

AGREEMENTS TO INDEMNIFY & GENERAL LIABILITY INSURANCE:

A Fifty State Survey

TABLE OF CONTENTS

Introduction	1
Alabama	4
Alaska	7
Arizona	12
Arkansas	15
California	19
Damages arising out of bodily injury or death to persons.	22
Damage to property.	22
Any other damage or expense arising under either (a) or (b).	22
Colorado	23
Connecticut	26
Delaware	29
Florida	32
Georgia	36
Hawaii	42
Idaho	45
Illinois	47
Indiana	52
Iowa	59
Kansas	65
Kentucky	68
Louisiana	69
Maine	72
Maryland	77
Massachusetts	81
Michigan	89
Minnesota	91
Mississippi	94
Missouri	97
Montana	100
Nebraska	104
Nevada	107
New Hampshire	109
New Jersey	111
New Mexico	115
New York	118

North Carolina	122
North Dakota	124
Ohio	126
Oklahoma	130
Oregon	132
Pennsylvania	139
Rhode Island	143
South Carolina	146
South Dakota	150
Tennessee	153
Texas	157
Utah	161
Vermont	165
Virginia	168
Washington	171
West Virginia	175
Wisconsin	177
Wyoming	180

INTRODUCTION

Indemnity is compensation given to make another whole from a loss already sustained. It generally contemplates reimbursement by one person or entity of the entire amount of the loss or damage sustained by another. Indemnity takes two forms – common law and contractual.

While this survey is limited to contractual indemnity, it is important to note that many states have looked to the law relating to common law indemnity in developing that state's jurisprudence respecting contractual indemnity. Common law indemnity is the shifting of responsibility for damage or injury from one tortfeasor to another tortfeasor.¹ It has been referred to as “an extreme form of contribution,”² which reflects that this form of indemnity initially arose as a judicial means of avoiding the harsh result of the now substantially abrogated rule prohibiting contribution among joint tortfeasors.³ The circumstances under which this form of indemnity will lie varies widely depending upon the applicable state law.⁴

Contractual indemnity, on the other hand, is that which is voluntarily given to a person or entity to prevent his suffering damage.⁵ It is security or protection against hurt or loss or damage.⁶ This form of indemnity is created by express contract or agreement and is a promise to safeguard another from existing or future loss or liability, or both.⁷ This form of indemnity may arise where the indemnitor and indemnitee are both mutually culpable, but the parties have contractually agreed that the risk of such culpability will be born entirely by one and not both. In other words, contractual indemnity may result from the agreement of one to answer for a legal obligation which would otherwise rest with another. It is this contractually created indemnity which is the subject of this survey because of its potential implications on another form of contractual indemnity: the liability insurance policy. The existence

¹ *Galliher v. Holloway*, 474 N.E.2d 797, 803 (Ill. App. 1985). Common law indemnity is also referred to as “equitable” or “implied” indemnity.

² *Slattery v. Marra Bros. Inc.*, 186 F.2d 134, 138 (2d Cir. 1950). In contrast to indemnification, contribution involves only partial reimbursement of one who has discharged a common liability. *Braye v. Acher-Daniel-Midlands Co.*, 659 N.E.2d 430, 433 (Ill. App. 1995). While contribution involves partial reimbursement of one which has discharged a common liability, indemnity requires reimbursement of the entire amount of liability. *Mullen v. Cogdell*, 643 N.E.2d 390, 400 (Ind. App. 1994). One involves the sharing of a loss; the other the shifting of the entire loss. *McClesky v. Noble Corp.*, 577 P.2d 830, 833 (Kan. App. 1978). “The distinction between contribution and indemnity is that contribution asks another to share in debt, while indemnity would require another to pay it all.” *Marshall v. Casey*, 532 N.E.2d 1121, 1123 (Ill. App. 1989).

³ RESTATEMENT (SECOND) OF TORTS § 886B; *National Serv. Indus., Inc. v. B.W. Norton Mfg. Co.*, 937 P.2d 551 (Utah App. 1997).

⁴ A survey of the differing standards and application of common law indemnity is beyond the scope of this survey.

⁵ *Keesler v. City of Peekskill*, 152 N.Y.S.2d 919, 920 (1955); *New Jersey v. Connolly*, 72 A. 363, 364 (N. J. 1909).

⁶ *Eggers v. Centrifugal & Mechanical Indus., Inc.*, 440 S.W.2d 512, 515 (Mo. App. 1969).

⁷ *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

and application of an agreement by one to indemnify another where a policy of liability insurance potentially covers a loss implicates many issues, two of which are paramount.

The first such issue arises where a person or entity obtains for its benefit a liability insurance policy which will indemnify the insured for its liability for damages, and the insured in turn agrees to indemnify a third party for its liability for damages. What is the effect of the insured's agreement to indemnify a third party on the insurer's agreement to indemnify the insured pursuant to the liability insurance policy? Must the insurer indemnify the insured for its indemnification of the third party? While the standard Commercial General Liability Policy⁸ contains an exclusion for contractually assumed liability,⁹ the policy restores coverage for liability assumed in an "insured contract,"¹⁰ a defined term under the policy.¹¹ Included within the definition of "insured contract" is "that part of any . . . contract or agreement under which [the insured] assume[s] the tort liability of another."¹² If an insured's agreement to indemnify a third party constitutes the assumption of the third party's tort liability, then loss or damage flowing from this assumed obligation is not excluded from coverage.

Since the insurer may not have contemplated exposure or obtained premium for this risk, the enforceability of the insured's agreement to indemnify is critical. To the extent the insured's indemnity obligation is unenforceable pursuant to the applicable

⁸ See ISO Forms CG 00 01 11 85; CG 00 02 11 85; CG 00 02 02 86; CG 00 01 11 88; CG 00 02 11 88; CG 00 01 10 93; CG 00 02 10 93; CG 00 01 01 96; CG 00 02 01 96; CG 00 01 07 98; CG 00 02 07 98; CG 00 01 10 01; CG 00 02 10 01; CG 00 01 12 04; CG 00 02 12 04.

⁹ The exclusion reads: "This insurance does not apply to: . . . "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 . . ."

¹⁰ In the 1985 and 1986 ISO Forms, the exception provides: "This exclusion does not apply to liability for damages: (1) Assumed in a contract or agreement that is an 'insured contract;' or (2) That the insured would have in the absence of the contract or agreement." (Exclusion b.(1) and (2)). In the 1988 and 1993 ISO Forms, the exception provides: "This exclusion does not apply to liability for damages: (1) 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; or (2) That the insured would have in the absence of the contract or agreement." (Exclusion b.(1) and (2)). In the 1996, 1998, 2001 ad 2004 ISO Forms, subsections b.(1) and b.(2) are inverted, but are otherwise the same.

¹¹ In the 1985 and 1986 ISO Forms, "Insured Contract" means, among other things, "That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of 'bodily injury' or 'property damage' to a third person or organization, if the contract or agreement is made prior to the 'bodily injury' or 'property damage.'" Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

In the 1988, 1993, 1996, 1998, 2001 ad 2004 ISO Forms, "Insured Contract" means, among other things, "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.

The parenthetical reference in the 1988 Form appears as a separate item in the definition of "insured contract" in the 1985 Form.

¹² See n. 11.

state law,¹³ the insured's obligation is negated and the insurer's risk removed. But is this the outcome under a particular state's law? Even where an insured agrees to an otherwise unenforceable indemnity, the indemnity may be upheld if the agreement envisions the purchase of insurance for the loss, since this may be read as an agreement to look solely to insurance in the event of loss, rather than to the indemnifying party.

Beyond the foregoing, an insured may agree to indemnify a third party for loss or damage, and also include the indemnitee as an additional insured under the very liability policy arguably bound to respond to the insured's agreement to indemnify. Under these circumstances, whether the "insured contract" exception to the exclusion for contractually assumed liability applies likely is never reached because status as an additional insured obligates the insurer directly to the indemnitee/third party to the extent of the coverage. What is the outcome, however, where the insured's indemnity obligation extends to limited circumstances or only to a certain monetary limit and the coverage of the liability policy is greater? Is the insurer's obligation to the third party/indemnitee/additional insured limited to the amount of the insured's obligation to indemnify, or is the insurer exposed to the full extent of the dollar amount of coverage stated in the policy?

The second important manner in which the presence of indemnity may implicate an insurer's ultimate risk arises where a person or entity obtains for its benefit a policy of liability insurance and the insured is the beneficiary of an agreement by a third party to indemnify the insured for its liability for damages. The indemnity flowing from a third party to the insured is significant since the insured's right to indemnity from the third party may afford the insurer a means of recouping any payment made by the insurer on behalf of the insured because of a legal liability of the insured.¹⁴

The general question presented is consequently simple: Is the indemnity agreement enforceable and what is its impact on the insurance obligation? This is the context of the present survey. A uniform format is followed in each of the state summaries. A preliminary discussion of indemnity agreements appears under **Section I**, entitled **General Rules of Contractual Indemnity**. **Section II** identifies statutory or judicially created exceptions to the general rules applicable to contracts of indemnity, entitled **Exceptions to General Rules of Contractual Indemnity**. **Section III** addresses the extent to which an insured's agreement to indemnify a third party constitutes an "insured contract" under the state law, negating the exclusion for contractually assumed liability to the extent of the indemnity, and is entitled **Indemnity Agreements as Insured Contracts**. **Section IV** addresses the interplay between an insured's agreement to indemnify a third party which is combined with a

¹³ Indemnity agreements are likewise unenforceable under provisions of federal law. Prohibited indemnity agreements include agreements tending to interfere with interstate commerce. See *Gordon Leasing Co. v. Navajo Freightlines*, 326 A.2d 114 (City Court 1974), and agreements to indemnify involving towage contracts. See *Bisso v. Inland Waterways Corp.* 349 U.S. 85, 75 S. Ct. 629, 99 L.Ed. 911 (1955). This list is not exhaustive and the extent to which an indemnity agreement is violative of federal law is beyond the scope of this survey.

