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Quarterly Newsletter

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Foreword by Mike Miller

Welcome to the second edition of the Miller & McCarthy, P.C. Quarterly Newsletter. The purpose of this newsletter is to provide the latest information on current topics of interest frequently raised by our clients. The attorneys at Miller & McCarthy, P.C. focus on civil litigation and practice statewide.¹ Our firm represents contractors and subcontractors across the state of Texas, most of whom have been involved with indemnity issues at one time or another.

This newsletter is written to assist those on both sides of indemnity provisions in contracts and subcontracts and is written by Josh P. Norrell, one of Miller & McCarthy's attorneys who specializes in appellate and coverage related matters. At Miller & McCarthy, we are able to provide both legal and practical experience to meet any client's need in either proving or challenging indemnity provisions. Our indemnity team can be reached during regular business hours at **469-916-2552** and toll-free at **1-800-338-2630**. An enforceable indemnity agreement can make all the difference and so can one that is not enforceable.

FIVE THINGS YOU NEED TO KNOW ABOUT INDEMNITY PROVISIONS

1. Express negligence

To ensure that the indemnifying party knew what it was agreeing to do when it signed the contract, agreements that indemnify another party for its own negligence are enforceable in Texas only if they meet the following fair notice requirements: (1) the **express negligence doctrine** and (2) the indemnity agreement is **conspicuous** and gives the indemnifying party adequate notice of the obligations. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990).

Under the express negligence doctrine, a party seeking indemnity for the consequences of its own negligence must express that intent in specific terms within the four corners of the contract. *Banner Sign & Barricade, Inc. v. Price Const., Inc.*, 94 S.W.3d 692 (Tex. App.—San Antonio 2002, pet. denied).

¹Mike Miller, Greg McCarthy, and all other attorneys at Miller & McCarthy, P.C. are not certified by the Texas Board of Legal Specialization with the exception of Melinda Huff (personal injury trial law).

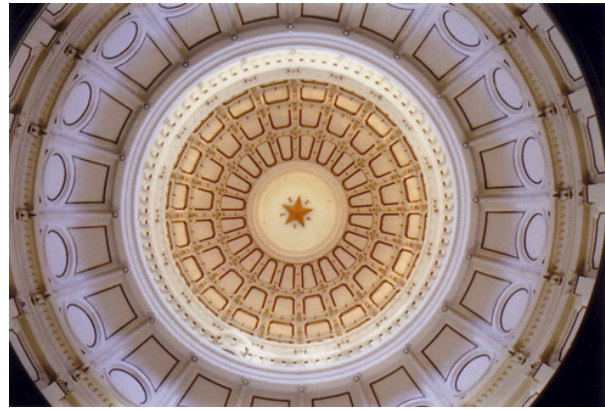


Photo by Rick & Judy Vanderpool

The following language has been held to satisfy the express negligence test:

- 'whether the same is caused or contributed to by the negligence of [indemnitee], its agent or employees'
- 'regardless of any cause or of any fault or negligence or contractor'
- 'regardless of the sole, joint, comparative, or concurrent negligence or gross negligence of [indemnitee], its officers, agents or employees'

An indemnity clause may also be drafted to work the other way and purposely **avoid** any indemnity for the other's negligence through an 'express exclusionary' clause in the agreement. For example, the company agrees to indemnify "except to the extent [other party or its agent] has caused, contributed to or compounded said damages." *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417 (Tex. 2000).

2. Conspicuousness

An indemnity clause will be "conspicuous" when it is written so that a reasonable person against whom it is to operate ought to have noticed it. *Dresser Indus., Inc. v. Page Petroleum*, 853 S.W.2d 505 (Tex. 1993). Courts will look to things such as size of font, title, whether the provision is in bold, where it appears in a document and the length of the document, and whether there is any evidence of "actual notice" by the reader. *Banzhaf v. ADT Security Sys.*, 28 S.W.3d 180 (Tex. App.—Eastland 2000, pet. denied). In *Banzhaf*, the indemnity provision was "conspicuous" where it: (1) was in dark, boldface type so it contrasted with the lighter, smaller type of the remaining contractual paragraphs; (2) was set forth in enlarged, all capital lettering; and (3) was directly above the signature line where a reasonable person's attention would be attracted to it when looking at the contract.

