

Indemnity Clauses -- Why so much Fuss?

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Indemnity clauses generally impose a duty to make good a loss, damage, or liability. In Texas, indemnity clauses can provide one party will defend, indemnify and hold harmless the other against liability even if it is due to the other's negligence, but only if certain conditions are met. Such clauses are sometimes called "broad form" indemnity agreements. An indemnity is very broad indeed when one must defend against and pay the liability for the sole or concurrent negligence of another. It is wise to seek legal advice about the scope, enforceability and effect of any broad form indemnity clause before agreeing to it.

Broad form indemnities are narrowly construed by the courts, and will not be enforced if any ambiguity exists in the language requiring one party to assume responsibility for the other's negligence. To be enforceable, broad form indemnities must satisfy the requirement for "fair notice." They must: 1) be *conspicuous* and; 2) meet the *express negligence doctrine*, i.e., expressly and clearly state that the party being indemnified is to be indemnified even for that party's own negligence.

Conspicuousness: To be conspicuous, a broad form indemnity clause must stand out in the contract so as to attract a reasonable person's attention. This is done by a prominent caption identifying the indemnity clause as such and showing the text of the clause in bold capitalized letters, so the clause will stand out in contrast to the surrounding text of the contract. The conspicuousness requirement may not be satisfied if the provision is hidden among the terms stated in fine print on the back page of a single page form. Courts decide conspicuousness on a case by case basis.

Express Negligence Doctrine: The "express negligence doctrine" requires indemnity clauses to expressly state with specificity the intent for one party to cover the other's negligence. Many standard form contracts use broad form indemnity clauses that are unenforceable in Texas courts. For example, the broad form indemnity clause used in the American Institute of Architects form does not meet the express negligence doctrine. The Texas Supreme Court held the following provision was insufficient to show a subcontractor's intent to cover the negligence a general contractor for its own negligence:

> "Subcontractor shall indemnify and hold contractor harmless against *any loss … as a result of operations* growing out of the performance of this contract and caused by the negligence or carelessness of the subcontractor."

Scope: Indemnity clauses usually cover claims that "arise out of," are "occasioned by," or are "due to" the contracted activity. However, a claim must fall within the intended scope of the indemnification obligation for the provision to be enforced. For example, one court found a contractor employee's injury did not "arise out of" the contractor's performance where the injury occurred long *after* the contractor's work was complete and no further work remained to be done.

Statutory Prohibitions: Broad form indemnity agreements are prohibited outright in many states, and are currently prohibited by certain Texas statutes in limited situations. A contractor or subcontractor cannot be required to indemnify a designer (architect or engineer) for personal injury, death or property damage caused by or resulting from the designer's negligence in rendering defective plans or specifications. Commercial owners cannot require designers to indemnify them for liability due to their own negligence. Texas law bars broad form indemnity agreements in contracts related to oil, gas, mineral, and water well related activities, and certain governmental entities cannot insist on being indemnified for their own negligence. Many predict that when the Texas Legislature convenes again in 2011 it will declare broad from indemnity agreements void as against public policy.

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