THE TEXAS ANTI-INDEMNITY ACT: RESTRICTIONS ON INDEMNITY IN TEXAS (SECOND EDITION)

A Cokinos | Young White Paper

Patrick J. Wielinski
wielinski@cokinoslaw.com
Travis M. Brown
tbrown@cokinoslaw.com
Amy N. Rauch
arauch@cokinoslaw.com
Cokinos | Young
One Galleria Tower
13355 Noel Road, Suite 1375
Dallas, Texas 75240

March 2025

Patrick J. Wielinski
pwielinski@cokinoslaw.com

Pat Wielinski is a principal in the law firm of Cokinos | Young in its Dallas office, and for approximately two decades, he led the firm's Insurance Coverage and Risk Management practice group before entering semi-retirement a few years ago. Pat has practiced in the areas of construction, insurance coverage, and risk management for more than 40 years. He is Past Chair of the Insurance Law Section of the State Bar of Texas and is a Fellow in the American College of Construction Lawyers, as well as the American College of Coverage Counsel. He regularly lectures to construction, insurance, and legal groups on insurance coverage and risk management issues.

He is the author of *Insurance for Defective Construction*, the sixth edition of which was published in August 2023. He is also the co-editor of *Construction Insurance: A Guide for Attorneys and Other Professionals*, published by the ABA Forum on the Construction Industry, of which he co-authored the chapter on commercial general liability coverage. He has co-authored *Contractual Risk Transfer: Strategies for Contractual Indemnity and Insurance Provision*s, published by International Risk Management Institute. He regularly authors numerous other publications for insurance, construction, and legal organizations.

Pat is a member of the AGC of America Surety Bonding and Construction Risk Management Committee. As part of that committee, he monitors the status of insurance law on a national basis as applied to construction risks, filing amicus curiae briefs for a number of Texas and national construction trade organizations in important cases addressing those issues.

Travis M. Brown
tbrown@cokinoslaw.com

Travis M. Brown is a principal in the law firm of Cokinos | Young. He is the leader of the firm's Insurance Coverage and Risk Management practice group and manages the firm's Dallas office. He has more than 15 years of experience advising clients on a broad range of insurance coverage issues. Travis began his career at an insurer-side firm with a national practice and gained valuable insight into how insurance companies evaluate claims, both prior to and during litigation. Now, he applies that experience and insight on the other side of the docket, to help companies ensure that their insurers honor their obligations under the policy when a claim arises. His primary focus is on advising contractors, owners, subcontractors, and other participants in the construction industry in disputes with their insurance companies. However, his coverage practice has involved disputes with insurers in a wide variety of cases well outside the construction context. In addition, Travis has submitted amicus curiae briefs for multiple state and national construction trade organizations in insurance and construction cases and regularly lectures to construction, insurance, and legal groups on insurance coverage and risk management issues and co-authors articles in connection with the same.

Amy N. Rauch
arauch@cokinoslaw.com

Amy Rauch is a principal at the law firm Cokinos | Young in its Dallas office. Amy has approximately 10 years of experience as insurance coverage counsel for policyholder clients. She regularly provides insurance advice to clients in the construction industry, including contractors, owners, and subcontractors, advising them on insurance and indemnity provisions in contract documents at the outset of their projects and guiding them through disputes with their insurance companies following a claim. In addition, she frequently leads the pursuit of defense and indemnity from additional insured carriers on behalf of general contractor and subcontractor clients in construction defect and employee injury cases. As a part of her practice, she has co-authored articles and given presentations on insurance coverage issues. She is a member of the Construction and Insurance Law Sections of the State Bar of Texas and is serving a two-year term (expiring 2026) on the Young Lawyer Subcommittee of the Insurance Council of the Insurance Law Section. She is also Board Certified in Insurance Law by the Texas Board of Legal Specialization.

TABLE OF CONTENTS

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

"Even lawyers find that words like 'indemnity' and 'subrogation' ring of obscure Martian dialect."

Court's Opinion, *Herrick Corp. v. Canadian Ins. Co. of California*, 29 Cal.App.4th 753 (4th Dist. 1994)

A. Introduction

Subchapter C of Chapter 151 of the Texas Insurance Code, the Texas Anti-Indemnity Act (the "TAIA"), went into effect on January 1, 2012. The TAIA 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.

Thirteen 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 apply to both. For nearly ten years, there was virtually no law interpreting the TAIA. However, that changed beginning in 2022, with five substantive opinions issued in that year alone and three more opinions issued since that time.[1] These cases are 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.

[1] In chronological order, the cases are:

(1) *Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179 (Tex. 2022);
(2) *BNSF Ry. Co. v. Jones Lang Lasalle Americas, Inc.*, 2022 WL 562898 (N.D. Tex. Feb. 24, 2022);
(3) *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 642 S.W.3d 551 (Tex. 2022);
(4) *Knife River Corp. – S. v. Zurich Am. Ins. Co.*, 2022 WL 686625 (N.D. Tex. Mar. 8, 2022);
(5) *Sw. Elec. Contracting Servs., Ltd. v. Indus. Accessories Co.*, 2022 WL 1468384 (W.D. Tex. May 10, 2022);
(6) *Phoenix Ins. Co. v. Knife River Corp. S.*, 2023 WL 5846803 (S.D. Tex. Sept. 11, 2023);
(7) *Cont'l Ins. Co. v. Cincinnati Ins. Co.*, 2023 WL 7199268 (W.D. Ark. Nov. 1, 2023) (applying Texas law); and
(8) *Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4728913 (E.D. Tex. Sept. 9, 2024) *report and recommendation adopted by* 2024 WL 4433070 (E.D. Tex. Oct. 7, 2024).

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. Other risks are transferred between the parties delivering the project or to third parties. However, the transfer of most construction risks is usually supported by insurance, which ultimately transfers potentially huge risks to an insurer that is generally considered to be more financially capable of bearing and spreading risks.

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. To sort out the various parties' obligations to each other and for the loss, consideration must be given not only to the insurance coverage for each party, 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 an upper tier to a lower tier, such as from the project owner to the general contractor and from the general contractor to its subcontractors. 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. Texas courts have described indemnification for an indemnitee's own negligence as an "extraordinary shifting of risk." *See, e.g., Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

As a result, in Texas, in order to accomplish the transfer of the indemnitee's own negligence, the indemnity clause must satisfy the "fair notice" requirements, which include (1) the express negligence doctrine adopted by the Texas Supreme Court in *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987); and (2) the conspicuousness requirement. *See, e.g., Dresser Indus., Inc.*, 853 S.W.2d at 508. Under the express negligence doctrine, the indemnity clause must expressly state that the intent of the parties is for the indemnitor to indemnify the indemnitee for its own negligence. *See, e.g., Dresser Indus., Inc.*, 853 S.W.2d at 508. The word "negligence" must be used. As to the conspicuousness requirement, the clause must be conspicuous so as to attract the attention of the indemnitor. *See id.* 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 requirement can be met if the indemnitee can demonstrate that the indemnitor had actual notice of the clause. After *Ethyl*, if these fair notice requirements were satisfied, courts would enforce the use of broad form indemnity provisions providing indemnity for even the indemnitee's sole negligence. However, the ongoing applicability of these fair notice requirements to construction contracts in the post-TAIA era is less than clear, as will be discussed below.

