

# NEGOTIATING AND DRAFTING INDEMNITY CLAUSES

A Discussion of Contractual Indemnity in Texas

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By

D. Hull Youngblood, Jr.<sup>1</sup>

Hon. G. Alan Waldrop<sup>2</sup>

S. David Smith<sup>3</sup>

Brandie L. Reisman<sup>4</sup>

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<sup>1</sup> D. Hull Youngblood, Jr., of Austin, Partner at Hughes Luce, LLP, is a former Chair of the State Bar Board of Directors and the State Bar MCLE Committee. He practices principally in the area of government contracting and finance.

<sup>2</sup> Hon. G. Alan Waldrop of Austin, Third Court of Appeals.

<sup>3</sup> S. David Smith of Houston, at McGlinchey Stafford, PLLC, is the Editor of the Texas Consumer and Commercial Law Update and Board Certified in Consumer and Commercial Law by the Texas Board of Legal Specialization. He practices primarily in the area of financial litigation.

<sup>4</sup> Brandie L. Reisman of Austin, 2007 J.D. Candidate, The University of Texas School of Law.

## Introduction

When an executive is negotiating the sale or purchase of a business (and most other significant transactions), there are three things of prime importance: *price, representations and warranties, and indemnification*. The issue of “price” is typically within the exclusive purview of the business decision makers. “Reps and warranties” are the point in the deal where the executives and their lawyers meet to jointly draft representations and warranties based upon the facts that the executives know, or do not know. But in the arena of indemnification, many times the clients will merely instruct their counsel to “make sure it is tight” or “make sure I am not on the hook”, and never actually read the provisions. It is the representations and warranties that may get the sellers their money, but it is the indemnification provisions that protect the buyers years after the closing.

An indemnity provision is one of the few agreements that litigators and transactional lawyers both negotiate and draft and, considering its importance, it should be more than a standard paragraph that is thrown in at the last minute. In litigation, the indemnification agreement most often surfaces in settlements. And, once again, it can be the linchpin that holds the settlement together or causes it to fall apart. While this may not be the case in the simple one-plaintiff, one-defendant case, if one tortfeasor tries to settle when one of several others does not, the complexities and resulting risks can make settlement impossible.

In this paper we hope to guide you around the traps that typically befall the lawyer charged with writing an indemnity

provision. In Article I, we discuss the difference between a duty to defend and the duty to indemnify. In Article II, we review the limits on contractual indemnity, including the right to attorney’s fees and costs. Finally, in Articles III and IV, we discuss procedural pitfalls, working with joint tortfeasors, and other ways that things can go wrong even when you think you have done everything right.

## Article I. Duty to Defend vs. Duty to Indemnify

Most indemnity provisions include the time-worn language that one party agrees to “*defend, indemnify, and hold harmless*” another party. While “indemnify” and “hold harmless” may be synonyms, the duty to “defend” is a separate and distinct responsibility, and requires individual treatment. In *Farmers Texas Mutual County Insurance v. Griffin*, 955 S.W.2d 81, 41 Tex. Sup. Ct. J. 103 (Tex. 1997), the Texas Supreme Court explained that “[a]n insurer’s duty to defend and duty to indemnify are distinct and separate duties. Thus, an insurer may have a duty to defend but, eventually, no duty to indemnify.” 955 S.W.2d at 82 (emphasis added). Providing an example of how these two duties might diverge, the court said “a plaintiff pleading both negligent and intentional conduct may trigger an insurer’s duty to defend, but a finding that the insured acted intentionally and not negligently [i.e., not within the policy’s coverage] may negate the insurer’s duty to indemnify.” Id. Therefore, *Griffin* makes it clear that a party’s duty to defend may arise even when it is later determined that the party has no duty to indemnify. See also *Reser v. State Farm & Fire Casualty Co.*, 981 S.W.2d 260 at 263 (Tex. App. – San Antonio 1998, no pet.) (noting that the

duty to defend is unaffected by the ultimate outcome of the case).

### **Section 1.01 Causation**

In every indemnification clause there must be a description of the causal connection between the claims that are protected and the subject matter from which they arise. For example the Defender might have an obligation to defend claims that are *caused by or due to* the conduct of the Target in performing a separate agreement. Alternatively, the Defender might have agreed to defend claims *arising out of* the conduct of the Target in performing a separate agreement. If the phrase “due to” is used in this context, the courts have held that this requires “a more direct type of causation” than the phrase “arising out of.” *Utica National Ins. Co. of Texas v. American Indemnity Co.*, 141 S.W. 3d 198 (Tex. 2004) (holding that *arising out of* does not require direct or proximate causation, while the phrase *due to* requires a more direct type of causation). See *American States Ins. Co. v. Bailey* 133 F.3d 363 (5th Cir. 1998) (where the court held that the words *arising out of* when used in an insurance policy are “broad, general, and comprehensive terms effecting broad coverage,” in that the words are “understood to mean originating from, having its origin in, growing out of, or flowing from). Accordingly, using the more expansive “arising from” language will provide a broader scope of indemnity, than using “caused by” or “due to”.

### **Section 1.02 The “8 Corners Rule”**

The Fifth Circuit discussed this rule in a recent case, *Primrose Operating Co. v. National American Ins. Co.*, 382 F.3d 546 (5<sup>th</sup> Cir. 2004):

Texas employs the “eight corners” or “complaint allegation” rule when determining whether an insurer has a duty to defend. *Potomac Ins. Co. v. Jayhawk Med. Acceptance Corp.*, 198 F.3d 548, 551 (5th Cir. 2000). The eight corners rule requires the finder of fact to compare only the allegations in the underlying suit—the suit against the insured—with the provisions of the insurance policy to determine if the allegations fit within the policy coverage. The duty to defend analysis is not influenced by facts ascertained before the suit, developed in the process of litigation, or by the ultimate outcome of the suit.<sup>1</sup>

Support for the *Primrose* court exists in a line of recent cases. The duty to defend is determined solely by the precise language in the contract and the factual allegations in the pleadings. *Griffin*, 955 S.W.2d at 82; *see also Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 125 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (“The duty to defend may be triggered by the pleadings, but the duty to indemnify is based on the jury's findings.”). In interpreting the contractual language, the Court’s primary concern is to ascertain the true intentions of both parties. *Tenneco Oil Co. v. Gulsby Eng'g, Inc.*, 846 S.W.2d 599, 606 (Tex.App.-Houston [14th Dist.] 1993, writ denied). A court must give reasonable effect to the provision and the contract as a whole. *See Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 382 (Tex. 1985) (explaining that, because parties to a contract intend every clause to have some effect, courts should attempt to provide a reasonable interpretation of the contract); *Keystone Equity Mgmt.*, 730 S.W.2d 339, 340 (Tex. App.-Dallas 1987, no writ) (explaining that courts should give words and phrases their ordinary and

commonly accepted meaning when determining the parties' intent in an agreement); *Manzo v. Ford*, 731 S.W.2d 673, 676 (Tex. App.-Houston [14th Dist.] 1987, no writ) (holding contract language must be construed by determining how a reasonable person would have used and understood such language).

In addition, if the underlying pleadings do not allege facts within the scope of the agreement, the indemnitor is not required to defend a suit against its indemnitee. *E & L Chipping Co.*, 962 S.W.2d 272, 274 (Tex. App.-Beaumont 1998, no pet.). In reviewing the pleadings, the court must focus on the facts that show the origin of the damages rather than on the particular legal theories alleged. *Griffin*, 955 S.W.2d at 82; *E & L Chipping Co.*, 962 S.W.2d at 274-75; *Tesoro Petroleum Corp.*, 106 S.W.3d at 125. A court does not consider the veracity of the allegations in the underlying pleadings, read facts into the pleadings, or look outside the pleadings for additional facts that could have been pled. *E & L Chipping Co.*, 962 S.W.2d at 275 (citing *Katerndahl v. State Farm Fire and Cas. Co.*, 961 S.W.2d 518, 521 (Tex.App.-San Antonio 1997, no pet.)).

### **Section 1.03** Two Sources to Turn to for Guidance

#### **1. Insurance-Related Authority**

Most of the cases cited regarding the duty to defend arise from an insurer's duty to defend pursuant to an insurance policy. This authority has been specifically approved for use in resolving issues arising from contractual indemnity and defense obligations. See *English v. BGP Intern, Inc.* 174 S.W.3d 366 (Tex. App.-Houston [14 Dist.] 2005, no pet. h.) at fn 6 (We recognize that most of the cases addressing this issue, and many of the cases we have cited,

involve the duty to defend in the insurance context. However, we find little reason why the principles regarding an insurer's duty to defend should not apply with equal force to an indemnitor's contractual promise to defend its indemnitee. See generally *Gen. Motors Corp. v. Am. Ecology Env'tl. Svcs. Corp.*, No. Civ.A.399CV2625L, 2001 WL 1029519, at 6-8 (N.D.Tex. Aug.30, 2001) (applying the same principles regarding the duty of an insurer to defend in the insurance context to the duty of an indemnitor who has contractually agreed to defend its indemnitee); *Fisk Electric Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813, 815 (Tex. 1994) (“[T]he standard for determining whether a contractual indemnitor has a duty to defend is the same as in cases involving an insurer's duty.”)). In *BGP*, the contractual indemnification provision reads in part:

BGP shall protect, *indemnify, defend,* and hold harmless [English] ... [from] any claim or suit, including trespass ... when BGP ... commence[s] field operations without the permit acquisition of 100% of the mineral owners and 100% of the surface owners. (Emphasis added.)

The *BGP* court interpreted this common language to mean that the Indemnitor owed a separate and distinct duty to provide a defense, even if the obligation to provide indemnification never arose. Specifically, the Court stated:

Based on our interpretation of this provision, it appears BGP agreed to both *defend and indemnify* English in suits arising from BGP's operations when those operations began before 100 percent of the

landowners had consented. Giving reasonable effect to every word used in the contract, and understanding the separate and distinct nature of the two duties, we hold that BGP agreed to defend English-separate and apart from its duty to indemnify-from suits falling within the terms outlined in the contract. See *Griffin*, 955 S.W.2d at 82; *Tesoro Petroleum Corp.*, 106 S.W.3d at 125; *E & L Chipping Co.*, 962 S.W.2d at 274.

## 2. **Statutory Authority**

For some relationships the duty to indemnify is controlled by statute and this duty could supersede attempts to craft a valid contractual indemnity provision to the contrary. For example, Texas Civil Practice & Remedies Code §82.002(e)(2) provides that the statutory duty to indemnify between sellers and manufacturers is in addition to any contractual duty to indemnify.<sup>2</sup> The statutory indemnity schemes in Texas are beyond the scope of this paper, but do not forget that they exist.

### **Section 1.04** Four Ways to Update Your Indemnification Clauses

Many indemnification clauses are too often thought of as “boiler plate”, and are merely “cut” from a prior document and pasted in to the current one under consideration. This haphazard perspective is probably more common in the litigation context (principally in settlement and release agreements) than it is in transactions. However, in small transactions, where time and money can be in short supply, using a “standard” indemnification provision can be a common mistake. Every indemnification needs to be customized for the facts of each situation, with careful consideration being given to the fact that most clients, even

sophisticated clients, know very little about the arcane verbiage typically found in the traditional indemnity provisions.

A few simple style changes can make even the most complex defense and indemnity agreement readable, understandable, and useable.

1. **Eliminate run-on sentences.** For some reason, it has become the norm to try to describe the entire agreement of the parties regarding indemnity in one sentence. The plethora of commas required, to allow for numerous levels of parenthetical sub-references, leads to unintelligible drafting. There are few other places in the law where the ancient forms hold so fast.
2. **Create a definition section.** Thirty years ago, the generally used real estate forms in Texas were revised to provide a definition section that made drafting (and reading) easier. (Remember “Party of the First Part” and the “Party of the Second Part”?) The family law forms quickly followed suit. A definition section at the front of an indemnity provision, can make drafting simpler and understanding clearer.
3. **Separate the duty to defend and duty to indemnify.** While these two duties are related, but they are separate. There are terms regarding defense that should be considered, negotiated and drafted that are irrelevant to the duty to indemnify. Likewise, there are things regarding indemnification that do not relate to the duty to defend. Draft the terms regarding each of these duties separately.

4. **Provide for the inevitable.** There will be problems in performing the duty to defend, specific to your transaction, that can be anticipated. You should draft for the most obvious of these. For example, a common problem arises when an indemnifiable claim is asserted against the Target that contains allegations that are covered by the duty to defend, and others for which no defense is required to be provided. This type of issue does not generally arise in indemnity duties, because the ultimate damages are usually determined to be covered or not covered and are easily separable. But the duty to defend requires a “Defender” to defend all claims in a lawsuit, even if some of those claims are not subject to a duty to defend. If this is expected to be a significant issue that results in a true disparity in the cost of the duty to defend, proper drafting can resolve that problem. See Paragraph 10.3(j) in Exhibit A for some suggestions on how to draft around the mixed allegation problem.

