# THE TEXAS ANTI-INDEMNITY ACT: RESTRICTIONS ON INDEMNITY IN TEXAS

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## A. Introduction

Subchapter C of Chapter 151 of the Texas Insurance Code, the Texas Anti-Indemnity Act (the "Act"), went into effect on January 1, 2012. The Act affects not only the validity of contractual indemnity provisions, but also the availability of additional insured coverage, voiding both indemnification clauses and additional insured provisions in construction contracts that purport to indemnify the indemnitee/additional insured for its own negligence or fault.

Eight years later, owners, contractors, subcontractors, and their insurers have had some time to analyze and adapt to the statutory provisions and to modify their contract documents to comply with the statute. Gone are the days where an unenforceable indemnity clause was backed up by otherwise enforceable additional insured coverage. Essentially the same rules should apply to both. However, very few cases have addressed the effect and application of the Act. In fact, to date, a total of eight opinions have cited the Act.[1] To the extent helpful, applicable case law is discussed below.

This white paper will discuss not only the statute, but also significant topics related to indemnity and additional insured coverage which, though they may not directly address Chapter 151, are important for an overall understanding of indemnity and additional insured coverage in Texas.

## B. Basic Indemnity Terminology

Modern construction is a dangerous business even though the means and methods of construction may have changed and improved over time. Many and varied risks are encountered and dealt with, whether through elimination or reduction through such means as safety planning, training, and best practices. Others are transferred between the parties delivering the project or to third parties. The transfer of the majority of construction risks is usually supported by insurance,

[1] *See Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 392 F.Supp.3d 731 (S.D. Tex. 2019); *Beazley Ins. Co. v. Eaton Corp.*, 2017 WL 9362564 (W.D. Tex. Nov. 17, 2017); *U.S. ex rel. E J Smith Constr., Co. v. Travelers Cas. & Surety Co.*, 2016 WL 1030154 (W.D. Tex. Mar. 10, 2016); *Higby Crane Serv., LLC v. Nat'l Helium, LLC*, 2015 WL 5692078 (D. Kan. Sept. 28, 2015); *U.S. ex rel. EJ Smith Constr. Co. v. Travelers Cas. & Surety Co.*, 2015 WL 12734070 (W.D. Tex. June 25, 2015); *U.S. ex rel. Liberty Steel Erectors, Inc. v. Balfour Beatty Constr.*, No. 6:13-cv-00385, 2015 U.S. Dist. LEXIS 182679 (W.D. Tex. May 15, 2015); *Union Pac. R.R. Co. v. Brown*, 2018 WL 6624507 (Tex. App.—San Antonio Dec. 19, 2018, no pet.); *Maxim Crane Works, L.P. v. Berkel & Co. Contractors, Inc.*, 2016 WL 4198138 (Tex. App.—Houston [14th Dist.] Aug. 9, 2016, pet. denied).

thus ultimately transferring potentially huge risks to a third party, usually an insurer considered to be more financially capable of bearing and spreading them.

***Construction indemnity and transfer of risk.*** Complexity often results where several parties are alleged to have caused or contributed to a loss, and even more so, where those parties all have some contractual relationship. Under these circumstances, in order to sort out such a situation, consideration must be given not only to the insurance coverage for each of those parties, but also to the contracts by which risks are transferred or allocated among the parties. The contracts between the parties on a construction project shift potential risks from one party to another, usually from the upstream party, such as from the owner to the contractor and from the contractor to the subcontractor. This is accomplished through the use of an indemnity or hold harmless clause which amounts to one party's agreement to assume the liability of another in the event of a claim or a loss. Note that the indemnity clause does not relieve the party receiving the indemnity from liability to an injured third party. In other words, the indemnitee will be held liable to the third party and must pay damages to the injured party whether or not the indemnitor fulfills its obligation to indemnify. If, for example, the indemnitor does not have the financial resources to respond to its obligation to indemnify, the indemnitee will still be required to pay damages to the injured party.

***Terminology.*** Indemnity clauses are usually classified into three categories:

- "Broad form" or "sole negligence" clauses, where the indemnitor assumes an unqualified obligation to hold the indemnitee harmless from all liability regardless of which party was actually at fault, even as to the sole negligence of the indemnitee.

- "Intermediate form" indemnity clauses, where the indemnitor assumes all liabilities of the indemnitee relating to the subject matter of the agreement, except for the injury or damages caused by the indemnitee's sole negligence. Any amount of fault on the part of the indemnitor obligates the indemnitor to indemnify the indemnitee for the entire amount of damages. For example, where the indemnitee is ninety percent at fault, and the indemnitor only ten percent at fault, the indemnitor nevertheless owes one hundred percent of the indemnity.

- "Limited form" indemnity clauses, also referred to as "comparative fault" clauses, obligate the indemnitor only to the extent of its own fault in contributing to the loss.

***Enforceability of indemnity clauses by Texas courts.*** Indemnification agreements, due to their use as risk transfer and liability apportionment devices for potentially large risks associated with construction, have been a frequent source of litigation, particularly where the agreement shifts liability for an indemnitee's own negligence to the indemnitor. Therefore, such agreements have not been favored by the courts, but a more modern view is that an indemnitee can transfer its own liability to the indemnitor so long as the indemnity agreement clearly expresses that intention. In Texas, in order to accomplish the transfer of the indemnitee's own negligence, the indemnity clause must satisfy the "fair notice" requirements, that is, it must expressly state that the indemnitee's own negligence is transferred, and it must be inserted into the contract so as to provide fair notice to the indemnitor. As such, the use of broad

indemnification obligations in which even the indemnitee's sole negligence has been transferred has been enforced, as long as the fair notice requirements have been met.

***Additional insured coverage.*** Due to the uncertainty surrounding the enforceability of indemnification clauses, many indemnitees in the construction industry became uncomfortable with relying solely upon them to transfer risk. This has led to the requirement by many upper tiers that they be named as additional insureds on the lower tiers' comprehensive general liability policies. As an additional insured, the upper tier has direct rights against the lower tier's commercial general liability insurer so that it can theoretically bring a greater amount of pressure upon the carrier in order to obtain a defense and coverage.

***Statutory regulation of indemnity clauses.*** Nevertheless, concerns over the fairness of such a transfer, particularly to lower tiers such as subcontractors, have been voiced with increasing frequency, leading the legislatures of over forty states to enact statutes that regulate indemnification clauses used in the construction industry. Many of the more recent statutes also regulate the ability of an upper tier to obtain additional insured status on a lower tier's liability policy for claims arising out of the upper tier's own fault or negligence. At times, broad additional insured coverage for the indemnitee's independent fault has been relied upon by upper tiers to backstop an unenforceable indemnity clause, whether because of a failure to comply with the fair notice requirements, or, in other states, because of the effect of an anti-indemnity statute to prevent the transfer of an indemnitee's own negligence via an indemnity clause.

***Texas regulation of construction indemnity.*** In May 2011, Texas joined the states that regulate the scope of permissible indemnity by statute. With an effective date of January 1, 2012, that statute also affected the availability of additional insured coverage, voiding both indemnification clauses and additional insured provisions that purport to indemnify the indemnitee/additional insured for its own negligence or fault. However, in light of the prevalence of third party over actions in Texas, there is an exception for bodily injury to the indemnitor's employees. Under those circumstances, indemnification for the indemnitee's own negligence is allowed.

## C. The CIP Provisions of Texas Insurance Code Chapter 151

The anti-indemnity legislation before the Texas Legislature in 2011 was sponsored by Senator Duncan as Senate Bill 361, but was stalled in committee. It was then added as an amendment to House Bill 2093, the Consolidated Insurance Programs bill. With the amendment, both were approved and House Bill 2093 was signed by Governor Perry on June 17, 2011, adding Chapter 151, "Consolidated Insurance Programs" to the Texas Insurance Code. The regulation of Consolidated Insurance Programs ("CIPS") emerged as a relatively minor portion of the new statute, with the indemnity tail wagging the tail of the CIP dog.

The CIP portion of Chapter 151 applies to a "consolidated insurance program," which is defined as 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. As such, the definition encompasses owner controlled insurance programs ("OCIPS") where the owner is the

 

sponsor, contractor controlled insurance programs ("CCIPS") where the contractor sponsors the program, as well as rolling CIPS since the applicability of the chapter to multiple construction projects is specifically addressed.

However, the term "construction project," which includes construction, remodeling, maintenance, or repair of improvements to real property, specifically states that a construction project does not include a single family house, townhome, duplex, or land development directly related thereto. Therefore, it does not apply to residential CIPS.

Sections 151.003-009 set out bare bones requirements as to a CIP, including furnishing information and the CIP policy to participants. Section 151.051 sets out the requirement that a CIP that provides general liability insurance coverage must provide completed operations coverage for a period of not less than three years. Thus, despite the designation of the statute as "Consolidated Insurance Programs," little regulation of a CIP is provided for, and the regulation that there is, a duration of three years for completed operations, appears to be somewhat short in light of the ten year statute of repose that applies to construction work in Texas.

