

# Who's on the Hook? A Brief Overview of Contractual Indemnity Provisions in Texas

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## I. INTRODUCTION

Indemnity provisions are instruments used by companies to contractually allocate risks. Whether a company enters into a Master Service Agreement with a multi-national organization or an agreement with a local contractor, those agreements almost certainly contain an indemnity provision whereby one party agrees to protect and hold harmless the other party from potential liability as a result of an accident. The real question

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that every company is left contemplating following an accident is—WHO IS LEFT ON THE HOOK TO PAY THE BILL?

Indemnity is defined as “[a] duty to make good any loss, damage, or liability incurred by another.”<sup>1</sup> Unilateral indemnification agreements shift the risk of liability of the party with the greater bargaining power to the other party to the agreement (wherein one party agrees, in advance, to pay for the liability of another party). Mutual indemnity agreements (often referred to as “knock-for-knock” agreements) involve a mutual allocation of risk (wherein the contracting parties agree to indemnify each other against losses that they or their employees sustain regardless of who is negligent).

This paper will not delve into all of the legal issues surrounding indemnity provisions. Instead, the purpose of this paper is to set forth basic principles underlying indemnification through a discussion of common forms of indemnity provisions in Texas, how to confirm that your indemnity agreement is enforceable, certain prohibitions against indemnity agreements, and various points of interest which should be considered when negotiating and entering into contractual agreements.

## **II. COMMON FORMS OF INDEMNITY AGREEMENTS**

Contractual indemnity provisions usually take one of three standard forms – (A) Broad Form, (B) Limited Form, and (C) Intermediate Form.

**(A) Broad Form** – Under this scheme, the indemnitor (company that is providing the indemnity) unqualifiedly agrees to indemnify the indemnitee (company that is recipient of indemnity) for any and all liability regardless of fault, including those losses which are caused by the sole negligence and/or fault of the indemnitee. In other words—the indemnitor covers all liability, even if the loss or damage was caused (in whole or in part) by the indemnitee.

*Example – “Contractor agrees to indemnify and hold harmless Owner from any acts or omissions, alleged or found to constitute negligence or other fault, caused directly or indirectly or solely by the owner. . .or jointly by Owner. . .and Contractor. . .Contractor agrees that it is*

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1. BLACK’S LAW DICTIONARY (9th ed. 2009).

*the specific intent of Contractor to indemnify Owner for the negligent acts or omissions of Owner. . . .”<sup>2</sup>*

In the above example, Contractor agreed to indemnify Owner for any loss, whether or not the loss is the result of the Owner's sole negligence and/or fault. Accordingly, if an individual working for Contractor, pursuant to the agreement between Contractor and Owner, is injured on a job and alleges that Owner caused the injury, then Contractor is responsible for indemnifying Owner for any and all damages that may be incurred as a result of this loss – despite the fact that the Owner is or may be wholly responsible for the incident.

**(B) Limited Form** – Under this scheme, an indemnitor's obligation is to indemnify the indemnitee ONLY to the extent of the indemnitor's fault. In other words – the indemnitor must cover only those liabilities it caused.

*Example – To the fullest extent permitted by law, Contractor shall indemnify and hold harmless Owner from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work . . . but only to the extent caused in whole or in part by negligent acts or omissions of Contractor.*

In the above example, the Contractor agreed to indemnify (pay defense costs and any damages) the Owner of the project but only if the loss/damage is actually caused by the Contractor or the Contractor contributes towards the cause of the loss/damage. In most instances, this type of agreement will likely result in the Contractor providing full indemnification for the Owner, as there will likely be allegations that the Contractor (as least partially) contributed to the negligent act which resulted in the loss or damage.

**(C) Intermediate Form** – Under this scheme, the indemnitor is obligated to indemnify the indemnitee relating to the subject of the agreement, UNLESS the injury or loss is caused by the indemnitee's sole negligence. In other words, indemnitor must cover all losses except those which are solely caused by the indemnitee.

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2. Douglas Cablevision IV, L.P. v. Sw. Elec. Power Co., 992 S.W.2d 503, 505 (Tex. App.—Texarkana 1999, pet. denied).