¹⁴ An insurer may also potentially recover on a theory of contribution or indemnity in the absence of a written indemnity, but such actions are typically limited to the applicable state's law regarding joint tortfeasor liability.

reference to first or third party insurance, and is entitled **Operation of An Agreement to Indemnify Referring to or Requiring Insurance**.

While this is principally a survey of the intersection between general liability insurance and an insured's separate agreement to indemnify, the discussion of relevant case law is not always limited to general liability policies where discussion and analysis of other policy forms is relevant to the subject matter of this survey.

ALABAMA

§ I – General Rules of Contractual Indemnity.

Express contracts of indemnity are enforceable under Alabama law.¹⁵ If the parties to an agreement “knowingly, evenhandedly, and for valid consideration intelligently enter into an agreement whereby one party agrees to indemnify the other,”¹⁶ the agreement will be enforced if expressed in *clear and unequivocal language*.¹⁷

The same rule applies to indemnity against the indemnitee's own wrongs.¹⁸ “While ‘talismanic language’ is not a necessity, the intention to indemnify for the indemnitee's own negligence must be clear from the instrument.”¹⁹ The language must clearly and unequivocally contemplate indemnification for the sole negligence of the indemnitee.²⁰ Applying this rule, an agreement to indemnify providing that it “shall apply regardless of the cause and even in the event of the sole, gross or concurrent negligence of [indemnitee]” was enforceable and did not run afoul of public policy notwithstanding that the indemnitor had no control over the activity giving rise to the claim.²¹ The potential inequity of such an outcome is tempered by the recognition that an indemnitor can expressly *exclude* liability for the sole negligence of the indemnitee by the clear and unambiguous terms of an indemnity provision.²²

An agreement to hold harmless another “from all damage suits and claims” was held to give rise to the duty to indemnify.²³ However, an agreement to indemnify

¹⁵ See *Royal Ins. Co. v. Whitaker Construction Corp.*, 824 So. 2d 747, 751 (Ala. 2002); *Nationwide Mutual Ins. Co. v. Hale*, 643 So. 2d 551, 555 (Ala. 1994); *Industrial Tile, Inc. v. Stewart*, 388 So. 2d 171, 175 (Ala. 1980).

¹⁶ *Stewart*, 388 So. 2d at 176.

¹⁷ *Id.*

¹⁸ *Id.*; *Whitaker*, 824 So. 2d at 753.

¹⁹ *Humana Medical Corp. v. Bagby Elevator Company*, 653 So. 2d 972, 975 (Ala. 1995).

²⁰ See *Mobil Oil Corp. v. Schlumberger*, 598 So. 2d 1341, 1346 (Ala. 1992).

²¹ *Id.* at 1344-1346.

²² See *McDevitt & Street Co. v. Mosher Steel Co.*, 574 So. 2d 794 (Ala. 1991) (citing with approval *Stewart* and acknowledging the validity of an indemnity provision that disclaims the duty to indemnify when the negligent act “is caused by the sole negligence of a party indemnified hereunder”).

²³ *Hall*, 643 So. 2d at 556-557.

and hold harmless “from all liability, claims, lawsuits and demands” was held to be ambiguous and not read as indemnifying the indemnitee for its own negligence.²⁴

§ II – Exceptions to General Rules of Contractual Indemnity.

“Agreements that purport to indemnify another for the other’s intentional conduct are void as a matter of public policy.”²⁵ This appears to be the only significant prohibition on the general rule that express contracts of indemnity are enforceable under Alabama law. In all other circumstances, the Alabama courts strive to effectuate the bargained for intent of the parties which contract for indemnity. Therefore, any other limitations on the scope of the indemnity must arise out of the terms and conditions of the indemnity agreement and are subject to the rule articulated in *Industrial Tile*.

While Alabama still adheres to a rule precluding contribution or common law indemnity between tortfeasors,²⁶ where one tortfeasor agrees in writing to indemnify another tortfeasor, even for claims based on the other’s own negligence, the agreement is enforceable.²⁷

§ III – Indemnity Agreements as Insured Contracts.

Where a liability insurance policy excludes coverage for injury or damage which the insured assumed in a contract or agreement, but contains an exception for “insured contracts,” defined by the policy as including the insured’s assumption of tort liability of another, this exception extends to an insured’s agreement to indemnify another.²⁸ An agreement to indemnify is an “insured contract” within the meaning of the liability insurance policy where the definition includes the assumption of tort liability of another.²⁹

²⁴ *Brown Mechanical Contractors, Inc. v. Centennial Ins. Co.*, 431 So. 2d 932, 945-46 (Ala. 1983).

²⁵ *City of Montgomery v. JYD Intern., Inc.*, 534 So. 2d 592, 594 (Ala. 1988); see also *Price Williams Assoc., Inc. v. Nelson*, 631 So. 2d 1016, 1019 (Ala. 1994); *Pruet v. Dugger-Holmes & Assoc.*, 162 So. 2d 613, 615 (Ala. 1964). The decision in *Titan Indemnity Company v. Riley*, 679 So. 2d 701 (Ala. 1996), arguably raises a question as to the viability of even this exception to the general rule. In *Titan*, the court found that “Alabama public policy does not prohibit the enforcement of a contract in which an insurer agrees to pay for injuries suffered by third parties as a result of intentional acts of the insured.” *Titan*, 679 So. 2d at 707. However, the ruling should be read as limited to policies of insurance, since the statement was based on *Burnham Shoes, Inc. v. West American Insurance, Co.*, 504 So. 2d 238 (Ala. 1987) (overruled on other grounds), in which it was held that an insurer could not avoid an obligation to defend a suit alleging intentional misconduct on public policy grounds where the insurance policy expressly provided for the defense of claims alleging intentional acts. *Burnham*, 504 So. 2d at 241. *Titan* applies this same reasoning to enforce an insurer’s contractual duty to indemnify an insured for its intentional acts, suggesting the court did not consider the difference between the duty to defend and the duty to indemnify. *Titan*, 679 So. 2d at 707.

²⁶ *Bagby Elevator Co.*, 653 So. 2d at 974; *Parker v. Mauldin*, 353 So. 2d 1375, 1377 (Ala. 1977).

²⁷ *Crigler v. Salac*, 438 So. 2d 1375, 1385-86 (Ala. 1983).

²⁸ See *Townsend Ford, Inc. v. Auto-Owners Ins. Co.*, 656 So. 2d 360, 364 (Ala. 1995).

²⁹ *Id.*

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Where a contractual agreement to indemnify a third party requires the purchase of insurance, the indemnitor's *direct* liability to the indemnitee extends only to the limits of the coverage, but the insurer's *indirect* liability to the indemnitee is not limited by the limits of the indemnity.³⁰ In *Alfa v. Nationwide*, the owner of an apartment building contracted with a property manager and contractually indemnified the manager for liability arising out of the indemnitee's managerial duties. The owner was furthermore required to obtain insurance sufficient to cover claims against the manager "to the same extent as owner" in the event of damage or injury.³¹ A fire resulted in the death of a tenant and suit was initiated against the owner and manager. The owner's insurer refused to defend or indemnify the manager.

The manager settled the claim against him for \$250,000.00³² and the owner's insurer paid the full amount of the policy limits of \$300,000.00 in settlement of the claims against the owner. The manager sought recovery against the owner and insurer for the refusal to defend and indemnify, and the court determined the manager's liability should be covered on a *pro rata* basis by his own insurer and the insurer of owner.³³ On remand, the remaining portion of the settlement satisfied by the manager's liability policy was held to be the individual liability of the owner pursuant to his agreement to indemnify the manager, which ultimately became an obligation of the insurer pursuant to the exception to the exclusion for contractually assumed liability arising in the event of an insured's indemnification of another.

On later appeal, the court held that the indemnity and insurance provisions were to be read together and implied that the indemnification of the manager by the owner was limited to the extent of the coverage obtained by the owner for the benefit of the manager.³⁴ That is, the owner's obligation to indemnify, and the insurer's obligation to cover the owner for the indemnity, ended at the outer boundaries of the insurance coverage. The court did not address directly the situation where the coverage extends further than the indemnity liability. However, the court implied that where the insurer agrees to provide coverage for the indemnity liability of its insured, the coverage rather than the indemnity governs the limits of liability.³⁵

This implication is given credence by the distinction between a contractual obligation to indemnify and a contractual obligation to procure insurance.³⁶ "Under an agreement to indemnify, the promisor assumes liability for all injuries and

³⁰ See *Alfa Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 684 So. 2d 1295, 1301 (Ala. 1996).

³¹ *Id.*

³² The settlement was actually paid by the manager's own liability insurer which then pursued a subrogation action against the owner and the other insurer. *Id.* at 1297.

³³ *Id.* at 1297-98.

³⁴ *Id.* at 1299.

³⁵ *Id.* at 1301.

³⁶ See *Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co.*, 629 So. 2d 633, 639 (Ala. 1993).

damages upon the occurrence of a contingency. In contrast, an agreement to obtain insurance involves the promisor's agreement to obtain or purchase insurance coverage, regardless of whether a contingency occurs."³⁷

If an indemnitor's liability insurance policy names an indemnitee as an additional insured, the insurer's coverage obligation to the indemnitee is determined by the insurance policy, not the underlying indemnity agreement.³⁸ In *Nationwide*, the court segregated the owner's duty to indemnify (and therefore, the insurer's duty to provide coverage for the indemnity liability) from the insurer's separate duty to provide coverage to the manager as an additional insured.³⁹

The court found that the owner's liability policy conferred upon the insurer the status of "primary insurer" to the manager, named as an additional insured under the policy.⁴⁰ Therefore, the manager was entitled to all the attendant benefits, e.g., the right to be indemnified and the right to be defended, that the policy bestows upon a primary insured.⁴¹ Presumably, coverage of the indemnitee is independent of any duty of indemnification owed the indemnitee under a contractual agreement and can therefore far exceed the limits of the indemnity.

