Construction Contract Anti-Indemnity Statutes: Roadblocks to Risk Allocation

Marie A. Moore
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.
New Orleans, LA

The majority of U.S. states have now enacted statutes that invalidate construction contract provisions in which a party agrees to indemnify other parties for all liabilities arising from the negligence of the party being indemnified. Jeremiah M. Welch and Alexandrea L. Isaac, "How Anti-Indemnity Statutes Control Construction Contracts," Conn. L. Trib., Nov. 2, 2009, at 17 (Vol. 35, No. 44); Allen Holt Gwyn and Paul E. Davis, "Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law," Construction Lawyer, Summer 2003, at 26 (Vol. 23, No. 3). More states are targeted for this basic anti-indemnity legislation or for broadened anti-indemnity prohibitions that include restrictions on the insurance which a party can be required to maintain in a construction contract.

The Public Policy Reasons for Enacting These Statutes

The American Subcontractors Association (ASA) is an active proponent of these statutes. In the 2009 article, "Anti-Indemnity Statutes in the 50 States," the ASA provides a chart showing the status of all U.S. anti-indemnity laws (ASA Chart) and explains that provisions in which a subcontractor is required to indemnify the contractor and to insure for accidents that are not caused by the subcontractor "unfairly shift the financial responsibility for claims to the subcontractor." Foundation of the American Subcontractors Association, Inc., Anti-Indemnity Statutes in the 50 States" (2009):

http://keglerbrown.com/File%20Library/Practice%20Areas/Construction%20Law/2009-anti-indemnity-manual.pdf.

The public policy considerations against these construction contract provisions stem "from the notion that a general contractor, assured that it will be fully indemnified for its conduct (however reckless or dangerous) loses the financial incentive to exercise due care, and therefore sloughs off any moral responsibility to prevent foreseeable injury to others." Andrew A. Beerworth, "Emerging Trends in Construction Indemnity and Insurance Law," 58 R.I. B.J. 17, at 18 (2010).

This argument assumes (1) that ordinary negligence is something that parties can consciously prevent; (2) that liability and insurance for another party's ordinary negligence should not as a matter of public policy be allocated to a subcontractor; and (3) that a subcontractor is always in a weaker position and should be protected by law from the effects of its own contractual agreements.

However, the statutes that are being enacted across the country do not protect merely subcontractors or parties with inferior bargaining positions. With the exception of Chapter 149, § 29C, of the General Laws of Massachusetts and, to some extent, § 6-34-1 of the General Laws of Rhode Island, these statutes also protect contractors and, in most cases, owners as well. The law considers neither the bargaining position of the parties nor the facts or pricing of a particular construction project—the prohibitions are absolute. As a consequence, lawyers dealing with construction contracts must be mindful of the special rules that may nullify their negotiated risk-shifting provisions.

The Scope of Statutory Restrictions

To complicate the task of evaluating these risk-shifting prohibitions, the state statutes are by no means uniform; and, some of the state statutes are more rigid in their application than others.

Many state statutes invalidate only provisions requiring that a party to a construction contract pay for losses and damages arising from the other party's *sole negligence.* The statutes enacted in California, New Jersey, South Carolina and Virginia are examples of statutes in which only indemnification against the indemnitee's *sole negligence* is prohibited. Cal. Civ. Code § 2782; Ga. Code Ann. § 13-8-2; N.J. Stat. Ann. § 2A:40A-1; S.C. Code Ann. § 32-2-10; Va. Code Ann. § 11-4.1.

In other states, the anti-indemnity statutes bar provisions that require a party to a construction contract to pay for the other party's negligence—whether the negligence is sole or contributory. The Oklahoma anti-indemnity statute specifies that the "indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitor, its agents, representatives, subcontractors, or suppliers." Okla. Stat. tit. 15, § 221(C). Other states whose statutes invalidate provisions requiring an indemnitor to indemnify the indemnitee against its own partial negligence include Connecticut, Delaware, New York and Washington. Conn. Gen. Stat. § 52-572k; Del. Code Ann. tit. 6, § 2704; N.Y. Gen. Oblig. Law § 5-322.1; Wash. Rev. Code § 4.24.115.

