Ten Years of the Texas Anti-Indemnity Act:

Where are we and where are we going?

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Anti-Indemnity Statutes and recent Texas developments

- Three types of indemnity clauses:
  - Broad Form - Indemnification for all losses even when the indemnitee is 100% at fault.
  - Intermediate Form - Complete indemnification for losses caused in whole or in part by the negligence of the indemnitor.
  - Limited Form - Indemnification for losses "to the extent" of the indemnitor's negligence.
- A slight majority of states have anti-indemnity statutes that permit only limited form indemnity:
  - AZ, AR, CA, CO, CT, DE, FL, IL, IA, KS, KY, LA, MN, MS, MO, MT, NE, NV, NH, NM, NY, NC, ND, OH, OK, OR, RI, **TX**, VA, WA

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3 Anti-Indemnity Statutes and recent Texas developments

- In Texas, an imbalance existed between general contractors and subcontractors
- Balance struck between claims subject to limited-form indemnity (most property damage claims) and broad-form indemnity claims (third-party over actions)
- Along came the Texas Anti-Indemnity Act – codified in the Insurance Code . . . In a provision dealing with consolidated insurance programs

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4 Anti-Indemnity Statutes and recent Texas developments

- Texas Anti-Indemnity Act - TEX. INS. CODE § 151
  - Effective January 1, 2012
  - Applies to subcontracts related to prime contracts executed before that date . . . maybe
  - Several exceptions to the TAIA

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5 Anti-Indemnity Statutes and recent Texas developments

- Texas Anti-Indemnity Act - TEX. INS. CODE § 151.102
  - 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.

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6 Anti-Indemnity Statutes and recent Texas developments

- Texas Anti-Indemnity Act - TEX. INS. CODE § 151.001(5)
  - "construction contract" means: a contract, subcontract, or agreement, or a performance bond assuring the performance of any of the foregoing, entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, repair, or maintenance of, or for the furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property.

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Anti-Indemnity Statutes and recent Texas developments

- Texas Anti-Indemnity Act – Tex. Ins. Code § 151.103:
  - Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

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Anti-Indemnity Statutes and recent Texas developments

- Texas Anti-Indemnity Act – Tex. Ins. Code § 151.104:
  - TAIA bars additional insured requirements to the extent indemnity is barred by the TAIA
  - Exception – policy provision or endorsement in a consolidated program listing, adding, or deleting named insureds

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Anti-Indemnity Statutes and recent Texas developments

Recent Texas Developments

- After 10 years of virtually no case law, four opinions have been issued this year:
  - *Signature Industrial Services, LLC v. International Paper Co.*, 638 S.W.3d 179 (Tex. 2022);
  - *BNSF Railway Co. v. Jones Lang Lasalle Americas, Inc.*, 2022 WL 562898 (N.D. Tex. Feb. 24, 2022);
  - *Maxim Crane Works, L.P. v. Zurich American Ins. Co.*, 642 S.W.3d 551 (Tex. 2022); and
  - *Knife River Corp. – South v. Zurich American Ins. Co.*, 2022 WL 686625 (N.D. Tex. Mar. 8, 2022).

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Anti-Indemnity Statutes and recent Texas developments

- *Signature Indus. Services, LLC v. Int'l Paper Co.*, 638 S.W.3d 179, 196 (Tex. 2022)
  - Proper inquiry under § 151.102 is pleadings-based:

    [Section 151.102] asks only whether the "claim" for which indemnity is sought was "caused by" the fault or breach of contract of the indemnitee. . . .

    The statute does not require factual inquiry into the "true" cause of the plaintiff's injuries. Absent fraud or some other unusual circumstance not present here, examining the pleadings will generally be a sufficient basis to determine whether the "claim" was "caused by" the fault or breach of contract of the party seeking indemnification.

