

*Ensuring greater recovery and minimizing voidable contracts through understanding indemnification and state statutes regulating contractual third parties.*

# Walking the Minefield: Navigating Anti-Indemnity Statutes and Maximizing Third- Party Contractual Indemnification for Construction Contracts

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Risk is omnipresent. There is no situation that is entirely risk free. Insurance policies are a basic example of risk transfer; the insured passes a specific risk to the insurer in exchange for the premium. Risk transfer can also be achieved in contractual indemnity agreements. An indemnity provision provides that a third party will compensate another for losses or damages that arise from the contracted action. For example, if a claim is brought against an owner, indemnification from the general contractor protects the owner from such claims brought by third parties.

Indemnification from third parties is an important consideration in many contractual arrangements.

While insurance exists to protect policyholders from specific risks, indemnification from a third party for a loss preserves insurance limits and is a desirable risk transfer mechanism.

State statutes often prohibit certain types of third-party indemnity provisions, creating enforcement issues in some states. Other states negate indemnification entirely where contracts contain prohibited indemnification provisions.

Understanding the relevant types of indemnification and how state statutes regulate contractual third-party indemnification provisions can help ensure greater recovery and minimize potentially voidable contract provisions. Since most of these statutes apply

to construction contracts, the remainder of this article will analyze indemnification agreements in the realm of construction contracts and construction projects to provide a broad overview of indemnification agreements and certain anti-indemnity statutes.

While indemnification agreements offer significant advantages, different considerations come into play depending on the types of parties involved and the type of indemnification sought. An owner must be aware of different issues and policy terms than those that primarily concern a general contractor or subcontractor. This article will aid insurance professionals in navigating the complicated and oftentimes unclear world of third-party contractual indemnification agreements by identifying important considerations, all while providing a broad examination into the different types of anti-indemnity statutes across the United States.

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### **Background: Contractual Indemnification**

Indemnity clauses are included in many contracts to facilitate risk transfer. Though an indemnification clause does not eliminate a party's legal obligations stemming from a bodily injury or property damage loss, it does, if enforceable, make the indemnitor (the person holding the other harmless in a contract) responsible for meeting the financial obligations of the indemnitee (the person held harmless).

The clear benefits of indemnity can be illustrated through a simple example. To construct a building, the owner typically contracts with a general contractor to build the structure. At this point the liability exposures created by the arrangement are manageable from the standpoint of each party. However, the general contractor will likely enter agreements with different subcontractors to facilitate the construction of the building. Before long, there are individual subcontractors for plumbing, concrete work, electrical, mechanical, window installation, roofing, and steel work, each under agreement with the general contractor and each subcontractor with employees. By the

time all the parties are in place, the latent liability represented by all of these entities is overwhelming. However, if the general contractor has indemnification provisions in every agreement with every subcontractor, the liability of the general contractor is reduced. Additionally, the subcontractors may be protected from being held responsible for damages for which they were not in any way responsible.

Indemnification provisions are rational and operate in many instances to protect both parties from assuming more liability than the benefit received. Many states have anti-indemnity statutes that limit the amount for which one party can contract to indemnify another party. As a result, the parties to a construction contract need to take a number of strategic considerations into account, which the remainder of this article will address.

### **Types of Indemnification**

Anti-indemnity statutes are designed to limit the amount of indemnity a third party can contract to provide. Many state statutes place limits on indemnity provisions only in the context of construction contracts.<sup>1</sup> The types of construction contracts affected can vary from only private contracts to residential, public, or, alternatively, all types of construction contracts. Some states also include design contracts. States have adopted three different methods in interpreting third-party indemnity contracts: (1) limited/comparative indemnity, (2) intermediate form indemnity, and (3) broad form indemnity.

#### *Limited Indemnity Provisions*

Limited indemnity provides the least protection to an indemnitee: the indemnitor assumes only the risk for its own negligence. For example, damages stemming from an employee's bodily injury suit would only be covered by a third-party indemnitor if, and to the extent, the indemnitor was negligent in causing the employee's injuries.

All states allow limited indemnity provisions under which the indemnitor promises to indemnify the indemnitee for the indemnitor's negligence. This corresponds with general contract law, and while it is a method of risk transfer, it will only arise in limited situations. The third-party indemnitor promises to take responsibility for its sole negligence; essentially, the indemnitee can only receive indemnification if the indemnitor was 100 percent negligent.

### *Intermediate Form Indemnity Provisions*

Intermediate form indemnity provides more protection to the indemnitee. Indemnification is available on a sliding scale based on specific percentages of negligence. This intermediate type of indemnity exists when the indemnitor promises to indemnify the indemnitee for the indemnitee's concurrent negligence — or when both parties have contributed to the loss. There are two types of “concurrent” indemnity.

- Full indemnification is when the indemnitor will indemnify the indemnitee for the indemnitee's negligence if the injury was not caused solely by the indemnitee.<sup>2</sup> This would allow a contractor who was 99 percent negligent to receive indemnity from the subcontractor who was 1 percent negligent for 100 percent of the damage.
- Partial indemnification is when the indemnitor promises to indemnify only the percentage of negligence caused by the indemnitor itself.<sup>3</sup> Partial indemnification sets a cap on the amount of indemnification available. If the subcontractor was 49 percent negligent and the contractor was 51 percent negligent, the contractor may only be indemnified for 49 percent of the total damages.

Many states have statutes prohibiting an indemnitee from contractually assigning its own sole negligence to an indemnitor (prohibition of broad form indemnification).<sup>4</sup> The majority of states allow indemnification for vicarious liability only.

### *Broad Form Indemnity Provisions*

The final type of third-party indemnification is broad form indemnity. Under a broad form indemnity provision, the third-party indemnitor assumes the entire risk of loss, regardless of whether or not the loss is due to the sole negligence of the indemnitee. Using the prior scenario, the employer/indemnitee would receive indemnity from the indemnitor even if the employer was wholly at fault for the injury.

This is the most beneficial indemnity provision from the standpoint of the indemnitee. Most states have prohibitions on broad form indemnity agreements in the context of construction and will hold contracts indemnifying the indemnitee for its own sole negligence void under public policy rationales.

