

# **CLARIFYING INDEMNIFICATION**

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# PRESENTER

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General Counsel and Compliance Officer

Born and raised in Detroit, Michigan

Graduate of University of Texas at Austin

Graduate of U of H Law Center

Practicing since 1993

Tadano America Corporation since 2019

In-House Positions with Westlake Chemical,  
Chicago Bridge & Iron Company (n/k/a  
McDermott), El Paso Energy Corporation (n/k/a  
Kinder Morgan)



# AGENDA

## INDEMNIFICATION

What is it?

What is the purpose?

How does it work for you? How does it work against you?

What are the mechanics?

Types of indemnification

Break down the “Legalese”

Q & A



# WHAT IS IT?

**Black's Law Dictionary:** an undertaking whereby one agrees to indemnify another upon the occurrence of an anticipated loss; a contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible

**Merriam-Webster:** the act of indemnifying, *i.e.* to secure against hurt, loss, or damage; to make compensation for incurred hurt, loss, or damage

Generally, a provision in a contract that allocates risk and expense associated with either party's breach, default, or misconduct to the responsible party

# WHAT IS THE PURPOSE?

To place the responsibility for various performance risks with the party best suited to control that outcome or with the party who is willing to accept the risk(s)

Goal: limit risks and exposure to what you can control





# RISK MITIGATION TOOLS

- Force Majeure Clause
- Limitations on Liability
- Termination Rights
- Specific Contractual Remedies, e.g. dispute resolution, liquidated damages, specific performance
- **INSURANCE!!!!**



# WHY DO YOU CARE?

1999: \$99M **settlement** in Milwaukee sports stadium crane collapse case that caused 3 fatalities

2008: \$96M **settlement** in NYC case involving crane collapse causing 4 fatalities

2018: \$44.37M **jury verdict** against B&G in Beaumont refinery case

2019: \$150M **jury verdict** related to the Seattle sports stadium crane collapse

2023: \$860M **jury verdict** against Greystar in Dallas apartment complex crane collapse



# WHAT ARE THE MECHANICS?

- (1) Negotiate a workable provision to protect your interests, i.e. stand behind your role and “cover” only what you can control
- (2) Expect claims to come in “shotgun” fashion
- (3) Analyze the facts and circumstances based on information available and see if your negotiated indemnity provision triggers an indemnity obligation for you or for others
- (4) If appropriate, make a demand for indemnity:

**SAMPLE: “In accordance with Sec. XYZ of the Such&Such agreement by and between You and Us, please accept this letter as a formal request for You to accept the defense of and hold Us harmless from and against the claim made by What’s-His-Name regarding the Thing-a-mah-jig...”**



