

**TEXAS INSURANCE CODE CHAPTER 151:  
NEW RESTRICTIONS ON INDEMNITY AND  
ADDITIONAL INSURED COVERAGE IN TEXAS**

October 2011

**Patrick J. Wielinski  
Rene R. Pinson  
Cokinos, Bosien & Young  
800 Crestview Tower  
105 Decker Court  
Irving, Texas 75062  
Telephone: 817-635-3620  
Email: [pwielinski@cbylaw.com](mailto:pwielinski@cbylaw.com)**



## **PATRICK J. WIELINSKI**

Pat Wielinski is a principal in the law firm of Cokinos, Bosien & Young in its Dallas-Fort Worth office located in Irving, Texas. Pat practices in the areas of construction, insurance coverage and risk management. He is Past Chair of the Insurance Law Section of the State Bar of Texas and regularly lectures to construction, insurance, and legal groups on insurance coverage and risk management issues.

He is the co-editor of *Construction Insurance: A Guide for Attorneys and Other Professionals*, published by the ABA Forum on the Construction Industry in April 2011, of which he co-authored the chapter on commercial general liability coverage. He also is the author of *Insurance for Defective Construction, Second Edition* and has co-authored *Contractual Risk Transfer: Strategies for Contractual Indemnity and Insurance Provisions*. He regularly authors numerous other publications for insurance, construction, and legal organizations.

Pat is a member of the AGC of America Surety Bonding and Construction Risk Management Committee. As part of that committee, he monitors the status of insurance law on a national basis as applied to construction risks, filing amicus curiae briefs for a number of Texas and national construction trade organizations in important cases addressing those issues.

## **RENE R. PINSON**

Rene Pinson is an associate in the law firm of Cokinos, Bosien & Young in its Dallas-Fort Worth office located in Irving, Texas. Rene practices in the areas of construction, insurance coverage and risk management.

*“Even lawyers find that words like ‘indemnity’ and ‘subrogation’ ring of obscure Martian dialect.”*

*Court’s Opinion, Herrick Corp. v. Canadian Ins. Co. of California, 29 Cal.App.4th 753 (4<sup>th</sup> Dist. 1994)*

# TEXAS INSURANCE CODE CHAPTER 151: NEW RESTRICTIONS ON INDEMNITY AND ADDITIONAL INSURED COVERAGE IN TEXAS

By Patrick J. Wielinski  
Rene R. Pinson

## A. Introduction to Indemnity Principles

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.<sup>1</sup> 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:

---

<sup>1</sup> Throughout this white paper, the term "indemnitee" refers to the party receiving indemnification from another, and on the other hand, the "indemnitor" is the party providing indemnity to another. This tracks the use of these terms in Chapter 151 itself. For simplicity's sake, most of the examples in this white paper will regard the owner as the indemnitee, and the contractor as the indemnitor, with the indemnity clause being contained in a general contract. Of course, indemnity clauses are also included in subcontracts, purchase orders and other agreements in which the indemnity clause also establishes the party that is the indemnitee receiving the indemnity, and the party that is the indemnitor giving the indemnity.

- “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.<sup>2</sup>

***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

---

<sup>2</sup> The fair notice requirements are discussed more fully below at Section I.

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 the last legislative session, 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, avoiding 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. This white paper will address the mechanics and changes that will occur when the new statute becomes effective and will also attempt to offer some suggestions aimed at addressing those changes.

## **B. 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. A copy of the House Bill No. 2093 enacting Chapter 151 is attached at Exhibit C. 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.

## **C. 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.

### **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 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 Section 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.

**D. 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 Section 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.

**E. Employee Exception to Indemnity Prohibition**

Despite the broad limitation for indemnity clauses to the extent of the indemnitor's own negligence or fault, Section 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 Section 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 is 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.

#### **F. 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 quite 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, applied a broad causation standard and upheld 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 was viewed by the indemnitee as a backstop to an indemnity clause that may have provided for a more limited scope of indemnity, or may not have been 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. This leaves open the possibility that even if an additional insured endorsement as promulgated provides coverage that is too broad, i.e. 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.