## D. The Anti-Indemnity Provisions of Chapter 151

When the anti-indemnity provisions of Chapter 151 are reviewed, it becomes somewhat clear that those sections were added on to the CIP portion, resulting in some inconsistency. The apparent inconsistencies in the statute persist. Nevertheless, the intent of the Anti-Indemnity Act is clear, that is, to outlaw indemnity for an indemnitee's own negligence.

Section 151.101 states that Subchapter C, the Anti-Indemnity Act, applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to Chapter 151 (a CIP) or Title 10 of the Texas Insurance Code. Title 10 sets out the regulations for property and casualty insurance in Texas, and includes the standard commercial general liability and workers compensation coverages. Therefore, the section applies to any construction contract where a party is required to provide liability insurance coverage. That liability coverage, usually provided through a commercial general liability ("CGL") insurance policy, includes contractual liability coverage, which is specifically included in the policy to cover the named insured's indemnity obligations assumed pursuant to contract. Therefore, the anti-indemnity provisions are of extremely broad, if not universal, application to construction contracts.

In that regard, the term "construction contract" is defined very broadly in §151.001(5) to include:

> "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.

As can be seen, the scope of the statute includes contracts for public or private construction, demolition and excavation contracts, design contracts, assignment agreements with an owner's lender, and performance bonds. Note that because of the inclusion of public contracts in the statute, §2252.902 of the Texas Government Code, the anti-indemnity statute that applied to Texas state public works, is now repealed. That statute provided for similar anti-indemnity provisions to those now included in Chapter 151 and that are applicable to all construction contracts.

The term "construction project" is also broadly defined in §151.001(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 contract does not include a single family house, townhome, duplex, or land development directly related thereto.

These broad definitions have yet to be interpreted, but together they point to a broad scope as to the particular types of contracts and projects to which the Act will apply. Collateral agreements as well as work not necessarily confined to the immediate project location itself are apparently included, and the reference to "areas incidental and necessary to the work" appears to be language that would be equally applicable to the CIP portion of the statute.

## E. Scope of Indemnity and Additional Insured Coverage Prohibited/Allowed

Section 151.102 sets out the primary provision in the Anti-Indemnity Act stating what types of indemnity or hold harmless agreements are void. This section, together with §151.104, which applies to additional insured provisions, are the statutory provisions most relevant to a construction defect claim arising out of a construction project.

In that connection, §151.102 of the Act provides:

> Except as provided by §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 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.

As can be seen, by declaring an agreement void and unenforceable to the extent that it requires the indemnitor to indemnify the indemnitee for its own negligence, the Act prohibits broad form and intermediate form indemnity. The only indemnity remaining is for the negligence of the indemnitor that contributed to the loss or claim; in other words, limited or comparative form indemnity. It does not appear to prohibit indemnification for the indemnitor's fault in instances where the indemnitee's negligence may have contributed to the loss. Nevertheless, under those circumstances, the indemnitee is entitled to indemnity only for the portion of the damages attributable to the indemnitor's fault.

Section 151.104 incorporates the prohibition on broad and intermediate indemnity clauses from §151.102 into contractual additional insured requirements and additional insured coverage, providing:

> [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.

Thus, under §151.104, additional insured provisions, like indemnity provisions, are enforceable only to the extent they provide coverage to the indemnitee/additional insured for the named insured's own fault or negligence. However, the exception for injury to employees of the indemnitor/named insured set out §151.103 and discussed below applies to both §151.102 and §151.104, allowing broad coverage for the indemnitee/additional insured's own negligence for those claims.

In addition, the **"*to the extent*"** language in both §151.102 and §151.104 indicates that it is possible to obtain indemnification and additional insured coverage at least to the extent of the indemnitor's own negligence under the Act. As is the case with an indemnity provision, giving this phrase effect, the Act only limits the scope of an indemnity or additional insured provision to bring it in compliance with the Act; it does not wipe the provision out completely.

Moreover, the U.S. District Court for the Western District of Texas has indicated that even if an indemnity provision requires broader indemnity than what is permitted by the Act, a savings clause in the construction contract or subcontract may advance the argument as to enforceability to the extent permitted under the Act, allowing the court to disregard the offending clause allowing for indemnity for sole negligence, leaving intact the rest of the indemnity provision. *U.S. ex rel. EJ Smith Constr. Co. v. Travelers Cas. & Surety Co.*, No. W–14–CV–427, 2015 WL 12734070, at *3 (W.D. Tex. June 25, 2015). This case was ultimately reassigned to another judge in the Western District after the surety filed a motion to recuse, which was granted. *U.S. ex rel. E J Smith Constr. v. Travelers Cas. & Surety Co.*, No. 5:15-CV-971 RP, 2016 WL 1030154, at *2 (W.D. Tex. Mar. 10, 2016). After the reassignment, the court invited the parties to move for reconsideration of any prior orders. The surety moved for reconsideration of the June 25, 2015 order denying its motion to dismiss the general contractor's indemnity claim. *Id.* at *3. On reconsideration, the court determined that the Act did not apply because the Original

Contract between the general contractor and the subcontractor was subordinate to the prime contract between the general contractor and the U.S. Army Corps of Engineers, which pre-dated the Act's effective date. *Id.* at *4-6. Consequently, the court did not reach the surety's argument that the Act invalidated the indemnity provision in the Original Contract despite the presence of the savings clause. *Id.* at *3 n.3.

Thus, in addition to the "to the extent language" in the Act, a savings clause in the construction contract may permit an upper tier contractor to seek a defense from an additional insured carrier to the extent of the named insured subcontractor's negligence. It also supports the reading of the Act that the "***to the extent***" limitation only affects the offending scope of indemnity and preserves indemnification for the indemnitor's own negligence or fault. In addition to relying on a general savings clause in the contract, see the model indemnity and additional insured specification provisions below; they include savings clauses within them.

Nevertheless, where the underlying pleading alleges only negligence on the part of the indemnitee, the indemnity clause will not be enforced. In *Union Pac. R.R. Co. v. Brown*, Union Pacific, the indemnitee, made an argument based on the "to the extent" language, contending that the Act voided "the indemnity provision only to the extent it require[d] indemnification for Union Pacific's own negligence." No. 04-17-00788-CV, 2018 WL 6624507, at *5 (Tex. App.—San Antonio Dec. 19, 2018, no pet.). The indemnity provision in the contract between Union Pacific and the indemnitor, Jay Construction, required Jay Construction to defend and indemnify Union Pacific:

> from any and all fines, judgments, awards, claims, decrees, demands, liability, losses, damages, injury, costs and expenses (including attorney fees and costs) of any and every kind whatsoever, including, without limitation, for injury or death to all persons ... arising in any manner from or in the performance of this Agreement or the breach by [Jay Construction] of any provision of this Agreement.

*Id.* at *1. The provision also required Jay Construction to indemnify Union Pacific "for claims 'caused or alleged to be caused by the partial or sole negligence of [Union Pacific] and/or its employees.'" *Id.* Union Pacific sought a defense and indemnity from Jay Construction following an accident involving a manlift provided by a subcontractor to Jay Construction that resulted in the death and serious injury of two Union Pacific employees. *Id.* Union Pacific urged the court to remand the case to the trial court "for a determination of 'the extent of Jay Construction's indemnity obligations to Union Pacific, if any, for the negligence or fault of Jay Construction, [or any other party].'" *Id.* at *5. The court declined to do so, noting that Union Pacific did not identify any pleading in which a party asserted that Union Pacific was liable for the negligence or fault of any other party and pointing out that Union Pacific was sued for its own negligence. Because the Act voided Jay Construction's obligation to indemnify Union Pacific for that negligence, there were no other remaining indemnity issues for remand. *Id.*

Although the court in *Union Pacific* found that the Act negated the indemnitor's indemnity obligations, the implication of the court's analysis is that if there had been allegations that the indemnitee was liable for the indemnitor's negligence, there would have been a need for

a determination as to the extent of the indemnitor's negligence for purposes of the enforceability of the indemnity provision under the Act.

Of course, downstream indemnitors have viewed §151.102 to be the primary operative provision of the Act, and it is obvious that it is. As the *Union Pacific* case demonstrates, the Anti-Indemnity Act provides relief from an obligation to indemnify the indemnitee, or upstream tier, for its own negligence, a long time result sought by subcontractors and their trade organizations. Therefore, clauses purporting to indemnify the indemnitee for its sole negligence, or intermediate form indemnity where the indemnitee is indemnified for its own negligence so long as the indemnitor is to any degree at fault, run afoul of §151.102 and are unenforceable, at least "to the extent" that they require the indemnitor to indemnify the indemnitee for the indemnitee's own fault. Nevertheless, lower tiers often ignore this formulation and argue for all or nothing unenforceability, which is a stance that has also been adopted by some additional insured carriers.

