



Recent Developments in Construction Law

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June 13, 2016

The following information is general in nature, is presented for discussion purposes only, and may not reflect current legal developments, nor fully explore all potential areas of this topic. Therefore, the information that follows should not be relied upon or construed as legal advice and is not a substitute for obtaining legal advice from an attorney licensed in the State of Texas.

Overview

- **Certificates of Merit**
- **Anti-Indemnity Act**
- **Mechanic's and Materialman's Liens**

Certificates of Merit

What is a Certificate of Merit?

- Chapter 150 of the Texas Civil Practice & Remedies Code requires a plaintiff to file a certificate of merit when filing a lawsuit or arbitration seeking damages from a professional arising out of the provision of professional services.
- An affidavit by a third-party professional that specifically sets forth any negligence, errors, or other actions or omissions by the defendant professional in providing professional services.
 - Filed with the original petition.
 - The third-party professional has to hold the same professional license as the defendant and must be knowledgeable in the defendant's area of practice.

Certificates of Merit

Why is a Certificate of Merit required?

- The certificate is intended to help the trial court or arbitrator determine if the claim lacks substance at the beginning of the case.
Criterion-Farrell Eng'rs v. Owens, 248 S.W.3d 395, 399 (Tex. App.—Beaumont 2008, no pet.).
- There is no requirement to file a certificate of merit for parties other than the plaintiff to assert third-party claims or cross-claims.
Jaster v. Comet II Construction, Inc., 438 S.W. 3d 556 (Tex. 2014).

Certificates of Merit

Claims Can Be Dismissed.

- “The plaintiff's failure to file the affidavit in accordance with this section **shall result in dismissal** of the complaint against the defendant. This dismissal **may be with prejudice.**”

TEX. CIV. PRAC. & REM. CODE § 150.002(e).

Certificates of Merit

Claims Can Be Dismissed.

- Courts have held that a court or arbitrator may, in their discretion, dismiss plaintiff's claim with prejudice.
- At least one court has held that plaintiff's claim **must** be dismissed with prejudice.
- This issue is currently pending before the Texas Supreme Court.

Compare CTL/Thompson Texas, LLC v. Starwood Homeowner's Ass'n, Inc., 461 S.W. 3d 627 (Tex. App.—Fort Worth 2015, pet. denied) (court's discretion); *TIC N. Cent. Dallas 3, LLC v. Envirobusiness, Inc.*, 463 S.W. 3d 71 (Tex. App.—Dallas 2014, pet. denied) (same); *with Bruington Eng'g., Ltd. v. Pedernal Energy, LLC*, 456 S.W.3d 181 (Tex. App.—San Antonio 2014, pet. granted) (dismissal with prejudice required).

Certificates of Merit

When Is It Required?

- A certificate of merit is required when the claims at issue in the case arise out of the provision of professional services.
 - Example: A homebuilder entered into an agreement with an engineering firm to design home foundations. The engineering firm did not properly design the foundations, causing defects. The homebuilder would have to file a certificate of merit if it sued the engineering firm for breach of contract.
- Not all cases involving professionals require a certificate of merit.
 - Example: A homebuilder entered into an agreement with an engineering firm to design home foundations. As part of the agreement, the engineering firm agreed to indemnify the homebuilder against third-party claims. A homeowner sued the homebuilder, claiming defects in the foundations. The homeowner's carrier filed suit against the engineering firm to enforce the indemnity agreement. A certificate of merit was not required for the indemnity claims, even though the underlying issues could involve whether the engineer exercised reasonable care in performing its professional services.

Childress Eng'g. Serv., Inc. v. Nationwide Mut. Ins. Co., 456 S.W.3d 725, 726-30 (Tex. App.—Fort Worth 2015, no pet.).

Certificates of Merit

Include the Factual Basis for Each Theory of Recovery.

