THE EFFECT OF CHAPTER 151 ON COVERAGE FOR INDEMNITY AND ADDITIONAL INSURED OBLIGATIONS – TOO SOON TO TELL?

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A. Introduction

** The Planning Committee for this conference invited me to present on the topic of the effect of the Texas Anti-Indemnity Statute upon the use of indemnification clauses and additional insured status since its effective date on January 1, 2012. A variation of that same topic is whether the statute, despite its scope, has effected any significant changes in the law, practice and insurance associated with them. The conclusion appears to be that so far, the statute has not been a "game changer" as to relationships of indemnitors, indemnitees, additional insureds and other risk transferors or transferees. Where the statute has exerted some effect, and where issues that were originally identified still exist, will be discussed in this paper. However, the basic platform for this paper was drafted two years ago at the time the anti-indemnity statute took effect and much of the commentary still holds true. Nevertheless, where there have been developments and where it is possible to identify trends, new issues, ongoing problems, etc., those discussions have been added to this paper and will be preceded by an asterisk and will be in italics. Perhaps the original text from two years ago can serve as a guide for those who are yet to become familiar with the statute or to serve as a refresher for those who already are.*

However, the net effect is there is not an overwhelming amount of additional discussion. The obvious explanation is that two years is a relatively short period for contract owners, contractors, subcontractors and their insurers to analyze and adapt to the statutory provisions and to modify their contract documents. In other words, the statute simply has not been in effect long enough. Moreover, for this same reason, cases addressing the effect and application of Chapter 151 have not had the opportunity to wind their way through the court system in order to result in reported opinions to guide the construction industry, the insurance industry and its counsel.

B. Basic Indemnity Terminology

Modern construction is a dangerous business even though the means and methods of construction may have changed and improved over time. Many and varied risks are encountered and dealt with, whether through elimination or reduction through such means as safety planning, training and best practices. Others are transferred between the parties delivering the project or to third parties. The transfer of the majority of construction risks is usually supported by insurance, thus ultimately transferring potentially huge risks to a third party, usually an insurer considered to be more financially capable of bearing and spreading them.

Construction indemnity and transfer of risk. Complexity often results where several parties are alleged to have caused or contributed to a loss, and even more so, where those parties

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

Terminology. Indemnity clauses are usually classified into three categories:

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

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

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

Additional insured coverage. Due to the uncertainty surrounding the enforceability of indemnification clauses, many indemnitees in the construction industry have become

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

Statutory regulation of indemnity clauses. Nevertheless, concerns over the fairness of such a transfer, particularly to lower tiers such as subcontractors, have been voiced with increasing frequency, leading the legislatures of over forty states to enact statutes that regulate indemnification clauses used in the construction industry. Many of the more recent statutes also regulate the ability for 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 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 indemnity tail wagging the CIP dog.

The CIP portion of Chapter 151 applies to a "consolidated insurance program" which is defined as a program under which a principal provides general liability insurance coverage, workers' compensation insurance coverage or both that are incorporated into an insurance program for a single construction project or multiple construction projects. As such, the definition encompasses owner controlled insurance programs ("OCIPS") where the owner is the sponsor, contractor controlled insurance programs ("CCIPS") where the contractor sponsors the program, as well as rolling CIPS since the applicability of the chapter to multiple construction projects is specifically addressed.

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

Section 151.051, essentially the only regulatory provision in the statute that actually regulates CIPS, sets out the requirement that a CIP that provides general liability insurance coverage must provide completed operations coverage for a period of not less than three years. Thus, despite the designation of the statute as "Consolidated Insurance Programs," little regulation of a CIP is provided for, and the regulation that there is, a duration of three years for completed operations, appears to be somewhat short in light of the ten year statute of repose that applies to construction work in Texas.

D. The Anti-Indemnity Provisions of Chapter 151

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

* *The apparent inconsistencies in the statute persist.*

1. Applicability of the Statute

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

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

> 'Construction contract' means a contract, subcontract, or agreement, or a performance bond assuring the performance of any of the foregoing, entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, repair, or maintenance of, or for the furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property, including moving,

demolition, and excavation connected with the real property. The term includes an agreement to which an architect, engineer, or contractor and an owner's lender are parties regarding an assignment of the construction contract or other modifications thereto.