#### **G. Exclusions from the Anti-Indemnity Provisions**

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.*** The anti-indemnity provisions do not apply to an insurance policy issued under a CIP, except as provided by Section 151.104. In other words, the additional insured prohibition contained in Section 151.104 applies to limit additional insured coverage under a CIP.
- ***Breach of Contract or Warranty.*** 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.
- ***Loan and Financing Documents.*** 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.*** The provisions do not apply to general agreements of indemnity required by sureties as a condition to providing surety bonds.
- ***Oilfield Indemnity.*** 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.
- ***License or access agreements with railroads.***
- ***Indemnity for copyright infringement.***
- ***Residential construction.*** Agreements in a construction contract pertaining to a single family home, townhouse, duplex, or land development related to residential projects are excluded.
- ***Municipal construction projects.*** Indemnity agreements in municipal construction contracts are excluded.
- ***Joint Defense Agreements.*** The statute does not apply to joint defense agreements entered into after a claim is made.

#### **H. 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.

### 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.

An example of a broad indemnity clause that is intended to satisfy these requirements is the broad indemnity clause found at paragraph (b) on Exhibit A to these materials.

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.

## **J. Hybrid or Bifurcated Indemnity Clauses**

As most participants in the Texas construction industry are aware, there have been a 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, appears to lend itself to a bifurcated approach. Toward that end, sample clauses that attempt to accomplish that bifurcation are attached as Exhibits A-1 and A-2, which set out upstream and downstream clauses. The clauses take a simple approach and obviously, should not be considered without considerable modification in order to conform to existing contract documents. Of course, any construction participant should consult with its lawyer as to compliance with the new anti-indemnity statute.

## **K. Additional Insured Contract Specifications**

Despite the strictures of Chapter 151, there appear to be a number of ways to satisfy 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. Sample additional insured specifications that set out those two levels of coverage are attached at Exhibits B-1 and B-2 to this paper. They illustrate both upstream and downstream clauses.

### **2. Alternative Specifications and Savings Clause Approach**

However, insurance specifications are not subject to the same close scrutiny as indemnity clauses. As a result, there may be more leeway in setting out the additional insured requirements. 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, and thus

additional insurance, for the negligence or fault of the indemnitee/additional insured itself. 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 work under the Contract,” is usually interpreted to require broad coverage, including the negligence of the additional insured. 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 named insured’s own negligence as to injury to the employees of the indemnitor.

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 remains is what, if any, type of endorsement should the additional insured specify? Attached at Exhibits B-2 and B-3 are alternative model additional insured specifications, both upstream and downstream, that require the named insured to provide Endorsements CG 20 10 01 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. As such, 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 insurer will provide the specified endorsement or level of coverage.

### **3. New Texas Forms From ISO**

To complicate matters further, ISO has very recently promulgated standard additional insured endorsements that are intended to comply with Chapter 151. 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 10 04 which provides coverage roughly equivalent to intermediate form indemnity. 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. Nevertheless, the second paragraph of the endorsement apparently scales back the coverage provided to that which is allowed under Chapter 151. In other words, as far as additional insured coverage for general liabilities 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.

At the same time, Chapter 151 provides an exception for broad indemnity for injuries to the named insured's employees. Just how that exception is provided for in the endorsement is unclear. In other words, does the incorporation of Chapter 151 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? The provision is somewhat 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.

It should be noted that three new CGL endorsements have been promulgated, including CG 33 95 05 12, Texas Additional Insured-Owners, Lessees or Contractors-Scheduled Person or Organization, and CG 33 93 05 12, Texas Additional Insured-Owners, Lessees or Contractors-Automatic Status when Required in Construction Agreement With You. A third endorsement has also been promulgated, CG 33 94 05 12, Texas Additional Insured-Owners, Lessees or Contractors-Completed Operations, which is intended to provide products completed operations coverage in connection with CG 33 95 05 12 and CG 33 93 05 12. Thus, it is roughly equivalent to the prior form, CG 20 37. As part of the same filing, ISO is withdrawing Endorsement 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. That alternative is set out in Exhibits B-3 and B-4.