ALASKA

§ I – General Rules of Contractual Indemnity.

Absent an applicable statutory prohibition, Alaska courts will construe a contractual indemnity provision to "effectuate the objectively reasonable expectations of the parties."⁴² With regard to an indemnification agreement which purports to indemnify a party for its own negligence, the interpretation of such a clause varies depending upon the nature of the contract.

In the case of commercial contracts, the more general rule that indemnity clauses are to be strictly construed, has been rejected.⁴³ Instead, when interpreting an indemnity in a commercial contract indemnifying a party for its own negligence, courts apply the "reasonable construction rule."⁴⁴ Under this rule of interpretation, the unambiguous language of an indemnity clause as reasonably construed should be

³⁷ *Id.*

³⁸ *See Nationwide*, 643 So. 2d at 551.

³⁹ *Id.* at 556-557.

⁴⁰ *Id.* at 558-559. The policy upon which the court premised its decision does not use the term "additional insured." Rather, the manager is listed as a party who is "also an insured." *Id.* at 559. However, there is no discernible distinction between the status of the manager as an "additional insured" or as a party also entitled to insurance under the policy.

⁴¹ *Id.* at 563; *see also Haisten v. Audubon Indem. Co.*, 642 So. 2d 404 (Ala. 1994) (holding that the insurer owed coverage to an additional insured/indemnitee either directly as an additional insured or indirectly through a recovery against the insured/indemnitor).

⁴² *Duty Free Shoppers Limited v. State*, 777 P.2d 649, 652 (Alaska 1989).

⁴³ *Stephan & Sons v. Municipality of Anchorage*, 629 P.2d 71, 74 (Alaska 1981).

⁴⁴ *Manson-Osberg Co. v. State*, 552 P.2d 654, 659 (Alaska 1976).

given effect “even if it does not contain words specifying indemnity for the indemnitee’s own negligence.”⁴⁵ Other than certain statutory restrictions set forth below, there is no public policy impediment to an indemnitor undertaking to indemnify the indemnitee for the indemnitee’s own negligence.⁴⁶

For example, a broad interpretation was given to an indemnity agreement which provided that a contractor must “indemnify and save harmless” the State from all claims brought because of injuries received by any person “on account of the operations” of the contractor.⁴⁷ The indemnity was held to apply to injuries occurring as a result of the State’s own negligence.⁴⁸ Similarly, an agreement which indemnified a subcontractor for all claims “arising out of, in connection with, or incident to” the subcontractor’s performance of its duties was determined to include claims based on the subcontractor’s own negligence.⁴⁹

An express indemnity clause is enforceable in an action for indemnity against an injured party’s employer, despite the general workmen’s compensation bar.⁵⁰

§ II – Exceptions to General Rules of Contractual Indemnity.

Alaska Statute, Section 45.45.900 provides:

A provision, clause, covenant, or agreement contained in, collateral to, or affecting a construction contract that purports to indemnify the promisee against liability . . . from the sole negligence or willful misconduct of the promisee or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable.

In the context of AS 45.45.900, willful misconduct means volitional action taken either with a knowledge that serious injury to another will probably result, or with wanton and reckless disregard of the possible results.⁵¹ The purpose behind this statute is to promote the public policy that all wronged persons should have a remedy for injuries suffered as a result of another person’s negligence.⁵²

As used in AS 45.45.900, the word “indemnity” has been read to mean “exempt”, and thus, the statute has been construed to restrict limitation of liability

⁴⁵ *Id.*

⁴⁶ *Burgess Construction Co. v. State*, 614 P.2d 1380, 1382 (Alaska 1980).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1382-1383 (noting that most modern authorities hold that similar indemnity clauses are effective to shift responsibility for an accident where the indemnitee is negligent and the indemnitor is not).

⁴⁹ *CJM Construction, Inc. v. Chandler Plumbing & Heating, Inc.*, 708 P.2d 60, 64 (Alaska 1985).

⁵⁰ *Manson-Osberg Co. v. State*, 552 P.2d 654 (Alaska 1976).

⁵¹ *Aetna Casualty & Surety Co. v. Marion Equipment Co.*, 894 P.2d 664 (Alaska 1995).

⁵² *City of Dillingham v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271, 1276 (Alaska 1994).

clauses as well as indemnity agreements.⁵³ Additionally, the statute has been read broadly to apply to indemnification clauses contained in leases of construction *equipment*, as such an agreement has been found to be “contained in, collateral to, or affecting a construction contract.”⁵⁴ Indemnification clauses in construction contracts which could *potentially* encompass claims caused by the indemnitee’s sole negligence or willful misconduct are not void simply because they could be read broadly. AS 45.45.900 does not invalidate an indemnity clause merely because there is a theoretical possibility that the clause could be applied to indemnify the indemnitee for conduct governed by the statute.⁵⁵ Instead, the statute only applies to invalidate an indemnity clause if the clause is actually applied, as between the parties, to indemnify an indemnitee for the indemnitee’s own sole negligence or willful misconduct.⁵⁶

In addition to the restrictions placed on indemnity agreements in AS 45.45.900, a public duty exception, generally applicable to public utilities and common carriers, has also been recognized.⁵⁷ Two principles underlie this public duty exception: (1) the exception applies to entities that must guard against negligence at all times, since indemnity agreements would create improper incentives for them to breach a duty owed to the public; and (2) public service entities should not be able to impose liability on those they are supposed to serve, since the recipients of the public service would have no choice but to accept that liability.⁵⁸

§ III – Indemnity Agreements as Insured Contracts.

The Supreme Court of Alaska has recognized that an agreement to indemnify another is within the definition of “liability assumed in a contract,” but has not determined whether agreeing to indemnify another for the other’s tort liability meets the definition in the standard general liability policy excepting from the exclusion an “insured contract.”⁵⁹ An Alaska federal court acknowledged the policy exception and implied that an agreement to indemnify one for tort liability may fall within the definition of “insured contract,” but could not determine the scope of the indemnity agreement on the evidence before it.⁶⁰

⁵³ *Id.* at 1277.

⁵⁴ *Aetna, supra*.

⁵⁵ *Hoffman Construction Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346, 358 (Alaska 2001).

⁵⁶ *Rogers & Babler v. State*, 713 P.2d 795, 798 (Alaska 1986).

⁵⁷ *Burgess supra*, at 1381; *Kuhn v. State of Alaska* 692 P.2d 261 (1984).

⁵⁸ *Burgess supra*, at 1382.

⁵⁹ *Olympic, Inc. v. Providence Washington Insurance Co. of Alaska*, 648 P.2d 1008 (Alaska 1982) (referring to incidental contracts as an exception to contractual liability exclusion); *Alaska National Insurance Co. v. Industrial Indemnity Co.*, 757 P.2d 1052 (Alaska 1988).

⁶⁰ *United States v. CNA Fin. Corp.*, 168 F. Supp. 2d 1109 (D. Alaska 2001).

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Alaska courts generally recognize that parties are allowed to freely negotiate the allocation of tort liability regardless of fault so long as the contract terms are not unconscionable.⁶¹ Where one party is responsible for procuring full insurance for both parties, that intent must be stated in express terms.⁶² In such a case, that party becomes responsible for the total risk of loss by affirmatively undertaking the duty to provide full insurance coverage for the mutual benefit of the parties.⁶³

Additional insured endorsements purporting to afford broader coverage than the named insured's underlying agreement to indemnify or obtain insurance coverage are broadly construed. In *State v. Underwriters at Lloyds, London*,⁶⁴ a lease between an airline and airport required the airline to indemnify the airport and to maintain insurance to protect the airport against comprehensive public liability, products liability and property damage. However, the insurance procured by the airline provided coverage that was broader than that called for in the lease.⁶⁵ The court held that "[t]he obligation of a liability insurer is contractual and is generally determined by the terms of the policy."⁶⁶ Finding nothing in the policy between the parties which limited its coverage to the minimums required under the lease, and no legal doctrine to support such a limitation, the court found that the airline's insurer was responsible for the full coverage in the policy with the airline, although this was greater than the airline's agreement to indemnify.⁶⁷

Where an additional insured endorsement in a policy identifies all subcontractors of the named insured as additional insureds, but only with regard to the subcontractors' property interest, it has been held that an insurer cannot seek subrogation against those subcontractors for any claim of negligence, even if such a claim is beyond the scope of the subcontractor's property interest.⁶⁸ In such a case, because a subcontractor has been identified as an additional insured, the insurer has no right to enforce a contractual indemnity agreement between its insured and the subcontractor.⁶⁹ In subrogation actions, an insurer cannot recover its losses from a negligent third party if that party is an additional insured under the applicable policy.⁷⁰ The language in the policy limiting coverage will not prevent courts from

⁶¹ *Dressler Industries, Inc. v. Foss Launch and Tug Co.*, 560 P.2d 393, 395 (Alaska 1977).

⁶² *Id.*

⁶³ *Id.* (holding that in the bailment context, an agreement to purchase insurance for the benefit of both parties is sufficient to shift the risk of loss for the bailed goods).

⁶⁴ 755 P.2d 396 (Alaska 1988).

⁶⁵ *Id.*

⁶⁶ *Id.* at 400.

⁶⁷ *Id.*

⁶⁸ *Baugh-Belarde Construction Co. v. College Utilities Corp.*, 561 P.2d 1211 (Alaska 1977).