A minority of states will allow and uphold broad

form indemnification if it is “clearly and unequivocally stated;” most of these states do not have any form of anti-indemnity statute and indemnification provisions are governed by state jurisprudence.<sup>5</sup> Certain states will uphold broad form indemnity provisions if they are “clearly stated;” it is vital in the precontract process that the liabilities and obligations of both parties are unmistakably clear. For example, in Alabama, indemnity agreements between private parties are valid where the parties “knowingly, evenhandedly, and for valid consideration, intelligently enter into an agreement whereby one party agrees to indemnify the other including indemnity against the indemnitee's own wrongs, if expressed in clear and unequivocal language.”<sup>6</sup> The “clear and unequivocal” requirement is strictly construed; however, as long as an indemnity agreement meets this stringent requirement, broad form indemnity agreements are valid.<sup>7</sup>

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In *George L. Brown Ins. Co. v. Star Ins. Co.*, the Nevada Supreme Court recently ruled that it would apply a similar method for upholding indemnity provisions.<sup>8</sup> Brown Insurance Agency (Brown) was an agent for a California corporation in the process of moving to Nevada. Brown indicated that an insurance policy would cover only employees who lived and worked in Nevada. An employee, also a California resident, was injured on the job and submitted a workers compensation claim. The insurer, Star Insurance Company (Star), denied coverage based on the fact that the employee was a California resident and coverage did not apply. The court ordered the insurer to pay benefits because Star had “actual and constructive knowledge of the fact that [the corporation] had an on-going business operation within the State of California.” The corporation brought an action against Brown for breach of contract. Brown and Star had an indemnification agreement that allowed Star to be indemnified for “any and all ... liabilities,” and Star sought to be indemnified for its own negligence.<sup>9</sup>

The Supreme Court of Nevada concluded that an indemnitee may be indemnified for his or her sole negligence if the contract “expressly or explicitly referenced the indemnitee’s own negligence.”<sup>10</sup>

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### *Anti-Indemnity Statutes Limiting Additional Insured Coverage in Insurance Contracts*

A small number of jurisdictions limiting indemnification agreements in construction contracts apply the same limitations to contractual requirements for insurance coverage.<sup>11</sup> Most anti-indemnity statutes apply exclusively to construction contracts; however, in Oregon, Kansas, and potentially Ohio,<sup>12</sup> the anti-indemnity statutes limit statutory indemnity to contractually required insurance as well. The significance of these statutes, with regard to indemnity, is that additional insured coverage will be extremely limited. In the majority of states,<sup>13</sup> additional insured status is another way to transfer risk. Many construction contracts require one party to provide commercial general liability (CGL) coverage for another party, thus making it an “additional insured” (AI) under the policy. For instance, a subcontractor is typically required to protect the general contractor from any liability arising from the subcontractor’s work by naming the general contractor as an additional insured on the subcontractor’s CGL policy. AI status simply treats the additional insured as if it were a party to the underlying policy.

Oregon’s anti-indemnity statute applies both to construction agreements and to agreements to procure insurance. Oregon’s broad anti-indemnity statute provides:

[A]ny provision in a construction agreement that requires a person or that person’s surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.<sup>14</sup>

The Supreme Court of Oregon held in *Walsh Construction Co. v. Mut. of Enumclaw* that an agreement requiring a subcontractor to procure additional insured coverage to cover the general contractor for the general contractor’s sole negligence was void.<sup>15</sup> In affirming the lower court’s decision, the Supreme Court reviewed the legislative history and in reaching its conclusion stated:

Whether the shifting allocation of risk is accomplished directly, e.g., by requiring the subcontractor itself to indemnify the contractor for damages caused by the contractor’s own negligence, or indirectly, e.g., by requiring the subcontractor to purchase additional insurance covering the contractor for the contractor’s own negligence, the ultimate — and [in this respect] statutorily forbidden — end is the same.<sup>16</sup>

*Walsh* stands for the proposition that requiring indemnity or requiring additional insured status for indemnitee’s negligence is prohibited.

Under subsequent cases, it seems clear that Oregon permits construction agreements that require a subcontractor to obtain an “additional insured” endorsement for vicarious liability.<sup>17</sup> In *Hoffman Constr. Co. v. Travelers Indem. Ins. Co.*, an Oregon district court held that ORS § 30.140(2) permits “construction agreements that require a subcontractor to obtain an additional insured endorsement indirectly indemnifying the general contractor for the subcontractor’s fault in causing injury.”<sup>18</sup> The court also acknowledged “*Walsh* did not address whether ORS § 30.140 relieves an AI insurer of the duty to defend or indemnify where the additional insured is seeking coverage for vicarious liability or liability arising from the fault of the named insured.”<sup>19</sup>

Kansas also voids additional insured endorsements for the purpose of providing liability coverage for the additional insured’s own negligence. Kansas recently adopted a broad anti-indemnity statute that applies to all contracts entered into after January 1, 2009, and states, in relevant part:

(b) An indemnification provision in a contract which requires the promisor to indemnify the promisee for the promisee’s negligence or intentional acts or omissions is against public policy and is void and unenforceable.

(c) A provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such other party's own negligence or intentional acts or omissions is against public policy and is void and unenforceable.<sup>20</sup>

In the traditional contractor/subcontractor scenario, the statute prohibits the contractor from requiring the subcontractor to provide additional insured status for the contractor's negligence. If the contractor required additional insured status solely for the negligence of the subcontractor or third parties, it would be valid under the contract.<sup>21</sup> Therefore, it is likely that if the insurance policy provided coverage for acts that happened to arise from the indemnitee's negligence, the indemnitee would likely receive coverage. To date, the statute has not been interpreted and has only been cited in one case, but it was held not to apply since the contract was a rental contract entered into prior to January 1, 2009.<sup>22</sup>

Ohio is also worth noting since the status of additional insured coverage under Ohio's anti-indemnity statute has been subject to different interpretations of additional insured endorsements.<sup>23</sup> In Ohio, broad form indemnity agreements are prohibited and will be declared void.<sup>24</sup> Ohio's anti-indemnity statute, R.C. 2305.31, applies to AI endorsements and operates to void any construction-related agreement that would, in effect, require another entity to indemnify a party for its own negligence.<sup>25</sup>

Some Ohio appellate courts have held that this statute applies to AI endorsements where the AI is found to be solely negligent.<sup>26</sup> Other Ohio appellate courts disagree and have held that R.C. 2305.31 can never apply to AI endorsements because they are distinct from the type of indemnity agreements contemplated by the statute.<sup>27</sup> The Ohio Supreme Court has not addressed the issue. However, the appellate courts uniformly recognize that there must be a final finding of liability, through settlement or judgment, before the AI endorsement is declared void. Thus, even if an insurer challenges AI coverage based on R.C. 2305.31 while an action is pending, the insurer should be required to defend until liability has been conclusively established.<sup>28</sup>

Although the majority of states do not place broad limitations on contractually required insurance, it is important to be aware of the few that do (Kansas

and Oregon) and the unsettled law in Ohio when entering into indemnity provisions.

