

**Safety & Risk Management: A Lawyer’s Perspective**

Andrea M. Palmer, JD | Director of Coverage and Litigation

apalmer@higginbotham.net

**Part I: Safety, Risk Management, and Contracts**

1. **Standard Types of Indemnity**
* Limited-form

“Party A indemnifies Party B, but only to the extent of Party A’s negligence.”

* Intermediate-form

**“Party A indemnifies Party B for the entire loss arising from the Agreement, even if Party A is only partially responsible.”**

* Broad-form

**“Party A indemnifies Party B for any loss arising from the Agreement, even if the loss is caused by Party B’s own negligence.”**

1. **Anti-Indemnification Statutes (Texas)**

Construction: Texas Anti-Indemnity Act (“TAIA”; Tex. Ins. Code § 151)

Under TAIA, commercial construction contracts not part of a Consolidated Insurance Program in Texas cannot require indemnity agreements with broad-form or intermediate-form indemnities, except for action-over claims. An action-over claim is when an employee of a downstream contractor attempts to sue the upstream project owner or contractor for a workplace injury, arguing that the injury occurred because of the upstream party’s negligence.

Oil & Gas: Texas Oilfield Anti-Indemnity Act (“TOAIA”; Civ. Prac. & Rem. Code § 127)

Under TOAIA, intermediate and broad-form indemnification provisions are void as against public policy, unless the indemnification provisions are mutual, or “knock-for-knock” provisions, and each parties’ indemnity obligation is limited to the extent of the coverage and dollar limits of insurance each party (as indemnitor) has agreed to obtain to benefit the other party (as indemnitee). TOAIA only applies to contracts concerning the rendering of “well or mine services”, including “those services or an act collateral to those services.”

Transportation: Transportation Anti-Indemnity Act (Tex. Trans. Code § 623.0155)

Under this Act, a contract cannot require a motor carrier to indemnify claims caused by another person’s acts or negligence as a condition to: (1) transport property for compensation or hire; (2) enter property for the purpose of loading, unloading, or transporting property; or (3) services incidental to activities in (1) or (2) (e.g. storage). There are no exceptions. A “motor carrier” is as “a common carrier, specialized carrier, or contract carrier that transports property for hire.” The term does not include a person who transports property as an incidental activity of a non-transportation business activity regardless of whether the person imposes a separate charge for transportation. The Act does not apply to middlemen who contract for transport but do not do the transportation.

1. **Things to Look for in Contracts:**
* How the parties are identified:
	+ “Contractor/Owner”
	+ “General Contractor/Subcontractor”
	+ “Grantor/Grantee”
* What law applies:
	+ Look for: “Choice of law” “Choice of venue” “Applicable law”
	+ If it’s not Texas, assume it may not operate the way you anticipate
* Liability-shifting provisions:
	+ Indemnification
	+ Waiver of liability/damages
	+ Responsibilities (repair, rebuilding, equipment)
1. **Coverage Caselaw Snippets & the Magic Words**

“The insured's failure to notify the insurer of a suit against her does not relieve the insurer from liability for the underlying judgment unless the lack of notice prejudices the insurer.”

*Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170 (Tex. 1995)

“An insurer's duty to defend is determined by the allegations in the pleadings and the language of the insurance policy. This is known as the “eight corners” rule.

*St. Paul Ins. Co. v. Texas Dept. of Transp.*, 999 S.W.2d 881 (Tex. App.—Austin 1999)

“Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy. Stated differently, in case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in the insured's favor. In reviewing the underlying pleadings, the court must focus on the factual allegations that show the origin of the damages rather than on the legal theories alleged.”

*National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139 (Tex.1997)

Magic Words: “At this time we have serious concerns regarding the good faith of your coverage review. Your review does not take address well-established Texas law. We ask that you immediately engage your coverage counsel for an opinion, for the following reasons.”

1. **Definition of an “Insured Contract”**

In order for an insurance policy to respond to allegations that depend on contractual liability, the contract must meet the definition of an “insured contract”. This is usually found in the exclusions:

**Contractual Liability Exclusion**

We will not pay for damages based upon or arising out of the liability of others assumed by an **Insured** under any contract or agreement. This exclusion does not apply to liability for damages:

1. Assumed in a contract or agreement that is an **Insured Contract**, provided that the actual or alleged act, error, or omission occurs subsequent to the execution of the contract or agreement; or
2. That the **Insured** would have had in the absence of the contract or agreement.

**Insured Contract** means that part of any contract or agreement whereby the **Named Insured** assumes the liability of another party to pay for damages because of **bodily injury**, **property damage**, or an act, error, or omission in the performance of work or services.

There are many variations on this form. Some exclude leases. Some require the contract to be scheduled with the carrier in order to meet the definition. Provision (b) is simply a limited-form indemnification; it just tracks tort law.

**Part II: Safety, Risk Management, and Litigation**

1. **A high-level view of the litigation process**
* Pre-suit investigation
* Suit filed
* Discovery
* Motion practice
* Trial/Settlement
* Appeal
1. **Litigation use of post-accident reports, actions, and statements**
* Depositions, inspections, interviews, expert testimony
1. **Things to keep in mind**
* Be mindful of what you put in writing, send in email, or record. “Anything you say can and will be used against [your client].”
* Attorney-client privilege applies to communications your [client’s] attorney.
* Litigation privilege applies to communications made in “anticipation of litigation.”
* Trade-secrets privilege: “A person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice.” Tex. R. Evid. 507