**Section 1.05** Eleven Issues and Strategies to Consider

Other issues to consider when drafting indemnity provisions might include the following:

1. **Basket.** Upper limit on aggregate amount of indemnification obligation. See Exhibit B for sample language.
2. **Hurdle.** Threshold amount of damage that the Target must suffer before a claim for indemnification can be made. Should the hurdle be per claim, aggregate or both? Once the hurdle is reached does the claim cover the first dollar? See Exhibit C for sample language.
3. **Future Contribution Claims After Settlement.** Regardless of attempts by the Target to reserve rights to contribution, a settling joint-tortfeasor Target can be required to waive all future claims for contribution after a settlement.
4. **HMO–“Handle My Own”.** Where there is an ongoing relationship that is being transferred from the Defender to the Target [such as the sale of a company and its customers] the Target may want to handle claims that arise with the new customers, even if the Seller/Defender is obligated to defend the claim. See Exhibit C for sample language.
5. **Governmental Entities.** Generally, a duty of indemnification imposed upon the state, a city, or a county has been held to be an impermissible form of debt. See *Brown v. Jefferson County*, 406 S.W.2d 185 (Tex. 1966) Even though you won’t get indemnification from a public entity, you can argue for some other protections. See Section 10.3(d) of Exhibit A for sample language.
6. **Selection of Counsel.** Who gets to choose – Defender or Target? Should you provide the opportunity for the Target to approve counsel, if approval is not unreasonably withheld? See Section 10.3 (i) of Exhibit A for sample language.
7. **Materiality.** If your sale/purchase documents have a “materiality” qualifier, will that provision affect

the determination of whether a breach of the agreement has occurred and/or the calculation of damages. See Exhibit D for sample language.

8. **Survivability.** When the agreement or the Representations and Warranties expire, should the obligation to defend/indemnify continue? See Exhibit E for sample language
9. **Assignability.** When the underlying agreement is assigned to a third party, does the obligation to defend/indemnify go with it?
10. **Sophistication.** If the parties are deemed to be sophisticated, it could alter the interpretation of the agreement. Consider adding provisions relating to Severability, Representation by qualified counsel of choice, Opportunity to review and consult counsel regarding the agreement, Joint drafting responsibility, and that the Parties irrevocably deem themselves to be “sophisticated” persons in all matters relating to the agreement and the provisions relating to indemnification and the duty to defend.
11. **Escrow.** Place cash (or other assets) in escrow for use as a remedy (or the sole remedy) for paying an obligation for defense or indemnification. When drafted properly these provisions are lengthy, require a separate Escrow Agreement, and a clear procedure for making and resolving claims against the Escrow Fund. Thorough treatment of this subject is beyond the scope of this article. Resources for forms and a discussion of the

“give and take” when negotiating the terms of escrow arrangements, and indemnification in sophisticated transactions, can be found at “Allocation of Post-Closing Risk in Private Company Acquisitions” by John Seegal, Acquiring or Selling the Privately Held Company, Practising Law Institute 2006

## **Article II. When it Comes to Indemnity, How Far Can You Go?**

Contractual indemnity provides a forum for parties to negotiate the shifting of risks between them, including the risk of paying for someone else’s mistakes. However, there are limits to the type of conduct you can indemnify and, unless you draft an indemnity provision carefully, you may not get the indemnification you legally seek.

The general rule is that, unless indemnifying the conduct is a violation of public policy, courts will allow it and enforce the provision as a matter of contract law.<sup>3</sup> For an extraordinary shifting of risk, such as indemnifying a party for its own negligence, the courts impose a fair notice requirement.<sup>4</sup>

### **Section 2.01 Three Questions to Ask Yourself Before You Draft the Provision**

#### **1. Does My Client’s Request Violate Public Policy?**

In the negligence context, Texas courts have allowed parties to shift the risk for everything from the sole negligence of the indemnitee<sup>5</sup> to liability for property damage, death and personal injury.<sup>6</sup> Courts have also upheld broad indemnity provisions that provide protection in cases of strict liability, breach of warranty, and the like.<sup>7</sup> In *Helmerich & Payne Int’l Drilling Co. v.*

*Swift Energy Co.*, 180 S.W.3d 635 (Tex. App-Houston [14th] 2005, no pet. h.), the court upheld the following broad indemnity provision:

Except as otherwise expressly limited herein, it is the intent of parties hereto that all releases, indemnity obligations and/or liabilities assumed by such parties under terms of this Contract, including, without limitation, Subparagraph 14.1 through 14.12 hereof, be without limit and without regard to the cause or causes thereof (including preexisting conditions), strict liability, regulatory or statutory liability, breach of warranty (express or implied), any theory of tort, breach of contract or the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive.<sup>8</sup>

If the general rule is that courts will uphold an indemnity provision that does not violate public policy, how do you know what might violate public policy? Obviously you cannot craft an indemnity provision to indemnify for something prohibited by statute. But can you indemnify someone for gross negligence? Can you craft the provision to provide reimbursement for attorney's fees and costs associated with your defense?

**(a) Public Policy as Evidenced by Statute**

There are over 638 statutes in Texas that contain some variant of the term *indemnity*.<sup>9</sup> The Oil-field Anti-Indemnity Act<sup>10</sup> is just one example of how statutory indemnity schemes intersect with contractual indemnity. This anti-indemnity

statute allows contractual indemnity in the form of insurance, but creates a ceiling on the contractual amount for unilateral indemnification provisions. Similarly, an example of a statutory bar to indemnity can be found in the Texas Labor Code. Under that statutory scheme, nonsignatories, such as third party beneficiaries, have been ruled to be impermissible indemnities.<sup>11</sup> By an amendment to the Labor Code, pre-injury waivers signed by workers after the 2001 effective date are void as against public policy.<sup>12</sup>

Federal statutes may also preempt your attempt to contractually indemnify a party. For example every contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, falls under the provisions of the Carriage of Goods by Sea Act (COGSA). 46 U.S.C.App. § 1303(8) states:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

In discussing a contract subject to COGSA and the type of conduct you can indemnify, the Fifth Circuit has stated: "By its nature, an indemnity provision allocates loss between joint tortfeasors and cannot relieve a culpable party of its liability vis-à-vis an injured 3<sup>rd</sup> party."<sup>13</sup>

(b) **Public Policy Concerning Gross Negligence and the Distinction between Release and Indemnity**

Statutes aside, one case seems clear, you cannot indemnify someone for gross negligence...or can you? At least one court has found that indemnity for gross negligence does not violate public policy where the parties are sophisticated entities. In *Valero Energy Corp. v. M.W. Kellogg Constr. Co.*, (866 S.W.2d 252 (Tex.App-Corpus Christi 1993, writ denied), the court held that a “[w]aiver and indemnity provision absolving contractor of all liability sounding in products liability and gross negligence in connection with construction of addition to refinery did not offend public policy where both owner and contractor were sophisticated entities.”<sup>14</sup>

However, in the release context, one party cannot release the other from liability for gross negligence. In *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex.App.-Beaumont 1986, no writ), Texas adopted the stance that a release for gross negligence is against public policy: “We hold a term in a release attempting to exempt one from liability or damages occasioned by gross negligence is against public policy.”<sup>15</sup>

It is important not to confuse *release* provisions with *indemnity* provisions. In *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854 (Tex. App.-Houston [14th Dist.] 1992, no writ), the court found requisite release *and* indemnity language in a contract which provided that a subcontractor was required to assume full responsibility and liability for work it performed, and:

[The subcontractor hereby] releases, relinquishes and discharges *and* agrees to indemnify protect and save harmless

Contractor, the City ... Construction Administrator ... from all claims, demands and causes of action of every kind and character including the cost of defense thereof, for any injury to, including death of, person (*whether they be third persons, contractor, or employees of either of the parties hereto*) and any loss of or damage to property (*whether the same be that either of the parties hereto or of third parties*) caused by or alleged to be caused, arising out of, or in connection with Subcontractor's work to be performed hereunder ... whether or not said claims, demands and causes of action in whole or in part are covered by insurance hereinbefore ... release, relinquish and discharge landowner, construction administrator, and general contractor from liability, and to indemnify landowner, construction manager, and general contractor, regardless of whether damage was suffered by third person or his property or parties themselves.<sup>16</sup> (*emphasis added*).

The court in *Derr* ruled the language precluded recovery by subcontractor from landowner, construction administrator, or general contractor for damage to subcontractor's crane.

2. **Does the Agreement Meet the Requirements of the Fair Notice Doctrine?**<sup>17</sup>

Provisions for release prior to the injury or for indemnity for one's own negligence share a common prerequisite to enforcement in that both must meet the requirements of the fair notice doctrine.<sup>18</sup> This point was emphasized in a recent case, *Sydlik v. REEll, Inc.*, No. 14-04-01080-CV,

2006 WL 1389552 (Tex. App-Houston [14th Dist.] May 18, 2006). In *Sydlik*, the court opined that a pre-injury release is a risk-shifting contractual agreement and must satisfy the fair notice doctrine: “If a release does not satisfy both of the fair notice requirements, then it is unenforceable. Thus, fair notice is the chief test we must apply, and conspicuousness and express negligence are merely the two prongs of that test.”<sup>19</sup>

#### (a) **The Express Negligence Test**

Almost twenty years ago, the Texas Supreme Court adopted the *express negligence* test for determining whether the parties to an indemnity contract intend to exculpate the indemnitee from the consequences of its own negligence. In *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987), the court overruled a series of previous cases by stating that “[p]arties seeking to indemnify indemnitee from consequences of its own negligence must express that intent in specific terms within four corners of contract.”<sup>20</sup>

However, the express negligence test does not apply in all indemnity contexts.<sup>21</sup> For example, the express negligence test has not been adopted in maritime law, nor does it apply in other statutory contexts.<sup>22</sup> Also, express negligence applies to indemnity for future acts only<sup>23</sup> and does not operate to bar third-party claims not based on negligence.<sup>24</sup> Finally, unless the parties raise an issue of ambiguity, the court will accept the most reasonable interpretation and construe the contract as a matter of law without discussion of the express negligence test.<sup>25</sup>

Texas courts have found the express negligence test met in the following contexts:

- **Where the indemnity provision included invitees and claim was**

**brought to recover for amount paid by indemnitee to settling third party.** In *St. Paul Surplus v. Halliburton*, 445 F.3d 820 (5<sup>th</sup> Cir. 2006), the service contract between the energy services company and developer of oil and gas properties, which required company to indemnify developer for property damage or personal injury to or death of company's employees, obligated company to reimburse developer and insurer, for the amount the insurer paid to drill barge owner who settled with company's employee injured while working on barge. The company's indemnity obligation arose from inclusion of invitees in the indemnity provision of service contract, as drill barge owner was an invitee.

- **Where continuous clause in agreement included indemnitee's own negligence.** In *Spawglass, Inc. v. E.T. Services, Inc.*, 143 S.W.3d 897 (Tex. App-Beaumont 2004, pet. denied), the contractor sought indemnity from the subcontractor when employee of subcontractor was injured and brought suit. The court found the indemnity clause in the contract satisfied express negligence where the drafter did not separate “any negligent act or omission or claim involving strict liability” from “or negligence per se of Contractor,” and the subject phrase “any negligent act or omission” makes sense only in conjunction with the prepositional phrase “of Contractor or Owner.”<sup>26</sup>
- **Where level of negligence was specified as any.** In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724

(Tex. 1989), the owner of a platform sought indemnification from the contractor when contractor's employee was injured on that platform and brought suit against the owner. The court found the indemnity provision in the contract between contractor and platform owner, providing that contractor would indemnify owner in any manner arising from work performed but not limited to any negligent act or omission of owner, met requirements of express negligence rule and was thus enforceable, even though language did not differentiate between degrees of negligence.<sup>27</sup>

In contrast, courts have prohibited indemnity, finding the express negligence test not met in the following contexts:

- **Where one party was found solely negligent and agreement did not specify indemnity for sole negligence.** In *Delta Air Lines, Inc. v. ARC Sec., Inc.*, 164 S.W.3d 666 (Tex. App. -Fort Worth 2005, pet. denied), the airline sought indemnity from the Skycap partner for costs incurred in defending a negligence suit where claims against the partner had been severed. The court found that the agreement did not directly or indirectly state that partner would indemnify the airline if airline was solely at fault, therefore, the airline was precluded from recovering costs.
- **Where action was brought against both parties and the agreement did not specify indemnity for indemnitee's own negligence.**<sup>28</sup> In *J.M. Krupar Constr. Co., Inc. v. Rosenberg*, 95 S.W.3d 322 (Tex. App. -Houston [1<sup>st</sup> Dist.] 2002, no

pet.), a homeowner brought an action against the general contractor and subcontractor for damages allegedly resulting from faulty design and construction of his home. The court ruled the general building contractor was not entitled to indemnification from its subcontractor where the contract between the general contractor and subcontractor did not expressly state that the subcontractor would indemnify the general contractor for expenses incurred in a claim resulting from general contractor's own negligence. In an earlier case, *Hardy v. Gulf Oil Co. v. Bouygues Offshore U.S.A., Inc.*, 949 F.2d 826 (5<sup>th</sup> Cir. 1992), the Fifth Circuit emphasized the importance of being specific about who was entitled to indemnity under the provision. In *Hardy*, when the contractor was held liable for negligently injuring an inspector, the contractor sought indemnity from the owner of the oil well. The court found that, though the contract contained a valid indemnity provision requiring the contractor to indemnify the owner, it did not contain a reciprocal provision stating that the owner had to indemnify the contractor, therefore the contractor was precluded from recovery.