#### *Anti-Indemnity Statutes Explicitly Not Limiting Insurance Contracts*

Other states prohibit broad form indemnity agreements but specifically state that the laws do not apply to insurance provisions.<sup>29</sup> This is an important distinction from the law in states like Ohio, Oregon, and Kansas because it specifically permits additional insured coverage for an indemnitee's own negligence.

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California is one example. The California anti-indemnity statute, by its terms, does not affect an insurer's obligation to provide insurance for the sole negligence of another contractor. The relevant portion of the statute provides:

(a) Except as provided in Sections 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable; provided, however, that *this section shall not affect the validity of any insurance contract, work-*

ers' compensation, or agreement issued by an admitted insurer as defined by the Insurance Code.<sup>30</sup>

This statute can be contrasted with statutes in other previously mentioned states, e.g., Oregon, that specifically provide that an indemnitor may not be required to procure insurance for the negligence of the indemnitee.

Several California courts have interpreted the California anti-indemnity statute not to preclude an insurer from indemnifying an additional insured for its "sole negligence."<sup>31</sup> One court stated:

Section 2782 expressly states that its "sole negligence" limitation "shall not affect the validity of any insurance contract." ... [A] provision in a liability policy providing coverage to an additional insured will not be deemed contrary to public policy or unenforceable merely because that additional insured party may have incurred claim liability due to its "sole negligence."<sup>32</sup>

#### *Anti-Indemnity Statutes Prohibiting Limitation of Tort Liability*

Additionally, at least one state, Wisconsin, prohibits indemnity agreements in construction contracts that limit or eliminate tort liability. The statute provides, in relevant part:

Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.<sup>33</sup>

The Wisconsin Court of Appeals in *Gerdmann v. U.S. Fire Insurance Co.* was faced with a determination of whether a contractual indemnity provision indemnifying the contractor "from any and all liability on account of personal injury ... to employees of the contractor" was void under the statute.<sup>34</sup> The court concluded that the indemnification provision did not limit the contractor's tort liability to third persons.<sup>35</sup> The indemnity provision operated as a kind of insurance provision — while the contractor was

still liable for the personal injuries, the subcontractor merely paid the costs.<sup>36</sup> The *Gerdmann* case involved a broad form indemnity agreement and legislation is currently pending before the Wisconsin Senate which would overturn *Gerdmann* and prohibit indemnity for negligence of the indemnitee.<sup>37</sup>

#### **Impact of Anti-Indemnity Statutes in Negotiation**

It can be overwhelming when the parties to a construction contract attempt to negotiate an indemnification provision to keep in mind each state's anti-indemnity statute. Being aware of the type of indemnity needed and the specific risks involved will simplify the process. Case in point: many state statutes apply only to construction contracts and a general awareness of the three different types of anti-indemnity statutes and specific awareness of the law in Ohio, Oregon, and Kansas will make the process of obtaining enforceable indemnity more straightforward and as trouble-free as possible.<sup>38</sup>

#### **Coverage for Contractual Indemnity**

An indemnity provision in a contract is only the first step in a successful risk transfer. An indemnity agreement requires the indemnitor to cover the indemnitee's loss; therefore, proper steps should be taken to ensure proper funds are available should the indemnitor become financially insolvent or a catastrophic loss occur. Insurance will oftentimes fulfill that role.

#### **Preventing Gaps in Coverage**

In any risk transfer analysis, it is crucial that insurance coverage be obtained for the scope of the indemnity given, the goal being to have co-extensive insurance coverage for indemnification obligations.<sup>39</sup> To illustrate, if an owner requires indemnification for all claims "arising from work on the project," a contractor should not agree to provide this indemnification. Instead, the contractor should provide coverage only for "bodily injury, property damage and personal injuries," those damages typically covered under a CGL policy. If the contractor agreed with the owner's original demand and a claim occurred that was not covered under the contractor's insurance policy, the contractor would have to pay out-of-pocket for the costs associated with the claim against the owner.

In a basic CGL insurance policy, coverage is

provided for “bodily injury” or “property damage” for which the “insured becomes legally obligated to pay.”<sup>40</sup> The indemnifying party must have that type of coverage under its policy in order for the policy to be triggered. Contracting for indemnification within the area for which the indemnitor has coverage, both in quantity and in kind, is a very important point to consider when entering into an indemnification agreement with a third-party indemnitor.

CGL policies typically have exclusions that specifically exclude coverage for bodily injury or property damage for which the insured is “obligated to pay damages by reason of the assumption of liability in a contract or agreement.”<sup>41</sup>

On first glance, it would appear that any indemnification agreement is thereby excluded under the policy and that the indemnitor would not be able to receive coverage for the indemnity agreement. However, the exclusion commonly contains an exception that provides that this exclusion does not apply to damages assumed in an “insured contract.”<sup>42</sup> An “insured contract” is typically defined in part within the policy as:

... [t]hat part of any other contract or agreement pertaining to the [named insured’s] business ... under which you assume the tort liability of another party to pay for bodily injury or property damage to a third person or organization ....<sup>43</sup>

It should be noted that under the “insured contract” exception to the contractual liability exclusion, attorney’s fees and expenses incurred by the indemnitee in defense of the claim are covered, provided that:

[l]iability to such party for, or for the cost of, that party’s defense has also been assumed in the same ‘insured contract’ ....<sup>44</sup>

Despite having an indemnification agreement that aligns with the indemnitor’s insurance policy, certain types of damages will not be covered by the insurer. Typically, insurance policies do not cover damages to the contractor’s own work; damages resulting from breach of contract; professional acts of architects, engineers, and surveyors; parties outside the contract; or occurrences for which coverage does

not exist under the policy language itself.<sup>45</sup> Essentially, an indemnitor should not agree to indemnify a third party for something the indemnitor’s insurance will not cover. It is exposing the indemnitor to additional liability that is potentially limitless.

