

THOUGHT LEADERSHIP

News

FEDERAL COURT EXAMINES AND ENFORCES ANTI-INDEMNITY STATUTE

Newsbrief

25 JUN 2019

Last week, a federal judge in Houston gave a master class in the construction and application of the Texas Anti-Indemnity Statute, Tex. Ins. Code § 151.101, governing indemnity and insurance coverage in construction-related contracts in Texas. In *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, CV H-18-3667, 2019 WL 2524244, at *1 (S.D. Tex. June 19, 2019) (slip op.), Contractor and Equipment Lessor on a construction project were both insured by Zurich. Their contract required Contractor to name Lessor as an additional insured (AI) on Contractor's policy. Lessor's policy included a Deductible Endorsement requiring Lessor to reimburse Zurich the first \$3 million of any judgment or settlement paid, and assigned to Zurich the right to recover "sums that are reimbursable and any deductible amount" from any liable third party.

After a loss occurred, Contractor was found 90% responsible and Lessor 10% responsible. Under Lessor's policy, Zurich paid Lessor's 10% share of the judgment and Lessor reimbursed Zurich its \$3 million deductible. Lessor then sued Zurich to recover under Contractor's policy the \$3 million it had reimbursed Zurich under its own policy, alleging that because it was an AI under Contractor's policy, it could recover from Contractor's policy amounts it had been required to reimburse under its own policy.

First, the court held that the Lessor had standing to recover the amounts it had already reimbursed Zurich from a third party, because the Deductible Endorsement assigned the right to recover "reimbursable" amounts from third parties, but not the right to recover amounts the insured had already reimbursed. The insured retained the right to recover amounts it had paid out of pocket to satisfy its deductible.

But, the court went on to hold that the Texas Anti-Indemnity Statute voided the Lessor's AI status under Contractor's policy. Under the Anti-Indemnity Statute, a party to a construction contract cannot contractually force financial responsibility for its own negligence to be covered by another party's liability insurance. After a detailed examination of the Statute and several exceptions (these included careful analysis of the status of various parties under workers compensation laws), the court concluded that the Lessor had not shown it fell into any exception to the Anti-Indemnity Statute, and the Statute voided its AI coverage under Contractor's policy.

Thus, the Lessor ultimately could not recover its deductible from the very insurance company to which it had paid the deductible, but the circular nature of that arrangement was not, in the end, the reason for the court's holding. The holding would have been just as true if Contractor and Lessor had been insured by two different carriers.