Texas Oilfield Anti-Indemnity Statute

TEX. CIV. PRAC. & REM. CODE §§127.001–127.007.

Indemnity

Black’s law definition

(1) A duty to make good any loss, damage or liability another has incurred. (2) The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. (3) Reimbursement or compensation for loss, damage, or liability.

Plainer English definition

An undertaking by which the indemnifying party ("indemnitor") agrees to make good any loss or damage that the indemnified party ("indemnitee") has incurred, or to safeguard the indemnitee against liability.

Scope of Indemnity

Liability v Loss

Liability – A contract of indemnity against liability obligates the indemnitor to protect the indemnitee from a loss or the cause of a loss.
-Example – A indemnifies B from claims arising from the acts or omissions of A.
-The right to recover on an indemnity against liability accrues when the liability becomes fixed and certain, regardless of whether the indemnitee has suffered an actual loss.

Loss – A contract against loss or damage obligates the indemnitor to reimburse the indemnitee for amounts actually paid.
-Example – A indemnifies B from loss or damage suffered by B as the result of the acts or omissions of A.
-The right to recover on an indemnity against loss or damage accrues upon the indemnitee’s actual payment of damages.

Texas Oilfield Anti-Indemnity Statute

Prior to 1973, oil companies and oil well operators would enter into contracts with smaller contractors, and require the smaller contractors to indemnify them not only from the contractor’s negligence, but from their own negligence as well. In addition to being unfair, this was placing an undue financial burden on these smaller contractors. In an effort to combat this practice, the Texas legislature passed the Texas Oilfield Anti-Indemnity Statute - TEX. CIV. PRAC. & REM. CODE §§127.001–127.007 (the “Statute”).

Void and Unenforceable Agreements

¹ See Getty Oil Co. v. Insurance Co. of N. Am., 845 S.W.2d 794, 803 (Tex. 1992).
§ 127.003 of the Statute provides that any “agreement pertaining to wells for oil, gas, or water or to a mine for a mineral” which purports to indemnify a person or entity against liability that (i) is caused by their sole or concurrent negligence and (ii) arises from personal injury or death; property injury; or any loss, damage or expense that arises from personal injury, death or property injury is void and unenforceable.²

Caveat

If the indemnity agreement does not purport to indemnify a party against that party's own negligence, then the indemnity agreement is not covered by the Statute. In addition, a party usually cannot agree to be indemnified against its own negligence unless the indemnity agreement in question complies with the following "fair notice" requirements:³

Fair Notice Requirements

- Express Negligence - a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract.

- Conspicuousness - “something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it.”⁴

Express Negligence

Indemnity agreements which: (a) clearly state which party is to be indemnified; (b) clearly set forth that the indemnity is even applicable for the indemnitee’s own negligence; and (c) specifically state that the indemnity is applicable whether the indemnitee is solely or concurrently negligent will likely meet the requirements of the express negligence test.⁵

Conspicuousness

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² Where operator of gas wells was found negligent and was assessed 65 percent of the causative responsibility for the explosion that killed decedent, operator was a negligent tortfeasor; because operator's liability was not purely vicarious, operator was not entitled to common law indemnity. Haring v. Bay Rock Corp., 773 S.W.2d 676 (Tex. App. San Antonio 1989).

³ The fair notice requirements include the express negligence doctrine and the conspicuousness requirement. The "fair notice" requirements are constructive knowledge requirements, as they do not depend on whether the indemnitee subjectively knew of the existence of the provision in question or understood its content, but only whether the appearance and content of the indemnity provision make it reasonable to impute knowledge and understanding of the provision on the indemnitee. Dresser Indus., Inc. v. Page Petro., Inc., 853 S.W.2d 505, 508, (Tex. 1993).

⁴ Id. at 511

The Court in *Dresser Indus., Inc. v. Page Petro., Inc.*, 853 S.W.2d 505, 511 (Tex. 1993), stated that a term or clause is conspicuous when it is printed in capital letters, or if it is larger or printed in a different color.

**Interpretation**

§ 127.001 of the Statute defines an “agreement pertaining to a well for oil, gas, or water or to a mine for a mineral” as: (1) a written or oral agreement or understanding concerning the rendering of well or mine services or (2) an agreement to perform a part of those services or an act collateral to those services, including furnishing or renting equipment, incidental transportation, or other goods and services furnished in connection with the services, but does not included a joint operating agreement.  

**Joint Operating Agreements**

It is important to note that joint operating agreements are excluded from the definition of an “agreement pertaining to a well for oil, gas, or water or to a mine for a mineral.”

§ 127.001 defines a "Joint operating agreement" as an agreement between or among holders of working interests or operating rights for the joint exploration, development, operation, or production of minerals.

