INDEMNITY AGREEMENTS IN TEXAS

I. Is the Agreement Valid?

A. Is it conspicuous?

Discussion

Texas requires that something must appear on the face of the contract or writing to attract the attention of a reasonable person when he looks at it. The conspicuousness requirement is a question of law for the court.

Language that is hidden under a separate heading or surrounded by unrelated terms is not conspicuous. Language hidden on the reverse side of a sales order under a paragraph entitled "Warranty" or surrounded by completely unrelated terms is not conspicuous. 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. Language in the body of a form is conspicuous if it is larger or in other contrasting type or color. Additional language in an extremely short document such as a telegram is also conspicuous. The Texas Supreme Court has adopted the standard for conspicuousness that is contained in the Uniform Commercial Code.

Note, however, that the fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement.

B. Execution of the Agreement

Was the agreement executed before the loss or after it? If afterwards, it may not be valid.

Was it executed by an authorized person? An employee on the job site or a field foreman who is not authorized to bind the company to such a far reaching agreement, has been previously held to invalidate an indemnity agreement. (*Roarke v. Garza*).

C. Applicable Laws

Was the agreement executed in Texas? Does the agreement make the laws of another state, other than Texas, applicable? An agreement that is executed in another state and/or performable in another state may, depending on the choice of law rules result in the laws of some other state applying. Many states have invalidated indemnity agreements under certain circumstances. Therefore it is important to know where the agreement was executed and whose law may apply to the interpretation of the agreement.

D. The Express Negligence Test

Now, in order for an indemnity agreement to contractually indemnify another for his own negligence, the agreement must, within the four corners of the agreement, specifically set forth that intent. This is known as the *Ethyl* rule. *Ethyl Corporation v. Daniel Construction Company*, 725 S.W.2d 705 (Tex. 1987). Now, in Texas, a party can, by contract, provide for indemnity for one's sole negligence, concurrent negligence or comparative negligence so long as that intent is properly set forth within the agreement.

Examples:

1. "Whether the same is caused or contributed to by the negligence of the indemnitee, its agents, or employees" held to clearly express the intent to indemnify the indemnitee from the consequences of its own negligence. See *Permian Corporation v. Union Texas*

Petroleum Corporation, 770 S.W.2d 928 (Tex. Civ. App. - El Paso, 1989).

2. "Regardless of cause or of any concurrent or contributing fault or negligence of contractor (indemnitee)..." and "Regardless of cause or of any fault or negligence of contractor (indemnitee)" was held to have satisfied the doctrines test; see *B.F.W. Construction Company, Inc. v. Garza*, 748 S.W.2d 611.

3. "Without limit and without regard to the cause or causes...or the negligence of any party or parties". See *Adams Resources Exploration Corporation v. Resource Drilling, Inc.*, 761 S.W.2d 63.

4. "Including but not limited to any negligent act or omission of Arco" held sufficiently to define the party's intent to indemnify Arco for its own negligence. See *Atlantic Richfield Company v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (1989). (The Supreme Court held that while the language of the indemnity provision did not differentiate between degrees of negligence, the aforementioned language was sufficient to define the party's intent).

5. "Contractor agrees to protect, defend, indemnify and save company harmless from and against all claims...without regard to the cause or causes thereof or

the negligence of any party or parties, arising in connection herewith" held sufficient to afford indemnity to the owner Arco. See *Atlantic Richfield Oil & Gas v. McGuffin*, 773 S.W.2d 711 (Tex. Civ. App. - Corpus Christi, 1989).

6. "Ford Bacon & Davis further agrees to be responsible for and to indemnify and save harmless Gulf from all loss or damage and all claims and suits...arriving by reason of injuries (including death) to any person...whether arising out of concurrent negligence on the part of Gulf or otherwise" held to meet the express negligence test. See *Gulf Oil v. Ford Bacon & Davis*, 782 S.W.2d 28 (Tex. Civ. App. - Beaumont, 1989).

