Insight from
Carlton Fields
2011

Indemnity Clauses in Construction Contracts

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Types of Indemnity

Although the definition of "indemnify" as a general concept is fairly straightforward (Black's Law Dictionary defines it in part as "to save harmless"), there are several different forms of indemnity that the construction practitioner must be aware of: 1) Common Law Indemnity, 2) Limited Form Indemnity, 3) Intermediate Form Indemnity, and 4) Broad Form Indemnity.

Common Law Indemnity

Common law indemnity is the most restrictive type of indemnity. To establish a cause of action for common law indemnity, a plaintiff must typically plead and prove four elements: (1) that he or she is without fault; (2) that his or her liability is vicarious and solely for the wrong of another; (3) that the defendant is with fault; and (4) that there is a special relationship between the plaintiff and defendant.[1]

Limited Form Indemnity

Under a limited form indemnity agreement, indemnification is allowable for losses exclusively caused by the indemnitor's negligence. Thus, "any negligence on the part of the indemnitee, either active or passive, will bar indemnification."[2]

Intermediate Form Indemnity

Intermediate indemnity applies when the indemnitor does not agree to indemnify the indemnitee for its sole negligence, but does agree to indemnify against loss that is caused "in whole or in part" by the negligence of the indemnitor. Thus, even where indemnitee is almost entirely, but not completely, at fault, the indemnitor is still responsible.[3]

Broad Form Indemnity

Broad form indemnity, as its name suggests, provides the broadest protection for an indemnitee and requires the indemnitor to save and hold the indemnitee harmless from all liabilities, regardless of which party's negligence caused the liability. "Under this type of provision, the indemnitee is indemnified whether his liability has arisen as the result of his negligence alone or whether his liability has arisen as the result of his co-negligence with the indemnitor."[4]

Given that an indemnitor may have no fault, but still be required to hold the indemnittee harmless, it is not surprising that a number of states have enacted anti-indemnity statutes that render broad form indemnity provisions unenforceable on the ground that they violate public policy.[5] Further, courts in states without anti-indemnity statutes disfavor broad form indemnity

clauses by strictly construing the language appearing in those clauses.[6]

Enforceability of Indemnification Clauses

Indemnity Clauses Must Be Clear and Specific

It is well settled that in order for an indemnity provision to be enforceable it must be clear, specific, and unequivocal. If an indemnity clause is unambiguous, the court will enforce the clause as written.[7] On the other hand, if the indemnification clause is ambiguous or conflicts with other provisions of the contract, courts will construe the contract against the drafter. Thus, if the indemnitee was the drafter, the court may find that the indemnitee is not entitled to indemnification.[8] Accordingly, the language of an indemnification clause in a construction contract must reflect the indemnitor's acceptance of the burden and must express the burden in clear and unequivocal terms.[9]

Public Policy Concerns Place Statutory Constraints on Indemnity Provisions

As case law developed enforcing intermediate and broad form indemnification provisions, many state legislatures enacted anti-indemnification statutes. Like the varying forms of indemnification, anti-indemnity statutes vary in reach and scope. They range from prohibiting intermediate and broad form indemnification to permitting broad form indemnification, but only if there is a monetary limitation on the indemnification obligation. Additionally, some states distinguish private contracts and public contracts with respect to the constraints placed on contractual indemnity. These statutes, in whatever form, are primarily based on public policy grounds.[10] The major public policy argument for prohibiting broad form indemnity clauses in the construction industry is that if a general contractor is permitted to shift the financial burden of liability, there is less incentive for a general contractor to take measures to make a construction site safe.[11] Therefore, to increase workplace safety, some state legislatures have made it unlawful to include broad form indemnification provisions in construction-related contracts.[12]

By example, Georgia's Code provides that a construction contract which purports "to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable."[13]

Similarly, Florida Statute § 725.06 voids broad form indemnity clauses which purport to require indemnification for damages caused by the actions of the indemnitee unless the contract contains a monetary limit on the extent of indemnification which bears a reasonable commercial relationship to the contract.