⁶⁹ *Id.*

⁷⁰ *Graham v. Rockman*, 504 P.2d 1351 (Alaska 1972).

viewing subcontractors as insureds in order to prevent them from being liable in subrogation claims.⁷¹ For example, although the policy may limit coverage for the subcontractor “only as regards [their] property,” or “as their interests may appear,” the subcontractor is still protected from subrogation claims for damages beyond this coverage.⁷²

However, in cases where the insured has entered into an indemnification agreement with a third party that is not named as an additional insured under the named insured’s policy, the insurer may recover amounts paid under that policy pursuant to the indemnification agreement.⁷³ In so doing, the court looks to and applies the plain language of the indemnification clause.⁷⁴

In *Alaska Insurance Co. v. RCA Alaska Communications, Inc.*,⁷⁵ it was held that a party could be an implied additional or co-insured and could still obtain the benefit of the named insured’s coverage. In *RCA*, a fire destroyed a building which RCA rented from Bachner, the owner.⁷⁶ The written lease between the parties provided that the owner would maintain insurance which would provide protection against all risks, including fire.⁷⁷ Bachner’s insurer paid for the fire loss, and then commenced a subrogation action against RCA, contending that RCA had negligently caused the fire.⁷⁸ The court held that RCA was an implied co-insured and reasoned that it would “contradict the reasonable expectations of a commercial tenant to allow the landlord’s insurer to proceed against it after the landlord had contracted in the lease to provide fire insurance on the leased premises . . .”⁷⁹ In these circumstances, it would be undesirable as a matter of public policy to permit the risk of loss from a fire negligently caused by a tenant to fall upon the tenant rather than the landlord’s insurer.⁸⁰

The Alaska courts have not discussed whether an agreement to procure insurance to cover an indemnity obligation runs afoul of AS 45.45.900. The general approach taken by courts seems to imply that indemnity agreements would not be subject to the statute if they provide that the indemnitor will procure insurance sufficient to cover the risk involved, though this issue has not been specifically addressed.

⁷¹ *Baugh-Belarde Construction Co.*, *supra*, at 1213 (holding that the builder’s risk policy protected each insured party against his own negligence, whether the property lost belonged to him or to some other insured party).

⁷² *Id.*

⁷³ *United Airlines, Inc. v. State Farm & Casualty, Co.*, 51 P.3d 928 (2002).

⁷⁴ *Id.*

⁷⁵ 623 P.2d 1216 (Alaska 1981).

⁷⁶ *Id.* at 1217.

⁷⁷ *Id.* at 1219.

⁷⁸ *Id.* at 1217.

⁷⁹ *Id.* at 1219.

⁸⁰ *Id.*

ARIZONA

§ I – General Rules of Contractual Indemnity.

A party may contractually relieve itself from liability to another for damages or ordinary negligence via a contract for indemnity.⁸¹ The duty to indemnify is determined by the contract itself rather than common law principles when parties expressly agree to indemnify in a contract.⁸²

An agreement to indemnify another for the other party's own negligent acts does not violate public policy.⁸³ However, indemnity of this nature is strictly construed and not enforced unless the indemnitor's obligation to protect the indemnitee against its own negligence is expressed in "clear and unequivocal terms."⁸⁴

Where an indemnity provision is silent as to its application to the negligence of the indemnitee – a general indemnity provision⁸⁵ – "an indemnitee is entitled to indemnification for a loss resulting in part from an indemnitee's passive negligence, but not active negligence."⁸⁶ One example of a "general" indemnity provision is an agreement

... to indemnify and hold indemnitee harmless from . . . any and all claims, liabilities, . . . and causes of action arising out or in connection with any accident or injury . . . caused in whole or in part by the act, neglect, fault of or omission of any duty incurred by indemnitee . . .⁸⁷

Active negligence exists where an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty the indemnitee has agreed to perform, whereas passive negligence is mere nonfeasance, such as the failure to discover a dangerous condition, perform a duty imposed by law, or take adequate precautions against certain hazards inherent in employment.⁸⁸

While courts ordinarily follow the rule that a party will not be indemnified for its own active negligence under a general indemnity agreement,⁸⁹ mechanical application of this rule should be avoided in determining the parties' intent with

⁸¹ See *Schweber Electronics v. National Semiconductor Corp.*, 850 P.2d 119 (Ariz. Ct. App. 1992).

⁸² *INA Ins. Co. of N. America v. Valley Forge Ins. Co.*, 722 P.2d 975, 979 (Ariz. Ct. App. 1986); *Grubb & Ellis Mgmt. Services, Inc.*, 2006 Ariz. App. Lexis 86, *8 (July 27, 2006).

⁸³ *Washington Elementary School Dist. No. 6 v. Baglino Corp.*, 817 P.2d 3, 6 (Ariz. 1991).

⁸⁴ *Id.*, citing *Pioneer Roofing Co. v. Mardian Constr. Co.*, 733 P.2d 652, 671 (Ariz. Ct. App. 1986).

⁸⁵ *Id.*

⁸⁶ *Id.*, citing *Pioneer Roofing*, 733 P.2d at 671.

⁸⁷ See generally *Cunningham v. Goettl Air Conditioning, Inc.*, 980 P.2d 489 (Ariz. 1999).

⁸⁸ *Id.*, citing *Estes Co. v. Aztech Constr., Inc.*, 677 P.2d 939 (Ariz. Ct. App. 1983).

⁸⁹ *Washington Elementary*, 817 P.2d at 6.

respect to indemnification as provided in the contract itself.⁹⁰ “Relying exclusively on the active/passive distinction in determining whether an indemnity agreement applies in a given case may prevent an agreement from being enforced as the parties intended.”⁹¹

Contractual indemnity provisions can also be construed as a limited form indemnity agreement, an intermediate form indemnity agreement or a broad form indemnity agreement:

The limited form indemnity obligates the indemnitor to save and hold harmless the indemnitee only for the indemnitor’s own negligence. The intermediate form indemnity obligates the indemnitor to hold harmless the indemnitee for all liability except that which arises out of the indemnitee’s sole negligence. The broad form indemnity requires the indemnitor to save and hold harmless the indemnitee from all liabilities arising from the project, regardless of which party’s negligence introduces the liability.⁹²

§ II – Exceptions to General Rules of Contractual Indemnity.

In certain circumstances, however, courts will void as against public policy intermediate and broad form indemnity provisions, depending on the type of contract at issue.

For example, in construction contracts involving private (*i.e.* non-public entities), Ariz. Rev. Stat. § 32-1159 voids as against public policy indemnity provisions that attempt to indemnify an indemnitee for its sole negligence. This statute provides, in relevant part, as follows:

- a. A covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract that purports to indemnify, to hold harmless or to defend the promisee from or against liability for loss or damage resulting from the sole negligence of the promisee or the promisee’s agents, employees or indemnitee is against the public policy of this state is void.
- b. Notwithstanding Subsection a, a contractor who is responsible for the performance of a construction contract may fully indemnify a person for whose account the construction contract is not being performed and who, as an accommodation, enters into an agreement with the contractor that permits the contractor to enter on or adjacent to its property to perform the construction contract for others.
- c. This Section applies to all contracts entered into between private parties. This Section does not apply to: (1) Agreements to which this state or a political subdivision of this state is a party, including inter-governmental agreements and agreements governed by Sections 34-226

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 3 *Connecticut Insurance LJ* 169, 179.

and 41-2586. (2) Agreements entered by agricultural improvement districts under Title 48, Chapter 17.⁹³

Accordingly, in the private construction context, a “broad form” indemnity provision as defined above is void as a matter of public policy. In the case of government construction contracts, a similar, but even less permissive statute applies. Ariz. Rev. Stat. § 34-226 provides, in relevant part, as follows:

- a. A covenant, clause or understanding in, collateral to or affecting a construction contract or subcontract or architect-engineer professional service contract or subcontract that purports to indemnify, to hold harmless or to defend the promisee of, for or against liability for loss or damages resulting from the negligence of the promisee or the promisee’s agents, employees or indemnitee is against the public policy of this state and is void.
- b. Notwithstanding Subsection a, a contractor who is responsible for the performance of a construction contract or subcontract may fully indemnify a person, firm, corporation, state or other agency for whose account the construction contract or subcontract is not being performed and who, as an accommodation, enters into an agreement with the contractor that permits the contractor to enter on or adjacent to its property to perform the construction contract or subcontract for others.⁹⁴

In the public construction context, therefore, both “broad form” and “intermediate form” indemnity provisions are void as a matter of public policy. Again, these statutory exceptions to the general rules of indemnity apply *only* in the construction context. Further, when applying either of these statutes, a distinction must be made as to whether the contract involves a public or private construction project.

§ III – Indemnity Agreements as Insured Contracts.

It does not appear that the Arizona courts have addressed the extent to which an agreement to assume the tort liability of another via an indemnity agreement is an “insured contract” within the meaning of the exception to the exclusion for contractually assumed liability in the form CGL policy.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

An agreement to procure insurance coupled with an indemnity provision does not automatically extend insurance coverage to the indemnitee unless some other basis for providing coverage exists, *i.e.* actually naming the indemnitee as an insured under the policy or endorsing the indemnitee as an additional insured. Stated differently, the mere fact that an insurance provision is included within an indemnity

⁹³ Ariz. Rev. Stat. § 32-1159 (2004).

⁹⁴ Ariz. Rev. Stat. § 34-226 (2004).

provision does not elevate the indemnitee to the level of an insured under the indemnitor's policy.⁹⁵

In some circumstances, however, the parties to a contract will agree to waive their respective rights against one another, including the right of indemnification, and instead look to the insurance procured by one or both of the parties in order to cover a particular type of loss.⁹⁶ Such waiver of subrogation clauses arise as an example in construction contracts where the contractor agrees to indemnify an owner for losses occasioned by the negligence or partial negligence of the contractor. That same contract, however, may also include a provision providing that the owner will procure insurance for a particular type of loss, most commonly fire damage. Regardless of its duty to indemnify, if the contractor's negligence results in the specific type of covered loss, the courts will look to the insurance of the owner to cover the loss.⁹⁷ "A waiver of subrogation is useful in such projects because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits, and yet protects the contracting parties from loss by bringing all property damage under the all risks builder's property insurance."⁹⁸

As such, the courts may read an indemnification provision that refers to or requires the procurement of a specific type of insurance as a "loss shifting" mechanism designed to impose liability solely on the insurer, rather than the parties to the contract in the event of an occurrence of the specific loss. As in other jurisdictions, the controlling provision may not be the one that refers to indemnity, but rather the one that refers to insurance.