In its 2010 regular session, Louisiana's legislature enacted Louisiana's first contractor anti-indemnity law, and it appears to provide the most protection for indemnitors in construction contracts. Section 9:2780.1(B) of the Louisiana Revised Statutes now renders unenforceable any provision contained in, collateral to or affecting a construction contract "which purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control."

Even a party's agreement to provide indemnity for acts or negligence of "parties over whom the indemnitor has no control" is barred by this statute.

Most statutes provide that they do not affect the validity of insurance contracts. For example, the Delaware law specifies:

"Nothing in subsection (a) of this section shall be construed to void or render unenforceable policies of insurance issued by duly authorized insurance companies and insuring against losses or damages from any causes whatsoever." Del. Code Ann. tit 6, § 2704; *see also,* e.g., Conn. Gen. Stat. § 52-572k; Miss. Code Ann. § 31-5-41; R.I. Gen. Laws § 6-34-1. Virginia's statute states explicitly that it does not apply to "the validity of any insurance contract, workers' compensation, or any agreement issued by an admitted insurer." Va. Code Ann. § 11-4.1.

Other states not only invalidate a party's obligation to indemnify another party for its own negligence, but also void a party's obligation to maintain insurance that would cover the other party's negligence or, in some cases, any negligence other than the negligence of the party required to provide the insurance. Okla. Stat. tit. 15, § 221(C). Oklahoma's statute, which is cited above, also protects the indemnitor's insurer from providing coverage in excess of the degree or the percentage of negligence or fault attributable to the party providing the insurance. Similarly, Louisiana's new statute states that a contract requiring a party to a construction contract to "procure liability insurance covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control is null void and unenforceable." La. Rev. Stat. Ann. § 9:2780.1(C).

The Policy and Drafting Concerns

Certainly, public policy should encourage contracting parties to act responsibly and protect the safety of workers and visitors. In *Pierre Condominium Association v. Lincoln Park West Associates, LLC,* 881 N.E.2d 588, 593 (Ill. App. Ct. 2007), the court explained that "The Indemnification Act was enacted to thwart the common construction industry practice of using indemnity agreements to avoid liability for negligence and to ensure a continuing incentive for individuals responsible for construction activities to protect workers and others from injury."

However, many, if not most, of the current anti-indemnity statutes are broader than is necessary to accomplish this public policy goal. They certainly protect a small contractor or a subcontractor performing a discrete construction task from an obligation to indemnify the owner or primary contractor for accidents not caused by the small contractor or subcontractor. However, many, if not most, of the current anti-indemnity statutes also protect large construction contractors in situations in which unfairness may result from the statute's application.

In many large construction projects, the entire construction site is turned over to the primary contractor and, as part of the contract price, the primary contractor assumes responsibility for and agrees to maintain the liability insurance covering all accidents that occur in connection with the construction or with respect to the property while the work is being performed, without consideration of the cause of the accident. Parties adopt this approach to reduce construction costs and make one liability insurer obligated to defend and pay all claims, without litigation among a number of insurance providers.

However, the broad anti-indemnity statutes will nullify agreements that seek to

implement this approach. Worse, an unrepresented owner using a national form contract that imposes total liability for the job site on the contractor may not know that its contractual risk allocations are void. In this situation, the owner may rely on the contractor's unenforceable written obligations and may not procure the insurance it needs to cover its own negligence.

What Can a Lawyer Do?

It is important that a lawyer representing a client on construction matters review the statutes of each state in which its client is operating, whether as the owner or contractor, to see if that state has adopted a construction anti-indemnity statute. If that state voids certain indemnities or insurance requirements in construction contracts, then the lawyer should include contractual provisions that conform to the statutory restrictions; the lawyer also must urge the client to maintain its own insurance to cover the liabilities that cannot be assumed by the other party.

MARIE A. MOORE, a Member of Sher Garner Cahill Richter Klein & Hilbert, L.L.C., in New Orleans, practices in the areas of commercial leasing and real estate, construction, lending and general commercial transactions. She has authored and coauthored many articles and frequently speaks at seminars on the topics of leases and other real estate issues.