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 led to the requirement by many upper tiers that they be named as additional insureds on the lower tiers' comprehensive general liability ("CGL") policies. As an additional insured, the upper tier has direct rights against the lower tier's CGL 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 most states to enact statutes that regulate indemnification clauses used in the construction industry.[2] Many of the more recent statutes also regulate the ability

[2] At least forty-five states have enacted anti-indemnity statutes that apply in the construction context. *See* Philip L. Bruner & Patrick J. O'Connor, Jr., *Anti-indemnity statutes: Varying approaches to limiting indemnity obligation*, 3 BRUNER & O'CONNOR CONSTRUCTION LAW §10:100 n.1 (November 2024 Update) ("As of 2021, 45 states have enacted anti-indemnity laws that limit or prohibit enforcing certain indemnification agreements in construction undertakings.") (citing Matthiesen, Wickert & Lehrer, S.C., *Anti-Indemnity Statutes in All 50 States* (Jan. 5, 2021), *available at* www.mwl-law.com); *see also* Matthiesen, Wickert & Lehrer, S.C., *Anti-Indemnity Statutes in All 50 States* (last updated Aug. 29, 2024), https://www.mwl-law.com/wp-content/uploads/2018/02/Anti-Indemnity-Statutes-In-All-50-States-00220865x9EBBF.pdf ("Forty-five (45) states have enacted anti-indemnity statutes that limit or prohibit enforcing indemnification agreements in construction settings."); Gordon Rees Scully Mansukhani, LLP, *50 State Legal Matrix – Anti-Indemnity Statutes for 2024*, 50 STATE LEGAL MATRICES FOR 2024 3-8 (current through Feb. 2024), https://www.grsm.com/Templates/media/files/pdf/50%20State%20Legal%20Matrices%202024_FINAL.pdf ("Forty-five (45) states have enacted anti-indemnity statutes that limit or prohibit enforcing indemnification agreements in construction settings."). In addition, though not listed in the preceding articles, Alabama enacted an anti-indemnity statute in 2021 that applies to contracts with design professionals, and the District of Columbia enacted an anti-indemnity statute in 2023 that protects subcontractors from having to indemnify

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 affects 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 TAIA in Chapter 151 getting significantly more attention than the CIP provisions.

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. TEX. INS. CODE §151.001(1). As such, the definition encompasses owner controlled insurance programs ("OCIPS") where the owner is the CIP sponsor, contractor controlled insurance programs ("CCIPS") where the contractor is the sponsor, and rolling CIPS since the definition specifically includes insurance programs for multiple construction projects.

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

contractors and owners for their sole negligence. *See* ALA. CODE 1975 §41-9A-3; D.C. CODE §27A-202. So, anti-indemnity statutes that affect contracts related to construction are the rule in almost every state.

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

Reviewing the anti-indemnity provisions of Chapter 151, 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 TAIA is clear, that is, to outlaw indemnity for an indemnitee's own negligence.

Section 151.101 states that Subchapter C, the TAIA, 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 ("CGL") 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 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, was 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.

The broad definition of construction contract has been interpreted according to its plain terms, confirming the broad scope of contracts and projects to which the Act applies. *See BNSF Ry. Co. v. Jones Lang Lasalle Americas, Inc.*, 2022 WL 562898, at *1, 4, 5 (N.D. Tex. Feb. 24, 2022) (Real Estate Management Services Agreement was a "maintenance" contract within plain terms of "construction contract" definition under New Mexico anti-indemnity statute (N.M. STAT. ANN. §56-7-1) and TEX. INS. CODE §151.001(5); under agreement, indemnitor agreed to provide "variety of real estate maintenance services" and property management services at BNSF facilities, which "range[d] from lighting and electrical maintenance to building and yard upkeep"). 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 TAIA 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 TAIA 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 TAIA 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. (emphasis added).

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 should be possible to obtain indemnification and additional insured coverage at least to the extent of the indemnitor's own negligence under the TAIA. Texas case law in the construction context is in accord that the words ***"to the extent"*** reflect a limited or comparative form indemnity only for the indemnitor's own negligence. *See, e.g., Tri- State Ins. Co. v. Rogers-O'Brien Constr. Co.*, 1997 WL 211534 (Tex. App.—Dallas Apr. 30, 1997, writ denied). Therefore, giving this phrase effect, the TAIA should only limit the scope of an indemnity or additional insured provision to bring it in compliance with the TAIA; it should not wipe the provision out completely. *See BNSF Ry. Co. v. Jones Lang Lasalle Americas, Inc.*, 2022 WL 562898, at *3, 5 (N.D. Tex. Feb. 24, 2022) (indicating that under the TAIA, indemnitor would not be required to indemnify indemnitee for indemnitee's own negligence pursuant to general indemnity provision in a maintenance contract, apparently giving effect to the "to the extent" language because the indemnity provision, as written, included indemnity for indemnitee's negligence). However, as discussed in more detail in Section F.2 below, at least two courts have not given this phrase effect and, instead, have found that a non-compliant indemnity provision negates an additional insured carrier's duty to defend.

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 TAIA, a savings clause in the construction contract or subcontract may advance the argument as to enforceability to the extent permitted under the TAIA, allowing the court to disregard the offending clause requiring impermissible indemnity, leaving intact the rest of the indemnity provision. *See United States of Am. for the Use & Benefit of EJ Smith Constr. Co. v. Travelers Cas. & Surety Co.*, 2015 WL 12734070, at *3 (W.D. Tex. June 25, 2015).[3] However, the U.S. District Court for the Eastern District of Texas recently rejected that argument in a coverage dispute between two insurers regarding the defense obligation owed by a lower tier excavator and its CGL insurer to the upper

[3] This case was ultimately reassigned to another judge in the Western District after the surety filed a motion to recuse, which was granted. *See United States of Am. for the Use & Benefit of E J Smith Constr., Co., LLC v. Travelers Cas. & Sur. Co.*, 2016 WL 1030154, at *2 (W.D. Tex. Mar. 10, 2016). After the reassignment, the parties were invited 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. *See id.* at *3. On reconsideration, the court determined that the TAIA did not apply, so the court did not reach the surety's argument that the TAIA invalidated the indemnity provision in the Original Contract despite the presence of the savings clause. *See id.* at *3 n.3. The March 10, 2016 opinion is discussed further in Sections J and O.2 below.

tiers arising out of an underlying property damage lawsuit filed by a third party property owner related to the construction project. *See Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4728913, at *7 n.6 (E.D. Tex. Sept. 9, 2024) *report and recommendation adopted by* 2024 WL 4433070 (E.D. Tex. Oct. 7, 2024).[4]

Due to the lack of clarity in the case law regarding the effect of the "to the extent language" in the TAIA and regarding the effect of a savings clause in the construction contract, it is a better practice to draft indemnity and additional insured specification provisions that clearly comply with the TAIA and include their own savings clauses, in addition to a general savings clause in the contract. Model indemnity and additional insured specification provisions are provided in Sections K and L.

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 TAIA voided "the indemnity provision only to the extent it require[d] indemnification for Union Pacific's own negligence." 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 TAIA 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 TAIA negated the indemnitor's indemnity obligations, the implication of the court's analysis was 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 TAIA.

[4] *Allied World v. Acadia* is discussed in more detail in Section F.2 below.

This is supported by the Texas Supreme Court's explanation of permissible indemnity under the TAIA, which makes it clear that the TAIA does not prohibit a party from providing contractual indemnity for its own negligence with this explanation:

> In other words, section 151.102 does not prevent Entity A from providing . . . indemnification against the consequences of the negligence of Entity A, Entity A's agents, or Entity A's employees—to Entity B.

See Maxim Crane Works, L.P. v. Zurich American Ins. Co., 642 S.W.3d 551, 556 (Tex. 2022).

