



Chapter 151: TEXAS ANTI- INDEMNITY STATUTE

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TRANSFER OF RISK

Two Main Risk Transfer Provisions:

- 1) Contractual Indemnity Provision
- 2) Additional Insured Provision

CONTRACTUAL INDEMNITY

Contractual Indemnity Agreement is a promise to hold the another party(indemnitee)harmless against damage or bodily injury.

Example:

“General Contractor hereby indemnifies . . .
Subcontractor . . . from and against all claims . .
whether the same is caused or contributed to by
the negligence of General Contractor . . .”

CONTRACTUAL INDEMNITY

3 TYPES

Broad Form Indemnity: Indemnitor indemnifies for any and all liability arising out of specified subject matter.

Intermediate Form Indemnity: Indemnitor indemnifies for any and all liability arising out of a specified subject matter, even if damage/injury is caused by the indemnitee's negligence, but excludes the indemnitor's sole negligence.

Limited Form Indemnity: Indemnitor indemnifies only to the extent of the indemnitor's fault.

ADDITIONAL INSURED PROVISION

Requires that a party 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.

CONTRACTUAL INDEMNITY

Prior to the Anti-Indemnity Act, indemnity agreements were subject to the Fair Notice Test and the Oilfield Anti-Indemnity Act. The Fair Notice Test still applies and is being addressed by Brent later in the program.

TREND

Trend in recent years is to limit or prohibit indemnity agreements in the construction context..

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.

The Act became effective January 1, 2012.

Codified in Texas Insurance Code Section 151.001 to 151.151.

TEXAS ANTI-INDEMNITY ACT

Prohibits and makes void broad form and intermediate form indemnity agreements (claims involving the sole or concurrent negligence of indemnitee) for construction projects, *if the Act applies to your contract.*

TEXAS ANTI-INDEMNITY ACT

When does the Act Apply?

TEXAS ANTI-INDEMNITY ACT

- **§ 151.101. Applicability**

(a) This subchapter applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to:

- (1) this chapter; or
- (2) Title 10.

TEXAS ANTI-INDEMNITY ACT

- This Chapter means a Consolidated Insurance Program
- “‘Consolidated insurance program’ means a program under which a principal provides general liability insurance coverage, workers’ compensation coverage, or both that are incorporated into an insurance program for a single construction project or multiple construction projects.”

TEXAS ANTI-INDEMNITY ACT

- Title 10 (sets out regulations for property and casualty insurance in Texas; includes standard commercial general liability and workers' comp coverage).

POLL

- What is the name of your favorite law firm?

TEXAS ANTI-INDEMNITY ACT

- TO WHAT DOES THE ACT APPLY?

TEXAS ANTI-INDEMNITY ACT

- **§ 151.102. Agreement Void and Unenforceable**
- ... 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... a party... against a claim caused by the negligence or fault ... 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

What is a “Construction Contract”?

Includes a contract, subcontract, agreement or performance bond:

Made by or between an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, repair, or maintenance of a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition and excavation connected with the real property.

TEXAS ANTI-INDEMNITY ACT

“An Agreement in a Construction Contract, *Collateral to or Affecting*” a Construction Contract.

No case law defining “collateral to or affecting”

Look to Texas Oil Field Anti-Indemnity Act (“TOAIA”), which has a similar provision:

TOAIA requires some connection between the contract and actual services performed on a well or mine.

TEXAS ANTI-INDEMNITY ACT

Exclusions from the Act

Employee Claims:

The Act specifically excludes agreements in which one party requires indemnity against another for the death or bodily injury of an employee of the indemnitor or its subcontractor. **Tex. Ins. Code § 151.103.**

TEXAS ANTI-INDEMNITY ACT

Contains 12 Exclusions:

- Consolidated insurance programs;
- Breach of contract or warranty actions;
- Loan and financing documents (other than construction contracts to which lenders are a party);
- General agreements of indemnity required by sureties;
- Workers' compensation benefits and protections;
- Agreements subject to Chapter 127 of the Civil Practice & Remedies Code;
- License or access agreements with railroad companies;
- Indemnity provisions apply to copyright infringement claims;
- Construction contracts pertaining to single-family homes, townhouses and duplexes;
- Public works projects of municipalities;
- Joint defense agreements entered into after a claim is made.

TEXAS ANTI-INDEMNITY ACT

Residential Construction Exception:

Construction contracts pertaining to “a single family house, townhouse, duplex, or land development directly related thereto” **Tex. Ins. Code § 151.105(10)(A)**.

Are condominiums and apartments intended to included in this exclusion?

Legislative history suggest not covered under the exclusions.

TEXAS ANTI-INDEMNITY ACT

Breach of Contract or Warranty Exception:

To be excluded, it must exist independently of an indemnity obligation. **Tex. Ins. Code § 151.105(2).**

TEXAS ANTI-INDEMNITY ACT

- How Does the Act Affect Additional Insured Provisions?

Any requirement in a construction contract for a party to name another as an AI under a policy of insurance with a scope of coverage that would cover the other party's own negligent conduct would be void to the extent it required coverage for the other party's own negligence. **Tex. Ins. Code § 151.104(a).**

TEXAS ANTI-INDEMNITY ACT

The Act cannot be waived!

TEXAS ANTI-INDEMNITY ACT

Effective Date:

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.

CASE LAW

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

FACTS:

GC provided CCIP

Sub leased crane from Maxim

Lease contained an Additional Insured requirement

GC's employee hurt on the job when crane fell over

Injured worker received WC through CCIP

Injured worker sues Sub and Maxim

Judgement against Sub and Maxim

Appellate Court determined that Sub is co-employer

under WC and reverses judgment against GC and

Maxim settles

Maxim sues for AI coverage

CASE LAW

- Arguments:
- Maxim-- Sub determined to be co-employer of injured worker under WC Act , employee exception to Anti-Indemnity Act applies and entitled to AI status
- Zurich-- WC Act doesn't apply to Anti-Indemnity Act and therefore the exception doesn't apply and no AI status

CASE LAW

- Holding: The Anti-Indemnity Act bars Additional Insured status for Maxim. Court reasons that WC definitions do not apply to the Anti-Indemnity Act. Injured worker was not employee of Sub and therefore exception did not apply.

TEXAS ANTI-INDEMNITY ACT

- What to Expect in the Future?

Texas Department of Insurance has express authority under the Act to promulgate regulations to fill in any gaps in the Act.

Courts will continue hearing cases involving the Act, thus interpreting and evolving Texas law of anti-indemnity in construction contracts.



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