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

**The term "construction project" is also broadly defined in §151.001(2):*

"Construction project" means construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents. A construction contract does not include a single family house, townhome, duplex, or land development directly related thereto.

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

E. Scope of Indemnity Prohibited

Section 151.102 sets out the primary provision in the statute stating what types of indemnity or hold harmless agreements are void. In that connection, the statute 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 statute 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.

The prohibition applies not only to the indemnity obligation, but also to any obligation to defend the indemnitee beyond the extent of the indemnitor's own fault. This may make some indemnity clauses very difficult to apply in order to apportion the defense obligation between the indemnitor's and the indemnitee's fault. Many indemnitees had sought to impose upon the indemnitor an obligation to defend an entire claim even though, or up until, it was determined that the indemnitee's own fault contributed to the damages. Such an "all or nothing" defense obligation no longer appears viable under the new statute.

** Of course, downstream indemnitors have viewed §151.102 to be the primary operative provision of the anti-indemnity statute, and it is obvious that it is. As such, it 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. Use of the "to the extent" language implies that the indemnity clause would be void and enforceable only to the extent of the indemnitee's own negligence, so it may be possible to obtain indemnity at least to the extent of the indemnitor's own negligence under that same clause.*

Often lower tiers ignore this formulation and argue for all or nothing unenforceability. Nevertheless, there is considerable room for negotiation, particularly as to the indemnity preserved under §151.103.

F. Employee Exception to Indemnity Prohibition

Despite the broad limitation for indemnity clauses to the extent of the indemnitor's own negligence or fault, §151.103 states that:

> 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.

This exception allows broad or intermediate form indemnity for bodily injury to the indemnitor's employees. 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, can sue third parties, including an upper tier, claiming that their negligence or fault contributed to the injury. Because of the close proximity of the tiers on a construction project, it is a particularly acute problem for the construction industry.

Many states have addressed that problem by statutory employer legislation as part of their workers compensation laws in which all tiers – owners, contractors, subcontractors, etc. – on a construction project are regarded as the employer of any injured employee and are entitled to exclusive remedy protection from common law actions. To date, Texas has not enacted such legislation, although the courts have applied the statutory employer rationale to construction projects that are insured under a CIP. Under those circumstances, a contractor is regarded as having "provided" workers compensation insurance, and thus is entitled to exclusive remedy protection under §406.123 of the Workers Compensation Act. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009)(owner sponsoring an OCIP had entered into a written agreement under which it provided workers compensation to enrolled subcontractors, thus entitling it to statutory immunity under §406.123); *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009)(general contractor participating in an OCIP had agreed to provide workers compensation insurance coverage pursuant to the contract documents and was entitled to statutory immunity under §406.123); *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tex. App. – Houston [1st Dist.] 2004, pet. denied)(where general contractor provides workers compensation insurance to subcontractors on the project, all lower tiers on that project are entitled to immunity from third party suits by injured employees). While the establishment of a statutory employer framework for Texas construction projects should be a creature of the Workers Compensation Act, the lack of such a device renders the employee exception provision in the anti-indemnity statute a necessary concession for protection of other parties on Texas construction projects.

** Intuitively, it would seem that where a specific exception has been inserted into a statute it would be understood, and even applied in practice. Unfortunately, such is not usually the case with the exception for injuries to indemnitor's employees in §151.103, termed the "Employee Exception." While potential indemnitors have had little trouble in applying §151.102 of the statute to limit their obligation to indemnification only to the extent of their own negligence or fault, they have, quite understandably, not embraced the 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. After the passage of two years, the difficulty of obtaining indemnification under the employee exception persists.*[1]

Essentially, the divide between indemnitors and indemnitees over indemnification for the indemnitee's own negligence has shifted from general indemnification for the indemnitee's negligence that is prohibited under the statute, to a more narrow, but no less important obligation, that is, indemnification for employee injuries. The 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 exception creates additional opportunities for intense negotiation. In

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

that sense, little has changed as far as drafting and negotiating indemnity clauses. There is still considerable opposition to any degree of indemnification for the indemnitee's own negligence even though indemnification for the sole negligence of the indemnitee is fostered by the allowance of third party over actions in workers compensation. Protecting against third party over actions remains one of the major issues for Texas construction practitioners under the new anti-indemnity statute.