*Example – Contractor agrees to indemnify Owner. . . irrespective of whether Owner was concurrently negligent . . . but excepting where the injury or death . . . was caused by the sole negligence of Owner.*

In the above example, the Contractor agreed to indemnify the Owner but only to the extent that any damage or loss arose out of the subject matter of the contract, provided that the allegations are not such that the Owner caused the loss or damage as a result of his own, sole negligence. Again, in most instances, this type of agreement will result in Contractor providing full indemnification to the Owner – as there will likely be allegations that the Contractor (at least partially) contributed to the negligent act which resulted in the loss or damage, thus, the Owner is not the sole cause of the incident.

**NOTE** – In reviewing limited form and intermediate form indemnity provisions, special consideration must be given to the fact that the indemnity obligation is based solely on a finding of one party’s fault (or lack thereof). If the indemnity provision in your contract contains an intermediate form or limited form indemnity provision, the parties to that agreement may be left to incur substantial costs while fighting about their percentage of responsibility for the incident (in order to determine whether or not they have indemnity obligations to the other party) in addition to the third party claim.

### **III. LEGAL REQUIREMENTS FOR ENFORCEABILITY OF INDEMNITY AGREEMENT**

While indemnity provisions are usually enforceable similar to any other contract provision, courts impose special considerations to provisions that contemplate an allocation of risk wherein the indemnitor agrees to indemnify the indemnitee regardless of fault. These types of agreements are viewed by Texas courts as “extraordinary” shifting of risk between parties, and the indemnity provisions are subject to compliance with specific legal requirements.

Texas courts impose a “**Fair Notice**” requirement<sup>3</sup> to determine the enforceability of an indemnity agreement wherein an indemnitor agrees to indemnify the indemnitee for losses caused by the indemnitee.

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3. Dresser Indus. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1987).

Under Texas law, the Fair Notice requirements are two fold: The language must (1) meet the express negligence doctrine<sup>4</sup> and (2) be conspicuous.

(1) Express Negligence Test:

The intent to indemnify another party for their own negligence must be stated in “specific” terms – this is referred to as the Express Negligence doctrine.<sup>5</sup> According to this doctrine, the intent of one party to prospectively release another party and agree to indemnify that party for its own negligence must be expressly stated within the contract. While the word “negligence” is likely not necessary if the indemnity provision refers to negligence through other words, the best practice is to make sure to use the specific word “negligence” in any indemnity provision.<sup>6</sup>

Texas Courts hold that the following provisions **do not** meet the express negligence test:

— Contractor agrees to indemnify and hold owner harmless against any and all claims arising out of Contractor’s activities, “excepting only claims arising out of accidents resulting from the sole negligence of owner.”<sup>7</sup>

— “[t]o the fullest extent permitted by law, [Contractor] shall indemnify, hold harmless, and defend [Owner]. . .from and against all claims, damages, losses, and expenses, including but not limited to attor-

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4. NOTE – Maritime law and Louisiana law employ similar but different tests. Under maritime law, an agreement is enforceable when the intent to indemnify against the indemnitee’s negligence is expressed in “clear and unequivocal” terms. *Seal Offshore, Inc. v. Am. Standard, Inc.*, 736 F.2d 1078, 1081 (5th Cir. 1984). Under Louisiana law, the parties must use “unequivocal terms.” *Perkins v. Rubicon Inc.*, 563 So.2d 258, 259 (La. 1990).

5. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987) (holding “parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in clear and specific terms”).

6. *Tex. Eng’g Extension Serv. v. Gifford*, No. 10–11–00242–CV, 2012 WL 851742, at \*8 (Tex. App.—Waco Mar. 14, 2012, no pet.); *Blankenship v. Spectra Energy Corp.*, No. 13–12–00546–CV, 2013 WL 4334306, at \*14 (Tex. App.—Corpus Christi Aug. 15, 2013, no pet.) (mem. op.).