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#### **Who Can Claim Coverage Under an Indemnification Provision**

In many instances, only a party to a contract can initially claim coverage for indemnity.<sup>46</sup> Coverage does not extend to third parties. Oftentimes, for a third party to receive indemnification from the indemnitor, third parties must prove that they are a third-party beneficiary under the agreement. The Restatement (Second) of Contracts § 302 provides:

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either: (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

A Pennsylvania district court relied on the Restatement provision cited above in holding that a third-party architect was entitled to seek indemnity under a project’s construction contract.<sup>47</sup> The Waynes-

borough Country Club entered into an architectural service contract with the defendant architectural firm and a separate construction contract with a general contractor under which the contractor agreed to indemnify the architect for property damage arising out of the work. After completion of the clubhouse, structural problems arose. The country club instituted suit against the defendants, who sought (in relevant part) indemnity from the general contractor under a third-party contractual indemnity claim.

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The court made a determination that the defendants had met the test set out in the § 302 of the Restatement and could pursue a claim of indemnity against the contractor for damage to the country club's tangible property other than the clubhouse project itself. The court determined that the defendants were entitled to seek contractual indemnity from the contractor because two of the three allegations in the underlying complaint could be viewed as allegations of the defendants' "secondary negligence, or negligence in the supervision of [the general contractor] and, as a result, a failure to forestall or correct [the] alleged errors."<sup>48</sup>

Before an indemnity agreement is entered into, a review of the insurance needed (if you are the indemnitor) or the insurance provided (if you are the indemnitee) is a necessary step that in the long run can minimize potential issues after a loss has occurred. An indemnity agreement is frequently only as good as the coverage behind it, and while an indemnitor can pay the loss out of its own resources, it is advisable to ensure that the insurance coverage procured matches the indemnity promised.

### **Precontract Considerations**

Not all indemnity provisions are created equal. Depending on your role in the project (owner, contractor,

or subcontractor), some indemnity provisions can be more beneficial than others. For instance, favorable indemnification terms to an owner may not directly translate into favorable terms for the subcontractor. In drafting or reviewing a contract, special attention must be given to indemnity provisions from the unique viewpoint of an owner, general contractor, or subcontractor.

### **Standard Form Contracts**

Many owner-contractor or contractor-subcontractor contracts are based on contracts drafted by the American Institute of Architects (AIA) or ConsensusDOCS LLC (ConsensusDocs). The AIA has released versions approximately every 10 years, with the most recent released in 2007. ConsensusDocs is relatively new and also issued a version in 2007. When entering into an indemnification agreement, the language is extraordinarily important, depending on whether you are the indemnitor or the indemnitee. A comparison of different versions and their effects is helpful to illustrate the potential impact on an indemnification claim.

Comparing the contractor-subcontractor contracts under the AIA and ConsensusDocs will help illustrate the different indemnification provisions. The indemnification language in the 2007 AIA Contract A401 provides, in relevant part:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.<sup>49</sup>

The ConsensusDocs 750 indemnification provision states, in relevant part:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor, Architect/Engineer, the Owner and their agents, consultants and employees (the Indemnitees) from all claims for bodily injury and property damage other than to the Work itself that may arise from the performance of the Subcontract Work, including reasonable attorneys' fees, costs and expenses, that arise from the performance of the Work, but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Subcontractor shall be entitled to reimbursement of any defense cost paid above Subcontractor's percentage of liability for the underlying claim to the extent attributable to the negligent acts or omissions of the Indemnitees.<sup>50</sup>

Both contracts are examples of partial indemnification agreements whereby the subcontractor agrees to indemnify for bodily injury or property damage only to the extent the damage is caused by the negligent acts of the subcontractor or its employees.

Although the two contracts are similar, the ConsensusDocs contract provides slightly better terms for a contractor. The ConsensusDocs contract extends indemnity to a wider breadth of people, including consultants, agents, and employees of the owner, architect/engineer, and contractor, whereas the AIA contract limits indemnification to the architect's consultants.

In each contract negotiation, the indemnification provision will turn on the individual facts and circumstances of the case. Each provision has its benefits and drawbacks, and it is important to be mindful of the terms of the contracts and how different states interpret certain provisions.

#### **“To the Fullest Extent Permitted by Law”**

As previously discussed, states have a variety of anti-indemnity statutes and in certain states an indemnification provision can be voided and

therefore unenforceable if a broad form indemnity clause is used in a prohibited jurisdiction. In some states, qualifying the indemnification provision with the phrase “to the fullest extent permitted by law” (as illustrated above in both the AIA and ConsensusDocs contracts) may be enough to prevent a court from declaring the entire indemnification provision void.<sup>51</sup> To date, a court has not voided an indemnity provision containing the language “to the fullest extent permitted by law.” The courts that have addressed this language interpret the intent of the parties to allow reformation of the indemnity provision to align with statutory requirements.

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The New York Court of Appeals interpreted the language “to the fullest extent of the law” to allow enforcement of the indemnity agreement between a contractor and a subcontractor in *Brooks v. Judlau Contracting Inc.*<sup>52</sup> In *Judlau*, an injured ironworker brought an action against a general contractor and subcontractor after falling from an overpass construction site. New York law bars contractual indemnification for the negligent acts of the indemnitee.<sup>53</sup> The indemnification provision provided, in relevant part:

The subcontractor shall, to the fullest extent permitted by law, hold the Contractor and the Owner, their agents, employees and representatives harmless from any and all liability ... or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by the Subcontractor.

The court held that this provision clearly obligated the subcontractor to indemnify the contractor only when the damages were caused by the subcontractor's negligence.<sup>54</sup> The court also stated that "to the fullest extent permitted by law" operates to limit an indemnification provision and that this interpretation was supported by numerous other courts.<sup>55</sup>

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Similarly, the Massachusetts Court of Appeals, in *Sheehan v. Modern Continental*, held that though an indemnity provision exceeded the scope of the Massachusetts anti-indemnity statute, the entire provision was not void.<sup>56</sup> In *Sheehan*, a subcontractor electrician agreed to indemnify a contractor for "claims and expenses attributable to injury caused or alleged to be caused in whole or in part by any negligent act or omission of the subcontractor."<sup>57</sup> The language "alleged to be caused" exceeded the Massachusetts anti-indemnity statute that holds that a contractor cannot base claims for indemnity on mere allegations, since the allegations could result in indemnification for damages not caused by the subcontractor.<sup>58</sup> The court voided only the portion of the indemnity provision that provided indemnity "alleged to be caused" by the contractor and upheld the validity of the remainder of the indemnity provision.<sup>59</sup>

