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Indemnity Provisions and The Express Negligence Doctrine



S. BRAD BROWN

Parties to a contract use indemnification agreements to transfer risk from one party to another. Indemnity provisions are typically found in contracts governing relationships where one party is performing services for another, such as in construction, manufacturing or maintenance. Such provisions are also normally found in leases where a premises owner, under a premises liability theory of recovery, can be held liable for actions of its tenant that may harm third parties entering the premises. Under most indemnity provisions, one party (the "indemnitor") agrees to indemnify the other party (the "indemnitee") from the

indemnity from the consequences of its own negligence express that intent in specific terms within the four corners of the agreement. Indemnification language that does not state the intent of the parties within the four corners of the contract is unenforceable as a matter of law.

In other words, the express negligence doctrine requires an indemnity clause to expressly state that it applies to "negligence" when referring to the conduct of the indemnitee to be effective as a release of such liability. A party has no obligation to indemnify another party for costs or expenses resulting from a claim made against the other party for its own negligence unless the indemnification provision complies with the express negligence test.

It is always critical to review indemnity provisions carefully. If you seek to have another party indemnify you for your own negligence, it is also important that you ensure that the indemnity provision meets the express negligence test. ★

The express negligence doctrine requires that a party seeking indemnity from the consequences of its own negligence express that intent in specific terms within the four corners of the agreement.

liabilities associated with the hazards of a particular business venture. By virtue of this agreement, the indemnitor assumes the liability of the indemnitee.

Some indemnity provisions go further by requiring that an indemnitor also indemnify the indemnitee for the indemnitee's own negligence. In order for this type of indemnification provision to be enforceable under Texas law, it must pass the express negligence test. The express negligence doctrine requires that a party seeking

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ANDREW D. GRAHAM

Assume the following: A small aircraft crashes in a national park, injuring its occupants. The occupants bring suit against the aircraft and engine manufacturers in state court asserting strict liability. The state court sits in a county with a pro-plaintiff reputation. What can the defendants do to try to level the playing field?

Potential litigants should be aware of a little-known doctrine that allows personal injury actions that arise from incidents occurring on a “federal enclave” to be properly removed to federal district court on the basis of federal question jurisdiction.

Personal injury actions, as state-law tort claims, are not normally litigated in federal court on the basis of federal question jurisdiction. However, a locale’s status as a “federal enclave” is sufficient to confer federal question jurisdiction upon a federal district court when a state-law tort claim is at issue.

Federal enclaves are provided for in Article I, § 8, cl. 17 of the United States Constitution. A “federal enclave” is defined as a portion of land over which the United States Government exercises exclusive federal legislative jurisdiction.

The first step in determining whether such property qualifies as a “federal enclave” is to determine whether the federal government owns such property.

The second step in determining whether a locale is a “federal enclave” is

to determine whether the state legislature in which the property is found has consented to federal government’s purchase of the land. The state legislature’s consent can be given both at the time of the federal government’s purchase of the land or afterwards, if the state later cedes its jurisdiction over the land. Without the consent of the state legislature in which the property is found, the property cannot be a “federal enclave,” even if the federal government owns the property.

The third step in determining whether land qualifies as a “federal enclave” is to determine if the property is of a type that the court might consider to be a federal enclave. While the language of Article I, § 8, cl. 17 suggests that a limited number of locales can be considered federal enclaves, federal case law has interpreted the language to be much broader than a literal reading suggests. Federal courts, for example, have held the following to be federal enclaves:

- War memorials;
- National Parks;
- Dams;
- Lighthouses;
- Offshore platforms; and
- Oil production structures.

In sum, potential litigants should be aware of the possibility that if a portion of land qualifies as a “federal enclave,” an action based solely upon state-law tort claims may be properly removed to federal court on the basis of federal question jurisdiction. ★

Is Arbitration Appropriate in Your Case?



JIM McCOWN

Alternative dispute resolution (ADR) continues to gain popularity, including binding arbitrations. Many companies now insist on clauses, as a standard contract provision, that require binding arbitration in the event of a dispute, particularly in consumer contracts. Arbitration clauses are widely enforceable, both under the Federal Arbitration Act [9 U.S.C. § 1, et seq.] and various state law acts, such as the Texas Arbitration Act. [Tex. Civ. Prac. & Rem. Code § 171.001, et seq.] While arbitrations can generally save

attorneys’ fees and expenses in comparison to traditional court resolutions, arbitration is not always preferable to litigation.