7. *Singleton v. Crown Cent. Petroleum Corp.*, 713 S.W.2d 515 (Tex. 1985).

ney's fees. . . arising out of or resulting from the performance of [Contractor's] work.”<sup>8</sup>

— “Contractor. . . agrees to indemnify and save [O]wner. . . harmless from any and all loss sustained by Owner by reason of damage to Owner's property or operations, and from any liability or expense on account of property damage or personal injury. . . arising out of. . . the performance or non-performance of work hereunder by Contractor . . . .”<sup>9</sup>

— Contractor must “protect, defend, indemnify and hold harmless [Owner]. . . against any loss or damage arising out of any claim or suit. . . resulting from operations when [Contractor]. . . commences field operations with the permit acquisition. . . or any claim or suit arising out of the negligent actions or omissions of [Owner] . . . .”<sup>10</sup>

Texas Courts hold that the following provisions **pass** the express negligence test:

— Contractor agrees to hold harmless and indemnify owner for all claims “including but not limited to any negligent act[s] or omission[s] of Owner.”<sup>11</sup>

— Contractor agrees to indemnify and hold harmless owner against all loss arising from the contract “without limit and without regard to the cause or causes thereof, or the negligence of any party or parties.”<sup>12</sup>

— “[Contractor] agrees to be responsible for and to indemnify and save harmless [Owner] from all loss or damage and all claims and suits. . . arising by reason of injuries (including death) to any person. . . whether

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8. Fisk Elec. Co. v. Constructors & Assocs., Inc., 888 S.W.2d 814 (Tex. 1994).

9. Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc., 739 S.W.2d 239, 239-40 (Tex. 1987).

10. English v. BGP Int'l. Inc., 174 S.W.3d 366, 369 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

11. Atlantic Richfield v. Petroleum Pers., Inc., 768 S.W.2d 724, 726 (Tex. 1989).

12. Maxus Exp. Co. v. Moran Bros., Inc., 817 S.W.2d 50, 56 (Tex. 1991).

arising out of concurrent negligence on the part of [Owner] or otherwise.”<sup>13</sup>

(2) Conspicuous –

The provision must be “conspicuous.”<sup>14</sup> In order for an indemnity provision to meet the conspicuousness requirement, the provision must be written/displayed/presented in a manner that any “reasonable” person would have noticed it.<sup>15</sup>

Texas Courts hold that the following provisions **are not conspicuous**:

— Indemnity language on the reverse side of a two-page sales order under a paragraph titled Warranty;<sup>16</sup>

— Language in small, light type on back of a rental form, surrounded by unrelated terms;<sup>17</sup>

— Indemnity language in the same size and font type as the rest of the contract, with no descriptive heading;<sup>18</sup>

— Indemnity language which appeared on the back side of a work order, in a series of numbered paragraphs that did not have headings or different type.<sup>19</sup>

Texas Courts hold the following provisions **to be conspicuous**:

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13. *Gulf Oil v. Ford, Bacon & Davis, Tex., Inc.*, 782 S.W.2d 28 (Tex. App.—Beaumont 1989, no pet.).

14. *Dresser*, 853 S.W.2d at 509-11 (stating a provision is ordinarily conspicuous when “a reasonable person against whom it is to operate ought to have noticed it”).

15. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004).

16. *K&S Oil Well Serv. V. Cabot Corp.*, 491 S.W.2d 733, 737 (Tex. Civ. App.—Corpus Christi 1973, no writ).

17. *Safeway Scaffold Co. v. Safeway Steel Prod., Inc.*, 570 S.W.2d 225, 228 (Tex. Civ. App.—Houston [1st Dist.] 1978).

18. *Douglas Cablevision*, 992 S.W.2d at 509.

19. *Dresser*, 853 S.W.2d at 506.

- An indemnity appearing on the second page but following a notice printed in large red type stating that the agreement included terms on the reverse side;<sup>20</sup>
- An indemnity that was more visible than other language on the same page;<sup>21</sup>
- Indemnity provision that was eight lines long and found in a paragraph labeled “waiver and release;”<sup>22</sup>
- Language that appears in larger type, contrasting colors, or otherwise calls attention to itself.<sup>23</sup>

#### **IV. ADDITIONAL CONSIDERATIONS RELATED TO TEXAS’ FAIR NOTICE REQUIREMENTS**

Although fair notice is required for allocation of risk where an indemnitor agrees to indemnify an indemnitee regardless of fault, the Texas Supreme Court has found that if a party knew or had actual knowledge of the indemnity provision, then (even absent compliance with the Fair Notice requirements) that provision would still be enforceable.<sup>24</sup> However, it is the indemnitee’s burden to prove this<sup>25</sup> – which would prove to be an almost insurmountable burden as the indemnitor will likely dispute that he/she had actual knowledge of the indemnity provision.

