

Indemnification: Hold Harmless in Defense

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What Are We Going to Talk About Today?

- 1. What is an Indemnification Agreement?**
- 2. How Do Courts Interpret Indemnity Agreements?**
- 3. When Does an Indemnity Claim Accrue?**
- 4. When Can an Indemnatee Require Indemnity for the Indemnatee's Own Negligence?**
- 5. What Statutes Prohibit Indemnitors from Assuming the Liability for the Indemnatee's Own Negligence?**

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What is an Indemnification Agreement?

An Indemnification Agreement is a Risk Transferring Agreement

The Indemnitee—typically an upper tier party—protects itself from the risk of liability by entering into an agreement with an Indemnitor—a lower tier party—who agrees to assume the Indemnitor's potential liability.

The Indemnitor agrees to safeguard or hold the Indemnitee harmless against either existing and/or future loss, liability, or both.

To Summarize...

Indemnitor = A person who agrees to assume the liability of another

Indemnitee = A person who transfers its liability to another

The Duty to Defend is Different

**The duty to indemnify
is not dependent on the duty to defend.**

**There may be a duty to indemnify
even if the duty to defend never arises.**

Generally, The Duty to Indemnify Must Be in a Written Contract

One Exception = Vicarious Liability

Example = Employer Held Liable for
Employee's Acts

or

Landlord Held Liable for
Tenant's Acts

Typically, It Involves Third Party Liability

Generally, an indemnity agreement obligates the indemnitor to protect the indemnitee against claims brought by a person not a party to the agreement.

There Are Three Common Types of Indemnity Agreements

Broad Form: Transfers all liability and loss to the indemnitor, *regardless of fault*.

Intermediate Form: Transfers all of the indemnitee's liabilities and losses to the indemnitor *so long as the indemnitor has some fault*.

Limited / Comparative Form: Transfers the indemnitee's liabilities and losses to the indemnitor *only to the extent of the indemnitor's percentage of fault in contributing to any loss*.

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How Do Courts Interpret Indemnity Agreements?

No Particular Language is Required

It is not necessary to include the words "indemnify" or "indemnity," or any other particular technical terms.

Courts Give a Common Sense Reading of the Contract

Judges, not juries, decide whether an indemnity agreement is enforceable and the scope of the indemnification

Judge's give effect to the parties' intent

But Courts Strictly Construed in Favor of the Indemnitor

If you do not want to the indemnification clause construed in favor of the indemnitor, then states so in the contract.

For example, use the following language:

This provision should be construed fairly and reasonably and neither more strongly for nor against either party.

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When Does an Indemnity Claim Accrue?

An Indemnitor's Obligations Arise When Liability is Established

- In a suit for indemnity, the injury upon which suit might be based does not arise until some liability is established.
- The general rule is that a claim for indemnity accrues only when payment is made or judgment is rendered.

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When Are Broad and Intermediate Form Indemnification Agreements Allowed?

When Can an Indemnitee Require Indemnification for Its Own Negligence?

There Are Three Common Types of Indemnity Agreements

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Traditionally, Broad and Intermediate Form Indemnity Agreements Were Common

Top-tier contractual parties often bargained for lower-tier parties to assume their liabilities and losses even if the top-tier party's negligence, strict liability, or comparative liability.

Today, Broad and Intermediate Form Indemnity Agreements Can Be Used Only Sparingly

Parties may still enter into broad or intermediate form agreements so long as a statute does not prohibit it.

Generally, statutes prohibit broad and intermediate form indemnity agreements involving:

1. Construction Contracts
2. Engineers Indemnifying Owners
3. Engineers Indemnifying Governmental Agencies
4. Contractors Indemnifying Engineers

Broad and Intermediate Form Indemnity Agreements Require Fair Notice

Fair Notice requires that the indemnity agreement complies with:

1. The Express Negligence Doctrine
2. Conspicuousness Requirements

The Express Negligence Doctrine = Expressly State the Parties' Intent

No Broad “All Sweeping” Language

Subcontractor agrees to indemnify Contractor and hold Contractor harmless from any and all claims, actions, causes of action, or demands of any kind or nature.

No Inferences or Implications

Subcontractor agrees to indemnify Contractor and hold Contractor harmless from any and all claims, actions, causes of action, or demands of any kind or nature arising from the work under the contract.