- **Where the parties specified a level of negligence and then tried to enforce indemnity for conduct falling either below or above that level.** In *Kenneth H. Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1994), the court ruled that shopping center owners, found liable to tenant for "knowingly" committing false, misleading, or

deceptive acts or practices, and for knowingly breaching warranty of commercial habitability, were not entitled to indemnification from contractor pursuant to agreement which excluded indemnification for claims arising out of owners' "gross negligence" or willful misconduct. The same sentiment was echoed by the Fifth Circuit in a later case, *Quorum Health Resources, L.L.C. v. Maverick County Hospital Dist.*, 308 F.3d 451 (5th Cir. 2002). In *Quorum*, the court discussed the history of the express negligence cases and prohibition on implicit agreements and held that an agreement explicitly excluding Quorum's gross negligence from the Hospital's indemnification obligation was insufficient to require the Hospital to indemnify Quorum for Quorum's simple negligence.<sup>29</sup>

(b) **The Conspicuousness Requirement**

The express negligence test is considered one prong of a two-prong fair notice test. To pass muster, the indemnity clause must also be conspicuous. In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the court adopted the conspicuous requirements of the UCC.<sup>30</sup> Tex. Bus. & Comm. Code Ann. §1.201(10) defines the conspicuousness requirement:

"Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following: (A) a heading in capitals equal to or greater in size

than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Though the ultimate outcome rises and falls on the specific facts of each case, a few examples are helpful in determining how you should draft to meet the conspicuousness requirement.

Texas courts have found the conspicuousness requirement met in the following contexts:

- In *XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 336 F. Supp. 2d 673 (S.D. Tex. 2004), the court found the agreement was conspicuous, where the provision was preceded by the word "Indemnification" and set off in contrasting type, and set forth in plain language, that the indemnitee was seeking indemnification for its active or passive negligence.<sup>31</sup>
- In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), the court held that an indemnity agreement "need not be confined to one sentence."<sup>32</sup> The indemnity language in the contract was sufficiently conspicuous to afford "fair notice" where the contract was one page, indemnity language was on the front side, and instead of being hidden under a separate heading, exculpatory and indemnity language

appeared in one paragraph where the indemnity language was not surrounded by completely unrelated terms.

In contrast, courts have struck down an indemnity provision, finding the conspicuousness requirement not met in the following context:

- In *ALCOA v. Hydrochem Indus. Serv., Inc.*, No. 13-02-00531-CV, 2005 WL 608232 (Tex.App.-Corpus Christi, March 17, 2005), the court found the express negligence met, but struck down the indemnity provision as not sufficiently conspicuous to satisfy the fair notice requirement where the provision was contained in one of six secondary documents and incorporated by reference in the main contract by the inconspicuous title “SUPPL. TERMS & CONDITIONS FORM.” Though the provision itself was set out in the secondary document by the heading “LIABILITY”, this was not enough to give fair notice to the existence of the indemnity provision.<sup>33</sup>

### 3. **How Do We Get Attorney’s Fees and Costs?**<sup>34</sup>

Texas follows the majority position when it comes to the issue of whether an indemnitor is liable for attorney’s fees incurred by the indemnitee in defending an action that alleges the indemnitee’s own negligence.<sup>35</sup> Pre-*Ethyl* courts upheld an award of attorney’s fees where expressly provided for by contract: “Where a written contract between parties provides indemnity against ‘all loss, liability, costs, damages, attorney’s fees and expenses, whatever,’ payment of those fees and expenses is a contract obligation as a matter of law.”<sup>36</sup>

In *Fisk*, the Texas Supreme Court held that “[N]o obligation to indemnify an indemnitee for the costs or expenses resulting from a claim made against it for its own negligence arises unless the indemnification agreement complies with the express negligence test.”<sup>37</sup> The court in *Fisk* was merely paying homage to the principal laid down by the court in *Ethyl*, namely that “[p]arties seeking to indemnify indemnitee from consequences of its own negligence must express that intent in specific terms within four corners of the contract.” The indemnity clause in *Fisk* stated: “[t]o the fullest extent permitted by law, [Fisk] shall indemnify, hold harmless, and defend [Constructors] ... from and against all claims, damages, losses, and expenses, including but not limited to attorney’s fees ...” arising out of or resulting from the performance of Fisk’s work.”<sup>38</sup> When one of Fisk’s employees was injured and then brought a negligence claim against the indemnitee, the indemnitee then brought a third party cause of action against Fisk for indemnification. Because the contract did not specify that the indemnitor would indemnify the indemnitee for claims based on the indemnitee’s negligence, the attorneys fees in question were not recoverable.

At least one court has disallowed recovery of costs associated with litigation where items were not expressly covered by the indemnity provision, including filing fees, postage, telephone expenses and fax charges.<sup>39</sup> In a separate case, an indemnitee was indemnified for the amount of the settlement, but was not allowed to recover attorney’s fees where the defense included claims based on the indemnitee’s negligence AND of another party the indemnitee had a contractual obligation to indemnify.<sup>40</sup> This is just one more example of where

improving your drafting could mean the difference between getting paid or not.

## **Section 2.02** Five Ways to Improve Your Drafting to Meet the Fair Notice Requirements

1. **Before You Draft, Be Aware of Any Applicable Statutes.** Unfortunately, we cannot foretell the myriad of circumstances that might surround the next contractual indemnity clause you write. As such, discussion of all the applicable statutes that could trip you up is outside the scope of this paper. Our words of wisdom in this area are limited to two: *Caveat Emptor*.
2. **Separate the Indemnity Provisions from the Release Provisions.** In *Wallerstein v. Spirit*, 8 S.W.3d 774 (Tex. App.-Austin 1999, no pet.), the court discussed the difference between the two, stating: "Release extinguishes any actual or potential claims releasor may have against releasee without regard to third parties; in contrast, indemnity does not apply to claims between parties to the agreement, but instead it obligates indemnitor to protect indemnitee against claims brought by persons not party to the provision. Typical release language is generally "release, discharge, relinquish," whereas typical indemnity language is "indemnify, save, protect, save/hold harmless." (*emphasis added*).
3. **Don't Bury the Indemnity Provision.** Recent case law suggests that actual notice will substitute for the conspicuousness prong, but it will not substitute for the express negligence prong.<sup>41</sup> However, courts

differ on this issue.<sup>42</sup> Your best bet is to make sure you have met both prongs of the fair notice doctrine. As one commentator has suggested, require the parties to initial the indemnity provisions.<sup>43</sup>

4. **Be specific about the type of negligence you are including or excluding from the indemnification provision.** While you may not have to use the term *negligence* to get the provision to hold, the safer route is to include the actual term in the indemnity provision and list out the parties you are indemnifying.<sup>44</sup> As the Fifth Circuit has articulated in reviewing the express negligence doctrine in Texas, you are not going to get indemnification for a specific level of negligence by implication,<sup>45</sup> however, if you explicitly state *any negligent act*, you will likely meet the express negligence test.<sup>46</sup>
5. **Chose your words carefully and know what rights you are giving up.** There is a difference between indemnification against liability and indemnification against damages. The causes of action accrue differently.<sup>47</sup> (*See* Article III). If pass-through claims are important to you, be careful to preserve liability for damages. At least one court has held that the contractor must remain liable to the subcontractor in order for the subcontractor to have an action against an owner in breach of contract.<sup>48</sup> Likewise, when ending a service contract pursuant to the contract's terms, be sure to reserve rights to indemnity.<sup>49</sup> Do not forget the basics, either. Indemnity provisions will hold up in contracts that contain an invalidities (or

survivability) clause,<sup>50</sup> but contracts of adhesion make the indemnity provision invalid as well.<sup>51</sup> Finally, as the court in *Helmerich* ultimately points out, you must carefully select and understand the full impact of the phrases you use in the contract.<sup>52</sup> In *Helmerich*, the indemnitor was denied the right to reimbursement despite an insurance provision specifically providing for the right. The parties had included an indemnity provision that was deemed to prevail where the contract included the language “notwithstanding anything to the contrary” and the insurance provision was not excepted out of that clause.<sup>53</sup>

### **Article III. Timing Can Be Everything**

The discussion up until this point has been prospective, that is, we have focused on ways to improve the drafting of indemnification clauses to anticipate situations that may arise in the future. Now, we turn to the situation in which we must deal with the clause drafted by others that you inherit in your case or transaction. Typically, you will be dealing with a clause that fails to clearly delineate between the duty to defend versus indemnify, is a run-on, and lacks definitions.

Before trying to understand the application of indemnification clauses to a specific fact pattern, a practical tip or two should be kept in mind. At the outset of any case, or transaction for that matter, make no assumptions as to whether there is or is not an indemnity clause involved. Over the years, lenders, servicers and others routinely dropped indemnity clauses into the documentation of financial transactions. For example, cases involving automobile, mortgage and title litigation should be

expected to have some type of indemnification. Therefore, at the outset of any case, insist upon full document production not just from the other side, but your own client as the indemnification may involve not just one of the litigants but another party or parties not currently roped into the lawsuit. Don't assume the non-existence of indemnification because it will certainly be an unpleasant surprise otherwise.

Another tip follows from the first point. Typically the indemnification clauses are boiler plate and are inserted into contracts which are meant to service a number of states. Therefore, it would be dangerous to assume that the clause is enforceable, either in whole or in part, or that it was specifically vetted to comply with Texas law. Also, consistent with the concerns expressed here, avoid the assumption that the parties will not assert their claim to indemnity. Simply because none of the parties has filed a claim in the lawsuit to date (or the transaction) should not be interpreted as a signal of complacency.

So, faced with a situation in which you believe that your client is entitled to indemnification from another, when should the claim be asserted? While perhaps it would make it easier on us as attorneys to always insist upon making the claim as soon as possible, the business relationships in the case will frequently operate to frustrate that desire. For example, in the financial services arena, a loan originator typically agrees to indemnify the lender (or assignee); yet, if the lender is a major source of business, many financial institutions are reluctant to squeeze the goose that lays the golden eggs. In that case the client will ask whether it is possible to wait. The answer

will depend, in large measure, upon the type of indemnification clause.

### **Section 3.01** Limitations

At the outset, the general rule of limitations applicable to indemnity is that the claimant has four years to bring suit as the matter is treated as arising in contract. *Holland v. Fidelity & Deposit of Maryland*, 623 S.W.2d 469, 470 (Tex. Civ. App.—Corpus Christi, no writ); §§16.004, 16.051, Tex. Civ. Prac. and Rem. Code. See also *Amoco Chemicals v. Malone*, 712 S.W.2d 611 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1986, no writ) (rejecting two year limitations period even though the claim arose from a personal injury matter). However, it is not uncommon for the parties to have attempted to shorten the limitations period in their documentation (two years is the minimum). §16.070(a), Tex. Civ. Prac. & Rem. Code.

If the indemnity is to liability, then the clause and obligation is derivative to the underlying relationship or agreement. *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978). In that case, the liability in question is theoretical or contingent, in which case the indemnification is not yet fixed or certain. *Amoco Chemicals*, 712 S.W.2d 611. The result is that the claim for indemnification does not accrue until a judgment has been entered against your client. *Boorhem-Fields, Inc. v. Burlington Northern R.R.*, 884 S.W.2d 330 (Tex. App.—Texarkana 1994, no writ).

