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June 25, 2018

Construction Law Practice Tip: *Claybar v. Samson Exploration* Is the Texas Indemnity Case to Watch

By Pierre Grosdidier

The law in Texas is that "[g]enerally, indemnity agreements do not apply to claims between the parties; rather, they apply to claims made by others who are not parties to the agreement.[1] In *Claybar*, the appellant (plaintiff below) argued compellingly, if not persuasively, against this "no first party indemnity" rule, which several Texas appellate courts have followed for decades. Claybar lost in the Beaumont Court of Appeals and filed a petition for review with the Texas Supreme Court. Perhaps confident of the Court's likely disposition of Claybar's petition, Samson waived its response. But the Supreme Court might have other ideas. On June 15, 2018, it requested that Samson file a response to Claybar's petition. *Claybar* is the Texas indemnity case to watch in the Texas Supreme Court.

Claybar leased parts of his land to Samson for oil and gas operations. Samson's subcontractor, Kinder Morgan Treating, LP ("KMT"), operated an amine treating plant on the lease and allegedly spilled chemicals that contaminated the soil. Claybar asserted that it had to sue KMT in negligence to hold it accountable for the spill and resulting ground pollution, accruing in the process nearly $1 million in legal expenses.[2] Claybar eventually settled with KMT for its property damages and then sought indemnity from Samson for its legal expenses. The Claybar-Samson contract contained the following indemnity provision:

> [Samson] shall indemnify [Claybar] against any claims, damages, demands, liabilities, and costs (including reasonable attorneys' fees) to the extent arising from or related to the negligence or misconduct of [Samson] or its employees, agents, contractors, or invitees in the course of their exercise of rights granted by this instrument, but not to the extent caused by [Claybar], or its employees, agents, contractors, or invitees.[3]

Claybar and Samson disagreed on whether this language covered Claybar's offensive legal expenses. Claybar argued, *inter alia*, that the indemnity provision's "plain language" gave him the right to recover. Samson counter-argued that the "provision only serve[d] to indemnify Claybar against claims from third parties," which was not the case here.[4] For example, under Samson's reasoning, the provision would have applied to claims asserted against Claybar by a neighbor afflicted by the chemical spill. By agreement, the two parties filed cross-motions for summary judgment in the trial court. The judge ruled for Samson and against Claybar, holding that the indemnity provision did not apply to Claybar's claims against KMT and Samson. On appeal, and now in its petition to the Supreme Court, Claybar argued three main points.

Claybar first argued that, under the rules of contract interpretation applicable here, "[i]t takes no stretch of imagination to conclude" that the contracting parties intended to shift all the risks of oil and gas operations to Samson.[5] The court's decision to impose this risk on Claybar, the latter argued, was unsupported and defied "common sense."[6] It also "undermines a vital component of the Texas economy" because it discourages land owners from opening their land to production.[7] But as sensible as this argument seems, *caveat emptor* arguably applies here, as Claybar admitted that he executed Samson's contract "without the advice of counsel."[8] An attorney familiar with the relevant case law might have amended the indemnity provision to expressly cover claims for injury to Claybar's property by Samson and its contractors.[9]

Claybar's next argument attacked the very foundation of the "no first party indemnity" rule.[10] Claybar argued that this rule, allegedly often just *dicta*, "was invented out of thin air and lacks any principled basis in law."[11]

According to Claybar, the rule can be traced back to a "stray remark" in the case of *Whitson v. Goodbodys, Inc.*[12] *Whitson* merely held that the express negligence doctrine did not apply to release agreements. In explaining the difference between a release and an indemnity provision, the *Whitson* court noted "essentially in passing" that, under the latter, "one party may be called upon to compensate an injured third party for tortious conduct over which he had no control."[13]

Claybar further argued that, on the basis of *Whitson*'s remark, the Waco Court of Appeals next held in *Dresser Indus., Inc. v. Page Petroleum, Inc.* ("*Dresser I*") that "'a contract of indemnity does not relate to liability claims between the parties to the agreement but, of necessity, obligates the indemnitor to protect the indemnitee against liability claims of persons not a party to the agreement.'"[14] "Nothing more" than the statements in these two cases, Claybar concluded, ultimately supports the "no first party indemnity" rule.[15] The Supreme Court eventually decided the case in *Dresser II* on conspicuousness grounds, reversing *Whiston* in the process. Claybar closed his second argument by pointing out that the Supreme Court did not repeat *Dresser I*'s "no first party indemnity" language in *Dresser II*, and instead invoked Black's Law Dictionary's definition of an indemnity provision as

> [a] collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person.[16]

Claybar's inference is that this broad definition, albeit *dicta* in *Dresser II*, does not exclude first party indemnification.

Claybar's second argument is possibly his better one. The key cases that have upheld the "no first party indemnity" rule all point back to *Dresser I* and, therefore, *Whitson*.[17] *Whitson*'s "stray remark" does not exclude first party indemnification. Moreover, the remark arose in the context of a discussion regarding the indemnification of a party for the party's own negligence and the reason for the express negligence doctrine.[18] This posture is substantially different from Claybar's. Claybar seeks indemnity for the indemnitor's negligence. Of course, courts are presumably free to impose a judicial rule that requires parties to expressly state their intent to indemnify each other under these conditions, but the public policy reasons for doing so are arguably difficult to discern in *Whitson*.

