

HB 2093

CHAPTER 151

INSURANCE CODE

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OUTLINE

- SUBCHAPTER A-DEFINITIONS
- SUBCHAPTER B-CIP'S
- SUBCHAPTER C-ANTI-INDEMNITY
- SUBCHAPTER D-MISCELLANEOUS

DEFINITIONS

- Sec. 151.001. DEFINITIONS. In this chapter:
- (1) "Consolidated insurance program" means a program under which a *principal* provides general liability insurance coverage, workers' compensation insurance coverage, *or both* that are incorporated into an insurance program for a single *construction project* or multiple *construction projects*.

WHO IS THE PRINCIPAL

- (8) "Principal" means the person who procures the insurance policy under a consolidated insurance program.

CONSTRUCTION PROJECT

- (2) "Construction project" means construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in *the construction contract* documents. A construction project under this chapter does not include a single family house, townhouse, duplex, or *land development directly related thereto*.

CONSTRUCTION PROJECT

- WHAT ABOUT CONDOMINIUMS?
- WHAT ABOUT APARTMENTS?

CONTRACTOR

- (3) "Contractor" means any person who has entered into a *construction contract* or a professional services contract and is enrolled in the consolidated insurance program.

CONSTRUCTION CONTRACT

- (5) "Construction contract" means a contract, subcontract, or agreement, or a performance bond assuring the performance of any of the foregoing, entered into or made by 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, or for the furnishing of material or equipment for, 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.

CONSTRUCTION CONTRACT

- The term includes an agreement to which an *architect, engineer, or contractor and an owner's lender* are parties regarding an assignment of the construction contract or other modifications thereto.

WHAT IS COVERED

- WHAT IS COVERED?
- CONTRACT, SUBCONTRACT,
AGREEMENT, PERFORMANCE BOND

WHO IS COVERED

- WHO IS COVERED?
- OWNER, ARCHITECT, ENGINEER, CONTRACTOR, CONSTRUCTION MANAGER, SUBCONTRACTOR, SUPPLIER, MATERIAL OR EQUIPEMENT LESSOR

WHAT ACTIVITY COVERED

- WHAT ACTIVITY IS COVERED?
- CONTRACT FOR DESIGN, CONSTRUCTION, ALTERATION, RENOVATION, REMODELING, *REPAIR*, *OR MAINTENANCE* OF . . . INCLUDING MOVING, DEMOLITION, AND EXCAVATION CONNECTED WITH REAL PROPERTY

WHAT KIND OF PROJECT

- WHAT KIND OF PROJECTS?
- CONSTRUCTION CONTRACTS FOR PUBLIC OR PRIVATE PROPERTY

RULEMAKING

- Sec. 151.002. RULES. The commissioner shall adopt rules as necessary to implement and enforce Subchapter B.
- THERE ARE MANY GAPS AND ISSUES CREATED BY THIS LEGISLATION. THE TDI WILL BE BUSY ADOPTING REGULATIONS TO FILL IN THE HOLES

SUBCHAPTER B

- Sec. 151.051. DURATION OF GENERAL LIABILITY COVERAGE. *A consolidated insurance program that provides general liability insurance coverage must provide completed operations insurance coverage for a policy period of not less than three years.*

PRODUCTS-COMPLETED OPERATIONS

- The term “products completed operations hazard” is defined to mean:
- “Products-completed operations hazard”:
- a. Includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned. However, “your work” will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
- Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

POLICY PERIOD

- WHAT DOES THIS MEAN?
- POLICY PERIOD IS A TERM OF ART
- THE ORIGINAL POLICY MUST HAVE A 3 YEAR POLICY PERIOD?
- WHAT IF PROJECT LASTS 4 YEARS?

POLICY PERIOD

- THE POLICY MUST EXTEND 3 YEARS AFTER SUBSTANTIAL COMPLETION?
- SUBSTANTIAL COMPLETION OF WHOSE WORK?
- IMPACT OF DON'S BUILDING-STILL HAVE COVERAGE AS LONG AS PROPERTY DAMAGE ACTUALLY OCCURRED
- WHAT ABOUT USE OF CLAIMS MADE POLICIES?

SUBCHAPTER C

- Sec. 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*.

SUBCHAPTER C

- (5) "Construction contract" means a contract, subcontract, or agreement, or a performance bond assuring the performance of any of the foregoing, entered into or made by 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, or for the furnishing of material or equipment for, 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. The term includes an agreement to which an architect, engineer, or contractor and an owner's lender are parties regarding an assignment of the construction contract or other modifications thereto.