For example, in *Holland v. Fidelity & Deposit of Maryland*, the indemnity clause stated: “All liability for losses and/or expenses of whatever kind or nature (including, but not limited to interest, court costs and counsel fees) and from and against any and all such losses and/or expenses which the surety may sustain and incur.” (emphasis added) Even though there were letters from the claimant acknowledging the loss, the court found that a rendition of

judgment was necessary before clock began to run on limitations.

On the other hand, if the indemnification is against damage, limitations accrue immediately upon incurring, for example, legal fees. In that circumstance, goes the theory, the indemnitee has suffered damage or injury upon being compelled to pay a judgment or a debt and there is no need to wait for a judgment. *Holland*, 623 S.W.2d at 470. The upshot is that should the language in your case reflect an intent to indemnify against damage (or expressly so state), then waiting to assert the claim could present dangers. Conversely, it does provide ammunition to support the claim that the indemnitor breached the obligation to defend and so forth regardless of whether the indemnitor was put on notice of the claim.

### **Section 3.02** Notification

A corollary but common issue is whether a claimant need put the indemnitor on notice of the claim. While, again, it would certainly be prudent to put the indemnifying party on notice as soon as possible, it may not be possible for the reasons described above. Alternatively, it may occur that your client is presented with a claim for indemnification after the case has been settled. In the first situation, there is no case law on the subject but it would certainly be an item that should be reviewed against the indemnification clause in the case for coverage. With regard to the alternative situation, there is some suggestion that a settlement of a claim in and of itself will not be sufficient to trigger the indemnity obligation. In *Humana Hospital v. American Medical Sys.*, 785 S.W.2d 144 (Tex. 1990) (on certified question), the Texas Supreme Court held that the settlement of the case did not

include a judicial determination of the liability of either of the parties, therefore no common law indemnification was owed. The Fifth Circuit reached a similar conclusion with regard to contractual indemnity. *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5<sup>th</sup> Cir. 1993).

#### **Article IV. Protecting the Settling Joint Tortfeasor**

In a settlement agreement, the client wants to buy peace—whole, complete, and final. How can you craft a settlement agreement to give them assurance of that peace? How do contribution and contractual indemnity theories work concurrently in settlement agreements? While the facts of your specific case will ultimately control whether or not complete peace is available, this section is intended to get you started down the right path in negotiations.

##### **Section 4.01 Three Questions to Ask Yourself Before You Draft the Settlement Agreement**

#### **1. Does the Settlement Agreement Violate Public Policy?**

The Texas Supreme Court has held that several types of assignments are invalid because they violate public policy. Some examples of these are (1) an assignment of a cause of action that works to collude against an insurance carrier; (2) an assignment of a legal malpractice claim; (3) an assignment that creates a Mary Carter agreement<sup>54</sup>; (4) an assignment of the plaintiff's cause of action to a joint tortfeasor of the defendant; (5) an assignment of interests in an estate that distorts the true positions of the beneficiaries, and (6) legal malpractice claims. In all these cases, the evil sought to be avoided is a distortion of the parties' positions so that they have incentives not

generally associated with their positions in the litigation.<sup>55</sup>

Given this backdrop, a joint tortfeasor wishing to find complete and total peace through settlement with a plaintiff must evaluate his position with regard to his fellow tortfeasors, including any indemnity agreements between them and any contribution rights the remaining defendants might have once a jury proportions fault.

The terms *contribution* and *indemnity* are separate and distinct legal theories. Indemnity anticipates a total shifting of responsibility from indemnitee to indemnitor. Contribution, however, assumes some sharing of the responsibility in proportion to the fault of the respective parties involved.<sup>56</sup>

#### **2. What Statutory Scheme Applies?<sup>57</sup>**

Contribution is a creature of statute<sup>58</sup> and Texas has two contribution statutes on the books. Texas Civil Practice and Remedies Code §§ 32.001 and 33.001. However, there are really three contribution schemes in Texas—two of the schemes are relatively easy to work with, but the third one lurks around the corner in that gray area between the statutes. If you are settling claims in a case, it is possible that contribution for some of those claims will fall outside of protection provided by Section 32 or Section 33 for settling joint tortfeasors.

Section 32 is the original contribution statute, enacted in 1917. In light of the modern contribution statutes, § 32.001 is limited to cases where the judgment is based upon a tort that does not fall under the comparative scheme adopted by § 33.001.<sup>59</sup> Section 33 applies primarily to negligence-based claims and there is an open question as to where claims for

intentional conduct and breach of contract fall.

The comparative scheme was first adopted in Texas by the 1973 *comparative negligence* statute as a way to give the plaintiff, who had contributed some amount of negligence less than a defendant, a way of recovering from that defendant. Common law had traditionally barred recovery, under the contributory negligence rule, to any plaintiff who had a hand in his own plight. In 1984, the Texas Supreme Court adopted a *comparative causation* scheme to deal with the gap left by the legislature for products liability law.<sup>60</sup> By 1987, the legislature was ready to fill that gap and the first comparative responsibility statute was passed. The *comparative responsibility* statute allowed the plaintiff to decide who the jury would ultimately be asked to assign responsibility to and it set the levels above which a defendant could be held jointly and severally liable. In 1995, the idea of joint and several liability was further refined when the *proportionate responsibility* statute introduced a 51% bar rule.<sup>61</sup>

### **The 51% Bar**

The 51% bar operates in two ways. First, it prohibits a claimant who is 51% or more responsible from recovering damages.<sup>62</sup> Second, it requires any defendant that is 51% or more responsible to be jointly and severally liable for damages.<sup>63</sup> Read literally, only one defendant could ever be jointly and severally liable and therefore only that defendant would ever have occasion to pay more than their share and be able to seek contribution.<sup>64</sup> The statutes also provide for contribution from any defendant, counterdefendant, or third-party defendant from whom *any* party seeks contribution.<sup>65</sup>

### **Right to Contribution**

A defendant who is 51% or more responsible has a right to seek contribution from the other liable defendants for the amount paid above his allotted percentage of responsibility.<sup>66</sup>

However, no defendant has a right of contribution against any settling person.<sup>67</sup> In addition, as one Court of Appeals has stated, “A defendant who settles cannot seek indemnity from co-defendants.”<sup>68</sup> That said, you should keep in mind that the plaintiff may make claims alleging various forms of intentional misconduct such as fraudulent misrepresentation that might fall outside of the statutory protection and your client could be sued for contribution based one or more those claims. Faced with this situation, a lawyer might seek indemnity from the plaintiff in the settlement agreement.<sup>69</sup> It is still an open question in Texas as to whether this form of contractual indemnity will work. This is a question the courts may not reach unless you keep in mind the basic drafting principles for contractual indemnity discussed throughout this paper.

### **Contractual Indemnity**

The rules of contribution operate to limit common law indemnity between joint tortfeasors,<sup>70</sup> but do not override statutory or contractual indemnity, or the narrow cases of common law indemnity (i.e., vicarious liability) that survived. Texas Civil Practice and Remedies Code 33.0017 provides:

§ 33.017. PRESERVATION OF EXISTING RIGHTS OF INDEMNITY. Nothing in this chapter shall be construed to affect any rights of indemnity granted by any statute, by contract, or by common law. To the extent of any

conflict between this chapter and any right to indemnification granted by statute, contract, or common law, those rights of indemnification shall prevail over the provisions of this chapter.<sup>71</sup>

Contractual indemnity provisions can disrupt the statutory right to contribution. In an early case involving Frank's Casing, the court held that where a third party defendant was indemnified by two indemnitors—A and B, the contract whereby indemnitor A indemnifies third party AND also indemnifies indemnitor B, will preclude indemnitor A from seeking contribution from indemnitor B.<sup>72</sup>

### 3. **What Effect Will My Client's Conduct Have on His Ability to Seek Indemnity?**

To get contribution, two things must happen: 1) judgment and 2) payment of disproportionate share, plus the defendant must fall within the appropriate statutory scheme and NOT SETTLE. However, to get indemnity or some other form of reimbursement, the client need only contract. In *Arkwright-Boston Manufacturers Mutual Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442 (5th Cir. 1991), the Fifth Circuit held that an excess insurer that paid insured's retained limit to claimant was not barred from seeking reimbursement from insured by Texas rule barring settling joint tort-feasor from seeking contribution from nonsettling tort-feasor.<sup>73</sup> The insurer's right to reimbursement stemmed from insurer's contractual duty to contribute its retained limit to what it admitted was reasonable settlement. In short, a defendant may contract for apportionment, but it must meet the express negligence test.<sup>74</sup>

### **Express Negligence, Again**

Before you advise your client to settle, read the indemnification provision closely. Courts have found occasion to disrupt the peace of settlement in the following instances:

- When liability arose from strict liability and that conduct was not expressly included in the indemnity provision, the provision did not meet the express negligence test (it also failed conspicuousness), and Indemnitor was not responsible for a settlement negotiated by the indemnitee, even though the indemnification provision provided for an absolute power to settle.<sup>75</sup>
- Where joint tortfeasor settled with plaintiff and settlement agreement released tortfeasor “for any and all claims, demands...and causes of action...whether in contract or tort...for an on account of injuries sustained...(including) any liability for any cross actions seeking contribution and indemnity...” the plaintiff was the one left holding the bag.<sup>76</sup>

However, to recover after settling, the indemnitee does not have to prove actual liability. In *XL Specialty Ins. Co. v. Kiewit Offshore Serv., Ltd.*, 426 F.Supp.2d 565 (S.D. TX 2006), the court held that where indemnitee enters into settlement agreement with a third party, the indemnitee can recover from the indemnitor upon showing that: 1) potential liability existed, and 2) the settlement was reasonable, prudent, and in good faith. The indemnitee does not have to prove actual liability.<sup>77</sup>

## One-Satisfaction Rule<sup>78</sup>

In *Stewart Title Guaranty Co., v. Sterling*, 822 S.W.2d 1 (Tex. 1991), the Texas Supreme Court ruled that there could be only one recovery for one injury. This point can be complicated by the actions of the parties, including the plaintiff's refusal to dismiss claims against a defendant. In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000), the court addressed this issue:

When a defendant settles after a jury verdict is returned but before a judgment is entered, the court should not apply the settlement credit to the judgment that would have been rendered against the settling defendant in determining the credit amount. Instead, the court should look to the judgment to be rendered against the non-settling defendant and apply established principles governing settlement credits.<sup>79</sup>

While this case warrants further discussion, we include it here as a brief reminder that when your client asks you to draft a settlement agreement that gives them complete peace, you may not hold all the necessary cards. What you can provide is a well-drafted indemnity clause that takes into consideration the suggestions presented in previous Articles, as well as the two points below.

### Section 4.02 Solving the problem through better drafting

1. **Address the Liability for a Comparative Negligence situation:** Limit indemnity to the percentage of negligence of the indemnitor.<sup>80</sup> Also limit liability to cases where the

indemnitee's percentage of liability exceeds the indemnitor's percentage of liability.<sup>81</sup>

2. **Be specific About the Exclusivity and Assignability of the Indemnity Provision.** Do you want the indemnity provision to be an exclusive remedy or cumulative? If the contract contains a "successor and assign" provision, is the indemnity included?<sup>82</sup>

### Conclusion

Indemnity provisions can be a headache for us all, but with a little forethought and a lot of revision, relief is on the way.

## **EXHIBIT A**

### **Indemnity provisions, that are more closely aligned to contribution provisions.**

## **ARTICLE X**

### **Insurance and Indemnification**

#### Section 10.1 Definitions.

As used in this Article X and, the following terms shall have the definitions set forth below:

“Claims” shall mean all claims, requests, accusations, allegations, assertions, complaints, petitions, demands, suits, actions, proceedings, and causes of action of every kind and description.

“Contractor’s Conduct” shall mean any act, failure to act, omission, professional error, fault, mistake, negligence, gross negligence or gross misconduct of Contractor, its employees, agents, representatives, or subcontractors, or employees, agents, or representatives of such subcontractors, arising out of:

- (i) Any workers’ compensation claims or claims under similar such laws or obligations related to this Agreement;
- (ii) Performance of this Agreement (or failure to perform);
- (iii) Breach of this Agreement; or
- (iv) Violation of any laws.

“Contractor Defended Claim(s)” shall mean all Claims against County or New Corp which allege that Damage was caused by, arises out of, or was contributed to, in whole or in part, Contractor’s Conduct.

“County’s Conduct” shall mean any act, failure to act, omission, professional error, fault, mistake, negligence, gross negligence or gross misconduct of New Corp or the County and all of its elected officials (including but not limited it the County Entities) and all of their respective employees, agents, representatives, or subcontractors, or employees, agents, or representatives of such subcontractors, arising out of:

- (i) Any workers’ compensation claims or claims under similar such laws or obligations related to a County employee or agent;
- (ii) Performance of this Agreement (or failure to perform);
- (iii) Breach of this Agreement;
- (iv) Violation of any law; or
- (v) Any County policy, County orders, internal management procedures of the County, financial procedures of the County, Orders of the Commissioners Court of the County, administrative rules and governmental requirements of law of the County, which govern Contractor relative to the Project in any way.

