

# Treacherous Terms: Drafting Contracts to Avoid Litigation

October 2018

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# Terms

## Indemnity Clause:

- Contractual allocation of risk or expense between two contracting parties.

## Indemnitor:

- Party assuming a risk or agreeing to pay or otherwise bear an expense.

## Indemnitee:

- Party relieved of a risk or entitled to receive compensation.

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# Terms

## Duties:

- Scope of Indemnitor's obligation.
  - Indemnify
  - Defend
  - What else?

## Risks:

- Risks assumed and expenses borne by Indemnitor.
  - Triggering events
  - Covered losses

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# Types of Losses Commonly Subject to Indemnity Clauses

- Indemnity claims by third parties
- Indemnity damage to property or personal injury
- Indemnity breach of contract and/or negligence
- Indemnity infringement of intellectual property rights of a third party

What is important to your client? What risks are unacceptable to your client?

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# Enforceability of Indemnity Clauses under Texas Law

A claim for contractual indemnity generally requires:

- (1) an agreement to indemnify;
- (2) the happening of an occurrence for which indemnity is promised; and
- (3) covered losses.

*Crimson Expl., Inc. v. Intermarket Mgmt, LLC*, 341 S.W.3d 432, 442 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2010, no pet.)

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# Enforceability of Indemnity Clauses under Texas Law

- Indemnity clauses are construed under normal contract construction rules. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000).
- Goal is to give effect to parties' intent expressed in the contract. *Ideal Lease Service v. Amoco Production Co.*, 662 S.W.2d 951, 953 (Tex. 1983).
- Indemnity clauses must be “clear and unambiguous.” *Transcontinental Gas Pipeline v. Texaco*, 35 S.W.3d 658 (Tex. App.—Houston [1<sup>st</sup> Dist.]

# Indemnity Clauses are Subject to the Express Negligence Rule

- **Express Negligence Rule:** If an indemnity provision is to protect the indemnitee from liability arising from the indemnitee's own negligence it must:
  - (1) Must meet "fair notice" requirements (i.e., conspicuousness). See *Dresser v. Page*, 853 S.W.2d 505, 507-509 (Tex. 1993).
  - (2) Must "expressly" state it covers indemnitee's own negligence if it is intended to cover an indemnitee's own negligence. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 507-509 (Tex. 1993).

A "catch-all" provision can be useful:

**"Except as specifically agreed to the contrary, the parties agree that all indemnities in this Section shall apply without regard to the cause or causes thereof, including, without limitation the indemnitee's own negligence..."**

# Drafting Indemnity Clauses

***“I know you think you understand what you thought I said but I’m not sure you realize that what you heard is not what I meant.”  
— Alan Greenspan***



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# Sample Indemnity Clause

Supplier agrees to release, indemnify, protect, defend, and hold harmless the Purchaser and its affiliates, and its and their officers, directors and employees and their respective successors from and against any claims, demands, causes of action, judgments, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities, including litigation costs and reasonable attorneys' fees, arising out of (a) death, illness, injury, or property loss or damage as a result of or in connection with the negligent acts or omissions of Supplier, its affiliates, subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, or (b) a breach of this Agreement by Supplier.

*\*\*All information in this presentation is for informational purposes only. This clause is not intended to be nor should it be used as a standard/form indemnity clause in your contracts or other documents. Please tailor your indemnity clauses to your specific client and situation.\*\**

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# Sample Indemnity Clause--Indemnitor

**Supplier** agrees to release, indemnify, protect, defend, and hold harmless the Purchaser and its affiliates, and its and their officers, directors and employees and their respective successors from and against any claims, demands, causes of action, judgments, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities, including litigation costs and reasonable attorneys' fees, arising out of (a) death, illness, injury, or property loss or damage as a result of or in connection with the negligent acts or omissions of Supplier, its affiliates, subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, or (b) a breach of this Agreement by Supplier.

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# Sample Indemnity Clause—Scope of Duty

Supplier agrees to **release, indemnify, protect, defend, and hold harmless** the Purchaser and its affiliates, and its and their officers, directors and employees and their respective successors from and against any claims, demands, causes of action, judgments, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities, including litigation costs and reasonable attorneys' fees, arising out of (a) death, illness, injury, or property loss or damage as a result of or in connection with the negligent acts or omissions of Supplier, its affiliates, subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, or (b) a breach of this Agreement by Supplier.

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# Black's Law Dictionary

**“Indemnify”**—To reimburse (another) for a loss suffered because of a third party's or one's own act or default; HOLD HARMLESS.

**“Defend”**—To deny, contest, or oppose an allegation or claim.

**“Hold Harmless”**—To absolve from any responsibility for damage or other liability arising from the transaction; INDEMNIFY.

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# Sample Indemnity Clause—Scope of Duty

Supplier agrees to **release, indemnify, protect, defend, and hold harmless** the Purchaser and its affiliates, and its and their officers, directors and employees and their respective successors from and against any claims, demands, causes of action, judgments, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities, including litigation costs and reasonable attorneys' fees, arising out of (a) death, illness, injury, or property loss or damage as a result of or in connection with the negligent acts or omissions of Supplier, its affiliates, subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, or (b) a breach of this Agreement by Supplier.

