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The Shifting Landscape in Construction Contracts: The Texas Anti-Indemnity Act

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Indemnity clauses have been a tried and true method in Texas for shifting risk in construction contracts, typically downstream to contractors and subcontractors. Until recently, Texas was one of the few remaining states in which there was not legislation that, at least to some extent, prohibited indemnity clauses in which the party being indemnified, or "indemnitee," could be indemnified for its own negligence by the indemnifying party, or "indemnitor." The law in Texas previously allowed for "broad form" (indemnitor assumes an unqualified obligation to indemnify regardless of which party is at fault) and "intermediate form" (indemnitor assumes all obligations to indemnify as long as any amount of fault rests with the indemnitor) indemnity as long as the indemnity clause was conspicuous and expressly stated the intent to indemnify the indemnitee for its own negligence. However, the vast majority of other states had anti-indemnity statutes that made clauses allowing indemnity for one's own negligence unenforceable.

In 2011, the Texas Legislature joined the ranks of the majority of states and adopted an anti-indemnity act. This legislation has been codified as Chapter 151 of the Texas Insurance Code and is commonly referred to as the "Texas Anti-Indemnity Act."

The Texas Anti-Indemnity Act became effective on January 1, 2012, and does not apply retroactively. Whether the Act applies to contracts for a particular construction project is determined by when the "original contract" was entered into by the parties. In other words, if there is a Master Services Agreement for a project entered into on December 31, 2011, but related subcontracts, purchase orders and insurance policies are executed in 2012, the Anti-Indemnity Act would not apply to any of the contracts for this particular project since the "original contract" became effective in 2011.

If you are a part of a construction project in which the original contract was executed on or after January 1, 2012, it is still essential to analyze whether the Texas Anti-Indemnity Act applies to your contract. Section 151.105 of the Act lists several statutory exclusions that potentially make the Anti-Indemnity Act inapplicable. While the space constraints of this article do not allow for a discussion of all of these exclusions, I do want to highlight two. First, the Act does not apply to a construction contract pertaining to "a single family house, townhouse, duplex, or land development directly related thereto." While this language contains some ambiguity, the apparent intent of the Legislature to carve out homebuilders from the scope of the Act is evident. Second, the Anti-Indemnity Act is not applicable to municipal public works projects. Therefore, the city or municipality involved in the construction of public projects, including convention centers, performance halls, or waste treatment facilities, can still require broad-form indemnity clauses in its contracts as under the regime in effect prior to the Anti-Indemnity Act.

There is also a broader exception for employee injury claims that applies even if your contract does not fall within any of the other statutory exclusions. Section 151.103 states that the Anti-Indemnity Act "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." In essence, this exception allows broad or intermediate form indemnity for claims of bodily injury to the indemnitor's employees or subcontractors. This provision is a by-product of the workers' compensation framework in Texas and will largely leave unchanged indemnification in bodily injury and wrongful death claims. This provision acknowledges the reality that subcontractors will, after recovering workers' compensation benefits, pursue owners and general contractors for additional amounts allegedly caused by the negligence of these upper-tier parties. This is true even though the subcontractor will often not have a contract with the upper-tier party. This exception recognizes the necessity of upper-tier parties continuing to protect themselves against such claims, especially in light of the unpredictability of such claims and the potentially large dollar amounts at issue.

With the Anti-Indemnity Act only recently in place, it is yet to be determined how the courts will interpret the Act and the inevitable attempts to draft around it. However, the legislature did curtail one traditional method of working around anti-indemnity statutes—additional insured coverage. Section 151.104(a) of the Act voids any additional insured coverage "to the extent" it provides coverage for the indemnitee's own negligence. Previously, many upper-tier contractors obtained additional insured status on lower- tier contractors'

comprehensive general liability policies, thus gaining the ability to have that carrier provide broad coverage for the additional insured, including for its own negligence. However, it should be noted that the Act's exception regarding employees' bodily injury claims also applies to additional insured coverage, still permitting broad coverage for the indemnitee's own negligence involving employee injuries.

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Even with the additional insured issue addressed by the Anti-Indemnity Act, there are numerous unanswered questions regarding how efforts to draft around the Act and its intended effects will be received. For example, what if parties agree to a limitation of liability provision or a consequential damage waiver that has the effect of limiting liability for a party's own negligence? Would it be enforceable if parties adopted the governing law of another jurisdiction that allows for broad form indemnity? As the Act's residential construction exclusion is silent as to condominiums, apartments, or mixed-use developments, would the Act apply to construction contracts for these projects?

When drafting construction contracts in the new world of the Texas Anti-Indemnity Act, it is highly encouraged to contact counsel as the interpretation of the law will change in the coming months and years as courts interpret the Act and the Texas Department of Insurance promulgates additional regulations to fill in the gaps in the existing legislation.