The Express Negligence Doctrine = Expressly State the Parties' Intent

No Deduction by Process of Elimination

Subcontractor agrees to indemnify Contractor and hold Contractor harmless from any and all claims, actions, causes of action, or demands of any kind or nature, except for any claim, action, cause of action, or demand for breach of contract or fraud.

Contractor agrees to ... indemnify ... owner ... from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... excepting only claims arising out of accidents resulting from the sole negligence of owner.

Conspicuous = a Reasonable Person Should Have Seen It

1. Heading must be different than its surrounding text.
 - in capitals equal to or greater in size than the surrounding text, or
 - in contrasting type, font, or color
2. The language content must be different than the surrounding text.
 - in larger type
 - in contrasting type, font, or color, or
 - set off by symbols or other marks that call attention to the language

Actual Knowledge Trumps Conspicuousness

If an indemnitee can prove the indemnitor had actual knowledge, then the indemnity clause does not have to be conspicuous.

Does this Indemnity Clause Meet the Express Negligence Test?

E. If any part of this document is ruled unenforceable by a Court of competent jurisdiction under the laws of the State of Texas, then the remainder of the document shall remain in full force and effect.

F. SUBCONTRACTOR SHALL INDEMNIFY AND HOLD CONTRACTOR HARMLESS AGAINST ANY LOSS OR DAMAGE TO PERSONS OR PROPERTY AS A RESULT OF OPERATIONS GROWING OUT OF THE PERFORMANCE OF THIS CONTRACT, INCLUDING, BUT NOT LIMITED TO, ANY AND ALL CLAIMS, CAUSES OF ACTION, OR DEMANDS RELATING TO ANY NEGLIGENT ACT OR OMISSION OF CONTRACTOR, ITS OFFICERS, AGENTS OR EMPLOYEES.

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[10 Minute Break]

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What Statutes Eliminate Broad and Intermediate Form Indemnity Agreements?

What Statutes Prohibit Indemnitors from Assuming the Liability for the Indemnitee's Own Negligence?

Three Statutes Limit Indemnification in Construction Contracts

- 1. The Texas Civil Practice & Remedies Code,**
- 2. The Texas Local Government Code, and**
- 3. The Texas Insurance Code**

If you fall under one of the three statutes, the indemnitee cannot require the indemnitor to assume liability for the indemnitee's own negligence.

Texas Civil Practice & Remedies Code

Limits Indemnification Provisions that Apply to Engineers

Only Applies to Indemnity Agreements Made In Connection With or Collateral To A Construction Contract

"Construction contract" means:

1. a contract or agreement
2. made and entered into by...[a] licensed engineer...
3. concerning the design, construction, alteration, repair, or maintenance of
4. a building, structure, appurtenance, road, highway, bridge, dam, levee, or other improvement
5. to or on real property,
6. including moving, demolition, and excavation connected with the real property.

The CPRC governs risk transferring agreements between OWNERS and ENGINEERS

**An owner cannot seek indemnity from an engineer
for liability or damage that is caused by or results
from the negligence of an owner**

*Does not apply to construction contracts
for a single family or multifamily residence.*

Does this Indemnity Agreement Conform with the CPRC?

Engineer, whose professional services are the subject of this Agreement, covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, Owner, employees, officers, directors, volunteers and representatives of the Owner, from and against damages, liabilities or costs, including reasonable attorney fee and defense costs, **to the extent caused by Engineer's negligent performance of professional services under this Agreement and anyone for whom Engineer is legally or contractually is liable.** The indemnity provided for in this Section shall not apply to any liability resulting from the negligence of the Owner, its officers or employees.

The CPRC also governs risk transferring between ENGINEERS and CONTRACTORS

An engineer cannot seek indemnity from a
contractor for liability or damage that...

An engineer cannot seek indemnity from a contractor for liability or damage that...

(1) results from:

- a) defects in plans, designs, or specifications prepared, approved, or used by engineer; or
- b) negligence of the engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract;

AND

(2) arises from:

- a) personal injury or death;
- b) property injury; or
- c) any other expense that arises from personal injury, death, or property injury.

Does this Indemnity Agreement Conform with the CPRC?