A Mississippi district court, in *Travelers Prop. Cas. Co. v. Federated Rural Elec. Ins. Exchange*, declared an indemnity provision void, but held that the entire indemnification provision was not void because the indemnity provision included the phrase "to the maximum extent permitted by law."<sup>60</sup> The case arose out of the death of an employee of Laird, insured under a Traveler's policy, who agreed to construct a power line for Magnolia Electric Power Association (MEPA), insured by Federated Rural. A written agreement existed between Laird and MEPA, whereby Laird agreed to hold harmless MEPA.<sup>61</sup> The court held that this agreement was void under a Mississippi statute<sup>62</sup> that prohibits broad form indemnity agreements in construction contracts.<sup>63</sup> The court then examined whether the language "to the maximum

extent permitted by law" would operate to "save" the remainder of the contract and allow it to be enforced despite the fact that the indemnification provision was void under the anti-indemnity statute.<sup>64</sup> The court called the "maximum extent permitted by law" language a "savings provision," which some states apply to reinterpret the indemnification provision, rather than voiding the entire indemnification agreement.<sup>65</sup> The court enforced the "savings provision" and reinterpreted the contract.<sup>66</sup> The court read the indemnification provision to hold that Laird would indemnify MEPA to the maximum extent permitted by Mississippi's law, as that appeared to be the intent of the parties.<sup>67</sup> In terms of how much indemnity was permitted under Mississippi law, the court held that Laird could indemnify MEPA for full indemnity including attorney's fees if it was found that the injury was not proximately caused by MEPA's negligence.

#### **"Tied" Provisions**

It is important when contracting to make sure that multiple provisions are not written together or interpreted together. Some courts, such as Illinois courts, will void provisions "tied" to an unenforceable broad form indemnity provision. Illinois prohibits broad form indemnity agreements with respect to construction contracts.<sup>68</sup>

In *Juretic v. USX Corp.*, the plaintiff suffered injuries after falling off an electrical tower.<sup>69</sup> Juretic worked for P.K. Engineering, who contracted with USX Corporation to "dismantle and reroute various electrical facilities." In the contract agreement, P.K. Engineering, the contractor, had agreed to indemnify USX Corporation for P.K. Engineering's own negligence and for negligence caused in whole or in part by USX Corporation. This was a broad form indemnity agreement and void under the Illinois anti-indemnity statute. An additional provision in the contract required P.K. Engineering to maintain insurance listing USX Corporation as an additional insured.<sup>70</sup>

Under Illinois law, if a provision is "inextricably tied to the void indemnity provision" then it is also void.<sup>71</sup> For the insurance provision to survive, it must cover matters other than obligations within the void indemnity provision.<sup>72</sup> The court analyzed the insurance provision and determined it provided insurance coverage in three parts: coverage for the contractor's obligations to the owner under the indemnification clause, coverage for both the contractor's and owner's

liability to pay for personal injuries, and coverage for the contractor's and owner's liability to pay for any property damage that arose out of the contractor's work under the agreement.<sup>73</sup> The court concluded that when read together, the first coverage part of the insurance provision was tied with the indemnity provision and therefore void; however, the second and third parts were enforceable.<sup>74</sup> Therefore, USX lost both P.K. Engineering's indemnity obligation and the insurance coverage for that obligation.

### Choice of Law Provision

In reviewing a potential contract, make note of whether or not a choice of law provision is in the contract. A choice of law provision will ensure that any contractual dispute will be resolved according to the law of the state specified in the contract. This can be an important consideration, especially if a project is taking place in a state with a stringent anti-indemnity statute. If, for instance, a construction project was occurring in Oregon, which has very unfavorable indemnity law, then the contracting parties could insert a choice of law clause in the contract providing that the contract is to be governed under the law of Alabama,<sup>75</sup> which allows broad form indemnification, if clearly and unequivocally stated. A broad form indemnity agreement in Oregon without a choice of law provision would render the indemnity agreement voidable as contrary to public policy.<sup>76</sup>

A choice of law provision can be a helpful way to ensure that an indemnity agreement will be upheld in a postclaim dispute. Knowledge of favorable indemnification provisions, which are party-specific, can also cut down on potential disputes after a claim has arisen. It may be impossible to construct an agreement that will not be challenged postclaim, but the objective in a precontract analysis is to draft a contract that will provide the clearest and strongest agreement. A tenet of contract law is that the terms of a contract are given their clear meaning.<sup>77</sup> A clear contract will therefore be enforced according to its unambiguous terms, thereby reducing litigation costs and minimizing postclaim disagreements.

### Conclusion

In designing a third-party indemnity agreement for a construction contract, several factors must be kept in mind. Awareness of the specific risks of a project

will help determine the most appropriate risk transfer vehicle. In ensuring your indemnity agreements are as strong as possible, vigilant consideration must be given to each step of the project from precontract through postclaim.

The importance of knowing, if not specifically contracting, the law of the state where the contract will likely be interpreted cannot be overstated. As illustrated, the breadth and complexity of anti-indemnity statutes across the United States can yield inconsistent results, and what may appear to be a strong indemnity agreement ultimately may be void and unenforceable. The considerations discussed in this article should provide an overview of the necessary terms and concepts to be aware of to maximize indemnification agreements.

For further information on state laws, there is a 50-state survey on the construction anti-indemnity statutes available at [www.sdvlaw.com](http://www.sdvlaw.com).

### Endnotes

- 1 See, e.g., Florida statute § 725.06 requiring indemnity clauses to state a monetary limitation on the extent of indemnification, or, alternatively, the promisee must give the promisor specific consideration in the contract and reproduce it in the project specifications or bid documents in order to obtain full indemnity. See also *Fed. Ins. Co. v. Western Waterproofing Co. of America*, 500 So.2d 162 (Fla. 1st DCA 1986); *Cone Brothers Contracting Co. v. Ashland-Warren Inc.*, 458 So.2d 851 (Fla. 2d DCA 1984); *A-T-O Inc. v. Garcia*, 374 So. 2d 533 (Fla. DCA 1979) (holding that in order to be valid under § 725.06, an indemnity agreement related to a construction contract must contain a monetary limitation on the extent of the indemnification).
- 2 Jurisdictions allowing full concurrent indemnity agreements: Alaska, Alabama, Arizona, California, the District of Columbia, Hawaii, Iowa, Idaho, Indiana, Massachusetts, Maryland, Maine, Michigan, Minnesota (if the injury is attributable to a breach of duty, or a negligent or wrongful act or omission), New Jersey, Pennsylvania (see *Construction Contracts* *infra* note 5), South Carolina, South Dakota, Tennessee, Texas, Virginia, Vermont, West Virginia, Wyoming.
- 3 States allowing partial concurrent indemnity agreements: Arizona (public construction and design contracts), Arkansas (unless there is a monetary limit on the extent of indemnification as required by contract), California (residential construction and design contracts), Colorado,

Connecticut, Delaware, Florida (unless there is a monetary limit on the extent of indemnification as required by contract), Illinois, Kansas, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania (in all construction design contracts where the design professional is the indemnitee), Rhode Island, Texas (all construction-related design contracts), Utah, Washington, Wisconsin.

