On June 17, 2011, Governor Rick Perry signed into law a bill (HB 2093) that imposes a new completed operations coverage requirement for wrap-up insurance programs and revises Texas's anti-indemnity statute.

- Specifically, affected construction projects insured by a wrap-up insurance program must include a minimum of 3 years of completed operations coverage on general liability policies.

- Of course, the required 3 years of coverage falls substantially short of Texas's 10-year statute of repose.
With respect to indemnification restrictions, any provision of a construction contract executed after January 1, 2012, that requires one party to indemnify another for a claim caused by the negligence or fault of the indemnitee, or any party under the control of the indemnitee, will be void and unenforceable.

- Texas currently allows broad form indemnification -- up to and including one's sole negligence -- in most private construction contracts as long as the risk transfer is clear and unequivocal.
With respect to indemnification restrictions, any provision of a construction contract executed after January 1, 2012, that requires one party to indemnify another for a claim caused by the negligence or fault of the indemnitee, or any party under the control of the indemnitee, will be void and unenforceable.

- HB 2093 specifically excepts contracts for single family dwellings, duplexes and townhomes, and public works projects.
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- Another exception preserves the right to seek indemnification for injury to an employee of the indemnitor or those acting on its behalf. This exception preserves the ability to transfer liability for third-party-over actions (A type of action in which an injured employee, after collecting workers compensation benefits from the employer, sues a third party for contributing to the employee’s injury).
With respect to indemnification restrictions, any provision of a construction contract executed after January 1, 2012, that requires one party to indemnify another for a claim caused by the negligence or fault of the indemnitee, or any party under the control of the indemnitee, will be void and unenforceable.

Texas is the only state with such an exception, which provides significant protection for upstream parties.
With respect to indemnification restrictions, any provision of a construction contract executed after January 1, 2012, that requires one party to indemnify another for a claim caused by the negligence or fault of the indemnitee, or any party under the control of the indemnitee, will be void and unenforceable.

- The limitations on indemnity also apply to additional insured requirements, which means upstream parties cannot require additional insured coverage that exceeds the allowable scope of indemnity.
House Bill 2093 – Construction Anti-Indemnity

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- Specifically, affected construction projects insured by a wrap-up insurance program must include a minimum of 3 years of completed operations coverage on general liability policies.

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Five Main Points from HB2903

1) After January 1, 2012, a party (the indemnitee) is prohibited from indemnifying another party (the indemnitee) from claims or damages to the extent caused by the indemnitee’s negligence. Indemnity clauses violating this prohibition will be void and unenforceable. This general prohibition applies to both claims arising from the indemnitee’s sole negligence (which is “broad form” indemnity) and the indemnitee’s partial negligence (“intermediate form” indemnity).
2) The general prohibition also extends to obligations to defend claims (other than "joint defense agreements" entered into after a claim has been asserted). In other words, the contract cannot require the indemnitor to "defend" the indemnitee for claims based upon the indemnitee’s negligence.
2) The general prohibition also extends to obligations to defend claims (other than “joint defense agreements” entered into after a claim has been asserted). In other words, the contract cannot require the indemnitor to “defend” the indemnitee for claims based upon the indemnitee’s negligence.

- The practical problem with this restriction on the defense obligation is that the decision to defend must be made before there is any finding of fault. Accordingly, this will mean that everyone will have to hire their own lawyers.
3) After January 1, 2012, Additional Insured endorsements to an indemnitor’s liability insurance policy that purport to provide coverage to an indemnitee for its sole or partial negligence are also void and unenforceable.

- This means that the currently available Additional Insured endorsements that provide coverage for the indemnitee’s partial negligence, so long as the claim arises from the indemnitor’s work, will no longer be enforceable in Texas. It is very likely that ISO will prepare specific Additional Insured endorsement forms for Texas.
4) However, the restrictions on indemnification (both with regard to claims and defense of claims) and on Additional Insured endorsements do NOT apply to on-the-job employee bodily injury claims.

   Accordingly, an indemnitee can still make the indemnitor defend and indemnify the indemnitee for its sole, as well as partial, negligence for a personal injury claim by an employee of the indemnitor (or its subcontractors). This means that the current broad or intermediate form Additional Insured endorsements will still be enforceable in Texas for on-the-job personal injury claims.
5) Even with the changes, Parties can still obtain insurance to transfer these risks.

A “consolidated insurance program” (such as an OCIP or CCIP) can provide coverage for all named insureds. This effectively serves the same purpose as an Additional Insured endorsement to one party’s insurance policy.
Five Main Points from HB2903

5) Even with the changes, Parties can still obtain insurance to transfer these risks.