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# Sample Indemnity Clause--Indemnatee

Supplier agrees to release, indemnify, protect, defend, and hold harmless the **Purchaser and its affiliates, and its and their officers, directors and employees and their respective successors** from and against any claims, demands, causes of action, judgments, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities, including litigation costs and reasonable attorneys' fees, arising out of (a) death, illness, injury, or property loss or damage as a result of or in connection with the negligent acts or omissions of Supplier, its affiliates, subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, or (b) a breach of this Agreement by Supplier.

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# Sample Indemnity Clause—Risks and Expenses (Covered Losses)

Supplier agrees to release, indemnify, protect, defend, and hold harmless the Purchaser and its affiliates, and its and their officers, directors and employees and their respective successors from and against any claims, demands, causes of action, judgments, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities, including litigation costs and reasonable attorneys' fees, arising out of (a) death, illness, injury, or property loss or damage as a result of or in connection with the negligent acts or omissions of Supplier, its affiliates, subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, or (b) a breach of this Agreement by Supplier.

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# Sample Indemnity Clause—Risks and Expenses (Triggering Events)

Supplier agrees to release, indemnify, protect, defend, and hold harmless the Purchaser and its affiliates, and its and their officers, directors and employees and their respective successors from and against any claims, demands, causes of action, judgments, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities, including litigation costs and reasonable attorneys' fees, arising out of (a) death, illness, injury, or property loss or damage as a result of or in connection with the negligent acts or omissions of Supplier, its affiliates, subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, or (b) a breach of this Agreement by Supplier.

# Revised Indemnity Clause

Subject to the limitations set forth in this Agreement, Supplier agrees to release, indemnify, ~~protect~~, defend, and hold harmless ~~the~~ Purchaser, its parent, subsidiaries, partners, and its affiliates, and subcontractors, and its and their shareholders, members, partners, managers, officers, directors, ~~and~~ employees, agents and invitees, and their respective successors, from and against any claims, demands, causes of action, judgments, settlements, proceedings, awards, damages, losses, fines, penalties, costs, expenses and liabilities of any kind, including litigation costs and reasonable attorneys' fees, [to the extent] arising out of (a) ~~death, illness, injury, or property loss or damage as a result of or in connection with~~ the negligent acts or omissions or willful misconduct of Supplier, its parent, subsidiaries, partners, affiliates, and subcontractors and its and their respective employees, officers, directors, representatives, agents and invitees, ~~or~~ (b) a breach of this Agreement by Supplier, (c) an injury to or death of any employee of Supplier or its subcontractors [regardless of the cause thereof,] (d) damage to the property of Supplier or its subcontractors, -[regardless of the cause thereof,] or (e) infringement by Supplier or its subcontractors of the intellectual property rights of any person.

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# Revised Indemnity Clause—Express Negligence Clause

THE INDEMNIFICATION, RELEASE AND ASSUMED OBLIGATIONS PROVISIONS PROVIDED FOR IN THIS AGREEMENT SHALL BE APPLICABLE WHETHER OR NOT THE LIABILITIES, LOSSES, COSTS, EXPENSES AND DAMAGES IN QUESTION AROSE OR RESULTED SOLELY OR IN PART FROM THE GROSS, SOLE, ACTIVE, PASSIVE, CONCURRENT OR COMPARATIVE NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT OR VIOLATION OF LAW OF OR BY ANY INDEMNIFIED PARTY. PURCHASER AND SUPPLIER ACKNOWLEDGE THAT THIS STATEMENT COMPLIES WITH THE EXPRESS NEGLIGENCE RULE AND IS CONSPICUOUS.

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# Anti-Indemnity Statutes

- Texas Oilfield Anti-Indemnity Act—Tex. Civ. Prac. & Rem. Code § 127 (enacted 9/1/85, Revised 9/1/89, 4/19/91)
- Construction Anti-Indemnity Act—Tex. Insurance Code § 151 (Enacted 1/12)

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# Limitation of Liability Clause

- Limits the amount of exposure a company faces in the event a lawsuit is filed or another claim is made.
  - (1) “Types” [categories/classes] of liability; and/or
  - (2) The “Amount of Liability”

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# Limitation of Liability Clause

## Carve out on Certain Limitations

- Exceptions such as fraud, willful misconduct
- Combination (complete exclusion from liability for certain classes of damages)

## Limiting the Amount of Liability

- Caps
- Percentages
- Fixed Dollar Amount
- An Amount Covered by Insurance
- Fees/Percentage or Cap tied to a certain period of time

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# Limitation of Liability Clause

## Enforceability in Texas

In Texas, a contractual limitation of liability clause is enforceable if it is:

- (1) conspicuous;
- (2) not unconscionable; and
- (3) Not contrary to public policy.

*See Mireles v. Tejas Appraisal & Inspection Co.*, No. 04-06-00582-CV, 2007 Tex. App. LEXIS 4958, at \*3-7 (Tex. App.—San Antonio, June 27, 2007, no pet.)

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# Helpful Hints in Drafting Limitation of Liability Clauses

- Beware of Boilerplate
- Confirm Nothing in Your Indemnity Provision Conflicts with your Limitation of Liability Clause
- Generally, your Limitation of Liability Clause Will Not Address Third Parties—Your Indemnity Provision Should
- Draft it Clearly and Make it Conspicuous

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## Case to Watch

- *Anadarko Petroleum Corp, et al. v. Houston Casualty Co., et al.*, case number 16-1013, in the Supreme Court of the State of Texas
- Argued to Texas Supreme Court September 2018

## Questions?

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