4 See, e.g., Alaska, Alaska Stat. § 45.45.900; Arizona, ARS § 32-1159; Arkansas, A.C.A. § 4-56-104; California, Cal. Civ. Code § 2782; Colorado, C.R.S. § 13-21-111.5; Connecticut, Conn. Gen. Stat. 2-572K; Delaware, Del. Code Ann. 6 § 2704; Florida, Fla. Stat. § 725.06; Georgia, O.C.G.A. § 13-8-2; Hawaii, H.R.S. § 431:10 – 222; Idaho, Idaho Code § 29-114; Illinois, § 740 ILCS 35/1; Indiana, Burns Ind. Code Ann. § 26-2-5-1; Kentucky, Ky. Rev. Stat. § 371.180; Maryland, Md. Cts. & Jud. Proc. Code § 5-401; Massachusetts, Mass. Gen. Laws Ch. 149 § 29C (all contracts in which a subcontractor agrees to indemnify another for injury or damage not caused by the subcontractor are void); Michigan, Mich. Comp. Laws Ann. § 691.991; Minnesota, Minn. Stat. § 337.02; Mississippi, Miss. Code Ann. § 31-5-41; Missouri, Mo. Rev. Stat. § 434.1002(1); Montana, Mont. Rev. Code Ann. § 18-2-124; Nebraska, Neb. Rev. Stat. § 25-21, 187(1); New Hampshire, RSA § 338-A: 1 & 2; New Jersey, N.J. Stat. § 2A:40A-1; New Mexico, NM Stat. Ann. § 56-7-1; New York, NY CLS Gen. Oblig. § 5-322.1; North Carolina, N.C. Gen. Stat. § 22B-1; North Dakota, N.D. Cent. Code § 9-08-02 and N.D. Cent. Code § 9-08-02.1 (contractor specific); Rhode Island, R.I. Gen. Laws § 6-34-1; South Carolina, S.C. Code Ann. § 32-2-10; South Dakota, S.D. Codified Laws § 56-3-18; Tennessee, TENN. Code Ann. § 62-6-123; Texas, Tex. Civ. Prac. & Rem. Code § 130.002; Virginia, VA. Code Ann. § 11-4.1; Washington, Rev. Code Wash. (ARCW) § 4.24.115; West Virginia, W. VA. Code § 55-8-14.

5 See, e.g., Alabama, *Doster Construction Co. Inc. v. Marathon Elec. Contractors Inc.*, 32 So.3d 1277 (Ala. 2009) (“Indemnification for an indemnitee’s own negligence requires clear and unequivocal language.”); District of Columbia, *N.P.P. Contractors Inc. v. John Canning & Co.*, 715 A.2d 139, 142 (D.C. 1998) (“An indemnity provision should not be construed to permit an indemnitee to recover for his or her own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties.”); Iowa, *Cremona v. R.S. Bacon Veneer Co.*, 433 F.3d 617, 620 (8th Cir. 2006), citing *Cochran v. Gehre Inc.*, 293 F.Supp.2d 986, 994-95 (N.D. Iowa 2003) (“Indemnification

contracts will not be construed to permit an indemnitee to recover for its own negligence unless the intention of the parties is clearly and unambiguously expressed. Thus, indemnification contracts claimed to contain these provisions are construed more strictly than other contracts.”); Louisiana, La. Rev. Stat. Ann. 38:2216(g) (prohibiting broad form indemnity provisions in public contracts), *Roundtree v. New Orleans Aviation Bd.*, 844 So.2d 1091, 1096 (La. Ct. App. 2003), citing *Polozola v. Garlock*, 343 So.2d 1000, 1003 (La. 1977) (a contract of indemnity whereby the indemnitee is indemnified against the consequences of his own negligence is strictly construed and must be expressed in unequivocal terms); Maine, *State Farm Mut. Ins. Co. v. Koshy*, 995 A.2d 651, 668 (Me. 2010) (contracts providing for a party to be indemnified for losses resulting from that party’s own negligence will be strictly construed); Nevada, Nev. Rev. Stat. Ann. § 616B.609 (prohibits indemnity contracts only if they affect rights created by the Nevada Industrial Insurance Act), *George L. Brown Ins. Agency, Inc. v. Star Ins. Co.*, 237 P.3d 92 (Nev. 2010) (“A contract must expressly or explicitly reference the indemnitee’s own negligence before an indemnitee may be indemnified for his or her own negligence.”); Oklahoma, Okla. Stat. Ann. Tit. § 221 (indemnification contracts allowed if clearly stated and indemnification contracts are void for “future unlawful acts”); Pennsylvania, Pa. Stat. Ann. Tit. 68 § 491 (indemnification contracts allowed if clearly stated), see also *Ocean Spray Cranberries Inc. v. Refrigerated Food*, 936 A.2d 81, 84 (Pa. Super 2007); Vermont, *Tateosian v. Vermont*, 945 A.2d 833, 841 (Vt. 2007) (an indemnity clause covers the sole negligence of the indemnitee only where it clearly expresses that intent); Wyoming, *Union Pacific Resources Co. v. Dolenc*, 86 P.3d 1287 (Wyo. 2004) (contracts purporting to indemnify parties against their own negligence to be strictly construed).

6 *Royal Insurance Co. of America v. Whitaker Contracting Corp.*, 824 So. 2d 747, 751 (Ala. 2002).

7 *Id.*

8 237 P.3d 92 (Nev. 2010). It is important to note one exception under Nevada law: indemnity contracts cannot “change, modify, or waive any liability” created under Nevada’s Workers Compensation Laws in Nev. Rev. Stat. Ann. Ch. 616A – 616D. See Nev. Rev. Stat. Ann. § 616B.609.

