

Real Estate Title Insurance & *Construction Law*

Carefully Drafted Indemnification Clauses Provide Significant Protections To Construction Contract Parties

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Virtually every construction contract and subcontract has an indemnification clause and many contain more than one. Despite the ubiquitous nature of such clauses, parties to construction contracts seldom are attentive to them during contract drafting and negotiation. Only when disputes arise do the parties begin to scrutinize the indemnification provisions in their contracts. Unfortunately, at that juncture, it is often too late and a party either will not realize the benefit of indemnification they assumed existed or they will have to engage in costly litigation over the scope and coverage of the indemnification provision. The potential for such outcomes can be avoided by careful drafting of the indemnification provision so as to ensure the clause provides the protection intended and complies with

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applicable law.

Contractual indemnification provisions (also known as hold harmless agreements) address transfer of risk of loss, usually with respect to claims asserted by third parties, from one party to the contract to another. By agreeing to an indemnification provision, the indemnitor (the party providing the indemnification) voluntarily assumes an obligation that would otherwise rest with the indemnitee (the party receiving the indemnification). A typical indemnification clause defines the nature of the claims that are subject to indemnification, the parties' respective responsibilities for such claims and the scope of the indemnification obligation. Indemnification clauses can provide significant protections to the indemnitee by obligating the indemnitor to be monetarily responsible for claims asserted against the indemnitee, including the costs and attorneys' fees incurred by the indemnitee in defending against the claims in any legal proceeding. Further, if sufficiently worded, an indemnification clause can enable an indemnitee to extricate itself early on from a litigation where the claims asserted against

it fall within the ambit of the indemnification obligations. Thus, it is critical that parties to a construction contract understand the scope of any indemnification clauses in their contracts and how such clauses will be construed by the governing law.

The contours of permissible indemnification under New Jersey law are broader than some other jurisdictions, including New York, and allow a party to a construction contract to indemnify the other party for its own negligence under certain circumstances. See *Leitao v. Damon G. Douglas Co.*, 301 N.J. Super. 187, 192 (App. Div. 1997). There are several salient points to consider in drafting an indemnification provision that will enable an indemnitee to avoid protracted litigation by optimizing the potential for indemnification for its own fault, the indemnitor's fault, and the fault of third parties.

First, while New Jersey law recognizes the right of an indemnitee to obtain indemnification for his own negligence, that right is not limitless. N.J.S.A. Section 2A:40A-1 provides that clauses in construction con-

tracts (other than those in which a railroad or the state is a party) purporting to provide indemnification for the indemnitee's sole negligence are void and unenforceable. Thus, parties should not overreach in drafting indemnification language. It is also advisable to include the phrase "to the fullest extent permitted by law" within an indemnification clause and to expressly limit the reach of the clause to that allowed by the statute.

Second, to obtain indemnification for one's own negligence, the language utilized must be precise. As the New Jersey Supreme Court stated in the seminal case of *Ramos v. Browning Ferris Industries, Inc.*, 103 N.J. 177, 191 (1986), "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." While the Court has not yet articulated the exact language that will satisfy this requirement, there are a plethora of reported decisions discussing indemnification clauses that did not suffice. See, e.g., *Azurak v. Corporate Prop. Investors*, 175 N.J. 110 (2003); *Mantilla v. NC Mall Assocs.*, 167 N.J. 262 (2001); *Englert v. The Home Depot*, 389 N.J. Super. 44 (App. Div. 2006). At a minimum, the provision should clearly state that the indemnitor understands that it is providing indemnification for claims arising out of or alleged to arise out of the indemnitee's own negligence. Further, ambiguity should be avoided as courts will ultimately construe any uncertain language in the provision against the party seeking indemnification.

Third, parties should be aware that there may be multiple indemnification provisions in the same contract and take steps to coordinate the various clauses. In some instances, the use of multiple provisions is not always obvious because the subject contract may incorporate provisions of other contracts involving the project. For example, it is not uncommon for a subcontract to incorporate provisions of the prime contract between the owner and general contractor. Inconsistent provisions can lead to significant adverse consequences as reflected by the Appellate Division decision in *Meder v. Resorts Int'l Hotel, Inc.*, 240 N.J. Super. 470, 477-80 (App. Div. 1989), where

the court held that the owner was not entitled to indemnification from the general contractor because the parties' contract contained three different and inconsistent indemnification clauses that, read together, did not support the owner's claim for indemnification for its own negligence.

Fourth, parties seeking indemnification for their own negligence should not rely on standard form contract indemnification provisions. This point was crystallized by the Appellate Division decision in *Englert v. The Home Depot*, 389 N.J. Super. 44 (App. Div. 2006), which held that the indemnification provision in the parties' subcontract did not provide indemnification for the contractor's own negligence. The language of the indemnification provision quoted in the opinion indicates that the parties were utilizing the American Institute of Architects ("AIA") general conditions indemnification provision (3.18 in the AIA 2007 form). As a result, it appears to be settled under New Jersey law that the AIA form indemnification provision will not provide indemnification for the indemnitee's own negligence.

Finally, because contractual provisions allowing recovery of attorneys' fees will be strictly construed, the indemnification provision should explicitly state that the scope of the indemnitor's obligation includes any and all attorneys' fees and legal fees, costs or expenses incurred by the indemnitee. The utilization of such language in the indemnification clause may provide sufficient incentive for the indemnitor to agree to defend a subsequent claim asserted against the indemnitee in lieu of facing the risk of being responsible for the attorneys' fees and other legal costs incurred by the indemnitee in defending against a claim covered by the clause.

Consistent with the foregoing principles, the sample indemnification provision for an owner/contractor contract set forth below utilizes language that should permit the owner to obtain indemnification from the contractor, even where the claims or damages arise out of or are alleged to arise out of the owner's independent negligence (provided that the owner is not solely negligent).

To the fullest extent permitted by law the contractor shall indemnify and hold harmless the owner and the owner's consultants, agents, representatives, and employees from and against any and all claims, damages, losses, costs, and expenses, including, but not limited to attorneys' fees, legal costs and legal expenses arising out of or resulting from the performance of the contractor's work under this contract, provided that such claim, damage, loss, cost, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) caused or alleged to be caused by the negligent acts, negligent omissions, and/or fault of the contractor, anyone directly or indirectly employed or retained by the contractor, or anyone for whose acts the contractor may be liable regardless of whether caused in part by the negligent act or omission of a party indemnified hereunder provided it is not caused by the sole negligence of a party indemnified hereunder. Contractor shall further indemnify and hold harmless the owner and the owner's consultants, agents, representatives, and employees from and against any and all claims, damages, losses, costs, and expenses, including, but not limited to attorneys' fees, legal costs and legal expenses, arising out of or resulting from performance of the work, provided that such claim, damage, loss, cost, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) caused or alleged to be caused by the negligent acts, negligent omissions, and/or fault of the owner or the owner's consultants, agents, representatives, or employees and arises out of this project or the work performed on this project and provided such claim, damage, loss, cost, or expense is not caused by the sole negligence of a party indemnified hereunder.

While New Jersey affords broader indemnification rights than some other jurisdictions, obtaining that protection requires diligent attention be given to the language of the indemnification provisions to ensure that the clause comports with the law and the parties' expectations. The time spent carefully crafting such language will be well-served in the event injury or property damage claims arise on the construction project. ■