In his third main argument, Claybar maintained that the Supreme Court expressly rejected the "no first party indemnity" rule in *Ingersoll-Rand Co. v. Valero Energy Corp.*[19] In that case, Ingersoll-Rand and Kellogg sought indemnity from Valero for legal fees incurred after Valero sued them for installing allegedly defective process equipment in a Valero facility. The contractors successfully defended Valero's suit by invoking the parties' contractual indemnity provision, which stated that Valero

> shall . . . indemnify . . . CONTRACTOR, it subcontractors and affiliates performing services under this Agreement against all claims, liabilities, loss or expense, including legal fees and court costs in connection therewith, arising out of or in connection with this Agreement . . . , including losses attributable to CONTRACTOR'S negligence . . . .[20]

The Corpus-Christi Court of Appeals had upheld the validity of this indemnity provision, but its opinion did not mention the "no first-party indemnity" rule.[21] The issue on appeal to the Supreme Court was when "an indemnitee's contractual claim for indemnification mature[s] for purposes of the compulsory counterclaim rule."[22] The Supreme Court merely noted the unusual posture of the case where the indemnitor (Valero) acted as plaintiff seeking damages from the indemnitee, in contrast to the "more 'common scenario'" where the

indemnitee seeks compensation from the indemnitor for resisting third-party claims. The Supreme Court saw no "persuasive reason" why this particular posture should affect its reasoning and it held that the defendants' indemnity claims for attorney's fees were timely. *Ingersoll-Rand*, Claybar argued, showed the "flimsiness of the premise for the so-called 'no first party indemnity' rule."[23]

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[1] *Claybar v. Samson Exploration, LLC*, No. 09-16-00435-CV, 2018 WL 651258, at *2 (Tex. App.—Beaumont Feb. 1, 2018, pet. filed) (mem. op.).
[2] Appellant's Brief, *Claybar*, No. 09-16-00435-CV, at 6 (hereinafter "Brief").
[3] *Claybar*, 2018 WL 651258, at *3.
[4] *Id*. at **1–2.
[5] Brief at 15.
[6] *Id*. at **15–16.
[7] *Id*. In its Petition for Review, Claybar describes the court of appeals' decision as "devastating to Texas landowners, robbing them of important protections critical to maintaining the vitality of the State's oil and gas exploration industry." Petition for Review, *Claybar*, No. 09-16-00435-CV, at 2.
[8] Brief at 4; Petition for Review, *Claybar*, No. 09-16-00435-CV, at 3.
[9] *Ganske v. Spence*, 139 S.W.3d 701, 708 (Tex. App.—Waco 2004, no pet.) ("we should not be heard to say that an indemnity provision cannot be written such that the parties indemnify each other against claims they later assert against the other."); *see also BP Prods. N. Am. v. J.V. Indus. Co., Ltd.*, No. H-07-2369, 2010 WL 1610114, at **4–5 (S.D. Tex. Apr. 21, 2010) (mem. op.) (indemnity provision that included damages to parties' property covered parties' claims against each other).
[10] Brief at 17–18 (citing cases supporting the rule).
[11] *Id*. at 18–19.
[12] *Id*. at 19–21 (citing *Whitson v. Goodbodys, Inc*., 773 S.W.2d 381, 383 (Tex. App.—Dallas 1989, writ dism'd), overruled by *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex. 1993) ("*Dresser II*")).
[13] Brief at 21 (citing *Whitson*, 773 S.W.2d at 383).
[14] Brief at 21 (citing *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 821 S.W.2d 359, 362–63 (Tex. App.—Waco 1991, writ granted) ("*Dresser I*"), *rev'd on other grounds*, 853 S.W.2d 505 (Tex. 1993)).
[15] Brief at 21.
[16] *Id*. at 21 (citing *Dresser II*, 853 S.W.2d at 508); *Dresser II*, 853 S.W.2d at 508.
[17] *See*, *e.g.*, *Nat'l City Mortgage Co. v. Adams*, 310 S.W.3d 139, 144 (Tex. App.—Fort Worth 2010, no pet.) (ultimately citing to *Dresser I* and *Whitson*); *MRO Sw., Inc. v. Target Corp.*, No. 04-07-00078-CV, 2007 WL 4403912, at *3 (Tex. App.—San Antonio Dec. 19, 2007, pet. denied) (same); *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, 179 S.W.3d 51, 63 (Tex. App.—San Antonio 2005, pet. denied) (same); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 20 S.W.3d 119, 130 (Tex. App.—Houston [14th Dist.] 2000, pet. granted) (same), rev'd in part on other grounds, 136 S.W.3d 227 (Tex. 2004); *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854, 858 (Tex. App.—Houston [14th Dist.] 1992, no writ) (same).
[18] *Whitson*, 773 S.W.2d at 381.
[19] Brief at 21–22 (citing *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 205 (Tex. 1999)).
[20] Brief at 22 (citing *Valero*, 997 S.W.2d at 206).

[21] *Valero Energy Corp. v. M.W. Kellogg Constr. Co.*, 866 S.W.2d 252, (Tex. App.—Corpus Christi 1993, pet. granted), *rev'd*, 997 S.W.2d 203 (Tex. 1999). *Valero* post-dates *Dresser II* by almost three months.
[22] Brief at 22 (citing *Valero*, 997 S.W.2d at 205).
[23] Brief at 21.