ARKANSAS

§ I – General Rules of Contractual Indemnity.

Arkansas courts apply the same rules of interpretation to indemnity agreements as apply to contracts generally.⁹⁹ "In construing a contract, the courts must endeavor to give meaning and effect to every word and may discard words as surplusage only when the intention of the parties clearly makes them such."¹⁰⁰ If, however, "there is no ambiguity in the language of the contract, then there is no need to resort to rules of construction."¹⁰¹ Like any contract, the interpretation of an indemnity agreement

⁹⁵ *Id.*

⁹⁶ See *United States Fid. & Guar. Co. v. Farrar's Plumbing & Heating Co., Inc.*, 762 P.2d 641 (Ariz. Ct. App. 1988); *Fire Ins. Exch. V. Thunderbird Masonry, Inc.*, 868 P.2d 948, 952-953 (Ariz. Ct. App. 1988).

⁹⁷ *Id.*, citing *Tokio Marine & Fire Ins. Co. v. Employers Ins. Of Wausau*, 786 F.2d 101, 104 (2nd Cir. 1986).

⁹⁸ *Tokio Marine*, 786 F.2d at 104.

⁹⁹ *Pickens-Bond Const. Co. v. North Little Rock Elec. Co.*, 459 S.W.2d 549 (Ark. 1970); *Chevron U.S.A. Inc. v. Murphy Exploration & Prod. Co.*, 2004 Ark. LEXIS 142 (Ark. Mar. 4, 2004).

¹⁰⁰ *Pickens-Bond*, *supra*.

¹⁰¹ *Nabholz Constr. Corp. v. Graham*, 892 S.W.2d 456 (Ark. 1995). See also *Ark. Kraft Corp. v. Boyed Sanders Constr. Co.*, 764 S.W.2d 452 (Ark. 1989)

is “to be determined by the court as a question of law, except where the meaning of the language depends on disputed extrinsic evidence.”¹⁰²

Contracts indemnifying one for his own negligence are enforceable,¹⁰³ however, they require clear and unequivocal language.¹⁰⁴ “Agreements to indemnify an indemnitee against its own negligence are generally disfavored, closely scrutinized, strictly construed against the indemnitee and in favor of the indemnitor, and will not be upheld unless expressed in such clear and unequivocal terms that no other meaning can be ascribed.”¹⁰⁵ The rules of strict construction do not apply to the “interpretation of indemnification agreements entered into by business entities in the context of free and understanding negotiation,”¹⁰⁶ nor do they apply where the language of the agreement is unambiguous such that no rules of construction are necessary to ascertain the contract’s meaning.¹⁰⁷

Any ambiguity in the contract will preclude a finding of indemnification for the indemnitee’s own negligence, but even an unambiguous agreement can fall short of reaching the indemnitee’s own negligence. “The language of an indemnity agreement can be unambiguous and still not spell out in clear, unequivocal, unmistakable terms the indemnitor’s intention to obligate itself to indemnify for the indemnitee’s negligence.”¹⁰⁸ While no particular words are required, the liability of an indemnitor for the negligence of an indemnitee is an extraordinary obligation to assume, and an intention to so indemnify must be spelled out in unmistakable terms.¹⁰⁹

Even with these strict rules of construction, broadly worded indemnity agreements may extend to indemnification for the indemnitee’s own negligence, and the indemnity agreement will be limited only to the extent the indemnitee is the sole proximate cause of the injury. For example, an agreement which required the indemnitor to indemnify “from whatever cause to property or persons used or employed on or in connection with his work, . . .” was considered broad and sweeping enough as to clearly and unequivocally show the indemnitor’s intention to cover the negligence of the indemnitee.¹¹⁰ This was not sufficient, however, to require indemnity for injuries for which the indemnitee’s negligence was the sole proximate cause.¹¹¹

¹⁰² *East-Harding, Inc. v. Horace A. Piazza & Assocs.*, 91 S.W.3d 547 (Ark. Ct. App. 2002).

¹⁰³ *Nabholz, supra*.

¹⁰⁴ *Potlatch Corp. v. Missouri Pac. R.R.*, 902 S.W.2d 217 (Ark. 1995).

¹⁰⁵ *Potlatch, supra*. See also *Paul Hardeman, Inc. v. J.I. Hass Co.*, 439 S.W.2d 281 (Ark. 1969).

¹⁰⁶ *Potlatch, supra*.

¹⁰⁷ *Pickens-Bond, supra*.

¹⁰⁸ *Arkansas Kraft, supra*.

¹⁰⁹ *Id.*

¹¹⁰ *Pickens-Bond, supra*.

¹¹¹ *Id.*

In contrast, where an agreement specifically refers to the indemnitee's own negligence, an even broader reading is warranted, and the indemnity agreement will be enforced even if the indemnitee's negligence is the sole proximate cause of the injury.¹¹² Indemnity will typically only reach indemnification for tort liability, and absent express language to the contrary, an indemnity agreement will not cover indemnification for the indemnitee's contractual liabilities.¹¹³

Additionally, as many of the indemnification cases arise in the construction context, a slightly different analysis may apply in cases involving other types of indemnity agreements.¹¹⁴ The context in which indemnity agreements arise may affect the interpretation of what obligations an indemnitor undertook by the agreement.¹¹⁵ For example, in an oil and gas lease, since the lessee is under a duty to restore the land after drilling, an indemnification agreement in such a lease must account for that duty, and a successor lessee who agrees to indemnify a predecessor lessee should know that its indemnity obligation will cover surface damage caused by its predecessor.¹¹⁶

Although claims for tort-based or common-law indemnity are barred by the workers' compensation act, there is "an exception to the exclusivity of the Workers' Compensation remedy when there is a contract or special relation capable of carrying with it an implied obligation to indemnify."¹¹⁷ Thus, an express contract for indemnity will support a claim against the employer of an injured party.¹¹⁸

§ II – Exceptions to General Rules of Contractual Indemnity.

Unlike the rule in many states, there is no statutory prohibition on indemnity agreements in the construction context, and the law on indemnity agreements has been developed through cases in which a subcontractor agreed to indemnify a general contractor.¹¹⁹ Generally such contracts are upheld against the contention that they violate public policy, but the language must be clear, unequivocal and certain.¹²⁰

The general rule is that "[s]ubject to public policy considerations a party may voluntarily agree to hold another harmless against loss by whatever cause it might be

¹¹² *Ross v. Smith*, 315 F. Supp. 1064 (E.D. Ark. 1970).

¹¹³ *Weaver-Bailey Contractors, Inc. v. Fiske-Carter Constr. Co.*, 657 S.W.2d 209 (Ark. Ct. App. 1983).

¹¹⁴ See e.g. *Chevron*, *supra*.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Mosley Machinery Co. v. Gray Supply Co.*, 833 S.W.2d 772 (Ark. 1992); see also *Cherry v. Tanda, Inc.*, 940 S.W.2d 457 (Ark. 1997).

¹¹⁸ *C & L Rural Elec. Coop. Corp. v. Kincaid*, 256 S.W.2d 337 (Ark. 1953).

¹¹⁹ See *Nabholz*, *supra*.

¹²⁰ *Elk Corp. of Arkansas v. Builders Transport, Inc.*, 862 F.2d 663 (8th Cir. 1988).

sustained.”¹²¹ It has not been set forth in detail, however, what types of indemnity agreements will violate public policy.

§ III – Indemnity Agreements as Insured Contracts.

An agreement to indemnify falls within the “insured contract” provisions of a commercial general liability policy.¹²² The liability for which indemnity is sought from the insured must be tort liability.¹²³

Where the claim against the insured sounds both in negligence and breach of contract, coverage for an “insured contract” will only extend to indemnification of the indemnitee for tortious injuries.¹²⁴

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Although there appear to be no cases directly discussing the effect of an agreement to obtain insurance on an indemnity agreement, conclusions can be drawn from cases which discuss parallel indemnity agreements and agreements to obtain insurance. For example, “where one party has agreed with another to obtain insurance for their mutual protection, the insurer will not be allowed to recover its losses from the non-insured party by means of subrogation or indemnity.”¹²⁵ Many states consider an agreement to obtain insurance as evidence that an indemnity agreement was meant to cover the indemnitee’s own negligence. It would likely follow then that an agreement to obtain insurance in connection with an indemnity agreement would bar the insurer from seeking subrogation from a negligent indemnitee.

An indemnity agreement can give context to allocation between various insurers.¹²⁶ An agreement which requires indemnity for the indemnitee’s own negligence can actually control an insurer’s liability and trump an “other insurance clause.”¹²⁷ “[I]ndemnity agreements determine the allocation of liability in an insurance dispute . . . an indemnity agreement between the insureds or a contract with an indemnification clause . . . may shift an entire loss to a particular insurer notwithstanding the existence of an ‘other insurance’ clause in its policy.”¹²⁸ Thus,

¹²¹ *JFM, Inc. v. Weddington*, 1988 Ark. App. LEXIS 568 (Ark. Ct. App., Dec. 7, 1988).

¹²² See *United States Fid. & Guar. Co. v. Cont’l Cas. Co.*, 2003 Ark. LEXIS 397 (Ark. June 26, 2003).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *United States Fid. & Guar. Co. v. Aetna Cas. & Sur. Co.*, 418 F.2d 953 (8th Cir. 1969).

¹²⁶ *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002).

¹²⁷ *Id.*

¹²⁸ *Id.*

in a suit “between two insurers with identical and dueling ‘other insurance’ clauses, the indemnity agreement [is] paramount.”¹²⁹

Finally, an agreement which contains both an agreement to indemnify and an agreement to procure insurance does not transform the indemnitor into an “insurer.”¹³⁰ In such a case, the indemnity agreement and the agreement to obtain insurance are typically incidental to the actual object of the contract (e.g. a construction project).¹³¹ Therefore, the indemnitor, by entering into parallel indemnity and insurance agreements, is not undertaking to become an insurer.