**Why are Joint Operating Agreements Excluded?**

§ 127.002 of the Statute provides that joint operating agreements: (1) are commonly understood, accepted, and desired by the parties; (2) encourage mineral development; (3) are not against the public policy of this state; and (4) are enforceable unless those costs or losses are expressly excluded by written agreement.

**Interpretation continued**

§ 127.001 of the Statute provides that “well or mine service”: includes: (i) drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing, or transporting oil, brine water, fresh water, produced water, condensate, petroleum products, or other liquid commodities, or otherwise rendering services

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6 Tex. Civ. Prac. & Rem. Code Ann. § 127.001 provides that mutual indemnity obligation means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which the parties agree to indemnify each other and each other's contractors and their employees against loss, liability, or damages arising in connection with bodily injury, death, and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from the performance of the agreement. *Maxus Exploration Co. v. Moran Bros.*, 817 S.W.2d 50 (Tex. 1991).

7 Tex. Civ. Prac. & Rem. Code Ann. § 127.002(a)(b) provides that an inequity is fostered on certain contractors by the indemnity provisions in some agreements pertaining to wells for oil, gas, or water or to mines for other minerals; certain agreements that provide for indemnification of a negligent indemnitee are against the public policy of this state. *Maxus Exploration Co. v. Moran Bros.*, 817 S.W.2d 50, (Tex. 1991).
in connection with a well drilled to produce or dispose of oil, gas, other minerals or water; and (ii) designing, excavating, constructing, improving, or otherwise rendering services in connection with a mine shaft, drift, or other structure intended for use in exploring for or producing a mineral; but does not include:

**Interpretation - continued**

(i) purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fixed associated facilities; or (ii) construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities.

**Be Careful**

The Act appears broad in scope; however, it does not impact all indemnity agreements, only those that are specifically described therein. Subject to certain exceptions, the Act will apply to an indemnity agreement if, and only if, that indemnity agreement:

(1) is contained in, collateral to, or affects a particular type of agreement; (2) purports to indemnify a party against that party's own negligence; and (3) covers a particular type of loss or liability for damage.

**Excluded Agreements**

In summary, the following agreements are expressly excluded from the definition of an "agreement pertaining to a well for oil, gas, or water or to a mine for a mineral:"

• joint operating agreements,

• agreements covering services or activities that are not covered by the Statute's definition of "well or mine service," and

• agreements covering services or activities that are expressly excluded from the Statute's definition of "well or mine service."

**Statutory Exceptions**

§127.005 of the Statute provides that additional types of indemnity agreements will not be rendered void and unenforceable when:8

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8 Where oil company's agreement with a contractor provided for contractor's indemnity for injury or death arising from the oil company's negligence and required the contractor to carry liability insurance, the provision was excepted from the scope of Tex. Civ. Prac. & Rem. Code Ann. § 127.003 and was enforceable under Tex. Civ. Prac. & Rem. Code Ann. § 127.005. Atlantic Richfield Oil & Gas Co. v. McGuffin, 773 S.W.2d 711, 1989 (Tex. App. Corpus Christi 1989).
The parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified below.  

With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to provide in equal amounts to the other party as indemnitee.

With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed $500,000.00.

**Additional Statutory Exceptions**

§127.006 of the Statute provides that the following will not be rendered void and unenforceable:

- insurance contracts and
- a benefit conferred under the Texas workers' compensation statutes.

§127.007 of the Statute allows the surface estate owner the right to secure indemnity from a lessee, an operator, a contractor or other persons conducting mineral exploration or production operations on the owner's land.

**Additional states with Anti-Indemnity Statutes**

Louisiana, New Mexico and Wyoming also have statutes limiting the ability of a party to be indemnified against its own negligence under certain types of oil, gas or water agreements.

**Conclusion**

Drafting enforceable indemnity agreements under the Texas Oilfield Anti-Indemnity Statute can be difficult. Although the Statute is broadly worded, a number of courts have interpreted its language strictly. Therefore, a thorough understanding of the Statute is critical in order to ensure that the agreements are technically sound and comply with each section of the Statute.

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9 Exception of Texas Oilfield Anti-Indemnity Act (TOAIA), permitting mutual indemnity provisions if obligations are supported by, and limited to, "equal amounts" of insurance coverage provided by each party to the other, does not require complete identity of indemnitees. Civ Prac & Rem C § 127.005(a), (b). Mid-Continent Gas. Co. v. Swift Energy Co., 206 F.3d 487 (5th Cir. 2000).

10 The Fifth Circuit found the indemnity agreement invalid under § 127.005 because there was never any agreement to purchase equal amounts of insurance, as was required under the statute. Greene's Pressure Testing & Rentals, Inc. v. Flournoy Drilling Co., 113 F.3d 47 (5th Cir. 1997).