- Additionally, Owners can purchase an Owners and Contractors Protective Liability policy. This policy is often furnished by the Contractor through its CGL insurer, but it is a separate policy protecting the Owner from bodily injury and property damage claims arising out of ongoing operations performed for the Owner by the Contractor on a construction project and for the Owner’s acts or omissions in connection with the “general supervision” of those operations.
Five Main Points from HB2903

- Even with the changes, Parties can still obtain insurance to transfer these risks.
- While it does not provide “completed operations coverage”, it does cover the Owner’s risk from “vicarious” or “derivative” liability claims arising from the ongoing work of the project. OCP policies are currently affordable and commercially available.
Prior to the passage of HB 1390, there were two, distinct types of retainage recognized under Texas law: (i) contractual retainage in prime contracts and subcontracts and (ii) a statutory opportunity for an owner to withhold 10% of the prime contract amount and create a “drop dead” date to file a lien.
If this statutory retainage was withheld and no notices of indebtedness were sent from a claimant to an owner, an owner could release the remaining 10% on the 31st date after completion, relatively secure in knowing that it would not be liable to lien claims filed thereafter.
These two, separate retainage concepts had separate provisions for notice and separate deadlines. Now, these concepts have been comingled.
Subcontractors and suppliers have two means to preserve the right to claim a lien for unpaid, contractual retainage.

- First, they can send notice letters as contractual retainage is withheld from their periodic draws. This process has not been changed.
- Second, they can now wait to the conclusion of their work scope and send notice of a retainage provision within 30 days of the completion or termination of their subcontract.
The statutory change does not require the lien claimant to advise the owner of the amount of any contractual retainage, it merely requires notice that a subcontractual retainage obligation exists. If timely notice is provided to an owner that a subcontract calls for retainage (timely meaning within 30 days after the subcontracted work is completed), the claimant can later file a lien to create a direct liability against an owner.
The statutory change does not require the lien claimant to advise the owner of the amount of any contractual retainage, it merely requires notice that a subcontractual retainage obligation exists.

The deadline to file the lien is a moving target, but generally ranges from 40 days after a notice of completion or a notice of termination is recorded by the owner on the entire project, to 4 months after completion of the entire project if no notices are recorded.
HB 1390 also allows an owner to accelerate this lien-filing obligation by allowing an owner to send a written demand that the claimant file its lien (putting the claimant on a 30-day deadline to file).
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- Unfortunately, the statutory amendment now comingles the notion of contractual retainage, statutory “safe harbor” retainage, and personal liability to an owner for debts.

- This may require future legislative clarification or court interpretation to resolve
HB 1390 also provides that if subcontractors have requested information of an owner during the course of a project (essentially information on completion, termination, or legal descriptions of the property), and the owner fails to provide the information in accordance with the statute, the deadline to file a lien to secure payment of contractual retainage reverts to 4 months after completion of the entire project.

The new retainage notice requirements will take effect on September 1, 2011.
HB 1456 brings two significant changes to existing Texas law.

- It prohibits the use of contractual waivers of lien rights for commercial construction projects.
  - The residential construction industry can be exempted from the prohibition on contractual waivers of lien rights.
HB 1456 brings two significant changes to existing Texas law. It mandates the use of uniform statutory lien waiver forms, for both conditional and unconditional lien waivers.

- These statutory forms are to be used during the payment process on all construction projects in Texas.
While the use of these standard, statutorily-worded lien waiver and release forms may reduce litigation and payment delays in the construction process, the primary goal of the statute was to invalidate contractual lien waivers and to preserve the rights of subcontractors and suppliers to file liens in the event of a failure of payment.
If the lien waiver and release is not drafted and executed in a form that “substantially complies” with the language found in HB 1456, then it is not enforceable and does not create an estoppel or impairment of a lien or payment bond claim.
However, if a subcontractor or supplier has actually been paid, a deficiency in a form would be irrelevant, as there would be no outstanding indebtedness for which a lien would be filed.
Prior to the enactment of SB 539, courts had discretion to determine whether to award costs and attorney’s fees to a successful party in a suit to foreclose on a lien or to enforce a claim against a construction-related bond.

SB 539 amended the Property Code to make the award of reasonable legal fees mandatory for a successful lien claimant.
In addition, this legislation prohibits a person from requiring a claimant to execute an unconditional waiver and release for a progress payment or final payment amount unless the claimant or potential claimant actually received payment in that amount in good and sufficient funds.

The requirement for the use of the uniform statutory lien waiver and release language takes effect on January 1, 2012.
Thank You