Accordingly, while actual knowledge of the provision is a defense to an allegation that the indemnity provision failed to meet the Fair Notice requirements, it is prudent practice for anyone drafting or reviewing an indemnity agreement to specifically reference any and all claims for which the indemnitor intends to indemnify the indemnitee (e.g. negligence, strict lia-

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20. *Goodyear Tire & Rubber Co. v. Jefferson Contr. Co.*, 565 S.W.2d 916, 920 (Tex. 1978).

21. *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, 901 S.W.2d 789 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

22. *Lawrence v. CDB Servs.*, 16 S.W.3d 35 (Tex. App. 2000) *aff’d*, 44 S.W.3d 544 (Tex. 2001) (While this case deals with a release of a claim, rather than an indemnity agreement, releases and indemnity agreements are held to the same standard.).

23. *Littlefield v. Schaefer*, 955 S.W.2d 272, 27-75 (Tex. 1997).

24. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 n.2 (Tex. 1993); *Cate v. Dover Corp.*, 790 S.W.2d 559, 561-62 (Tex. 1990).

25. *See Cate*, 790 S.W.2d at 562.

bility, breach of warranty, etc.) in a conspicuous manner (e.g. bold, large font, different color font, etc.).<sup>26</sup>

Finally, Texas Courts do not apply the fair notice requirement to anything other than extraordinary shifting of risk.<sup>27</sup> Absent extraordinary risk shifting in a contract, Texas courts have “resisted expanding the fair notice requirement.”<sup>28</sup>

## V. **STATUTORY INDEMNITY CONSIDERATIONS FOR PRODUCT MANUFACTURERS AND SELLERS**

The Texas Legislature provides certain protections to “innocent sellers” of products in Chapter 82 of the Texas Civil Practice and Remedies Code. This statute sets forth that a product manufacturer<sup>29</sup> “shall indemnify and hold harmless a seller<sup>30</sup> against loss arising out of a products liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.”<sup>31</sup> Accordingly, the product manufacturer is statutorily required to indemnify an innocent seller for any and all products liability claims which arise out of or result from a defect in the product the manufacturer created.

Any party seeking to assert a right to indemnity under this Chapter must pass a two-part test: The seller claiming indemnity must show (1) that the “potential indemnitor” is a manufacturer under Chapter 82 and (2) that there are “covered

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26. One way to prove knowledge would be to show prior indemnity demands based on an indemnity provision in a standard form contract that is used repeatedly. Another method is to require that the provision be initialed. Finally, some contracts contain a disclaimer (in distinctive print) immediately above the signature line exclaiming: THIS CONTRACT CONTAINS AN INDEMNITY PROVISION.

27. *Ethyl Corp.*, 725 S.W.2d at 707; *Dresser*, 853 S.W.2d at 507.

28. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997); *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 806 (Tex. 1992); *Storage & Processors, Inc.*, 134 S.W.3d at 193.

29. Manufacturer is “a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.” TEX. CIV. PRAC. & REM. CODE § 82.001(4) (West 1993).

30. A seller is any person or company that engages in the business of “distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.” *Id.* § 82.001(3).

31. *Id.* § 82.002(a).

claims” in the action that require the manufacturer to indemnify seller.<sup>32</sup>

In 2008, the Texas Supreme Court issued an opinion limiting the applicability of Chapter 82 as follows:

- Sellers of defective products are not entitled to Chapter 82 indemnity from parties other than the manufacturer;
- Chapter 82 does not preclude common law indemnity; and
- Sellers of defective products are not entitled to common law indemnity from “upstream suppliers” other than the manufacturer without showing that the upstream supplier was at fault.<sup>33</sup>

Based on this case, a seller of a product may no longer assert a right to indemnity under Chapter 82 against ALL upstream suppliers in the chain of distribution (as companies that only distribute the product and do no more have no indemnity obligations under Chapter 82). The seller MUST show that the upstream seller caused or contributed to the alleged product defect.