“County Defended Claims” shall mean all Claims against Contractor which allege that Damage was caused by, arises out of, or was contributed to, in whole or in part, County’s Conduct.

“County Entities” shall mean the County of Ajax, Texas, the Commissioners of Ajax County, Texas, the County Judge of Ajax County, Texas and the Sheriff of Ajax County, Texas.

“Damages” shall mean injuries, wound, wrong, hurt, harm, fees, damages, costs, expenses, outlays, expenditures or losses of any and every nature, including, but not limited to:

- (i) injury or damage to any property or right,
- (ii) injury, damage or death to any person or entity
- (iii) attorneys fees, witness fees, expert witness fees and expenses, and
- (iv) all other costs and expenses litigation

“Defender” shall mean the Party from whom a defense and/or indemnification of a Claim is sought by another party pursuant to this Agreement.

“NC’s Conduct” shall mean any act, failure to act, omission, professional error, fault, mistake, negligence, gross negligence or gross misconduct of New Corp, its employees, agents, representatives, or subcontractors, or employees, agents, or representatives of such subcontractors, arising out of, whether directly or indirectly, the following:

- (i) Any workers’ compensation claims or claims under similar such laws or obligations related to this Agreement;
- (ii) Performance of, or failure to perform, any agreement relating to the Project, the operation of the Project or the financing of the Project ; or
- (iii) Violation of any law.

“New Corp” shall mean New Corp, Inc.

“NC Defended Claims” shall mean all Claims against Contractor which allege that Damage was caused by, arises out of, or was contributed to, in whole or in part, NC’s Conduct.

“Proven” shall mean that a court of competent jurisdiction has entered a final unappealable judgment on a Claim adjudging an entity or person liable for a monetary judgment.

“Target” shall mean a party to this Agreement against whom a Claim is asserted that for which that Party seeks a defense and/or indemnification from another Party to this Agreement.

Section 10.2 Insurance.

(a) All policies of insurance to be provided by Contractor hereunder shall be maintained with insurance companies having an A. M. Best rating of not less than A- and shall be provided in amounts (that if not otherwise stated herein) are at levels determined to be normal and reasonable by industry standards throughout the term of this Agreement. Contractor shall obtain and keep in force during the term of this Agreement, insurance containing at least the following coverages:

- (1) General liability (minimum limits of \$5,000,000 aggregate, and \$1,000,000 per occurrence);
- (2) Comprehensive property hazard (minimum limits as provided in the Lease);
- (3) Rental interruption (in the amount required in Section 7.5 of the Lease);
- (4) Employee workers compensation or lawful alternative;
- (5) Riot
- (6) \*\*\*\*\*

(b) If not included in the insurance policies required to be maintained as set forth above in Section 10.2, Contractor shall obtain and maintain a policy of insurance providing:

- (1) Coverage to protect the County against all claims (including claims based on violations of civil rights) arising from the services performed by Contractor under this Agreement; and
- (2) \*\*\*\*\*

(c) However, notwithstanding any other obligation expressed herein to provide insurance coverage, Contractor is not obligated to provide any insurance coverage protecting the County, New Corp or any of their respective elected officials, employees, officers or agents against claims of any nature (including but not limited to claims regarding civil rights) alleged to have arisen from the County's Conduct, or any action or inaction by New Corp. Contractor shall have the County (including the County Commissioners and the County Judge) the Sheriff and New Corp named as additional insureds under such insurance coverage that Contractor is required to provide hereunder, except that Contractor shall not be obligated to make any party or entity an additional insured under the Healthcare Liability or medical malpractice coverage provided by Contractor. Contractor shall seek to have the policy(s) required to be provided hereunder, contain a provision of thirty (30) days notice prior to cancellation being given to New Corp and the County, except that County and New Corp shall receive ten (10) days notice of cancellation of such policies of insurance for non-payment of premiums. County and New Corp shall be exempt from, and in no way liable for, any sums of money that may represent a deductible in any insurance policy obtained by Contractor. The payment of such deductible shall be the sole responsibility of Contractor.

Section 10.3 Defense and Indemnification.

(a) Pre-contract Claims. The County shall remain solely responsible for the defense of, and shall have all liability for, all litigation, Claims and Damages that are related to or resulting from Claims pending against the County or New Corp on the Service Commencement Date or arising thereafter from occurrences prior to the Service Commencement Date.

(b) Defense of claims alleged against County and/or New Corp.

(i) Notwithstanding the provisions of any insurance policy obtained under this Agreement, and subject to the terms and conditions of this Article X, Contractor shall provide a defense for the County and New Corp, and their respective agents, officials and employees, (including but not limited to the County Entities) from all Contractor Defended Claims. Additionally, Contractor shall provide a defense for the County and New Corp, and their respective agents, officials and employees, (including but not limited to the County Entities) from all Claims for infringement of any patent, trademark or copyright arising out Contractor' performance of this Agreement or use by the County of materials furnished or work performed under this Agreement.

(ii) Contractor's obligation to provide a defense pursuant to this Article X shall not extend to any portion of any Claim or any portion of any Damage, which is alleged to have arisen from, or alleged to have been caused, in whole or in part, by any of County's Conduct.

(iii) Any provisions or limits of insurance set forth in this Agreement hereunder, or provided by Contractor, shall not limit Contractor's liability pursuant to this Article X.

(c) Indemnification of Claims Proven against County or New Corp.

(i) Contractor shall indemnify County and New Corp, and their respective agents, officials and employees (including but not limited to the County Entities) from any judgment arising from any Contractor Defended Claims, which are Proven against County or New Corp. Additionally, Contractor shall indemnify the County and New Corp, and their respective agents, officials and employees (including but not limited to the County Entities) from any judgment arising any Claims, which are Proven against the County or New Corp for infringement of any patent, trademark or copyright arising out of Contractor's performance of this Agreement or use by the County or New Corp of materials furnished or work performed under this Agreement.

(ii) Contractor's obligations to indemnify the County and New Corp pursuant to this Article X shall not extend to any portion of any Claim, that is Proven to have arisen from, or Proven to have been caused, in whole or in part, by any of County's Conduct or the NC's Conduct. Any provisions or limits of insurance set forth in this Agreement, shall not limit Contractor's liability pursuant to this Article X. Contractor shall fully pay any

judgment it is obligated to pay hereunder, within 21 days of said judgment becoming a final and unappealable judgment.

(d) Defense of claims alleged against Contractor.

(i) Subject to the terms and conditions of this Article X, the County, to the extent permitted by law, shall defend Contractor from County Defended Claims. Subject to the terms and conditions of this Article X, New Corp, shall defend Contractor from NC Defended Claims. The obligation of County and New Corp to defend Contractor pursuant to this Article shall not extend to any portion of any Claim alleged to have arisen from, or alleged to have been caused, in whole or in part, by Contractor's Conduct. Any provisions or limits of insurance set forth in this or any other Agreement, shall not limit County's liability pursuant to this Section.

(ii) New Corp's and County's obligation to provide a defense pursuant to this Article X shall not extend to any portion of any Claim or any portion of any Damage, which is alleged to have arisen from, or alleged to have been caused, in whole or in part, by any of Contractor's Conduct. Any provisions or limits of insurance set forth in this Agreement hereunder, or provided by County or New Corp, shall not limit County or New Corp's liability pursuant to this Article X.

(e) Indemnification of Claims Proven against Contractor.

(i) New Corp shall indemnify Contractor, and its agents, officials and employees from any judgment arising from any County Defended Claims or NC Defended Claims, which are Proven against Contractor.

(ii) NC's obligations to indemnify the Contractor pursuant to this Article X shall not extend to any portion of any Claim, that is Proven to have arisen from, or Proven to have been caused, in whole or in part, by any of Contractor's Conduct. Any provisions or limits of insurance available to New Corp regarding the indemnification hereunder, shall not limit New Corp's liability pursuant to this Article X. New Corp shall fully pay any judgment it is obligated to pay hereunder, within 21 days of said judgment becoming a final and unappealable judgment.

(f) No waiver of defenses. None of the Parties hereto shall waive, release, or otherwise forfeit any possible defense that either of them may have without the consent of the other Party relative to any Claim for which either Party may be obligated to provide a defense or indemnification hereunder. Both Parties shall preserve all such available defenses and cooperate with the other Party to make such defenses available for each other's benefit to the maximum extent allowed by law.

(g) Notice of Claims. Any Party that seeks indemnification or a defense under this Agreement (a "Target") shall, within ten (10) business days after being notified of a Claim, notify the Party from whom the Target will seek a defense or indemnification of a Claim (the

“Defender”) under this Agreement. The Defender shall have the right to assume the defense of said Claim pursuant to the provisions hereof, unless (i) such Claim may result in a criminal proceeding against the Target, (ii) such Claim may result in liabilities which would not be fully indemnified hereunder, or (iii) in response to a petition by the Target, a court of competent jurisdiction rules that the Defender failed or is failing to vigorously prosecute or defend such Claim.

(h) Refusal or Failure to Defend. Any Party may refuse to provide a defense hereunder, if such refusing Party reasonably believes that the Claim, for which a defense is sought, is not required to be defended pursuant to the terms of this Agreement, and a refusal to defend under such circumstances shall not be a material breach of this Agreement. However, if the Target shall be required by a final judgment to pay any amount in respect of any obligation or liability against which the Defender is required to indemnify under this Agreement, the Defender shall promptly reimburse the Target in an amount equal to the amount of such payment. Further, if such refusal, or any failure, to provide a defense against a Claim is found not to have been reasonably justified, under the commercially reasonable standards observed in the \*\*\*\*\* industry, then the Defender that has refused to provide a defense shall be obligated to pay all of the Damages and out-of-pocket expenses incurred by the Target in defending said claim, including, but not limited to the value of the time, including travel time, that all of the employees, agents and representatives of the Target dedicated to, or expended in furtherance of, the defense of said Claim. The Defender, who fails to provide a defense required by this Agreement, without any further action required by any Party, hereby intentionally relinquishes and waives any and all rights of every nature to dispute, defend against or contest, in any manner, (including but not limited to the waiver of every defense of every nature) the claim of the Target regarding the amount of, reasonableness of, necessity for or the Defender’s obligation to pay, the costs, fees and expenses, and other Damages incurred by the Target in defending the Claim for which a defense required by this Agreement was refused by the Defender.

(i) Providing and Assisting with the Defense. The Defender shall provide a defense with qualified counsel that is selected by the Defender, and such counsel shall be deemed to have been approved by the Target, without further action by said party, unless the Target establishes: (i) a substantive and material conflict of interest with such counsel; or (ii) a fair and substantial cause or reason to withhold such approval, such as the incompetence or significant inexperience of such counsel. The Defender hereunder shall not settle or compromise any claim or cause of action without the consent of the Target, but such consent shall not be unreasonably withheld. Likewise, the Target, shall not settle or compromise any such claim or cause of action without the consent of the Defender, but such consent shall not be unreasonably withheld. The Target shall cooperate in such defenses and shall make reasonably available all records, witnesses, evidence and other tangible items, in the possession, custody or control of the Target, deemed relevant by the Defender. The Target shall also take all such other action, and sign such documents, as the Defender shall deem to be reasonably necessary to defend such Claims in a timely manner.

(j) Division of Fees. Counsel retained hereunder for the defense of a Target shall be instructed by the Defender to regularly estimate in good faith the portions of all costs, fees and expenses of such defense which relate directly to NC Defended Claims, the County Defended

Claims and the Contractor Defended Claims. All fees of such defense counsel shall be allocated between NC Defended Claims, County Defended Claims and Contractor Defended Claims. Said report shall be provided in an accounting which shall be made available to the Target(s) and Defender(s), and such accounting shall be irrevocably binding on the Target(s) and the Defender(s). County and New Corp shall reimburse Contractor for the costs, fees and expenses paid by Contractor to such defense counsel relating directly to the defense of NC Defended Claims, and County Defended Claims. Contractor shall reimburse County and New Corp respectively for the costs, fees and expenses paid by County or New Corp respectively, to such defense counsel that are directly related to the defense of Contractor Defended Claims. The Target agrees to fully pay such reimbursements within 30 days after receipt of any such accounting by defense counsel described herein.

