



Indemnities Made Simple:

Understanding in practice what law school could not explain

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This presentation is for you if:

You have drafted a lease for a hanger or an aircraft.

You have signed an invoice for fuel or services.

You need a settlement agreement.

You know “express negligence” exists but cannot “explain like I’m five”.

A white airplane is flying through a blue sky with white clouds. The airplane is positioned in the upper right quadrant of the image, with its nose and cockpit visible. The sky is filled with soft, white clouds, and the overall scene is bright and clear.

Types of Indemnity

- Limited-form
- Intermediate-form
- Broad-form

Limited-Form Indemnification

“Party A indemnifies Party B, but only to the extent of Party A’s negligence.”

Intermediate-Form Indemnification

“Party A indemnifies Party B for the entire loss arising from the Agreement, EVEN IF PARTY A IS ONLY PARTIALLY RESPONSIBLE, AND EVEN IF CAUSED BY PARTY B’S NEGLIGENCE.”

Broad-Form Indemnification

“Party A indemnifies Party B for any loss arising from the Agreement, EVEN IF THE LOSS IS CAUSED BY PARTY B’S OWN NEGLIGENCE.”

Texas Civil Practice and Remedies Code § 41.001(11)

“Gross negligence” means an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Limited-Form Indemnification

“Party A indemnifies Party B for all damages arising out of the Agreement.”

“Party A indemnifies Party B, but only to the extent damages are caused by Party A’s negligence, or the negligence of Party A’s agents, employees, or invitees.”

Limited-Form Indemnification: Excluding Third Parties

“But only to the extent caused by or due to the negligence, wrongful act, or omission of Party A or Party A’s Group.”

“This indemnification excludes losses caused or suffered by Third Parties.”

Limited-Form Indemnification: Including Third Parties

“Even if caused by the acts of Third Parties.”

Intermediate-Form Indemnification

“Party A indemnifies Party B for the entire loss arising from the Agreement, EVEN IF PARTY A IS ONLY PARTIALLY RESPONSIBLE, AND EVEN IF CAUSED BY PARTY B’S NEGLIGENCE.”

Intermediate-Form Indemnification: Excluding Third Parties

“These indemnities exclude losses caused or suffered by Third-Parties.”

“However, each Party shall be responsible for losses suffered by Third-Parties to the extent each Party is responsible for such claims.”

Intermediate-Form Indemnification: Including Third Parties

“This indemnification shall include claims caused or suffered by Third-Parties.”

“Party A indemnifies Party B for the entire loss arising from the Agreement, whether or not involving a Third-Party claim, EVEN IF PARTY A IS ONLY PARTIALLY RESPONSIBLE.”



Enforceability of Indemnity Provisions

- Rules of Construction
 - Strictly construed against indemnitee
 - Fair-notice requirements
 - Conspicuousness
 - Four-Corners Rule
 - Express-Negligence Rule
 - Savings clauses
- Anti-indemnity acts
- Contracting with government entities
 - Carveouts in anti-indemnity acts
 - Indemnifications are “debts”

Strictly Construed Against Indemnitee

“[I]ndemnity agreements are strictly construed in favor of the indemnitors.” *Safeco Ins. v. Gaubert*, 829 S.W.2d 274 (Tex. App.—Dallas 1992, writ den’d).

“[The contract] specifically provides that in the event of a dispute over the meaning or application of the contract, it shall be construed ‘fairly and reasonably and neither more strongly for nor against either party’” *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457, 461 (Tex. App.—San Antonio 1995, writ dism’d).

The Fair Notice Doctrine & The Express Negligence Rule

Fair Notice Requirements:

- Conspicuousness (bold, capitalized, underlined text)
- Contained within the four-corners of the document
- Comply with the Express Negligence Rule

Express Negligence Rule:

- To indemnify a party for its own negligence, a contract must “express that intent in specific terms.” *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987)
- ***“Even if caused by the negligence of the indemnitee.”***
- ***“It being the express intent of the parties to indemnify the indemnitee even for its own negligence.”***

Savings Clauses Gone Wild

“NOTWITHSTANDING THE FOREGOING, IF CHAPTER 151 OF THE TEXAS INSURANCE CODE APPLIES, THIS INDEMNITY PROVISION SHALL NOT APPLY TO THE EXTENT THAT IT REQUIRES SUBCONTRACTOR TO INDEMNIFY AN INDEMNIFIED PARTY AGAINST A CLAIM CAUSED BY THE NEGLIGENCE OR FAULT OF THE INDEMNIFIED PARTY.”