## **VI. WHEN AN OTHERWISE VALID INDEMNITY PROVISION MAY BE UNENFORCEABLE**

The Texas legislature has enacted certain “anti-indemnity” statutes that can void a mutual allocation of risk that the parties contracted for in their service or drilling contracts and construction contracts. In the event a contract is governed by Louisiana law, that law also has similar (but not identical) legislation.<sup>34</sup>

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32. *Seelin Med., Inc. v. Invacare Corp.*, 203 S.W.3d 867, 870 (Tex. App.—Eastland 2006, pet. denied).

33. *SSP Partners v. Gladstrong Inv. (USA) Corp.*, 275 S.W.3d 444, 457-58 (Tex. 2008).

34. The Louisiana Oilfield Indemnity Act (“LOIA”) prohibits certain types of indemnity and defense agreements. The primary purpose of the act is to invalidate all indemnity agreements in oil and gas contracts that purport to indemnify a party for its own negligence in causing death or bodily injury. LOIA applies ONLY if the agreement is (1) an oil and gas contract governed by the act, (2) deals with death or bodily injury, and

The statutes were enacted by the Texas legislature as a means to prevent the party with all of the bargaining power from requiring the party with less bargaining power to assume all of the risk.

***Texas Oilfield Anti-Indemnity Act (“TOAIA”)***

TOAIA applies to contracts/agreements related to wells for oil, gas, or water, or to mining for minerals.<sup>35</sup> This section of the Texas Civil Practice and Remedies Code applies to any agreement to provide services to the well or mine, and any service or collateral acts such as furnishing transportation or rental equipment.<sup>36</sup>

TOAIA voids any agreement “. . .if it purports to indemnify a person against loss or liability for damage that is caused by or results from the sole or concurrent negligence of the indemnitee, his agent, or employee, or an individual contractor directly responsible to the indemnitee . . . .”<sup>37</sup> This statute stands for the proposition that a party cannot indemnify another party for sole or concurrent negligence (even if the first party is also responsible).

However, TOAIA provides an exception for indemnity agreements if the parties agree in writing that indemnity will be supported by liability insurance procured by the indemnitor.<sup>38</sup> If the parties have a mutual indemnity obligation, then the indemnity obligation is limited to the extent of the insurance each party agreed to provide.<sup>39</sup>

TOAIA does not apply to:

- Joint Operating Agreements,
- Indemnity Agreements given to surface estate owners for exploration of minerals;
- Damages resulting from radioactivity;

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(3) purports to indemnify for the indemnitee's own negligence. LA. REV. STAT. ANN. § 9:2780 (2014).

35. TEX. CIV. PRAC. & REM. CODE § 127.001 (2015).

36. *Id.*

37. *Id.* § 127.003.

38. *Id.* § 127.005.

39. *Id.*

- Property injury resulting from pollution including cleanup/control of pollutant;
- Property injury that results from reservoir or underground damage;
- Personal injury/death/property damage as a result of services on a wild well; and
- Costs to control a wild well.<sup>40</sup>

***Texas Anti-Indemnity Act (“TAIA”)***<sup>41</sup>

Contracts that involve construction may also be governed by TAIA. The Texas Legislature enacted the TAIA which prohibits and voids broad form and intermediate form indemnity agreements (i.e. indemnification provision covering the negligence of an indemnitee) for construction projects (assuming the TAIA applies).<sup>42</sup>

The Texas Insurance Code’s definition of “construction contract” is broad, and includes a range of both private and public agreements—including design, construction, alteration, renovation, remodeling, repair, or the furnishing of material or equipment.<sup>43</sup> Also, a “construction contract” is defined to include construction, maintenance, or repair of improvements to real property – this excludes projects relating to single family houses, townhouses, duplexes, or land development related thereto.<sup>44</sup>

TAIA applies in the following ways: (1) it voids provisions applicable to contracts that indemnify parties for their own negligence, (2) it applies to agreements which “affect” the construction contracts; (3) it prohibits “broad form” and “intermediate form” indemnity provisions, and (4) it voids certain “additional insured” provisions in construction contracts.<sup>45</sup>

However, TAIA does not apply to the following:

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40. *Id.* § 127.004.