9 *Brown Ins. Co.*, 237 P.3d at 94.

10 *Id.* at 97.

11 See, e.g., Kansas, Kan. Stat. Ann. § 16-121(b); Ohio, Ohio Rev. Code Ann. § 2305.31; Oregon, Or. Rev. Stat. § 30.140(1) & (2).

12 Ohio case law is unsettled on this issue. See discussion

- infra*.
- 13 As previously discussed, with the exception of Ohio, Oregon, and Kansas.
  - 14 Or. Rev. Stat. § 30.140(1) (2010).
  - 15 104 P.3d 1146, 1150 (Ore. 2005).
  - 16 *Id.* citing *Walsh Construction Co. v. Mut. Of Enumclaw*, 76 P.3d 164 (Ore. Ct. App. 2003).
  - 17 *Hoffman Constr. Co. v. Travelers Indem. Ins. Co.*, 2005 U.S. Dist. LEXIS 39752 (D. Or. Nov. 28 2005).
  - 18 *Id.* at \*13.
  - 19 *Id.* at \*7.
  - 20 Kansas' statute specifically states section in (d) (4) that it does not apply to insurance contracts. *See* Kan. Stat. Ann. § 16-121(b). Prior to 2009, the statute applied only to construction contracts.
  - 21 *Id.*
  - 22 *Midwest Concrete Placement v. L&S Basements*, Case No. 07-2316, 2009 U.S. Dist. LEXIS 37351, at \*22 (D. Kan., April 29, 2009).
  - 23 The statute provides:  
A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.
  - 24 Neither indemnity agreements nor liability insurance contracts are considered against public policy. *See, e.g., Glaspell v. Ohio Edison Co.*, 29 Ohio St. 3d 44 (1987).
  - 25 R.C. 2305.31 prohibits "indemnity agreements, in the construction-related contracts described therein, whereby the promisor agrees to indemnify the promisee for damages caused by or resulting from the negligence of the promisee, regardless of whether such negligence is sole or concurrent." *Glaspell v. Ohio Edison Co.*, 29 Ohio St. 3d 44, 64 (1987); *see, e.g., C.J. Mahan Construction Co. v. Mohawk Re-Bar Services Inc.*, No. 2004CA00387, 2004 WL 2562600, at \*4-5 (Ohio App. 5 Dist. Oct. 11, 2005).
  - 26 *Buckeye Union Ins. Co. v. Zavarella Bros. Const. Co.*, 699 N.E.2d 127, 130 (8th Dist. 1997); *Liberty Mut. Ins. Group v. Traveler's Prop. Cas.*, No. 80560, 2002 WL 1933244, at \*4 (Ohio App. 8 Dist. Aug. 22, 2002) (subcontractor's additional insured endorsement did not provide coverage for construction manager's negligence); *Dayton Power & Light Co. v. Enerfab Inc.*, 2007 Ohio 432, P23 (Ohio Ct. App., Montgomery County Feb. 2, 2007).
  - 27 *Brzeczek v. Standard Oil Co.*, 447 N.E.2d 760 (6th Dist. 1982) (indemnification provisions and agreements to add another party as an additional insured are two different things); *Stickovich v. Cleveland*, 757 N.E.2d 50 (8th Dist. 2001); *Danis Bldg. Constr. Co. v. Employers Fire Ins. Co.*, 2002 Ohio App. LEXIS 6243 (2nd Dist. 2002).
  - 28 *Kovach v. Warren Roofing & Illuminating Co.*, 2007 Ohio App. LEXIS 2314 (8th Dist. 2007).
  - 29 *See, e.g.,* California, Cal. Civ. Code § 2782.
  - 30 Cal. Civ. Code § 2782 (2010) (emphasis added).
  - 31 *Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co.*, 20 Cal. Rptr. 3d 128 (Cal. Ct. App. 2004); *National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 82 Cal. Rptr. 2d 16 (Cal. Ct. App. 1999).
  - 32 *American Cas. Co. v. General Star Indemnity Co.*, 125 Cal. App. 4th 1510, 1525 (Cal. App. 2d Dist. 2005).
  - 33 Wis. Stat. Ann. § 895.447(1).
  - 34 350 N.W.2d 730, 733 (Ct. App. 1984).
  - 35 *Id.*
  - 36 *Id.* at 734.
  - 37 2009 Bill Text WI S.B. 589.
  - 38 States that expressly apply to construction contracts: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.
  - 39 *See, e.g.,* Florida Statute § 725.06 requires indemnity clauses for full or sole negligence of the indemnitee to state a monetary limitation on the extent of indemnification, or, alternatively, the promisee must give the promisor specific consideration in the contract and reproduce it in the project specifications or bid documents. *See Fed. Ins. Co. v. Western Waterproofing Co. of America*, 500 So.2d 162 (Fla. 1st DCA 1986); *Cone Brothers Contracting Co. v. Ashland-Warren Inc.*,

