



How ANTI-INDEMNITY STATUTES CONTROL CONSTRUCTION CONTRACTS



State laws limit shifting of liability from contractors to subcontractors

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In the construction setting, contractual agreements between contractors and subcontractors often include what is commonly referred to as a hold harmless provision. Such provision requires one party (usually the subcontractor or indemnitor) to assume the liability of the other (usually the general contractor or indemnitee).

However, because of a perceived imbalance of bargaining power between the contractors and subcontractors, hold harmless provisions in the construction arena have been drastically affected by states' anti-indemnity statutes. These statutes limit the scope of legal liability that one party may transfer to another through a contract, and vary from state to state. Currently 44 states, including Connecticut, have anti-indemnity statutes while the six remaining states and the District of Columbia determine the scope of permissible indemnification through the common law.

When examining an anti-indemnity statute, a determination must be made as to whether indemnification is permissible when the negligence alleged is the sole result of either the indemnitor or the indemnitee, or in the event that they are found to be joint tortfeasors. Understanding a state's position on the issue of indemnification in a situation where the indemnitor and indemnitee are concurrently negligent is critical. The majority rule prohibits an indemnitee from contractually assigning its own sole negligence to an indemnitor, but permits some or all recovery when the indemnitor bears some responsibility.

Connecticut's anti-indemnity statute

(Conn. Gen. Stat. §52-572k) provides that, with respect to construction contracts, an agreement to indemnify a party for liability resulting from the indemnified party's sole negligence is deemed to be in violation of public policy and therefore void. The Connecticut courts have not yet determined how the Connecticut anti-indemnity statute applies when the indemnitor and indemnitee are joint tortfeasors. New York may provide some guidance on this issue as its anti-indemnity statute is similar to Connecticut's. The scope of the New York anti-indemnity statute was addressed in *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008).

Judlau examined a contractual indemnification clause between Judlau, the general contractor, and its subcontractor both of which were named in the plaintiff's bodily injury lawsuit. The trial court dismissed the general contractor's indemnification claim, holding that the general contractor's work was a substantial factor in causing the plaintiff's accident and that the general contractor was, "at least to some degree," actively negligent. Based on this finding, the court concluded that the general contractor was precluded from seeking indemnification from co-defendant/subcontractor, the indemnitor in the



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contractual relationship. It is important to note that the trial court *did not* determine that the general contractor was solely negligent for the plaintiff's accident.

Partial Indemnification

The *Judlau* decision was appealed and reversed by the Court of Appeals of New York. The Court of Appeals clarified that it *would not* allow Judlau to recover for its own acts of negligence, but it would permit indemnity for that negligence which could be attributed to the subcontractor. To hold otherwise and not allow a partial indemnification by the general contractor would leave the general contractor liable for negligent acts of the subcontractor and would be contrary to the intent of New York's anti-indemnity statute. Thus, the New York anti-indemnity statute does not prevent partial indemnification

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when the indemnitee and indemnitor are found to be joint tortfeasors.

Based on the variation among states' anti-indemnity statutes and the tremendous implications that the statutes can have upon a contractual hold harmless provision, it is important to examine the governing law that controls the contract.

Such an examination requires a comprehensive review of the controlling state's choice of law application. It is not enough to simply draft a broad hold harmless clause; some courts hold that contractual indemnification language that is determined to be overly broad is completely stricken from the contract and provides the indemnitee no protection or right of indemnification. Therefore, the contractual language must track the requirements and provisions contained within the controlling anti-indemnity statute or, in some states, language such as "to the fullest extent permissible by law" may be sufficient to cure an overly broad hold harmless agreement. *Ostuni v. Town of Inlet*, 881 N.Y.S.2d 678, 680 (N.Y. App. Div. 2009).

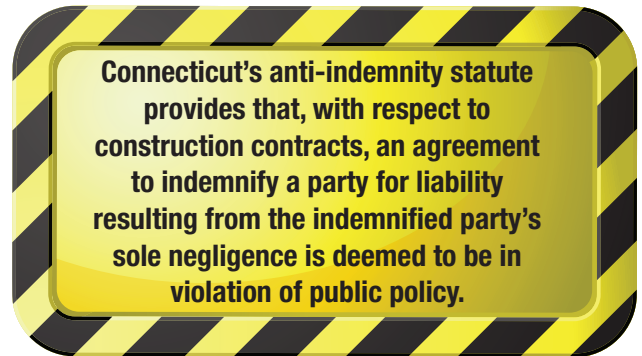
Additional Insured Provision

In addition to hold harmless provisions, parties to construction contracts usually in-

clude language that require the indemnitor to add the indemnitee as an additional insured on its general liability insurance policy. Requests to procure insurance generally do not violate anti-indemnity statutes (see Conn. Gen. Stat. § 52-572, which states that "this section [the anti-indemnity statute] shall not affect the validity of any insurance contracts"), with Oregon and Oklahoma being the exception.

Therefore, while oftentimes an indemnitee, commonly a general contractor, will find itself in a situation where the contractual indemnification agreement is not covered by the indemnitor's policy, the general contractor can nevertheless seek defense and indemnity from the indemnitee's insurer as an additional insured.

This combination of a well-drafted contract using terms allowed by the controlling anti-indemnity statute, and requiring procurement of the proper additional insured endorsement will protect the parties in the



event of claims by third parties. Other considerations to be mindful of when drafting a construction contract to protect the contractor's future risks are:

- the additional insured endorsement must provide coverage for risks assumed by contractual indemnification provision(s).
- contractual indemnification agreements that provide for both defense and indemnity are usually "insured contracts" for which coverage is provided by a standard commercial general liability policy; however the defense portion is treated as "damages" and therefore erodes policy limits leaving less coverage for future claims. ■