- The statute requires the certificate of merit to provide the “factual basis” for each theory of recovery, but does not define what “factual basis” means.
 - One court interpreted the statute to require the certificate of merit to set forth sufficient facts to support each element of each cause of action, even for such causes of action as breach of contract and gross negligence.
Durivage v. La Alhambra Condominium Assoc., 2011 Tex. App. LEXIS 10030, at *1 (Tex. App.—Corpus Christi 2011, pet. dismiss’d).
 - Another court disagreed, reasoning that the professional signing the certificate of merit was required to include only facts showing the professional errors and omissions giving rise to the claims.
M-E Engineers, Inc. v. City of Temple, 365 S.W.3d 497, 506 (Tex. App.—Austin 2012, pet. denied).

Overview

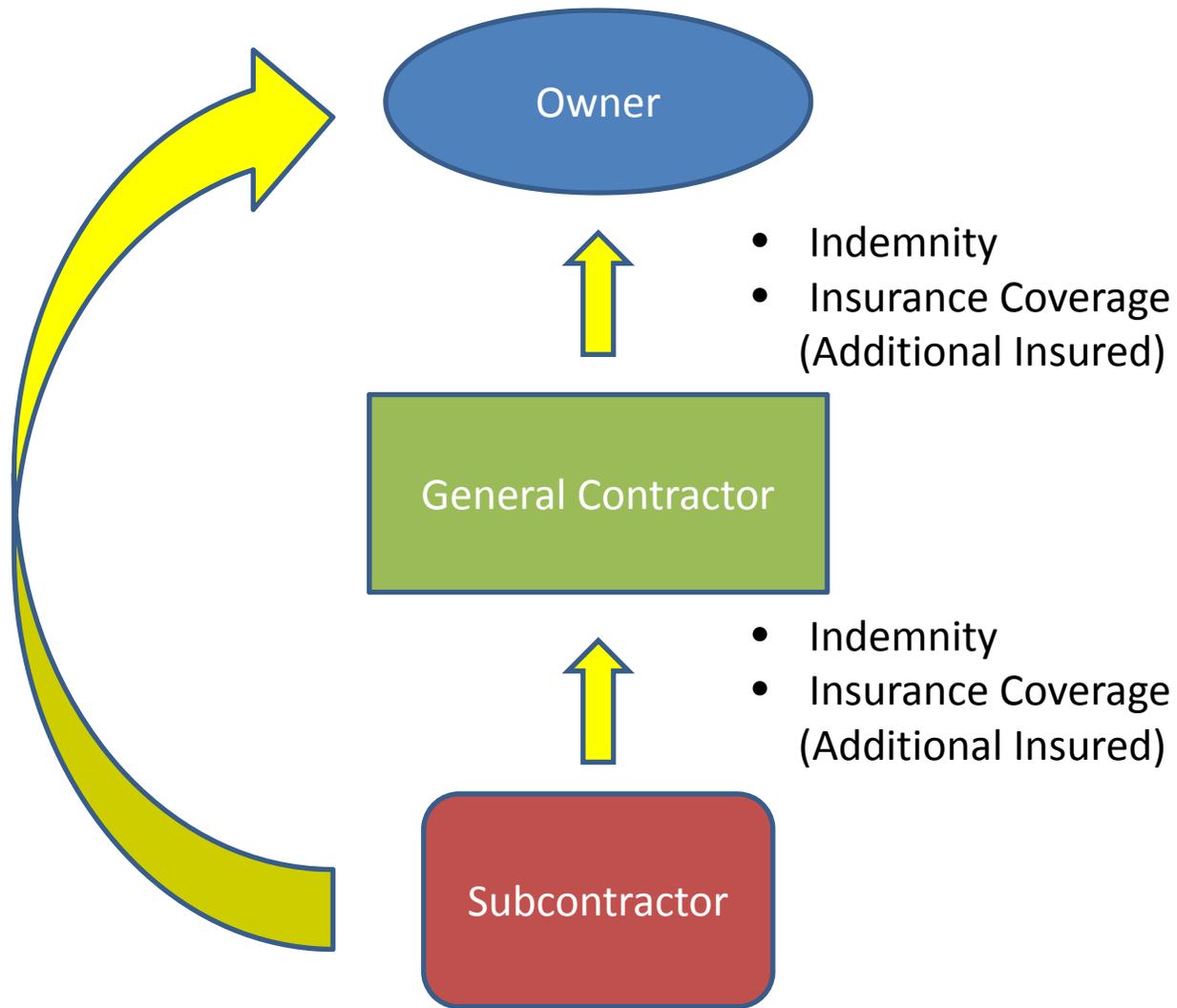
- Certificates of Merit
- **Anti-Indemnity Act**
- Mechanic's and Materialman's Liens

