

## INDEMNITY CLAUSES: FAIR NOTICE OF NEGLIGENT ACTS

What if you are about to enter into an agreement to buy a house, or buy a business, or hire a contractor, and the other side wants you to indemnify them against any negligent acts that may be committed by them in the course of their performance?

Texas recognizes very specific requirements that must be met if the indemnity provision seeks to protect one party from its own negligence in advance of the occurrence of an alleged negligent act. If the indemnity provision provides that one person (the indemnitor) shall indemnify another party (the indemnitee) from its own negligence in advance of such alleged conduct, the indemnity agreements must provide certain "fair notice" to the indemnitor. See *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 507-508 (Tex. 1993) (emphasis added). This "fair notice" includes adherence to both (1) the express negligence doctrine and (2) the conspicuousness requirements. See *Id.*

The first fair notice requirement mandates that the indemnity language be sufficiently clear as to the parties' intent. This requirement, known as the express negligence doctrine, provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms." See *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). Under the express negligence doctrine, "the intent of the parties must be specifically stated within the four corners of the contract." See *Id.* (emphasis added).

The second fair notice requirement makes sure the indemnity provision does not get overlooked by the indemnifying party. The "conspicuousness requirement," as it is known, ensures "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." *Dresser*, 853 S.W.2d at 508. Texas courts have stated that "when a reasonable person against whom a clause is to operate ought to have noticed it, the clause is conspicuous." *Id.* at 511. On the other hand, an indemnity provision, which is "no more visible than any other provision in an agreement," and which "does not appear to be designed to draw the attention of a reasonable person against whom the clause is to operate," is not conspicuous. See *Douglas Cablevision IV, Ltd. v. Southwestern Electric Power*, 992 S.W.2d 503, 509 (Tex.App.-Texarkana 1998, pet. denied).

So the next time you are negotiating a contract that contemplates indemnifying a party's negligent acts, or you are involved in litigation with an indemnity provision providing for the same, let an experienced attorney provide you with advice on the intricate nuances present in the current state of the law.

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### AREAS OF PRACTICE

Bankruptcy; Business Law; Commercial Litigation; Healthcare; Probate & Estate Administration; Real Estate