Standard Form of Contractual Indemnity Provisions

An indemnity provision is one of, if not the most, commonly used provisions in a construction contract. For that reason, it is contained in all of the standard form industry contracts; namely, the AIA A201-2007,[14] Consensus DOCS – 2009[15] and EJCDC C-700.[16]

Insuring the Indemnity Risk

There are two critical issues that a construction practitioner must address when drafting indemnification provisions. First, the provision must be enforceable. Second, the prevision must be insurable.

As described above, there are four types of general indemnification provisions: common law, limited form, intermediate form and broad form. Since many states have anti-indemnity statutes which render intermediate and/or broad form indemnification provisions unenforceable as a matter of public policy, a thorough understanding of the applicable state law is critical, because if the indemnification provision is unenforceable then it may also be uninsurable.[17]

In order to insure the indemnification obligation, indemnitors purchase contractual liability coverage under a Commercial General Liability ("CGL") policy. As an added protection, indemnitees often require indemnitors to name them as an additional insured on the indemnitors' policy. Some states, however, not only prohibit intermediate form or broad form indemnification, but also prohibit parties from shifting this risk to the indemnitor by naming the indemnitee as an additional insured.[18]

Contractual Liability Coverage

Indemnification obligations are typically insured under a CGL policy. However, the analysis is not as straightforward as one may think and requires four steps. First, coverage is granted in the Insuring Agreement contained in Section I – Coverages, which provides, in part:

> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies….

Second, coverage is taken away in Exclusion 2.b.—Contractual Liability:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **b. Contractual Liability**
>
> "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 …

Third, coverage is given back through an exception to the exclusion. In that connection, section 2.b.(2) provides:

> This exclusion does not apply to liability for damages … (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.…

Fourth, the definition of an "insured contract" must encompass an indemnity obligation."[19] In that connection, the standard Insurance Services Office ("ISO") defines an "insured contract" as:

> **f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement….[20]

If the indemnification provision is unenforceable due to an anti-indemnity statute, the courts are split on whether it meets the definition of an "insured contract." Some courts hold that there is no "insured contract" and thus no coverage.[21] Others hold that the portion of the indemnification that is enforceable still constitutes an "insured contract."[22] Still others

hold that unless the insurance policy uses the term "enforceable insured contract" an unenforceable indemnification constitutes an "insured contract."[23]

It is therefore imperative for construction law practitioners to verify that indemnification obligations are enforceable and insurable under applicable state law. It is also important to recognize that courts take varying positions on whether an invalid indemnification provision constitutes an "insured contract" or whether a valid indemnification provision even constitutes an "insured contract."

Additionally, practitioners must be aware that some insurers modify the standard definition of an "insured contract" by (1) requiring the indemnitor to be partially negligent or at fault or (2) eliminating **Paragraph f.** in its entirety through an endorsement, which has the effect of eliminating coverage for an indemnification obligation. By deleting **Paragraph f.**, the definition of an "insured contract" does not include an indemnification obligation, and thus this coverage is eliminated.

Supplementary Payments Coverage

In addition to obtaining coverage for the indemnity obligation, an insured can often purchase Supplementary Payments coverage within the CGL Policy, which under certain conditions will pay for the indemnitee's defense costs. The Supplementary Payments Coverage provides the indemnitee coverage similar to that of an additional insured.

Conclusion

The principle of indemnification is critical to the functioning of an orderly society. As such, there are no more important terms in the construction contract than the indemnity and related insurance provisions.

The construction practitioner must have a thorough understanding of the different forms of indemnification – common law, limited, intermediate, and broad form, and the statutory restrictions placed on these forms. It is equally critical that the construction practitioner have a thorough knowledge of the insurability of the indemnification risk through liability coverage and additional insured endorsements, and the statutory restrictions placed on these coverages.

