

2014 Texas Indemnity Law Update

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Purpose of an Indemnity Provision

- Promise to safeguard or hold a party harmless against existing and/or future loss liability
- In some circumstances, such as an agreement to indemnify a party for its own negligence, courts see this as an “extraordinary” shifting of risk
- Nevertheless, Texas courts generally enforce an unambiguous indemnity provision except where the provision:
 - Violates the constitution or a statute; or
 - Violates public policy

Common Forms of Indemnity in Texas

- Contractual indemnity (most common)
- Statutes affecting indemnity (less common)
- Common law indemnity (rare)

Contractual Indemnity: Tenants of Construction

- Interpreted under normal rules of contract construction
 - (See *Nabors Drilling USA, L.P. v. Encana Oil and Gas (USA), Inc.*, 2013 Tex. App. LEXIS 8583, at *3 (Tex. App. – Fort Worth July 11, 2013, pet. filed) (mem. op.))
- Strictly construed against the indemnitee
 - This rule prohibits the extension, by construction or implication, of the indemnitor's obligations beyond the precise terms of the agreement
 - (See *Irvin v. Guarantee Company of North America, U.S.A.*, 2008 Tex. App. LEXIS August 5, 2008, at *3 (Tex. App. – Dallas August 5, 2008, no pet.) (mem. op.))
- **But** – will not be strictly construed if contract provides otherwise
 - (See *Webb v. Lawson-Avila Construction*, 911 S.W.2d 457, 461 (Tex. App. – San Antonio 1995, writ dism'd))

Three Common Types of Contractual Indemnity Provisions

- Broad Form
 - Full indemnification regardless of fault
- 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 loss

Contractual Indemnity: Fair Notice Requirements

- “Fair Notice” required for a party to obtain indemnification for its own negligence *in advance*
 - Applies to “Broad Form” and “Intermediate Form” indemnification provisions
- “Fair Notice” has two components:
 - “Express Negligence” doctrine; and
 - “Conspicuousness” test
- Whether the “Fair Notice” requirements are met is a matter of law determination for the court

Contractual Indemnity: “Express Negligence” Doctrine

- *Ethyl Corporation v. Daniel Construction Company*, 725 S.W.2d 705, 708 (Tex. 1987)
 - Held that “parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in clear and specific terms”
 - Intent must be specifically stated in unambiguous terms within the “four corners” of the contract
- The word “negligence” is likely not necessary if the indemnity provision(s) refer(s) to negligence by other words, but best practice is to use the specific word anyway
 - (*See Texas Engineering Extension Service v. Gifford*, 2012 Tex. App. LEXIS 2030 (Tex. App. – Waco March 14, 2012, no pet.) (mem. op.))
 - (*See Blankenship v. Spectra Energy Corporation*, 2013 Tex. App. LEXIS 10169, at *4 (Tex. App. – Corpus Christi August 15, 2013, no pet.) (mem. op.))
- Note – it has been recognized that “authorities discussing the policy and applicability of the fair notice requirements to releases are applicable to indemnity clauses.”
 - (*See OXY, USA, Inc. v. Southwestern Energy Production Company*, 161 S.W.3d 277, 283 n.2 (Tex. App. – Corpus Christi 2005, pet. denied))

Contractual Indemnity: “Express Negligence” Doctrine

- Since *Ethyl*, this doctrine has been applied to more than just negligence – *see, e.g.:*
 - Strict liability
 - *Houston Lighting & Power Company v. Atchison, Topeka, & Santa Fe Railway Company*, 890 S.W.2d 455, 459 (Tex. 1994)
 - DTPA, insurance code violations, breach of the covenant of good faith and fair dealing
 - *The Aetna Casualty & Surety Company v. Texas Workers’ Compensation Insurance Facility*, 1998 Tex. App. LEXIS 2045, at *4 (Tex. App. – Austin April 2, 1998, pet. denied) (not designated for publication)
 - Breach of warranty
 - *Staton Holdings, Inc. v. Tatum, L.L.C.*, 345 S.W.3d 729, 735 (Tex. App. – Dallas 2011, pet. denied)
 - Intentional conduct
 - *Hamblin v. Lamont*, 2013 Tex. App. LEXIS 14875, at *5 (Tex. App. – San Antonio December 11, 2013, no pet. h.)

