



Chapter 151: Issues Encountered

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TEXAS ANTI-INDEMNITY ACT

Two Main Risk Transfer Provisions:

Contractual Indemnity Agreements

&

Additional Insured Provisions



TEXAS ANTI-INDEMNITY ACT

Contractual Indemnity Agreement is a promise or safeguard to hold the 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 . . .”



TYPES OF CONTRACTUAL INDEMNITY AGREEMENTS

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.



CONTRACTUAL INDEMNITY AGREEMENTS

In the past, the risk shifting agreements that passed Fair Notice Doctrine were enforceable:

Express Negligence Test:

Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987): A party “seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms.”

Conspicuousness Requirement:

Dresser Indus., Inc. v. Page Petroleum, 853 S.W.2d 505, 511 (Tex. 1993): ‘A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it.’



ADDITIONAL INSURED PROVISIONS

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.



RISK TRANSFER PROVISIONS IN CONSTRUCTION CONTRACTS

Trend in recent years to limit or prohibit indemnity agreements.

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

Chapter 151 of Texas Insurance Code

When does the Act Apply?

Chapter 151 is titled “Consolidated Insurance Program.”



TEXAS ANTI-INDEMNITY ACT

Chapter 151 of Texas Insurance Code

- * “‘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.” **Tex. Ins. Code § 151.001(1).**



TEXAS ANTI-INDEMNITY ACT Chapter 151 of Texas Insurance Code

Section 151.101 states that the Anti-Indemnity Statute “applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to:”



TEXAS ANTI-INDEMNITY ACT Chapter 151 of Texas Insurance Code

Chapter 151 (Consolidated Insurance Programs); or

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



TEXAS ANTI-INDEMNITY ACT

Texas Insurance Code Section 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

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. **Tex. Ins. Code § 151.001(5).**



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

The Act Could Apply to Contracts Not Typically Considered to be in the Construction Field

Target Corp. v. All Jersey Janitorial Serv., 916 F. Supp. 2d 909 (D. Minn. 2013):

The district court found that “maintenance of real property” in the context of the statute failed to cover a contract for housekeeping services.



TEXAS ANTI-INDEMNITY ACT

The Act Could Apply to Contracts Not Typically Considered to be in the Construction Field

Thompson v. Pizza Hut, 1992 WL 142318 (N.D. Ill. 1992):

The district court held that a contract to computerize cash registers at Pizza Hut restaurants was within the scope of the Illinois Anti-Indemnity Act.



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

Section 151.105 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

Exclusions from the 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

Exclusions from the 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

Exclusions from the Act

Public Projects of a Municipality Exclusion:

This exclusion acknowledges and preserves governmental immunity protections. **Tex. Ins. Code § 151.105(10)(B).**



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

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.



TEXAS ANTI-INDEMNITY ACT

The Act cannot be waived!



TEXAS ANTI-INDEMNITY ACT

Will the Fair Notice Doctrine Peter Out?

An indemnity provision will need to satisfy the fair notice requirements for the exceptions to the statute (i.e., residential contracts or claims involving employee injuries or death).



TEXAS ANTI-INDEMNITY ACT

How will the Act impact insurance companies?

If companies interpret the Act broadly, they risk losing business, as they can no longer offer AI status or obtain indemnity agreements from other insurance companies;

Premiums may increase for GCs and Owners;

If companies interpret the Act narrowly, they may offer the same coverage to later argue that they are prohibited from paying out on policies issued.



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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