CLIENT ADVISORY

Big Changes in Texas: Limitations on Indemnity and Additional Insured

On June 17, 2011, Texas Governor Rick Perry signed legislation amending the Texas Insurance Code to drastically limit the enforceability of indemnity agreements and additional insured coverage required by certain construction contracts[1].

Against Public Policy

The recently signed legislation, Texas HB 2093, declares as "void and unenforceable as against public policy" an agreement that requires one person or organization (the indemnitor) to indemnify another person or organization (the indemnitee) to the extent that claims arises out of any negligence or fault of the indemnitee. In other words, "broad form" indemnity agreements (indemnification for the indemnitee's *sole negligence*) and "intermediate form" indemnity agreements (indemnification for *concurrent* or *shared* negligence of the indemnitor and indemnitee) are no longer enforceable in certain construction contracts. The result is that only "limited form" indemnity agreements (indemnification for the indemnitor's negligence) are enforceable – but subject to one very important exception.

Important Exception – Indemnity for Employee Injury or Death Claim

Via an express exception, HB 2093 does not apply to agreements to indemnify others for their *sole* or *concurrent* negligence if the claim is for bodily injury or death of an employee of the indemnitor, an employee of the indemnitor's agents or the employee of a sub-subcontractor of the subcontractor.[2]

Illustration – Unenforceable Under HB 2093 A subcontractor agrees to indemnify a general contractor for its *sole* negligence. Due to the sole negligence of the general contractor, a pedestrian passing by the jobsite is injured. In this instance, HB 2093 would render the indemnity agreement void and unenforceable – the subcontractor would have no obligation to indemnify the general contractor for the general contractor's liability that caused the injury to the pedestrian.

Illustration – Enforceable under HB 2093 Using the same facts, if an employee of the subcontractor is injured at the jobsite due to the *sole* negligence of the general contractor, HB 2093 does not apply. If the general contractor demanded contractual indemnification from the subcontractor, the indemnity agreement would likely be enforceable against the subcontractor. (For more on contractual indemnification for employees' injuries, see "Third Party Over" Claims – Part II.)

Enforcement of Shared Negligence under HB 2093 An indemnity for intermediate form indemnification (concurrent or shared negligence) *may be* enforceable under HB 2093 against the indemnitor, but if it is, it can only be for the portion of the indemnitor's negligence.

As legislation prohibits indemnification of others "to the extent that it requires an indemnitor to indemnify…against a claim caused by the negligence…of the indemnitee", there does appear to be room for enforcement of portions of an intermediate form indemnity agreement, but only for damages attributed to the indemnitor's negligence. Of course, whether such an indemnity agreement is enforceable is controlled in large part by the wording of the indemnity agreement, as well as whether the court elects to void the entire agreement or instead enforces the portions the agreement that do not violate the law.

Illustration – Intermediate Form A subcontractor agrees to indemnify a general contractor for its *concurrent* or *shared* negligence. Due to the negligence of both the subcontractor and general contractor, a pedestrian passing by the jobsite is injured. If the court allocated negligence causing the injury to the pedestrian to be 20% the subcontractor's fault and 80% the general contractor's fault, an attempt by the general contractor to seek indemnification for its 80% negligence would be void and unenforceable. However, the general contractor's attempt to seek contractual indemnification for the subcontractor's 20% negligence would likely not be a violation of HB 2093. Of course, the general contractor may also have a right to common law indemnity (absent contractual indemnification) from the subcontractor for the subcontractor's 20% negligence.

Additional Insured Coverage

Possibly the most noteworthy aspect of HB 2093 is its effect on insurance. Any provision in an insurance policy that provides additional insured coverage is also "void and unenforceable" if the scope of coverage provided to the additional insured is prohibited under an indemnity agreement.[3]

In short, additional insured coverage that provides coverage for the sole or concurrent negligence of the additional insured is no longer allowed. Of course, the employee injury exception applies – the legislation

(continued on next page)

To learn more about how AmWINS can help you place coverage for your clients, reach out to your local AmWINS broker or marketing@amwins.com.