## F. The Act's Effect on the Duty to Defend the Indemnitee/Additional Insured

Often, an indemnity clause obligates the indemnitor to defend the indemnitee in addition to providing indemnification for a loss. Section 151.102 applies not only the obligation to indemnify and hold harmless, but also the duty to defend, rendering void a provision to the extent it requires the indemnitor to defend the indemnitee to the extent of the indemnitee's own negligence. In addition, the Employee Injury Exception in §151.103 applies to the defense obligation. Thus, the same rules apply to defense as well as indemnity. However, the limitations upon indemnity clauses might not mesh as well with the obligation of an insurer to defend an additional insured.

Historically, additional insured coverage was potentially broad and often did not limit the scope of coverage provided to the additional insured/indemnitee, even for its own sole negligence. The only restriction was that the claim had to arise from the named insured's work for the additional insured. Many courts, including the courts of Texas, apply a broad causation standard and uphold coverage for the indemnitee's own independent negligence if it was arguably related to the named insured's work pursuant to the contract. The additional insured coverage is viewed by the indemnitee as a backstop to an indemnity clause that has provided for a more limited scope of indemnity or that may not be enforceable under a particular state's laws. Eventually, many insurers scaled back the scope of additional insured coverage provided to the indemnitee/additional insured, sometimes limiting coverage to liability arising out of the negligence or fault of the indemnitor/named insured, which could place indemnitors in potential breach of broad contractual requirements to provide unqualified additional insured coverage.

Nevertheless, even under a more limited indemnity provision or additional insured endorsement that requires the liability of the indemnitee/additional insured to be caused, in whole or in part, by the acts or omissions of the indemnitor/named insured, Texas courts interpret and apply the duty to defend broadly.

Under Texas law, the determination as to whether an additional insured carrier owes a defense is a two part inquiry. The first inquiry is whether the entity seeking coverage qualifies as

 

an additional insured under the named insured's policy. *See, e.g.*, *Lyda Swinerton Builders, Inc. v. Oklahoma Surety Co.*, 903 F.3d 435, 445-46 (5th Cir. 2018). For ease of discussion, these materials will address a typical scenario where the general contractor is seeking additional insured coverage from the named insured/subcontractor's insurer. Absent an endorsement in the subcontractor's policy that specifically names the general contractor as an additional insured, a determination as to additional insured status typically involves an analysis of the terms of the additional insured endorsement in the subcontractor's policy and the insurance requirements in the subcontract. *Id.* If the general contractor qualifies as an additional insured, then the second inquiry involves the familiar analysis of whether the pleadings in the construction defect suit trigger the additional insured carrier's duty to defend under Texas law.

Often in a construction defect lawsuit, a plaintiff will sue the general contractor for negligence, breach of contract, and breach of warranty, alleging that it defectively constructed the project, and that the general contractor hired and failed to supervise the subcontractors who performed defective work, which damaged the project. The plaintiff will also frequently list various components of the project that were allegedly defectively constructed. Texas courts have routinely found that these types of allegations are sufficient to trigger an additional insured carrier's duty to defend the general contractor under the policy of a subcontractor whose scope of work is implicated by the pleadings. *See, e.g.*, *Lyda Swinerton Builders*, 903 F.3d at 447-48.

And under Texas law, "[i]f a complaint potentially includes a covered claim, the insurer must defend the entire suit." *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). The policy "obligates the insurer to *defend* its insured, not to provide a pro rata defense." *Mid-Continent Cas. Co. v. Acad. Dev., Inc.*, 476 Fed. Appx. 316, 321 (5th Cir. 2012). Thus, "[e]ach insurer whose policy obligations are triggered ***independently owes the insured a complete defense***." *Colony Nat'l Ins. Co. v. United Fire & Cas. Co.*, 677 Fed. Appx. 941, 947 (5th Cir. 2017) (emphasis added). This logic applies to the named insured's own carriers as well as its additional insured carriers. Thus, in practice, this means that when a plaintiff's pleading contains allegations of property damage implicating the work of multiple subcontractors, the general contractor is often entitled to a defense as an additional insured from multiple additional insured carriers, each of whom owes the general contractor a complete defense, even if some of the claims are excluded.

The requirement that an insurer provide a complete defense under Texas law becomes more complicated in light of the Act's prohibitions in §151.102 and §151.104 and the realities of construction defect litigation. This is because the prohibitions in §151.102 and §151.104 apply not only to the duty to indemnify, but also to any duty to defend the indemnitee/additional insured beyond the extent of the indemnitor's own fault. This may make some indemnity clauses and additional insured endorsements very difficult to apply in order to apportion the defense obligation between the fault of the indemnitor/named insured and the indemnitee/additional insured.

However, as mentioned, because the Act only prohibits additional insured coverage "to the extent" that it is required for an indemnitee's own negligence or breach of contract, the Act does not prohibit indemnification or additional insured coverage for the indemnitor's own negligence or fault. In a typical construction dispute, a general contractor/ indemnitee tenders the

defense of a claim to a downstream subcontractor/indemnitor's insurer for additional insured coverage. In this scenario, where the general contractor would be liable for the negligence or defective work of its subcontractors by virtue of the prime contract with the owner, the Act permits additional insured coverage for that liability. Combining that with the broad duty to defend in Texas that requires an insurer to defend the entire lawsuit if there is any potential for covered liability, the additional insured carrier arguably owes the general contractor a complete defense, even where the underlying pleadings also implicate the general contractor's own negligence or breach of contract.

Based on this logic, many indemnitees seek to impose upon the additional insured carrier an obligation to defend an entire claim. However, in response to the Anti-Indemnity Act, some insurers have taken a hard line, i.e., an all or nothing approach, declining to defend the general contractor even if the general contractor is expressly alleged to be liable for a specific subcontractor's defective work because the pleading also alleges that the general contractor was negligent and/or that other subcontractors were negligent. This argument is essentially the opposite of the eight corners rule, in that these insurers take the position that the Act negates the entire duty to defend if there are any potential allegations against the general contractor for its own negligence or breach of contract. In other words, the position of some additional insured carriers appears to be that even if the named insured subcontractor's work is clearly implicated by the pleadings, the plaintiff has also alleged that its damages were caused by the general contractor's own negligence or breach of contract. Therefore, by seeking a complete defense, the general contractor is necessarily asking the additional insured carrier to defend the general contractor, at least in part, for the general contractor's own negligence, which is prohibited by the Act. Moreover, these insurers instead argue that because there are allegations against both the subcontractor and the general contractor, each party (and its insurer) should bear its own defense costs.

This position ignores the "to the extent" limitation on the additional insured obligation. That language does not excuse the additional insured carrier from defending the additional insured completely. Rather, the obligation of the additional insurer still applies to the extent of the negligence or fault of the indemnitor/named insured subcontractor.

This position is also at odds with the reality of typical construction defect litigation, where the plaintiff typically asserts negligence and breach of contract claims against the general contractor. It is unlikely that the Texas legislature intended for the Act to wipe out all additional insured defense obligations for construction defect litigation in Texas. Instead, the Act's prohibitions and Texas law on the duty to defend can be harmonized by treating the Act's prohibitions the same way that a policy limitation is treated with respect to the duty to defend: if there is a potentially covered claim, i.e., the potential that the general contractor will be held liable for the subcontractor's negligence, then the additional insured carrier has a duty to defend the entire lawsuit. For example, a petition may allege negligent conduct, but also allege punitive damages based upon intentional conduct of the insured.[2] The insurer is nevertheless obligated to defend all allegations, even if allegations as to intentionally caused punitive damages are excluded or are not caused by an "occurrence."

[2] *See Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466 (5th Cir. 2001) (applying Texas law).

Alternatively, the realities of how additional insured carriers actually fund an additional insured's defense in a construction defect suit continue to provide a path forward when the work of multiple subcontractors is implicated. Each carrier owes the general contractor a complete defense in theory; but in reality, they often split the defense costs equally among themselves, paying their pro rata portion. Usually a pro rata portion should not be assigned to the general contractor's carrier since the contract and the insurance policy should provide that this coverage is excess to the additional insured coverage. Nevertheless, at a minimum, the Act should permit this pro rata sharing among the subcontractors that are alleged to have performed the defective work.

A related issue is the point in time when an apportionment of defense costs is to be made, particularly if an additional insured carrier takes an all or nothing approach to the duty to defend. Since that duty is determined based on the pleadings, but each party's proportional negligence typically is unknown at the outset of a lawsuit, will apportionment require a court determination, whether by judge or jury, as to the comparative fault of the indemnitor and the indemnitee? Such a determination may not be possible until after the fact, leaving the defense obligation unresolved until then.

In light of the issues discussed above, it seems that the Anti-Indemnity Act has muddied the water as to the "complete" defense obligation under Texas law. However, until a court provides some guidance as to how the Act affects an additional insured carrier's duty to defend, each side is left to make its own arguments in the hopes of persuading the other.

## G. Employee Exception to Indemnity/Additional Insured Prohibition

Despite the broad limitation for indemnity clauses and additional insured provisions to the extent of the indemnitor's own negligence or fault discussed above, §151.103 contains an exception for lower tier employee injury claims:

> 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.