This is what occurred in *Southwest Electrical Contracting Services, Ltd. v. Industrial Accessories Co.*, 2022 WL 1468384 (W.D. Tex. May 10, 2022). There, the court determined that a $2,000,000.00 credit memo issued against the general contractor/indemnitee's final billing to the project owner for work on two frac sand plant construction projects solely involved the electrical subcontractor/indemnitor's deficient work under the subcontracts. Therefore, the general contractor was not seeking indemnity from the electrical subcontractor for the consequences of the general contractor's own fault, and the indemnity provision was enforceable under the TAIA to the extent of subcontractor/indemnitor's own negligence. *Id.* at *38 & n.26.

Of course, downstream indemnitors have viewed §151.102 to be the primary operative provision of the TAIA, and it is obvious that it is. As the *Union Pacific* case demonstrates, the TAIA 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 TAIA'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 against claims caused by 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. *See id.* If the general contractor qualifies as an additional insured, then the second inquiry generally involves an analysis of the pleadings and the policy under the eight-corners rule to determine whether the additional insured carrier has duty to defend under Texas law. *See Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 201 (Tex. 2022) (eight-corners rule "remains the initial inquiry to be used to determine whether a duty to defend exists, and it will resolve coverage determinations in most cases" (internal citations omitted)).

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 is more complicated in light of the TAIA'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 TAIA only prohibits additional insured coverage "to the extent" that it is required for an indemnitee's own negligence or breach of contract, the TAIA 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 TAIA 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 TAIA, many insurers will decline 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 TAIA 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 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 TAIA. 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 should not excuse the additional insured carrier from defending the additional insured completely. Rather, the obligation of the additional insurer should still apply 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 TAIA's prohibitions and Texas law on the duty to defend can be harmonized by treating the TAIA'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.[5] 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."

It has been a mixed bag as to how these arguments have played out in litigation. The primary instruction from the Texas Supreme Court is that under TEX. INS. CODE §151.102, the proper inquiry is to be pleadings-based:

> But we do not understand section 151.102 to ask who is truly at fault for the injuries complained of. Instead, it asks only whether the "claim" for which indemnity is sought was "caused by" the fault or breach of contract of the indemnitee. *See Union Pac. R.R. v. Brown*, No. 04-17-00788-CV, 2018 WL 6624507, at *5 (Tex. App.—San Antonio Dec. 19, 2018, no pet.) (requiring the indemnitee to identify pleadings alleging its liability for the fault of the indemnitor).

Signature Indus. Services, LLC v. Int'l Paper Co., 638 S.W.3d 179, 196 (Tex. 2022). However, there is still no definitive answer as to whether an additional insured carrier must provide a complete defense. To date, the U.S. District Courts for the Northern and Southern Districts of Texas have upheld an additional insured carrier's duty to provide a complete defense. *See Phoenix Ins. Co. v. Knife River Corp. S.*, 2023 WL 5846803 (S.D. Tex. Sept. 11, 2023); *Knife River Corp. – South v. Zurich Am. Ins. Co.*, 2022 WL 686625 (N.D. Tex. Mar. 8, 2022); *BNSF Ry. Co. v. Jones Lang Lasalle Americas, Inc.*, 2022 WL 562898 (N.D. Tex. Feb. 24, 2022). On the other hand, the U.S. District Courts for the Eastern District of Texas and the Western District of Arkansas have found that the TAIA negated the additional insured carrier's duty to defend. *See Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4728913 (E.D. Tex. Sept. 9, 2024) *report and recommendation adopted by* 2024 WL 4433070 (E.D. Tex. Oct. 7, 2024); *Cont'l Ins. Co. v. Cincinnati Ins. Co.*, 2023 WL 7199268 (W.D. Ark. Nov. 1, 2023). Each of these cases is discussed in more detail below. There are no reported state court decisions.

1. Cases Upholding the Duty to Defend under the TAIA

***Phoenix Ins. Co. v. Knife River Corp. S.*, 2023 WL 5846803 (S.D. Tex. Sept. 11, 2023).**
The Southern District of Texas upheld an additional insured carrier's duty to provide a complete defense for Knife River Corp. South (KRC) in the underlying personal injury litigation arising out of a project on which KRC served as the general contractor. In doing so, the court determined that (1) the subcontract did not violate the TAIA because the "plain language of the Subcontract

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

indicates that Phoenix [the additional insured carrier] is required to defend Knife River as an additional insured only where PMI [the subcontractor] is allegedly at fault, not where Knife River is at fault"; and (2) the underlying lawsuit triggered the additional insured carrier's duty to defend because the underlying petition alleged that the injury was caused in part by the subcontractor's acts. *See id.* at *2-3.

***Knife River Corp. – South v. Zurich American Ins. Co.*, 2022 WL 686625 (N.D. Tex. Mar. 8, 2022).** A driver and his wife sued the general contractor Knife River Corp.-South (KRC), the subcontractor for signage work (AWP), and the subcontractor for milling operations on a highway construction project following a single car accident in the construction zone of the project in which the driver sustained serious injuries. *See id.* at *1. KRC eventually settled the underlying lawsuit and sued AWP's CGL and excess insurers for breach of contract and for a declaratory judgment that (a) the CGL insurer had a duty to defend and indemnify KRC as an additional insured or pursuant to AWP's contractual indemnity obligations and (b) the excess policy also provided coverage to KRC. *See id.* The additional insured carriers moved to dismiss[6] KRC's declaratory judgment claims regarding their duty to defend and indemnify based on the TAIA, arguing that KRC sought reimbursement from the additional insured carriers for its own negligence not the negligence of the signage subcontractor, AWP. *See id.*

The court found that the TAIA did not bar KRC's claims, both with respect to the additional insured carriers' duty to indemnify KRC for the underlying settlement and with respect to the primary CGL carrier's duty to defend. *See id.* at *8. In reaching this conclusion, the court relied on the following allegation from the underlying petition:

> Defendants are jointly and severally responsible for the acts and/or omissions of [their] respective agents, employees, servants, ostensible agents, and/or representatives through the theories of employment, agency, respondeat superior, ostensible agency, apparent agency, actual agency, and/or other agency and/or vicarious responsibility principles.

See id. at *8. The court also pointed out that the CGL policy provided indemnity to an additional insured "to the extent permitted by law" and stated that "that coverage or indemnification is available only to the extent the claimed bodily injury results from AWP's [the named insured subcontractor]—not KRC's—negligence." *See id.* It should be noted that the language of the additional insured endorsement quoted earlier in the court's opinion was not as limited as the court indicated; instead, the endorsement contained standard ISO language providing additional insured coverage to KRC "only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by" AWP's acts or omissions. *See id.* at *5. Nevertheless, the court found that policy provisions complied with the TAIA, and that if KRC's pleadings were taken as true, KRC had "plausibly alleged that AWP's acts or omissions in placing signs in KRC's construction zone potentially caused—in whole or in part—the underlying accident and that KRC was potentially liable for such acts." *See id.* at *9. Therefore, the court declined to dismiss KRC's claims regarding the settlement based on the TAIA. Relying on the same allegations in the underlying petition set out above, together with underlying allegations that "Defendants" (which included KRC and subcontractor

[6] The court considered the insurers' motion under Rule 12(c) because they filed it as a FED. R. CIV. P. 12(b)(6) motion after they had answered. *See id.* at *1 n.2.

AWP) "were responsible for the allegedly hazardous sign placement in KRC's construction zone," the court determined that the underlying petition "arguably allege[d] that KRC was liable for AWP's negligent acts, within KRC's construction zone, under a theory of ostensible agency." The court also recognized that KRC's complaint against the additional insured carriers alleged that it was "the sign-related allegations in the underlying petition that potentially trigger[ed] Zurich's duty to defend," citing to *Union Pac. R.R. Co. v. Brown*, 2018 WL 6624507,[7] for comparison since the *Union Pacific* court upheld summary judgment based on the TAIA where the indemnitee did not identify a pleading asserting that it was liable for another parties' negligence. *See id.* at *9. Therefore, the court declined to dismiss KRC's claims regarding the additional insured CGL carrier's duty to defend KRC. *See id.* at *10.