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Anti-Indemnity Statutes and recent Texas developments

- *Maxim Crane Works, L.P. v. Zurich American Ins. Co.*
  - Maxim leased a crane to subcontractor Berkel & Company Contractors, Inc. for use on a 2013 construction project to build a large office campus in Houston.
  - While being operated by a Berkel employee, the crane collapsed, seriously injuring Tyler Lee, an employee of the general contractor, Skanska USA Building, Inc. Lee sued Maxim and Berkel.
  - Berkel was enrolled in Skanska's CCIP, but Maxim was not because it was an expressly excluded subcontractor/vendor under the terms of the CCIP.
  - Under the Texas Workers Compensation Act (TWCA), Lee was found to be a statutory co-employee of Berkel.

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Anti-Indemnity Statutes and recent Texas developments

- *Maxim Crane Works, L.P. v. Zurich American Ins. Co.*
  - Berkel had a separate CGL policy issued by Zurich and, pursuant to the crane lease, was required to provide additional insured coverage to Maxim.
  - Maxim sought indemnity and additional insured coverage from Zurich, and Zurich denied Maxim's claim based on the TAIA.
  - Maxim argued that the employee injury exception under § 151.103 of the TAIA applied because Lee was Berkel's statutory co-employee under the TWCA.

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Anti-Indemnity Statutes and recent Texas developments

- *Maxim Crane Works, L.P. v. Zurich American Ins. Co.* 642 S.W.3d 551 (Tex. 2022)
  - Certified question from the Fifth Circuit:

    Whether the employee exception to the TAIA, Texas Insurance Code § 151.103, allows additional insured coverage when an injured worker brings a personal injury claim against the additional insured (indemnitee), and the worker and the indemnitee are deemed "co-employees" of the indemnitor for purposes of the TWCA.

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Anti-Indemnity Statutes and recent Texas developments

- *Maxim Crane Works, L.P. v. Zurich American Ins. Co.* 642 S.W.3d 551 (Tex. 2022)
  - The Supreme Court of Texas answered "no" based on the common, ordinary meaning of the word "employee" as used by the Legislature in the TAIA.
  - The meaning of "employee" under the TWCA has no bearing on the meaning of "employee" under the TAIA for purposes of § 151.103.

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Anti-Indemnity Statutes and recent Texas developments

- *Maxim Crane Works, L.P. v. Zurich American Ins. Co.*
  - But the Texas Supreme Court made it clear that the TAIA does not prohibit an indemnitor from indemnifying the indemnitee for the indemnitor's own negligence with this explanation:

    > In other words, section 151.102 does not prevent [an indemnitor] from providing the same indemnification—indemnification against the consequences of the negligence of [the indemnitor], [the indemnitor's agents], or [the indemnitor's] employees—to [the indemnitee].

    2022 WL 627829, at *4.

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Anti-Indemnity Statutes and recent Texas developments

- *BNSF Railway Co. v. Jones Lang Lasalle Americas, Inc.*
  - Jones Lang LaSalle Americas ("JLL") entered into a real estate management service agreement with BNSF in which JLL agreed to procure insurance, indemnify BNSF, and hold it harmless for all claims regarding injury or death arising from JLL's own negligent acts or omissions.
  - A BNSF switchman was injured when he was struck by a train. He sued multiple parties, including BNSF and JLL.

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Anti-Indemnity Statutes and recent Texas developments

- *BNSF Railway Co. v. Jones Lang Lasalle Americas, Inc.*
  - BNSF sought defense and indemnity from JLL and its insurer.
  - The court addressed indemnity first
    - The parties raised choice of law issues as between Texas and New Mexico law, but the court found that the result would be the same – *i.e.*, neither state's law, including their respective anti-indemnity laws, required JLL to *indemnify* BNSF for *BNSF's* own negligence.
    - Notably, the "employee" exception did not apply because the injury was to the indemnitee's employee – not the indemnitor's

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Anti-Indemnity Statutes and recent Texas developments

- *BNSF Railway Co. v. Jones Lang Lasalle Americas, Inc.*
  - The court then addressed defense issues second:
    - JLL argued that it had no duty to defend BNSF because another party (the electrical contractor) was defending BNSF.
    - JLL also argued that, if it did have to defend BNSF, it was required to do so only for claims arising from JLL's negligence.

