

Indemnity Agreements – Shield and Sword

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Indemnity Agreement

A promise to safeguard or hold the indemnitee harmless against either existing and/or future loss liability. The agreement creates a potential cause of action in the indemnitee against the indemnitor.

Three Common Types of Indemnity Agreements

- Broad Form – full indemnification regardless of fault of indemnitor
- Intermediate Form – full indemnification so long as any fault rests with the indemnitor
- Limited Form – indemnification only to the extent of the indemnitor's own fault in contributing to the fault

Defense vs. Indemnity

- Duty to Indemnify – make payments to settle a claim or to satisfy a judgment
- Duty to Defend – pay for counsel to defend a lawsuit

Fair Notice Requirements in Texas

- According to *Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993), the fair notice requirements include express negligence doctrine and conspicuousness requirement.
- First, the **express negligence doctrine** states that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract.
- Second, the **conspicuousness requirement** mandates that something must appear on the face of the contract to attract the attention of a reasonable person when he looks at it.

Does this satisfy Texas' Fair Notice Requirements?

ARTICLE 6B – INDEMNITY

CONTRACTOR AGREES TO RELEASE, PROTECT, INDEMNIFY AND HOLD COMPANY GROUP HARMLESS FROM AND AGAINST ALL CLAIMS, WITHOUT LIMIT, ON ACCOUNT OF BODILY INJURY, SICKNESS, DISEASE OR DEATH, OR LOSS OF OR DAMAGE TO PROPERTY OF CONTRACTOR GROUP ALLEGEDLY OR ACTUALLY SUSTAINED DURING, OR DIRECTLY OR INDIRECTLY ARISING OUT OF, OR IN ANY WAY CONNECTED WITH OR INCIDENTAL TO, THIS AGREEMENT OR THE OPERATIONS CONTEMPLATED THEREBY, INCLUDING ANY LOADING, UNLOADING, INGRESS, OR EGRESS OF CARGO OR PERSONNEL.

The Express Negligence Doctrine

- Contract language providing that “PPI agrees to . . . Indemnify . . . ARCO . . . In any matter arising from the work performed hereunder, including but not limited to any act or omission of ARCO” satisfies the express negligence test. *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 769 S.W.2d 724 (Tex. 1989).
- Contract language providing for indemnity against claims “without regard to the cause or causes thereof, including . . . the negligence of any party or parties” satisfied the express negligence test. *Tesoro Petroleum Corp. v. Nabors Drillings USA, Inc.*, 106 S.W.3d 118, 132 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

Texas Indemnity Statutes

- Texas Anti-Indemnity Act (Tex. Ins. Code § 151.001, *et seq.*)
- Indemnification in Certain Construction Contracts (CPRC § 130.001, *et seq.*)
- Products Liability (CPRC § 82.001, *et seq.*)
- Texas Oilfield Anti-Indemnity Act (CPRC § 127.001, *et seq.*)

Texas Anti-Indemnity Act

- Broadly applies to commercial “construction contracts” for design, construction, alternation, renovation, remodeling, repair, or furnishing of material or equipment for the construction, maintenance, or repair of improvements to real property.
- Voids provisions that indemnify parties for their own negligence or fault along with related “additional insured” provisions.

Texas Oilfield Anti-Indemnity Act

- The TOAIA generally applies to indemnity provisions “contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to mine for a mineral.” *Id.* at § 127.003(a). Such agreements include “(i) a written or oral agreement or understanding concerning the rendering of well or mine services; or (ii) an agreement to perform a part of those services or an act collateral to those services, including furnishing . . . incidental transportation” CPRC § 127.001(1)(A).
- “Well or mine services” are also broadly defined by the TOAIA to include “drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing, or transporting oil, brine water, fresh water, produced water, condensate, petroleum products, or other liquid commodities, or otherwise rendering services in connection with a well drilled to produce or dispose of oil, gas, other minerals, or water” though operations related to oil and gas pipelines are expressly excluded. CPRC §127.004(A)(i).

Texas Oilfield Anti-Indemnity Act

- The TOAIA generally voids oilfield agreements purporting to indemnify a party from its sole or concurrent negligence for personal injury or property damage **EXCEPT** where “the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor.” CPRC § 127.005(a).

Texas Oilfield Anti-Indemnity Act

- With respect to mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance of qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee. CPRC § 127.005(b).
- With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed \$500,000. CPRC § 127.005(c).
- The TOAIA does not affect validity of insurance contract.

Indemnity and Insurance

- Additional Insured Provision – generally requires a party to be added as an additional insured in the name of the insured's liability policy, subject to the terms and conditions of the policy and additional insured endorsement
- Waiver of Subrogation Provision – provides that insurance company cannot sue indemnitee to recover amounts paid under policy (i.e. workers compensation)
- Primary Coverage Provision – generally specifies that the indemnitor's policy will pay before the indemnitee's policy

“Knock-for-Knock” Indemnities

- A “Knock-for-Knock” indemnity is reciprocal in nature and is based on ownership of property and personnel as opposed to allocating risk based on fault.
- Each party will be responsible for personal injury to its own employees and damage to its own property.
- Idea is to align responsibility with insurance coverage as each party typically will have insurance for its own employees and property.
- Is property damage component of “knock-for-knock” indemnity still enforceable?

First Party Claims vs. Third Party Claims

- Differences between M&A and commercial contracts
- In commercial contracts, failure to limit indemnity obligations to third-party claims may lead to unintended, duplicative and conflicting coverage for events of default
- Drafting considerations to avoid unintended consequences:
 - Limit all indemnity obligations to claims “asserted by Third Parties” and, if possible, limit further to specific categories of Third-Party claims (i.e. – “bodily injury, death, or physical damage to Third-Party tangible property”, “infringement of intellectual property rights of a Third Party”, etc.)
 - Define “Third Party” and exclude “affiliates” of the indemnified party from the definition, particularly when indemnity obligations are not subject to any limitations of liability
 - Limit indemnity obligations to claims caused by negligence, willful misconduct, violation of applicable law, etc., as opposed to “breach of contract”
 - Clarify that any exclusions to limitations of liability for indemnification do not apply to direct claims by the other party or its affiliates

Indemnities in M&A Transactions

- Why have Indemnification Provisions?
- What are the Benefits to Buyer and Seller?
- Who is the Indemnitor...and who is being Indemnified?
- What is being Indemnified? (breaches, specific matters, sandbagging)
- Survival Period

Indemnities in M&A Transactions

- Financial Limits on Indemnification (baskets, deductibles, caps)
- Other Limitations (exclusive remedy, no consequential damages, duty to mitigate)
- Exceptions to Limitations
- Funding the Indemnity (escrows, holdbacks, set-offs, R&W Insurance)

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Patrick B. Tobin is a business lawyer and trusted legal adviser to companies and their owners. Patrick helps start, grow, finance or raise equity for your business, acquire new or additional lines of business and, sell your business. Patrick's client base includes industries and companies in Texas or with Texas based investments.

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Matthew J. Swantner focuses his practice on litigation, including contract disputes, business torts, oil and gas matters, creditor's rights, mineral and construction liens, and insurance disputes throughout Texas and New Mexico.

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