CALIFORNIA

§ I – General Rules of Contractual Indemnity.

In California, indemnity may arise either by contractual language specifically providing for indemnification or by the “equities of the particular case.”¹³² Indemnity agreements are interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting.¹³³

While the California cases examining indemnity contracts produce inconsistent results, it is generally recognized that parties to an express indemnity agreement may contractually agree to provide indemnity for the indemnitee’s own active negligence.¹³⁴ To do so, the parties must employ “sufficiently specific language.”¹³⁵ An indemnity agreement providing for indemnification against an indemnitee’s own negligence “must be *clear and explicit* and is to be strictly construed against the indemnitee.”¹³⁶ In the absence of such an express provision, the indemnification provision will be construed to provide indemnity to the indemnitee only if he has been no more than *passively* negligent.¹³⁷ In some cases, even an indemnitee who has been only *passively* negligent may be precluded from indemnification depending

¹²⁹ *Id.*

¹³⁰ *See Cherry, supra.*

¹³¹ *Id.*

¹³² *E. L. White, Inc. v. City of Huntington Beach*, 579 P.2d 505, 506-07 (Cal. 1978).

¹³³ *United Airlines, Inc. v. W. Airlines, Inc.*, 282 P.2d 118, 122 (2nd Dist. Ct. App. 1955); *see also Goodman v. Severin*, 274 Cal. App. 2d 885, 894 (2nd Dist. Ct. App. 1969) (determining the actual intention of the parties governs the construction of an indemnification agreement); *accord*, Cal. Civ. Code § 1636 (“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”).

¹³⁴ *E. L. White*, 579 P. 2d at 511.

¹³⁵ *Id.*

¹³⁶ *Widson v. Int’l Harvester Co., Inc.*, 153 Cal. App. 3d 45, 59 (4th Dist. Ct. App. 1984) (emphasis added) (citing *Goldman v. Ecco-Phoenix Elec. Corp.*, 396 P.2d 377 (Cal. 1964)); *see also Price v. Shell Oil Co.*, 466 P.2d 722, 730 (Cal. 1970) (stating language must *expressly and unequivocally* require indemnitor to indemnify the indemnitee for its own active negligence) (emphasis added).

¹³⁷ *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97, 100 (Cal. 1975).

upon the language of the express indemnity provision.¹³⁸ Thus, while parties may freely enter into contractual agreements providing for total indemnity, governing case law requires specificity in the contractual language of the indemnification clause sufficient to alert the indemnitor as to the extent of its obligation.

A “general” indemnity clause will not be construed to provide indemnity for loss resulting in part from an indemnitee’s active negligence. For instance, provisions purporting to indemnify an owner “in any suit at law,”¹³⁹ “for any and all claims for damages to any person,”¹⁴⁰ and “from any cause whatsoever,”¹⁴¹ without expressly mentioning the indemnitee’s negligence, have been construed to be “general” indemnification clauses, which will not be interpreted to provide indemnity where an indemnitee is actively negligent.

The active-passive dichotomy is not always dispositive of whether an actively negligent indemnitee is precluded from indemnification under a general indemnity provision. It has been held that “whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control.”¹⁴² One California court has classified indemnity clauses into three types,¹⁴³ and this stratification tracks the general rule that the specific language in the express indemnity clause and the intent of the parties will dictate whether an indemnitor will be obligated to indemnify an indemnitee for the indemnitee’s active negligence.¹⁴⁴

¹³⁸ *MacDonald & Kruse, Inc. v. San Jose Steel Co.*, 29 Cal. App. 3d 413, 420-21 (2d Dist. Ct. App. 1972).

¹³⁹ *Markley v. Beagle*, 429 P.2d 129 (Cal. 1967).

¹⁴⁰ *Morgan v. Stubblefield*, 493 P.2d 465 (Cal. 1972).

¹⁴¹ *MacDonald & Kruse*, 29 Cal. App. 3d at 422.

¹⁴² *Rossmoor Sanitation, supra*, at 104.

¹⁴³ *MacDonald & Kruse, supra*, at 419-21:

TYPE I: The first type of provision is that which provides “expressly and unequivocally” that the indemnitor is to indemnify the indemnitee for, among other things, the negligence of the indemnitee. 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.

TYPE II: The second type of provision is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee’s liability “howsoever same may be caused” or “regardless of responsibility for negligence.” Under this type of indemnity provision, the indemnitee is indemnified from his own acts of passive negligence that solely or contributorily cause his liability, but is not indemnified for his own acts of active negligence.

TYPE III: The third type of contractual provision is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee’s liabilities caused by the indemnitor, but which does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee’s liabilities that were caused by other than the indemnitor. Under this type of provision, any negligence on the part of the indemnitee, either active or passive, will bar indemnification against the indemnitor irrespective of whether the indemnitor may also have been a cause of the indemnitee’s liability.

¹⁴⁴ *But see Morton Thiokol, Inc., v. Metal Bldg. Alteration Co.*, 193 Cal. App. 3d 1025 (1st Dist. Ct. App. 1987) (holding that agreement whereby one party was to be indemnified for any damages sustained as a result of another’s breach of contract entitled indemnitee to indemnification notwithstanding its active negligence, where the accident would not have occurred except for the indemnitor’s breach of contract).

However, the evolution of comparative indemnification in California may alter the general rule. In *Hernandez v. Badger Constr. Equip. Co.*,¹⁴⁵ one California appellate court held that under an express indemnity clause, principles of comparative fault or proportional indemnification should be applied.¹⁴⁶ Subsequently, another appellate district narrowed the scope of comparative indemnity by reiterating the general rule that an actively negligent indemnitee cannot recover under a general indemnity clause.¹⁴⁷ The court noted that although the general rule is not applicable to all cases, it is a guiding tool used to ascertain the intent of the parties.¹⁴⁸ The California Supreme Court has yet to address the issue of comparative indemnity.

§ II – Exceptions to General Rules of Contractual Indemnity.

Express indemnification agreements are subject to certain limitations based upon principles of public policy, which have been codified in California. “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”¹⁴⁹ However, an indemnity agreement as to a wrongful act already done is valid, unless it was a felony.¹⁵⁰ Additionally, “[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.”¹⁵¹ Public policy also proscribes indemnification for punitive damages.¹⁵²

In the realm of construction contracts, California prohibits indemnification agreements for injury caused *solely* by an indemnitee’s negligent or willful misconduct. The applicable Code section provides:

- a. Except as provided in [other provisions of the Code], provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the *sole negligence or willful misconduct* of the promisee or the promisee’s agents, servants, or independent contractors who are

¹⁴⁵ 28 Cal. App. 4th 1791 (4th Dist. Ct. App. 1994).

¹⁴⁶ *Id.* at 1820-23 (holding that under an express indemnity clause, an actively negligent indemnitee was entitled to indemnification, but only to the proportion that the indemnitor caused the plaintiff’s injuries).

¹⁴⁷ *Maryland Cas. Co. v. Bailey & Sons, Inc.*, 35 Cal. App. 4th 856, 869 (4th Dist. Ct. App. 1995).

¹⁴⁸ *Id.*

¹⁴⁹ Cal. Civ. Code § 1668.

¹⁵⁰ *Lemat Corp. v. Am. Basketball Ass’n*, 51 Cal. App. 3d 267, 277 n.9 (1st Dist. Ct. App. 1975); see Cal. Civ. Code § 2774 (“An agreement to indemnify a person against an act already done, is valid, even though the act was known to be wrongful, unless it was a felony”).

¹⁵¹ Cal. Ins. Code § 533.

¹⁵² *PPG Indus., Inc., v. Transamerica Ins. Co.*, 975 P.2d 652, 658 (Cal. 1999).

directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable; provided, however, that this section shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer as defined by the Insurance Code.

- b. Except as provided in [other provisions of the Code], provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable.¹⁵³

This code section does not proscribe agreements for indemnification when the loss or injury is due only *in part* to the indemnitee's negligence or willful misconduct.¹⁵⁴

Another statutory provision precludes indemnity agreements involving trucking or cartage, and provides in relevant part:

Any provision, promise, agreement, clause, or covenant contained in, collateral to, or affecting any hauling, trucking, or cartage contract or agreement is against public policy, void and unenforceable if it purports to indemnify the promisee against liability for any of the following damages which are caused by the sole negligence or willful misconduct of the promisee, agents, servants, or the independent contractors directly responsible to the promisee, except when such agents, servants, or independent contractors are under the direct supervision and control of the promisor:

- (a) Damages arising out of bodily injury or death to persons.
- (b) Damage to property.
- (c) Any other damage or expense arising under either (a) or (b).¹⁵⁵

The provision is expressly inapplicable to contracts of insurance.¹⁵⁶

§ III – Indemnity Agreements as Insured Contracts.

California recognizes an agreement to indemnify a third party by an insured as an “insured contract” within the meaning of the exclusion for contractually assumed liability.¹⁵⁷

¹⁵³ Cal. Civ. Code § 2782.

¹⁵⁴ See *Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co.*, 234 Cal. App. 3d 1724, 1738 (4th Dist. Ct. App. 1991).

¹⁵⁵ Cal. Civ. Code § 2784.5

¹⁵⁶ *Id.*

¹⁵⁷ *NH Ins. Co. v. Ridout Roofing Co., Inc.*, 68 Cal. App. 4th 495, 500-01 (1st Dist. Ct. App. 1988)

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Notwithstanding application of the statutory provision voiding certain indemnity agreements in the construction context,¹⁵⁸ because contracts of insurance are expressly excepted from the prohibition,¹⁵⁹ in situations where an indemnitee is named as an additional insured under a liability policy, California courts will validate an otherwise unenforceable indemnity agreement by construing the agreement as a contract for the purchase of insurance.¹⁶⁰ California has not addressed the operation of an additional insured endorsement which purports to extend greater coverage to the indemnitee than the underlying agreement of the named insured to indemnify.