SUBCHAPTER C

- (2) "Construction project" means construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents.
A construction project under this chapter does not include a single family house, townhouse, duplex, or land development directly related thereto.

SUBCHAPTER C

- (6) "Indemnitor" means a party to a construction contract that is required to provide *indemnification or additional insured status* to another party to the construction contract or to a third party.

SUBCHAPTER C

- THIS SUBCHAPTER (C) APPLIES TO CONTRACTS SUBJECT TO (1) *THIS CHAPTER*
- THIS CHAPTER-151
- CLEARLY APPLIES TO CIP'S

SUBCHAPTER C

- THIS SUBCHAPTER (C) APPLIES TO CONTRACT SUBJECT TO: 2) TITLE 10
- TITLE 10. PROPERTY AND CASUALTY INSURANCE
- TITLE 10 GOVERNS ALL PROPERTY & CASUALTY INSURANCE SOLD THROUGH THE ADMITTED MARKET
- SECTIONS 1801-2301 TEX.INS.CODE

SUBCHAPTER C

- ***NEED CHART ON TITLE 10

SECTION 2251.003

- (b) This subchapter and Subchapters B, C, D, and E apply to all lines of the following kinds of insurance written under an insurance policy or contract issued by an insurer *authorized to engage in the business of insurance in this state*:
 - (1) general liability insurance;

SECTION 2301.003

- APPLICABILITY OF SUBCHAPTER. (a)

This subchapter applies to:

- (b) This subchapter applies to all lines of the following kinds of insurance written under an insurance policy or contract issued by an insurer *authorized to engage in the business of insurance in this state*:
 - (1) general liability insurance;

SUBCHAPTER C

- which an *indemnitor* is provided or procures insurance subject to:
- TITLE 10
- THIS MEANS THAT IF THE INDEMNITOR PROCURES INSURANCE SUBJECT TO TITLE 10 THE ANTI-INDEMNITY PROVISIONS APPLIES
- THIS IS THE CASE EVEN IF IT IS NOT A CONSOLIDATED INSURANCE PROGRAM

SUBCHAPTER C

- IF THE INDEMNITOR OBTAINS INSURANCE FROM A NON-ADMITTED INSURER, DO THE PROVISIONS NOT APPLY?
- WHAT HAPPENS IF THE INDEMNITOR HAS NO INSURANCE? IS THE INDEMNITY OBLIGATION STILL VALID?
- THE DRAFTERS SAY YES

SUBCHAPTER C

- WHAT HAPPENS IF THE INDEMNITOR HAS SELF INSURANCE? IS THE INDEMNITY STILL VALID?
- THE DRAFTERS SAY SELF INSURANCE IS NOT PART OF TITLE 10 AND THE INDEMNITY AGREEMENT WOULD BE VALID
- WHAT ABOUT A LARGE SIR? IT WOULD STILL BE INSURANCE UNDER TITLE 10

SUBCHAPTER C

- (6) "Indemnitor" means a party to a construction contract that is required to provide indemnification or additional insured status to another party to the construction contract or to a third party.

SUBCHAPTER C

- (b) Subsection (a) applies regardless of whether the insurance is provided or procured before or after execution of the contract.

SUBCHAPTER C

- Sec. 151.102. AGREEMENT VOID AND UNENFORCEABLE. Except as provided by Section *151.103*, 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

SUBCHAPTER C

- 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.*

SUBCHAPTER C

- WHAT IS AGREEMENT COLLATERAL TO OR AFFECTING A CONSTRUCTION CONTRACT?
- LOAN DOCUMENTS?
- ATTORNEY FEE AGREEMENT?
- TITLE POLICIES?
- PURCHASE OF MATERIALS?

SUBCHAPTER C

- AGAINST PUBLIC POLICY

SUBCHAPTER C

- an indemnitor to indemnify, hold harmless, or defend a party, including a third party,
- WHO IS A PARTY?
- A PARTY TO THE CONTRACT? SEE DEFINITION OF INDEMNITOR
- WHO IS A THIRD PARTY?
- SOMEONE NOT A PARTY TO THE CONTRACT?

