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BROAD-FORM INDEMNITY ELIMINATED IN CONSTRUCTION-RELATED CONTRACTS IN TEXAS

As of January 1, 2012, broad-form indemnity has been eliminated in Texas in commercial construction-related contracts pursuant to Tex. Ins. Code §151.102.[2] This brings Texas in line with 45 other states (see attached 50 state chart) which have passed the same or similar laws eliminating broad-form indemnity in construction-related contracts.

There are significant express statutory exceptions to this elimination of broad-form indemnity. Significant exceptions are as follows:

1. Personal injury claims to employees of the party being indemnified;
2. Claims arising from single-family residential construction; and
3. Claims arising from construction projects insured through programs known as "Wraps" or "OCIPS."[3]

A Brief Review of the History of Broad-Form Indemnity in Construction Contracts in Texas

Historically, the folks who originate, develop, direct and serve as general contractors for construction projects in Texas have insisted—through the use of broad-form indemnity agreements in their contracts—that those supplying labor and materials indemnify owners, developers and general contractors from any and all liability arising from the actions and omissions which give rise to property damage or personal injuries.[4]

As a practical matter, the folks with the money continually insist on being protected by the folks who are willing to do the work or supply materials. Frankly speaking, owners, developers, and general contractors present subcontractors and material suppliers with contracts written by the owners, developers and general contractors, or their attorneys with little or no room for negotiation. The ever-powerful broad-form indemnity agreements frequently appear in those contracts.

Over the years, these agreements have been deemed enforceable so long as the language complied with certain minimum standards of conspicuity, clarity, and express mentions of the term "negligence," making clear that the indemnitor was requested to indemnify the indemnitee even under circumstances where the loss was caused by the actions and omissions of the indemnitee.[5]

Broad-form indemnity was always viewed as an unfair provision by the subcontractors and material suppliers. As previously stated, these subcontractors and material suppliers were often presented with such form contracts containing broad-form indemnity clauses with

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[2] Act effective Jan. 1, 2012, 82d Leg., R.S., ch. 1292, § 1, 2011 Tex. Sess. Law Serv. (West) (to be codified at Tex. Ins. Code Ann. § 151.102).

[3] Tex. Ins. Code Ann. § 151.105.

[4] *See* XL Specialty Ins. Co. v. Kiewtt Offshore Serv., Ltd., 513 F.3d 146 (5th Cir. 2008); *see* House Comm. on State Affairs, Bill Analysis, Tex. S.B. 555, 81st Leg., R.S. (2009) (such clauses in many construction contracts made a subcontractor 1) liable for a general contractor's breach of contract and warranty and 2) for any fines or penalties assessed by a governmental entity directly against the general contractor).

[5] *See* Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993); Ethyl Corp. v. Daniel Construction Company, 725 S.W.2d 705,707 (Tex. 1987); Ohio Oil Company v. Smith, 362 S.W.2d 621, 626 (Tex. 1963).

the understanding that part of the contract was non-negotiable. Simply put, "if you want the work, if you want us to buy your materials, then sign our form."

Instead, it came to pass that on January 1, 2012, subcontractors and their supporters in the state legislature were successful in changing the law for the State of Texas in a significant way by eliminating broad-form indemnity as an option in commercial construction-related contracts.[6] However, time will tell whether the proponents will celebrate this change.

What Really Changed? Let's Be Clear at the Outset

Significantly, this change in the law does not prohibit an owner, developer, or general contractor from including broad-form indemnity language in the contract based upon the notion that it might be found that the actions and omissions of a subcontractor or material supplier solely caused a loss. In such a case, the statutory language suggest that the broad-form indemnity provision would be enforceable.