G. Effect on Additional Insured Coverage

One of the more significant developments across the United States as far as the scope of anti-indemnity statutes is their amendment to include not only the transfer of risk by indemnity clauses, but also through additional insured requirements where the indemnitee requires the indemnitor to name the indemnitee as an additional insured on its insurance policy. 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 may not be enforceable under a particular state's laws. Eventually, many insurers scaled back the scope of additional insured coverage to be provided to the indemnitee/additional insured, sometimes to liability arising out of the negligence or fault of the indemnitor/named insured, placing indemnitors in potential breach of broad requirements contained in their contract to provide unqualified additional insured coverage.

As stated, in addition to these limitations engrafted by the insurance industry itself, the growing trend among state legislatures is to amend anti-indemnity statutes to apply not only to indemnity agreements, but also to additional insured requirements. Section 151.104 is such a statute, and it applies to both indemnity clauses and additional insured requirements. In that regard, §151.104 states that a provision in the 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 Chapter 151 for an agreement to indemnify, hold harmless, or defend. In other words, additional insured provisions are enforceable only to the extent they provide coverage to the indemnitee/additional insured for the named insured's own fault or negligence. In addition, the exception for injury to employees of the indemnitor/named insured applies, allowing broad coverage for the indemnitee/additional insured's own negligence for those claims.

As such, the belt and suspenders approach of additional insureds/indemnitees is considerably weakened by the anti-indemnity statute. The scope of permitted coverage for indemnity and additional insured correspond so that there is an across-the-board prohibition as to an indemnitee/additional insured's own negligence.

The statute voids additional insured provisions "to the extent" that they require coverage for the indemnitee's own negligence or fault. As is the case with §151.102 described above, the "to the extent" formulation implies that even if an additional insured endorsement as promulgated provides coverage that might include the additional insured's own negligence or fault, the additional insured coverage should still apply to the named insured's negligence or fault and be enforceable to that extent.

Section 151.104 includes a paragraph that appears to be a throw back to the CIP bill. It states that the additional insured limitation does not apply to a provision in an insurance policy issued under a CIP to the extent that the provision lists, adds or deletes named insureds to the policy. 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 statute.

** A more in-depth discussion of the interaction of the anti-indemnity statute and additional insured coverage is set out below.*

H. Exclusions from the Anti-Indemnity Provisions

Section 151.105 of the statute provides for a number of exclusions that apply to both indemnity clauses and additional insured provisions, some of which may be a product of the attachment of the anti-indemnity bill to the CIP bill, or simply political compromise. The major exclusions are as follows:

- ***CIP Exclusion — §151.105(1).*** The anti-indemnity provisions do not apply to an insurance policy issued under a CIP, except as provided by §151.104. In other words, the additional insured prohibition contained in §151.104 applies to limit additional insured coverage under a CIP.

* *While this exception is somewhat ambiguous, it may have 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, particularly the fact that all participants are insured under the same policy.*

- ***Breach of Contract or Warranty — §151.105(2).*** The statute does not apply to an action for breach of contract or warranty that exists independently of an indemnity obligation, including an indemnity obligation in a construction contract under a construction project for which insurance is provided under a CIP. In other words, the bill applies only to indemnity, and not direct breaches of contract.

* *To date, no court has addressed this exception, but it appears to be an attempt to prevent the use of the anti-indemnity statute to bar what is normally regarded as*

direct breach of contract or 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 Oilfield Ant-Indemnity Act, Chapter 127 of the Texas Civil Practice and Remedies Code, are excluded from Chapter 151.

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

- ***Residential construction — §151.105(10)(A).*** Agreements in a construction contract pertaining to a single family home, townhouse, duplex, or land development related to residential projects are excluded.

