



Understanding the Texas Anti-Indemnity Act

Jana S. Reist

2015 Annual Construction Law Seminar

© 2015 This paper and/or presentation provides information on general legal issues. It is not intended to provide advice on any specific legal matter or factual situation, and should not be construed as defining Cooper and Scully, P.C.'s position in a particular situation. Each case must be evaluated on its own facts. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act on this information without receiving professional legal counsel.

TEXAS ANTI-INDEMNITY ACT

➤ Two Main Risk Transfer Provisions in Construction Contracts:

1. Contractual Indemnity Agreements
2. Additional Insured Provisions

TEXAS ANTI-INDEMNITY ACT

- Contractual Indemnity Agreements – 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 . . .”

CONTRACTUAL INDEMNITY AGREEMENTS

Three main types of indemnity agreements :

1. Broad form indemnity – indemnitor assumes unqualified obligation to indemnify the indemnitee for any and all liability arising out of specified subject matter.
2. Intermediate Form Indemnity – requires indemnitor to indemnify the indemnitee for any and all liability arising out of a specified subject matter, even if damage/injury is caused by the negligence of indemnitee, but specifically excludes the indemnitor's sole negligence.
3. Limited form Indemnity - Indemnitor is obligation to indemnify indemnitee only to the extent of the indemnitor's fault.

CONTRACTUAL INDEMNITY AGREEMENTS

➤ Historically the risk shifting agreements were enforceable if they passed 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.”

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.

RISK TRANSFER PROVISIONS IN CONSTRUCTION CONTRACTS

- Trend in recent years to limit or prohibit indemnity agreements
- 45 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

- 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”
 - “Consolidated Insurance Program”: “a program under which a principal provides general liability insurance coverage, workers’ comp coverage, or both that are incorporated into an insurance program for a single construction project or multiple construction projects.” 151.001(1)

TEXAS ANTI-INDEMNITY ACT

CHAPTER 151 OF TEXAS INSURANCE CODE

- 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:
 - Chapter 151 (Consolidated Insurance Programs)
 - 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”?

- Texas Ins. Code 151.001(5)
- It 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

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

- *Target Corp. v. All Jersey Janitorial Serv.*, No. 11-2429, 916 F.Supp.2d 909 (D. Minn. Jan. 7, 2013)
 - Court found that “maintenance of real property” in the context of the statute did not 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*, No. 89-C-6496, 1992 WL 142318 (N.D. Ill. June 18, 1992)
 - Found that a contract to computerize cash registers at Pizza Hut restaurants to be within the scope of the Illinois anti-indemnity act.

TEXAS ANTI-INDEMNITY ACT

Exclusions from the Act

- **Employee Claims (151.102)**
 - 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

- 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 single-family homes, townhouses and duplexes”
 - 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.”

TEXAS ANTI-INDEMNITY ACT

Exclusions from the Act

- **Public Projects Exclusion**
 - This exclusions acknowledges and preserves governmental immunity protections.

TEXAS ANTI-INDEMNITY ACT

How Does it Affect Additional Insured Provisions?

- 151.104: 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.

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 die off?

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

TEXAS ANTI-INDEMNITY ACT

Will the Fair Notice Doctrine die off?

- For general indemnity clause that complies with the indemnity statute:
 - Can be argued that fair notice requirements would not apply since indemnitee is not seeking indemnification for its own negligence;
 - However, Texas case law unclear and seems logical to assume that the intent of agreement should still be clear.

TEXAS ANTI-INDEMNITY ACT

- How will the Act impact insurance companies?
 - If companies interpret statute 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
 - Or, if look at it narrowly, may offer same coverage, but then 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 also be weighing in on the interpretation in the coming years.

If you have any questions, contact:

Jana S. Reist

Jana.Reist@cooperscully.com

214.712.9571