Contractual Indemnity: “Express Negligence” Doctrine Public Policy Issues

- Watch out for potential public policy issues with indemnity for gross negligence and/or intentional conduct because the law is unsettled – *see, e.g.:*
 - *Atlantic Richfield Company v. Petroleum Personnel, Inc.*, 768 S.W.2d 724, n.2 (Tex. 1989) (expressly declining to decide whether indemnity for one’s own gross negligence or intentional injury is permissible, but noting that “[p]ublic policy concerns are presented by such an issue that have not been argued or briefed by the parties.”)
 - *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App. – Beaumont 1986, no writ) (holding that “a term in a release attempting to exempt one from liability or damages occasioned by gross negligence is against public policy.”)
 - *Valero Energy Corporation v. The M.W. Kellogg Construction Company*, 866 S.W.2d 252, 258 (Tex. App. – Corpus Christi 1993, writ denied) (holding in a case with sophisticated parties who heavily negotiated the contract at issue that an agreement providing prospective indemnity for gross negligence did not offend public policy)
 - *Webb v. Lawson-Avila Construction*, 911 S.W.2d 457, 462 (Tex. App. – San Antonio 1995, writ dism’d) (holding that indemnification provision at issue validly provided indemnification for gross negligence)

Contractual Indemnity: “Express Negligence” Doctrine Public Policy Issues Continued

- *Rosen v. National Hot Rod Association*, 1995 Tex. App. LEXIS 3225, at *7 (Tex. App. – Houston [14th Dist.] December 21, 1995, writ denied) (“A release cannot absolve an individual from his liability for gross negligence.”)
- *Solis v. Evins*, 951 S.W.2d 44, 50 (Tex. App. – Corpus Christ 1997, no writ) (“We find no authority for the proposition that a party may prospectively contractually exculpate itself with respect to intentional torts. That would be contrary to public policy.”)
- *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 336 (Tex. App. – Houston [14th Dist.] 2006, no pet.) (“[W]hile pre-accident waivers of gross negligence are against public policy, post-accident releases are not.”) (citing *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433, 435 (Tex. 1997) (per curiam)))
- *Akin v. Bally Total Fitness Corporation*, 2007 Tex. App. LEXIS 1218, at *3 n.1 (Tex. App. – Waco February 14, 2007, pet. denied) (mem. op.) (observing that “[m]ost courts hold that pre-injury waivers of gross negligence are void as against public policy,” but noting conflict and gathering authorities on both sides of the issue)

Contractual Indemnity: “Express Negligence” Doctrine Public Policy Issues Continued

- *Cell Comp, L.L.C. v. Southwestern Bell Wireless*, 2008 Tex. App. LEXIS 4510, at *6 (Tex. App. – Corpus Christi June 19, 2008, no pet.) (noting that its own previous decision in *Solis* held that it would be “contrary to public policy” for a party to “prospectively contractually exculpate itself with respect to intentional torts.”)
- *Blankenship v. Spectra Energy Corporation*, 2013 Tex. App. LEXIS 10169, at *5 n.6 (Tex. App. – Corpus Christi August 15, 2013, no pet.) (mem. op.) (gathering authorities and observing that “[t]here is some disagreement among the courts of appeals as to whether a party may validly release claims of gross negligence.”)
- *Hamblin v. Lamont*, 2013 Tex. App. LEXIS 14875, at *5 (Tex. App. – San Antonio December 11, 2013, no pet. h.) (invaliding indemnity provision on fair notice grounds but also stating, “[m]oreover, we question whether public policy would prevent Lamont from ‘prospectively contractually exculpat[ing himself] with respect to intentional torts’ even if the indemnity provisions contained the specific language.”)

Contractual Indemnity: “Conspicuousness” Test

- *Dresser Industries v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509-11 (Tex. 1987)
- Adopted UCC definition of conspicuousness:
 - “A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it”
 - *E.g.*, capital headings, larger font size, contrasting font color, bold type, etc.
- Sliding scale of acceptability based on length and complexity of the contract at issue

Contractual Indemnity: Fair Notice Requirements

- “Actual Notice” or “Actual Knowledge” exception to Fair Notice requirements
 - Definitely applies to “Conspicuousness” test
 - Application to “Express Negligence” doctrine unsettled
 - (*See Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 333-34 (Tex. App. – Houston [14th Dist.] 2006, no pet.))
 - (*See Enron Corp. Savings Plan v. Hewitt Associates, L.L.C.*, 611 F. Supp. 2d 654, 674-74 (S.D. Tex. 2009))

Statutes Affecting or Providing Indemnity

- Texas Anti-Indemnity Act
 - (TEX. INS. CODE § 151.001, *et seq.*)

- Architect/Engineer Anti-Indemnity Statute
 - (TEX. CIV. PRAC. & REM. CODE § 130.001, *et seq.*)

- Texas Oilfield Anti-Indemnity Act
 - (TEX. CIV. PRAC. & REM. CODE § 127.001, *et seq.*)

- Products Liability Indemnity Statute
 - (TEX. CIV. PRAC. & REM. CODE § 82.001, *et seq.*)