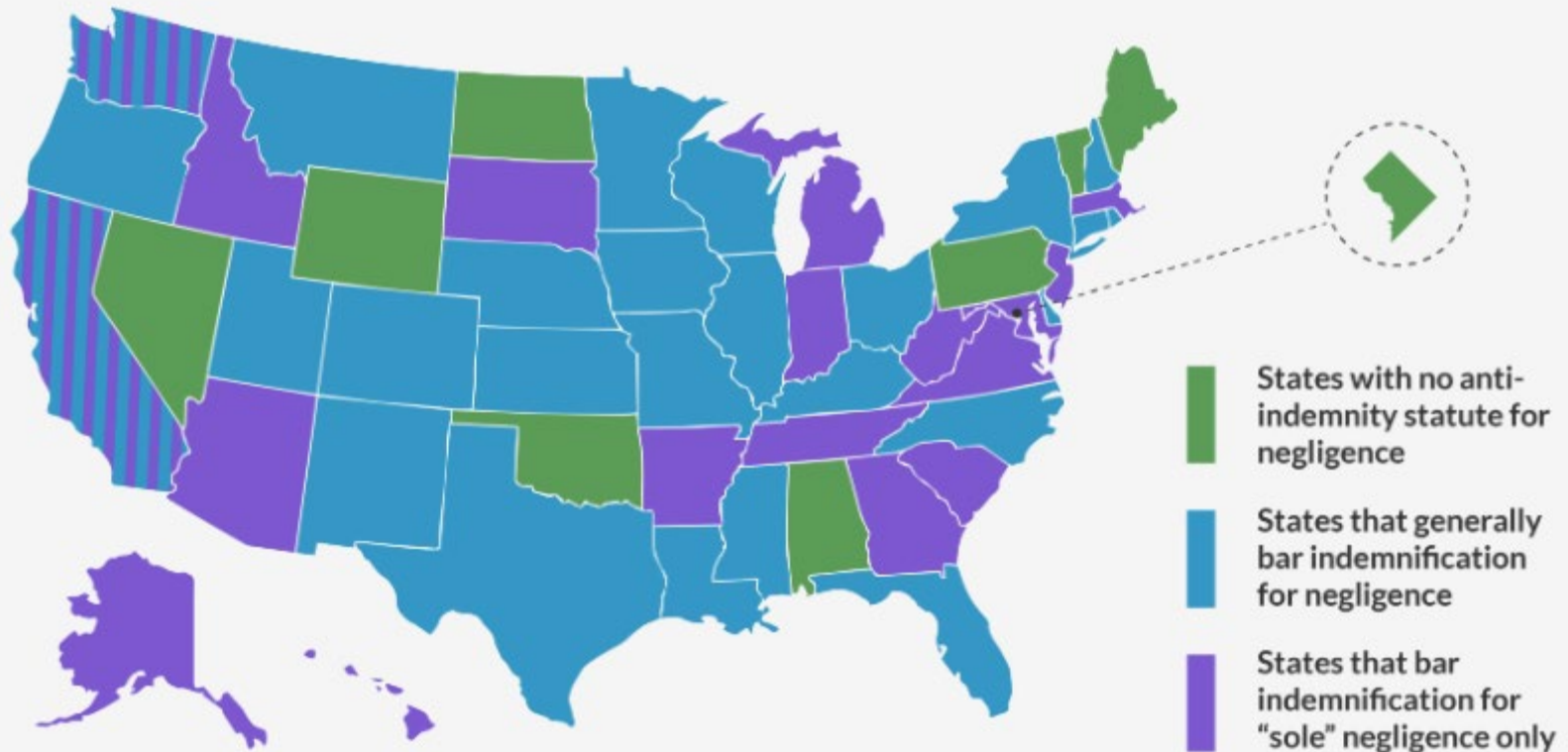


# TYPES OF INDEMNITY CLAUSES

- “Take it or leave it”
- Mutual Indemnity
- One Way/Unilateral
- “Knock for Knock”



# State Anti-Indemnity Statutes



# HOW DOES IT WORK FOR YOU? AGAINST YOU?

REMEMBER THE PURPOSE:

*To place the responsibility for the various performance risks with the party best suited to control that outcome*



# EXAMPLE: DRESSER



Manufacturer	Design & Manufacture	?
Retailer	Warnings & Instructions	?
User/Buyer	Furnishing the Room	?

**CAUSATION**



# EXAMPLE: TOASTER



CAUSATION

Manufacturer	Design & Manufacture	?
Retailer	Warnings & Instruction	?
User/Buyer	Making Breakfast	?

# EXAMPLE: NOISE CANCELING MUFFS



CAUSATION

Manufacturer	Workmanship	?
Employer	Provide PPE	?
Employee	Work	?
Bank	Loan for PPE	?

# STANDARD CLAUSE (simple)

The Tenant hereby indemnifies and holds Landlord harmless from and against any and all claims, demands, and expenses arising from Tenant's use of the Leased Premises or from any act permitted, or any omission to act, in or about the Leased Premises or the Property by the Tenant or its agents, employees, contractors, invitees or those for whom it is responsible...

# STANDARD CLAUSE

Each Party (the "Indemnifying Party") will indemnify, defend, and hold the other Party, its officers, directors, employees, and/or shareholders, harmless from and against any and all damages (whether ordinary, direct, indirect, incidental, special, consequential, or exemplary), judgments, liabilities, fines, penalties, losses, claims, actions, demands, lawsuits, costs, and expenses including, without limitation, reasonable attorney's fees, which arise out of or relate to any material breach of this Agreement by the Indemnifying Party or its employees or agents, or from any acts or omissions of negligence, willful misconduct, or fraud of the Indemnifying Party or its employees or agents, including, but not limited to, third party claims and claims for property damage or personal injury to the other Party's Personnel ("Personnel" defined as such Party's employees, servants and agents, independent contractors and subcontractors). The Indemnifying Party's liability under this Section shall be reduced proportionally to the extent that any act or omission of the other Party or its employees or agents contributed to such liability. The Indemnifying Party's obligations hereunder are subject to being provided with prompt written notice of the event giving rise to an indemnity obligation, providing reasonable cooperation and assistance in the defense or settlement of any claim, and granting the Indemnifying Party control over the defense and settlement of the same.