The Construction Anti Indemnity Act

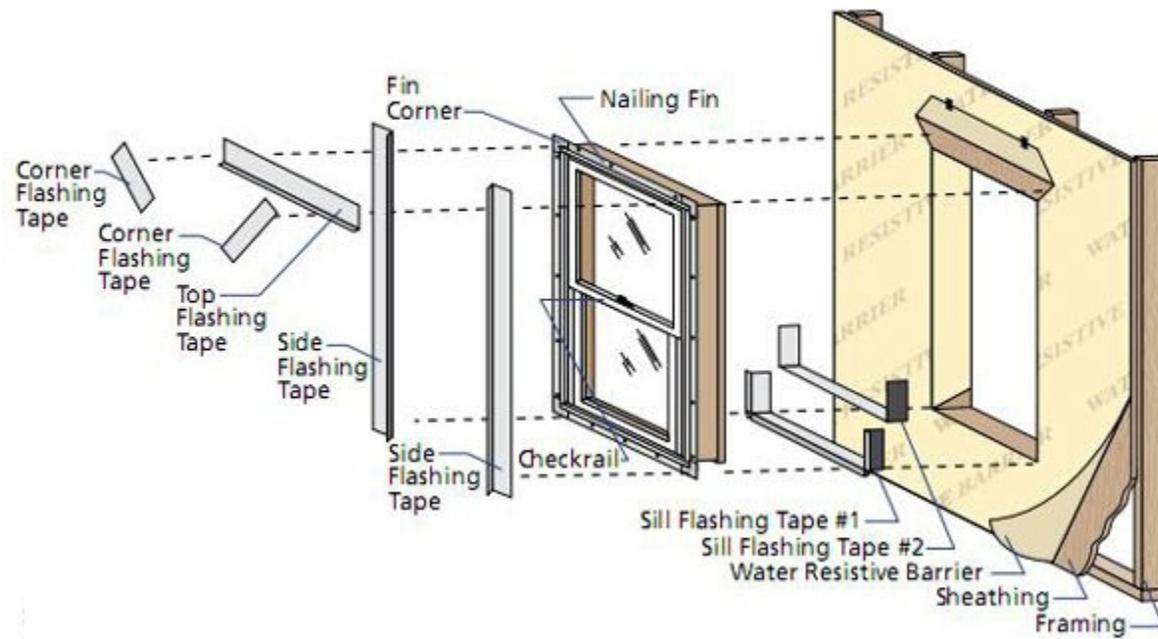
Basics of Indemnity and Additional-Insured Coverage

- The Construction Anti-Indemnity Act invalidates certain indemnity and additional-insurance provisions in construction contracts.
 - TEX. INS. CODE §§ 151.101, *et seq.*
 - Effective for construction contracts if the contract with the owner was signed on or after January 1, 2012.