## **EXHIBIT B**

### **Threshold of damages before claim asserted, and ceiling on aggregate amount of indemnification obligation.**

Dollar Limitations. The Contractor shall not be liable to indemnify and hold harmless the County for any Damages arising from with respect to the Claims, until County has first suffered, sustained or incurred aggregate losses relating to such matters in excess of \$50,000, at which point the Contractor will be liable to indemnify the County and hold them harmless from and against all such Damages in excess of the \$50,000 deductible amount. In addition, the Contractor shall not be liable to indemnify the County for such Damages in excess of an amount equal to 25% of the Purchase Price.

## EXHIBIT C

### **Target retains the right to defend and settle claims that involve current customers**

Target Right to Defend. Notwithstanding any other term in this Agreement, in the event that a Claim otherwise subject to indemnification hereunder relates to the Target's relationship with its then current customers or employees, the Target shall retain the sole right to direct the defense and settlement of said Claim. In such event, the Defender shall be obligated to promptly, upon submission of a written demand, pay to the Target a sum equal to (x) all Damages, losses, costs, fees and expenses incurred by the Target relating to the defense of said Claim, (xi) any sums due pursuant to any judgment resulting from said Claim, and (xii) any and all Damages, losses, costs, fees and expenses, and other amounts due and owing as a result of, related to, or arising from, any settlement of said Claim, so long as said sums are not commercially unreasonable. The Parties agree that, in any claim by a Target for indemnification as to the amount of any settlement, the Defender shall have the burden of proof in any showing that the amount claimed is commercially unreasonable. In the event that the Defender has a commercially reasonable basis to claim that any sum alleged to be due and owing by a Target pursuant to this Section 10.3(l) is commercially unreasonable, the initiation of litigation or any other proceeding to assert such claim against the Defender, shall not be deemed to be a material breach of this Agreement.

## **EXHIBIT D**

### **Materiality will affect whether a breach has occurred, but will not reduce damages**

Materiality. With respect to any claim for indemnification under this Article X relating to a breach (or alleged breach) of a representation or warranty that contains a materiality qualifier (whether by reference to Material Adverse Effect or otherwise), such materiality qualifier will be considered for purposes of determining whether a breach of such representation and warranty has occurred, but such materiality qualifier will not be considered in determining the amount of the Damages arising out of such breach.

## **EXHIBIT E**

### **Sale of a Business**

#### **Schedule for survival of Reps and Warranties, and term of indemnification obligation.**

Survival of Representations and Warranties. The representations and warranties of the Sellers set forth in this Agreement will survive the execution and delivery of this Agreement and the Closing until the two (2) year anniversary of the Closing Date, except that (a) the representations and warranties set forth in Section \*\*\* will survive indefinitely, (b) if the violation of any representation or warranty would constitute a violation of any Law, such representation or warranty will survive until thirty (30) days after expiration of the statute of limitations applicable to such violation and (c) any representation or warranty the violation of which is made the basis of a Claim for indemnification pursuant to this Article \*\*\* will survive until such Claim is finally resolved if the Purchaser notifies the Owner of such Claim in reasonable detail prior to the date on which such representation or warranty would otherwise expire hereunder. The representations and warranties of the Purchaser set forth in this Agreement will survive the execution and delivery of this Agreement and the Closing until the two (2) year anniversary of the Closing Date. No claim for indemnification pursuant to Sections \*\*\* and \*\*\* based on the breach or alleged breach of a representation or warranty may be asserted by the Seller Indemnitees and/or the Purchaser Indemnitees (as the case may be) after the date on which such representation or warranty expires.

## EXHIBIT F

### Retail Sales Financing Agreement with Dealer

“If any Dealer representation, warranty or covenant made in Section 4 or made in the assignment of a Contract to (Lender) is breached or is untrue after (Lender) purchases the Contract under Section 1(b) herein, Dealer shall promptly pay (Lender), upon receipt of (Lender)’s demand, any or all of the following amounts at the election of (Lender): (i) the unpaid balance of the Contract affected by such breach or untruth; (ii) all losses and expenses incurred by (Lender) as a result of such breach or untruth; and (iii) out-of-pocket expenses paid or incurred by (Lender) in connection with the collection of any amount due under any such Contract, including attorney’s fees and costs of litigation, whether by or against (Lender), and expenses with respect to repossessing storing, repairing and selling the Vehicle. In addition, Dealer shall indemnify (Lender) for any losses and expenses, including attorneys’ fees and costs of litigation, suffered by (Lender) in any judicial or administrative proceeding because of any claim or defense asserted against (Lender) **as a result of any act or omission on the part of Dealer**, including, at the election of (Lender), the unpaid balance of the Contract.” (emphasis added)

**EXHIBIT G**  
**General Indemnity Agreement**

1. I agree that the following definitions apply: . . . (b) Loss means any payment or expense either incurred or anticipated by the you in connection with . . . this agreement, including but not limited to: payment of proceeds or any other expense in connection with claims, potential claims, or demands; claim fees; penalties; interest; court costs; collection agency fees; costs related to taking, protecting, administering, realizing upon, or releasing collateral; and attorneys' fees (including but not limited to those incurred in defense of claims or pursuing any rights of indemnification or subrogation and in obtaining and enforcing any judgment arising from those rights).
2. I, individually, and jointly and severally with Principal and all other indemnitors, agree to hold you harmless from all Loss and to pay back or reimburse for all loss.
10. I agree that you have has the exclusive right in its sole discretion, to decide whether to adjust, pay, compromise, defend, or appeal any claim, counterclaim, demand, suit or judgment.
15. I agree to waive and subordinate all rights of indemnity, subrogation and contribution of each against the other until all obligations to you under this agreement, at law or in equity, have been satisfied in full.

**EXHIBIT H**  
**Deposit Agreement**

*Adverse Claims:*

Upon receipt of oral or written notice from any party of a claim regarding the Account, the Bank may place a hold on the Account and shall be relieved of any and all liability for its failure or refusal to honor any item drawn on your Account or any other withdrawal instruction.

*Legal Proceedings and Expenses:*

All expenses incurred by the Bank as a result of any legal proceeding affecting your Account including, but not limited to, court costs and attorney fees, may be charged against your Account or billed to you separately.

**EXHIBIT I**  
**Civil Practice & Remedies Code**  
**Chapter 32. Contribution**

§ 32.001. APPLICATION. (a) This chapter applies only to tort actions.

(b) This chapter does not apply if a right of contribution, indemnity, or recovery between defendants is provided by other statute or by common law.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 32.002. RIGHT OF ACTION. A person against whom a judgment is rendered has, on payment of the judgment, a right of action to recover payment from each codefendant against whom judgment is also rendered.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 32.003. RECOVERY. (a) The person may recover from each codefendant against whom judgment is rendered an amount determined by dividing the number of all liable defendants into the total amount of the judgment.

(b) If a codefendant is insolvent, the person may recover from each solvent codefendant an amount determined by dividing the number of solvent defendants into the total amount of the judgment.

(c) Each defendant in the judgment has a right to recover from the insolvent defendant the amount the defendant has had to pay because of the insolvency.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

## **EXHIBIT J**

### **Civil Practice & Remedies Code Chapter 33. Proportionate Responsibility**

#### **Subchapter A. Proportionate Responsibility**

§ 33.001. PROPORTIONATE RESPONSIBILITY. In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.04, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995.

§ 33.002. APPLICABILITY. (a) This chapter applies to:

(1) any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought; or

(2) any action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.

(b) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(1).

(c) This chapter does not apply to:

(1) an action to collect workers' compensation benefits under the workers' compensation laws of this state (Subtitle A, Title 5, Labor Code) or actions against an employer for exemplary damages arising out of the death of an employee;

(2) a claim for exemplary damages included in an action to which this chapter otherwise applies; or

(3) a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99.

(d) to (h) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(1).

Added by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.05, eff. Sept. 2, 1987. Amended by Acts 1989, 71st Leg., ch. 380, § 4, eff. Sept. 1, 1989; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 414, § 17, eff. Sept. 1, 1995; Acts 2001, 77th Leg., ch. 643, § 2, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 204, § 4.01, 4.10(1), eff. Sept. 1, 2003.

§ 33.003. DETERMINATION OF PERCENTAGE OF RESPONSIBILITY. (a) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the

harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:

- (1) each claimant;
- (2) each defendant;
- (3) each settling person; and
- (4) each responsible third party who has been designated under Section

33.004.

(b) This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.

Added by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, eff. Sept. 2, 1987. Amended by Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, § 4.02, eff. Sept. 1, 2003.

§ 33.004. DESIGNATION OF RESPONSIBLE THIRD PARTY. (a) A defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

(b) Nothing in this section affects the third-party practice as previously recognized in the rules and statutes of this state with regard to the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

(c), (d) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(2).

(e) If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.

(f) A court shall grant leave to designate the named person as a responsible third party unless another party files an objection to the motion for leave on or before the 15th day after the date the motion is served.

(g) If an objection to the motion for leave is timely filed, the court shall grant leave to designate the person as a responsible third party unless the objecting party establishes:

(1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and

(2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.

(h) By granting a motion for leave to designate a person as a responsible third party, the person named in the motion is designated as a responsible third party for purposes of this chapter without further action by the court or any party.

(i) The filing or granting of a motion for leave to designate a person as a responsible third party or a finding of fault against the person:

(1) does not by itself impose liability on the person; and

(2) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.

(j) Notwithstanding any other provision of this section, if, not later than 60 days after the filing of the defendant's original answer, the defendant alleges in an answer filed with the court that an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit, the court shall grant a motion for leave to designate the unknown person as a responsible third party if:

(1) the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;

(2) the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and

(3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.

(k) An unknown person designated as a responsible third party under Subsection (j) is denominated as "Jane Doe" or "John Doe" until the person's identity is known.

(l) After adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage.

Added by Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 204, § 4.03, 4.04, 4.10(2), eff. Sept. 1, 2003.

## **Subchapter B. Contribution**

§ 33.011. DEFINITIONS. In this chapter:

(1) "Claimant" means a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes:

(A) the person who was injured, was harmed, or died or whose property was damaged; and

(B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person.

(2) "Defendant" includes any person from whom, at the time of the submission of the case to the trier of fact, a claimant seeks recovery of damages.

(3) "Liable defendant" means a defendant against whom a judgment can be entered for at least a portion of the damages awarded to the claimant.

(4) "Percentage of responsibility" means that percentage, stated in whole numbers, attributed by the trier of fact to each claimant, each defendant, each settling person, or each responsible third party with respect to causing or contributing to cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought.

(5) "Settling person" means a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

(6) "Responsible third party" means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these. The term "responsible third party" does not include a seller eligible for indemnity under Section 82.002.

(7) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(3).

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, § 4.05, 4.10(3), eff. Sept. 1, 2003.

§ 33.012. AMOUNT OF RECOVERY. (a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.

(b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.

(c) Notwithstanding Subsection (b), if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:

(1) the sum of the dollar amounts of all settlements; or

(2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

(d) An election made under Subsection (c) shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and when made, shall be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected Subsection (c)(1).

(e) This section shall not apply to benefits paid by or on behalf of an employer to an employee pursuant to workers' compensation insurance coverage, as defined in Section 401.011(44), Labor Code, in effect at the time of the act, event, or occurrence made the basis of claimant's suit.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.08, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, § 4.06, 4.10(4), eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 277, § 1, eff. June 9, 2005; Acts 2005, 79th Leg., ch. 728, § 23.001(6), eff. Sept. 1, 2005.

§ 33.013. AMOUNT OF LIABILITY. (a) Except as provided in Subsection (b), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.

(b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:

(1) the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent; or

(2) the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in the following provisions of the Penal Code and in so doing proximately caused the damages legally recoverable by the claimant:

- (A) Section 19.02 (murder);
- (B) Section 19.03 (capital murder);
- (C) Section 20.04 (aggravated kidnapping);
- (D) Section 22.02 (aggravated assault);
- (E) Section 22.011 (sexual assault);
- (F) Section 22.021 (aggravated sexual assault);
- (G) Section 22.04 (injury to a child, elderly individual, or disabled individual);

individual);

- (H) Section 32.21 (forgery);
- (I) Section 32.43 (commercial bribery);
- (J) Section 32.45 (misapplication of fiduciary property or property of financial institution);
- (K) Section 32.46 (securing execution of document by deception);
- (L) Section 32.47 (fraudulent destruction, removal, or concealment of writing); or

writing); or

(M) conduct described in Chapter 31 the punishment level for which is a felony of the third degree or higher.

(c) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(5).

(d) This section does not create a cause of action.

(e) Notwithstanding anything to the contrary stated in the provisions of the Penal Code listed in Subsection (b)(2), that subsection applies only if the claimant proves the

defendant acted or failed to act with specific intent to do harm. A defendant acts with specific intent to do harm with respect to the nature of the defendant's conduct and the result of the person's conduct when it is the person's conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

(f) The jury may not be made aware through voir dire, introduction into evidence, instruction, or any other means that the conduct to which Subsection (b)(2) refers is defined by the Penal Code.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, § 4.07, 4.10(5), eff. Sept. 1, 2003.