However, including the word "solely" within the statute brings forth the question of whether the enforceability of the indemnity provision must await a factual determination as to whether an action or omission of the *indemnitee* caused the loss. If so, the indemnification provision is unenforceable "to the extent" that it purports to force the indemnitor to assume the liability for actions and omissions of the indemnitee who, in whole or in part, caused the loss. ***The practical problem is that no one knows the result until a jury or fact-finder has made that determination.*** In the interim, one may assume that the indemnitee has tendered its defense and indemnity obligation to the subcontractor or material supplier (indemnitors); and to the extent that liability insurance has been obtained by the subcontractor and/or material supplier names the general contractor, owner, or developer as an additional insured, the liability carrier now must wrestle with the question of whether it should assume or deny liability on the tendered duty to defend and indemnity obligation. Obviously, if the ultimate determination as to whether this duty exists must await a verdict or findings of fact and conclusions of law, the liability carrier whom was forced to make the initial assessment of its responsibility to the indemnitee is provided with little or no guidance as to how to make that determination. This is a complex conundrum, to say the least. The duty to defend, up until this statutory change, was determined at the outset for the Four/Eight Corners Rule—by simply comparing the pleadings to the coverage language of the liability insurance policy.[7]

It can be said with some assurance, that the change in the law has introduced a new and significant element of uncertainty into the practice because it makes the full extent of the indemnity obligation unclear, until it is determined, whether the subcontractor's actions and omissions were the sole cause of the loss, which will be at the end of the case.

Perhaps There Was a Better Way to do This

In a perfect world, it would be nice to know whether the liability carrier or the subcontractor's policy naming the owner, developer, or general contractor as an additional insured has, in fact, an enforceable duty to defend the indemnitees before the conclusion of the case. That is the justification for the Eight Corners Rule which has been established law and practiced in Texas for decades.[8] Certainly from the perspective of the liability carrier, which has named the owner and/or general contractor as an additional insured, it would be better if the duty to defend/indemnify were settled by the pleadings and did not have to await the jury's verdict.

However, the previously discussed level of uncertainty interjected into this decision-making process by the new statute predictably will lead to an increase in the amount of denials issued by liability carriers to the tendered duty to defend and indemnify obligation. That said, what becomes of the liability carrier's denial of its duties to defend and indemnify the owner and/or general contractor in the event the subcontractor is found to be *solely* responsible? Perhaps the carrier, having denied the tendered defense and indemnity obligations to the indemnitee, may now face a bad faith claim when the fact finder decides that the subcontractor was *solely* responsible. As one can see, the problems created by the new statute could compound upon each other and result in a new mess much larger than the one before its enactment.

[6] Act effective Jan. 1, 2012, 82d Leg., R.S., ch. 1291, § 1, 2011 Tex. Sess. Law Serv. (West) (to be codified at Tex. Ins. Code Ann. § 151.102).

[7] *See* Burlington Northern v. National Union, 334 S.W.3d 217 (Tex. 2011); King v. Dallas Fire Ins. Co., 88 S.W.3d 185, 187 (Tex. 2007).

[8] *See King*, 88 S.W.3d at 185.

Arising From a "Construction Contract"

This legislation only applies to contracts that arise from commercial "construction contracts," which the statute defines as:

> A contract, subcontract, or agreement or a performance bond assuring the performance of any of the foregoing, entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, repair, or maintenance of, or for the furnishing of material or equipment for a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property. The term includes an agreement to which an architect, engineer, or contractor and an owner's lender are parties regarding an assignment of the construction contract or other modification thereto.[9]

That is a nice definition, but what does it really mean? Obviously, construction projects involve an array of related contracts for the supply of materials, design, architectural engineering services, etc. To what extent will those contracts, which at least purport to "arise from" construction activities, be covered by the statute or subsequently become an additional issue for the courts to analyze.

Approach of Other States to the Applicability of the Statute to Other "Construction Contracts"

Since the statute is in its infancy, no Texas court has interpreted what constitutes a "construction contract" thereunder. Therefore, we must look to other state's decisions for some indication as to where the Texas courts could go when confronted with questions as to whether an indemnity claim arises from a construction contract.

In *United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.*, the United States Court of Appeals for the Tenth Circuit determined the breadth of New Mexico's anti-indemnity statute.[10] The indemnitee, United Rentals, leased a scissor lift to the indemnitor, Yearout.[11] Two Yearout employees were accidentally killed.[12] After a settlement, United Rentals sought indemnification from Yearout based on an indemnification provision in the rental agreement.[13] Yearout claimed the indemnification provision was unenforceable, as a "construction contract."[14] United Rentals argued that the equipment lease was different from other types of agreements enumerated in New Mexico's statute.[15] The New Mexico statute defined "construction contract" as:

> a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.[16]

[9] Tex. Ins. Code Ann. § 151.001.

