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INDEMNIFICATION PROVISIONS IN CONSTRUCTION CONTRACTS:

AN OVERVIEW OF ENFORCEABILITY IN ALL 50 STATES

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Indemnification provisions come up in many construction, service, subcontractor, design and demolition contracts. They are particularly prevalent in construction subcontractor agreements, master service agreements for both design and build services, remediation and demolition contracts, and oil and gas contracts. Indemnification provisions can create a lot of confusion. At their core, an indemnification provision is intended to shift potential risks in a contract from one party to another. One party agrees to indemnify (i.e. step in their shoes and protect) the other for potential claims and damages that may result from a particular type of risk. In many respects indemnification clauses operate like an informal insurance arrangement between the contracting parties. The indemnifying party (sometimes called the indemnitor) agrees to protect and pay for damages that might get assessed against the indemnified party (sometimes called the indemnitee). Indemnification clauses are often hotly negotiated and they need to be tailored to cover the specific risks that the parties want to allocate between them. Some common risks covered in indemnification clauses are claims (i.e. lawsuits) and damages resulting from breach of the contract, intentional acts, property damage, personal injury and death.

Many times an owner, general contractor or the prime contractor will insert an indemnification provision into their contract that is so overly broad that parts of it or all of it are actually unenforceable under applicable state law. Because indemnification provisions are critical provisions in litigation (and in deciding to litigate), particular attention to be placed on them during the contract negotiation phase. When this happens, courts often throw out the entire indemnification provision.

The current trend for these overly broad provisions requires that the subcontractor indemnify the prime contractor and/or owner for any and all claims and losses related to property damage and death, even if they were caused by the actual negligence of the prime contractor/owner. For reference purposes here's an example of that type of contract provision:

*Contractor shall release Company, and shall defend, indemnify and hold harmless Company Group from and against any and all Claims brought by or on behalf of any member of Contractor Group or their invitees alleging property damage, bodily injury, personal injury, illness, or death of any member of Contractor Group or their invitees and which arise out of, relate to, or are connected with this MSA or the performance thereof. **THE RELEASE, HOLD HARMLESS, DEFENSE AND INDEMNITY OBLIGATIONS CONTAINED IN THIS ARTICLE SHALL APPLY EVEN IF CAUSED, IN WHOLE OR IN PART, BY PRE-EXISTING CONDITIONS, STRICT LIABILITY, SOLE, OR CONCURRENT NEGLIGENCE OR OTHER FAULT, WHETHER PASSIVE OR ACTIVE, OF ANY PERSON OR ENTITY, INCLUDING BUT NOT LIMITED TO THE COMPANY GROUP OR ANY MEMBER OF THE COMPANY GROUP...***

It's one thing to indemnify another party for your own negligence, it's quite another to indemnify them for their own negligence. Colorado does not view these sorts of indemnification provisions in construction contracts favorably. In fact they are considered against public policy and are void and unenforceable.

For reference, Colorado's statute §13-21-111.5 is reproduced in relevant part below:

(1) In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss...

(6)(a) The general assembly hereby finds, determines, and declares that:

(I) It is in the best interests of this state and its citizens and consumers to ensure that every construction business in the state is financially responsible under the tort liability system for losses that a business has caused...

(III) Construction businesses in recent years have begun to use contract provisions to shift the financial responsibility for their negligence to others, thereby circumventing the intent of tort law...

(b) Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or

bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitor is void as against public policy and unenforceable.

The statute defines a “Construction agreement” as: “a contract, subcontract, or agreement for materials or labor for the construction, alteration, renovation, repair, maintenance, design, planning, supervision, inspection, testing, or observation of any building, building site, structure, highway, street, roadway bridge, viaduct, water or sewer system, gas or other distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction.”

Drafting an overly broad indemnification provision may seem like a good idea at the time, but it can backfire if it runs afoul of state law. We hope the following indemnification chart is a useful general tool and reference point for indemnification statutes across the USA. We have gone through all 50 states and reviewed their indemnification statutes for limitations on the enforceability of indemnification provisions in the context of construction contracts in particular. This outline is intended to present an abbreviated overview and reference source and to help facilitate a general understanding of the topic.

As with any law, they change from time-to-time, so this should only serve as a general baseline for the topic and should not replace actual legal review.

<u>State</u>	<u>Prohibitive Statute</u>	<u>Statute</u>	<u>Comment</u>
Alabama	No		AL does allow contributory indemnification and prohibit indemnification for intentional conduct.
Alaska	Yes	§45.45.900	Prohibits indemnification for indemnitee's sole negligence or willful misconduct.
Arizona	Yes	§32-1159	Prohibits indemnification for sole negligence.
Arkansas	Yes	§22-9-214	Prohibits indemnification for indemnitee's sole negligence and prevents parties from contracting around this provision by selecting a different governing law.
California	Yes	§2782	Prohibits indemnification for indemnitee's sole negligence or willful misconduct.
Colorado	Yes	§13-21-111.5	Prohibits any provision to indemnify, insure, or defend for negligence or fault of the indemnitee.
Connecticut	Yes	§52-572K	Prohibits indemnification for indemnitee's sole negligence.
Delaware	Yes	§2704	Prohibits indemnification for indemnitee's sole or partial negligence.