**L. 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 insureds 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.
- If feasible, try to execute general contracts prior to January 1, 2012.

**EXHIBIT A-1**

**UPSTREAM INDEMNITY**

- (A) TO THE FULLEST EXTENT PERMITTED BY LAW, 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 ANY NEGLIGENT ACT OR OMISSION 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, 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 A-2**

**DOWNSTREAM INDEMNITY**

- (A) TO THE FULLEST EXTENT PERMITTED BY LAW, AND EXCEPT AS SET OUT IN SUBPARAGRAPH (b) BELOW, SUBCONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND CONTRACTOR AND OWNER, AND ALL OF THEIR 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 SUBCONTRACT OR SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS SUBCONTRACTOR MAY BE LIABLE.
- (B) NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND CONTRACTOR AND OWNER, AND ALL OF THEIR 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 SUBCONTRACTOR 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 SUBCONTRACTOR 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 SUBCONTRACTOR'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 SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS PARAGRAPH.

**EXHIBIT B-1**

**UPSTREAM BIFURCATED ADDITIONAL INSURED SPECIFICATION**

Additional Insured. 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, except to the extent of liability attributable to the negligence or fault of Owner.

Notwithstanding the foregoing, 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 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 B-2**

**DOWNSTREAM BIFURCATED ADDITIONAL INSURED SPECIFICATION**

Additional Insured. Contractor and Owner shall be included as insureds under the CGL policy for liability arising out of Subcontractor's work performed under this Subcontract, including products-completed operations coverage for a period of ten years following substantial completion, except to the extent of liability attributable to the negligence or fault of Contractor or Owner.

Notwithstanding the foregoing, as to liability of Contractor or Owner for bodily injury or death of an employee or agent of Subcontractor or Subcontractor's subcontractor, the additional insurance provided by Subcontractor shall provide coverage for the negligence or fault of Contractor or Owner, including the sole negligence of Contractor or Owner.

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

**EXHIBIT B-3**

**UPSTREAM ALTERNATE ADDITIONAL INSURED SPECIFICATION**

Additional Insured. 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. Such coverage shall be written on forms CG 20 10 10 01 and CG 20 37 10 01, or a substitute endorsement providing "equivalent" coverage. For purposes of this additional insured requirement, "equivalent" coverage means coverage for liability arising out of Contractor's work performed for Owner, including coverage for the negligence or fault of Owner as to bodily injury or death of an employee or agent of Contractor or Contractor's subcontractor, including products-completed operations.

The insurance provided by Contractor to Owner 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 B-4**

**DOWNSTREAM ALTERNATE ADDITIONAL INSURED SPECIFICATION**

Additional Insured. Contractor and Owner shall be included as insureds under the CGL policy for liability arising out of Subcontractor's work performed under this Subcontract, including products-completed operations coverage for a period of ten years following substantial completion. Such coverage shall be written on forms CG 20 10 10 01 and CG 20 37 10 01, or a substitute endorsement providing "equivalent" coverage. For purposes of this additional insured requirement, "equivalent" coverage means coverage for liability arising out of Subcontractor's work performed for Contractor, including coverage for the negligence or fault of Contractor or Owner as to bodily injury or death of an employee or agent of Subcontractor or Subcontractor's subcontractor, including products-completed operations.

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

EXHIBIT C

H.B. No. 2093

AN ACT

relating to the operation and regulation of certain consolidated insurance programs.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 2, Insurance Code, is amended by adding Subtitle C to read as follows:

SUBTITLE C. PROGRAMS AFFECTING MULTIPLE LINES OF INSURANCE

CHAPTER 151. CONSOLIDATED INSURANCE PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 151.001. DEFINITIONS. In this chapter:

(1) "Consolidated insurance program" means 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.