One problem with arbitration is the lack of appellate review of arbitration proceedings and decisions. Arbitrators typically have wide authority to render procedural and substantive decisions in a dispute. These decisions are not appealable per se. Parties do not typically have any remedy for preliminary decisions, such as adverse discovery rulings, prior to the entry of a final and binding arbitration decision. As a result, companies can be compelled in arbitration to produce mountains of potentially undiscoverable and invasive information, without any effective remedy to appeal or limit that discovery.

Likewise, parties have only a limited remedy to appeal or contest a final arbitration award. The only remedy a party has after receiving an adverse and final arbitration decision is a proceeding in court to attempt to set aside the entire award. In most states, including Texas, it is extremely difficult to set aside an arbitration award because a showing of fraud or abuse of authority is typically required to set aside an award.

A by-product of the lack of appellate review is the absence of a threat of

appeal to the arbitrators to ensure that the arbitrators follow appropriate precedent in rendering their decisions. Thus, an arbitrator who is not familiar with the appropriate legal authorities, or worse, wholly refuses to follow those authorities, cannot be reversed or compelled to follow the law, absent evidence of actual fraud.

In addition, there is generally no summary judgment procedure in arbitrations to dismiss cases which have no legal merit, or cases in which there are no factual issues in dispute. In these circumstances, a summary judgment motion may quickly and inexpensively resolve a case prior to trial. In arbitration, a full-blown arbitration proceeding would typically be necessary, including discovery, thus unnecessarily increasing time and expense.

Moreover, in some arbitrations, depositions are not as broad as in a judicial proceeding (which is advantageous when attempting to reduce discovery costs). The absence of such depositions, however, may be an impediment towards a negotiated settlement. If the parties are not fully aware of all of the facts necessary to the case prior to the actual arbitration, the chances of settlement prior to the arbitration hearing are likewise reduced.

Lastly, the arbitrator fees are often initially overlooked when arbitration clauses are agreed to in a contract. If these fees are overlooked, the parties can be in for a rude awakening once an arbitration commences and they receive a bill for those fees. Arbitrators’ fees are generally expensive, and in an extended arbitration, could approach hundreds of thousands of dollars. In some cases, these arbitrator costs can offset any savings and attorneys’ fees in an arbitration proceeding.

In short, arbitration can be a quick and inexpensive alternative to court litigation, but it is not appropriate in all cases. All of the foregoing issues should be discussed before agreeing to an arbitration provision in a contract. ★

As a result, companies can be compelled in arbitration to produce mountains of potentially undiscoverable and invasive information, without any effective remedy to appeal or limit that discovery.





KIMBERLY VAN AMBURG

Prior to 1994, punitive damages were generally insurable under Texas law for grossly negligent conduct, which had an intent threshold that was notably lower than that of intentional torts. However, the standard for punitive damages was substantially changed as the result of the Texas Supreme Court's decision in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). The Court in *Moriel*, noting that punitive damages are meant to serve a public purpose of punishment and deterrence, emphasized

that this public policy is advanced by ensuring that a defendant who deserves to be punished "in fact receive[s] an appropriate level of punishment." Thus, it follows that if a defendant has insurance coverage for wrongful conduct that is egregious enough to warrant punitive damages, the punishment and deterrence policies will not be furthered.

Further, the intent threshold for recovering punitive damages was heightened in *Moriel*, and the *Moriel* standard was codified in the Texas Civil Practice and Remedies Code. Now, in order to be entitled to an award of punitive damages, the plaintiff must show fraud or malice, with malice defined as either: (a) specific intent to cause substantial injury; or (b) an act or omission which viewed objectively and subjectively, involves an extreme degree of risk of harm. Because the intent element is high under this standard, a plaintiff who meets the standard may also plead or prove his way into a policy exclusion for claims arising out of malicious or intentional conduct.

After *Moriel*, several Texas courts of appeals held that punitive damages are not insurable in the context of uninsured/underinsured motorist claims. See, e.g., *Milligan v. State Farm. Mut. Auto. Ins. Co.*, 940 S.W.2d 228 (Tex. App. – Houston [14th Dist.] 1997, writ denied); *Vanderlinden v. USAA Prop. & Cas. Ins. Co.*, 885 S.W.2d 239 (Tex. App. – Texarkana 1994, writ denied). In addition, one federal district court has held that post-*Moriel*, punitive damages are not insurable under Texas law. See *Hartford Cas. Ins. Co. v. Powell*, 19 F. Supp.2d 678 (N.D. Tex. 1998).

