

BILL ANALYSIS

C.S.S.B. 555
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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.S.B. 555 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.S.B. 555 amends a provision of the Civil Practice and Remedies Code that currently declares to be void and unenforceable a covenant in a construction contract that requires a contractor to indemnify or hold harmless a registered architect or licensed engineer or an agent, servant, or employee of a registered architect or licensed engineer to expand the application of the provision to any person, rather than just the contractor, performing work that is the subject of a construction contract.

C.S.S.B. 555 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.S.B. 555 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.S.B. 555 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.S.B. 555 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.S.B. 555 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.S.B. 555 repeals Section 2252.902, Government Code, relating to indemnity provisions in construction contracts.

C.S.S.B. 555 81(R)

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.S.B. 555 differs from the original by adding an amendment to Section 130.002(a), Civil Practice and Remedies Code, to provide more broadly for a “person” who is to perform work that is subject to a construction contract, instead of only a “contractor”.

C.S.S.B. 555 differs from the original by adding to the definition of “construction contract” to include an architect or engineer who can enter into or make a contract, whereas the original did not include these items in its definition of “construction contract.” Also adds to the definition of “construction contract” the design of a building or structure, whereas the original did not include this item in its definition of “construction contract”

In the portion of the bill that provides that the chapter does not affect certain insurance policies, C.S.S.B. 555 excepts from that exclusion provision only insurance policies under Section 502.005 (unenforceable additional insurance provision), whereas the original also excepted from that exclusion provision insurance policies under Section 502.003 (agreement void and unenforceable).

C.S.S.B. 555 differs from the original by establishing that its provisions do not affect certain license agreements between a railroad company and a person that permits the person to enter the railroad company’s property for work under certain construction contracts, whereas the original did not establish such.