Florida	Yes	§725.06	Prohibits indemnification for indemnitee's sole or partial negligence.
Georgia	Yes	§13-8-2(b)	Prohibits any provision to indemnify, insure, or defend for negligence or fault of the indemnitee.
Hawaii	Yes	§431:10-222	Prohibits indemnification for indemnitee's sole negligence or willful misconduct.
Idaho	Yes	§29-114	Prohibits indemnification for sole negligence.
Illinois	Yes	740 Ill Comp. Stat. An. 35/1	Prohibits indemnification for indemnitee's sole negligence.
Indiana	Yes	§26-2-5-1	Prohibits indemnification for indemnitee's sole negligence or willful misconduct.
Iowa	Yes	§537A.5	Prohibits indemnification for acts or omissions of indemnitee.
Kansas	Yes	§16-121	Prohibits indemnification for indemnitee's negligent or intentional acts or omissions.
Kentucky	Yes	§371.180	Prohibits indemnification for indemnitee's sole negligence.
Louisiana	Yes	§2780.1	Prohibits indemnification for acts or omissions of indemnitee.
Maine	No		Courts strictly construe the provision against the party seeking indemnification.
Maryland	Yes	§5-401	Prohibits indemnification for indemnitee's sole negligence.
Massachusetts	Yes	Ch. 149, §29C	Prohibits indemnification for any injury or damage not caused by the indemnitor.
Michigan	Yes	§691.991	Prohibits indemnification for indemnitee's sole negligence.
Minnesota	Yes	§337.01-.05	Prohibits indemnification for indemnitee's sole negligence, but only applies to the property on which construction is occurring (not for occurrences on adjacent properties).
Mississippi	Yes	§31-5-41	Prohibits indemnification for indemnitee's sole negligence.
Missouri	Yes	§434.100	Prohibits indemnification for indemnitee's sole negligence; however, there is a proposed regulation to broaden the statute.

Montana	Yes	§28-2-2111	Prohibits indemnification for the indemnitee's sole negligence or concurrent negligence of indemnitee and indemnitor.
Nebraska	Yes	§25-21, 187	Can only indemnify for indemnitor's own negligence.
Nevada	No		Case law limits indemnification to the extent of indemnitor caused the damages.
New Hampshire	Yes	§338-A:1	Prohibits indemnification for indemnitee's sole negligence.
New Jersey	Yes	§2A:40A-1	Can only indemnify for indemnitor's own negligence and concurrent negligence.
New Mexico	Yes	§56-7-1	Prohibits indemnification for indemnitee's sole negligence, acts, or omissions.
New York	Yes	§5-322.1	Permits indemnity to the extent of the indemnitor's own negligence; however, there is proposed legislation that may change the current statute.
North Carolina	Yes	§22B-1	Indemnity is limited to indemnitor's own negligence.
North Dakota	Yes	§9-08-02.1	Prohibits indemnification for indemnitee's sole negligence or willful misconduct.
Ohio	Yes	§2305.31	Prohibits indemnification for indemnitee's sole negligence.
Oklahoma	Yes	Tit. 15, §221	Permits indemnity to the extent of the indemnitor's own negligence.
Oregon	Yes	§30.140	Prohibits indemnification for indemnitee's sole negligence.
Pennsylvania	Yes	§491	Only applies to design contracts, but prohibits indemnification for indemnitee's own negligence.
Rhode Island	Yes	§6-34-1	Permits indemnity only for the indemnitor's own negligence.
South Carolina	Yes	§32-2-10	Prohibits indemnification for indemnitee's own negligence, but permits it for concurrent negligence of the indemnitee and indemnitor.
South Dakota	Yes	§56-3-18	Prohibits indemnification for indemnitee's sole negligence.
Tennessee	Yes	§62-6-123	Permits indemnity for the indemnitor's own negligence and concurrent negligence of indemnitor and indemnitee.

Texas	Yes	§130.002; §2252.902	Only apply to public works and design professionals. Prohibits indemnifying architect or engineer from sole negligence in design defects. Prohibits indemnifying for indemnitee's sole or concurrent negligence where claim is for personal injury.
Utah	Yes	§13-8-1	Permits indemnification for indemnitor's sole and concurrent negligence only.
Vermont	No		Requires Clear and Convincing evidence of intent for indemnification clauses purporting to indemnify indemnitee for indemnitee's own negligence.
Virginia	Yes	§§11-4.1, 11-4.4	Prohibits indemnification for indemnitee's sole negligence.
Washington	Yes	§4.24.115	Prohibits indemnification for indemnitee's sole negligence. Does allow for indemnification to the extent of indemnitor's concurrent negligence, if agreement specifically provides such.
West Virginia	Yes	§55-8-14	Prohibits indemnification for indemnitee's sole negligence, but requires showing that indemnitee is 100% responsible and that it cannot be inferred from the contract that there was a proper agreement to purchase insurance for the benefit of all concerned.
Wisconsin	No	§895.447	Courts interpret clauses to be the least restrictive on the freedom to contract.
Wyoming	No		Courts require clear and unequivocal evidence of intent to indemnify indemnitee for indemnitee's own negligence.

About the Author:



Craig T. Watrous is a Denver-based attorney who regularly represents owners, contractors and sureties in construction contracting and litigation including private and public jobs, bond claims, mechanic's liens and related disputes. He is a partner at MLMW and represents parties to construction disputes in state and federal courts and all alternative dispute venues including mediations and arbitrations (AAA). Craig can be reached for questions at cwatrous@mlmw-law.com or by phone at (303) 722-2165 (direct).

If you have any questions about the enforceability of a specific indemnification provision in a contract you are entering into, let us know. For information about our law firm's [construction practice](#) or to obtain other resources for construction industry professionals, please visit our website at: www.mlmw-law.com



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