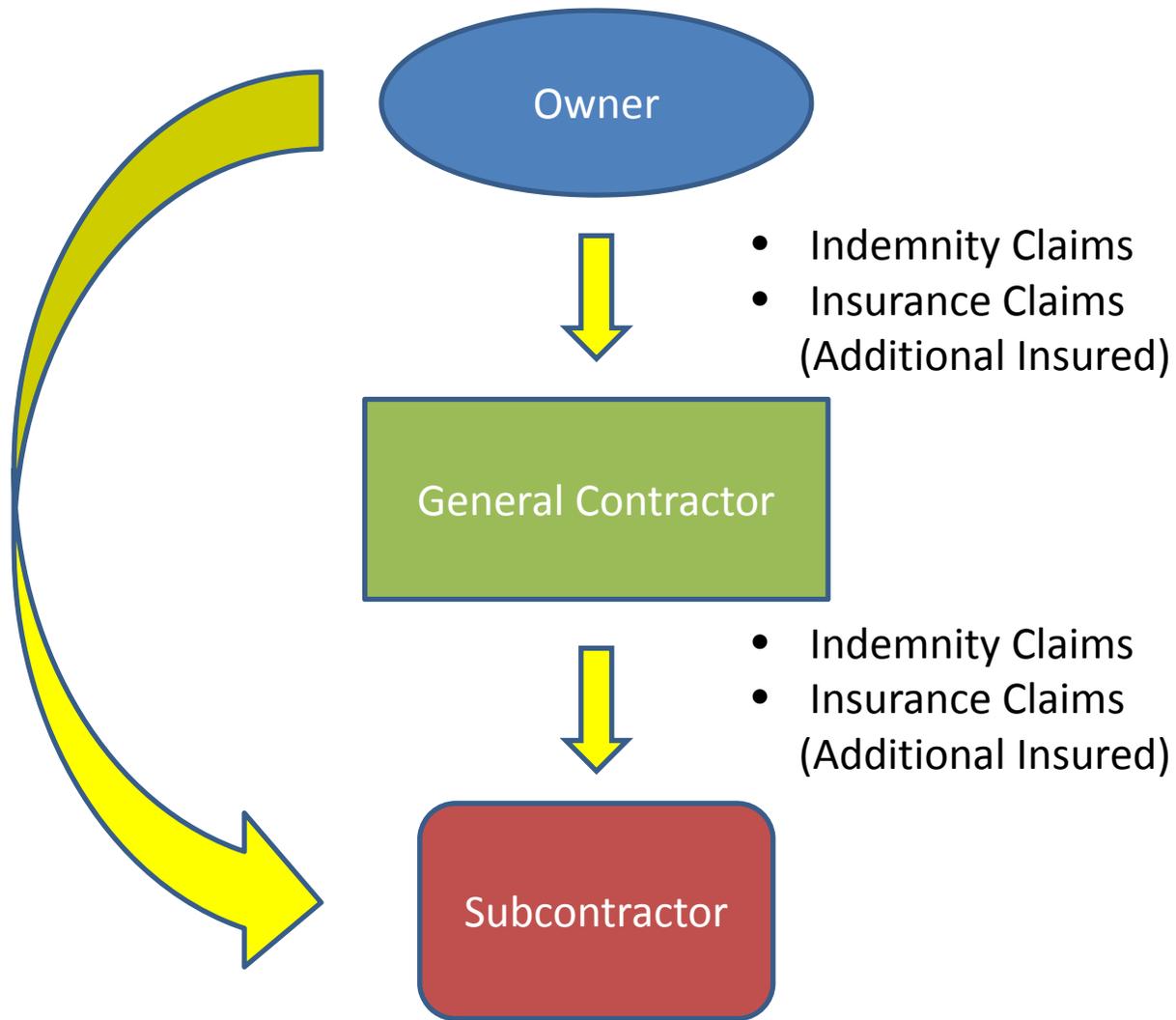




Flashing Sequence - Typical Wood Frame Construction







The Construction Anti Indemnity Act

Types of Indemnity Agreements Are Now Unenforceable.

- Types of Indemnity Provisions
 - **Broad-Form:** Downstream party indemnifies for all losses, even if they are solely the upstream party's fault.
 - **Intermediate-Form:** Downstream party indemnifies for all losses, as long as the downstream party was at least partially responsible.
 - **Limited Indemnity:** Downstream party indemnifies only for losses it causes.