COLORADO

§ I – General Rules of Contractual Indemnity.

Indemnity agreements will be upheld in Colorado as long as the parties' intent to indemnify is clear and unambiguous.¹⁶¹ Such agreements are subject to the same rules of construction which govern contracts generally.¹⁶² Indemnity clauses are consequently enforced according to the plain and generally accepted meaning of the language utilized and interpreted in their entirety to give effect to all of their provisions so none are rendered meaningless.¹⁶³ An indemnity agreement is to be given such a meaning as would be attached to it by a reasonably intelligent person knowing all the circumstances prior to and contemporaneous with the making of the integration.¹⁶⁴ Like other contracts, indemnity agreements can arise orally, but broad statements such as "Don't worry about it – we will take care of it if anything happens," will not suffice to create an indemnity obligation.¹⁶⁵ The word "indemnity" is not required to create an indemnity obligation, and conversely, the presence of this word does not guarantee that an indemnity contract was actually created.¹⁶⁶

¹⁵⁸ See Cal. Civ. Code § 2782.

¹⁵⁹ *Id.*

¹⁶⁰ See *Chevron U.S.A., Inc., v. Bragg Crane & Rigging Co.*, 180 Cal. App. 3d 639, 644-47 (4th Dist. Ct. App. 1986); see also *Shell Oil Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 44 Cal. App. 4th 1633, 1641-43 (2d Dist. Ct. App. 1996).

¹⁶¹ *Public Service Co. of Colorado v. United Cable Television of Jeffco, Inc.*, 829 P.2d 1280, 1284 (Colo. 1992).

¹⁶² *May Department Stores Co. v. University Hills, Inc.*, 824 P.2d 100, 101 (Colo. App. 1991).

¹⁶³ *Trosper v. Wilkerson*, 764 P.2d 375, 376 (Colo. App. 1988).

¹⁶⁴ *Alzado v. Blinder, Robinson & Co.*, 752 P.2d 544, 553 (Colo. 1988).

¹⁶⁵ *Williams v. White Mountain Construction Company, Inc.*, 749 P.2d 423, 426 (Colo. 1988).

¹⁶⁶ *Id.*

An indemnity contract holding an indemnitee harmless for its own negligent acts must contain “clear and unequivocal” language to this effect.¹⁶⁷ The “clear and unequivocal” standard does not, however, require the contract to expressly state that one party will indemnify the other party for the first party’s own negligence.¹⁶⁸ Such an intent may be demonstrated by broad language, such as “party A will indemnify party B from any and all claims, liabilities . . .”¹⁶⁹ However, in the commercial setting, the rule of strict construction governing the interpretation of indemnity agreements is relaxed,¹⁷⁰ apparently attributable to the increasing use of liability insurance as a means of covering the indemnity obligation.¹⁷¹ Specific reference to the negligent conduct of the indemnitee as within the intended scope of the indemnity does not render an otherwise unambiguous indemnity provision insufficient to indemnify the indemnitee from its own negligence.¹⁷²

A cause of action by a third-party against an employer for injuries of an employee will be allowed if based upon an express contractual indemnity provision, despite the immunity provided by the Colorado Workmen’s Compensation Act.¹⁷³

§ II – Exceptions to General Rules of Contractual Indemnity.

Public contracts related to construction which purport to indemnify or hold harmless any public entity from that entity’s own negligence are void as against public policy and are wholly unenforceable.¹⁷⁴

In the event that a public contract or agreement for the construction, alteration, repair, or maintenance of any building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other works dealing with construction, or any moving, demolition, or excavation connected with such construction, contains any covenant, promise, agreement, or combination thereof to indemnify or hold harmless any public entity from that public entity’s own negligence, then such covenant, promise, agreement, or combination thereof is void as against public policy and wholly unenforceable.

The statute is intended to affect only the contractual relationship between the parties relating to indemnification of public entities for the negligent acts of the public

¹⁶⁷ *Id.*

¹⁶⁸ *Public Service, supra*, at 1284.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1284-1285.

¹⁷¹ *Id.*

¹⁷² *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781 (Colo. 1989).

¹⁷³ *United Cable TV of Jeffco v. Montgomery LC, Inc.*, 942 P.2d 1230 (Colo. Ct. App. 1996); *Borroel v. Lakeshore, Inc.*, 618 F.Supp. 354, 359 (D. Colo. 1985).

¹⁷⁴ Colo. Rev. Stat. § 13-50.5-102.

entity, and does not affect any other right or remedy of public entities or contracting parties.¹⁷⁵

Contractual provisions which seek to indemnify a party for intentional wrongdoing are against public policy, and Colorado courts will not enforce such provisions, even if one party has detrimentally relied upon the contract.¹⁷⁶ For example, if one breaches a fiduciary duty, he will not be entitled to enforce an indemnity provision and obtain indemnification for his wrongful acts.¹⁷⁷

Parental indemnity provisions, i.e. an agreement whereby a parent agrees to indemnify another party for any injuries or damages suffered by the parent's child, violate public policy to protect minors and create an unacceptable conflict of interest between a minor and his parent or guardian.¹⁷⁸

§ III – Indemnity Agreements as Insured Contracts.

Although it has been recognized that an indemnity agreement generally falls within the policy term “liability assumed in a contract,”¹⁷⁹ the Colorado courts have not addressed whether an indemnity agreement falls within the “insured contract” or “incidental contract” exception to an insurance policy exclusion for contractually assumed liability, where “insured contract” includes the insured’s assumption of tort liability of a third-party.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Mutual agreements to shift the risk of loss or damage to insurance are valid under Colorado law.¹⁸⁰ An agreement between an owner and its contractor which required the owner to provide insurance for the full value of the work was sufficient to shift the loss to the owner’s insurer as the agreement “mirrors the parties’ intent to provide mutual exculpation” from the incurred loss.¹⁸¹ Similarly, a waiver of subrogation provision between an owner and a contractor which referred to property insurance obtained by the owner was held to place both parties essentially in the position of co-insureds on a policy of first-party property insurance.¹⁸² The court found that the waiver of subrogation expressed an agreement by the parties to

¹⁷⁵ *Id.*

¹⁷⁶ *Equitex, Inc. v. Ungar*, 60 P.3d 746, 753 (Colo. Ct. App. 2002); *Hardy v. Heritage Health products Co.*, 98 P.3d 945, 949 (Colo. Ct. App. 2004).

¹⁷⁷ *Id.*

¹⁷⁸ *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1237 (Colo. 2002) (parent’s agreement to indemnify for any injuries received by minor while participating in ski club invalid and contrary to public policy).

¹⁷⁹ *Weger v. United Fire and Casualty Co.*, 796 P.2d 72, 74 (Colo. Ct. App. 1990).

¹⁸⁰ *Steamboat Development Corp. v. Bacjac Industries, Inc.*, 701 P.2d 127, 129 (Colo. Ct. App. 1985).

¹⁸¹ *Id.*

¹⁸² *Town of Silverton v. The Phoenix Heat Source System, Inc.*, 948 P.2d 9, 12 (Colo. Ct. App. 1997) (holding that an insurer may not subrogate against a other party to insured’s waiver of subrogation provision).

exculpate each other from liability and to look solely to the owner's insurance for recovery.¹⁸³ Similarly, where a contract between an owner and a contractor stated that the insurance obtained by the owner "shall include the interest of the Owner, the Contractor, Subcontractor . . . and their work," the express language of the contract acted to include the subcontractor as a beneficiary of the owner's insurance obligation.¹⁸⁴

In *Hartford Insurance Co. v. CMC Builders, Inc.*,¹⁸⁵ a contractor agreed to indemnify the owner, but the agreement stated that any loss of property would be covered by insurance procured by the owner. The Court found the owner's obligation to obtain insurance to cover a specific loss to be an exception to the general indemnification agreement, finding that the purpose of the exception was to relieve the contractor from liability for the specific peril insured against and to require the owner to protect itself through its purchase of insurance.¹⁸⁶ As such, the contractor could not be held liable as an indemnitor for the loss of property in question.¹⁸⁷

The Colorado courts have not directly addressed the extent to which an insurer's obligations to an indemnitee pursuant to an additional insured endorsement interact with the underlying agreement on the part of the insured to indemnify the additional insured.

CONNECTICUT

§ I – General Rules of Contractual Indemnity.

In Connecticut, express indemnity agreements can indemnify against loss and/or potential liability.¹⁸⁸ To indemnify one against his own negligence, however, such an intention must be expressed in clear and unequivocal language within the agreement.¹⁸⁹ Such agreements are not against public policy except to the extent they implicate an express statute, as discussed below.¹⁹⁰

¹⁸³ *Id.*

¹⁸⁴ *Richmond v. Grabowski*, 781 P.2d 192, 195-196 (Colo. Ct. App. 1989).

¹⁸⁵ 752 P.2d 590 (Colo. Ct. App. 1988).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *Amoco Oil Co. v. Liberty Auto & Elec. Co.*, 810 A.2d 259 (Conn. 2002); *Hyson v. White Water Mtn. Resorts of Connecticut*, 829 A.2d 827 (Conn. 2003).

¹⁸⁹ See *United Aircraft Corporation v. David H. Mackenzie, Inc.*, 196 F. Supp. 933, 935 (D. Conn. 1961); *Hyson*, *supra*.

¹⁹⁰ See *Burke v. Car and Truck Leasing Co., Inc.*, 467 A.2d 1255, 1257 (Conn. App. 1983). See also *Local 1035 v. Pepsi Allied Bottlers, Inc.*, 99 F. Supp. 2d 219 (D. Conn. 2000) (Indemnity agreement void under Fair Labor Standards Act and Connecticut counterpart).