TEX. INS. CODE §151.103 (the "Employee Injury Exception").

The Employee Injury Exception allows broad or intermediate form indemnity for bodily injury to the indemnitor's employees, agents, or subcontractors. In other words, it provides indemnity for the indemnitee faced with a "third party over action" in which the lower tier's employee, after recovering workers' compensation benefits, sues third parties, including an upper tier, claiming that their negligence or fault contributed to the employee's injury. Because of the close proximity of the various tiers on a construction project, third party over actions are a particularly acute problem for the construction industry.

Many states have addressed that problem by statutory employer legislation as part of their workers compensation laws in which all tiers – owners, contractors, subcontractors, etc. – on a construction project are regarded as the employer of any injured employee and are entitled to exclusive remedy protection from common law actions. The establishment of a statutory employer framework for Texas construction projects should be a creature of the Workers Compensation Act, but to date, Texas has not enacted such legislation. As a result, third party over actions are allowed under Texas law. Thus, the Employee Injury Exception preserves a critical risk transfer device – contractual indemnity – that upper tier contractors on Texas construction projects use to protect themselves from such actions. Despite this, as discussed more fully below, even under CIPs, protection for other co-participants, particularly lower tier subcontractors, is lacking under the Employee Injury Exception.

Note that the limitations on additional insured coverage set out in §151.104 (discussed above) are also subject to the Employee Injury Exception by virtue of §151.104, which incorporates the prohibitions on indemnity clauses under the Act. Since there is no prohibition against indemnification or defense as to the indemnitee's negligence or fault in a claim by another party to the construction contract or a third party for the bodily injury or death of the indemnitor's employee, agent, or subcontractor of any tier, additional insured coverage is allowed for that risk.

Although potential indemnitors have had little trouble in applying §151.102 of the Act to limit their obligation to indemnification only to the extent of their own negligence or fault, they have, quite understandably, not embraced the Employee Injury Exception, and through many negotiations, a lower tier can be heard to either deny the existence of the exception for their employee injuries, or at least to refuse to agree to undertake that obligation. Thus, while it seems intuitive that the insertion of a specific exception into a statute would lead to an analysis and interpretation of the exception in the case law and application of the exception in practice, that does not appear to be the case thus far with the Employee Injury Exception in §151.103. After the passage of eight years, it appears that only a single case has addressed the exception, M*axim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 392 F.Supp.3d 731 (S.D. Tex. 2019), *appeal filed*, No. 19-20489 (5th Cir. July 10, 2019), and the difficulty of obtaining indemnification under the exception persists.[3]

Unfortunately, the facts of *Maxim Crane* are complex and can only be briefly summarized here. In *Maxim*, Skanska was the general contractor for an office campus construction project in Houston in 2013 and hired Berkel as a subcontractor. 392 F.Supp.3d at 732. Skanska provided a contractor controlled insurance program (CCIP) that included workers compensation coverage in which Berkel enrolled. *Id.* at 732-33. Berkel also had a separate CGL policy with Zurich effective August 2013 to 2014. Berkel leased a crane from Maxim, and pursuant to the lease agreement between Berkel and Maxim, Berkel was required to add Maxim as an additional insured on Berkel's CGL policy. Maxim also had its own separate CGL policy. The coverage suit arose after a Berkel employee overloaded a Maxim crane, causing it to fall

[3] An employee exception to anti-indemnity provisions is not altogether new in Texas. Section 2252.902 of the Texas Government Code, the public works anti-indemnity statute, included a similar employee exception. However, Subsection (c) of §2252.902 (now repealed by passage of Chapter 151) flew under the radar of many practitioners and appeared to be frequently overlooked.

over onto Skanska's project superintendent, whose leg was amputated. The superintendent received workers compensation benefits through Skanska's CCIP and then sued Berkel, Maxim, and other defendants. Maxim sought defense and indemnity as an additional insured from Berkel's CGL insurer, Zurich. *Id.* at 733. Zurich denied coverage, arguing that the Anti-Indemnity Act prohibited Maxim's additional insured coverage under the Zurich policy. *Id.* at 734.

In addressing the Anti-Indemnity Act's applicability to Maxim's claim for additional insured coverage, the court noted that the additional insured provision in the lease "applied regardless of fault." *Id.* at 739-40. Because Maxim was alleged to be "independently liable for its own negligence, not for any negligence of Berkel," the Anti-Indemnity Act would void Maxim's additional insured coverage under Berkel's policy unless an exception to the Anti-Indemnity Act applied. *Id.* at 740.

Then the court turned to the Employee Injury Exception in §151.103. It was undisputed that the superintendent was actually Skanska's employee. *Id.* at 742. Therefore, Maxim's argument that the Employee Injury Exception applied turned on the interpretation and introduction of coemployer/coemployee status from the Texas Workers Compensation Act into the Anti-Indemnity Act. In that respect, the state court in the underlying lawsuit had concluded that Berkel and Skanska were both covered under Skanska's CCIP, so "Skanska [was] Berkel's statutory employer" under the Workers Compensation Act, and since the superintendent was Skanska's actual employee, he was also deemed to be Berkel's "coemployee" under the Workers Compensation Act. Further, because Skanska was immune from liability under the workers compensation exclusive-remedy provision, Berkel was also immune as a "coemployee." *Id.* at 734.

In light of the underlying court's determination, the *Maxim* court noted that Maxim could take advantage of the Employee Injury Exception in §151.103 only if (1) Berkel's status as the superintendent's statutory "coemployee" under the Workers Compensation Act was the same as being the superintendent's statutory "coemployer"; and (2) if so, then the superintendent's claim against Maxim also had to be "a claim for the bodily injury or death of an employee of the indemnitor." *Id.* at 742.

The court determined that the superintendent was not Berkel's employee and Berkel was not the superintendent's employer under the definition of "employer" and "employee" in §401.012 of the Workers Compensation Act because there was no evidence that Berkel directed the superintendent to perform services; that he worked at Berkel's premises; that he was Berkel's trainee; or that Berkel had a contract with, employed, or provided workers compensation coverage to him. *Id.* at 742-43 (citing TEX. LAB. CODE §401.012). The court also discussed deemed statutory employer status under §406.123 of the Workers Compensation Act, determining that the terms "coemployee" and "coemployer" were not interchangeable under the language of the statute or under the relevant case law. Since the superintendent was not Berkel's actual employee and he was not employed by a Berkel subcontractor enrolled in Skanska's CCIP, Berkel was not the superintendent's coemployer under §406.123. *See id.* at 743-45.

Moreover, the court found that even if Maxim's coemployer argument was successful, status as a coemployer/coemployee under the Workers Compensation Act could not be imported

to the Employee Injury Exception in the Anti-Indemnity Act. In other words, deemed coemployer/coemployee status applied in the context of the Workers Compensation Act, but it did not apply to the Employee Injury Exception in the Ant-Indemnity Act. In reaching this conclusion, the court relied on the language of §406.123(e), which stated that the deemed status under that section was "only for purposes of the workers' compensation laws of this state," and on the fact that neither party had pointed to a case applying deemed coemployer/coemployee status outside of the Workers Compensation Act. *Id.* at 745. In addition, the court noted that the definition of the term "employee" varied across different Texas statutes, which suggested that coemployer/coemployee status was not universal across Texas law, but rather, applied only in the context of the Workers Compensation Act. *Id.* at 746. As a result, the court would not import coemployer status from the Workers Compensation Act into the Employee Injury Exception under §151.103 of the Anti-Indemnity Act.

Note that Maxim's "coemployer" argument was intended to trigger an employee or lower tier relationship between Skanska as an upper tier employer and Maxim as a lower tier subcontractor. However, that argument failed in part because there was no chain of contractual relationships that flowed from Skanska to Maxim. Rather, Maxim was an equipment lessor to Berkel and was not a participant in the CCIP so that Maxim was not insured under it. Moreover, the injured superintendent was not the employee of a lower tier subcontractor; instead, he was the employee of a higher tier contractor, the general contractor. Thus, the facts of the case and the contractual relationships between the parties did not present the typical third party over action contemplated by the Employee Injury Exception.

The court went on to find that the Workers Compensation Exception under §151.105(5) of the Anti-Indemnity Act did not apply because under the plain terms of the exception, Maxim had not shown that applying the Anti-Indemnity Act would affect a benefit or protection of the workers compensation laws, and the superintendent had already received his workers compensation benefits. *See id.* at 746-47. Although the *Maxim* case addresses some relatively complex issues under the Workers Compensation Act, the implication of the court's opinion as to the Anti-Indemnity Act is clear: the Employee Injury Exception will be narrowly construed.

