THE DEVIL IS IN THE DETAILS

APPLICATION OF ANTI-INDEMNITY STATUTES IN CONSTRUCTION CONTRACTS

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Parties to construction contracts have historically used indemnity clauses to shift the responsibility to pay damages from one party (the indemnitee) to another party (the indemnitor) without regard to who actually caused the damage. Over time, however, states enacted so-called "anti-indemnity" statutes to limit the amount of liability that parties to construction contracts can allocate to others.

To date, all but four states and Washington D.C. have enacted such statutes that limit and control the ability of certain parties to pass liability to others. While most of these statutes are similar in nature, there are distinct – and sometimes subtle – differences between them, which can have a significant impact on the ability of owners/general contractors to pass liability onto other parties. If the indemnity provision in a construction contract is struck down because it violates an anti-indemnity statute, the indemnitor may be saddled with liability that it did not intend for. Accordingly, any party entering into a construction contract should consider analyzing the applicable state's anti-indemnity statute when drafting such a contract.

This article will discuss the history of these anti-indemnity statutes and then analyze two common issues that arise: the applicable scope of most anti-indemnity statutes; and whether these anti-indemnity statutes apply only to the sole negligence of the indemnitee or to both sole negligence of the indemnitee and concurrent negligence by both the indemnitee and indemnitor. The intent of this article is to identify and describe some of the important differences in the varying anti-indemnity statutes, and to offer some suggestions for how counsel and risk managers can proactively limit the potential risk involved in indemnity claims.

A HISTORY LESSON: THE ENFORCEABILITY OF INDEMNIFICATION PROVISIONS IN CONSTRUCTION CONTRACTS HAS CHANGED OVER TIME

Historically, indemnity clauses in contracts were governed by common law. Whether or not an indemnity clause was enforceable depended on the perceived intent of the parties. As a result, many owners/general contractors included language in their construction contracts requiring other parties, such as subcontractors and service providers, to provide full indemnity for any claims against the indemnified party that would arise during the course of the work.

However, over the past 50 years, many states have enacted anti-indemnity legislation to curtail the perceived imbalance in bargaining power between owners/general contractors and subcontractors/service providers so that owners/general contractors would be liable for their own negligence. Public policy also dictated that there would be more incentive to improve workplace safety by requiring owners/general contractors to be more responsible for their own negligent acts.

Currently, 46 states have enacted some form of an anti-indemnity statute that prohibits or limits the ability of the indemnitee to transfer liability in construction contracts for its sole negligence. Most states do, however, allow limited indemnity provisions under which the indemnitor promises to indemnify the indemnitee for the indemnitor's negligence. A majority of these states also permit an indemnitor to indemnify the indemnitee for the indemnitor's concurrent negligence. However, some states have curtailed the availability of indemnity for any fault allocated to the indemnitee.

THE SCOPE OF ANTI-INDEMNITY CLAUSES: WHICH CONTRACTS AND PARTIES ARE SUBJECT TO ANTI-INDEMNITY STATUTES?

The first step a party must take before drafting or attempting to enforce an indemnity agreement is to determine whether the state's anti-indemnity statute covers the specific contract in question and which parties, if any, are prohibited from being indemnified. This may require some analysis of the choice of law rules should a dispute arise under the construction contract. Although this may be a complex analysis without a clear answer until after some personal injury or property damage occurs during the performance of the contract, identifying the potential jurisdictions where a dispute may arise can offer some clarity into which state's anti-indemnity statute will likely apply.

Once venue is determined, the next

step is analyzing the scope of the applicable anti-indemnity statute. Many anti-indemnity statutes apply generally to all agreements that relate to construction contracts. The operative language in these broader anti-indemnity statutes provides that it applies to all agreements that are made "in connection with or collateral to a construction contract" or some similar language. However, other state's anti-indemnity statutes have a much narrower scope, and apply only to agreements "contained in a construction contract." Because the scope of this language varies from state-to-state, it is important for parties to construction contracts, and suppliers of equipment and materials to others that may be parties to construction contracts, to pay close attention to the applicable state's anti-indemnity statute.

