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## The Future of Contractual Indemnity in Texas

### *Indemnity as we know it*

Indemnity is a duty to make good any loss, damage, or liability incurred by another. It is rare to find a construction contract today that does not contain some type of indemnity clause or agreement – that is, some contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur.

Indemnity agreements are classified according to the scope of the indemnity obligation provided thereunder. Currently, there are three main forms of types of indemnity:

Broad-Form Indemnity: Under this type of indemnity, the indemnitor essentially assumes an unqualified obligation to indemnify the indemnitee for any and all liability arising out of a specified subject matter (usually the indemnitor's work under the agreement), even if the damage, injury or claim is actually caused by the sole negligence of the indemnitee. This form of indemnity transfers the entire risk of loss from the indemnitee to the indemnitor.

Intermediate-Form Indemnity: This type of indemnity requires an indemnitor to indemnify the indemnitee for any and all liability arising out of a specified subject matter (usually the indemnitor's work under the agreement), even if the damage, injury or claim is actually caused by the negligence of the indemnitee, but specifically excludes the indemnitor's sole negligence. Thus, so long as the indemnitor is partially at fault, the indemnitor must indemnify the indemnitee for 100% of the claimed damages.

Limited-Form Indemnity: This type of indemnity is sometimes referred to as "non-*Ethyl* indemnity" or "comparative fault indemnification." Under this type of agreement, the indemnitor is obligated to indemnify the indemnitee only to the extent of the indemnitor's own fault.

While indemnity agreements are generally enforceable under Texas law, those agreements requiring one party to indemnify another for his own negligence must meet certain express requirements before they will be enforced. These requirements are known as the Fair Notice Doctrine. Indemnity agreements of this type (broad form and intermediate form) must meet the fair notice requirements of (1) the express negligence test (the *Ethyl* test) and (2) conspicuousness.

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Express Negligence: In *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987) the Texas Supreme Court adopted the express negligence test which requires a party seeking indemnity from the consequences of his own actions/negligence to express that intent in specific terms within the four corners of the contract. The intent must be: (1) clearly expressed, (2) set forth within the four corners of the agreement, and (3) stated in specific terms. Texas courts have referred to this specific and clearly expressed requirement as "crystal clear" and "absolutely clear."

Conspicuousness: In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the Texas Supreme Court adopted the definition contained in former Section 1.201(10) of the Texas Business & Commerce Code as the standard for determining conspicuousness of indemnity agreements: "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." *Id* at 511.

### *The indemnity of tomorrow*

In January 2009, a draft of an indemnity bill was put before the Texas Legislature. This bill, if passed, will amend the Texas Civil Practice and Remedies Code by adding Title 10, Chapter 502. The bill has the potential to drastically change indemnity as we know it today.

If the bill is passed, **only limited-form indemnity will be allowed**. In other words, the bill would invalidate broad-form contractual indemnity provisions that require the indemnitor to indemnify the indemnitee for the indemnitee's own negligence. It would also disallow intermediate-form indemnity where the indemnitee is entitled to full indemnity regardless of the percentage of fault attributable to the indemnitor. The classic example of such intermediate-form indemnity is where the indemnitor is 10% at fault, and the indemnitee is 90% at fault in contributing to the loss, but the indemnitee is nevertheless entitled to 100% indemnity. Proposed section 502.003 voids such indemnity provisions, and under that example, the indemnitee would only be entitled to 10% indemnity commensurate with the percentage of fault attributable to the indemnitor.



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The anti-indemnity bill is the culmination of years of intense activity on the part of various subcontractor organizations, primarily the ASA and the Texas Construction Association. Their efforts play on the difficulties of obtaining insurance, as well as the general public policy that parties are to be responsible for their own negligence. The bottom line is that, as contractors, you must pay close attention to the status of this bill. If adopted, it will change the way contracts are drafted and will have a tremendous effect on the traditional risk-shifting provisions included in contracts used throughout the industry.



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