[10] 573 F.3d 997, 999 (10th Cir. 2009).

[11] *Id.*

[12] *Id.* at 1000.

[13] *Id.*

[14] *Id.*

[15] *United Rentals Northwest, Inc.*, 573 F.3d at 1000.

[16] *Id.* (quoting N.M. Stat. Ann. § 56–7–1 (E)).

United Rentals argued that its analysis was consistent with that of other jurisdictions.[17] Yearout pointed out that the anti-indemnity statute employed the phrase "relating to," which typically signals a broad scope, and that it was consistent with the purpose of the statute to allow it to apply to equipment agreements, and that the interpretation was consistent with the conclusion reached by other jurisdictions.[18]

The court acknowledged that there were several plausible alternative interpretations of the statute because on one hand, it could be read that "an equipment lease does not require the lessor to engage in any activity that could be considered construction, alteration, repair or maintenance . . . nor is the lessor directly concerned with the intended use of the equipment . . . ."[19] Nevertheless, the court viewed the phrase "relating to" as bringing an equipment lease within the scope of the statute because, under Yearout's reading, "a contract to rent equipment used for construction 'relates to' construction."[20]

The court also asserted that the phrase "and includes," generally constitutes expansionary wording rather than signifying a limitation.[21] The court made note of a definitive split among states as to whether an equipment lease is held to be within the reach of an anti-indemnity statute.[22] The court finally certified the issue to the New Mexico Supreme Court so it could answer the undecided question.[23]

The New Mexico Supreme Court held that an equipment lease is included within the scope of the anti-indemnity statute.[24] The Supreme Court began its opinion by stating that rather than using narrow language, such as "for construction," the New Mexico Legislature employed a broader phrase "relating to construction."[25] The court considered factors that established the nexus between the equipment lease and the construction project, including: 1) how the equipment lease discussed particularities about the construction project; 2) the fact that the equipment was delivered to a construction site; and 3) all parties knew the equipment was to be used in a construction context.[26]

The phrase "relating to" is not the sole basis for the court's decision because it is "an uncertain term with no clear end to its reach."[27] The court also analyzed the examples listed in the statute and stated that a plain reading of the language "relating to construction, alteration, repair or maintenance" was not clearly limited to the listed services; therefore, the legislature must have intended a broad interpretation of the statute.[28] Finally, on its face, however, the statute did not "clearly include nor clearly exclude" equipment leases and thus the court was forced to look to the legislative purpose.

The express public policy supporting the statute was to "promote safety in construction projects by holding each party to the contract accountable for injuries caused by its own negligence."[29] By enacting the anti-indemnity statute, the legislature "overrode competing public policies favoring the freedom to contract."[30] Because the legislative purpose of "invalidating anti-indemnification clauses in agreements 'relating to' construction projects is to make the workplace safer, it is difficult to articulate a principled basis for excluding construction equipment rental agreements from the intended scope of the statute."[31] The court distinguished contrary opinions from other states because in those cases either the parties did not intend the equipment to be used in a construction contract or the statute's language was narrower.[32] The court found that equipment leases to be included within the scope of the

[17] *Id.* at 1001.
[18] *Id.*
[19] *Id.* at 1002.
[20] *Id.*
[21] United Rentals Northwest, Inc. v. Yearout Mech., Inc., 573 F.3d 997, 1002-03 (10th Cir. 2009).
[22] *Id.* at 1003.
[23] *Id.* at 1003-04.
[24] United Rentals Northwest, Inc. v. Yearout Mech., Inc., 237 P.3d 728, 730 (N.M. 2010).
[25] *Id.* at 732.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 733.
[29] *United Rentals Northwest, Inc.*, 237 P.3d at 733.
[30] *Id.* at 734.
[31] *Id.*
[32] *Id.* at 738.

statute because they were "relating to construction."[33] The Tenth Circuit subsequently affirmed the decision to grant Yearout's motion to dismiss the indemnification suit.[34]

