

Analysis of Indemnity Provisions

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Why are they important?

- An enforceable indemnity provision is the lynchpin to contractual liability coverage.
- “Legalese” and other (valid) complaints

“It is hard to imagine another set of legal terms with more soporific effect than indemnity, subrogation, contribution, co-obligation and joint tortfeasorship. Perhaps because the words describe legal relationships between multiple parties, they are vaguely reminiscent of complex mathematical equations which, after all, also describe relationships, except in numbers rather than words – and for most of us, they are about as easy to understand. Even lawyers find that words like ‘indemnity’ and ‘subrogation’ ring of obscure Martian dialect.”

Herrick Corp. v. Canadian Ins. Co. of California, 29 Cal.App.4th 753, 34 Cal.Rptr.844 (4th Dist. 1994).

Indemnity Provisions 101

- Enforceability varies dramatically from state to state
 - Which law applies?
 - Choice of law provision
 - Other factors (location of parties, where was contract negotiated/signed, place of performance)
- Generally, agreements are categorized by courts as one of three types:
 - (1) broad form
 - (2) intermediate form
 - (3) limited form
- Many provisions are not easily categorized or mix elements of each “type”

Broad Form Indemnity Agreements

- Indemnitor indemnifies the indemnitee for
 - (1) indemnitor's sole negligence;
 - (2) indemnitee's sole negligence; and,
 - (3) joint negligence of indemnitor and indemnitee
- Seeks to transfer *entire* risk of loss to indemnitor
- Numerous obstacles to enforcement
- Enforceability prohibited or severely restricted in many states

Intermediate Form Indemnity Agreements

- Indemnitor indemnifies the indemnitee, for:
 - (1) indemnitor's sole negligence; and
 - (2) joint negligence of indemnitor and indemnitee
- Indemnitor assumes all risk of loss except where indemnitee is solely at fault
- Source of numerous conflicts between indemnitor and indemnitee
- Frequently requires indemnitor to provide defense pending ultimate resolution

Limited Form (Comparative Fault) Indemnity Agreements

- Basically provides that each party will take care of their own negligence
- Will usually be enforced by courts
- May actually be less favorable than what jurisdiction provides

Issues in Analyzing Enforceability

- What degree of fault can be transferred in the particular jurisdiction?
- Can sole negligence be transferred?
- Special concerns regarding “construction” contracts
 - Anti-indemnity statutes
 - 2007 Texas Legislature: House Bill 2262, Senate Bill 346
The Subcontractors’ Relentless Effort.

Enforceability Under Texas Law:

“We don’t like liars, cheaters, and tricksters”

- “Fair Notice” Doctrine

- (1) “Express Negligence” Rule

- (2) “Conspicuousness” Requirement

- Caveat: Doctrine does not apply if indemnitee had “actual knowledge”.

“Express Negligence” Rule

- Party seeking indemnity for its own negligence must state it specifically within the contract.
Dresser Industries, Inc. v. Page Petroleum, Inc., 53 S.W.2d 505 (Tex. 1993)
- Does not require use of the term “negligence”.
Banzhat v. ADT Sec. Sys. Southwest, Inc., 28 S.W.3d 180 (Tex.App. – Eastland 2000, pet. denied)
- **Correct inquiry:** whether parties made clear in agreement intent of the indemnitor to indemnify the indemnitee for its own acts of negligence.

“Conspicuousness” Requirement

- Must attract the attention of a reasonable person.

Ling & Co. v. Trinity Sav. & Loan Ass’n, 482 S.W.2d 841 (Tex. 1972)

- Separate provision, bold, capitalization, contrasting font/color.

Examples

Asset Purchase Agreement

* * *

(e) *Payments.* Payments of all amounts owing by an Indemnifying Party pursuant to this Article X relating to a Third Party Claim shall be made within 30 days after the latest of (i) the settlement of such Third Party Claim, (ii) the expiration of the period for appeal of a final adjudication of such Third Party Claim or (iii) the expiration of the period for appeal of a final adjudication of the Indemnifying Party's liability to the Indemnified Party under this Agreement. Payments of all amounts owing by an Indemnifying Party pursuant to Section 10.04(d) shall be made within 30 days after the later of (i) the expiration of the 60-day Indemnity Notice period or (ii) the expiration of the period for appeal of a final adjudication of the Indemnifying Party's liability to the Indemnified Party under this Agreement.