E. Agreements with Limitations

1. Payne & Keller will indemnify PPG for claims "arising out of...the acts or omissions of Payne & Keller or its employees in the performance of the work irrespective of whether PPG was concurrently negligent...but excepting where the injury or death...was caused by the sole negligence of PPG". Payne & Keller's employee was found to be negligent, but his negligence was <u>not</u> found to be a proximate cause of the occurrence. PPG's negligence, however, was found to be a proximate cause of the occurrence. The Supreme Court held that the jury findings were that of sole negligence on the part of PPG and hence, the sole negligence exception was triggered so that PPG was not entitled to claim indemnity from Payne & Keller.

This case is also important in that it stands for the proposition that there must be a finding of proximate cause, otherwise a negligence finding would be insufficient.

2. Does the use of the term "persons" in the indemnity agreement include a workers' comp's subscriber's employee so as to avoid the workers' compensation bar which prohibits liability in the absence of a written agreement expressly assuming such liability? A subcontractor agreed to indemnify the contractor from liability "for or on account of injury to or death of person or persons occurring by reason of or arising out of the act or negligence of subcontractor...regardless of whether such claims or actions are founded in whole or in part upon the alleged negligence of Ensearch" held sufficient to avoid the workers' comp bar and to satisfy the express negligence test - *Ensearch Corporation v. Parker*, (Tex. 1990).

3. "Subcontractor shall indemnify and hold harmless the contractor for any claim which is caused in whole or in part by a negligent act or omission of the subcontractor...regardless of whether it is caused in part by a party indemnified hereunder", held insufficient to indemnify the contractor for its own negligence as that was nowhere stated within the agreement. See *Adams v. Spring Valley Construction Company*, 728 S.W.2d 412 (Tex. Civ. App. - Dallas 1987).

4. Contractor agrees to indemnify and hold harmless owner for all claims, "excepting only claims arising out of accidents resulting from the sole negligence of owner" held not to satisfy the express negligence test because all the agreement said is what the parties were <u>not</u> required to do. See *Singleton v. Crown Central Petroleum Corporation*, 729 S.W.2d 690 (1987).

F. Can Indemnity Be Required Without Satisfying *Ethyl*?

Some courts have held that certain indemnity agreements are valid where the party seeking indemnity has not been found to be negligent. These are what are known as lower court exceptions to the express negligence test. The Supreme Court has yet to rule upon any of these so-called exceptions.

Some courts have held that the indemnitee's negligence is an affirmative defense that must be pled and proven by the indemnitor. In *R.B. Tractor, Inc. v. Mann*, 800 S.W.2d 955 (Tex. Civ. App. - San Antonio 1990) a lessor under an indemnification provision in an equipment lease sued the lessee. The Court of Appeals held that the party against whom indemnity was sought had the burden to prove that the party seeking indemnity was negligent in order to avoid liability under the agreement.

In *Continental Steel Company v. H.A. Lott, Inc.*, 772 S.W.2d 513 (Tex. Civ. App. - Dallas, 1989) it was held that an indemnity agreement obligated a subcontractor to indemnify the general contractor for its costs and expenses incurred in the successful defense of a claim arising out of a worker's injuries which had been alleged to have been caused by the general contractor's negligence. The court held the express negligence doctrine did not apply to the indemnity provisions that covered losses not resulting from the indemnitee's own negligence. In other words, because the jury had found that the general contractor was not negligent, the court held that it was entitled to recover its defense costs and expenses from the subcontractor with whom it had an indemnity agreement that did not satisfy the *Ethyl* express negligence test.

In *Construction Investments and Consultants, Inc. v. Dresser Industries*, 776 S.W.2d 790 the Houston First Court of Appeals held that Dresser was entitled to indemnity from Construction Investments and Consultants pursuant to an indemnity contract which did not meet the express negligence test. Dresser had successfully defended a negligence claim by an employee of CCIC's subcontractor. Dresser was

therefore allowed to collect its attorney's fees and expenses in defending the cause because the court felt such an attempt was expressly set forth within the agreement. Dresser was not seeking indemnification for its negligence and therefore the court felt that *Ethyl* did not apply.