§ 33.015. CONTRIBUTION. (a) If a defendant who is jointly and severally liable under Section 33.013 pays a percentage of the damages for which the defendant is jointly and severally liable greater than his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant's percentage of responsibility.

(b) As among themselves, each of the defendants who is jointly and severally liable under Section 33.013 is liable for the damages recoverable by the claimant under Section 33.012 in proportion to his respective percentage of responsibility. If a defendant who is jointly and severally liable pays a larger proportion of those damages than is required by his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other defendant with whom he is jointly and severally liable under Section 33.013 to the extent that the other defendant has not paid the proportion of those damages required by that other defendant's percentage of responsibility.

(c) If for any reason a liable defendant does not pay or contribute the portion of the damages required by his percentage of responsibility, the amount of the damages not paid or contributed by that defendant shall be paid or contributed by the remaining defendants who are jointly and severally liable for those damages. The additional amount to be paid or contributed by each of the defendants who is jointly and severally liable for those damages shall be in proportion to his respective percentage of responsibility.

(d) No defendant has a right of contribution against any settling person.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.11, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995.

§ 33.016. CLAIM AGAINST CONTRIBUTION DEFENDANT. (a) In this section, "contribution defendant" means any defendant, counterdefendant, or third-party defendant from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of submission.

(b) Each liable defendant is entitled to contribution from each person who is not a settling person and who is liable to the claimant for a percentage of responsibility but from whom the claimant seeks no relief at the time of submission. A party may assert this contribution right against any such person as a contribution defendant in the claimant's action.

(c) The trier of fact shall determine as a separate issue or finding of fact the percentage of responsibility with respect to each contribution defendant and these findings shall be solely for purposes of this section and Section 33.015 and not as a part of the percentages of responsibility determined under Section 33.003. Only the percentage of responsibility of each defendant and contribution defendant shall be included in this determination.

(d) As among liable defendants, including each defendant who is jointly and severally liable under Section 33.013, each contribution defendant's percentage of responsibility is to be included for all purposes of Section 33.015. The amount to be contributed by each contribution defendant pursuant to Section 33.015 shall be in proportion to his respective percentage of responsibility relative to the sum of percentages of responsibility of all liable defendants and liable contribution defendants.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.11A, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995.

§ 33.017. PRESERVATION OF EXISTING RIGHTS OF INDEMNITY. Nothing in this chapter shall be construed to affect any rights of indemnity granted by any statute, by contract, or by common law. To the extent of any conflict between this chapter and any right to indemnification granted by statute, contract, or common law, those rights of indemnification shall prevail over the provisions of this chapter.

Added by Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 204, § 4.08, eff. Sept. 1, 2003.

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<sup>1</sup> Primrose Operating Co. v. National American Ins. Co., 382 F.3d 546, 552 (5th Cir. 2004).

<sup>2</sup> For a recent case on the issue, *see* General Motors Corp. v. Hudiburg Chevrolet, 14-04-01080CV, 2006 WL 741552 (Tex. May 18, 2006). For an excellent article on the potential for statutory indemnity, *see* Andy Payne, *Comparative Causation and Indemnity*, Feb. 25, 2005,

<http://www.paynelawgroup.com/documents/Comparative%20Causation%20and%20Indemnity.DOC>.

<sup>3</sup> *See* Transcontinental Gas Pipeline Corp. v. Texaco, 35 S.W. 3d 658 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2000, pet. denied); D. Wilson Constr. Co. v. Cris Equip. Co., 988 S.W.2d 388 (Tex.App.-Corpus Christi 1999, writ dismissed w.o.j.) (general contractor's indemnity and breach of warranty claims against subcontractor were contract causes of action subject to four-year statute of limitations); HCC Employer Serv., Inc. v. Westchester County Surplus Lines Ins. Co., No. H-05-1275, 2006 WL 1663343 (S.D.Tex. June 5, 2006) (insurance policies are subject to the general principles of contract interpretation and construction (citations omitted)); Assoc. Indem. Corp. v. CAT Contracting, Inc. 964 S.W.2d 276, 284 (Tex. 1998).

<sup>4</sup> ALCOA v. Hydrochem Indus. Serv., Inc., No. 13-02-00531-CV, 2005 WL 608232 (Tex.App.-Corpus Christi, March 17, 2005).

<sup>5</sup> Hernandez v. Big 4, Inc., 241 F. Supp. 2d 715 (S.D.Tex.-Galveston 2003) (indemnity agreements, even those agreements that require a party to indemnify another party despite fact that the latter is solely responsible, are enforceable under Texas law).

<sup>6</sup> St. Paul Surplus v. Halliburton, 445 F.3d 820 (5th Cir 2006); *but see* Oilfield Anti-Indemnity Act that precludes indemnity in these areas. Tex. Civ.Prac. & Rem. Code Ann. § 127.003 (Vernon 2005 & Supp. 2006).

<sup>7</sup> *See* Houston Lighting & Power Co. v. Atchison, Topeka, & Sante Fe R.R. Co., 890 S.W.2d 455, (Tex. 1994).

<sup>8</sup> Helmerich & Payne Intn'l Drilling Co. v. Swift Energy Co., 180 S.W.3d 635 (Tex. App.-Houston [14<sup>th</sup>] 2005, no pet. h.).

<sup>9</sup> Based on Westlaw search (DB=TX STAT ANN; Query=INDEMNIF!).

<sup>10</sup> Tex. Civ. Prac. & Rem. Code Ann. § 127.005 (c) (Vernon 2005 & Supp. 2006).

<sup>11</sup> *See* Superior Snubbing v. Energy Serv. Co., 158 S.W.3d 112 (Tex.App.-Fort Worth 2005, pet. granted)(ruling that nonsignatories, such as third party beneficiaries, were not permissible indemnities under section 417.004 of the Texas Labor Code).

<sup>12</sup> Garcia v. J.J.S. Enterprises, Inc., No. 08-04-00179-CV, 2005 WL 2044670 (Tex. App.-El Paso, Aug. 25, 2005).

<sup>13</sup> Thyssen Steel Co. v. M/V Kavos Yarakas, 50 F.3d 1349 (5th Cir. 1995).

<sup>14</sup> Ingersoll-Rand Company v. Valero Energy Corporation, 997 S.W.2d 203 (Tex. 1999). *But see*, Atlantic Richfield Company v. Petroleum Personnel, Inc., 768 S.W.2d 724 (Tex. 1989) (specifically noting that it was not addressing the issue of whether contracting for indemnity from one's own gross negligence was permissible in Texas; The court upheld a provision requiring indemnity for *any negligent act*, but side-stepped the issue of whether the provision violated public policy.).

<sup>15</sup> This position was recently followed in Texas Moto-Plex v. Phelps, No. 11-03-00336-CV, 2006 WL 246520 (Tex. App.-Eastland, Feb. 2, 2006). In this case the court in analyzing the validity of a Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement provision, stated that pre-accident releases for gross negligence violate public policy. Because the parties did not dispute that the provision met the parameters of the express negligence test, the court briefly mentioned test and went on to say that if the jury's finding of gross negligence was affirmed, it wouldn't matter if the activities fell within the release language.

<sup>16</sup> Derr Construction Company v. City of Houston, 846 S.W.2d 854, 858 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1992, no writ).

<sup>17</sup> The fair notice doctrine and express negligence doctrine have been confused by some courts. *Compare* Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc., 246 F. Supp. 2d 632 (S.D. Tex. 2003)(Under Texas law, express negligence rule requires that (1) party's intent to be released from all liability caused by its own future negligence must be expressed in unambiguous terms within four corners of contract, and (2) indemnity clause must be conspicuous under objective standard defined in Uniform Commercial Code), *with* Missouri Pac. R.R. Co. v. Lely Dev. Corp., 86 S.W.3d 787 (Tex.App.-Austin 2002, pet. dismissed)(To be enforceable under the fair-notice test, an indemnity agreement must: (1) express in specific terms within the four corners of the contract an intent that the indemnitor will indemnify the other party against the consequences of that party's negligence, known as the "express negligence doctrine," and (2) be conspicuous enough on the face of the contract to draw the attention of a reasonable person reviewing the contract), *and* Douglas Cablevision IV, L.P. v. Southwestern Electric Power Co., 992 S.W.2d 503 (Tex.App.-Texarkana 1999, pet. denied)(Agreement by one party to indemnify another party for consequences

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of other's own negligence must meet fair notice requirements of express negligence and conspicuousness to be enforceable).

<sup>18</sup> Post-injury releases are treated differently. *See* *Lehmann v. Har-Con Corp.*, 76 S.W.3d 555 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2002, no pet.) (post-accident release was not subject to requirements of express negligence doctrine and provision that read: "ANY AND ALL CLAIMS, DEMANDS, ACTIONS AND/OR CAUSES OF ACTION OF WHATSOEVER NATURE OR CHARACTER, INCLUDING ACTIONS FOR INTERVENTION AND/OR THOSE CLAIMS, DEMANDS, ACTIONS OR CAUSES OF ACTION DUE TO THE SOLE NEGLIGENCE OF DEFENDANT" did not preclude the indemnitee from seeking indemnity for claims that were other than sole negligence).

<sup>19</sup> *Sydlik v. REEIII, Inc.*, No. 14-04-01080-CV, 2006 WL 1389552 (Tex. App.-Houston [14<sup>th</sup> Dist.] May 18, 2006).

<sup>20</sup> *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707 (Tex. 1987).

<sup>21</sup> *See* *Storage & Processors, Inc., v. Reyes*, 134 S.W.3d 190 (Tex. 2004) (extending express negligence to the context of non-subscriber worker's compensation benefits plan and discussing areas where express negligence does not apply, including no-damage-for-delay clause and insurance-shifting agreements).

<sup>22</sup> For a discussion of express negligence in maritime law, *see* *East v. Premier, Inc.*, 98 Fed.Appx. 317 (5th Cir. 2004); for other statutes, *see e.g.*, *George Dental Soc., INC. v. Poindexter, III*, No. 01-02-01230-CV, 2004 WL 170030 (Tex.App.-Hous. [1 Dist.], Jan. 29, 2004)(Treasurer's claim for indemnification for costs and expenses in defending slander suit was based on statutory duty imposed by Texas Non-Profit Corporation Act, not on contractual indemnification between treasurer and non-profit, and thus, trial court did not err in denying non-profit corporation's motion for judgment based on express negligence doctrine).

<sup>23</sup> *See* *Devon SFS Operating v. First Seismic*, No. 01-04-00077-CV, 2006 WL 374257 (Tex. App.-Houston [1<sup>st</sup>], Feb. 16, 2006, no pet. h.) (Ethyl rule does not apply on its face); *Oxy USA, Inc. v. Southwestern Energy Prod. Co.*, 161 S.W.3d 277 (Tex. App.-Corpus Christi 2005, pet. filed) (liability limited to transactions that had already occurred); *Transcontinental*, 35 S.W. 3d 658.

<sup>24</sup> *DDD Energy, INC. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880, (Tex. App.-Houston [14<sup>th</sup> Dist.] 2001, no pet.).

<sup>25</sup> *See Helmerich*, 180 S.W.3d 635; *TIG Ins. Co. v. North American Van Lines*, 170 S.W.3d 264 (Tex.App.-Dallas 2005, no pet.)(ambiguity does not arise merely because the parties to an agreement advance differing interpretations; the contract is ambiguous only if the application of established rules of construction leads to more than one reasonable meaning).

<sup>26</sup> *Spawglass, Inc. v. E.T. Services, Inc.*, 143 S.W.3d 897, 899 (Tex. App.-Beaumont 2004, pet. denied).

<sup>27</sup> *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989).

<sup>28</sup> *See e.g.*, *Adams Resources Exploration Corp. v. Resource Drilling, Inc.*, 761 S.W.2d 63 (Tex. App.-Hou 14<sup>th</sup> 1988, no writ) (operator of an oil well filed a third-party action against a contractor for indemnification when the contractor's employee was injured on the job;the court found the indemnity agreement stating that contractor was to indemnify operator of oil well for any accident for which operator was found liable was enforceable where the agreement specifically asserted that it covered the negligence of both parties, stated intent of parties as it specified who was to indemnify whom, both parties were professionals in their field and employed highly experienced personnel who understood importance of wording of contract, parties were in similar bargaining positions, and parties were legally competent to enter agreement).

