

BILL ANALYSIS

C.S.H.B. 818
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In a construction contract, an owner requires a general contractor to assume liability for the owner's negligence, and a contractor then requires any subcontractor the contractor uses to assume the same liability. Therefore, a general contractor is responsible for any damages incurred in an accident for which an owner is responsible, including the defense costs of the owner, and a subcontractor is responsible for any damages resulting from the negligent acts of the general contractor or the owner. Most construction contracts also require a general contractor or a subcontractor to purchase an "additional insured" endorsement to the general contractor's or subcontractor's insurance policy, requiring the insurance company to provide coverage for any other entity involved in the contract. Many construction contracts make a subcontractor liable for a general contractor's breach of contract and warranty and make the subcontractor responsible for any fines or penalties assessed by a governmental entity directly against the general contractor. These contract provisions make a subcontractor in effect the entire project's insurer, placing the subcontractor and its insurance carrier at risk for the negligent acts of an owner or a general contractor. A general contractor assumes a similar risk for the negligent acts of an owner.

C.S.H.B. 818 makes each party liable for its own negligence. The bill prohibits transferring liability by contract or other means, except for the bodily injury or death of an employee of the indemnitor, its agent, or a subcontractor of any tier.

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

C.S.H.B. 818 amends the Civil Practice and Remedies Code to define, for the purposes of indemnity provisions, "construction contract" to mean 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 bill defines the term further to include 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. The bill defines "indemnitor" to mean 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. The bill defines "claim" to include a loss or liability for a claim, damage, expense, or governmentally imposed fine, penalty, administrative action, or other action.

C.S.H.B. 818 establishes that 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, fault, breach or violation of a statute, ordinance, or governmental regulation or rule, or contractual breach 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. The bill makes its provisions inapplicable 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. The bill establishes 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 exceeds the scope of indemnity allowed as described by the bill.

C.S.H.B. 818 establishes that its provisions do not affect:

- 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 certain additional insurance coverage;
- a cause of action for breach of contract or warranty that exists independent of an indemnity obligation;
- a provision in a construction contract that requires the indemnitor to purchase or maintain insurance covering the acts or omissions of the indemnitor;
- indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and owner's lender are parties as provided by the bill;
- general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;
- the benefits and protections under state workers' compensation laws;
- the benefits or protections under state governmental immunity laws;
- certain mineral agreements containing indemnity provisions; or
- 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.

C.S.H.B. 818 establishes that its provisions do 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 insurance.

C.S.H.B. 818 establishes that its provisions may not be waived by contract or otherwise, and that any purported waiver is void and unenforceable. The bill authorizes parties in a construction contract to agree upon an indemnity or additional insured provision that is not otherwise prohibited. The bill applies Texas law, exclusive of state choice-of-law rules that would apply the laws of another jurisdiction, to every construction contract agreement affecting improvements to real property within Texas.

C.S.H.B. 818 repeals Section 2252.902, Government Code, relating to indemnity provisions in construction contracts.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 818 differs from the original by redefining "claim" to include a governmentally imposed fine, penalty, administrative action, or other action, whereas the original's definition of "claim" did not include these items. The substitute differs from the original by including among the specified contracts in the definition of "construction contract" a performance bond, entered into or made by an architect, engineer, or material lessor, whereas the original did not include these items in its definition of "construction contract."

C.S.H.B. 818 adds a provision not in the original establishing that certain provisions in an agreement collateral to or affecting a construction contract are void and unenforceable as against public policy. The substitute removes a provision in the original establishing as void and unenforceable a provision requiring an indemnitor to indemnify a claim arising from damage to property, any other type of damage, or a fine, penalty, administrative action, or other action assessed by a governmental entity directly against the indemnitee. The substitute differs from the original in establishing as void and unenforceable a provision in a construction contract that requires the purchase of additional insured coverage or, rather than and, as in the original, any coverage endorsement or provision within an insurance policy providing additional insured coverage.

C.S.H.B. 818 differs from the original by establishing that its provisions do not affect certain insurance policies and certain license agreements between a railroad company and a person that permits the person to enter the railroad company's property, whereas the original did not establish such. The substitute differs from the original by establishing that its provisions do not otherwise affect a construction contract provision that requires a party to the contract to purchase contractors all-risk insurance or builders all-risk insurance, whereas the original did not establish such.

C.S.H.B. 818 differs from the original by expanding the savings provision.