SUBCHAPTER C

- NEGLIGENCE
- FAULT
- BREACH OR VIOLATION OF A STATUTE, ORDINANCE, GOVERNMENTAL REGULATION, STANDARD OR RULE
- OR THE BREACH OF CONTRACT OF THE INDEMNITEE

SUBCHAPTER C

- ITS AGENT OR EMPLOYEE
- OR ANY THIRD PARTY UNDER THE CONTROL OR SUPERVISION OF THE INDEMNITEE

SUBCHAPTER C

OTHER THAN THE INDEMNITOR OR ITS
AGENT, EMPLOYEE, OR
SUBCONTRACTOR OF ANY TIER

PASSWORD:

SEPTEMBER

SECTION 151.103

- Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

SECTION 151.104

- (a) Except as provided by Subsection (b), 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.*

SECTION 151.104

- ADDITIONAL INSURED COVERAGE
- THE SCOPE OF WHICH IS PROHIBITED UNDER THIS SUBCHAPTER FOR AN AGREEMENT TO INDEMNIFY, HOLD HARMLESS, OR DEFEND
- WHAT DOES THIS MEAN?
- YOU CANNOT REQUIRE AI COVERAGE TO PROVIDE INSURANCE FOR AN INDEMNITY AGREEMENT?

SECTION 151.104

- AI COVERAGE DOES NOT PROVIDE THIS ANYWAY
- IT IS CONTRACTUAL LIABILITY COVERAGE
- CAN AI COVERAGE BE PROVIDED AS LONG AS IT IS NOT FOR THE AI'S OWN NEGLIGENCE? I.E. FOR VICARIOUS LIABILITY WHERE RIGHT OF CONTROL IS RETAINED OR NON-DELEGABLE DUTY SITUATIONS?

SECTION 151.104

- (b) This section does not apply to a provision in an insurance policy, or an endorsement to an insurance policy, issued under a consolidated insurance program to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy.

SECTION 151.104

- SECTION (A) ONLY DEALS WITH CONSTRUCTION CONTRACTS
- SECTION (B) ADDRESSES INSURANCE POLICIES
- THE ITEMS LISTED IN (B) COULD NEVER RUN AFOUL OF SECTION (A)

SECTION 151.105

- This subchapter does not affect:
- (1) *an insurance policy*, including a policy issued under an owner-controlled or owner-sponsored consolidated insurance program or a contractor-controlled or contractor-sponsored consolidated insurance program, *except as provided by Section 151.104*;

SECTION 151.105

- SECTION 151.104 ADDRESSES
CONSTRUCTION CONTRACTS, NOT
INSURANCE POLICIES

SECTION 151.105

- This subchapter does not affect:
- (2) a cause of action for *breach of contract* or *warranty* that exists independently of an indemnity obligation, *including an indemnity obligation in a construction contract under a construction project for which insurance is provided under a consolidated insurance program;*

SECTION 151.105

- including an indemnity obligation in a construction contract under a construction project for which insurance is provided under a consolidated insurance program;
- THAT IS ALL THAT THIS CHAPTER DEALS WITH
- WHY USE THE TERM “INCLUDING”
- NOTHING ELSE IS ADDRESSED

- (3) indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and owner's lender are parties as provided under Section 151.001(5);
- IF NOT IN A CONSTRUCTION CONTRACT, THEY WOULD NOT APPLY ANYWAY

- (4) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;
- SURETY COMPANIES WILL REQUIRE THE CONTRACTOR OR SUBCONTRACTOR AGREE TO INDEMNIFY THE SURETY IN THE EVENT OF ANY LOSS. NO BONDS WOULD BE ISSUED WITHOUT THESE INDEMNITIES

- 5) the benefits and protections under the workers' compensation laws of this state;
- NO GENERAL WAIVER OF THE BAR ON LAWSUITS
- ONE EXCEPTION IS THAT A SUBSCRIBER STILL HAS LIABILITY FOR INJURY TO AN EMPLOYEE IF THERE IS A VALID INDEMNITY

LABOR CODE

- Sec. 417.004. EMPLOYER LIABILITY TO THIRD PARTY. In an action for damages brought by an injured employee, a legal beneficiary, or an insurance carrier against a third party liable to pay damages for the injury or death under this chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement unless *the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability.*

- (6) the benefits or protections under the governmental immunity laws of this state;
- GENERALLY, THE TORT CLAIMS ACT PROVIDES IMMUNITY TO GOVERNMENTAL ACTORS SEE SEC. 101 TEX.CIV.PRAC.&REM.CODE

CH 127

CIV. PRAC. & REM. CODE

- (7) agreements subject to Chapter 127, Civil Practice and Remedies Code;
- Sec. 127.001. DEFINITIONS. In this chapter:
- (1) "Agreement pertaining to a well for oil, gas, or water or to a mine for a mineral":
 - (A) means:
 - (i) a written or oral agreement or understanding concerning the rendering of well or mine services; or
 - (ii) an agreement to perform a part of those services or an act collateral to those services, including furnishing or renting equipment, incidental transportation, or other goods and services furnished in connection with the services; but
 - (B) does not include a joint operating agreement.