* *This exclusion dovetails with the definition of "construction project" in §151.001(2) that specifically excludes "a single family house, townhome, duplex, or land development directly related thereto."*

One of the major issues as to this exception is whether it extends to condominiums and apartments as "a single family house, townhouse, duplex or land development directly related thereto." While an attempt to exclude "homebuilders" from the statute is found in the legislative history, there are also indications that multi-family projects may not be included in the exception and therefore are governed by the terms of the anti-indemnity statute. This issue will more than likely be a subject of not only future debate, but 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 a "municipality." The Texas Local Government Code §1.005 defines a "municipality" in a somewhat circular fashion as "a general-law municipality, home-rural municipality, or special-law municipality" and the types of municipalities are categorized according to the manner of their creation, as more specifically described in Chapter 5 of the Texas Local Government Code. At the same time, Chapter 29 of the Texas Government Code defines "municipality" to mean "an incorporated city, town, or village." Further, not all entities related to municipalities are regarded as such. For example, in Edinburg*

Hospital Authority v. Trevino, 941 S.W.2d 76 (Tex. 1997), the court concluded that a hospital authority was not a "municipality" subject to the higher liability limits of the Tort Claims Act. It is possible that the exception in the anti-indemnity statute for a "public works project of a municipality" may be limited to construction contracts with cities, towns, or villages, and may not include contracts with other quasi-governmental entities created by municipalities.

The related issue is what constitutes a "public works project." In that regard, Tex. Gov.'t Code §2253.001 defines a "public work contract" as "a contract for constructing, altering, or repairing a public building or carrying out or completing any public work." This definition appears to be narrower than the definition of "construction contract" contained in §151.001(5) which provides the definition for "construction contract" to which the anti-indemnity statute 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 different 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 statute does not apply to joint defense agreements entered into after a claim is made.

I. Ongoing Viability of Fair Notice Doctrine

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

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

- ***Conspicuousness test.*** In addition, the clause must be conspicuous so as to attract the attention of the indemnitor. In other words, it must be in bold print, all caps, or with a conspicuous heading. It cannot simply match the other provisions of the contract. The conspicuousness test can be met if the indemnitee can demonstrate that the indemnitor had actual notice of the clause.

Since the anti-indemnity statute allows broad indemnification for the indemnitee's own negligence as to employee injuries, that provision will need to satisfy the fair notice requirements under Texas law. As to a more general indemnity clause that complies with the indemnity statute, requiring indemnity only to the extent of the indemnitor's own negligence, it can be argued that the fair notice requirements would not apply since the indemnitee is not seeking indemnification for its own negligence. Nevertheless, Texas case law has been somewhat

unclear as to whether a limited indemnity clause, in general, must satisfy the fair notice requirements. Good practice would dictate that even in the event that the indemnitee is seeking indemnity only to the extent of the indemnitor's own negligence, that intent should be clearly stated within the clause. Moreover, since the requirement is for limited form indemnity, there would appear to be no substantive downside to meeting the fair notice requirement, i.e. including the clause in capital, or bold, etc. letter type. This is especially true if the contract includes the broad indemnity clause for employee injuries.

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

J. Drafting Hybrid or Bifurcated Indemnity Clauses

As most participants in the Texas construction industry are aware, there have been 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 is attached as Exhibit A. The clause takes a simple approach and obviously, should not be considered without modification in order to conform to existing contract documents.

** The author has used a version of this clause for some clients for several years prior to the enactment of Chapter 151. Those clients were most concerned with indemnification for third party over actions, but were willing to make concessions as to indemnity for other injuries and property damage at the jobsite. Slight revisions to Exhibit A have been made along the way, but it is intended to comply with not only the anti-indemnity statute, 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 Exhibit A 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.

K. Drafting Additional Insured Contract Specifications

There appear to be a number of ways to satisfy the limitations on the scope of additional insured coverage under §151.104 of the statute.

1. Bifurcated Specifications Approach

As previously discussed, the additional insured provisions of Chapter 151 incorporate the same limitations as 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 a general contract context is attached at Exhibit B to this paper.

2. Alternative Specifications and Savings Clause Approach

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 exception allowing broad indemnity and additional insured coverage for the additional insured's own negligence as to injury to the employees 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? Attached at Exhibit C are model specifications for commercial general liability insurance, additional insured coverage, and evidence of insurance (certificates of insurance) that require the named insured to provide Endorsements CG 20 10 10 01 and CG 20 37 10 01 which

together provide broad coverage for the additional insured's own fault as to both operations and completed operations exposures. Subject to availability as discussed below, these endorsements would provide the broad coverage allowed for employee injuries, but would be voided as to coverage for the additional insured's own fault in other contexts. A major caveat remains, however, as to whether the named insured will provide the specified endorsement or level of coverage. The provision in Exhibit C also includes a savings clause that specifies additional insured protections "to the extent of" the coverage allowed under Chapter 151, the Anti-Indemnity Statute.