Essentially, the divide between indemnitors and indemnitees over indemnification for the indemnitee's own negligence has shifted from general indemnification for the indemnitee's negligence that is prohibited under the statute, to a more narrow, but no less important obligation, that is, indemnification for employee injuries. The Employee Injury Exception has frequently resulted in the use of "bifurcated" indemnity clauses, a more general clause (setting out limited indemnity) to apply to third party bodily injury and property damage, coupled with a separate indemnity clause (setting out broad indemnity) to apply to injuries to employees of the indemnitor. The more cumbersome means that must be taken to preserve indemnification pursuant to the Employee Injury Exception creates additional opportunities for intense negotiation. In that sense, little has changed as far as drafting and negotiating indemnity clauses. There is still considerable opposition to any degree of indemnification for the indemnitee's own negligence even though indemnification for the sole negligence of the indemnitee is fostered by the allowance of third party over actions in workers compensation. Protecting against third party over actions remains one of the major issues for Texas construction practitioners under the Anti-Indemnity Act.

## H. CIP Exclusion from the Anti-Indemnity Provisions

Section 151.105 of the Act provides for a number of exclusions that apply to both indemnity clauses and additional insured provisions, one of which is the peculiar means whereby the anti-indemnity legislation was passed – that is, as an add-on to the CIP Bill.

Section 151.105(1) states that the anti-indemnity provisions do not apply to an insurance policy issued under a CIP, except as provided by §151.104. Section §151.104(a) generally provides that the restrictions on indemnification for the negligence or fault of the indemnitee contained in §151.102 apply to additional insured provisions. However, §151.104(b) further provides that §151.104 does not apply to the addition or deletion of named insureds on policies issued under a CIP. This paragraph appears to address the peculiar circumstances of a CIP in which it names all participants on the project as named insureds, and there is no need for additional insured coverage among the participants. This is a somewhat technical distinction, which should not arise in the course of issuance and administration of a CIP on a construction project. In other words, it adds little to the Act. Thus, while this exception is somewhat ambiguous, it appears to be a throwback to the CIP Bill. It may have also been included as an effort by the legislature to encourage the use of CIPS on construction projects in Texas, which could have the consequence of eliminating numerous issues relating to indemnity and additional insured coverage because of the nature of a CIP. In other words, limitations as to insurance coverage for named insured entries on a CIP would make little sense since all participants are insured under the same policy.

As to the inclusion of additional insureds on a liability policy issued under a CIP, it appears that the restrictions upon insuring another against its own fault or negligence apply. In other words, assume that an owner is added as an additional insured on a CCIP, contractor controlled insurance program (the preferred means of protecting an owner under a CCIP); in that event, the anti-indemnification provisions apply. They would also apply to the addition of other third parties as additional insureds to the policy, such as lenders or design professionals.

Nevertheless, it should not be forgotten that the anti-indemnity provisions of Chapter 151 are applicable to indemnity provisions contained in the contracts between the tiers of participants, with the exception of claims made by lower tier employees against upper tiers or the owner on a wrapped project, as provided in §151.103.

## I. Other Exclusions from the Anti-Indemnity Provisions

Section 151.105 of the Anti-Indemnity Act provides for a number of other exclusions that apply to both indemnity clauses and additional insured provisions. Some are obviously the result of political compromise. The major exclusions are as follows:

- ***Breach of Contract or Warranty — §151.105(2).*** The statute does not apply to an 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 CIP. In other words, the bill applies only to indemnity and not direct breaches of contract. To date, no court

has addressed this exception, but it appears to be an attempt to prevent the use of the Anti-Indemnity Act to bar what is normally regarded as direct breach of contract or breach of warranty claims even where they may implicate recovery of damages by a party for its own fault.

- ***Loan and Financing Documents — §151.105(3)***. The provisions do not apply to indemnity clauses contained in loan and financing documents other than construction contracts to which the contractor and the owner's lender are parties.

- ***General Agreements of Indemnity — §151.105(4)***. The provisions do not apply to general agreements of indemnity required by sureties as a condition to providing surety bonds.

- ***Oilfield Indemnity — §151.105(7).*** Indemnity clauses that are regulated under the Texas Oilfield Ant-Indemnity Act (TOAIA), Chapter 127 of the Texas Civil Practice and Remedies Code, are excluded from Chapter 151. The TOAIA applies to agreements concerning the rendering of well or mine services, which is defined as "purchasing, gathering, storing or transporting oil, brine water, fresh water, produced water . . . or otherwise rendering services in connection with a well drilled to produce or dispose of oil, gas or other minerals or water." However, the definition of well or mine services specifically excludes "construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines, or fixed associated facilities." Whether the TOAIA or Chapter 151 apply to a particular project, such as the construction of a certain type of pipeline may not always be clear. And the scope of permissible indemnity may differ depending on which statute applies.

- ***Indemnity for copyright infringement — §151.105(9).***

- ***Residential construction — §151.105(10)(A)***. Agreements in a construction contract pertaining to a single family home, townhouse, duplex, or land development related to residential projects are excluded. This exclusion dovetails with the definition of "construction project" in §151.001(2) that specifically excludes "a single family house, townhome, duplex, or land development directly related thereto."

  One of the major issues as to this exception is whether it extends to condominiums and apartments as "a single family house, townhouse, duplex, or land development directly related thereto." While an attempt to exclude "homebuilders" from the Act is found in the legislative history, there are also indications that multi-family projects may not be included in the exception and therefore are governed by the terms of the Anti-Indemnity Act. This issue will more than likely be a subject of not only future debate, but also court treatment.

- ***Municipal construction projects — §151.105(10)(B).*** Indemnity agreements in municipal construction contracts are excluded. This provision states that it does not apply to "a public works project of a municipality." Two issues may arise with regard to this exclusion, including what constitutes a "public works project" and what

constitutes a "municipality." The Texas Local Government Code §1.005 defines a "municipality" in a somewhat circular fashion as "a general-law municipality, home-rural municipality, or special-law municipality," and the types of municipalities are categorized according to the manner of their creation, as more specifically described in Chapter 5 of the Texas Local Government Code. At the same time, Chapter 29 of the Texas Government Code defines "municipality" to mean "an incorporated city, town, or village." Further, not all entities related to municipalities are regarded as such. For example, in *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76 (Tex. 1997), the court concluded that a hospital authority was not a "municipality" subject to the higher liability limits of the Tort Claims Act. It is possible that the exception in the Anti-Indemnity Act for a "public works project of a municipality" may be limited to construction contracts with cities, towns, or villages and may not include contracts with other quasi-governmental entities created by municipalities.

The related issue is what constitutes a "public works project." In that regard, Tex. Gov't Code §2253.001 defines a "public work contract" as "a contract for constructing, altering, or repairing a public building or carrying out or completing any public work." This definition appears to be narrower than the definition of "construction contract" contained in §151.001(5), which provides the definition for "construction contract" to which the Anti-Indemnity Act applies.

Moreover, based on the exclusion for municipal public works, contractors that engage in that type of work, as well as private work, will likely need to utilize multiple contract forms, with one that includes the narrower indemnity applicable to construction work in general, and one that seeks the broader indemnity that is still allowed as to municipal public works projects.

- ***Joint Defense Agreements – §151.105(11).*** The Act does not apply to joint defense agreements entered into after a claim is made, an exception that requires little explanation, except for why it found its way into the Act in the first place.

## J. Ongoing Viability of the Fair Notice Doctrine

As mentioned above, prior to the enactment of Chapter 151, Texas courts had upheld the enforceability of broad indemnity clauses, even to the extent of the indemnitee's sole negligence, where the indemnity clause met the fair notice requirements. In order to satisfy the fair notice requirements, two elements must be satisfied:

- ***The express negligence doctrine.*** The clause must expressly state that the intent of the parties is for the indemnitor to indemnify the indemnitee for its own negligence. The word "negligence" must be used.

- ***Conspicuousness test.*** In addition, the clause must be conspicuous so as to attract the attention of the indemnitor. In other words, it must be in bold print, all caps, or with a conspicuous heading. It cannot simply match the other provisions of the contract. The

conspicuousness test can be met if the indemnitee can demonstrate that the indemnitor had actual notice of the clause.

Since the Anti-Indemnity Act allows broad indemnification for the indemnitee's own negligence as to employee injuries, that provision will need to satisfy the fair notice requirements under Texas law. As to a more general indemnity clause that complies with the Act, requiring indemnity only to the extent of the indemnitor's own negligence, it can be argued that the fair notice requirements would not apply since the indemnitee is not seeking indemnification for its own negligence. Nevertheless, Texas case law has been somewhat unclear as to whether a limited indemnity clause, in general, must satisfy the fair notice requirements. Good practice would dictate that even in the event that the indemnitee is seeking indemnity only to the extent of the indemnitor's own negligence, that intent should be clearly stated within the clause. Moreover, since the requirement is for limited form indemnity, there would appear to be no substantive downside to meeting the fair notice requirement, i.e., including the clause in capital, or bold, etc. letter type. This is especially true if the contract includes the broad indemnity clause for employee injuries.

The ongoing viability of the fair notice requirements as to enforceability of broad indemnity under Texas law presents challenges for the drafter of a clause that is intended to not only satisfy the general provisions of the Act, i.e., limiting that indemnity to the extent of the indemnitor's own negligence or fault, but also to take advantage of the broad indemnity allowed for injury to the indemnitor's employees. This has led some indemnitees to resort to the "bifurcated" indemnity clause in an effort to comply with the fair notice requirements, particularly as to the exception for employee injuries.