In *Champlin Petroleum Company v. Goldston Corporation*, 797 S.W.2d 165 (Tex. Civ. App. - Corpus Christi, 1990) it was held that a refinery owner could recover the amount of a settlement it entered into with the plaintiff where there had been no finding of negligence on the part of the owner. The contractor took the position that under the indemnity agreement that the owner had to show that it was not solely negligent in order to collect under the terms of the indemnity agreement. The owner, however, argued that it was the contractor that had to prove that the owner was negligent in order for the express negligence test to apply. The appellate court held that the burden was on the contractor to show that the owner was negligent in order for the express negligence test to bar a recovery. Hence, the owner was entitled to recover the amount of the settlement from the contractor under the indemnity agreement.

II. The Anti-Indemnity Statute

A. Agreements pertaining to a well for oil, gas, or water or to a mine for minerals.

Despite the express negligence test, an indemnity agreement may be rendered invalid by this statute. An agreement that pertains to just about any phase of an oil, gas or mineral exploration, production, or service industry would probably be covered by the statute. The statute covers services rendered in connection with the well and, in addition, acts that are collateral to the rendering of services or furnishing or renting of equipment, incidental transportation and/or other goods and services that pertain to a well or mineral exploration. The statute will render such agreements to indemnify for one's sole or concurrent negligence void and unenforceable unless it involves a joint

operating agreement that contains provisions for the sharing of costs or losses arising from joint activities, including costs or losses attributable to the negligent acts or omissions of any party conducting in the joint activity (However, a joint operating agreement is defined to mean an agreement between or among holders of working interests or operating rights for the joint exploration, development, operation, or production of materials).

Another exception would be where the written agreement amongst the parties also includes a provision that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to certain insurance limitations set forth in the statute. With respect to mutual indemnity obligations, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance that the indemnitor has agreed to provide in equal amounts to the other party's indemnity. In a unilateral indemnity obligation, i.e. one where a party agrees to indemnify another for his sole negligence, the amount of insurance required cannot exceed $500,000.

Under the Civil Practices & Remedies Code, chapter 127, well or mine service, however, does not include construction, maintenance, or repair of oil, natural gas, liquids or gas pipelines or fixed associated facilities.

An agreement pertaining to a well for oil, gas or water means either an agreement pertaining to the rendering of well or mine services or an agreement to perform a part of those services or an act collateral to those services, including furnishing or renting equipment, incidental transportation, or other goods and services furnished in connection with the services.

B. Indemnification of architects and engineers and certain construction contracts.

Any covenant or promise in connection with a construction contract is void and unenforceable if it promises or provides for a contractor who is to perform the work to indemnify or hold harmless a registered architect, registered engineer or an agent, servant or employee of a registered architect or registered engineer from liability for damage that is:

1. caused by or results from defects in plans, designs or specifications approved, prepared or used by the architect or engineer or the negligence of the architect or 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 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.

The chapter does not apply to a contract or agreement in which the architect or an engineer is indemnified from liability for negligent acts other than those described in the chapter or the negligent acts of the contractor, any subcontractor, or any person directly or indirectly employed by the contractor or sub. Hence, in a recent case, an architect was entitled to bring a claim against the contractor to obtain indemnity for costs incurred in defending a suit that was brought by a property owner for damage that resulted from work performed by the contractor in accordance with plans prepared by the architects. There, the jury findings were that the architect was not negligent, but that the contractor was. It was therefore held that the Anti-Indemnity Statute did not

apply because the damage was found by the jury not to be caused by the conduct of the architect. See *Foster, Henry, Henry & Thorpe, Inc. v. J.T. Construction Company, Inc.*, 808 S.W.2d 139 (Tex. Civ. App. - El Paso, 1991).

III. Releases within an Indemnity Agreement

Oftentimes, contractual indemnity agreements include release agreements. These releases operate to relieve a party in advance for responsibility for its own negligence. These releases, however, must satisfy the same conspicuousness requirements that indemnity agreements must meet. See *Page Petroleum, Inc. v. Dresser Industries*, 36 S.Ct.Jrnl. 737 (Tex. 1993).