On the other hand, in *Eagle Pacific Ins. Co. v. Quintanilla*, a Mississippi Court of Appeals found that an agreement to provide welders for a construction project was a contract "merely to supply contract laborers," and not one for "work," and thus was not within the scope of Mississippi's anti-indemnity statute.[35] The Mississippi anti-indemnification statute applied to agreements "for . . . construction, alteration, repair or maintenance . . . or other work dealing with construction."[36] The argument was that the agreement at issue was "other work dealing with construction."[37]

The court stated that the party that supplied the welders took "no part in the work" and the contract was "merely . . . to supply laborers."[38] In other words, the party took "no action in the actual construction or construction-related work involved."[39] Because of this, the anti-indemnity statute did not apply to the provision at question.[40]

It remains to be seen how a Texas court will interpret the Texas statute, but this is obviously an important issue for all construction practitioners to keep an eye on.

50 State Chart

Attached to this article is a chart with citations to 50 states, 46 of which have adopted statutes with the same or similar language. Construction contracts frequently have choice of law provisions which may reference the laws of other states.

Predictions

Though no Texas cases have been decided yet in 2012, one may safely assume that the question of the extent of the duty to defend and indemnify obligations will be a litigated matter in the years to come. It is also safe to assume that there will be questions raised as to what contracts are covered by this anti-indemnity legislation. Practically speaking, owners, developers, and general contractors will continue to tender the duty to defend and indemnify obligations to the subcontractors and material suppliers, hoping the indemnitee will be found to be "solely" responsible. Also as a practical matter, drafters of construction contracts will probably continue to employ language that includes an indemnity obligation based upon the notion that limited indemnity language will be enforceable.

[33] *Id.*

[34] United Rentals Northwest, Inc. v. Yearout Mech., Inc., 384 Fed. Appx. 719, 723 (10th Cir. 2010).

[35] 923 So.2d 266, 269 (Miss. App. 2006).

[36] *Id.* (quoting Miss. Code Ann. § 31-5-41).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 270.

[40] *Eagle Pac.*, 923 So.2d at 271.

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State	To What Types of Projects the Statute Applies	Sole Negligence or "Any Negligence" statute?	Insurance Implications?	Source	Comments
Alabama	No Statute	N/A	N/A	N/A	N/A
Alaska	Applies to a "provision, clause, covenant, or agreement contained in, collateral to, or affecting a construction contract"	Sole Negligence	See comments	Alaska Stat. § 45.45.900	Does not affect insurance contract workers' compensation, agreement issued by an insurer, or indemnification regarding hazardous substances
Arizona	Applies to a "covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract"	Sole Negligence in one provision and any negligence in the other two	No express provision.	Ariz. Rev. Stat. § 32-1159; § 34-226; § 41-2586	§§ 34-226 and 41-2586 apply to the "negligence" of the promisee, whereas § 32-1159 applies to the "sole negligence"
Arkansas	Applies to a "Construction Agreement" or "Construction Contract"	Sole negligence	Explicitly allows additional insured provisions and contracts providing liability insurance coverage	Ark. Code Ann. §§ 22-9-214; 4-56-104	§ 22-9-214 applies to public construction contracts (defined).
California	Applies to "provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract" (§ 2782) Applies to "provisions, clauses, covenants, and agreements contained in, or collateral to, or affecting any construction contract" that was entered into on or after January 1, 2013. (§ 2782.05) "Construction contract" defined at Cal. Civ. Code § 2783	Sole negligence (§ 2782) Any negligence (§ 2782.05)	Does not affect the validity of any insurance contract (§ 2782) Does not affect obligations of an insurance carrier. (§ 2782.05) Does not apply to residential contracts. (§ 2782.05) Does not apply to a "provision in a construction contract that requires the promisor to purchase or maintain insurance covering the acts or omissions of the promisor, including additional insurance endorsements covering the acts or omissions of the promisor during ongoing and completed operations." (§ 2782.05)	Cal. Civ. Code § 2782 et seq	Provisions, calsues, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into on or after January 1, 2013 that relieves the public agency from its own negligence is void. (§ 2782) For residential construction contracts entered into after January 1, 2009, any provisions providing indemnification for a builder's or contractor's negligence are unenforceable. Indemnification is available to a professional engineer against liability for the engineer's negligence while providing inspection services, subject to conditions. Cal. Civ. Code § 2782.2. Not intended to prevent indemnification for a professional engineer or geologist in the context of hazardous materials, providing that certain conditions are met. Cal. Civ. Code § 2782.6. See also Cal. Civ. Code § 2782.8 (applying to public agencies)
Colorado	Applies to "construction agreement" (defined)	Any negligence	Does not apply to provisions that require the indemnitor to "purchase, maintain, and carry insurance covering the acts or omissions of the indemnitor, nor shall it apply to contract provisions that require the indemnitor to name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insured coverage provides coverage to the indemnitee for liability due to the acts or omissions of the indemnitor"	Colo. Rev. Stat. § 13-21-111.5	Does not affect provisions that require a person to indemnify another person, but not "for any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitor" See also Colo. Rev. Stat. § 13-50.5-102 (applying to public contracts or agreements)