If you do not have a contact at AmWINS to help with your construction risks, click here for a list of brokers on our website.

AmWINS Group, Inc.

AmWINS Group, Inc. is a leading wholesale distributor of specialty insurance products and services. AmWINS has expertise across a diversified mix of property, casualty and group benefits products. AmWINS also offers value-added services to support some of these products, including product development, underwriting, premium and claims administration and actuarial services. With over 2,000 employees located in 16 countries, AmWINS handles over $5.7 billion in premium annually through our four divisions: Brokerage, Underwriting, Group Benefits and International.

does allow sole or concurrent negligence coverage of the additional insured IF the claim is for injury or death of an employee of the named insured or a subcontractor of the named insured.

Illustration – Additional Insured Coverage As required by the subcontract, the subcontractor adds the general contractor to the subcontractor's CGL policy, using an older additional insured endorsement (such as the CG 20 10 11/85) that provides coverage for the sole negligence of the general contractor.

Similar to the indemnity illustration, a pedestrian is injured on the jobsite due to the sole negligence of the general contractor. HB 2093 would determine the additional insured endorsement as void and unenforceable; the subcontractor's insurer would not have to provide coverage to the general contractor as an additional insured.

If the general contractor in the above example was only partially negligent along with the subcontractor (concurrent or shared negligence) in causing the injury to the pedestrian, the additional insured coverage would likely apply to the general contractor, but only to the extent of the subcontractor's negligence. HB 2093 would render void any coverage for any of the general contractor's negligence injuring the pedestrian.

Injured Employee Exception Also similar to the indemnity illustration, instead of a pedestrian being injured at the jobsite, the employee of the subcontractor is injured on the jobsite due to the sole negligence of the general contractor.

If the employee brings a claim against the general contractor for its sole negligence, the additional insured coverage obtained for the general contractor by the subcontractor would not violate HB 2093 and it is likely the insurer would have to defend and pay damages on behalf of the general contractor because of the general contractor's additional insured status.

Texas Additional Insured Endorsement Similar to other states that have enacted legislation affecting the scope of coverage available to additional insureds, such as Colorado and Kansas, ISO has filed (but as of the publication of this article, has not yet obtained approval) Texas-specific additional insured endorsements as well as Texas changes to the definition of "insured contract." It strongly suggested that those subject to HB 2093 monitor ISO changes (if any) as well any changes that insurers may file independently to better match the scope of coverage prescribed in HB 2093.

Wrap Up Programs

A consolidated insurance program for a construction project that begins on or after January 1, 2012 must provide extended completed operations coverage for no less than three years.

HB 2093 – Effective January 1, 2012

While the legislation takes effect in Texas on January 1, 2012, HB 2093 does address how it will affect existing contracts and insurance policies.

Original Construction Contracts The legislation applies to "original construction contracts with an owner… entered into on or after the effective date of the Act." Subcontracts, purchase orders, personal property lease agreements and *insurance policies* related to these original contracts are also subject to the changes in the law.

If the original construction contract with an owner is entered into before the effective date of the Act, then subcontracts, purchase orders, personal property lease agreements and *insurance policies* related to the original contract are not subject to the changes in the law – they are governed by the law immediately before the date of the Act.

About the Author - ***Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based risk management, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com***

[1] HB 2093 expressly excludes (and therefore does not apply to) indemnity and additional insured provisions in construction contracts for single family homes, townhouses, duplexes and related land development and further excludes and does not apply to indemnity and additional insured provisions in construction contracts for a public works project of a municipality.

[2] Indemnity for the sole negligence of the indemnitee is still subject to Texas "express negligence rule", which requires the indemnity provision to "unambiguously state a party's intent to indemnify the indemnitee for all liability caused by the indemnitee's own future negligence." *XL Specialty Ins. Co. v. Kiewitt Offshore Svcs. LTD. 513 F.3d 146 (5th Circuit 2008*).

[3] This section of HB 2093 does not apply to a consolidated insurance program for named insureds to the policy.