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1 *See Dade County Sch. Bd. v. Radio Station* WQBA, 731 So. 2d 638, 642 (Fla. 1999).
2 *MacDonald & Kruse, Inc. v. San Jose Co., Inc*., 29 Cal. App. 3d 413, 420 (Cal. Ct. App. 1972).
3 *Bradford v. Kupper Assocs.*, 283 N.J. Super. 556 (App. Div. 1995); *Sexallus v. Muscarelle*, N.J. Super. 535, 586 A.2d 305 (N.J. Super. A.D. 1991).
4 *MacDonald & Kruse, Inc.*, 29 Cal. App. 3d 413, 419 (Cal. App. 2 Dist. 1972).
5 *See Jankele v. Tex.*, 54 P.2d 425 (Utah 1936).
6 *See e.g., Craig Constr. Co. v. Hendrix*, 568 So. 2d 752, 756 (Ala. 1990); *Wash. Elem. Sch. Dist. No. 6. v. Baglino Corp.*, 817 P.2d 3, 6 (Ariz. 1991); *Ark. Kraft Corp. v. Boyed Sanders Constr. Co.*, 764 S.W.2d 452, 453 (Ark. 1989); *Goldman v. Ecco-Phoenix Elec. Corp.*, 396 P.2d 377, 379 (Cal. 1964); *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 44 (Del. 1972); *Rodrigue v. LeGros*, 563 So. 2d 248, 254 (La. 1990); *Parliament Constr. Co. v. Beer Precast Concrete Ltd.*, 319 N.W.2d 374, 378 (Mich. 1982); *Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646 (Minn. Ct. App. 1985); *Sw. Bell Tel. Co. v. J.A. Tobin Constr. Co.*, 536 S.W.2d 881, 885 (Mo. Ct. App. 1976); *Freund v. Utah Power & Light Co.*, 793 P.2d 362, 370 (Utah 1990).
7 *Doster Constr. Co., Inc. v. Marathon Elec. Contractors*, No. 1061471, 2009 WL 3064789, at *4 (Ala. Sep. 25, 2009).
8 *Chester Upland Sch. Dist. v. Edward J. Meloney, Inc.*, 901 A.2d 1055, 1063 (Pa. Super. Ct. 2006).
9 *Estate of A. Williams v. S. Ind. Gas and Elec. Co., Inc*., 551 F. Supp. 2d 751, 755 (S.D. Ind. 2008) (holding that an indemnification clause, which simply states that a subcontractor shall indemnify a general contractor for any negligence that arises from the job is insufficient to inform the subcontractor that it must indemnify the general contractor for acts of the general contractor's own negligence).
10 *Id.* at 755.

11 *Id.* at 969.
12 *Id.*
13 *Georgia*, Ga. Code Ann. § 13-8-2(b)
14 The AIA Family of Construction Documents are prepared by the American Institute of Architects ("AIA") and are probably the most widely used family of construction documents. Information about the AIA can be found at http://www.AIA.org.

15 The ConsensusDOCS were developed by a coalition of twenty-three leading industry organizations representing owners, contractors, subcontractors, designers and sureties. One of the primary sponsors was the Associated General Contractors of America ("AGC"). Information about the ConsensusDOCS can be found at http://www.consensusdocs.org.
16 The EJCDC Documents are prepared by the Engineers Joint Contract Documents Committee ("EJCDC") and are issued and published jointly by the (1) National Society of Professional Engineers, (2) Consulting Engineers Council, (3) American Society of Civil Engineers, and (4) Construction Specifications Institute. Information about the EJCDC can be found at http://www.EJCDC.org.
17 *See Mid-Continent Cas. Co. v. Constr. Servs. and Consultants, Inc.*, 2008 WL 896221 (S.D. Fla. 2008); *Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So. 2d 336 (Fla. 4th DCA 1996).
18 *See e.g. Ky. Rev. Stat. Ann.* §§16-121 (2008) ("A general provision in [the covered agreements] 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").
19 *Mid-Continent Cas. Co.*, at * 4.
20 ISO Form CG 00 01 11 88, Section V. ¶ 9.f.
21 *True Oil Co. v. Mid-Continent Cas. Co.*, 173 Fed. Appx. 645, 2006 WL 728772 at *5 (Wyo. 2006) (intermediate form indemnification agreement voided by Wyo. Stat. Ann. § 30-1-131; as such, does not constitute an "insured contract").
22 *Mid-Continent Cas. Co. v. Constr. Servs. and Consultants, Inc.*, 2008 WL 896221 (S.D. Fla. 2008).
23 M*artin County Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, 2010 WL 55926 at *5 (E.D. Ky.)