***BNSF Ry. Co. v. Jones Lang Lasalle Americas, Inc.*, 2022 WL 562898 (N.D. Tex. Feb. 24, 2022).** The Northern District reached a similar conclusion as to the duty to defend under the TAIA in *BNSF Ry. Co.* There, 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. *See id.* at *1-2. The indemnity provision applied even if BNSF's negligence contributed to the injury. *See id.* at *1. A BNSF switchman was injured when he was struck by a train, and he sued multiple parties, including BNSF and JLL. *See id.* at *1. JLL moved for summary judgment on all of BNSF's claims.

Among other things, JLL argued that it did not breach its duty to indemnify BNSF under the contractual indemnity provision because it was not required to indemnify BNSF for BNSF's own negligence. *See id.* at *3-5. The parties raised choice of law issues regarding the indemnity provision, but the court found that the result would be the same under New Mexico law, including New Mexico's anti-indemnity statute, so the court applied Texas law. *See id.* at *3-5. In doing so, the court recognized that if it applied the general indemnity provision (which included indemnity for BNSF's negligence) subject to Texas law, including the TAIA, JLL would not be required to indemnify BNSF for BNSF's own negligence. *See id.* at *3. Because the general indemnity provision as written included indemnity for BNSF's negligence, the court appeared to give effect to the "to the extent" language in §151.102 of the TAIA. *See id.* at *5.

JLL also argued that it had no duty to defend BNSF because another party (the electrical contractor) was defending BNSF, and JLL contended that if it did have to defend BNSF, it was required to do so only for claims arising from JLL's negligence. *See id.* at *6-7. The court rejected JLL's arguments regarding its duty to defend. 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. Since JLL's alleged negligence was a covered claim, JLL had to defend the entire lawsuit. *See id.* at *6-7.

These three decisions weigh in favor of indemnitees and the continued duty by CGL insurers to provide a complete defense to their additional insureds if the indemnity provision complies with the TAIA and the pleadings allege negligence on the part of the indemnitor. In other

[7] *Union Pacific* is discussed in Section E above.

words, the TAIA should not void all defense obligations if a prohibited claim is mixed with allowable claims.

2. Cases Denying a Defense Based on the TAIA

In contrast, the following two decisions favor additional insured carriers because the underlying allegations of negligence against the indemnitees/additional insureds negated the additional insured carriers' duty to defend due to the prohibitions under §151.102 and §151.104 of the TAIA. In denying the duty to defend, the courts did not give effect to the "to the extent" language in the TAIA and essentially turned an insurer's duty to provide a complete defense on its head.

***Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4728913 (E.D. Tex. Sept. 9, 2024) *report and recommendation adopted by* 2024 WL 4433070 (E.D. Tex. Oct. 7, 2024).** This coverage dispute arose out of the construction of the Lower Bois D'Arc Creek Reservoir Dam and Intake Project in Fannin County, Texas. The project owner, a municipal water district, entered into a prime contract with Archer Western to serve as the construction manager for the project. Archer subcontracted with Phillips and Jordan (P&J) to construct the dam, intake tower, and service spillway and perform reservoir clearing of the site for the project (the "Archer-P&J subcontract"). Archer entered into a separate subcontract with an excavator pursuant to which the excavator agreed to clear the dam footprint and name Archer and the water district as additional insureds on its CGL insurance (the "Archer-excavator subcontract"). P&J also entered into a sub-subcontract with that same excavator under which the excavator agreed to perform excavation and erosion control work and to name P&J, Archer, and the water district as additional insureds on the excavator's CGL insurance ("P&J sub-subcontract").

The owners of a downstream ranch sued the water district, Archer, P&J, and the excavator after heavy rains allegedly caused a portion of their ranch to flood. The ranch owners alleged that the defendants' failure to properly control floodwaters in connection with the project caused the damage to their property. *Id.* The water district, Archer, and P&J tendered the lawsuit to P&J's insurer, Allied World, and to the excavator's insurer, Acadia. *See id.* at *2. Allied World agreed to defend the water district, Archer, and P&J. Acadia did not. So, Allied World sued Acadia to recover the defense costs it paid. The insurers filed cross motions for summary judgment, which were referred to the United States Magistrate Judge. *See Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4433070, at *1 (E.D. Tex. Oct. 7, 2024).

In the Magistrate Judge's Report and Recommendation, the court first determined that the water district, Archer, and P&J were additional insureds under the excavator's policy. *Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4728913, at *4. Then the court analyzed whether the TAIA negated Acadia's duty to defend additional insureds in the underlying lawsuit under the excavator's policy. In its analysis of the TAIA, the court interpreted §151.102 to void the parties' contractual "additional insured provisions to the extent that the indemnity provisions require Acadia to provide coverage for a claim caused by P&J, Archer, or the Water District's 'negligence[.]'" *Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4728913, at *5. In that regard, the contractual indemnity provisions, by their terms, did not comply with §151.102. The indemnity provision in the Archer-excavator subcontract stated that the excavator's duty to defend and indemnify "shall apply regardless of any allegations of active and/or passive

negligent acts or omissions of an Indemnified Party." *See id.* at *6 (emphasis omitted). According to the court, this language "plainly aims to require Acadia, as Hammett's insurer, to defend P&J, Archer, and the Water District against their own negligence," so "the provision naming P&J, Archer, and the Water District as additional insureds is void." *See id.* As to the P&J sub-subcontract, Allied World acknowledged that the indemnity provision included "the active or passive negligence or other fault of [an indemnitee]" but noted the indemnity obligation did not include the indemnitee's sole negligence. The court found that, because insurers have a duty to provide a complete defense for both covered and uncovered claims, Acadia could still be required to defend "P&J, Archer, or the Water District for their contribution to the resulting damage." *See id.*

Allied World also argued that the indemnity provisions in the Archer-excavator subcontract and the P&J sub-subcontract had savings clauses stating that "the indemnification provisions apply only 'to the fullest extent permitted by law,'" so the indemnity provisions could be enforced to the extent of the excavator's negligence and to the extent they required insurance coverage for that obligation. *See id.* at *7 n.6. The court found that the "purported savings clause does not obligate Acadia to provide a defense" because the additional insured provisions were void under the TAIA.

In addition, the Acadia additional insured endorsement contained standard ISO language providing additional coverage for "liability for . . . 'property damage' . . . caused, in whole or in part, by" the excavator's acts or omissions "in the performance of [the excavator's] ongoing operations for the additional insured." *See id.* at *7. The court found that because the endorsement "extend[ed] to claims involving the fault or negligence of P&J, Archer, and the Water District," the additional insured coverage was void under the TAIA. *See id.* It should be noted that the endorsement language quoted by the court did not include a savings clause.

With respect to its analysis of the allegations in the underlying petition, the Eastern District indicated that any allegation as to one potentially uncovered claim apparently negates the entire duty to defend. Specifically, the Eastern District indicated that the alternative allegations of negligence against the additional insureds/indemnitees negated Acadia's duty to defend any of them, even though there were also allegations regarding the named insured excavator's own negligence and allegations regarding the additional insureds' vicarious liability for the excavator's acts or omissions. *See id.* at *8-9. In other words, the underlying plaintiffs "alleged that P&J, Archer, and the Water District were independently liable or liable in the alternative to [the excavator]," so the additional insured provisions were void to the extent they required Acadia to defend P&J, Archer, and the water district against their own negligence. *See id.* at *9.