41. The TAIA only applies to an original contract with an owner of an improvement or contemplated improvement that is entered into on or after the effective date of the act—January 1, 2012.

42. TEX. INS. CODE §§ 151.101-.102 (West 2012).

43. *Id.* § 151.001.

44. *Id.*

45. TEX. INS. CODE. ANN. §§ 151.101-.104 (2015).

- Indemnification for claims for bodily injury to or death of the indemnitor;
- An insurance policy, except as provided by Section 151.104;
- A cause of action for breach of contract or breach of warranty;
- Indemnities in loan and financing documents—except if lenders are parties;
- Indemnity required by sureties as a condition for bond execution;
- Workers' Compensation laws in Texas;
- Agreements subject to Tex. Civ. Prac. & Rem. Code 127;
- Agreement between railroad company and person who permits another to enter property;
- Copyright infringement;
- Indemnity related to a single family house, etc., or public works; or
- Joint Defense agreement entered into after claim is made.<sup>46</sup>

## **VII. PRACTICAL CONSIDERATIONS**

As discussed at the start of this paper, the greatest practical consideration is: Who is on the hook when an incident occurs (whether that incident results in personal injury, death, or property damage)? The second consideration is: If you are on the hook, are you covered by insurance or will you be paying straight out of the bottom line?

Detailed above are numerous (but not all) considerations that must be taken into account when reviewing or analyzing an indemnity agreement in a contract. In order to confirm that you have insurance to cover any potential loss or loss which you agreed to indemnify, you should consider the following:

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46. *Id.* § 151.105.

- Does your insurance policy cover the risks of the contractual agreement?
- Are you confident that you qualify as an additional insured on your contractor's policy?
- Are you a named insured on the policy that covers the risk?
- Will the limits of your insurance policy cover the known or unknown risks?
- Whether or not you are self-insured, do you have excess coverage over and above any primary policy?

In order to avoid having to answer these questions after an incident occurs – make sure that you sit down with your broker and confirm what policy(ies) will cover any damages or losses that you may incur.

### ***VIII. ADDITIONAL CONSIDERATIONS***

The information contained hereinabove addresses specific issues to look for when reviewing your indemnity agreement. However, there are several other issues which require equal if not more consideration in review of any potential agreements. Below is a list of potential issues which should be taken into consideration when reviewing an indemnity provision in a contract.

**Extend the protections of the agreement to the proper parties** – Make sure that when the company name is defined in the contract that it includes all necessary parties, companies, subsidiaries, etc. that may be subjected to a claim for a loss related to the contract.

**Additional Insured** – Being named as an additional insured is an affirmative protection that gives the additional insured the direct rights of protection under the policy of insurance. When entering into an agreement, the indemnitee should require that he also be named as an additional insured – this provides the indemnitee with an extra level of protection, in that the indemnitee can seek protection from the indemnitor as well as the indemnitor's insurance company.

In Texas, when the additional insured language is part and parcel of the indemnity provision, then the status of your company as an additional insured hinges on the enforceability of the indemnity provision.<sup>47</sup> If the additional insured language is in the indemnity provision of a contract and the indemnity provision does not comply with the Fair Notice requirements, then the insurance provision has no effect.<sup>48</sup>

However, an additional insured provision of an agreement or contract that is separate and distinct from the indemnity provision resolves this confusion. When the additional insured provision is separate and distinct from the indemnity provision, the enforceability of the indemnity provision has no effect on the enforceability of the additional insured provision.<sup>49</sup>

**Waiver of Subrogation** – Any agreement you enter into should require a waiver of subrogation in favor of any and all indemnified parties. This prevents the contractor's insurance company from asserting a claim against the indemnified party for its proportionate fault following an accident. Additionally, the agreement may require a workers' compensation waiver of subrogation – which results in the workers' compensation insurance carrier waiving its right to reimbursement for workers' compensation payments made to an injured employee.<sup>50</sup>

**Primary Coverage** – Require that the insurance provided by the contractor is primary to other coverage in favor of indemnified parties – at least for the risks and liabilities assumed by the contractor.