Connecticut	Applies to a "covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith"	Any negligence	Does not affect the validity of any insurance contract	Conn. Gen. Stat. § 52-572k	
Delaware	Applies to a covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement . . . relative to the construction, alteration, repair or maintenance in the State of a road, highway, driveway, street, bridge or entrance or walkway of any type constructed thereon in the State, and building, structure, appurtenance or appliance in the State, including without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith"	Any negligence	Shall not be construed to void or render unenforceable policies of insurance issued by authorized insurance companies	Del. Code. tit. 6, § 2704	Applies even if "crystal clear and unambiguous." The statute applies in all phases of the preconstruction, construction, repairs and maintenance.
D.C.	No Statute	N/A	N/A	N/A	N/A
Florida	Applies to any "portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair or demolition of a building, structure, appurtenance, or appliance, including moving and excavated and associated therewith"	Any negligence	Silent	Fla. Stat. § 725.06	The contract will be void and unenforceable, unless "the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any." Any monetary limitation must be less than $1 million, unless otherwise agreed upon. If indemnification is provided for the indemnitee, it shall not include gross negligence or willful, wanton, or intentional conduct.
Georgia	Applies to a "covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith"	Sole negligence	See comments	Ga. Code Ann. § 13-8-2	The statute does not apply to "any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy."
Hawaii	Applies to any "covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition or excavation connected therewith"	Sole negligence	Does not affect a valid insurance contract or agreement issued by an admitted insurer	Haw. Rev. Stat. § 431:10-222	

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Idaho	Applies to a "covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith"	Sole negligence	Silent	Idaho Code § 29-114	
Illinois	Applies to "contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or any moving, demolition or excavation connected therewith"	Any negligence	Silent	740 Ill. Comp. Stat. 35/1	
Indiana	Applies to all "provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract" (undefined), except for highway contracts	Sole negligence	Silent	Ind. Code § 26-2-5-1	
Iowa				Iowa Code § 537A.5	
Kansas	Applies to "contract" (defined term)	Any negligence	Does not affect or impair the validity of any insurance contract Additional insured provisions, providing insurance for own negligence, is void	Kan. Stat. Ann. § 16-121	Does not affect the validity of "an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the promisor" subject to statutory limitations.
Kentucky	Applies to a "construction services contract," which is defined as a "contract or agreement relating to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition connected therewith" or the "planning, design, administration, study, evaluation, consulting, or other professional and technical support services provided in connection with any of the work or activities described" above	Any negligence	Does not apply to construction bonds or affect the validity of insurance contracts	Ky. Rev. Stat. Ann. § 371.180	
Louisiana	Applies to "any provision, clause, covenant, or agreement contained in, collateral to, or affecting a . . . construction contract" (defined)	Any negligence	Any agreement to require indemnitor to procure liability insurance covering acts and omissions of the indemnitee is unenforceable, but it is not intended to prevent the indemnitee from requiring the indemnitor to provide proof of insurance for obligations covered by the contract	La. Rev. Stat. 9:2780.1	Does not apply to any clauses entered into prior to January 1, 2011. See also La. Rev. Stat. 38:2216 (applying to agreements with "public body"); La. Rev. Stat. 38:2195 (applying to public contracts) See also La. Rev. Stat. 9:2780 (addressing agreements in regard to wells for oil, gas, or water, or drilling for minerals)
Maine	No Statute	N/A	N/A	N/A	N/A

