

BILL ANALYSIS

C.S.H.B. 1217
By: Eiland
Insurance
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Currently, on construction projects, owners are requiring general contractors to add themselves and oftentimes others such as architects and engineers as additional insureds on the general contractor's liability insurance policy. The general contractor's policy is deemed as primary and the owner's liability policy is secondary. This means that the general contractor's liability policy will be the first responsible to pay for any damages and defense costs. The owner's policy only becomes liable if the general contractor's policy limits is exhausted. The negligent conduct of the owner goes on the insurance record of the general contractor. Similarly, general contractors pass through this requirement to subcontractors in which case the liability policy of the subcontractor is primarily liable for any acts of negligence of the general contractor as well as those up the chain such as the owner, architects and engineers. In fact, the subcontractor may not have been on the construction site for several months and its insurance policy may still have to pay. The subcontractor's work may have had no connection to the conduct causing the injury or damage but the subcontractor's insurance is responsible for paying. The net effect of this system of "passing the buck", through the requirement of adding others to their liability policy, is that it requires those who did not cause an accident and can least afford it, to be liable for another's mistake. Further, it makes the least able person, the subcontractor, the primary "insurer" for the entire project and puts the subcontractor's insurance at risk for actions of others.

Any party who is not responsible for the action or conduct causing the damage should not be required to risk its insurance policy and risk the ability to obtain insurance at a fair price, or even to obtain insurance at any price, for the negligence of someone else. Additional insured insurance coverage is becoming increasingly difficult to obtain and when available is more expensive. Either being without insurance or having high priced insurance places a construction company at a competitive disadvantage. The insurance of a party to a construction contract should cover the liability for that party and not be required to do so for another.

This bill provides that each party that improves real property shall not be able to shift its responsibility onto the liability policy of another through contract or other means. The bill is intended to prohibit a person's insurance policy from providing coverage for someone else's negligence. The measure also prohibits a party from requiring another party to waive any right of subrogation under their insurance policy against a negligent party. This bill helps restore the rule of making a person responsible for his or her own actions and not allowing insurance to circumvent that policy. Further, it encourages all parties to take efforts to prevent accidents and maintain a safe workplace.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1: Amends Subchapter E, Chapter 21, Insurance Code by adding Article 21.75 to read as follows:

Art. 21.75. INSURANCE AND RISK TRANSFER AGREEMENTS IN CERTAIN CONSTRUCTION CONTRACTS.

Sec. 1. DEFINITIONS. Provides definitions for "Additional insured", "Construction contract" and "Construction insurance provision".

Sec. 2. CERTAIN INSURANCE PROVISIONS UNENFORCEABLE. (a) A provision of a construction contract or collateral document requiring a party to add another party, including an indemnitee, to an insurance policy as an additional insured is void and unenforceable. This Section also prohibits a provision requiring a party to waive any right of subrogation that they may have under their insurance policy against the acts of the party seeking the waiver of subrogation.

(b) An insurance policy provision or endorsement that provides for an additional insured or a waiver of subrogation is void.

Sec. 3. CERTAIN CONSTRUCTION CONTRACT PROVISIONS UNENFORCEABLE. A provision of a construction contract is unenforceable if it purports to indemnify or hold harmless a person against loss or liability that results from sole or concurrent negligence of the indemnitee or the indemnitee's agent, employee or independent contractor directly responsible to the indemnitee and arises or results from personal injury or death, property damage, or a fine or fee or other action assessed by a governmental entity or other types of loss, damage or expense.

Sec. 4 INSURANCE CONTRACTS, WORKER'S COMPENSATION. This article does not effect the enforceability or validity of an insurance policy or contract or the benefits or protections of the worker's comp. laws of this state.

Sec. 5 WAIVER PROHIBITED. Prohibits a waiver of chapter provisions.

Sec. 6. APPLICABILITY OF OTHER LAW. Provides that the chapter prevails over any other law that conflicts with or is inconsistent with this chapter.

SECTION 2: Repeals section 2252.902 of the Government Code.

SECTION 3: Makes application of this Act prospective.

SECTION 4: Effective date: September 1, 2005.

EFFECTIVE DATE

September 1, 2005

COMPARISON OF ORIGINAL TO SUBSTITUTE

The substitute prohibits the use of broadform indemnification clauses in construction contracts. These are the clauses that require one party to pay for the damages and the cost of defense caused by the other party's negligence. (SECTION 1, Article 21.75, Sec. 3 of the Substitute adds this provision. Beginning at Pg. 2, Line 18 through Pg. 3, Line 15)

The substitute also repeals section in Government Code dealing with Indemnification Clauses in contracts with the State in order to allow this legislation to govern those provisions. (Section 2 of the Substitute. Page 3, Line 21)

The bill retains the ban on use additional insured provisions in construction contracts which requires a party to add another as the additional insured on a general liability policy.

The bill also retains the prohibition of requirements that one party waive any right of subrogation they may have against another party because of the other party's negligent acts causing injury or damage.