3. Texas Additional Insured Forms

Several months after the effective date of the statute, Insurance Services Office (ISO) promulgated additional insured endorsements that are intended to comply with Chapter 151. A copy of the endorsement is attached as Exhibit D. The operative language of the new form, CG 33 95 05 12, provides as follows:

> **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', '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, if you have entered into a construction contract subject to Subchapter C of Chapter 151 of Subtitle C of Title 2 of the Texas Insurance Code with the additional insured shown in the Schedule, the insurance afforded to such person(s) or organization(s) only applies to the extent permitted by Subchapter C of Chapter 151 of Subtitle C of Title 2 of the Texas Insurance Code.

As can be seen, the first half of the endorsement is substantially similar to CG 20 10 07 04 which provides coverage roughly equivalent to intermediate form indemnity.[2] In other words, as long as the named insured providing the endorsement 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 33 95 05 12, 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. Of course, providing additional insured coverage to any extent of the additional insured's own negligence is prohibited under §151.104. Thus, though the endorsement was apparently promulgated to comply with Texas law, it sets out a partially void scope of indemnity.

[2] That endorsement has been available since 2004 and has become more prevalent as to construction insureds.

Nevertheless, the second paragraph of CG 33 95 05 12 is intended to scale back the coverage provided to that which is allowed under Chapter 151. In other words, as far as additional insured coverage for third party injuries and property damage associated with the project, that provision would appear to scale back the "intermediate form" coverage to limited coverage, that is, only to the extent of the named insured's own negligence. The additional insured would receive no coverage for its own negligence or fault.

** Nevertheless, §151.104 incorporates the 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 the endorsement is very unclear. In other words, does the incorporation of Chapter 151 into the endorsement expand the intermediate form additional insured coverage to broaden coverage for the additional insured's own negligence as far as injuries to employees of the named insured (even when that intermediate form coverage is void for other exposures on the project)? The provision is at least ambiguous on this point, and insured contractors and additional insurers are sure to disagree as to the broadening of coverage for employee injuries. The test to determine ambiguity of an insurance policy under Texas law is whether there are two reasonable interpretations. In that instance, the ambiguity is construed in favor of coverage and the insured. To date there has been no clarification from the insurance industry or the courts.*

As stated, the operative insuring agreement in the Texas endorsement is identical to that of CG 20 10 07 04, which has become the most frequently used endorsement in the construction industry. As set out above, CG 20 10 07 04 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 10 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 code, causing his fall), so that the employee's negligence was attributable to the employer so that the "in whole or in part" requirement under CG 20 10 07 04 was satisfied. While the Gilbane court upheld a duty to indemnify, the rejection of a duty to defend is common based upon the workers compensation single remedy.

The Gilbane case illustrates the major problem for upper tiers in seeking a defense as an additional insured on the employer's CGL policy where an endorsement such as CG 33 95 05 12 includes a requirement that the named insured's negligence contribute to the injury. It remains to be seen if the savings language as to the anti-indemnity statute will be applied so broadly as to expand coverage for the employee exception.

It should be noted that in that in addition to CG 33 93 05 12, the automatic additional insured endorsement attached at Exhibit D, CG 33 95 05 12 provides additional insured coverage for scheduled persons and entities. A third endorsement has also been promulgated, CG 33 94 05 12, the companion endorsement intended to provide products completed operations coverage

in connection with CG 33 95 05 12 and CG 33 93 05 12. A copy of that endorsement is attached as Exhibit E. ISO has now withdrawn Endorsements CG 20 10 07 04, CG 20 33 07 04 and CG 20 37 07 04.

Due to the potential ambiguity in the newly-promulgated forms as to broad coverage for the negligence of the additional insured as to injuries to the named insured's employees, 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 as set out above.