Maryland	Applies to a "covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition, and excavating connected with those services or that work"	Sole negligence	Does not affect the validity of any insurance contract or any other agreement issued by an insurer	Md. Code Ann. Cts. & Jud. Proc. § 5-401	
Massachusetts	Applies to any "provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work"	Voids provisions that require a subcontractor to provide indemnification for injuries or damages not caused by the subcontractor	Silent	Mass. Gen. Laws ch. 149, § 29C	
Michigan	Applies to a "covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith"	Sole Negligence	Silent	Mich. Comp. Laws § 691.991	
Minnesota	Applies to "an indemnification agreement contained in, or executed in connection with, a building and construction contract" (defined)	Any indemnification agreement is unenforceable except to the extent that the damage is attributable to the negligent conduct of the promisor	Does not affect the validity of any insurance contract or agreement lawfully issued by an insurer Does not affect the validity of agreements where a promisor agrees to provide specific insurance coverage for others	Minn. Stat. §§ 337.01 to 337.05	
Mississippi	Applies to all "public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith"	Any negligence	Does not apply to construction bonds or insurance contracts or agreements	Miss. Code Ann. § 31-5-41	
Missouri	Applies to "any contract or agreement for public or private construction work" (defined)	Any negligence	Does not apply to insurance contracts or agreements, a promise to be covered as an insured or an additional insured, or an agreement to indemnify if the agreement also required the party to obtain specific limits of insurance to insure the indemnity obligation	Mo. Rev. Stat. 434.100	
Montana	Applies to a "construction contract" (defined term)	Any negligence, recklessness, or intentional misconduct	Does not apply to insurer's obligations.	Mont. Code Ann. § 28-2-2111	A construction contract may still contain a provision that requires a party to purchase a project-specific insurance policy

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Nebraska	Applies to "a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction"	Any negligence	Does not apply to insurance contracts or agreements.	Neb. Rev. Stat. § 25-21,187	
Nevada	N/A	N/A	N/A	Nev. Rev. Stat. Ann. § 616B.609	Is not specific to construction contracts, but provides that a contract that has a purpose of waiving or modifying terms of liability created by Nevada statutes are void.
New Hampshire	Applies to an "agreement or provision" regarding architects, engineers, surveyors, or his agents or employees	Any negligence	Silent	N.H. Rev. Stat. Ann. § 338-A:1	
New Jersey	Applies to a "covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, relative to the construction, alteration, repair, maintenance, servicing, or security of a building, structure, highway, railroad, appurtenance and appliance, including moving, demolition, excavating, grading, clearing, site preparation or development of real property connected therewith"	Sole negligence	Does not affect the validity of any insurance contract or agreement issued by an authorized insurer	N.J. Stat. Ann. § 2A:40A-1	
New Mexico	Applies to a "provision in a construction contract" (defined)	Any negligence	A construction contract may require a party to purchase a project-specific insurance policy Does not apply to an insurer's obligation to its insureds	N.M. Stat. Ann. § 56-7-1	As used therein, "indemnity" and "hold harmless" include a requirement to name the indemnified party as an additional insured
New York	Applies to a "covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith"	Any negligence	Does not affect the validity of any insurance contract or other agreement issued by an admitted insurer.	N.Y. Gen Oblig. Law § 5-322.1	
North Carolina	Applies to a "promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith"	Any negligence	Does not affect an insurance contract or any other agreement issued by an insurer	N.C. Gen. Stat. § 22B-1	Does not apply to contracts entered into by the Department of Transportation.
North Dakota	Applies to a "provision in a construction contract"	All "errors or omissions"	Silent	N.D. Cent. Code § 9-08-02.1	Applies to situations where contractors are liable to the owner for errors or omissions in the plans and specifications of a construction contract.