- (8) a license agreement between a railroad company and a person that permits the person to enter the railroad company's property as an accommodation to the person for work under a construction contract that does not primarily benefit the railroad company;

- (9) an indemnity provision pertaining to a claim based upon copyright infringement;
- ARCHITECTURAL PLANS ARE SUBJECT TO COPYRIGHT AND MANY CONTRACTS MAY HAVE INDEMNITY PROVISIONS RELATING TO COPYRIGHT VIOLATIONS. THE PERSON PROVIDING THE PLANS GENERALLY REPRESENTS THERE ARE NO VIOLATIONS OF ANY COPYRIGHTS

- (10) an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to:
 - (A) a single family house, townhouse, duplex, or land development directly related thereto; or
 - (B) a public works project of a municipality; or

- THE INTENT IS THAT RESIDENTIAL CONSTRUCTION IS NOT COVERED BY THIS ACT. RESIDENTIAL CONSTRUCTION IS NOT A CONSTRUCTION PROJECT. SINCE THIS EXCLUSION IS LISTED IN 151.105 IT WOULD INDICATE THAT 151.102 IS NOT LIMITED TO CONSTRUCTION PROJECTS AS DEFINED IN 151.101.

- CONSTRUCTION CONTRACTS FOR PUBLIC WORKS PROJECTS OF A MUNICIPALITIES ARE ALSO EXEMPTED

- (11) a joint defense agreement entered into after a claim is made.
- (4) "Claim" includes a loss or liability for a claim, damage, expense, or governmentally imposed fine, penalty, administrative action, or other action.

- TRE 503
- **(b) Rules of Privilege.**
- (1) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

- ONCE A CLAIM HAS BEEN MADE, PARTIES ARE ALLOWED TO ENTER INTO JOINT DEFENSE AGREEMENTS WITH INDEMNITY PROVISIONS FOR THEIR VIOLATIONS

SUBCHAPTER D

- SUBCHAPTER D. NONWAIVER
- Sec. 151.151. NONWAIVER. A provision of this chapter may not be waived by contract or otherwise.

2252.902 GOVERNMENT CODE

- SECTION 2. Section 2252.902, Government Code, is repealed.
- Sec. 2252.902. INDEMNITY PROVISIONS IN CONSTRUCTION CONTRACTS. (a) In this section, "construction contract" means a contract or agreement made and entered into by a state governmental entity, contractor, construction manager, subcontractor, supplier, or equipment lessor, concerning the construction, alteration, or repair, of a state public building or carrying out or completing any state public work.

- (b) Except as provided by Subsection (c), a covenant, promise, or agreement contained in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it indemnifies a person against all or any portion of loss or liability for damage that:
 - (1) is caused by or results from the sole, joint, or concurrent negligence of the indemnitee, its agent, employee, or another independent contractor directly responsible to the indemnitee; and
 - (2) arises from:
 - (A) personal injury or death;
 - (B) property damage;

- C) a fine, penalty, administrative action, or other action assessed by a governmental entity directly against the indemnitee, its agent or employee, or an independent contractor directly responsible to the indemnitee; or
- (D) any other loss, damage, or expense that arises from an occurrence described by Paragraph (A), (B), or (C).

- THE REPEALER OF 2252.902 IS INDICATIVE OF THE FACT THAT 151.102 HAS WIDER APPLICATION THAN PROJECTS WITH CONSOLIDATED INSURANCE PROGRAMS. IT APPLIES TO ALL CONSTRUCTION CONTRACTS, UNLESS EXCEPTED BY 151.105

EFFECTIVE DATE

- SECTION 3. (a) Chapter 151, Insurance Code, as added by this Act, applies only to a new or renewed consolidated insurance program for a construction project that begins on or after January 1, 2012. A consolidated insurance program for a construction project that begins before January 1, 2012, is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

EFFECTIVE DATE

- (b) The changes in law made by this Act apply only to an original construction contract with an owner of an improvement or contemplated improvement that is entered into on or after the effective date of this Act. If an original construction contract with an owner of an improvement or contemplated improvement is entered into on or after the effective date of this Act, the changes in law made by this Act apply to a related subcontract, purchase order contract, personal property lease agreement, and insurance policy.

EFFECTIVE DATE

- If an original construction contract with an owner of an improvement or contemplated improvement is entered into before the effective date of this Act, that original construction contract and a related subcontract, purchase order contract, personal property lease agreement, and insurance policy are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

EFFECTIVE DATE

- SECTION 4. This Act takes effect January 1, 2012.

PASSWORD:

SEPTEMBER

THE END