Savings Clauses

- *In the event that this Agreement is subject to the indemnity limitations of any applicable State law, it is agreed that the above obligations to indemnify are automatically revised modified as needed to comply with such law.*
- *In the event it is judicially determined that a release, hold harmless, or indemnity obligation under this Contract is void or otherwise unenforceable, both parties agree such obligation shall apply to the extent and degree necessary to provide the maximum level of protection allowed to the indemnitee by such law.*

***“1.1 Party A indemnifies Party B for any loss arising from the Agreement, EVEN IF THE LOSS IS CAUSED BY PARTY B’S OWN NEGLIGENCE.*”**

***“For contracts performed in Texas, replace 1.1 with:*”**

***“1.1 Each Party indemnifies the other Party for all damages to property or injury or death to persons suffered by each Party Group, REGARDLESS OF CAUSE, AND EVEN IF CAUSED BY THE NEGLIGENCE OR FAULT OF THE INDEMNITEE.”*”**

Anti-Indemnity Acts

None apply directly to aviation, but beware of projects that overlap with these areas:

- Construction: Texas Anti-Indemnity Act (“TAIA”; Tex. Ins. Code § 151)
- Oil & Gas: Texas Oilfield Anti-Indemnity Act (“TOAIA”; Civ. Prac. & Rem. Code § 127)
- Motor Carriers: Transportation Anti-Indemnity Act (Tex. Trans. Code Sec. 623.0155)

Contracts with Government Entities

You can indemnify Uncle Sam:

(TAIA) Insurance Code Sec. 151.105.
EXCLUSIONS.

This subchapter does not affect:

(10) an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to:

(B) a public works project of a municipality; ...

But Uncle Sam may not be able to indemnify you:

“[N]o debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund.” Tex. Const. art. XI, § 7.

A white airplane is flying through a blue sky with white clouds. The airplane is positioned in the upper right quadrant of the image, with its nose and cockpit visible. The sky is filled with soft, white clouds, and the overall scene is bright and clear.

Indemnities and Insurance

- Agreement of indemnity and insurance
- Contractual liability coverage
- Waiver of subrogation

Agreement of Indemnification and Insurance

1.1 Indemnity

To the extent caused by Smith's negligence or willful misconduct, Smith shall indemnify, defend, and hold harmless Jones for any claims that arise out of this Agreement or the Work.

2.1 Insurance

Smith's insurance policies shall: 1) be occurrence based; 2) name Jones as an Additional Insured (other than on workers compensation and employers liability); 3) provide defense as an additional benefit; 4) not exclude from coverage the negligence, strict liability, or gross negligence, whether sole or otherwise, of the "Additional Insureds"; and 5) include an endorsement that the insurer shall not cancel or non-renew without thirty days' written notice to Jones.

Coverage of Contractual Liability

Contractual Liability Exclusion: We will not pay for damages based upon or arising out of the liability of others assumed by an **Insured** under any contract or agreement. This exclusion does not apply to liability for damages:

- a) Assumed in a contract or agreement that is an **Insured Contract**, provided that the actual or alleged act, error, or omission occurs subsequent to the execution of the contract or agreement; or
- b) That the **Insured** would have had in the absence of the contract or agreement.

Insured Contract means that part of any contract or agreement whereby the **Named Insured** assumes the liability of another party to pay for damages because of **bodily injury, property damage**, or an act, error, or omission in the performance of work or services.

Indemnification and Waiver of Subrogation (name a more classic duo)

Indemnification

- **Party A indemnifies Party B, EVEN FOR PARTY B'S OWN NEGLIGENCE.**
- Party A is relying on insurance coverage to support this indemnification.

Subrogation

- Prevents Party A's insurer from coming against Party B after paying for Party A's indemnification obligations.
- Must be secured from the carrier to avoid a breach of contract.