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Anti-Indemnity Statutes and recent Texas developments

- *BNSF Railway Co. v. Jones Lang Lasalle Americas, Inc.*
  - The court rejected those arguments.
  - The court noted that there is a duty to defend if the underlying complaint includes at least one covered claim, and the underlying complaint against BNSF alleged JLL's negligence, along with BNSF's own negligence.
  - Since JLL's alleged negligence was a covered claim, JLL had to defend the entire lawsuit.

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Anti-Indemnity Statutes and recent Texas developments

- *Knife River Corp. – South v. Zurich American Ins. Co.*
  - Underlying claim arose out of an accident that occurred on a highway project.
  - Knife River was the general contractor and sought a defense and indemnity as to a settlement for the underlying lawsuit under CGL and excess policies issued by Zurich to AWP, the subcontractor for the signage work on the project.
  - Underlying petition claimed that Knife River and AWP were responsible for the allegedly hazardous sign placement in the construction zone, arguably alleging that Knife River was liable for AWP's negligent acts.

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Anti-Indemnity Statutes and recent Texas developments

- *Knife River Corp. – South v. Zurich American Ins. Co.*
  - The court looked to the allegations in the underlying lawsuit and determined that Zurich owed a duty to defend.
  - The court stated § 151.102 "allows a party to indemnify another in limited circumstances, but it disallows indemnification for claims caused by the party seeking indemnification."
  - The court denied Zurich's Rule 12(b)(6) motion to dismiss.

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Anti-Indemnity Statutes and recent Texas developments

- Takeaways from the recent Texas decisions:
  - The TAIA should not wipe out all defense obligations or all additional insured coverage, despite recent additional insured carrier positions.
  - Indemnity and additional insured obligations should be enforceable to the extent of the indemnitor's own negligence.
  - The Northern District of Texas cases align with decisions from other jurisdictions addressing the duty to defend. *See, e.g.*, *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 443 N.W.2d 872 (Neb. 1989); *Bitco Gen. Ins. Corp. v. Wynn Constr. Co.*, 2017 WL 3470584 (W.D. Ok. Aug. 11, 2017).

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Anti-Indemnity Statutes and recent Texas developments

- Other states have also enforced indemnity provisions to the extent of the indemnitor's negligence due to contractual savings clauses.
  - *E.g.*, *Precision Trenchless, LLC v. Saertex multiCom LP*, 2021 WL 4310668 (D. Conn. Sept. 22, 2021).
    - The indemnity provision in the contract violated the Connecticut anti-indemnity statute, but that only barred the portion of the indemnity provision that plainly sought to indemnify the municipality against personal injury or property damage "caused by" the municipality 's negligence.
    - The savings clause in the provision—"To the fullest extent permitted by Laws and Regulations"—and the contract's severability clause left the rest of the provision in effect.

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Anti-Indemnity Statutes and recent Texas developments

- *See also Handler Corp. v. State Drywall Co.*, 2007 WL 3112466 (Del. Super. Ct. Sept. 27, 2007), *aff'd*, 956 A.2d 31 (Del. 2008), where the court concluded that it did not need to "nullify" the remainder of an indemnity provision that was not in violation of the Delaware anti-indemnity statute because "[t]he Agreement contain[ed] a severability clause."

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Where does Texas go from here?

- Will another Texas court address the *BNSF* issue of one covered claim = a complete defense?
  - Violation of TAIA
  - "Defend one, defend all"
- Will the Supreme Court of Texas recognize a "savings clause" to enforce compliance?
  - No statutory reference to savings clause
  - Should all indemnity be stricken or should severability provision control?
  - Reimbursement provision?

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Questions and Comments?

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