The court also found that the "public works" exception to the TAIA under §151.105(10)(B) did not apply because the water district is not a municipality as discussed below in Section J. *See id.* at *10.

Unfortunately, the court's analysis undermines several arguments that general contractors often make when attempting to obtain a defense and indemnity as additional insureds under their subcontractors' CGL policies for claims that are subject to §151.102 and §151.104, including arguments concerning the effect of a savings clause and concerning an insurer's duty to provide a complete defense. In that regard, under the court's rationale, the existence of one potentially covered claim no longer triggers the duty to defend, let alone the duty to provide a complete

defense, if there is also at least one allegation of an uncovered claim. As discussed above, this interpretation is not supported by the language of the statute, and it renders the savings provisions in policies and in contracts meaningless.

***Continental Ins. Co. v. Cincinnati Ins. Co.*, 2023 WL 7199268 (W.D. Ark. Nov. 1, 2023).** This case arose out of underlying construction defect litigation concerning the alleged defective construction of a student-housing apartment building. The general contractor's insurer, Continental, defended the general contractor in the underlying litigation and filed the coverage action against seven additional insured carriers seeking a declaratory judgment that each of them owed the general contractor a defense and seeking reimbursement of the defense costs it had paid. HDI, an insurer of one of the subcontractors and a defendant in the coverage action, moved to dismiss Continental's claims under FED. R. CIV. P. 12(c), arguing that Texas law governed the HDI policy and the TAIA "prohibit[ed] enforcement of the policy provisions that Continental [was] invoking." *See id.* at *1-2. The indemnity provision in the relevant subcontract required indemnity for claims arising from the general contractor's concurrent negligence, but not its sole negligence or willful misconduct. *See id.* at *2. The additional insured provision in the subcontract required the additional insured coverage to be primary and non-contributory to the general contractor's own insurance and required the subcontractor's policy to provide that the insurer would defend any suit against the general contractor.

HDI contended, and the court agreed, that the TAIA would invalidate the indemnity provision in the subcontract. *See id.* at *3. In addition, because the named insured subcontractor was a Texas company and the HDI policy was issued in Texas, the court determined that Texas law governed the HDI policy. The court, relying on §151.102 and §151.104, stated that "under Texas law, the Policy is unenforceable to the extent it provides additional insured coverage to [the general contractor], or otherwise requires HDI to indemnify [the general contractor], for [the general contractor's] own negligence or fault." *See id.* at *4. The court granted HDI's motion to dismiss and dismissed Continental's claims against HDI without prejudice. *See id.* at *5.

The court's broad statements about how the TAIA negates additional insured coverage are problematic and will likely provide ammunition for additional insured carriers to deny coverage to additional insureds/indemnitees. However, this case should be easy to distinguish because the court's analysis and application of the TAIA is cursory at best, omitting (a) a detailed discussion of the allegations in the project owner's pleadings, and (b) any discussion at all as to the actual terms of the subcontractor's policy. An examination of the pleadings and the policy language are an essential part of any evaluation as to how the TAIA affects an additional insured carrier's duty to defend.

3. A Potential Path Forward and Related Defense Issues

Given this conflicting case law, 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 TAIA

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 TAIA has continued to muddy the waters as to the "complete" defense obligation under Texas law. So, until the Texas Supreme Court provides some definitive guidance as to how the TAIA affects an additional insured carrier's duty to defend, each side is left to make its own arguments based on the conflicting federal district court opinions above in the hopes of persuading the other.

G. Employee Injury 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 workers' compensation exclusive remedy (the "comp bar"), the injured party in a third party over action will frequently omit any allegation of wrong-doing against the employer, who may, in actuality, be substantially or even primarily responsible for the 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 comp bar protection from common law actions. The establishment of a statutory employer framework for Texas construction projects should be a creature of the Texas Workers Compensation Act

("TWCA"), but to date, Texas has not enacted such legislation.[8] 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 demonstrated by the *Maxim Crane* case discussed below, protection from third party over actions under the Employee Injury Exception is incomplete.

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 TAIA. 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 TAIA to limit their indemnity obligation 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, that does not appear to be the case thus far with the Employee Injury Exception in §151.103. After thirteen years, it appears that only a single case has addressed the exception, *Maxim Crane Works, L.P. v. Zurich American Ins. Co.*, 642 S.W.3d 551 (Tex. 2022), and the primary takeaway from that case is that the term "employee" within the Employee Injury Exception in §151.103 will be construed according to its plain and ordinary meaning.

Unfortunately, the facts of *Maxim Crane* are complex, and these facts and the contractual relationships between the parties do not present the typical third party over action contemplated by the Employee Injury Exception. In *Maxim Crane*, Skanska was the general contractor for an office campus construction project in Houston in 2013 and hired Berkel as a subcontractor. *See id.* at 553. Skanska provided a CCIP that included workers compensation coverage in which Berkel enrolled. *See id.* Berkel also had a separate CGL policy with Zurich. 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. *See id.* Maxim also had its own separate CGL policy and was not enrolled in the CCIP. *See id.* at 554.

[8] Having said that, there is a limited framework when a construction project is insured under a CIP that provides workers compensation coverage. Under the TWCA, if the general contractor and a subcontractor "enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor," the general contractor becomes the statutory employer of the subcontractor and the subcontractor's employees, so that the general contractor is entitled to the comp bar if the subcontractor's employees sustain worksite injuries. *See* TEX. LAB. CODE § 406.123(a), (e); *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 642 S.W.3d 551, 558 (Tex. 2022). The workers comp coverage is typically provided to the subcontractors in a CIP. It should be noted that Texas courts, interpreting §406.123, have extended the comp bar throughout all tiers of contractors enrolled in a CIP. A discussion as to those cases is outside the scope of this paper.

The coverage suit arose after a Berkel employee overloaded a Maxim crane, causing it to fall over onto a Skanska employee, whose leg was amputated. *See id.* The Skanska employee received workers compensation benefits through Skanska's CCIP and then sued Berkel, Maxim, and other defendants. The Skanska employee obtained a large verdict at trial, which was overturned on appeal on the basis that the comp bar barred the employee's negligence claims against Berkel because the Skanska employee and Berkel were statutory co-employees, and the common law intentional-injury exception to the TWCA did not apply. *See Berkel & Co. Contractors, Inc. v. Lee*, 612 S.W.3d 280, 283 n.7, 284, 289 (Tex. 2020).[9] Because Maxim was not enrolled in the CIP, it was not entitled to the same comp bar protection and sought indemnification from Berkel's insurer, Zurich, after settling the claims.

The coverage suit between Maxim and Zurich (Maxim's purported additional insured carrier/Berkel's CGL insurer) turned on the applicability of the Employee Injury Exception under §151.103. So, in a certified question, the Fifth Circuit asked the Texas Supreme Court whether §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 indemnitor are deemed 'co-employees' for purposes of the TWCA." *See Maxim Crane Works, L.P.*, 642 S.W.3d at 552-53 (cleaned up). The court answered no, rejecting Maxim's argument that the meaning of the term "employee" under the TWCA should be applied to §151.103 of the TAIA. The court noted that while the term "employee" is not defined in the TAIA, nothing in either the TWCA or the TAIA supported Maxim's argument. *See id.* at 557-59. Instead, language from both statutes indicated that the statutes should be construed separately. *See id.* at 559. For instance, §406.123(e) of the TWCA states that the deemed employee status under that section is "only for purposes of the workers' compensation laws of this state." And §151.105(5) of the TAIA "clarifies that it 'does not affect . . . the benefits and protections under the workers compensation laws of this state.'" *See id.* Therefore, the court held that "the word 'employee' in section 151.103 of the TAIA bears its common, ordinary meaning, which is not affected by whether the indemnitor and injured employee are considered co-employees for purposes of the TWCA." *See id.* at 558-60. So, even though the Employee Injury Exception ordinarily preserves the right of indemnification for parties who are not entitled to comp bar protection against "employers" who are, the *Maxim Crane* case demonstrates one factual scenario where that protection from third party over actions is undermined.