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47. *In re Deepwater Horizon*, No. 13-0670, 2015 WL 674744 (Tex. Feb. 13, 2015) (holding that BP's status as an insured was inextricably intertwined to the indemnity obligations, and that BP did not obtain additional insured status as a result of the Court determining that the indemnity provision did not cover the underwater pollution claim).

48. *ALCOA v. Hydrochem Indus. Servs., Inc.*, No. 12-02-00531-CV, 2005 WL 608232 (Tex. App.—Corpus Christi Mar. 17, 2005, pet. denied) (mem. op.).

49. *Id.*

50. *Chevron v. Simon*, 813 S.W.2d 491 (Tex. 1991); *Bennett v. Thomason*, No. 14-97-00157-CV, 1998 WL 751991, at \*4 (Tex. App.—Houston [14th Dist.] Oct. 29, 1998, pet. denied).

**Certificates of Insurance** – Require that a certificate of insurance evidencing that the required coverage is in place is provided.

**Defend and Indemnify** – Does the agreement require the party to defend and indemnify, or just indemnify? If there is no requirement to defend, then an indemnitor will sit back and wait for a resolution (at which time it will have to pay – potentially on damages, not defense costs). If the provision requires the indemnitor to defend and indemnify, then it must pay attorney’s fees and costs as well as any resulting damages.

**Procedure for Contesting Indemnity Provision** – Are you required to pay the costs of prosecuting an indemnity action, etc.? Which costs?

**Who Selects Attorney to Represent the Party** – Is the indemnitor or indemnitee provided with opportunity to select defense counsel?

**Notice Provision in Indemnity Agreement** – How quickly do you have to provide notice under an indemnity agreement?

**What Right Does the Indemnified Party Have to Investigate** – Who will control the investigation and defense of the claim?

**Make Sure Indemnity Provision Is for All Negligence, Not Just One Party’s Sole Negligence** – An agreement to indemnify for sole negligence may negate the ability to require indemnity for indemnitor’s own negligence (assuming it is not the sole negligence).

**Include Claims Beyond Negligence** – Does the indemnity agreement also list out claims for strict liability and breach of warranty?

**Choice of Venue and Choice of Law Provisions** – Does the agreement you enter into require you to litigate any dis-

pute in Kansas?<sup>51</sup> Does the agreement require any dispute to be decided under the laws of Montana?<sup>52</sup> Does the agreement require you to forego a lawsuit and arbitrate your case?

Contracts routinely contain “choice of venue” and “choice of law” provisions that require parties to submit to the jurisdiction of a foreign state to resolve their disputes or have a Texas court rely on another state’s laws in determining the case.<sup>53</sup> Make sure you search for and review any “choice of law” provision in a contract to know where (in the event a dispute arises) you will need to file your claim and/or what laws will govern your dispute.

**Limitation of Liability Provision** – Does the contract have a limit of how much one party must pay?<sup>54</sup> Review and analyze a contract before signing to determine if the party that agrees to indemnify is only obligated to pay costs to a certain dollar amount. If this is the case, then once that party pays its required “limit,” others will be left footing the bill for the remaining costs related to an incident.

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51. *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 134 S.Ct. 568 (2013) (holding that forum selection clauses should be enforced absent extraordinary circumstances).
  52. *Sava Gumarska in Kemijska Indus. D.D. v. Advanced Polymer Sci., Inc.*, 128 S.W.3d 304, 314 (Tex. App.—Dallas 2004, no pet.) (stating the parties’ contractual choice of law will be given effect if the contract bears a reasonable relationship to the chosen state and no countervailing public policy of the forum demands otherwise).
  53. As detailed above, the laws of Texas are very particular. If consideration must be given for the laws of another state, you must address this at the start of any contractual relationship.
  54. *Fox Elec. Co. v. Tone Guard Sec.*, 861 S.W.2d 79 (Tex. App.—Fort Worth 1993, no writ) (upholding limitations of liability clauses, even when a suit is based on negligence, so long as the clause specifically takes into account any loss through negligence and there is no disparity of bargaining power between the parties).