Avoiding Breaching the Insurance Contract

Subrogation: If payment is made under the **Policy**, **We** will be subrogated to all of the **Covered Person's** rights of recovery, and all such rights of any person receiving monies provided or paid by the **Policy**, against any person or organization except the Policyholder and its affiliates, and the **Covered Person** agrees to execute and deliver instruments and do whatever else is necessary to secure **Our** subrogation rights. Neither the **Policyholder** nor the **Covered Person** will do anything to prejudice **Our** subrogation rights, without **Our** prior written consent.

A white commercial airplane is shown from a low angle, flying upwards and to the right against a blue sky with scattered white clouds. The aircraft's nose and cockpit are visible, and a red stripe runs along the side of the fuselage. The background is a vast sky with soft, white clouds.

Indemnities in Practice

- Liability waiver or limitation
- Settlement agreements
- Contractual provisions

Liability Waivers or Limitations

Smith waives all rights against Jones for recovery of loss, injury, or damages to the extent such loss, injury, or damages are covered by the insurance policies maintained by Smith.

NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR INDIRECT, EXEMPLARY, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, OR LOST GOODWILL, PROFIT, REVENUE, OR SAVINGS RELATED TO THE AGREEMENT, THE USE OF THE PRODUCTS, OR ANY DELAYS, EVEN IF A PARTY HAS BEEN ADVISED OR IS AWARE OF THE POSSIBILITY OF SUCH DAMAGES.

Settlement Agreements

In further consideration of the payment of the sum expressed above, The Releasing Party agrees to INDEMNIFY AND HOLD HARMLESS the Released Party from any and all demands, causes of action, obligations, liabilities, claims, or other liability of any kind that is, has been, or may ever be asserted as arising by, through, or under The Releasing Party and relating to the Incident. This Indemnity applies to all claims, third-party actions, or cross-actions seeking contribution, indemnity, or any other liability, asserted against The Released Party by any person, entity, insurer, firm, or corporation that is alleged to be liable in any claim, demand, or cause of action that arises by through, or under The Releasing Party and is related to the Incident.

Indemnities in the Wild: Aircraft Dry Lease

Lessor agrees to indemnify and hold harmless Lessee from any claim, damage, liability, expense, or loss, but only to the extent arising out of Lessor's negligent or willful errors or omissions under this Lease.

Indemnities in the Wild: Hanger Lease

Indemnification for Environmental Claims.

Lessee shall indemnify and hold harmless Lessor from any and all environmental claims, fines, liabilities, penalties, fees, damages, and losses relating to the discharge, clean up, or disposal of Hazardous Materials, but only if such claims, fines, liabilities, penalties, fees, damages, and losses arise out of Lessee's use of the Hanger.

Indemnities in the Wild: Hanger Lease

Lessee agrees to indemnify, defend, and hold harmless Lessor and its officers, directors, agents, and employees from all claims (including those arising from third parties), liabilities, damages, delays, or judgments (including attorneys' fees), suffered by Lessor and arising out of any injury to or death of any person or loss of or damage to any property, or arising out of any breach of this Lease or any act or failure to act or negligence of Lessee.

Indemnities in the Wild: Hanger Lease

Tenant shall indemnify, defend, and hold Landlord harmless from all losses, claims, suits, damages, or expenses (including attorneys' fees), which are incurred by Landlord due to any breach this Lease, or violation of any Environmental Requirement by Tenant. The obligations of Tenant under this paragraph shall survive termination of this Lease. All indemnities in this paragraph shall be enforced to the fullest extent of the law, EVEN IF CAUSED BY THE ACTIVE, PASSIVE, JOINT, OR CONCURRENT NEGLIGENCE OF LANDLORD, but not to the extent caused by the sole negligence, gross negligence, or willful misconduct of Landlord.

Indemnities in the Wild: Fuel Supplier

Customer agrees to defend, indemnify, and save Supplier and its agents and employees harmless from and against any and all claims, demands, losses, liabilities, and expenses (including attorneys' fees) of whatsoever nature, as a result of injury to or death of any person or injury to or loss of any property (including Customer's employees, agents, or customers or property belonging to Customer) arising out of this contract, or the storage, handling, distribution, sales, or use of any Products purchased hereunder, or the storage, handling, distribution, sales, or use of any Products purchased hereunder.

Customer's obligation to indemnify Supplier shall not apply to personal injury or property damage resulting directly from Product which is off-specification when supplied by Supplier to Customer, nor to incidents arising out of the sole negligence of Supplier or its employees or agents.



Questions (perhaps answers)