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 narrower, 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

[9] The Texas Supreme Court noted that the "court of appeals held that Berkel was Lee's co-employer and thus Lee's injury claim fell within the exclusive-remedy provision of the Act," and that the Lees did not challenge that aspect of the court of appeal's holding. *Berkel*, 612 S.W.3d at 284. However, this appears to be a typo as the court of appeals determined that under the TWCA, Lee was "Berkel's statutory co-employee." *See Berkel & Co. Contractors, Inc. v. Lee*, 543 S.W.3d 288, 296 (Tex. App.—Houston [14th Dist.] 2018).

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.

The indemnitor's insurers frequently share this opposition to indemnity for the indemnitee's own negligence. As a result, it is not unusual for the CGL policies of downstream indemnitors to contain manuscript endorsements that are aimed at eliminating CGL coverage for third party over actions.[10] This may be accomplished through endorsements that exclude coverage for independent contractors' bodily injuries or that modify the Employer's Liability Exclusion to apply to additional insureds and/or more categories of workers and/or to eliminate the "insured contract" exception to the Employer's Liability Exclusion.

Because of the reluctance of indemnitors and their insurers to provide indemnification for the indemnitee's own negligence, protecting against third party over actions remains one of the major issues for Texas construction practitioners under the TAIA.

H. Ongoing Applicability of the Fair Notice Requirements

As mentioned above, prior to the enactment of the TAIA, Texas courts 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, i.e., the express negligence doctrine and the conspicuousness requirement.

Since the TAIA allows broad indemnification for the indemnitee's own negligence as to employee injuries, there is an argument that such a provision needs to satisfy the fair notice requirements under Texas law. However, Texas case law on the issue is unclear, and the language of the TAIA itself indicates that it should supersede the common law fair notice requirements for all prime construction contracts entered into after January 1, 2012 (the effective date of the TAIA), so that the fair notice requirements are no longer controlling law for construction contracts falling within the scope of the TAIA. Specifically, the uncodified text of Section 3(b) of the final, enrolled version of House Bill 2093, as signed by the governor, which contains the TAIA, states as follows:

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

[10] The standard CGL policy excludes coverage for an employee's bodily injury claims via the Employer's Liability Exclusion. However, that exclusion applies only if the injured employee is an "employee" of "the insured," i.e., the insured seeking coverage. And the exclusion has an insured contract exception that applies to indemnity provisions. As a result, the standard CGL policy does not exclude coverage for third party over actions.

> subcontract, purchase order contract, personal property lease agreement, and insurance policy ***are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.***

See Act of May 29, 2011, 82d Leg., R.S., ch. 1292, § 3(b), 2011 Tex. Gen. Laws 3612, 3614 (H.B. 2093) (emphasis added); *see also United States of Am. for the Use & Benefit of E J Smith Constr., Co., LLC v. Travelers Cas. & Sur. Co.*, 2016 WL 1030154 (W.D. Tex. Mar. 10, 2016) (quoting §3(b), stating that the language of §3(b) is found in "the final, enrolled version [of House Bill 2093], as signed by the governor," and recognizing that "[u]ncodified session law is law nonetheless"). As emphasized above, §3(b) of House Bill 2093 indicates that the TAIA has replaced the common law fair notice requirements, i.e., the "law in effect immediately before" the TAIA's effective date of January 1, 2012. As a result, the fair notice requirements should govern only when the prime contract pre-dates January 1, 2012. That is the conclusion reached by the Western Distict of Texas for a September 2010 prime construction contract between the U.S. Army Corps of Engineers (the project owner) and a joint venture (the general contractor) for the construction of a new medical center at Fort Hood, Texas:

> The Court concludes that the Texas Anti-Indemnity Statute does not govern the Indemnification Agreement. Rather, the Indemnification Agreement is subject to ***the common law fair notice requirements which were controlling prior to the Texas Anti-Indemnity Statute's enactment***. Accordingly, the Court now asks whether the Indemnification Agreement is enforceable under the common law fair notice requirements.

See E J Smith Constr., 2016 WL 1030154 at *4-6.

In addition, there is a difference in the language used in the exclusions to the TAIA set out in §151.105 (discussed below) versus the Employee Injury Exception in §151.103 of the TAIA. For instance, §151.105 states that Subchapter C of Chapter 151 of the Texas Insurance Code "***does not affect***" any of the categories of contracts listed in §151.105, so those categories of contracts are outside the scope of the TAIA entirely. *See* TEX. INS. CODE §151.105 (emphasis added). In contrast, §151.103 states that "[§]151.102 does not apply to" the bodily injury claims of a subcontractor's employees. In other words, the TAIA still applies to the construction contract generally under §151.101, but the prohibitions on indemnity in §151.102 specifically do not apply to subcontractor employee injury claims. Moreover, the authors are not aware of any TAIA cases that have applied the fair notice requirements in addition to the requirements under the TAIA.

As to a more general indemnity clause that complies with the TAIA, requiring indemnity only to the extent of the indemnitor's own negligence, it can be argued that the fair notice requirements should 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. For example, in *DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880, 885 (Tex. App.—Houston [14th Dist.] 2001, no pet.), the court determined that "the express negligence component of the fair notice requirements does not apply where an indemnitee is seeking indemnification from claims not based on the negligence of the indemnitee." In other words, the fair notice requirements apply only where

the indemnitee is seeking indemnification based on its own negligence. If the indemnitee is not seeking indemnity for its own negligence, then it should be able to provide evidence as to the indemnitor's negligence. *See, e.g., Southwest Electrical Contracting Services, Ltd. v. Industrial Accessories Co.*, 2022 WL 1468384 (W.D. Tex. May 10, 2022) (discussed in Section E above).

However, a recent opinion from the Beaumont Court of Appeals reached a different conclusion, finding that a limited form indemnity provision violated the express negligence doctrine, even though the indemnitee argued that it was seeking indemnity for the indemnitor's negligence. *See S&B Engineers & Constructors, Ltd. v. Scallon Controls, Inc.*, 2024 WL 2340790, at *1 (Tex. App.—Beaumont May 23, 2024, pet. filed). This case has been appealed to the Texas Supreme Court. *See S&B Engineers & Constructors, Ltd. & Zurich Am. Ins. Co. v. Scallon Controls, Inc.*, No. 24-0525 (Tex. filed July 1, 2024).

In *S&B Engineers & Constructors, Ltd. v. Scallon Controls, Inc.*, S&B Engineers & Constructors (S&B) contracted with Sunoco to work on a Fire Suppression System at a Sunoco Logistics Terminal. S&B purchased equipment for the project from a subcontractor, Scallon, which it subsequently subcontracted with to perform Programmable Logic Controller Technical Services, including configuring inputs and outputs of the Fire Suppression System. *See* 2024 WL 2340790, at *1-4. The purchase order and subcontract each had an indemnity provision requiring the subcontractor to defend and indemnify the general contractor for bodily injury claims, among other types of claims, to the extent caused by the subcontractor's negligence. *See id.* at *3-4. During the project, the Fire Suppression System was allegedly activated, causing an explosion and the release of a fire suppressant chemical. *See id.* at *1. Following the explosion, employees of another contractor at the plant filed a personal injury lawsuit against the plant owner and S&B alleging that they were injured while trying to leave their work area following the explosion and chemical release. *See id.*

S&B asserted third-party indemnity and contribution claims against its subcontractor, alleging that the subcontractor's negligent performance of work, particularly its alleged configuration of the fire safety system as "fail-safe," instead of "non-fail-safe" or "de-energized," proximately caused the chemical release that resulted in the explosion and the plaintiffs' injuries. *See id.* at *2, 5-6. The owner asserted similar third-party claims against the subcontractor, but they were later nonsuited after the owner and S&B settled with the plaintiffs. *Id.* at *3.

