

# TEXAS HOUSTON

# SHIFTY BUSINESS: SHIFTING THE RISK IN TEXAS CONSTRUCTION CLAIMS

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Shifting risk in a construction claim is essential. Shifting risk not only honors the parties' promises and contractual obligations, but also serves a means for resolution. However, the ability to shift risk is largely determined before a claim ever comes across your desk. Determining whether a party can properly shift risk requires an examination of the claim made, review of the client's contract, an understanding the client's role on the project, and review of the applicable insurance policies.

Two main sources of risk shifting are (1) contractual indemnity and defense requirements and (2) additional insured endorsements. Since 2012, both sources have been subject to Texas Anti-Indemnity Statute. See TEX. INS. CODE Ch. 151. Generally, this chapter makes an indemnity provision in a commercial construction contract void and unenforceable to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault of the indemnitee. This "limited form" still allows for indemnitor to indemnify the

upstream contractor but only to the extent of the indemnitor's own negligence or fault. Therefore, a keen review of the client's contract is required to make sure it meets the statute's requirements.

In addition to reviewing the contract language, it is best practice to review the client's insurance policy and endorsements for the project to determine if there may be coverage issues. While more advanced contracting parties will require policies to be written on certain ISO forms with certain endorsements, not all contracts will contain such language leaving the parties to select whatever policy they believe will be sufficient. Even if parties are required to purchase certain insurance, mistakes do get made and the client may have the wrong type of coverage. This lapse can result in the lack of applicable coverage and an additional basis for a breach of contract claim. As such, it is important to identify and tackle these issues early on.

In the absence of contractual risk shifting, a party could assert a contribution claim. However, due to the economic loss rule, this contribution claim could be barred because it is based in negligence. Typically, the nature of damages sustained in construction claims are contractual in nature making any cause of action sound in breach of contract alone. Thus, a party will likely have to bring a breach of contract claim.

Ultimately, the more parties that share in the risk the easier it is to resolve a claim. This is because if one party falls into one a risk shifting pitfall the other parties can come in to prop it up. However, parties should understand their respective contracts and policies to ensure that the proper pretext exists to shift the risk.



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