## K. Drafting Indemnity Clauses

As most participants in the Texas construction industry are aware, there has been a wealth of indemnity clauses that have been used by indemnitees seeking indemnity for their own negligence. Some indemnitees have used hybrid or bifurcated clauses, including separate scopes of indemnity for more general claims involving property damage, third parties, etc. as opposed to claims involving third party over actions by injured employees of the indemnitor. Chapter 151, in its demarcation between more general indemnity and indemnity for employee injuries, lends itself to a bifurcated approach. Toward that end, a sample clause that attempts to accomplish that bifurcation in the owner/contractor context is as follows:

**INDEMNITY**

**(A) TO THE FULLEST EXTENT PERMITTED BY LAW, INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE, AND EXCEPT AS SET OUT IN SUBPARAGRAPH (B) BELOW, CONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND OWNER, AND ALL OF ITS OFFICERS, DIRECTORS, AGENTS AND EMPLOYEES, FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEYS FEES, ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS CONTRACT OR CONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF CONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OR FAULT OF CONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY CONTRACTOR OR ANYONE FOR WHOSE ACTS CONTRACTOR MAY BE LIABLE.**

**(B) NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE, CONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND OWNER, AND ALL OF ITS OFFICERS, DIRECTORS, AGENTS AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEYS FEES, ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE OR DEATH OF, ANY EMPLOYEE, AGENT OR REPRESENTATIVE OF CONTRACTOR OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART BY THE NEGLIGENCE OF ANY INDEMNITEE, IT BEING THE EXPRESSED INTENT OF OWNER AND CONTRACTOR THAT IN SUCH EVENT THE CONTRACTOR IS TO INDEMNIFY, HOLD HARMLESS AND DEFEND THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRING CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE OR DEATH OF CONTRACTOR'S EMPLOYEE OR THE EMPLOYEE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. CONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS PARAGRAPH.**

This clause takes a simple approach and, obviously, should not be considered without modification in order to conform to existing contract documents.

The author has used a version of this clause for some clients for years prior to the enactment of Chapter 151. Those clients were most concerned with indemnification for third party over actions, but they were willing to make concessions as to indemnity for other injuries and property damage at the jobsite that arose out of their own acts or omissions. Slight revisions to the provision above have been made along the way, but it is intended to comply with not only the Anti-Indemnity Act, but also the fair notice requirements as to express negligence and conspicuousness, particularly with regard to the Employee Injury Exception contained in Subparagraph (B) of the model clause. Obviously, this is a highly simplified clause as to the conduct that gives rise to the indemnity, and some practitioners prefer to extend the litany of conduct that can give rise to the indemnity obligation, such as, negligence per se, strict liability, etc. Nevertheless, the use of the terminology "negligence or fault" is intended to be inclusive.

Please note that the sample indemnity provision above applies to a general contract between the owner and the general contractor and appropriate modifications would need to be made in other contexts, such as a general contractor-subcontractor relationship.

## L. Drafting Additional Insured Contract Specifications

As previously discussed, the additional insured provisions of Chapter 151 incorporate the same limitations that apply to indemnity provisions – limited additional insured coverage only for the indemnitor/named insured's own negligence, except as to bodily injuries to employees of the named insured. In that instance, additional insured coverage for the negligence or fault of the indemnitee/additional insured itself is permitted, including the sole negligence of the additional insured. A sample additional insured specification that sets out those two levels of coverage in the general contract context is as follows:

> Commercial General Liability Insurance. Subcontractor shall maintain commercial general liability (CGL) insurance with a limit of not less than $1,000,000 each occurrence with a $2,000,000 general aggregate. The CGL insurance general aggregate limit shall apply separately to this project. CGL insurance shall cover liability including, but not limited to, liability arising from premises, operations, independent contractors, products-completed operations, personal and advertising injury, and contractual liability. Subcontractor shall maintain CGL insurance with a limit of not less than $1,000,000 each occurrence and $2,000,000 general aggregate with coverage as specified in this Paragraph for at least __ years following final completion of the Subcontract Work. The CGL policy shall be endorsed to provide Contractor 30-days written notice prior to the cancellation or material change in coverage.
>
> Additional Insured. To the fullest extent permitted under Chapter 151 of the Texas Insurance Code, Contractor and Owner shall be included as an insured under the CGL policy for liability arising out of Subcontractor's work performed under this Subcontract, including products-completed operations coverage for a period of __ years following substantial completion, to the extent of liability attributable to the negligence or fault of Subcontractor.

Notwithstanding the foregoing and to the fullest extent permitted under Chapter 151 of the Texas Insurance Code, the additional insured coverage provided by Subcontractor shall provide coverage for the negligence or fault of Contractor or Owner, including the sole negligence of Contractor or Owner, as to liability of Contractor or Owner for bodily injury or death of an employee or agent of Subcontractor or Subcontractor's subcontractor.

The insurance provided by Subcontractor to Contractor and Owner as an additional insured on the CGL Policy shall be written on ISO Additional Insured Endorsements CG 20 10 10 01 and CG 20 37 10 01, or endorsements providing equivalent coverage, including products-completed operations. For purposes of this additional insured requirement, the term "equivalent" coverage means coverage for liability arising out of Subcontractor's work performed for Contractor and includes products-completed operations coverage. This insurance shall apply as primary and non-contributory insurance with respect to any other insurance or self-insurance programs maintained by Contractor or Owner. Equivalent additional insured coverage shall also be provided by Subcontractor to Contractor or Owner on Subcontractor's umbrella liability policy on a "follow form" basis and that additional insured coverage on the umbrella policy shall be primary to any other coverage available to Contractor or Owner.

Evidence of Insurance. All policies of insurance shall be written through a company acceptable to Contractor. Prior to commencing the Work, Subcontractor shall furnish Contractor with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements set forth above. A copy of the endorsement or other policy provision adding Contractor and Owner as additional insureds to the CGL policy shall be attached to the certificate of insurance.

Despite the strictures of Chapter 151, it appears that insurance specifications are not subject to the same close interpretation as indemnity clauses. For example, the fair notice requirements may not apply to insurance specifications. As a result, there may be some leeway in setting out the additional insured requirements despite the limits on additional insured coverage. For example, the additional insured provisions of Chapter 151 in §151.104 void additional insured provisions only ***"to the extent"*** that they seek to provide indemnity prohibited under §151.101, et seq. The "to the extent" formulation may be read to indicate a savings clause approach, whereby, even though the additional insured requirement may exceed the scope of coverage allowed by statute, the clause may nevertheless be enforceable to the extent permitted. For example, a traditional additional insured specification, stating that "Contractor shall provide additional insured coverage to Owner for liability arising out of Contractor's operations under the Contract," is usually interpreted to require broad coverage, including the negligence of the additional insured. *See Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008). Such a provision requires broader coverage as to general indemnity than is permitted under Chapter 151, but it is possible that it could be enforced at least "to the extent" of the named insured-contractor's negligence or fault. At the same time, the requirement does not run afoul of the Employee Injury Exception in §151.103 allowing broad indemnity and

additional insured coverage for the additional insured's own negligence as to injuries to the employees or lower tier subcontractors of the named insured by requiring that coverage.

The upshot of this discussion is that a typical additional insured specification, without further revision, may be enforceable in part as to limited additional insured coverage for the named insured's negligence only, as well as coverage for the additional insured's own negligence as to injuries to employees of the named insured. At the same time, coverage for the additional insured's own negligence (except as to the named insured's injured employee) will be voided. Therefore, the question is what, if any, type of endorsement should the upper tier specify? The model additional insured specifications set out above are for commercial general liability insurance, additional insured coverage, and evidence of insurance (certificates of insurance) that require the named insured to provide Endorsements CG 20 10 10 01 and CG 20 37 10 01, which together provide broad coverage for the additional insured's own fault as to both operations and completed operations exposures. If available, these endorsements would provide the broad coverage allowed for employee injuries, but would be voided as to coverage for the additional insured's own fault in other contexts. The model specifications include a savings clause that specifies additional insured coverage "to the extent of" the coverage allowed under Chapter 151, the Anti-Indemnity Act. However, these broader endorsements are not usually available to all sized contractors, and, as discussed below, the newer, more frequently available endorsements do not provide the same degree of protection from third party over actions by injured workers on the project.

***Insurance Specification Drafting Tips.*** The following are some matters that should be addressed in drafting an additional insured specification.

- Include a savings clause.
- Make sure that products-completed operations coverage is specified for the desired period of time following substantial completion, usually. Sometimes the period is extended as far out as the statute of repose.
- Specify that coverage should be provided to the extent of liability attributable to the negligence or fault of the subcontractor.
- Include coverage for the negligence or fault of the additional insured, including sole negligence, as to liability for bodily injury or death of an employee or agent of the named insured.
- Specify ISO additional insured endorsements, CG 20 10 10 1 and CG 2037 10 01, but most likely CG 20 33 04 13 and CG 20 39 12 19 (blanket) will be available.
- Specify "equivalent" coverage, including products-completed operations and liability arising out of the named insured's work performed for the additional insured.
- The additional insured insurance shall apply as primary and non-contributory with respect to any other insurance or self-insurance maintained by the named insured.