In summary judgment briefing, the subcontractor argued, among other things, that "there is no enforceable indemnity agreement, and the express negligence rule precludes S&B and Sunoco from recovering from Scallon." *Id.* at *6. In particular, the subcontractor argued that the owner and S&B were seeking reimbursement for funds paid to settle the plaintiffs' negligence claims against S&B and the owner so that S&B and the owner were seeking indemnity from the subcontractor for their own negligence, which was impermissible under the express negligence doctrine. *See id.* at *6-7. The subcontractor emphasized that the injured plaintiffs only sued the owner and S&B and that both parties voluntarily entered into the settlement agreement with the plaintiffs. *Id.* at 9. S&B disagreed, relying on the terms of the subcontract and purchase order as well as deposition testimony from both its own representatives and representatives of the subcontractor to show that the subcontractor's negligence caused the plaintiffs' injuries and ultimately led to the settlement. *See id.* at *5-6, 8-9. Therefore, S&B argued that it was seeking

indemnity for the subcontractor's negligence, not its own negligence, so the express negligence doctrine did not apply. *See id.* at *8. The trial court granted summary judgment in favor of the subcontractor, and S&B appealed, contending that "the trial court erred in granting summary judgment for [the subcontractor] based on the express negligence rule because that rule does not apply to [the subcontractor's] obligations under the . . . Purchase Order, and because the Terms and Conditions obligate [the subcontractor] to indemnify S&B for [the subcontractor's] own fault." *See id.* at *12-13.

In analyzing that issue, the Beaumont Court of Appeals stated that "the indemnity language fails to specify that [the subcontractor] will indemnify S&B for S&B own negligence" and concluded that S&B's claim was barred by the express negligence doctrine. *See id.* at *16. In reaching this conclusion, the court did not address S&B's summary judgment evidence supporting its claim for indemnity. Instead, the court focused on the pleadings in which the plaintiffs sued only the owner and S&B, explaining that S&B could not seek indemnity from the subcontractor for the settlement because (a) the settled claims were "claims against S&B for negligence"; (b) the plaintiffs did not assert negligence claims against the subcontractor; and (c) the subcontract and the purchase order did not expressly require the subcontractor to indemnify S&B for S&B's own negligence. *See id.* The court, relying on *Gilbane Building Co. v. Keystone Structural Concrete, Ltd.*, 263 S.W.3d 291, 298 (Tex. App.—Houston [1st Dist.] 2007, no pet.),[11] noted that "the policy underlying the express negligence rule is to prevent post-settlement 'satellite litigation' about who caused the plaintiff's injury." *Id.*

Although this case was not a TAIA case, the court's decision could have implications in the TAIA-context because of how the court essentially prevented the general contractor from enforcing a limited form indemnity provision for the underlying settlement, which implicates the duty to indemnify (not the duty to defend), because the allegations in a third party's pleadings against the general contractor did not include allegations against the subcontractor. In those circumstances, an indemnitee should be allowed to enforce the indemnity provision to the extent of the subcontractor's negligence, as in *Southwest Electrical Contracting Services, Ltd. v. Industrial Accessories Co.*, 2022 WL 1468384 (W.D. Tex. May 10, 2022) discussed above.

Good practice would dictate that even if 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 conspicuousness requirement, i.e., including the clause in capital, or bold, etc. letter type. This is especially true if the contract includes a broad indemnity clause for employee injuries.

The uncertainty concerning the ongoing applicability of the common law fair notice requirements to construction contracts presents challenges for the drafter of an indemnity clause that is intended not only to satisfy the general provisions of the TAIA, i.e., limiting that indemnity to the extent of the indemnitor's own negligence or fault, but also to take advantage of the broad

[11] In *Gilbane*, after the court found that the contractual indemnity provision did not satisfy the express negligence doctrine, it stated: "To allow [the indemnitee] to litigate the question of who caused [the plaintiff's] injuries post-settlement and without a valid indemnity agreement 'retards rather than advances the policy of preventing satellite litigation regarding interpretation of indemnity contracts.'" 263 S.W.3d at 298.

indemnity allowed for injury to the indemnitor's employees. This has led many indemnitees to resort to a "bifurcated" indemnity clause in an effort to comply with the fair notice requirements, particularly as to the exception for employee injuries.

I. CIP Exclusion from the TAIA Provisions

Section 151.105 of the TAIA 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 TAIA. 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.

J. Other Exclusions from the TAIA Provisions

Section 151.105 of the TAIA 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 TAIA 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 Anti-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." TEX. CIV. PRAC. & REM. CODE § 127.001(4). 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)***. Indemnity 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 TAIA 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 TAIA. 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-rule 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." TEX. GOV'T CODE § 29.001. 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 TAIA 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. In that regard, the United States District Court for the Eastern District of Texas has determined that this exclusion to the TAIA, which it described as the "public works exception," does not apply to a municipal water district because it "is a political subdivision of the state but is not itself a 'municipality.'" *See Allied World Assurance Co. (U.S.) Inc. v. Acadia Ins. Co.*, 2024 WL 4433070, at *3 (E.D. Tex. Oct. 7, 2024).

A 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 TAIA 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 TAIA 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 TAIA in the first place.

K. Drafting Hybrid or Bifurcated 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 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 OF ANY TIER, 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 AN EMPLOYEE OF CONTRACTOR, ITS AGENTS, OR ITS SUBCONTRACTORS OF ANY TIER. 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 authors have 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 TAIA, 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 contractor/subcontractor 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 CGL 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 they 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 the TAIA. 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. 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 01 and CG 20 37 10 01, but most likely CG 20 33 12 19 and CG 20 39 12 19 (blanket) or CG 20 10 12 19 and CG 20 37 12 19 (scheduled) 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[12] 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 07 04, the companion endorsement providing completed operations coverage.[13] 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, if 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 TAIA.

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

[12] "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 endorsements, such as CG 20 33 07 04, the "CG" indicates it is a CGL 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.

[13] 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.

do not appear to be standard ISO endorsements in wide circulation that address the prohibitions 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 insured carriers 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, which satisfied the "in whole or in part" requirement under CG 20 33 07 04. While the *Gilbane* court upheld a duty to indemnify, the rejection of a duty to defend is common based upon the workers compensation exclusive 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. <u>The 2013 ISO Revisions</u>

In April 2013, ISO promulgated new standard form additional insured endorsements, including endorsements for use in the construction industry. The primary endorsement is CG 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 paper.

However, the forms retain the "caused, in whole or in part, by" 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. <u>The 2019 Blanket Endorsements</u>

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. ISO also issued Endorsements CG 20 10 12 19 and CG 20 37 12 19 that provide additional insured coverage to the persons or organizations listed in the Schedule of the endorsement, which, in practice, often states "as required by written contract" or something along those lines. This essentially converts a scheduled additional insured endorsement into a blanket additional insured endorsement.

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.[14] 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

[14] 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.

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 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 are 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.[15]

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 TAIA 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

[15] 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.

original contract. For example, if an original contract for a large project was entered into on December 15, 2011, all subcontracts, purchase orders, and insurance policies, including those entered into after January 1, 2012, would 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.

