



## Settle Now, Indemnify Later: Texas Supreme Court Reinforces Risk Allocation

In a significant decision for contractors, owners, and insurers in the oil and gas, energy, and construction industries, the Texas Supreme Court reaffirmed that contractual rights to proportional indemnity survive settlement – even when the indemnitor does not participate in that settlement. The Court’s ruling in *S&B Engineers & Constructors, Ltd. v. Scallon Controls, Inc.* underscores the strength of freely negotiated indemnity agreements and rejects attempts to limit those rights based on contribution principles that apply only in tort.

### Background of the Dispute

The case arose from a catastrophic workplace accident at a South Texas refinery. After a fire suppression system unexpectedly discharged during a power interruption, seven workers fell from scaffolding while attempting to escape. The workers sued Sunoco and its contractor, S&B Engineers & Constructors, alleging negligence.

S&B had subcontracted with Scallon Controls, Inc. to supply and program the fire suppression system. The S&B–Scallon agreement included a proportional indemnity provision, requiring Scallon to indemnify S&B for Scallon’s *allocable share* of negligence – but expressly excluding indemnity for S&B’s own negligence.

After years of litigation, S&B and Sunoco settled with the injured workers. Scallon did not participate in the settlement and was not mentioned in the settlement documents. Post-settlement, S&B and Zurich (Sunoco’s insurer) sought contractual indemnification from Scallon for its alleged share of responsibility.

The trial court and court of appeals rejected the indemnity claim, relying largely on older Texas Supreme Court precedent limiting contribution rights following

settlement. The Texas Supreme Court reversed.

### **Contractual Indemnity Is Not Contribution**

A central holding of the opinion is the Court's clarification that contractual indemnity and tort-based contribution are fundamentally different. The court of appeals relied heavily on *Beech Aircraft Corp. v. Jinkins* (1987), which held that a settling tortfeasor cannot seek contribution from a non-settling party.

The Court rejected that reasoning, explaining that *Jinkins* addressed statutory and common-law contribution, not freely negotiated contractual risk allocation. Unlike contribution, contractual indemnity does not allow a settling defendant to "buy" the plaintiff's claim and pursue others – it enforces rights the parties agreed to before any injury occurred. Texas law, the Court emphasized, has long favored freedom of contract, particularly where sophisticated parties allocate risk in advance.

### **Express Negligence Doctrine Does Not Bar Proportional Indemnity**

The Court also rejected the argument that the express negligence doctrine barred recovery. That doctrine applies only when a contract purports to indemnify a party for its own negligence. Here, the contract did the opposite: it explicitly limited indemnity to Scallon's own negligence and disclaimed indemnity for S&B's negligence altogether.

By doing so, the agreement fully complied with *Ethyl Corp. v. Daniel Construction Co.*, which expressly permits comparative or proportional indemnity agreements. The Court made clear that there is no requirement that responsibility be allocated in the underlying tort action rather than through a later indemnity proceeding.

### **Settling First Is Permissible – but Risky**

Although the Court confirmed that settlement does not extinguish contractual indemnity rights, it stressed that settling before pursuing indemnity carries meaningful burdens. On remand, S&B and Zurich must prove:

1. The settlement was made in good faith and for a reasonable amount; and
2. Some portion of the liability is allocable to Scallon's negligence.

Failure on either point could eliminate or limit recovery. The Court emphasized that these requirements protect against inflated settlements and ensure that indemnitors are liable only for their true share of responsibility.

### **Limitations Ruling Favors Indemnitees and Insurers**

The Court also reversed the court of appeals' ruling that Zurich's indemnity claim was time-barred. Under Texas law, indemnity claims accrue when the indemnitee's liability becomes fixed and certain, which occurs upon settlement or judgment – not at the time of the accident. Zurich's intervention, filed within four years of the settlement, was therefore timely.

### **Why This Decision Matters**

This opinion carries important lessons for energy, construction, and industrial projects:

- Proportional indemnity provisions are enforceable, even after settlement.
- Courts will respect contractual risk allocation, rather than forcing parties into tort-based contribution rules.
- Indemnity agreements that expressly disclaim coverage for the indemnitee's own negligence avoid express negligence pitfalls.
- Settling parties may pursue indemnity later – but must be prepared to prove reasonableness, good faith, and fault allocation.

### **Takeaway**

The Texas Supreme Court's decision sends a clear message: settlement does not cancel contractual indemnity rights. Parties who carefully draft indemnity provisions can rely on them – even when disputes are resolved before trial – so long as they are willing to carry the evidentiary burdens that follow.

For companies operating under complex contractor-subcontractor relationships, this decision reinforces the importance of thoughtful contract drafting and strategic settlement planning.

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