- The same follow-form coverage should be provided under the umbrella/excess policy.

Note that these are drafting tips. They cannot assure success in negotiating favorable terms, either downstream or upstream; but awareness always helps.

## M. Additional Insured Forms

Additional insured forms often have a confounding effect on owners, contractors and their lawyers – and apparently the insurance industry. Therefore, a more in-depth discussion may be warranted.

### 1. Pre-Chapter 151

Prior to the enactment of Chapter 151, a standard form endorsement[4] that gained prominence was Form CG 20 10 07 04, Additional Insured — Owners, Lessees or Contractors — Scheduled Person or Organization. A copy of the "blanket" version of that endorsement, CG 20 33 07 04, "Additional Insured — Owners, Lessees or Contractors — Automatic Status when required in Construction Agreement with You" is attached as Exhibit 1, together with CG 20 37 04 13, the companion endorsement providing completed operations coverage.[5] For purposes of this discussion, the coverage provided to the additional insured is roughly equivalent to intermediate form indemnity under an indemnification clause. In other words, as long as the named insured providing the endorsement (i.e., the lower tier and usually also the indemnitor) is to any degree negligent, it will provide coverage for all liability of the additional insured, including the additional insured's own negligence. Therefore, under CG 20 33 07 04, the additional insured is entitled to coverage for its own negligence if there is some fault on the part of the subcontractor, even if it is only one percent. Nevertheless, as set out below, this endorsement was ill-suited to provide the additional insured with all the protection it usually sought from the lower tiered named insured. It also runs afoul of the limitations of the Anti-Indemnity Act.

Section 151.104 incorporates the §151.103 exception for injuries to employees of lower tiers on the project, allowing broad additional insured coverage for that exposure. Just how that exception is provided for in an additional insured endorsement is very unclear. At this time, there do not appear to be standard ISO endorsements in wide circulation that address the prohibitions

[4] "Standard Form" endorsements are typically drafted by the Insurance Services Office ("ISO") and are approved for use by state insurance regulatory agencies, including the Texas Department of Insurance. As to the labeling of standard additional insured endorsement, such as CG 20 33 07 04, the "CG" indicates it is a commercial general lability endorsement. The number "20" indicates it is an additional insured endorsement. The number "33" indicates the number of the particular endorsement (there hundreds of them). Finally, the last four characters, such as "07 04," indicate the date the endorsement was adopted, i.e., July 2004.

[5] Blanket endorsements are frequently used in order prevent inadvertently failing to add a specific endorsement naming a specific additional insured as required in a contract. Endorsement CG 20 37 07 04 must be used in conjunction with CG 20 10 07 04 or CG 20 33 07 04 (the blanket endorsement) in order to provide completed operations coverage to the additional insured. CG 20 10 07 04 and CG 20 33 07 04 are limited to coverage for the named insured's ongoing operations and do not provide coverage for bodily injury or property damage that occurs after its work has been completed.

on broad and intermediate form indemnity and additional insured coverage set out in §151.102 and §151.104 while still preserving the broad form indemnity and additional insured coverage permitted under the Employee Injury Exception in §151.103. The case law is nonexistent on this point, and insured contractors and additional insurers are sure to disagree as to the broadening of coverage for employee injuries. The test to determine ambiguity of an insurance policy under Texas law is whether there are two reasonable interpretations. In that instance, the ambiguity is construed in favor of coverage and the insured. To date there has been no clarification from the insurance industry or the courts.

Additional Insured Endorsement CG 20 33 07 04 has become the most frequently used endorsement in the construction industry. However, the endorsement has proved to be of limited utility in protecting the additional insured from third party over actions filed by injured employees of lower tiers. This is because the injured employee does not allege negligence on the part of the employer-named insured due to the workers compensation bar. Texas courts have recognized this problem under the CG 20 33 07 04 endorsement, and in *Gilbane Building Co. v. Admiral Ins. Co.*, 664 F.3d 589 (5th Cir. 2011), the court held that since there were no allegations of negligence on the part of the employer, there was no duty to defend the additional insured in a third party over action. However, evidence at the trial indicated that the injured employee's own negligence had contributed to the accident (i.e., he had climbed a ladder with muddy boots in the rain and had gotten his feet tangled in an electrical cord, causing his fall), so that the employee's negligence was attributable to the employer so that the "in whole or in part" requirement under CG 20 33 07 04 was satisfied. While the *Gilbane* court upheld a duty to indemnify, the rejection of a duty to defend is common based upon the workers compensation single remedy.

The *Gilbane* case illustrates the major problem for upper tiers in seeking a defense as an additional insured on the employer's CGL policy where an endorsement includes a requirement that the named insured's negligence contribute to the injury. As a result, Texas insured contractors may continue to specify broader forms, such as the CG 20 10 10 01, that provide the broad coverage for those types of injuries, with Chapter 151 voiding the coverage to the extent of the additional insured's own negligence as to other types of bodily injury and property damage exposures.

### 2. The 2013 ISO Revisions

In April 2013, ISO promulgated new standard form additional insured endorsements, including endorsements for use in the construction industry. The primary endorsement is GG 20 10 04 13, and CG 20 33 04 13 is written on a blanket basis, automatically adding additional insureds as required by contract. A copy of the blanket endorsement is attached at Exhibit 2. Since these forms only apply to ongoing operations, the companion endorsement is CG 20 37 04 13, also attached at Exhibit 2, which must be used to provide completed operations coverage. Some of the revisions were primarily intended to clarify various issues that are beyond the scope of this presentation.

However, the forms retain the "caused in whole or in part" formulation, and the operative insuring agreement of the endorsements states as follows:

**Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person have agreed in writing in a contract or agreement that such person or organization be added as an additional insured, but only with respect to liability for "bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However, the insurance afforded to such additional insured:

1. ***Only applies to the extent provided by law***; and

2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured. (emphasis added)

As emphasized above, another provision that was added to the forms in April 2013 was a savings clause that states that additional insured status only applies "to the extent permitted by law," which is an obvious acknowledgement of the growing number of states enacting legislation restricting additional insured coverage. This list of states includes Texas, and the issue persists as to whether a savings clause in the endorsement can be relied upon to expand coverage under these endorsements pursuant to the exception allowing broad coverage for injuries to employees of the named insured where the §151.103 Employee Injury Exception applies to a claim for which coverage is required in the contract.

### 3. The 2019 Blanket Endorsements

Most recently, in December 2019, ISO issued Endorsements CG 20 33 12 19 and CG 20 39 12 19, new additional insured endorsements to provide operations and completed operations coverage on a blanket basis where required by contract. Again, where additional insured coverage is specified for completed operations, two endorsements need to be used, the CG 20 33 12 19 endorsement for operations coverage, together with the corresponding completed operations endorsement, CG 20 39 12 19. Copies of these endorsements are attached at Exhibit 3.

## N. *Deepwater Horizon* – Indemnity as Limitation on Additional Insured Coverage

As set out above, the 2013 ISO revisions to the additional insured endorsement forms include a provision that states that the coverage to be provided to the additional insured by

contract or agreement will not be broader than that which is required under that contract or agreement.[6] This provision appears to import the terms of a third party contract into the policy to which the additional insured endorsement is attached. Therefore, drafters of additional insurance specifications in the underlying contract should take extra care that the specification effectively sets out the scope of coverage requested, such as primary and non-contributory coverage.

Of particular concern may be whether other provisions in the underlying construction contract, particularly the indemnification clause, may be engrafted upon the additional insured endorsement so as to limit coverage (setting aside the limitations of Chapter 151 that limit both indemnity and additional insured coverage). This was the situation in *In re Deepwater Horizon,* 470 S.W.3d 452 (Tex. 2015). In that case, a dispute arose after British Petroleum (BP) sought coverage for damages of $750,000,000 arising out of the offshore fire and explosion of the Deepwater Horizon oil rig as an additional insured on primary and excess liability policies issued to the rig owner, Transocean, with whom it contracted. The appeal was heard on certified questions from the Fifth Circuit to the Texas Supreme Court, and the primary issue was whether the scope of BP's coverage as an additional insured was determined by the umbrella policy itself or the indemnity clauses in the drilling contract between BP and Transocean. The drilling contract included "knock-for-knock" indemnity clauses in which Transocean agreed to indemnify BP for above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risks Transocean did not assume, i.e., subsurface pollution. At the same time, the insurance specifications in the drilling contract required that BP be named as an additional insured under Transocean's policies, except workers compensation for liabilities assumed by Transocean under the terms of the drilling contract.