# STANDARD CLAUSE

Each Party (the "Indemnifying Party")

will indemnify, defend, and hold

the other Party, its officers, directors, employees, and/or shareholders,

harmless from and against

any and all **damages** (whether ordinary, direct, indirect, incidental, special, consequential, or exemplary), judgments, liabilities, fines, penalties, losses, claims, actions, demands, lawsuits, costs, and expenses including, without limitation, reasonable attorney's fees,

which arise out of or relate to any material breach of this Agreement by the Indemnifying Party or its employees or agents, or from any acts or omissions of negligence, willful misconduct, or fraud of the Indemnifying Party or its employees or agents,

including, but not limited to, third party claims and claims for property damage or personal injury to the other Party's Personnel ("Personnel" defined as such Party's employees, servants and agents, independent contractors and subcontractors).

The Indemnifying Party's liability under this Section shall be reduced proportionally to the extent that any act or omission of the other Party or its employees or agents contributed to such liability. The Indemnifying Party's obligations hereunder are subject to being provided with prompt written notice of the event giving rise to an indemnity obligation, providing reasonable cooperation and assistance in the defense or settlement of any claim, and granting the Indemnifying Party control over the defense and settlement of the same.



# TANDEM LIFT

A tandem lift is required at the Wile E. Coyote Acme Oil Plant and Refinery. The plant has a standby crane that was purchased at auction 5 years ago. The standby crane (the other crane in your tandem) visually appears to be “seaworthy” but is not regularly used and may be a bit small for this lift. The Contractor, facing time pressure from Mr. Coyote refuses to wait for another, more suitable crane to become available, exclaiming “that’s what the standby crane is for!!!” Because this is an example in this presentation, you can probably guess that during the lift, the boom on the standby crane fails, dropping part of the load onto a nearby pipe rack, cascading pipe into a personnel transport van that was dropping off contract workers. The five (5) injured contract workers and the van driver file suit.

Distributor

General Contractor

Insurer

Lender/Financier

Manufacturer

Operator

Crane Owner

Property Owner

Rental Company

Rigging and Roping

Service and Repair

Trainers

Transport

Used and Auction

# TANDEM LIFT, PART 2

Same tandem lift at the Acme Oil Plant and Refinery. This time, there is no standby crane on site and you are responsible for acquiring the services of the second crane to work in tandem with your crane. On the scheduled day of the lift, you were present and ready but the party you contracted to provide the second crane is unable to get the crane delivered to the site. Acme's production is temporarily shut down and Acme is subject to liquidated damages. Acme sues you for delaying production and seeks to recover the liquidated damages it paid to its customer. What do you do?

Distributor

General Contractor

Insurer

Lender/Financier

Manufacturer

Operator

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Property Owner

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# NO BRAKES

A mobile crane is performing a lift at a construction site. A new security guard, who has not received site orientation, fails to engage the parking brake on his security golf cart. The cart rolls down a hill and runs into a light pole. The light pole falls and comes into contact with a suspended load. The load teeters, sways, and eventually falls, the debris injuring two (2) nearby contract workers. The injured workers file third party suits.

Distributor
General Contractor
Insurer
Lender/Financier
Manufacturer
Operator
Crane Owner
Property Owner
Rental Company
Rigging and Roping
Service and Repair
Trainers
Transport
Used and Auction



# RELEASE

A mobile crane is onsite at a refinery to perform a lift. Scaffolding partially obstructs visibility of piping that is near the lift zone. The scaffolding contractor cannot dismantle the scaffold until it is inspected, which will take between 24-48 hours. The General Contractor makes the call to proceed with the lift right away. With no spotters assigned, the load comes into contact with the unseen piping, releasing gas, causing the plant to shutdown and causing the local authorities to issue a shelter-in-place during prime lunchtime hours. A local restaurant sues for lost business, and the refinery owner sues to recover fines and penalties and emergency response costs.

Distributor  
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Manufacturer  
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Trainers  
Transport  
Used and Au

# IN CONCLUSION...

REMEMBER THE PURPOSE:

*To place the responsibility for the various performance risks with the party best suited to control that outcome*

**QUESTIONS?**