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The New Anti-Indemnity Statute: The New World for Construction and Real Estate Development

By Lionel Schooler and April Vasquez

INTRODUCTION. Contracting parties regularly negotiate for one party to be responsible for claims of specified liabilities to which the other party might be exposed. These provisions, known as indemnification provisions, cover claims ranging from breach of an agreement or harm arising out of work to be performed under an agreement to the covered party's own negligence as well as a laundry list of other acts. Having agreed to take on such legal responsibility, an indemnitor (the party providing the indemnity protection) typically seeks to obtain insurance coverage against the risks associated with such responsibilities.

The landscape of enforcing indemnity agreements and the right to invoke corresponding insurance coverage is about to change on January 1, 2012, thanks to the Legislature's recent enactment of Chapter 151 of the Texas Insurance Code. This Chapter limits the scope of an indemnity that may be included in certain types of contracts and also limits parties from obtaining insurance coverage for such prohibited indemnities.

THE BACKDROP OF ENACTMENT OF CHAPTER 151. Forty-five states have some form of anti-indemnity statute, with some states even banning indemnification provisions altogether. After years of contractor and subcontractor lobbying on this issue, Texas finally followed suit by the enactment of Chapter 151.

WHO IS AFFECTED? The new statute applies to a "construction contract" for a "construction project" (not including construction projects for single family houses) for which an indemnitor is provided or procures insurance subject to Chapter 151 of the Texas Insurance Code or Title 10 (regulations for property and casualty insurance). "Construction contract" is broadly defined as "a contract, subcontract or agreement 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 the furnishing of a material for, a building or other improvement on public or private property."

WHAT IS PROHIBITED? Chapter 151 essentially bans broad and intermediate forms of contractual indemnity and bans a party from obtaining insurance to cover these prohibited forms of indemnity. A provision in a construction contract (or in an agreement affecting a construction contract) is void to the extent it requires a party to indemnify or defend another party against the non-indemnifying party's own negligence (whether sole or joint). In addition, the statute bars parties from seeking "additional insured" insurance coverage to cover risks associated with those events whose indemnification is banned by the Chapter. Chapter 151 applies regardless of whether the insurance is provided or procured before

or after execution of the construction contract. By its terms, the provisions of Chapter 151 cannot be waived.

WHAT IS EXCLUDED FROM THE SCOPE OF THE STATUTE? The statute does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless or defend another party against a claim for bodily injury or death of an employee of the indemnitor, its agent or its subcontractor. Such indemnification provisions are still allowed according to principles of existing law.

The statute also does not apply to an insurance policy issued under a consolidated insurance program, construction contracts pertaining to an indemnity provision based on copyright infringement, breaches of contract or warranty that exist independently, loan and financing documents (other than construction contracts with the lender as a party), surety indemnification agreements, joint defense agreements entered into after a claim is made, contracts under the Oil Field Anti-Indemnity Act, and indemnity agreements in municipal construction contracts. However, it should be noted that the Oil Field Anti-Indemnity Act applies to drilling, production, and transportation operations but does not apply to construction, maintenance or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities, so Chapter 151 could apply in those areas.

CONCLUSION. Chapter 151 will become effective January 1, 2012. Parties affected by the statute should take care to ensure their construction contracts, real estate development contracts and oil field project contracts are revised to conform to the new restrictions on indemnification and insurance requirements imposed by Chapter 151. If you would like further assistance or more information on this new statute, please contact **April Vasquez** at 713.752.5254 or avasquez@jw.com or **Lionel Schooler** at 713.752.4516 or lschooler@jw.com.

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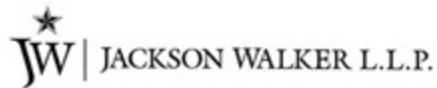
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