Due to the 10-year statute of repose under TEX. CIV. PRAC. & REM. CODE § 16.009(a), which runs from the date of substantial completion, there should not be much new litigation arising out of pre-2012 original construction contracts.

Nevertheless, issues continue to arise concerning the TAIA's effective date. For instance, the authors have encountered questions regarding the TAIA's applicability when there is a pre-2012 master agreement between a project owner and the general contractor with a broad or intermediate form indemnity provision, but a purchase/work order for a new construction project is issued under that master agreement years after the TAIA's effective date. In other words, some project owners may be trying to tie a new construction project to an old master agreement in an apparent attempt to circumvent the TAIA's prohibitions on broad form and intermediate form indemnity in TEX. INS. CODE §151.102. Presumably if there was construction defect litigation arising out of such a project, the owner would argue that the TAIA does not apply on the basis that the pre-2012 master agreement is the "original construction contract" and the project-specific purchase/work order issued years after the TAIA's effective date is related and subordinate to the master agreement. In support of such an argument, the owner may rely on *U.S. ex rel. E J Smith Constr., Co. v. Travelers Cas. & Surety Co.*, 2016 WL 1030154.

In that case, the court determined that the "original construction contract" was the 2010 prime contract between the general contractor and the U.S. Army Corps of Engineers, the project owner, for the construction of a new medical center. *See E J Smith Constr., Co.*, 2016 WL 1030154, at *1, 5. The TAIA did not apply to the prime contract because it was entered into before the TAIA's effective date. *See id.* Therefore, the TAIA likewise did not apply to the subcontracts before the court related to the construction of the parking garages at the project site, which were all entered into *after* the TAIA's effective date, because those subcontracts were subordinate to the prime contract. *See id.* Under Section 3(b) of the final, enrolled version of House Bill 2093 (set out and emphasized above in Section H of this paper), the prime contract and the subordinate subcontracts were governed by the law in effect immediately before the TAIA's effective date, i.e., the Texas common law fair notice requirements. *See id.* at *6.

However, it should be noted that the contracts before the court in *E J Smith* involved lower tiers on the project: a subcontract between the general contractor and a subcontractor and, following that subcontractor's default, related contracts between the subcontractor's surety, the general contractor, and a replacement subcontractor. So, the court's reliance on the prime contract's date to determine the TAIA's applicability to the subcontracts does not resolve the hypothetical question as to the TAIA's applicability when both a master agreement and a purchase/work order for a specific project are between the project owner and the general contractor but have different dates that are respectively before and after the TAIA's effective dates.

Courts have not addressed this contracting scenario in the context of the TAIA's effective dates. However, the Fifth Circuit has addressed this scenario in the context of the effective date of

the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"). *See Matte v. Zapata Offshore Co.*, 784 F.2d 628, 630 (5th Cir. 1986); *Page v. Gulf Oil Corp.*, 775 F.2d 1311 (5th Cir. 1985). The Fifth Circuit's analysis in *Matte* and *Page* provides useful guidance as to how this issue should be evaluated under the TAIA.

In both cases, the relevant master agreements were entered into before the LOAIA's effective date of September 11, 1981. *See Matte*, 784 F.2d at 629-30 (1977 master service agreement (MSA) between oil platform owner/indemnitee and contractor/indemnitor); *Page*, 775 F.2d at 1313-14 (1979 "blanket contract" between offshore operator/indemnitee and oilfield supplier/indemnitor). And in both cases the indemnitee did not ask the indemnitor to perform specific services until after LOAIA's effective date. *See Matte*, 784 F.2d at 629-30 (court stated owner issued a verbal work order to contractor after LOAIA's effective date; specific date of work order not provided); *Page*, 775 F.2d at 1314 (operator's verbal request for supplier's services at operator's platform was in November 1981).

In analyzing the LOAIA's applicability in *Page*, decided the year before *Matte*, the Fifth Circuit explained that "[a] contract is executed, for the purposes of [the LOAIA], when all of the acts necessary to render it a binding obligation are completed." *See Page*, 775 F.2d at 1314. The Fifth Circuit determined that the respective master agreements were not binding contracts, remarking in *Page* that "the blanket agreement merely sets out the rules of the game in the event that the parties decide to play ball." *See Page*, 775 F.2d at 1315 (parties' blanket contract did not identify specific "time, place, or type of performance," and contract's structure "contemplated that it would become effective only upon [the operator's] notice or request for any of the described services"); *see also Matte*, 784 F.2d at 630 (1977 MSA, "standing alone, [was] not a binding contract"; instead, it "provided the framework for subsequent contracts" that would result from work orders, which either party could accept or reject). In *Page*, the acts necessary to make the blanket contract a binding contract did not occur until November 1981, when the operator verbally requested, and the supplier agreed to provide, service and equipment at the operator's platform. *See* 775 F.2d at 1314-15. Relying on *Page*, the Fifth Circuit concluded in *Matte* that the binding contract between the parties did not exist until the platform owner issued, and the contractor accepted, the individual work order after the LOAIA's effective date. *See Matte*, 784 F.2d at 630. Because the binding contracts in both cases did not exist until after the LOAIA's effective date, the LOAIA applied even though the master agreements pre-dated the LOAIA. *See Page*, 775 F.2d at 1313, 1314-15: *Matte*, 784 F.2d at 630.

Texas courts have taken a similar view that a master agreement is not binding a contract between the parties until they agree to a purchase/work order setting out the details of the work to be performed for a specific project. *See, e.g.*, *Shell W. E & P, Inc. v. Pel-State Bulk Plant, LLC*, 509 S.W.3d 581, 587 (Tex. App.—San Antonio 2016, no pet.) ("A master service agreement does not provide for the performance of any specific work or any specific price; instead it requires the issuance of work orders and, upon acceptance of the work orders, they become part of the master service agreement."); *All Am. Excavation, Inc. v. Austin Materials, LLC*, 2016 WL 1464409, at *2 (Tex. App.—San Antonio Apr. 13, 2016, no pet.) ("In the context of a master service agreement

between a contractor and a subcontractor, the master service agreement is not sufficiently definite to bind either party to perform any services.").[16]

Turning back to the hypothetical scenario described above, the owner's pre-2012 master agreement with the general contractor, alone, is not a binding contract under Texas law. Therefore, like the determination as to the LOAIA's applicability in *Page* and *Matte*, a determination as to the applicability of the TAIA should be based on the date of the purchase/work order—not the pre-2012 master agreement. Assuming that the owner issues, and the general contractor agrees to, the purchase/work order for the new construction project after the TAIA's effective date, then the "original construction contract" between the owner and general contractor is governed by the TAIA. So, if the pre-2012 master agreement has a broad or intermediate form indemnity provision, that provision would be void and unenforceable to the extent of the indemnitee's negligence under TEX. INS. CODE §151.102 for all claims except for bodily injury claims falling within the Employee Injury Exception under TEX. INS. CODE §151.103.

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-TAIA 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.

- Include savings language in both the indemnity and additional insured provisions to make it clear that the indemnity obligation and the required additional insured coverage apply to the fullest extent permitted by law, including Chapter 151 of the Texas Insurance Code.

- 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.

[16] *See also, e.g.*, *Gulf Crane Services, Inc. v. Total Safety U.S., Inc.*, 2019 WL 4603753, at *6 (S.D. Tex. Aug. 22, 2019) ("A master services contract is not self-effectuating, but instead provides the general terms of an agreement between two parties should they invoke the master services contract according to its terms."); *ODL Services, Inc. v. ConocoPhillips Co.*, 264 S.W.3d 399, 414 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (noting that a master agreement "was not a binding contract until the parties entered into some kind of future agreement for [the contractor]'s services").

- 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 2019 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.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 07 04

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.