One of the more pervasive issues that has arisen regarding the scope of anti-indemnity clauses is whether rental agreements for construction equipment and vehicles are subject to anti-indemnity statutes. For states that have enacted a broader anti-indemnity statute applicable to "agreements in connection with a construction contract," the majority rule is that such rental agreements are subject to anti-indemnity statutes.[1] However, a minority of states, including Missouri, only apply their anti-indemnity statutes to certain contracts "in connection with construction contracts," such as design contracts, private contracts, or public contracts.[2]

Furthermore, certain anti-indemnity statutes are limited to certain parties and certain claims. For example, Pennsylvania's anti-indemnity statute only applies to indemnity agreements under which architects, engineers, or surveyors are indemnified for costs related to the design of the project. However, only a minority of states limit indemnification to certain underlying contracts, parties and claims.

After finding that a certain contract may be subject to an anti-indemnity clause, the next step is to determine whether the statute allows indemnification when the negligent actor was the indemnitor, the indemnitee, or both.

IS THIS COVERED: HOW MUCH RISK CAN THE INDEMNITEE TRANSFER IN CONSTRUCTION CONTRACTS?

In the context of construction contracts, broad indemnity clauses require the indemnitor to indemnify the indemnitee for all claims against the indemnitee, even those that arise out of the indemnitee's sole negligence. These broad indemnity provisions are the most targeted by anti-indemnity legislation, and thus, run the risk of being struck down in subsequent litigation.

To date, 16 states have enacted anti-indemnity statutes that specifically target indemnity agreements that provide indemnification for the indemnitee's sole negligence. However, while those statutes explicitly prohibit agreements that indemnify an indemnitee for its sole negligence, many anti-indemnity statutes are silent as to whether they also apply when there is concurrent negligence by the indemnitor and the indemnitee. Determining whether the statute allows for indemnification of concurrent negligence can be critical to knowing whether or not the indemnification provision will be enforceable.

Adding to the uncertainty surrounding the enforceability of indemnity agreements is the fact that some states have little case law interpreting its anti-indemnity statute. In addition, some courts have found that agreements may be enforceable if they seek to indemnify an indemnitee only for its concurrent negligence (unless otherwise expressed in the statute). For instance, California courts found that their anti-indemnity statute applied when the indemnitee is solely negligent, but not when the indemnitor and the indemnitee are jointly negligent. Likewise, a Michigan court severed part of an indemnity clause that provided indemnity for the indemnitee's sole negligence, but retained the part of the indemnity clause that provided indemnity for the indemnitee's concurrent negligence. However, when an indemnity agreement broadly provides for indemnity that includes the indemnitor's sole negligence, courts have been more prone to find such agreements unenforceable.

Lastly, it is important to note that Alabama, Maine, Vermont, Wyoming, and Washington D.C. do not have anti-indemnity statutes. Instead, these jurisdictions interpret indemnity clauses based on the common law and have enforced broad indemnity agreements so long as the intent of the parties is *clearly and unequivocally stated.* It is vital that the obligations of both parties are unmistakably clear when drafting a contract in these jurisdictions.

CONCLUSION

Indemnity clauses have become ubiquitous in construction contracts and agreements in connection with those contracts. While it may be enticing to resort to boilerplate language, those responsible for drafting and reviewing such contracts should ensure that the indemnity clause does not conflict with the applicable anti-indemnity statute. If an indemnification clause is voided following a loss during a construction project, the shift in potential liability could be substantial.

As a general rule, an indemnity clause will most likely be enforceable in those states with anti-indemnity statutes if the proposed indemnitees are permitted to be indemnified by the applicable anti-indemnity statute and the indemnity clause does not explicitly seek to indemnify the indemnitee for its sole negligence. Of course, one should always refer to the specific anti-indemnity statute and the case law interpreting such statute, particularly in those states that prohibit indemnification for concurrent negligence as well as sole negligence. Keeping the above points in mind and conducting diligent research should enable individuals to draft enforceable indemnity clauses and avoid unexpected losses.

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[1] *Calkins v. Lorain Div. of Koehring Co.*, 26 Wn. App. 206, 613 P.2d 143 (Wash. Ct. App. 1980).
[2] R.S.Mo. § 434.100.