The Construction Anti Indemnity Act

Types of Indemnity Agreements Are Now Unenforceable.

- With some exceptions, to the extent construction contracts require Broad-Form and Intermediate-Form Indemnity, they are now **void and unenforceable**. TEX. INS. CODE § 151.102(a).
- To the extent construction contracts require the contractor to provide additional-insured coverage for losses not caused by the contractor, they are now **void and unenforceable**. TEX. INS. CODE § 151.104(a).

The Construction Anti Indemnity Act

Exceptions to the Construction Anti-Indemnity Act.

- Lots of exceptions – For example:
 - Construction of single-family houses, townhouses, or duplexes.
TEX. INS. CODE §§ 151.001(2), 151.105(10);
 - Claims for bodily injury or death of the downstream party’s own employee, agent, or subcontractor. TEX. INS. CODE § 151.103;
 - Workers’ compensation claims. TEX. INS. CODE § 151.105(5);
 - Loan agreements or general-indemnity agreements for surety bonds.
TEX. INS. CODE §§ 151.105(3)-(4);
 - Owner-Controlled Insurance Programs or Contractor-Controlled Insurance Programs. (OCIPs or CCIPs). TEX. INS. CODE §§ 151.104(b), 151.105(1);
 - A joint-defense agreement entered into after a claim is made.
TEX. INS. CODE § 151.105(11).
- See TEX. INS. CODE ch. 151 (especially § 151.105) for additional exceptions.

The Construction Anti Indemnity Act

Approaches to Compliance.

- Keep the indemnity language previously used, but add a modifying paragraph:

NOTHING HEREIN SHALL BE CONSTRUED TO REQUIRE THE CONTRACTOR TO INDEMNIFY AN INDEMNITEE FOR AN INDEMNIFIED CLAIM CAUSED BY OR RESULTING SOLELY FROM AN INDEMNITEE'S OWN NEGLIGENCE UNLESS OTHERWISE PERMITTED BY APPLICABLE PROVISIONS OF CHAPTER 151 OF THE TEXAS INSURANCE CODE. IT IS AGREED THAT WITH RESPECT TO ANY LEGAL LIMITATIONS NOW OR HEREAFTER IN EFFECT AND AFFECTING THE VALIDITY AND ENFORCEABILITY OF THE INDEMNIFICATION OBLIGATION UNDER THIS SECTION, SUCH LEGAL LIMITATIONS ARE MADE A PART OF THE INDEMNIFICATION OBLIGATION TO THE MINIMUM EXTENT NECESSARY TO BRING THIS SECTION INTO CONFORMITY WITH THE REQUIREMENTS OF SUCH LIMITATIONS, AND AS SO MODIFIED, THE INDEMNIFICATION OBLIGATION SHALL CONTINUE IN FULL FORCE AND EFFECT.

- Revise the indemnity language to address the requirements of the Construction Anti-Indemnity Act.
 - Address the applicable exceptions to the Construction Anti-Indemnity Act to avoid unnecessarily limiting the scope of indemnity.

The Construction Anti Indemnity Act

Approaches to Compliance.

- Add similar language addressing any provisions requiring the indemnitee to provide additional-insured coverage.
- Provide contractors with forms to use with subcontractors that include provisions complying with the Construction Anti-Indemnity Act.
- There are very few court decisions interpreting this statute. **Proceed with caution.**

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Mechanic's and Materialman's Liens

Notice Requirements for Mechanic's and Materialman's Liens.

- Texas has some of the most complicated lien laws in the country.
- Claimants must comply with the notice requirements of Chapter 53 of the TEXAS PROPERTY CODE.
- Failure to comply with notice requirements may invalidate lien claims.
- Owners should pay particular attention to all notice deadlines.

Mechanic's and Materialman's Liens

Notice Requirements for Progress Payments.

