Intersection of Indemnity and Insurance: How to Redeem Contractual Risk Management

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Introduction

The purpose of this paper is, first, to clarify the contours of Texas indemnity law. It briefly describes the history of common law indemnity and contribution. It then analyzes contractual indemnity post-*Ethyl*, outlines pertinent anti-indemnity statutes, and describes statutory indemnity for innocent retailers, a notable exception to the otherwise sparse indemnity landscape.

Second, this paper sets forth ways to breach the gaps left by Texas indemnity law in managing our clients' risks. Primarily, lawyers can focus on additional insured provisions and the provision of worker's compensation insurance. Lawyers can also eliminate boiler plate language in preference to duty to defend provisions that, at a minimum, will provide for the costs of defense if the putative indemnitee and indemnitor are both sued for negligence.

Part I: Indemnity

I. Common law indemnity and contribution

Under the common law, wrongdoers generally had no cause of action amongst each other to recover portions of judgments that they paid but did not cause.[1] This was consistent with the common law preclusion of actions if the plaintiff's negligence contributed to his injury. It was considered against public policy to allow a wrongdoer a cause of action based on his wrong.[2]

Under the one-satisfaction principle, however, some courts of appeals allowed a non-settling defendant credit for a settlement that the plaintiff entered into with a previous defendant.[3] In 1917, the Texas legislature enacted art. 2121, which statutorily allowed tortfeasors to sue other tortfeasors for apportionment of damages. Article 2121 did not, however, address the rights of non-settling defendants against settling defendants and did not address contributing negligence by a plaintiff.

In 1973, the Texas legislature enacted article 2121a, which abrogated the common law absolute bar to recovery if a plaintiff was also negligent. Article 2121a provided for apportionment of responsibility by all parties and specified what rights non-settling defendants had based on prior settlements. Texas's current contribution and proportionate responsibility statutes are found in chapters 32 and 33 of the Texas Civil Practice and Remedies Code.

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[1] *Cypress Creek Utility Serv. Co., Inc. v. Muller*, 640 S.W.2d 860, 861-62 (Tex. 1982) (citing *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (1799)).

[2] *Id.*

[3] *Cypress Creek Utility Serv. Co. v. Muller*, 640 S.W.2d 860, 862-63 (Tex. 1982) (discussing *Bradshaw v. Baylor Univ.*, 84 S.W.2d 703 (Tex. 1935)).

Despite these changes in statutory contribution, up until 1980, common law indemnity among tortfeasors remained. Although joint tortfeasors who did not violate any duties as between each other would not be entitled to indemnity, common law indemnity did arise when there was a violation of a duty that gave rise to damages to a third party. *B&B Auto Supply v. Central Freight Lines, Inc*., 603 S.W.2d 814, 816 (Tex. 1980). Unlike contribution, however, the common law right to indemnity from another tortfeasor was for the *entire* amount paid to the underlying plaintiff. *Id.*

In *B&B Auto Supply*, the Texas Supreme Court determined that the all-or-nothing approach in common law indemnity among tortfeasors was inconsistent with the statutory contribution framework. Accordingly, it explicitly limited common law indemnity among tortfeasors to that which arises from purely vicarious liability.

Attorneys' fees were recoverable under common law indemnity but required a judicial determination of the indemnitor's liability. *Humana Hosp. v. Amer. Medical Sys.*, 785 S.W.2d 144 (Tex. 1990).

II. Contractual Indemnity

B&B Auto Supply left parties free to contract for indemnity. Prior to *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), Texas applied a "clear and unequivocal" test in determining whether an indemnitor had a duty to indemnify an indemnitee for the consequences of its own negligence, such as in a comparative negligence situation.[4]

There were three exceptions to the clear and unequivocal test that were sometimes relied upon: (1) agreements in which the indemnitor undertakes to indemnify the indemnitee against liability for damages caused by defects in certain premises or from maintenance or operation of a specified instrumentality[5]; (2) agreements made pursuant to situations where the indemnitor has complete supervision over the property and employees of the indemnitee in connection with performance of the contract[6]; and (3) agreements in which the indemnitor agrees to indemnify the indemnitee for all injuries sustained by the indemnitor's employees.[7]

Courts strictly construed indemnity provisions, but clarity eluded the indemnity jurisprudence. As noted by the Texas Supreme Court in *Ethyl*, "[t]he intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor." The result was a "plethora" of lawsuits interpreting the ambiguous provisions.

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[4] *Sira & Payne, Inc. v. Wallace & Riddle,* 484 S.W.2d 559 (Tex. 1972).

[5] *Mitchell's, Inc. v. Friedman*, 303 S.W.2d 775, 779 (Tex. 1957).

[6] *Spence & Howe Construction Co. v. Gulf Oil Corp*., 365 S.W.2d 631, 637–38 (Tex. 1963).

[7] *James Stewart & Co. v. Mobley,* 282 S.W.2d 290 (Tex.App.—Dallas 1955, writ ref'd).

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