Anti-Indemnity Statutes and Contractual Indemnification for Construction Contracts

Contractual indemnity agreements transfer risk by providing for a third party to compensate another for losses or damages that arise from the contracted action. For example, in the construction context, if a claim is brought against an owner, indemnification by the general contractor protects the owner from claims brought by third parties.

Anti-Indemnity legislation is important to subcontractors because too often contractors and owners shift their own liability and risk to the subcontractors. Specifically, certain provisions in a construction subcontract, such as "hold harmless" and "additional insured" provisions, may seek to hold the subcontractor accountable for accidents or other losses that are not the fault of the subcontractor.

These provisions are of concern to subcontractors because they may shift the financial responsibility for claims to the subcontractor or its insurance company. As a result, a party who is indemnified by the subcontractor may use less care to avoid injury or loss because the indemnified party is not liable for its own actions. This may result in more accidents on a worksite that could have been avoided.

The party who is truly responsible for the loss suffers no increased cost, while the subcontractor bears the entire burden. Only six states (CO, GA, MT, NM, OK, OR) address this problem by prohibiting a party from requiring another party to name it as an additional insured under a policy of insurance.

Most states have adopted three general methods of interpreting third party indemnity contracts: 1) limited indemnity; 2) partial indemnity; and 3) broad form indemnity. Anti-indemnity statutes in several states have been designed and enacted to limit the amount of indemnity a third party can contract, specifically in the context of a construction contract.

1) Limited Indemnity

Limited indemnity provides the least amount of protection to the indemnitee, i.e., the party being indemnified. The indemnitor, i.e., the party indemnifying the other party, assumes only the risk for its own negligence. For example, damages resulting from a personal injury suit would only be covered by a third party indemnitor if and to the extent that the indemnitor caused the injuries.

All states allow limited indemnity contract provisions.

2) Partial Indemnity Covers "Partial Fault"

Partial indemnity provides more protection to the indemnitee. Indemnification may be available on a sliding scale based upon specific percentages of negligence. Partial indemnification is when the indemnitor promises to indemnify the indemnitee's concurrent negligence – when both parties have contributed to the loss. Anti-indemnity statutes apply to bar indemnity provisions which allow partial fault.

Local states which have anti-indemnity statutes barring indemnity for partial fault are DE and OH. These states provide more protection to subcontractors as indemnitors.

3) Broad Indemnity Covers "Sole Fault"

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. The indemnitee would receive indemnity from the indemnitor even if the indemnitee was solely at fault for the injury.

This is the most beneficial form of indemnification from the standpoint of the indemnitee. Most states have prohibitions on broad form indemnity agreements in construction contracts and will void contracts which indemnify the indemnitee for its own sole fault or negligence.

Six local states have anti-indemnity statutes barring indemnity for sole fault. These are CT, DE, MD, NJ, OH, and WV. (Note that the statutes of DE and OH bar indemnity for both partial and sole fault, giving subcontractors as indemntitors greater protection by law).

4) States in Mid-Atlantic Region

The list below cites the applicable statutes and describes how seven states prohibit indemnity for partial fault or sole fault of the indemnified party.

PA

There is no anti-indemnity statute which specifically bars indemnification of subcontractors. In Pennsylvania, indemnification provisions in contracts are generally allowed if

they are clearly and unequivocally stated. *See Ocean Spray Cranberries, Inc. v. Refrigerated Food*, 936 A.2d 81, 84 (Pa. Super 2007).

Pa. Stat., Title 68, § 491 prohibits indemnity of design professionals only. The statute prohibits design professionals from limiting their liability for professional negligence and bars claims made by design professionals which seek indemnification.

NJ

N.J. Stat. § 2A:40A-1, bars indemnity for ***sole fault***. This statute pertains to all construction contracts and all agreements where the indemnitee is a design professional and liability arises out of design services.

DE

Del. Code, Title 6, § 2704, bars indemnity for ***sole or partial fault***. This statute pertains to all construction and design contracts.

CT

Conn. Gen. Stat. § 52-572k (P.A. 01-155), bars indemnity for ***sole fault***. This statute pertains to all construction contracts, and does not mention design contracts.

MD

Md. Code. Ann., Cts. & Jud. Proc. § 5-401 (2008), bars indemnity for ***sole fault***. This statute pertains to all construction contracts.

OH

Ohio Rev. Code § 2305.31, bars indemnity for ***sole or partial fault***. This statute pertains to all construction and design contracts.

WV

W.Va. Code § 55-8-14, bars indemnity for ***sole fault***. This statute pertains to all construction contracts.

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