<sup>29</sup> *Quorum Health Res., L.L.C. v. Maverick County Hospital Dist.*, 308 F.3d 451, 465 (5th Cir 2002). ([T]he exclusion of gross negligence creates an implicit agreement to indemnify for simple negligence, requiring the Hospital to deduce its full obligation from the gross negligence exception. An implicit indemnity agreement does not pass the Texas express negligence test (citations omitted)).

<sup>30</sup> *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

<sup>31</sup> *XL Specialty Ins. Co. v. Kiewit Offshore Serv., Ltd.*, 336 F.Supp.2d 673, 675 (S.D. Tex. 2004).

<sup>32</sup> *Enserch Corporation v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990).

<sup>33</sup> ALCOA 2005 WL 608232 at \*9.

<sup>34</sup> This paper does not address the separate requirements of reasonableness and necessity imposed by Chapters 37 and 38 of the Texas Civil Practice and Remedies Code.

<sup>35</sup> *See* *George E. Powell, Jr., Indemnitor's liability to indemnitee for attorney's fees and expenses arising out of defense of action alleging indemnitee's negligence*, 59 A.L.R.5th 733 (2005).

<sup>36</sup> *See* *Paulus v. Lawyers Surety Corp.*, 625 S.W.2d 843 (Tex.App.-Houston 1981, writ ref'd n.r.e.) (citing *Highlands Cable Television, Inc. v. Wong*, 547 S.W.2d 324, 326 (Tex.Civ.App.-Austin 1977, writ ref'd n.r.e.)). For a post-*Ethyl* court, *see* *Citgo Petro v. Wright Petro*, No. 13-03-367, 2005 WL 3117284 (Tex. App.-Corpus Christi Nov. 23, 2005, pet. filed).

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<sup>37</sup> Fisk Electric Co. v. Constructors & Assoc., Inc., 888 S.W.2d 813 (Tex. 1994).

<sup>38</sup> *Id.* at 814.

<sup>39</sup> Arthur's Garage v. Racal-Chubb, 997 S.W.2d 803 (Tex. App.-Dallas 1999, no writ).

<sup>40</sup> Amerada Hess Corp. v. Wood Group Production Technology, 30 S.W.3d 5 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2000, writ denied).

<sup>41</sup> *Sydlik*, 2006 WL 1389552 (While actual notice may serve as a substitute for conspicuousness, it may not serve as a substitute for express negligence).

<sup>42</sup> *See e.g., Garcia*, 2005 WL 2044670 (if both contracting parties have actual knowledge of the agreement, it can be enforced even if the fair notice requirements were not satisfied); *Reyes*, 134 S.W.3d 190 (if both contracting parties have actual knowledge of the plan's terms, an agreement can be enforced even if the fair notice requirements were not satisfied); *Air Liquide America Corp. v. Crain Bros.*, 11 F. Supp. 2d 709 (S.D.Tex.-Houston 1997) (given the testimony by Perry establishing that Crain had actual knowledge of the indemnification provision, the Court holds that the indemnity provision in the Construction Contract is enforceable against Crain); and *Missouri Pac. R.R. Co.*, 86 S.W.3d 787 (the fair-notice test does not apply if the indemnitee establishes that the indemnitor had actual notice or knowledge of the indemnity agreement).

<sup>43</sup> *See* William H. Locke, Jr., *Risk Management Through Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation, Limitation, Exculpation and Release*, (March 6, 2002) at 6-34, <http://www.acca.com/chapters/program/sanant/riskmanagement.pdf>

<sup>44</sup> *See e.g., Banzhaf v. ADT Sec. Sys. Southwest, Inc.*, 28 S.W.3d 180 (Tex. App.-Eastland 2000, pet. denied) (upheld an indemnity provision as satisfying the express negligence test though the provision itself did not use the word negligence; a separate paragraph in contract made indemnity provisions applicable to loss, damage, or injury from "negligence, active or otherwise"), *but see* *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907 (Tex.App.-Amarillo 1997, no writ) (finding that a consultant was not an *Indemnified Person* within the listing of indemnity clause covering the "Operator, its officers, directors, employees and joint owners", even when another provision specifically listed "consultants").

<sup>45</sup> *Quorum*, 308 F.3d 451.

<sup>46</sup> *See Atlantic Richfield*, 768 S.W.2d 724.

<sup>47</sup> *See* *T.C. Tubb v. Bartlett*, 862 S.W.2d 740 (Tex.App.-El Paso 1993, writ denied) (With respect to promise to indemnify against liability, cause of action accrues to indemnitee only when liability has become fixed and certain, as by rendition of a judgment.; With respect to promise to indemnify against damages, right to bring suit does not accrue until indemnitee has suffered damage or injury by being compelled to pay judgment or debt); *Lake Charles Harbor and Terminal Dist. v. Board of Tr. of the Galveston Wharves*, 62 S.W.3d 237 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2001, pet. denied) (Board's agreement to indemnify the purchaser for damages resulting from any misrepresentation or breach of warranty did not constitute an all-encompassing guarantee that it would be responsible for every loss sustained by the purchaser).

<sup>48</sup> *Interstate Contracting v. City of Dallas*, 135 S.W.3d 605 (Tex. 2004).

<sup>49</sup> *See Millennium*, 246 F. Supp. 2d 632 ( Under Texas law, property owner's termination of services contract, pursuant to contract's terms and without any reservation of rights, ended contractor's indemnification obligation under contract).

<sup>50</sup> *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715 (5<sup>th</sup> Cir. 1995).

<sup>51</sup> *OPI Int'l, Inc. v. North Bank Towing Corp.*, 878 F.Supp. 996 (S.D. Tex. 1995).

<sup>52</sup> *Helmerich*, 180 S.W.3d at n 9

<sup>53</sup> *Id.*

In a Mary Carter Agreement (named for *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. App.1967)), the "settling defendant has a stake in plaintiff's recovery, often a rebate of some or all of amount paid by settling defendant to plaintiff by giving settling defendant a percentage of plaintiff's recovery in excess of an agreed amount, thereby providing an incentive for settling defendant to assist plaintiff in maximizing its recovery against non-settling defendants." *J.M. Krupar Construction Co., Inc. v. Rosenberg*, 95 S.W.3d 322 at n 6 (Tex. App.-Houston [1<sup>st</sup> Dist.] 2002, no pet.).

<sup>55</sup> *Coronado Paint v. Global Drywall Sys.*, 47 S.W.3d 28 (Tex.App.-Corpus Christi 2001, pet. denied)(citing *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992)).

<sup>56</sup> *St. Anthony's Hospital v. Whitfield*, 946 S.W.2d 174 (Tex.App.-Amarillo 1997, writ denied).

<sup>57</sup> For an excellent background on the pre-amendment issues with allocation, *see* Russell H. McMains, *Contribution and Indemnity Problems in Texas Multi-Party Litigation*, 17 St. Mary's L.J. 653 (1986); For a discussion of the

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issues prior to the proportionate responsibility amendment, *see* Fred Misko, Jr., *Contribution and Indemnity; Joint and Several Liability; Complex Settlement Agreements*, (June 1993), <http://www.misko.com/library/Contrib.pdf>.

<sup>58</sup> *In re Martin*, 147 S.W.3d 453 (Tex. App—Beaumont 2004, pet. struck) (In Texas, a claim for contribution from a joint tortfeasor is a statutory creation).

<sup>59</sup> *See generally*, *Stewart Title Guaranty Co., v. Sterling*, 822 S.W.2d 1 (Tex. 1991) (It should be noted that the recent tort reform legislation did not effect the original contribution statute. Therefore, the original contribution statute and its 70 year judicial application and interpretation remains valid for all torts outside of the scope of the other contribution schemes);

<sup>60</sup> *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

<sup>61</sup> TEX. CIV. PRAC. & REM. CODE ANN §§ 33.001 and 33.004 (Vernon 1997 & Supp. 2006).

<sup>62</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1997 & Supp. 2006). PROPORTIONATE RESPONSIBILITY. In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.

<sup>63</sup> *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon 1997 & Supp. 2006). AMOUNT OF LIABILITY. (a) Except as provided in Subsection (b), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed. (b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if: (1) the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent; or (2) the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in the following provisions of the Penal Code and in so doing proximately caused the damages legally recoverable by the claimant: [...]" (*penal code provisions omitted*).

<sup>64</sup> *Taveau, D.O., v. Brenden*, 174 S.W.3d 873 (Tex.App—Eastland 2005, pet. denied) (When the percentage of negligence attributable to a particular defendant is greater than 50 percent, he is jointly and severally liable for the entire amount of damages (citations omitted)).

<sup>65</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 33.016 (Vernon 1997 & Supp. 2006).

<sup>66</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 33.015 (Vernon 1997 & Supp. 2006).

<sup>67</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 33.015 (d) (Vernon 1997 & Supp. 2006).

<sup>68</sup> *Trussway, Inc. v. Wetzel*, 928 S.W.2d 174, 176 (Tex.App.-Beaumont 1996, writ denied).

<sup>69</sup> *See e.g.*, *T.C. Tubb v. Bartlett*, 862 S.W.2d 740 (Tex.App.-El Paso 1993, writ denied).

<sup>70</sup> For a case on the conflicts between contribution and common law indemnity, *see e.g.*, *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980)(statute providing for proportionate contribution among tort-feasors precludes total shifting of ultimate responsibility to one tort-feasor under common law doctrine of indemnity; holding that common law indemnity between joint tortfeasors is no longer available in negligence cases, and thus, first joint tortfeasor was entitled to contribution from second joint tortfeasor for damages arising from accident in proportion to negligence attributed to second joint tortfeasor.)

<sup>71</sup> This provision was introduced in 1995 and amended in 2003.

<sup>72</sup> *See Campbell v. Sonat Offshore Drilling, Inc.*, 27 F.3d 185 (5<sup>th</sup> Cir. 1994).

<sup>73</sup> *Arkwright-Boston Mfr. Mutual Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442 (5<sup>th</sup> Cir. 1991).

<sup>74</sup> *See also Man GHH Logistics GMBH v. EMSCOR, Inc.*, 858 S.W.2d 41 (Tex. App-Houston [1<sup>st</sup> Dist.] 1993, no writ) (Indemnification agreement failed to establish a claim for contractual contribution, where it contained no agreement that sellers of crane would reimburse buyers for any settlements buyers voluntarily made with plaintiffs, and the agreement failed to mention "contribution" or discuss any apportionment of fault); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 WL 1252321 (Tex.), 48 Tex. Sup. Ct. J. 735 (An insured's agreement to reimburse liability insurer for settlement of suit against insured is implied in law or quasi-contractual if the insured demands that the insurer accept settlement offer within policy limits or expressly agrees to acceptance of the offer); *Texas Association of Counties County Gov't Risk Mgmt Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000). For maritime law, *see Boyett v. Keene Corp.*, 815 F.Supp. 204 (E.D. Beaumont 1993) (Availability of common-law indemnity under maritime law is quite limited and, in most cases, damages should be allocated according to the respective fault of the tort-feasors); *City of Houston v. Goings*, 795 S.W.2d 829 (Tex. App-Houston [14<sup>th</sup> Dist.] 1990, writ denied).

<sup>75</sup> *Coastal States Crude Gathering Co. v. Natural Gas Odorizing, Inc.* 899 S.W.2d 289 (Tex. App.—Houston [15<sup>th</sup> Dist.] 1995, writ denied).

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<sup>76</sup> This is a circuit of indemnity situation as recognized by court in *Martinez v. Gulf States Utility Co.*, 864 S.W.2d 802 (Tex. App—Houston [14<sup>th</sup> Dist.] 1993, writ denied).

<sup>77</sup> *XL Specialty Ins. Co. v. Kiewit Offshore Serv., Ltd.*, 426 F.Supp.2d 565 (S.D. TX 2006)(Where indemnitee enters into settlement agreement w/ 3rd party, can only recover from indemnitor upon showing that: 1) potential liability existed and 2) settlement was reasonable, prudent, and in good faith. Indemnitee does not have to prove actual liability).

<sup>78</sup> *First Title Co. of Waco v. Garrett*, 860 S.W.2d 74 (Tex. 1993).

<sup>79</sup> *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000).

<sup>80</sup> Suggested Provision: Notwithstanding the foregoing, Tenant's obligation to indemnify the Indemnified Persons shall extend only to the percentage of responsibility of Tenant and of Tenant's Instrumentalities in contributing to such Liabilities. Locke *supra* note 43.

<sup>81</sup> Suggested Provision: Notwithstanding the foregoing, Tenant's obligation to indemnify the Indemnified Persons shall apply only where the percentage of negligence of Tenant and of its Instrumentalities in contributing to the Liability exceeds the negligence of the Landlord and its Instrumentalities. Locke *supra* note 43.

<sup>82</sup> Locke *supra* note 43 at 6-48.