Ohio	Applies to a "covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith"	Any negligence	"Shall not prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection"	Ohio Rev. Code Ann. § 2305.31	
Oklahoma	Applies to "any provision in a construction agreement" (defined term)	Any negligence	Does not apply to provisions which require the purchase of a project-specific insurance policy	15 Okla. Stat. 221	Any 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"
Oregon	Applies to "any provision in a construction agreement" (defined term)	Any negligence	Silent	Or. Rev. Stat. § 30.140	Does not apply to real property lease or rental agreement regardless of whether any provision of the agreement "relates to or involves planning, design, construction, alteration, repair, improvement or maintenance as long as the predominant purpose of the lease or rental agreement is not planning, design, construction, alteration, repair, improvement or maintenance of real property" Does not apply to railroads.
Pennsylvania	Applies to every "covenant, agreement or understanding in, or in connection with any contract or agreement made and entered into . . . arising out of: (1) the preparation or approval by an architect, engineer, surveyor or his agents, servants, employes or invitees of maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or (2) the giving of or the failure to give directions or instructions by the architect, engineer, surveyor or his agents, servants or employes"	Silent	Silent	68 P.S. § 491	Only applies in limited circumstances of damages arising out of map, drawings, opinions, reports, surveys, change orders, designs, or specifications, or the failure to give directions or instructions.
Rhode Island	Applies to a "covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected with a building, structure, highway, road, appurtenance, or appliance"	Any negligence	"Shall not prohibit any person from purchasing insurance for his or her own protection." Does not affect the validity of any insurance contract	R.I. Gen. Laws § 6-34-1	
South Carolina	Applies to "a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating"	Sole negligence	Does not affect any insurance contract	S.C. Code Ann. § 32-2-10	Does not apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates

BROAD-FORM INDEMNITY ELIMINATED

South Dakota	Applies to a "covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith"	Sole negligence	Silent	S.D. Codified Laws § 56-3-18	
Tennessee	Applies to a "covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith"	Sole negligence	Silent	Tenn. Code Ann. § 62-6-123	
Texas	Applies to "a provision in a construction contract, or in an agreement collateral to or affecting a construction contract" (defined term)	Any negligence	"A construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited." Does not affect an insurance policy, except as provided above.	Tex. Ins. Code § 151.001, et seq.	Does not affect an indemnity provision in a construction contract regarding a single family house, townhouse, duplex or land development related thereto or a public works project of a municipality.
Utah	Applies to a "provision . . . included in a contract related to a construction project" (construction contract defined)	Any negligence	Silent	Utah Code Ann. § 13-8-1	The provision applies in a construction contract between: a construction manager, a general contractor, a subcontractor, a sub-subcontractor, or a supplier. If an owner is a party to the agreement, the fault of the owner is apportioned among the parties on a proportional share of fault provided that the damages were caused in part by the owner and the cause of the damages did not occur while the owner was operating as one of the above types of parties.
Vermont	No Statute	N/A	N/A	N/A	N/A
Virginia	Applies a "provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto, including moving, demolition and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings"	Sole negligence	Does not affect the validity of any insurance contract or any agreement issued by an admitted insurer	Va. Code Ann. § 11-4.1	

Washington	Applies to a "covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith"	Any negligence	Silent	Rev. Code Wash. § 4.24.115	When concurrent negligence is present, an indemnification provision is only enforced to the extent of the indemnitor's negligence as long as it is specifically and expressly provided for.
West Virginia	Applies to a "covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement entered into . . . relative to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of any building, highway, road, railroad, water, sewer, electrical or gas distribution system, excavation or other structure, project, development or improvement attached to real estate, including moving and demolition in connection therewith"	Sole negligence	Does not affect insurance contracts or agreements	W. Va. Code 55-8-14	
Wisconsin	Applies to a provision in "any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition, or excavation"	Provides that any limitation or elimination of liability is void	Does not apply to insurance contracts	Wis. Stat. § 895.447	
Wyoming	Applies to all "agreements, covenants or promises contained in, collateral to or affecting any agreement pertaining to" wells for oil, gas or water, or mines for any minerals	Any negligence	Does not affect any insurance contract	Wyo. Stat. §§ 30-1-131 to 30-1-133	