However, the Courts to recently consider the issue have moved in the opposite direction and have held that punitive damages are insurable. See *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 2003 WL 21475423 (Tex. App. – Fort Worth, June 26, 2003) (policy provided coverage for punitive damages arising from gross negligence); *Fairfield Ins. Co. v. Stephens Martin Paving, L.P. et al.*, 2003 WL 22005877 (N.D. Tex. 1998). That said, the holdings in these cases may not end the debate. In the *Westchester* case, which was relied upon heavily by the federal district court in the *Fairfield* case, Admiral's motion for rehearing was granted, but the Court has not yet issued a ruling following the rehearing. The *Fairfield* case has been appealed (by Fairfield), *Fairfield Ins. Co. v. Stephens Martin Paving, L.P. et al.*, No. 03-10982, in the United States Court of Appeals for the Fifth Circuit. Fairfield's brief was due December 30, 2003.

Accordingly, the debate over whether punitive damages are insurable in Texas is likely to continue into the near future.



The Current Trend in Deep Vein Thrombosis Lawsuits



KATHERINE A. STATON

Deep Vein Thrombosis (DVT) is a condition caused by a blood clot (thrombosis) that develops deep in a vein, usually in the leg. A DVT occurring below the knee commonly does not cause complications and may only need to be monitored. However, when a clot forms above the knee, there is a risk that it will break away and travel to the lung, or in rare instances, the brain. DVTs are more likely to occur in people over 40 who are obese or who have already had a DVT. Additionally, other factors that

increase the likelihood of DVT are prolonged rest, major injury or paralysis, surgery, cancer and related treatment, pregnancy and childbirth, hormone replacement therapy, circulatory or heart problems, and the taking of a contraceptive pill. There are studies underway to determine whether DVT is more likely to occur on long-range flights due to lack of activity or whether DVT from immobility occurring in other situations, such as is common during long car trips, bus trips, train trips, sitting in movie theatres, or simply sitting at one's desk can as readily occur.

Within the last few years, we have seen an increase of DVT claims related to air travel. These claims tend to be governed by the Warsaw Convention due to international travel involving longer flights. Plaintiffs asserting claims against aircraft manufacturers, seat designers and air carriers related to an improper seat design causing DVT have summarily failed since these claims do not constitute an "accident" under the Warsaw Convention. The more viable claim pertaining to a DVT Warsaw claim appears to pertain to an air carrier's alleged failure to warn of a

known condition (that being DVT related to long flights) and to educate the passengers that they may be exposed to DVT during a long-range flight. Plaintiffs argue that it is a customary procedure in the airline industry to warn of the DVT risk, and that the failure to warn of DVT constitutes an unexpected and unusual operation of an aircraft which is considered an "accident" under the Warsaw Convention. Two United States District Courts in Texas and California (Northern District) have allowed DVT Warsaw claims to move forward based on this failure to warn theory constituting an "accident" under the Warsaw Convention. These two courts, however, have cited as support to other Warsaw cases which do not pertain to DVT but involve passengers suffering from a heart condition and asthma wherein crew failure to act in addressing the medical condition was held to constitute an "accident" under the Warsaw Convention.

Other United States District Courts in Alaska, Maryland and California (Central District) have held that alleged failure to warn DVT claims are not "accidents" under the Warsaw

Convention. Additionally, courts in Australia, England, Canada and Germany have held that there is no cause of action under the Warsaw Convention for claims related to DVT injuries occurring on long-range flights.

It will be interesting to see how cases currently on appeal will be viewed by the appellate courts as to whether a failure to warn of the danger of DVT on long-range flights will constitute an "accident" under the Warsaw Convention, and whether there will be an industry-wide warning mandated for international travel informing passengers of the risk of DVT.



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Upcoming Aviation Events

February 26-27, 2004

SMU Journal of Air Law & Commerce

SMU Air Law Symposium
Hotel Intercontinental • Dallas, Texas
www.smu.edu/lra/ALS/index.htm

March 11-13, 2004

Women in Aviation

15th Annual International Women in Aviation Conference • Reno, Nevada
www.wai.org/conference/2004_conf_index.cfm

March 15-17, 2004

HELI-EXPO 2004

Las Vegas Convention Center and Hilton Hotel • Las Vegas, Nevada
www.heliexpo.com

April 19, 2004

American Bar Association

Section of Public Utility, Communications and Transportation Law
Annual Section Spring Meeting • Washington, D.C.
www.abanet.org/pubutil/home.html

May 1-4, 2004

AIA's 28th Annual Educational Conference and Membership Meeting

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