Conversely, in *UPS Truck Leasing, Inc. v. Leaseway Transfer Pool, Inc.*, 27 S.W.3d 174 (Tex. App.—San Antonio 2000, no pet.), the indemnity provision was not conspicuous because it (1) was paragraph 18 of 30 and (2) was located on the back side of a two-page, single-spaced standard form lease agreement. Further, even though the indemnity language was contained in a separate paragraph with a caption that was in upper case, bold type; the title of the caption was merely "**CUSTOMER AGREES.**" The court held that the appearance of upper case and bold type is of no avail when it does not specifically reference the indemnity provision or indemnity language. The mere presence of bold, upper-case type did not satisfy the "conspicuousness" requirement when the title did not refer to

"indemnity" in any way, and accordingly, the indemnity provision was not enforceable.

3. Actual Notice

Texas courts will enforce an indemnity provision, even if it is arguably not "conspicuous," if there is evidence of actual notice by the indemnitor. A signature or initials near the indemnity clause, and on the same page, will aid in meeting this requirement because it will show that the indemnitor read the clause. In *Coastal Transport Co. v. Crown Central Petroleum*, 20 S.W.3d 119 (Tex. App.--Houston [14th Dist.] 2000, pet. denied), the fair notice requirement of conspicuousness was not applicable because Coastal stipulated that its President read the Agreement when he signed it on Coastal's behalf. The court found the fact that Coastal's President read the Agreement to be sufficient evidence to establish actual notice of the indemnity provision.

4. Purchase Orders

If the indemnity provision is on the front of the purchase order, in bold, contrasting type, with an 'INDEMNITY' heading, it will likely be considered conspicuous. However, if it is on the back of the purchase order, in a series of numbered paragraphs without heading or contrasting type, it will not likely be considered conspicuous. *Dresser Indus.*, 853 S.W.2d at 511. This is true regardless of whether the front of the purchase order states that 'the terms and conditions stated on the reverse side' are called to the customer's attention or not. The one possible exception would be, on the front, to reasonably call the customer's attention to the 'INDEMNITY' section on the reverse side, draft the reverse INDEMNITY section to pass all other tests above, have the purchase order be the only document, and have the INDEMNITY section be the only language on the back such that a reasonable person's attention would be drawn to it.

5. Sample (for illustration only)

INDEMNITY

SUBCONTRACTOR ASSUMES LIABILITY FOR ANY CLAIM OR ACTION BASED ON OR ARISING OUT OF INJURIES, INCLUDING DEATH, TO PERSONS,

OR DAMAGES TO OR DESTRUCTION OF PROPERTY, SUSTAINED OR ALLEGED TO HAVE BEEN SUSTAINED IN CONNECTION WITH, OR TO HAVE ARISEN OUT OF, OR INCIDENTAL TO, THE PERFORMANCE OF THIS SUBCONTRACT BY SUBCONTRACTOR AND/OR CONTRACTOR, THEIR AGENTS AND EMPLOYEES, AND THEIR SUBCONTRACTORS, THEIR AGENTS AND EMPLOYEES, REGARDLESS OF WHETHER SUCH CLAIMS OR ACTIONS ARE FOUNDED IN WHOLE OR IN PART UPON STRICT LIABILITY OR ANY DEGREE OF ALLEGED NEGLIGENCE, WHETHER SOLE, CONCURRENT, OR GROSS, OF CONTRACTOR, ITS REPRESENTATIVES, OR THE EMPLOYEES, AGENTS, INVITEES, OR LICENSEES THEREOF.

SUBCONTRACTOR FURTHER AGREES TO INDEMNIFY AND HOLD HARMLESS CONTRACTOR AND ITS REPRESENTATIVES, AND THE EMPLOYEES, AGENTS, INVITEES AND LICENSEES THEREOF IN RESPECT OF ANY SUCH MATTERS, AND AGREES TO DEFEND ANY CLAIM OR SUIT OR ACTION BROUGHT AGAINST CONTRACTOR, ITS REPRESENTATIVES, AND EMPLOYEES, AGENTS, INVITEES, AND LICENSEES THEREOF. THIS OBLIGATION TO INDEMNIFY SHALL NOT BE ENFORCEABLE IF, AND ONLY IF, IT BE DETERMINED BY JUDICIAL PROCEEDINGS THAT THE INJURY, DEATH, OR DAMAGE COMPLAINED OF WAS ATTRIBUTABLE SOLELY TO THE GROSS NEGLIGENCE OF CONTRACTOR. INSURANCE COVERING THIS INDEMNITY AGREEMENT SHALL BE PROVIDED BY SUBCONTRACTOR.

A Favorite Quote

The heights of great men reached and kept,
Were not attained by sudden flight,
But they, while their companions slept,
Were toiling upwards in the night.
-Winston Churchill (1874 - 1965)

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