Therefore, the court set out to determine the extent to which the terms of the drilling contract were incorporated into the additional insured provisions of the Transocean policies. In making its determination, the court considered *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), in which it had previously held that the scope of additional insured coverage is to be decided within the four corners of the insurance policy pursuant to its express language and the court should not sacrifice predictability by importing terms of indemnity agreements into the policy. Therefore, under those circumstances, the *ATOFINA* court held that additional insured coverage is separate and independent of indemnity obligations.

Nevertheless, in *Deepwater Horizon,* the court found that the indemnity clause did serve as a limitation on the scope of additional insured coverage. While the court did not expressly abandon the "separate and independent test," it held that it would "determine the scope of coverage from the language employed in the insurance policy, and if the policy directs us elsewhere, we will refer to an incorporated document to the extent required by the policy. Unless obligated to do so by the terms of the policy, however, we do not consider coverage limitations in underlying transactional documents." The court looked to the provisions in Transocean's policies that extended insured status to any person or entity to whom Transocean was obligated by an oral or written "insured contract" to provide insurance, defining "insured contract" as a contract pertaining to the business of Transocean in which Transocean assumes the tort liability of another party. Thus, the term "insured contract" included indemnity provisions in the drilling

[6] Note that CG 20 10 04 13 and CG 20 33 04 13 also provide that the amount of insurance shall not exceed the limit required in the contract or agreement or the limit of the insurance policy, whichever is less.

contract, and the court determined that BP's status as an additional insured was "inexorably linked" to the extent of Transocean's indemnity obligations. Therefore, Transocean's insurers had no obligation to provide additional insured coverage to BP for subsurface pollution property damage.

The lesson of *Deepwater Horizon* is that parties that wish to (or do not wish to) provide limitations on particular liabilities for which indemnity and additional insured coverage is sought should carefully tailor not only the indemnity agreement, but also to the extent possible, the additional insured provisions of their policies. Typically, insureds may have little ability to influence their insurer's choice of language used in an additional insured endorsement, but, as set out above, ISO has apparently endeavored to accomplish that coordination under its 2013 revisions. Those revisions seek to link the scope of additional insured coverage to the contract between the parties by expressly providing that the coverage "will not be broader than that which you are required by the contract or agreement to provide for such additional insureds." Whether this reference to the underlying contract will be sufficient to comply with the Texas Supreme Court's reasoning in *Deepwater Horizon* will need to be developed by further case law. In other words, the issue will be whether the reference in the ISO 2013 endorsements is sufficient to explicitly incorporate the terms of the underlying contract.[7]

## O. Effective Dates – Still an Issue?

Section 151.151 provides that none of the provisions of Chapter 151 may be waived by contract or otherwise. It also sets out the effective dates for the statute.

### 1. Effective Date for CIPS

Chapter 151 applies only to a new or renewed CIP for a construction project that begins on or after January 1, 2012. A CIP that incepts before January 1, 2012, is governed by the law as it existed immediately before January 1, 2012.

### 2. Effective Date for Anti-Indemnity Provisions

The Anti-Indemnity Act applies only 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. The term "original construction contract" refers to a contract with an owner, and if it is entered into on or after the effective date of the act, the changes apply to a related subcontract, purchase order, personal property lease agreement, and insurance policy for that project. If the original construction contract with the owner is entered into before January 1, 2012, then the law in effect immediately before that date applies not only to the original contract, but also to all related subcontracts, purchase orders, personal property leases, and insurance policies associated with that original contract. For example, if an original contract for a large project is entered into on December 15, 2011, all subcontracts, purchase orders, and insurance policies, including those

[7] In *Exxon Mobil Corp. v. Ins. Co. of the State of Pa.*, 568 S.W.3d 650 (Tex. 2019), the Texas Supreme Court declined to extend the holding of *Deepwater Horizon*, determining that the reference to an extrinsic contract in a waiver of subrogation endorsement in and of itself, without describing the scope of insurance coverage under the contract, did not incorporate those terms into the endorsement.

entered into after January 1, 2012, will nevertheless be governed by prior law. It is only where the original contract is entered into on or after January 1, 2012, that the new law applies.

These provisions were applied by the U.S. District Court for the Western District of Texas under Section 3(b) of H.B. 2093, the uncodified session law creating the Anti-Indemnity Act, in its March 10, 2016 opinion in *U.S. ex rel. E J Smith Constr., Co. v. Travelers Cas. & Surety Co.*, 2016 WL 1030154, at *4-5. In addressing the Act's applicability, the court noted that Section 3(b) of H.B. 2093 clarified that the Act applied only to an "original construction contract," i.e., a prime contract, entered into after the Act's effective date, and to any subordinate subcontracts to that prime contract. Section 3(b) further stated that if the "original construction contract" was entered into before the Act's effective date, then the original construction contract and any "related subcontract, purchase order contract, personal property lease agreement, and insurance policy" were governed by the law in effect immediately before the effective date of the Act. *Id.* at *5. The court found that the Act did not apply to the subcontracts before it because, even though the subcontracts were entered into *after* the Act's effective date, they were subordinate to a prime contract that was entered into *before* the Act's effective date. *Id.* at *1, 5. Therefore, the Texas common law fair notice requirements applied and the limitations of the Anti-Indemnity Act did not.

## P. Addressing Indemnity and Additional Insured Coverage in Light of Chapter 151

The following are suggestions that come to mind as to practices relating to indemnity and any additional insured coverage in a post-Chapter 151 world.

- Comply with the fair notice requirements under Texas law as to clearly expressing the intent to indemnify the indemnitee for its own negligence in the employee injury context, and make those requirements conspicuous.

- Draft the more general indemnity clauses limited by Chapter 151 to clearly and expressly state the indemnitee's intent to obtain indemnity for the indemnitor's negligence, making the indemnity clause similarly conspicuous.

- Specify additional insured coverage that includes coverage for the indemnitee's own negligence as to the indemnitor's employees.

- It may be possible to use the Employee Injury Exception in Chapter 151, as to bodily injury to the employees of the indemnitor, to strengthen the bargaining position to obtain that scope of indemnity in light of the statutory sanction of its use.

- The same may apply to the ability to obtain additional insured endorsements that provide coverage for the additional insured's own negligence as to injuries to the named insured's employees.

- Try to obtain copies of the additional insured endorsements to the indemnitor's policies to verify coverage.

- Continue to specify that the indemnitor provide additional insured coverage for both ongoing and completed operations exposures.

- If a project is to be wrapped under an OCIP or a CCIP, consider the pros and cons as to indemnity and additional insured coverage, particularly any benefits as far as exclusive remedy protection as to third party over actions.

- Be aware of the need to coordinate indemnity and other limitations of liability with the scope of additional insured coverage, whether under endorsements such as the 2013 ISO forms or the Texas Supreme Court's incorporation of third party contracts under *In re Deepwater Horizon*.

# EXHIBIT 1

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**A.** **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

**1.** Your acts or omissions; or

**2.** The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

**B.** With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

**1.** "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

**a.** The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

**b.** Supervisory, inspection, architectural or engineering activities.

**2.** "Bodily injury" or "property damage" occurring after:

**a.** All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

**b.** That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.



  

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

| Name Of Additional Insured Person(s) Or Organization(s): | Location And Description Of Completed Operations |
|---|---|
| | |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. | |

**Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

# EXHIBIT 2

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**A.** **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

**1.** Your acts or omissions; or

**2.** The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured:

**1.** Only applies to the extent permitted by law; and

**2.** Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

**B.** With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

**1.** "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

**a.** The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

**b.** Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or the failure to render any professional architectural, engineering or surveying services.



  

**2.** "Bodily injury" or "property damage" occurring after:

**a.** All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

**b.** That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

**C.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

**1.** Required by the contract or agreement you have entered into with the additional insured; or

**2.** Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.



  

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

**SCHEDULE**

| Name Of Additional Insured Person(s) Or Organization(s) | Location And Description Of Completed Operations |
|---|---|
| | |
| | |
| | |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. | |



**A.** **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

**B.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

# EXHIBIT 3

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN A WRITTEN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**A.** **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

**1.** Your acts or omissions; or

**2.** The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured:

**1.** Only applies to the extent permitted by law; and

**2.** Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

**B.** With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

**1.** "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

**a.** The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

**b.** Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or the failure to render any professional architectural, engineering or surveying services.



  

**2.** "Bodily injury" or "property damage" occurring after:

**a.** All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

**b.** That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

**C.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

**1.** Required by the contract or agreement you have entered into with the additional insured; or

**2.** Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.



  

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT WITH YOU (COMPLETED OPERATIONS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

**A.** Section **II** – Who Is An Insured is amended to include as an additional insured any person or organization for whom you have performed operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" performed for that additional insured and included in the "products-completed operations hazard".

However, the insurance afforded to such additional insured:

**1.** Only applies to the extent permitted by law; and

**2.** Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

**B.** With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:

This insurance does not apply to:

"Bodily injury" or "property damage" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

**1.** The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

**2.** Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the rendering of or the failure to render any professional architectural, engineering or surveying services.

**C.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

**1.** Required by the contract or agreement you have entered into with the additional insured; or

**2.** Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.



  