Contractor covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, Engineer, and Engineer's employees, officers, directors, and representatives, from and against damages, liabilities or costs, including reasonable attorney fee and defense costs, from any and all claims, actions, causes of action, or demands of any kind or nature for loss, damage, or liability arising from Contractor's Work under this Agreement. **The indemnity provided for in this Section shall not apply to any liability resulting from defects in plans, designs, or specifications prepared, approved, or used by engineer or negligence of the engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract and arising from personal injury or death, property damage, or any expenses arising therefrom.**

EXAMPLE

***Foster, Henry, Henry, & Thorpe, Inc. v. J.T. Const. Co., Inc.*,
808 S.W.2d 139, 141 (Tex. App.—El Paso 1991, writ denied).**

Texas Local Government Code

Limits Indemnification Provisions that Apply to Engineers

The Local Gov't Code Governs Indemnity Agreements between GOVERNMENTS and ENGINEERS

A governmental agency may generally only require an engineer to indemnify, defend, and hold harmless the governmental agency for the engineer's....

- negligence,
- intentional tort,
- intellectual property infringement, and
- failure to pay a subcontractor or supplier.

“Governmental agency” means a municipality, county, school district, conservation and reclamation district, hospital organization, or other political subdivision of this state.

Example of Indemnification Agreements with Governmental Agencies

Consultant, whose professional services are the subject of this Agreement, covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, City and the elected officials, employees, officers, directors, volunteers and representatives of City, individually and collectively, from and against damages, liabilities or costs, including reasonable attorney fee and defense costs, **to the extent caused by Consultant's negligent performance of professional services under this Agreement and anyone for whom Consultant legally or contractually is liable.** The indemnity provided for in this Section shall not apply to any liability resulting from the negligence of City, its officers or employees, in instances where such negligence causes personal injury, death or property damage. **IN THE EVENT CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

Texas Insurance Code

Limits Indemnification Provisions in Construction Contracts

The Insurance Code Contains the Broadest Anti-Indemnity Laws in Texas

Prohibits any indemnitor from indemnifying, holding harmless, or defending any party, including a third party, against a claim caused by the indemnitee's....

- negligence or fault,
- breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or
- breach of contract.

How Do You Know If The Insurance Code Anti-Indemnity Provisions Apply To Your Contract?

Must answer YES to all of the following questions:

1. Is your contract a construction contract or incidental to a construction contract?
2. Does the contract involve a construction project?
3. Is there or will there be a Consolidated Insurance Program for the project?

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Does your contract involve a construction contract?

"Construction contract" means:

1. a contract, subcontract, or agreement, or a performance bond,
2. entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor
3. for the design, construction, alteration, renovation, remodeling, repair, or maintenance of, or for the furnishing of material or equipment for,
4. a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property.

“Construction Contract” includes:

- an assignment of the construction contract or other modifications thereto.
- any related subcontracts, purchase orders, personal property lease agreements, and insurance policies.

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Must answer YES to all of the following questions:

1. Is your contract a construction contract or incidental to a construction contract?
2. Does the contract involve a construction project?
3. Is there or will there be a Consolidated Insurance Program for the project?

If yes, does your contract involve a construction project?

“Construction project” means construction, remodeling, maintenance, or repair of improvements to real property.

- Includes: the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents.
- Does not include: a single family house, townhouse, duplex, or land development directly related thereto.

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Must answer YES to all of the following questions:

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2. Does the contract involve a construction project?
3. Is there or will there be a Consolidated Insurance Program for the project?

If yes, is there a consolidated insurance program for the project?

The indemnitor is provided or procures general liability insurance, worker's compensation insurance, casualty insurance or property insurance.

But, There Are Many Exceptions to the Insurance Code Anti-Indemnity Agreement

- Claims for bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier;
- Breach of contract or warranty actions;
- Loan and financing actions;
- General surety agreements;
- Worker's compensation benefits;
- Licenses or access agreements with railroad companies.

Example of Indemnity Agreement Under the Insurance Code

Consultant, whose professional services are the subject of this Agreement, covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, City and the elected officials, employees, officers, directors, and representatives of City, individually and collectively, from and against damages, liabilities or costs, including reasonable attorney fee and defense costs, **to the extent caused by Consultant's negligent performance of professional services under this Agreement and anyone for whom Consultant legally or contractually is liable, breach of contract, and/or violation of any statute, regulation, or ordinance, or government standard or rule by the City or its employees.** The indemnity provided for in this Section shall not apply to any liability resulting from the negligence or fault of City, its officers or employees, a breach of contract by the City, its officers or employees, and the violation of any statute, regulation, ordinance, or government standard or rule by the City or its employees.

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