- The procedures for perfecting a lien claim depend the person with whom the claimant contracted.
- Subcontractors are divided into two categories:
 - First-Tier subcontractors, who contracted with the original contractor; and
 - Second-Tier subcontractors, who contracted with a First-Tier subcontractor or another Second-Tier subcontractor.

Mechanic's and Materialman's Liens

Notice Requirements for Progress Payments.

- Second Month Notice (Second-Tier Subcontractors)
 - Sent to Original Contractor no later than the 15th day of the second month following each month in which the Second Tier subcontractor supplied labor or materials to the project.
- Third Month Notice (First-Tier and Second-Tier Subcontractors)
 - Sent to Original Contractor and Owner no later than the 15th day of the third month following each month in which the Second and/or First Tier subcontractor supplied labor or materials to the project.
 - Include mandatory language informing owner its property may be subject to lien if the claim is not resolved.

Mechanic's and Materialman's Liens

Notice Requirements for Progress Payments.

Month Work Performed or Materials Delivered	"Second Month" Notice Required if Contract not with Original Contractor	"Third Month" Notice for All Claimants except those with Directly Contract with Owner
January	March 15	April 15
February	April 15	May 15
March	May 15	June 15
April	June 15	July 15
May	July 15	August 15
June	August 15	September 15
July	September 15	October 15
August	October 15	November 15
September	November 15	December 15
October	December 15	January 15
November	January 15	February 15
December	February 15	March 15

Mechanic's and Materialman's Liens

Notice Requirements for Progress Payments.

- Fourth Month Notice & Affidavit (Original Contractors and all Subcontractors)
 - An affidavit claiming a lien must be filed no later than the 15th day of the fourth month after the last day of the last month in which the claimant provided labor or materials to the project.
 - The affidavit must be filed in the property records of the county where the project is located.
 - Within five days of filing, the claimant must send a copy of the affidavit to the owner and original contractor via certified mail, return receipt requested.
- Actual notice is not a substitute for the statutorily required written notices.
Moore v. Brenham Ready Mix, Inc., 463 S.W.3d 109, 117 (Tex. App.—Houston [1st Dist.] 2015, no. pet).

Mechanic's and Materialman's Liens

Notice Requirements for Retainage.

- Retainage is a percentage amount withheld by the owner until the construction is complete.
- Notice requirements and periods for retainage are different from progress payments, and can be affected by many factors:
 - Whether an Affidavit of Completion was filed;
 - Whether the original construction contract was terminated or abandoned;
 - Whether the owner sent the claimant a written demand to file its lien affidavit;
 - Whether the owner gave the required notice under the Property Code.

See Tex. Prop. Code § 53.057.

- This can be a complex analysis.

Mechanic's and Materialman's Liens

Construction of Lien Statutes.

- Mechanic's and materialman's lien statutes are construed liberally for the purpose of protecting laborers and materialmen.
- A materials supplier need not prove that the materials it supplied were actually used on the project to enforce its lien.
Addison Urban Development Partners, LLC v. Alan Ritchey Materials Co., 437 S.W. 3d 597, 606 (Tex. App.---Dallas 2014, no pet.).

- A general contractor's lien waiver does not necessarily waive its subcontractors' lien rights.
Pham v. Harris County Rentals, LLC, 455 S.W. 3d 702, 709-10 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Mechanic's and Materialman's Liens

Foreclosure on Liens.

- “A mechanic’s lien **may be** foreclosed only on judgment of a court of competent jurisdiction foreclosing the lien and ordering the sale of the property subject to the lien.” TEX. PROP. CODE § 53.154 (emphasis added).
- If the lienholder proves it has a valid debt and a properly perfected mechanic’s lien, the trial court **must** enter a judgment foreclosing on the lien and ordering the sale of the property.

Crawford Services, Inc. v. Skillman Int’l Firm, LLC, 444 S.W. 3d 265, 271 (Tex. App.—Dallas 2014, pet. dism’d).

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