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NEW TEXAS CLIENT ALERT – June 23, 2011

Texas "Anti-Indemnity" Statute Passed Barring Most Construction Contract Indemnity And Additional Insured Coverage Claims By Owners and General Contractors Against Subcontractors Effective Jan. 1, 2012

At the tail end of the Texas Legislative Session ended on May 31, 2011, the Texas Legislature passed a construction contract "anti-indemnity" bill that, effective January 1, 2012 bars enforcement of contractual indemnity and additional insured provisions by general contractors and owners against subcontractors in most cases.

New General Rule--Effective Jan. 1, 2012, and subject to a couple of exceptions (see below), owners and general contractors will no longer be able to enforce contractual indemnification or contractual Additional Insured ("AI") requirements contained in commercial construction contracts with their subcontractors or actual AI coverage endorsements in the sub's insurance policies if the general/owner has been sued on a claim alleging negligence, breach of contract or other degree or type of fault. Although the bill's language is couched broadly in terms of indemnity and additional insured provisions of construction contracts, its bar against enforcement will fall mostly on general contractors and owners as owners and general contractors are typically the parties seeking contractual indemnity and AI coverage. The bill declares as "void and unenforceable" construction contract provisions that obligate an indemnitor to indemnify another party (*i.e.*, the indemnitee) against any degree of negligence, fault, breach of contract or violation of statute committed by the indemnitee, its agents, employees or others under its control. The bill contains a similar bar against enforcement of Additional Insured coverage requirements, including actual coverage provisions of the policy, unless the coverage is afforded as part of a consolidated/OCIP/"wrap" type program.

Exceptions—There is a significant exception if the claim is an injury claim brought by an employee or subcontractor of the indemnitee. Thus, if the injured Plaintiff is a subcontractor's employee or an employee of such sub's subcontractor, then the general contractor or owner can still obtain indemnity and AI coverage from that particular subcontractor or its carrier. Second, the statute does not apply to construction contracts related to single family residences. Finally, as there is a separate anti-indemnity provision that has been on the books for about five years for public works contracts involving the State, the statute does not apply to such public works contracts.

If you wish to discuss any insurance-related issues or needs, please feel free to contact Schubert & Evans, P.C. at 214.744.4400 or visit our website at www.schubertevans.com.