

BILL ANALYSIS

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S.B. 361
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In construction contracts, owners require general contractors to assume liability for the owner's negligence, and those contractors require any subcontractors under them to do the same. Therefore, in the case of an accident for which the owner is responsible, a general contractor is responsible for any damages incurred, including the defense costs of the owner, and a subcontractor will be responsible for the same due to the general contractor's negligence and be required to pay for the negligence of the owner as well. Most construction contracts also require a contractor or subcontractor to purchase an "additional insured" endorsement to its insurance policy, which effectively requires its insurance company to provide coverage for the other entities involved in the contract. Many construction contracts also make the subcontractor liable for a breach of contract and warranty by the general contractor or make the subcontractor responsible for any fines or penalties assessed by a governmental entity directly against an indemnitee. This essentially makes subcontractors the "insurers" of the entire project, placing the subcontracting company and its insurance carrier at risk for negligent acts of those entities above them.

As proposed, S.B. 361 makes each party liable for its own negligence and prohibits transferring liability by contract or other means in actions involving property damage; bodily injury or death, except for the bodily injury or death of an employee of the indemnitor, its agent, or subcontractor of any tier; breach of contract or warranty; and violation of statute, ordinance, governmental regulation or rule. This legislation restores the doctrine that an entity is responsible for that entity's own actions in those enumerated instances.

As proposed, S.B. 361 amends current law relating to indemnification provisions in construction contracts.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 130.002(a), Civil Practice and Remedies Code, as follows:

- (a) Provides that a covenant or promise in, in connection with, or collateral to a construction contract is void and unenforceable if the covenant or promise provides for a person, rather than a contractor, who is to perform the work that is the subject of the construction contract to indemnify or hold harmless a registered architect, licensed engineer or an agent, servant, or employee of a registered architect or licensed engineer from liability for damage that is caused by or results from certain defects or negligence and arises from personal injury or death, property injury, or any other expense that arises from personal injury, death, or property injury.

SECTION 2. Amends the Civil Practice and Remedies Code, by adding Title 10, as follows:

TITLE 10. ADDITIONAL MISCELLANEOUS PROVISIONS

CHAPTER 502. INDEMNITY PROVISIONS IN CONSTRUCTION CONTRACTS

Sec. 502.001. DEFINITIONS. Defines, in this chapter, "claim," "construction contract," and "indemnitor."

Sec. 502.002. PERMISSIBLE CONTRACT PROVISION. Authorizes parties to agree in a construction contract upon an indemnity or additional insured provision that is not prohibited by this chapter.

Sec. 502.003. AGREEMENT VOID AND UNENFORCEABLE. Provides that except as provided by Section 502.004, 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 another party to the construction contract or 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.

Sec. 502.004. EXCEPTION FOR EMPLOYEE CLAIM. Provides that Section 502.003 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.

Sec. 502.005. UNENFORCEABLE ADDITIONAL INSURANCE PROVISION. Provides that 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 chapter for an agreement to indemnify, hold harmless, or defend.

Sec. 502.006. EXCLUSIONS. Provides that this chapter does not affect:

- (1) an insurance policy, including a policy issued under an owner-controlled or owner-sponsored consolidated insurance program or a contractor-controlled or contractor-sponsored consolidated insurance program, except as provided by Section 502.005;
- (2) a cause of action for breach of contract or warranty that exists independently of an indemnity obligation;
- (3) a provision in a construction contract that requires the indemnitor to purchase or maintain insurance covering the acts or omissions of the indemnitor;
- (4) indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and owner's lender are parties as provided under Section 502.001(2);
- (5) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;
- (6) the benefits and protections under the workers' compensation laws of this state;
- (7) the benefits or protections under the governmental immunity laws of this state;
- (8) agreements subject to Chapter 127 (Indemnity Provisions in Certain Mineral Agreements); or

(9) a license agreement between a railroad company and a person that permits the person to enter the railroad company's property as an accommodation to the person for work under a construction contract that does not primarily benefit the railroad company.

Sec. 502.007. OTHER INSURANCE. Provides that this chapter does not otherwise affect a construction contract provision that requires a party to the contract to purchase owners and contractors protective liability insurance, railroad protective liability insurance, contractors all-risk insurance, or builders all-risk or named perils property insurance.

Sec. 502.008. PROHIBITION OF WAIVER. Prohibits the provisions of this chapter from being waived by contract or otherwise. Provides that any purported waiver is void and unenforceable.

Sec. 502.009. APPLICABILITY OF TEXAS LAW. Requires that under this chapter, the law of this state, exclusive of this state's choice-of-law rules that would apply the laws of another jurisdiction, applies to every construction contract agreement affecting improvements to real property within this state.

SECTION 3. Repealer: Section 2252.902 (Indemnity Provisions in Construction Contracts), Government Code.

SECTION 4. Provides that 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. Provides that if an original construction contract with an owner of an improvement or contemplated improvement is entered into on or after the effected 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. Provides that 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 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.

SECTION 5. Effective date: September 1, 2011.