Texas Anti-Indemnity Act: Scope

- Effective January 1, 2012
- Applies to:
 - A “construction contract”;
 - For a “construction project”;
 - For which an indemnitor is provided or procures insurance subject to Chapter 151 or Title 10 of the Texas Insurance Code
- Chapter 151 relates to Consolidated Insurance Programs
- Title 10 relates to regulations for property and casualty insurance in Texas
 - Includes standard CGL and WC coverages

Texas Anti-Indemnity Act: Important Definitions

- Definition of “construction contract” is broad, and includes a range of private and public contracts, subcontracts, and agreements
 - Includes design, construction, alteration, renovation, remodeling, repair, or the furnishing of material or equipment
- Definition of “construction project” includes **construction, maintenance, or repair** of improvements to real property
 - Excludes projects relating to a single family house, townhouse, duplex, **or land development directly related thereto**

Texas Anti-Indemnity Act: Application

- Voids provisions in applicable contracts that indemnify parties for their own negligence or fault
- Also applies to agreements “collateral to or affecting” applicable contracts
- In essence, prohibits “Broad Form” and “Intermediate Form” indemnity provisions in contracts and agreements falling within its scope
- Also voids certain “additional insured” provisions in construction contracts

Texas Anti-Indemnity Act: Exceptions

- Does not apply to:
 - Indemnification for claims for bodily injury to or death of “the indemnitor, its agent, or its subcontractor of any tier”;
 - An insurance policy, including a policy issued under an owner-controlled or owner-sponsored consolidated insurance program or a contractor-controlled or contractor-sponsored consolidated insurance program, except as provided by Section 151.104;
 - A cause of action for breach of contract or warranty that exists independently of an indemnity obligation, including an indemnity obligation in a construction contract under a construction project for which insurance is provided under a consolidated insurance program;

Texas Anti-Indemnity Act: Exceptions Continued

- Does not apply to:
 - Indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and owner's lender are parties as provided under Section 151.001(5);
 - General agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;
 - The benefits and protections under the workers' compensation laws of this state;
 - The benefits or protections under the governmental immunity laws of this state;
 - Agreements subject to Chapter 127, Civil Practice and Remedies Code;

Texas Anti-Indemnity Act: Exceptions Continued

- Does not apply to:
 - A license agreement between a railroad company and a person that permits the person to enter the railroad company's property as an accommodation to the person for work under a construction contract that does not primarily benefit the railroad company;
 - An indemnity provision pertaining to a claim based upon copyright infringement;
 - An indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to:
 - A single family house, townhouse, duplex, or land development directly related thereto;
or
 - A public works project of a municipality; or
 - A joint defense agreement entered into after a claim is made

Texas CPRC 130.001, *et seq.*: Architects and Engineers

- Voids any provision in a construction contract requiring a contractor to indemnify a registered architect or licensed engineer for liability relating to:
 - Defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or
 - Negligence of the architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction plans, designs, or specifications that are part of the construction contract
- Also voids provisions in a construction contract (other than a contract for a single family or multifamily residence) requiring a registered architect or licensed engineer to indemnify an owner for the owner's own negligence
 - (See TEX. CIV. PRAC. & REM. CODE § 130.002(b))

Texas CPRC 130.001, *et seq.*: Architects and Engineers: Exceptions

- Does not apply to:
 - An insurance contract;
 - A workers' compensation agreement;
 - An owner of an interest in real property or persons employed solely by that owner, except as provided by Section 130.002(b);
 - Except as provided by Section 130.002(b), a covenant or promise to:
 - Indemnify or hold harmless an owner of an interest in real property and persons employed solely by that owner; or
 - Allocate, release, liquidate, limit, or exclude liability in connection with a construction contract between an owner or other person for whom a construction contract is being performed and a registered architect or licensed engineer

Texas CPRC 130.001, *et seq.*: Architects and Engineers: Exceptions Continued

- Does not apply to:
 - A contract or agreement in which an architect or engineer or an agent, servant, or employee of an architect or engineer is indemnified from liability for:
 - negligent acts other than those described by this chapter; or
 - negligent acts of the contractor, any subcontractor, any person directly or indirectly employed by the contractor or a subcontractor, or any person for whose acts the contractor or a subcontractor may be liable

Texas Oilfield Anti-Indemnity Act

(TEX. CIV. PRAC. & REM. CODE § 127.001, *et seq.*)

- Generally renders void indemnification provisions for an indemnitee's own negligence in contracts pertaining to oil, gas, or water wells or mineral mines
- However, does not prohibit indemnity provisions supported by liability insurance provided by the indemnitor
 - If unilateral indemnity, the amount of insurance required may not exceed \$500,000
 - If mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee

Texas Oilfield Anti-Indemnity Act

(TEX. CIV. PRAC. & REM. CODE § 127.001, *et seq.*):

Exceptions

- Does not apply to:
 - Joint operating agreements;
 - Purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fixed associated facilities; or
 - Construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities

