

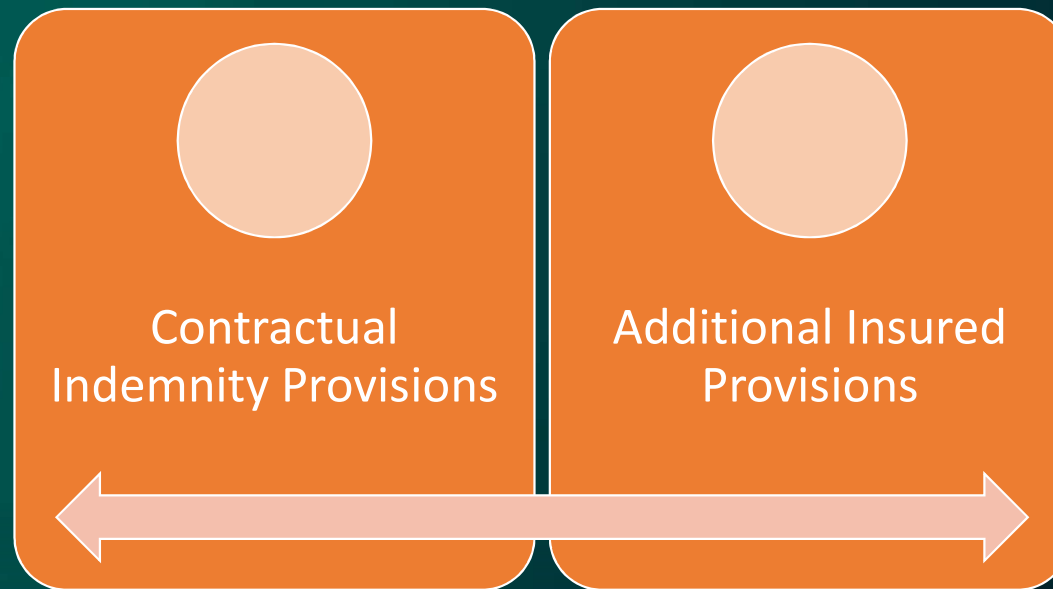
Texas Anti-Indemnity Act



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Transferring Risks in Construction Contracts: Two Roads of Risk Transfer



Transferring Risks in Construction Contracts:

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

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: Contractual Indemnity Provisions Before the Act

For over 55 years prior to the TAIA, these risk-shifting provisions were enforceable. Ultimately, they had 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.”

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

Chapter 151 of Texas Insurance Code

- 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. Dates of the subcontracts do not control.
- The Act cannot be waived.

Texas Anti-Indemnity Act

➤ STATED PURPOSE:

- Old construction landscape – general contractors were “essentially making subcontractors the ‘insurers’ of the entire project, placing the subcontracting company and its own insurance carrier at risk for negligent acts of those entities above them.” *See* Bill Analysis, Tex. S.B. 361, 82nd 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, 82nd Leg., R.S. amended (2011).

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.”

Transferring Risks in Construction Contracts: Contractual Indemnity Provisions After the Act

- Voids application of broad-form and intermediate-form indemnity agreements
- Subcontractor no longer must provide indemnity for liability caused by sole or concurrent negligence of GC
- Modifies over 55 years of the common law on contractual indemnity.

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

Chapter 151 of Texas Insurance Code

- Chapter 151 applies to all construction contracts involving Texas projects, unless excepted by 151.105.

Texas Anti-Indemnity Act

- 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:
 - a) single-family homes, townhouses and duplexes;
 - b) Public works projects of municipalities;
 11. Joint defense agreements entered into after a claim is made

TEXAS ANTI-INDEMNITY ACT

Exclusions from the Act

- 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 exclusions.

TEXAS ANTI-INDEMNITY ACT

- Exception for Employee Claims (151.103)
 - The Act specifically does not apply to agreements in which one party requires indemnity against another for the death or bodily injury of an employee of the indemnitor or its subcontractor

Poll Question

In what country did the first Starbucks open outside of North America?

France

Italy

Japan

Columbia

Transferring Risks in Construction Contracts: Additional Insured Provisions

- Requires a party to be added as an insured in the name insured's liability policy, subject to the terms and conditions of the policy and the additional insured endorsement.
- In standard construction contracts, owner will require GCs to name them as additional insured on GC's policies. In turn, GC's will require subs to name them as additional insured on GC's policy.

Transferring Risks in Construction Contracts: Additional Insured Provisions Prior to the Act

- The risk shifting provisions could result in the subcontractor's insurer paying all of the damages, including damages caused by the general contractor, so long as subcontractor was at least 1% at fault. *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589 (5th Cir. 2011) (Additional Insured Indemnity).
- The subcontractor's insurer also would pay defense costs for the entire suit against the general contractor for a single allegation of damages potentially caused by subcontractor. *See Lyda Swinerton Builders, Inc. v. Oklahoma Sur. Co.*, 903 F.3d 435, 448 (5th Cir. 2018); *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008) (Additional Insured Duty to Defend).

Texas Anti-Indemnity Act:

How does the Statute Affect Additional Insured Provisions?

[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

Texas Anti-Indemnity Act:

How does the Statute Affect Additional Insured Indemnity?

- Only limited form indemnity directly from subcontractor is permitted.
- Statute applies equally to contractual indemnity and additional insured obligations.
- Thus, subcontractor insurer can pay to indemnify general contractor for damages caused by subcontractor, but not damages caused by general contractor.

Texas Anti-Indemnity Act:

How does the Statute Affect the Duty to Defend?

- General duty to defend – over 50 years of Texas case law that said a complete defense owed for an insured.
- Subcontractor carriers paid for the entire defense of the GC.
- GC carriers routinely did not share in the defense costs.
- “Cram down” defense costs to subs.

Texas Anti-Indemnity Act:

How does the Statute Affect the Duty to Defend?

- 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.”
- Subcontractor insurer cannot indemnify or defend GC for own negligence.
- A complete defense no more? Would lead to defense of GC of own bad acts.
- Would be change of common law just like contractual indemnity.

Texas Anti-Indemnity Act:

How does the Statute Affect the Duty to Defend?

Before the Statute

- In lawsuit against general contractor - some allegations against the Subcontractor and some allegations against the GC meant subcontractor insurers had to defend the GC for the entire lawsuit (“mixed pleading”).

After the Statute

- Subcontractor Insurers do not defend entire lawsuit if allegations involve both the subcontractor and the GC (“mixed pleading”).

TEXAS ANTI-INDEMNITY ACT

- **How will the Act impact insurance coverage?**
 - Sub insurers may no longer be offering AI defense for most construction projects.
 - Premiums may increase for GCs and Owners
 - Or, for the insurers that look at it narrowly, may offer AI defense, but then later argue that indemnity obligation is limited to sub's negligence (i.e, pay nothing for GC).

TRANSFERRING RISK IN LIGHT OF ACT

➤ When receive notice of claim/lawsuit:

- Review the risk transfer provisions in contracts
 - Is it valid under Fair Notice Doctrine (if TX law applies)?
 - Does Anti-Indemnity Act apply? Exceptions?
 - Primary/non-contributory AI coverage required? Endorsements?
- Review the policy provisions
 - AI endorsements, contracted party, primary, completed ops?
- If the insured is a GC or owner, put relevant lower tier contractors and their insurance companies on notice and tender claim to lower tier subs for defense/indemnity.
- If the insured is a sub and there are sub-subcontractors, attempt to push downstream.

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