HB 2093 signed into law June 17, 2011, effective January 1, 2012

- Brief overview of anti-indemnity/additional insured provisions of Ins. Code Ch. 151

- Not about:
  - Detailed evaluation of the many issues of implementation and interpretation of the new law
  - Texas’ difficult doctrine of “Fair Notice” requirements for enforceable indemnity agreements
  - Additional-insured endorsements
  - Certificates of insurance
Practice in the Construction Industry Before 2012

- On all but very large construction projects, each party procured its own liability insurance
- Also, Owners and General Contractors usually required Subcontractors to indemnify and add them as additional insureds on the subs’ insurance
- On large projects ($100M or greater), parties often procured consolidated insurance programs covering O, GC, Subs, and other participants for CGL and WC risks
  - Owner-controlled insurance programs (OCIPs) and Contractor-controlled insurance programs (CCIPs)
Subcontractor’s Revenge

- Subcontractors hated the old practice
- Subs’ lobby engineered a coup in HB 2093
  - The original “Consolidated Insurance Program” bill was defeated
  - The next day, HB 2093 was submitted with all but a small part of the CIP bill deleted
  - Newly inserted were the anti-indemnity/ additional insured provisions now encoded in Tex. Ins. Code Ch. 151.
“Consolidated Insurance Program” (CIP) law in Ch. 151, Subch. C, Texas Insurance Code

- §151.102 voids indemnification agreements in a “construction contract” or an agreement collateral to or affecting a “construction contract” except for employee-injury claims
- §151.104 voids additional-insured procurement agreements covering the same scope prohibited in §151.102 (again, except for employee-injury claims), unless issued under a CIP
- §151.105 lists 11 exceptions
- §151.151: provisions of this chapter may not be waived by contract or otherwise
CIP and “Construction Project” (§151.001): Definitions

- “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.

- “Principal” means the person who procures the insurance under a CIP.
“Construction project” means construction, remodeling, maintenance, or repair of improvements to real property, including immediate location and areas incidental and necessary to the work as defined in the “construction contract” documents,

but not including: single family house, townhouse, duplex, or development directly related thereto
“Construction Contract” (§151.001): Definition

- “Construction Contract” includes contracts, subcontracts and performance bonds made by 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.
Subchapter C (Anti-indemnity/anti-additional-insured provisions) applies to insurance subject to:

- This chapter or
- Title 10 (Property & Casualty Insurance)

Title 10 arguably applies only to admitted insurers

What about surplus lines insurers or self-insurers?
Additional Insured Provision (§151.104(a))

- Additional-insured agreement is “void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under the subchapter for an agreement to indemnify, hold harmless or defend” (i.e., §151.102)

- What if the additional-insured requirement is not explicitly tied to the indemnity?

- What if the additional-insured requirement does not include the named insured’s negligence, but covers only vicarious liability?
Additional Insured Provision (§151.104(b))

- This section does not apply to a provision or endorsement in an insurance policy ... issued under a CIP “to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy”

- What does that mean?

- Many construction contracts simply require one party to add other parties as additional insureds without any reference to “named insureds”
Exceptions (§ 151.105)

- Subch. C does not apply to:
  - Owner-controlled or contractor-controlled consolidated programs
  - Breach of contract or warranty independent of an indemnity obligation
  - Indemnities in loan or financing documents except the “construction contract”
  - Indemnities required by sureties
  - Benefits under WC or governmental immunity laws
Anti-Indemnity Provisions: Exceptions

- Agreements subject to ch. 127 CP&R Code (oil-field anti-indemnity)
- Indemnity based on copyright infringement
- Joint defense agreement entered after a claim
- Construction contract indemnities pertaining to
  - Single family, townhouse, duplex
  - Public work of a municipality
Duration of Completed Operations Coverage (151.051)

- A CIP that provides CGL coverage must provide “completed operations” coverage for a policy period of not less than 3 years.

- Does this mean the CGL policy must have a policy period not less than 3 years?

- Or must the policy have a tail covering occurrence for at least 3 years after “substantial completion” of the project?

- What about projects lasting more than 3 years?
Effective Date

• New law effective January 1, 2012:
  ► An original construction contract entered on or after 1/1/2012 is governed by new law
  ► A construction project entered or construction project begun before 1/1/2012 is governed by old law
  ► A construction contract entered before effective date is governed by old law even if project begins after 1/1/2012
What is happening now?

- Apparently, the insurance industry is sitting this one out:
  - Brokers tell me that requests from insureds for CIPs have increased substantially
  - But underwriting standards have not been expanded or relaxed
  - Only large projects ($100M) or large players (largest oil companies or GCs) with multiple significant projects (say, 10 projects a year @ 10M each)
  - Insurers appear to be leaving it up to the courts to sort out
What to expect?

- Perhaps protracted litigation – courts may enforce the anti-indemnity/additional insured provisions as best they can
  - Might additional insureds argue that the Legislature intended to void indemnities and additional insured agreements only if CIPs were made available generally in the market place

- The Texas Department of Insurance may clarify terms and implementation (§151.002)

- Or perhaps this will turn out like Y2K (the mountains labor and a silly mouse is born)
Questions