- Also does not apply to loss or liability for damages or an expense arising from:
 - Personal injury, death, or property injury that results from radioactivity;
 - Property injury that results from pollution, including cleanup and control of the pollutant;
 - Property injury that results from reservoir or underground damage, including loss of oil, gas, other mineral substance, or water or the well bore itself;
 - Personal injury, death, or property injury that results from the performance of services to control a wild well to protect the safety of the general public or to prevent depletion of vital natural resources;
or
 - Cost of control of a wild well, underground or above the surface

Texas Oilfield Anti-Indemnity Act

(TEX. CIV. PRAC. & REM. CODE § 127.001, *et seq.*):

Exceptions Continued

- This chapter does not affect:
 - The validity of an insurance contract; or
 - A benefit conferred by the workers' compensation statutes of this state
- This chapter does not deprive an owner of the surface estate of the right to secure indemnity from a lessee, an operator, a contractor, or other person conducting operations for the exploration or production of minerals of the owner's land

CPRC Chapter 82: Manufacturer/Seller Indemnity

- Applies to a “products liability action”
 - “Products liability action” means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories
- Requires a “manufacturer” to indemnify a “seller” against loss except for the seller’s:
 - Negligence;
 - Intentional misconduct; or
 - Other act or omission for which the seller is independently liable

CPRC Chapter 82: Manufacturer/Seller Indemnity

- Who is a manufacturer?
 - A person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or component part of a product and who places the product or any component part of the product in the stream of commerce
- Who is a seller?
 - A person who is engaged in the distributing or otherwise placing products, or components of products, in the stream of commerce for any commercial purpose
 - A person who **merely** provides services is not a seller
- Manufacturers are **always** sellers, but sellers are not always manufacturers
 - (*See General Motors v. Hudiburg Chevrolet*, 199 S.W.3d 249, 256 (Tex. 2006))

CPRC Chapter 82: Manufacturer/Seller Indemnity

- Recoverable “loss” includes court costs and other reasonable expenses, reasonable attorneys’ fees, and any reasonable damages incurred
 - Indemnity for “loss” extends to both the underlying action and an action to enforce an indemnity obligation under this section
 - Indemnity should exclude attorneys’ fees and other expenses attributable to a seller’s independent liability
- “Reasonable damages” includes amounts paid by the seller in settlement

CPRC Chapter 82: Manufacturer/Seller Indemnity: Trigger and Scope of Duty

- Duty to indemnify applies **regardless** of manner in which the products liability action is concluded:
 - Settlement;
 - Judgment; or
 - Dismissal
- No showing of manufacturer liability is required to trigger statutory duty to indemnify
 - Instead, duty to indemnify triggered by the claimant's pleadings
 - However, duty to indemnify not implicated unless the pleadings can be fairly read to allege a defect in the manufacturer's product
- Issues raised by multiple manufacturer defendants
 - (See generally *General Motors v. Hudiburg Chevrolet*, 199 S.W.3d 249 (Tex. 2006))
 - (See generally *Ansell Healthcare Products v. Owens & Minor, Inc.*, 251 S.W.3d 499 (Tex. 2008))

CPRC Chapter 82: Manufacturer/Seller Indemnity: Manufacturer “Outs”

- Manufacturer may escape indemnity obligation by proving seller’s independent culpable conduct
- Innocent manufacturer of a component product that is not defective may be considered an innocent “seller” and owed reciprocal indemnification

Common Law Indemnity: Rare But Still There

- Some vestiges of common law indemnity survive today,
e.g.:
 - Purely vicarious employer liability
 - Purely vicarious landlord-tenant liability
 - Manufacturer's duty to indemnify innocent seller
- Must be a judicial determination or admission that a wrongdoer could be legally liable
 - Until then, indemnity claim is premature

Protect Yourself! Drafting Tips

- Indemnitee – insist on provision against strict construction
 - Indemnitor – do the opposite
- Indemnitee – if other party will agree, include indemnity for your own gross negligence and intentional torts
 - Be advised that courts *may* not uphold indemnity for gross negligence or more culpable conduct on public policy grounds
- Indemnitor – unless there is a compelling reason to do so, do not agree to indemnify the other party for its own gross negligence or intentional torts
- Be conspicuous! Make your indemnification provision(s) stand out
- Specify claims and levels of negligence
- Consider using multiple indemnity provisions in construction contracts
 - E.g., separate indemnity provisions you know will be enforced from those that may be at risk of invalidation or limitation by a court
 - Include a severability clause in the contract
- Expressly include a separate agreement to defend, *e.g.*, “defend, indemnify, and hold harmless...”
 - If you want to option to select and direct your own counsel, include an agreement on that as well

Texas Indemnity Law Update

Thank you!