(f) *Escrow Deliveries.* For so long as the Escrow Agreement is in effect and for so long as Shares are held by the Escrow Agent, the rights of the Purchaser Indemnitees to indemnification pursuant to this Article X shall be satisfied with the Shares deposited with the Escrow Agent under the Escrow Agreement, valuing such Shares as set forth therein. If and to the extent that any indemnifiable Claim exceeds the value of the Shares so disposed or if the Escrow Agreement is no longer in effect, the Sellers and the Holders, subject to Sections 10.08 and 10.10, shall pay such Claim, jointly and severally. In no event, however, shall defense costs of the Sellers and the Holders as Indemnifying Parties be paid from the Shares so deposited.

Section 10.05 NEGLIGENCE. THE INDEMNIFICATION PROVIDED IN THIS AGREEMENT SHALL BE APPLICABLE WHETHER OR NOT THE SOLE, CONCURRENT, CONTRIBUTORY OR COMPARATIVE NEGLIGENCE OR THE SOLE OR CONCURRENT STRICT LIABILITY OF THE PERSON ENTITLED TO INDEMNIFICATION HEREUNDER IS ALLEGED OR PROVEN.

Examples

“Boilerplate” Subcontractor Agreement

* * *

11. **CONTRACTOR'S INDEMNITY AND WAIVER.** TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER, ITS PARENT CORPORATION, SUBSIDIARIES AND AFFILIATES, AND ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS, (HEREIN COLLECTIVELY REFERRED TO AS THE “INDEMNITEE”), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTIONS, SUITS, OR OTHER LITIGATION OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF AND ATTORNEYS' FEES), WHETHER ASSERTED BY THE HOMEOWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND PERMITTED SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF PROPERTY (INCLUDING THE LOSS OF USE THEREOF), (HEREIN COLLECTIVELY REFERRED TO AS “LOSS”), IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (I) A BREACH OF THE WARRANTIES, REPRESENTATIONS, OBLIGATIONS, AND COVENANTS PROVIDED HEREIN BY CONTRACTOR; (II) THE WORK PERFORMED OR TO BE PERFORMED BY CONTRACTOR OR CONTRACTOR'S PERSONNEL, AGENTS, SUPPLIERS, OR PERMITTED SUBCONTRACTORS; OR (III) ANY NEGLIGENT ACTION AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK, EVEN WHEN THE LOSS IS CAUSED BY THE FAULT OR NEGLIGENCE OF THE INDEMNITEE. ANY PAYMENTS BY CONTRACTOR UNDER THIS PARAGRAPH ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ANY AND ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, AND PERMITTED SUBCONTRACTORS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO ANY LOSS INVOLVING SUCH TOOLS OR EQUIPMENT IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH, THE WORK TO BE PERFORMED HEREUNDER.

12. **Representations and Warranties.** Contractor represents and warrants to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement, (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken prior to the execution and delivery of this Agreement, (iii) this Agreement is or will be (when executed) valid and binding obligations of Contractor, enforceable in accordance with its terms, (iv) this Agreement and Contractor's performance thereof, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority, (v) Contractor has, and each Contractor's employees, agents or permitted subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work, (vii) Contractor is in compliance with all governmental requirements to which it is subject, and (viii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

13. **Insurance.** Contractor agrees to carry: (a) Broad Form Commercial General Liability Insurance on an Occurrence Form, naming the Indemnitee as an additional insured with completed operations coverage and containing a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than One Million Dollars (\$1,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises operations; (ii) products and completed operations including materials designed, furnished, and/or modified in any way by Contractor; (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) property damage resulting from explosion, collapse, or underground (x, c, u) exposures; (b) Worker's Compensation Insurance that provides statutory benefits and coverage such that Owner will have no liability to Contractor's personnel, employees, or agents; and (c) Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgement. Owner and Contractor (collectively, the Parties) intend and agree that the coverage obtained by Contractor naming Owner as an additional insured as set forth herein shall apply on a primary basis with any insurance of Owner being excess coverage. Such coverages will be carried continuously during the term of this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion. Such insurance shall provide for a waiver of subrogation.

INITIALS:

Owner:

[Signature]

Contractor:

[Signature]

Maximizing Enforceability

- Analyze jurisdiction's indemnity law carefully
- Avoid “boilerplate” provisions for use in multiple states
- Separate indemnity provisions for different types of activities
- Document specific contracting intent
- Be particularly cautious with “construction”/design contracts
- Establish who controls defense/settlement of claim
- Place indemnity provisions and insurance provisions in separate parts of contract