- 458 So.2d 851 (Fla. 2d DCA 1984); *A-T-O, Inc. v. Garcia*, 374 So. 2d 533 (Fla. DCA 1979).
- 40 Insurance Services Office, Sample Commercial General Liability Coverage Form CG 00 01 12 07, Section I.1.a, Page 1 of 16.
- 41 *Id.* at Section I.2b, Page 2 of 16 (2006).
- 42 *Id.* at Section I.2b (2).
- 43 Insurance Services Office, Sample Commercial General Liability Coverage Form CG 00 01 12 07, Section V.9d, Page 13 of 16.
- 44 *Id.* at Section 1.2.b.2.a, Page 2 of 16.
- 45 See generally Insurance Services Office, Sample Commercial General Liability Coverage Form CG 00 01 12 07.
- 46 Many states have statutes permitting a plaintiff, once he or she obtains a judgment that remains unsatisfied, to bring an action directly against the defendant's insurer; that action is subject to the defenses that the insurer would have against the policyholder. See N.Y. Ins. Law § 3420. See also *Lang v. Hanover Ins. Co et al.*, 820 N.E.2d 855, 856 (N.Y. 2004) (the effect of § 3420 is "to give the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied").
- 47 *Waynesborough Country Club of Chester County v. Diedrich Niles Bolton Architects Inc.*, Civ. No. 07-155, 2008 U.S. Dist. LEXIS 18746, at \*2 (D.Penn. 2008).
- 48 *Id.* at \*17.
- 49 AIA Document A401 – 2007, Standard form of Agreement between Contractor and Subcontractor, Section 4.6.1 Indemnification.
- 50 ConsensusDocs 750 – 2007, Standard Form of Agreement between Contractor and Subcontractor, Section 9.1 Indemnity.
- 51 See *Brown v. Two Exchange Plaza Partners*, 146 App Div 2d 129, 539 NYS2d 889 (1989, 1st Dept). That portion of agreement purporting to require indemnification by subcontractor even if general contractor's negligence contributed to accident was void under CLS Gen Oblig § 5-322.1; however, since indemnification agreement was prefaced by words "to the extent permitted by law," it was otherwise valid to extent it required indemnification in absence of general contractor's negligence.
- 52 898 N.E.2d 549 (N.Y. 2008).
- 53 *Id.*
- 54 *Id.* at 550. See N.Y. Gen. Oblig. Law § 5-322.1(1) ("A covenant, promise, agreement or understanding in, or in connection with ... a contract or agreement relative to the construction, alteration, repair or maintenance of a building ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.").
- 55 *Id.* at 552. See *Dutton v. Pankow Bldrs.*, 296 A.D.2d 321, 322, 745 N.Y.S.2d 520 (1st Dept. 2002) (phrases "to the fullest extent permitted by applicable law" and "regardless of whether [the general contractor is] partially negligent ... exclud[ing] only liability created by the [general contractors'] sole and exclusive negligence" enforceable); *Murphy v. Columbia Univ.*, 4 A.D.3d 200, 202, 773 N.Y.S.2d 10 (1st Dept. 2004) (obligation was "to the fullest extent permitted by applicable law"); *Jackson v. City of New York*, 38 A.D.3d 324, 324, 831 N.Y.S.2d 176 (1st Dept. 2007) (same); *Lesisz v. Salvation Army*, 40 A.D.3d 1050, 1051, 837 N.Y.S.2d 238 (2d Dept. 2007) (same); *Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667, 671, 835 N.Y.S.2d 693 (2d Dept. 2007) (same); *Bink v. F.C. Queens Place Assoc. LLC*, 27 A.D.3d 408, 409, 813 N.Y.S.2d 94 (2d Dept. 2006) (same); *Madeira v. Affordable Hous. Found. Inc.*, 315 F.Supp.2d 504, 508-509 (S.D.N.Y. 2004) (contractual indemnification language "[t]o the fullest extent permitted by law" and "to the extent caused in whole or part by the Subcontractor" is enforceable).
- 56 822 N.E.2d 305, 306 (Ma. Ct. App. 2005).
- 57 *Id.* See Mass. Gen. Laws C.149 § 29C (Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water or other utility line, which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents or subcontractors, shall be void.).
- 58 *Id.*
- 59 *Id.*
- 60 Civ. No. 3:08cv83, 2009 U.S. Dist LEXIS 79801, at \*2 (S.D. Miss. September 3, 2009).
- 61 *Id.* at 5.
- 62 Miss. Code. Ann. § 31-5-41 (With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise and/or agreement contained therein

to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.).

- 63 *Federated Rural*, 2009 U.S. Dist. LEXIS 79801, at \* 5.  
 64 *Id.* at \*6.  
 65 *Id.*  
 66 *Id.* (The court noted that it was following several other jurisdictions in enforcing the "savings provision.") See, e.g., *Giagarra v. Pav-Lak Contracting Inc.*, 55 A.D.3d 869, 866 (N.Y. App. Div. 2008) (finding that similar language reformed otherwise invalid indemnity provision); *Vecellio & Grogan Inc. v. Piedmont Drilling & Blasting Inc.*, 644 S.E.2d 16, 21 (N.C. Ct. App. 2007) (same); *Hagerman Const. Corp. v. Long Elec. Co.*, 741 N.E.2d 390, 393 (Ind. Ct. App. 2000); *Callahan v. A.J. Welch Equip. Corp.*, 634 N.E.2d 134, 137 (Mass. Ct. App. 1994) (finding indemnity provision in a construction contract that offended statute not entirely void because of the phrase "to the fullest extent permitted by law"); *Bennett v. Bank of Montreal*, 161 A.D.2d 158 (N.Y. App. Div. 1990); *Brown v. Two Exch. Plaza Partners*, 146 A.D.2d 129 (N.Y. App. Div. 1989); *Cox v. Lumbermens Mut. Cas. Co.*, 439 N.E.2d 126, 130, 64 Ill. Dec. 197 (Ill. App. Ct. 1982). See also *Ramsey v. Georgia-Pacific Corp.*, 597 F.2d 890, 894 (5th Cir. 1979).  
 67 *Federated Rural*, 2009 U.S. Dist. LEXIS 79801, at \* 8.  
 68 § 740 ILCS 35/1.  
 69 596 N.E.2d 810, 811 (1992).  
 70 *Id.*  
 71 *Juretic*, 596 N.E.2d at 812.  
 72 *Id.* at 812.  
 73 *Id.*  
 74 *Id.*  
 75 Note that in general, the state where law is specified to apply must have some relationship to the contract. For example, if one of the contracting parties was based in Alabama, that might suffice.  
 76 Note that Kansas' anti-indemnity statute applies to any

contract for construction taking place in Kansas, so a choice of law provision would not eliminate the statutory liabilities. See Kan Stat. Ann. § 16-121(e).

- 77 See *Gerdman v. U.S. Fire Insurance Co.*, 350 N.W.2d 730, 735 (Wis. Ct. App. 1984); *Reliant Energy Services Inc. v. Enron Canada Corp.*, 349 F.3d 816, 822 (5th Cir. 2003); *Goldman v. White Plains Center for Nursing Care LLC.*, 896 N.E.2d 662, 664, 867 N.Y.S.2d 27 (N.Y. 2008); *Planters Gin Co. v. Fed. Compress & Warehouse Co. Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002) ("The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern."); *Rory v. Continental Ins. Co.*, 473 Mich. 457, 703 N.W.2d 23, 30 (Mich. 2005); *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 664 N.W.2d 776, 780 (Mich.2003); *Wineburgh v. Wineburgh*, 816 A.2d 1105, 1108 (Pa. Super. 2002); *Nationwide Ins. Co. v. Rhodes*, 870 So.2d 695, 696-97 (Ala. 2003).

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