insurer has a duty to defend with respect to any aspect of the lawsuit, it has a duty to defend with regard to every aspect of the lawsuit.")

Otherwise, General Contractors would be entitled to a defense as additional insureds in cases where the plaintiff only alleges damages caused by the subcontractor or the subcontractor's scope of work (i.e., all cases **except** those involving only the general contractor's negligence).

How will policyholders interpret this conundrum?

Most, if not all, construction defect lawsuits name the general contractor as a defendant.

To follow the carrier's argument that any time a GC is named there is no defense obligation, is to hold that the Act essentially voids all defense obligations for CD claims in Texas.

More reasonable interpretation of the Act is that the Legislature meant to permit indemnification/AI when the general contractor may be held liable for the subcontractor's negligence, which is how carriers have been behaving.

Questions?

Robert J. Witmeyer
214-712-9554
Rob.Witmeyer@cooperscully.com

Aaron G. Stendell
214-712-9524
Aaron.Stendell@cooperscully.com

COOPER & SCULLY, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202