(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 project under this chapter does not include a single family house, townhouse, duplex, or land development directly related thereto.

(3) "Contractor" means any person who has entered into a construction contract or a professional services contract and is enrolled in the consolidated insurance program.

(4) "Claim" includes a loss or liability for a claim, damage, expense, or governmentally imposed fine, penalty, administrative action, or other action.

(5) "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.

(6) "Indemnitor" means a party to a construction contract that is required to provide indemnification or additional insured status to another party to the construction contract or to a third party.

(7) "Insurer" has the meaning assigned by Section 560.001.

(8) "Principal" means the person who procures the insurance policy under a consolidated insurance program.

Sec. 151.002. RULES. The commissioner shall adopt rules as necessary to implement and enforce Subchapter B.

[Sections 151.003-151.050 reserved for expansion]

SUBCHAPTER B. GENERAL REQUIREMENTS

Sec. 151.051. DURATION OF GENERAL LIABILITY COVERAGE. A consolidated insurance program that provides general liability insurance coverage must provide completed operations insurance coverage for a policy period of not less than three years.

[Sections 151.052-151.100 reserved for expansion]

SUBCHAPTER C. REQUIREMENTS RELATED TO INDEMNIFICATION

Sec. 151.101. APPLICABILITY. (a) This subchapter applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to:

(1) this chapter; or

(2) Title 10.

(b) Subsection (a) applies regardless of whether the insurance is provided or procured before or after execution of the contract.

Sec. 151.102. AGREEMENT VOID AND UNENFORCEABLE. Except as provided by Section 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.

Sec. 151.103. EXCEPTION FOR EMPLOYEE CLAIM. 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.

Sec. 151.104. UNENFORCEABLE ADDITIONAL INSURANCE PROVISION. (a) Except as provided by Subsection (b), 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 subchapter for an agreement to indemnify, hold harmless, or defend.

(b) This section does not apply to a provision in an insurance policy, or an endorsement to an insurance policy, issued under a consolidated insurance program to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy.

Sec. 151.105. EXCLUSIONS. This subchapter 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 151.104;

(2) a cause of 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 consolidated insurance program;

(3) 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 151.001(5);

(4) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;

(5) the benefits and protections under the workers' compensation laws of this state;

(6) the benefits or protections under the governmental immunity laws of this state;

(7) agreements subject to Chapter 127, Civil Practice and Remedies Code;

(8) 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;

(9) an indemnity provision pertaining to a claim based upon copyright infringement;

(10) an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to:

(A) a single family house, townhouse, duplex, or land development directly related thereto; or

(B) a public works project of a municipality; or

(11) a joint defense agreement entered into after a claim is made.

[Sections 151.106-151.150 reserved for expansion]

SUBCHAPTER D. NONWAIVER

Sec. 151.151. NONWAIVER. A provision of this chapter may not be waived by contract or otherwise.

SECTION 2. Section 2252.902, Government Code, is repealed.

SECTION 3. (a) Chapter 151, Insurance Code, as added by this Act, applies only to a new or renewed consolidated insurance program for a construction project that begins on or after January 1, 2012. A consolidated insurance program for a construction project that begins before January 1, 2012, is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b) 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. If an original construction contract with an owner of an improvement or contemplated improvement is entered into on or after the effective 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. 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 4. This Act takes effect January 1, 2012.

---

President of the Senate

---

Speaker of the House

H.B. No. 2093

I certify that H.B. No. 2093 was passed by the House on May 13, 2011, by the following vote: Yeas 103, Nays 41, 1 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 2093 on May 26, 2011, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 2093 on May 29, 2011, by the following vote: Yeas 121, Nays 21, 4 present, not voting.

---

Chief Clerk of the House

I certify that H.B. No. 2093 was passed by the Senate, with amendments, on May 23, 2011, by the following vote: Yeas 23, Nays 8; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 2093 on May 29, 2011, by the following vote: Yeas 26, Nays 5.

---

Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

---

Governor