4. The 2013 ISO Revisions

**In 2013, ISO promulgated new standard form additional insured endorsements, including endorsements for use in the construction industry. The primary endorsement is GG 20 38 04 13, that automatically adds additional insureds as required by contract. Since that form only applies to ongoing operations, the companion endorsement is CG 20 37 04 13, which must be used to provide completed operations coverage. Copies of these two endorsements are attached as Exhibits F and G, respectively. The revisions were primarily intended to clarify various issues that are beyond the scope of this presentation. However, the new forms retain the "caused in whole or in part" formulation and the problems addressed above as to third party over actions.*

However, one of the provisions that was added to the forms was a savings clause that additional insured status only applies "to the extent permitted by law," an obvious acknowledgement of the growing number of states enacting legislation restricting additional insured coverage. This list of states includes Texas and the same issue persists as described above – whether a savings clause can be relied upon to expand coverage pursuant to the exception allowing broad coverage for injuries to employees of the named insured.

L. Effective Dates

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. Anti-Indemnity Provisions

The new statute 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 to all related subcontracts, purchase orders, personal property leases, and insurance policies associated with that original contract. For example, if an original contract for a large project is entered into on December 15, 2011, all subcontracts, purchase orders and insurance policies, including those entered into after January 1, 2012, will nevertheless be governed by prior law. It is only where the original contract is entered into on or after January 1, 2012, that the new law applies.

** Because the anti-indemnity statute does not apply to construction contracts entered into prior to January 1, 2012, it is still relatively early to see any significant interpretation of those provisions from the courts.*

M. Addressing Indemnity in Light of Chapter 151

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

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

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

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

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

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

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

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

EXHIBIT A

INDEMNITY

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

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

EXHIBIT B

BIFURCATED ADDITIONAL INSURED SPECIFICATION

Additional Insured. To the fullest extent permitted under Chapter 151 of the Texas Insurance Code, Owner shall be included as an insured under the CGL policy for liability arising out of Contractor's work performed under this Contract, including products-completed operations coverage for a period of ten years following substantial completion, to the extent of liability attributable to the negligence or fault of Contractor.

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

The insurance provided by Contractor to Owner as an additional insured shall be primary and noncontributory to other insurance available to Owner. Equivalent additional insured coverage shall also be provided by Contractor to Owner on Contractor'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 Owner.

EXHIBIT C

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 Requirement. To the fullest extent of coverage allowed under Chapter 151 of the Texas Insurance Code, Contractor and Owner shall be included as additional insureds under the CGL policy, using 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 insurance with respect to any other insurance or self-insurance programs maintained by Contractor. Subcontractor shall name Owner and Contractor as additional insureds in its CGL policies for __ years after final completion as set out above.

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. Contractor shall have the right, but not the obligation, to prohibit Subcontractor or any sub-subcontractor from entering the project site until such certificates or other evidence that insurance has been placed in compliance with these requirements is received and approved by Contractor. Failure to maintain the required insurance may result in termination of this Agreement at Contractor's option. If Subcontractor fails to maintain the insurance as set forth herein, Contractor shall have the right, but not the obligation, to purchase said insurance at Subcontractor's expense. Subcontractor shall provide certified copies of all insurance policies required above within 10 days of Contractor's written request for copies.

EXHIBIT D

COMMERCIAL GENERAL LIABILITY
CG 33 93 05 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TEXAS 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.

However, if you have entered into a construction contract subject to Subchapter C of Chapter 151 of Subtitle C of Title 2 of the Texas Insurance Code with the additional insured, the insurance afforded to such person or organization only applies to the extent permitted by Subchapter C of Chapter 151 of Subtitle C of Title 2 of the Texas Insurance Code.

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.

EXHIBIT E

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 33 94 05 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TEXAS 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".

However, if you have entered into a construction contract subject to Subchapter C of Chapter 151 of Subtitle C of Title 2 of the Texas Insurance Code with the additional insured shown in the Schedule, the insurance afforded to such person(s) or organization(s) only applies to the extent permitted by Subchapter C of Chapter 151 of Subtitle C of Title 2 of the Texas Insurance Code.

EXHIBIT F

COMMERCIAL GENERAL LIABILITY
CG 20 38 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT

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:

1. 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; and
2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above.

Such person(s) or organization(s) 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:

a. Your acts or omissions; or
b. 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 described above:

a. Only applies to the extent permitted by law; and
b. 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 the person or organization described in Paragraph 1. above 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 described in Paragraph **A.1.**; 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 G

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 04 13

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.