In areas other than construction, negligence disclaimers have not been categorically denounced and the courts have taken a case-by-case approach.¹⁹¹ In a lease arrangement where the seller agreed to indemnify the buyer against “any and all liabilities,” the promise to indemnify was found to cover negligence on the part of the indemnitee because the use of “any and all” was all encompassing.¹⁹²

§ II – Exceptions to General Rules of Indemnity.

The one significant prohibition on the general rule that express contracts of indemnity are enforceable under Connecticut law is a prohibition against certain indemnity in construction agreements.¹⁹³ The legislature enacted a statute, the purpose of which is to nullify any “hold harmless” provision in a construction contract which grants immunity to either party for acts of sole negligence.¹⁹⁴ The statute, as amended in 2001, provides:

Any 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, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee’s agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers’ compensation agreement or other agreement issued by a licensed insurer.¹⁹⁵

In 2001, the state legislature amended the statute by substituting the word “negligence” for the words “sole negligence,” thereby broadening its reach.¹⁹⁶ Since the statutory revision, few cases have examined its application. The courts have yet to determine whether the provisions of the 2001 amendment of § 52-572k will be applied retroactively.¹⁹⁷

A party raising claims for breach of contract, tortious interference, breach of implied covenant of good faith and violations of the Connecticut Uniform Trade Practices Act may avoid the application of § 52-572k because the party did not plead

¹⁹¹ See *Comind, Companhia De Seguros v. Sikorsky Aircraft*, 116 F.R.D. 397 (D. Conn. 1987), *see supra*.

¹⁹² See *Burkle*, *supra*.

¹⁹³ See CONN. GEN. STAT. § 52-572k (2003).

¹⁹⁴ *Id.* See *Guild v. Exxon Corp.*, 81 F. Supp. 2d 377, 381 (D. Conn. 1999) (citing House of Representatives Proceedings, 1997, Vol. 20, Part 10, 3864-4326, p. 4298).

¹⁹⁵ CONN. GEN. STAT. § 52-572k(a) (2003).

¹⁹⁶ See *Costin v. Bhandari Constructors & Consultants, Inc.*, 285 F. Supp. 2d 165 (D. Conn. 2003); *Parker v. Konover Construction Corp.*, 2003 Conn. Super. LEXIS 1815 (unpublished).

¹⁹⁷ See *Costin* at 171 (n. 5).

negligence, but only breach of contract.¹⁹⁸ Moreover, in a case involving an ambiguous indemnification clause, to the extent the provisions of a construction agreement purport to indemnify a subcontractor for liability resulting from his own negligence, the court held those provisions void; however, it allowed the provision which simply sought to hold the party liable for other acts and omissions.¹⁹⁹ An indemnification provision related to the installation of an alarm system, which the court determined was not an appurtenance, was not subject to 52-572k.²⁰⁰ Indemnification related to the conduct of the manager of a construction project is likewise unaffected by the prohibitory statute.²⁰¹

In view of the exclusivity of workers' compensation relief, indemnity claims against employees as joint tortfeasors warrant the special additional limitation of an independent legal relationship.²⁰² An indemnitee may recover from the injured party's employer/indemnitor so long as two requirements are met: (1) the contractual provision at issue must express such an intent, and (2) an independent legal relationship must be established which supports the indemnification sought.²⁰³

§ III – Indemnity Agreements as Insured Contracts.

The state appellate courts and federal court in Connecticut have not addressed the precise issue of whether an agreement to indemnify would be considered an "insured contract" within the meaning of the form commercial general liability policy which contains an exception to the exclusion for contractually assumed liability where the assumption is of the tort liability of another. Based upon several "unreported" Superior Court decisions, however, Connecticut law would appear to consider agreements to indemnify to fit within the exception to the exclusion.²⁰⁴

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Parties to a contract may waive their rights to recover against each other and agree instead to look to insurance for coverage for any damage resulting from the

¹⁹⁸ See *Guild*, 81 F. Supp. 2d at 381.

¹⁹⁹ See *Costin*, supra.

²⁰⁰ See *Albany Ins. Co. v. United Alarm Services, Inc.*, 194 F. Supp. 2d 87, 96 (D. Conn. 2002), *appeal den'd*, 733 A.2d 849 (Conn. 1999).

²⁰¹ See *Sandella v. Dick Corporation*, 729 A.2d. 813, 823 (Conn. App. 1999).

²⁰² See *Donar v. King Associates, Inc.*, 786 A.2d 1256 (Conn. App. 2001).

²⁰³ See *id.* at 1259; see also, *Bertrand-Miller v. Wehry*, 2004 Conn. Super. LEXIS 1335, *6 (unpublished) (citing *Ferryman v. Groton*, 561 A.2d 432 (Conn. 1989))

²⁰⁴ See *Nationwide Mut. Ins. Co. v. Lydall Woods Colonial Vill., Inc.*, 2003 Conn. Super. LEXIS 1956 (Conn. Super. Ct. 2003)(unreported)(" The contract liability assumption exclusion, as articulated in cases in state and federal courts around the country, is uniformly considered to apply to those situations where an insured agrees to indemnify a third party pursuant to contract, not tortious conduct as it relates to duties pursuant to a contract under which an insured was established and from which it draws its legal existence.") and *R.E.O., Inc. v. Travelers Cos.*, 1998 Conn. Super. LEXIS 1447, 30-31 (Conn. Super. Ct. 1998)(holding that coverage should be afforded when only one count of a multi-count complaint related to an indemnity agreement).

subject of their agreement.²⁰⁵ Such a waiver clause bars recovery to the extent of insurance coverage.²⁰⁶ In reaching this result, the court looked at the full meaning of the contract and noted that silence as to one distinction detailed in another provision “cannot be mere oversight and must be deemed meaningful . . . An explicit clause to protect the insurer’s right of subrogation at all times could have been included in the policy, but was not.”²⁰⁷ The language that obligated the contractor to procure liability insurance for damage to a construction project and the owner to purchase property insurance constituted a waiver of “all” claims for damage occurring during a construction project to the extent that the owner had obtained insurance under the contract.²⁰⁸

Notably, however, the court in the same case rejected the argument that the contractor was an additional insured under the contract. “Absent any express agreement between the parties, the court will not attach meaning to silence by reading into the contract what could have been expressed but was not.”²⁰⁹ The court concluded that to the extent that the contractor’s negligence proximately caused the un-reimbursed damages (the owner’s deductible), the contractor was held liable for that amount.²¹⁰

DELAWARE

§ I – General Rules of Contractual Indemnity.

Contractual indemnity is enforceable where there is an express contract between the parties containing an explicit undertaking to reimburse for the liability of the character involved.²¹¹ In order to be enforceable, indemnity clauses must be clear and unequivocal.²¹² “Indemnification contracts are construed to give effect to the parties’ intent; in other words, only losses which reasonably appear to have been intended by the parties are compensable under such contracts.”²¹³ Yet, attorneys’ fees and expenses may be recovered under an indemnification agreement if they are incurred as a result of defending claims that are the subject of the duty to

²⁰⁵ See *Stop & Shop Supermarket Co. v. ABCO Refrigeration Supply Corp.*, 842 A.2d 1194, 1198 (Conn. Super. Ct. 2003), *petition for cert. for appeal dismissed*, 853 A.2d 523 (Conn. 2004).

²⁰⁶ See *id.*

²⁰⁷ *Id.* at 1198.

²⁰⁸ See *id.* at 1198, citing *Burkle*, *supra*.

²⁰⁹ *Stop & Shop*, 842 A.2d at 1200.

²¹⁰ See *id.* at 1199-1200 (citing *S.S.D.W. Co. v. Brisk Waterproofing Co.*, 556 N.E.2d 1097 (N.Y. 1990) (dissent); *Housing Inv. Corp. v. Carris*, 389 Co.2d 689 (Fla. App. 1980); *Trinity Universal Ins. Co. v. Bill Cox Construction, Inc.*, 75 S.W.3d 6 (Tex. App. 2001)).

²¹¹ *Shiles v. Reed Trucking Co.*, 1995 Del. Super. LEXIS 563, *7 (Del. Super. Ct. 1995) (quoting *Ianire v. Univ. of Delaware*, 255 A.2d 687, 692 (Del. Super. Ct. 1969)).

²¹² *All-State Investigation & Sec. Agency, Inc. v. Turner Constr. Co.*, 301 A.2d 273 (Del. Super. Ct. 1972); *Sweetman v. Strescon, Indus., Inc.*, 389 A.2d 1319, 1321 (Del. Super. Ct. 1978).

²¹³ *Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1165 (Del. 1978).

indemnify.²¹⁴ This is true even where the indemnity clause does not expressly mention attorneys' fees.²¹⁵

With the exception of construction related contacts (see § II, *infra.*), agreements under which the indemnitee is indemnified against its own negligence are also valid.²¹⁶ However, a contract for indemnity will not be construed to indemnify a person against his own negligence where such intention is not expressed in clear and unequivocal terms.²¹⁷ Moreover, such contracts are not favored at law, and where possible, will be construed so as not to confer immunity from liability.²¹⁸

§ II – Exceptions to General Rules of Contractual Indemnity.

6 Del. C § 2704 prohibits parties entering into construction contracts from transferring the risk of their own negligence to another party through an agreement to indemnify.²¹⁹ The statute provides:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement (including but not limited to a contract or agreement with the State, any County, municipality or political subdivision of the State, or with any agency, commission, department, body or board of any of them, as well as any contract or agreement with a private party or entity) relative to the construction, alteration, repair or maintenance of a road, highway, driveway, street, bridge or entrance or walkway of any type constructed thereon, and building, structure, appurtenance or appliance, including without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless architects, engineers, surveyors, owners or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons or damage to property caused by or resulting or arising from or out of the negligence of such architect, engineer, surveyor, owner or others than the promisor or indemnitor, or their agents, servants or employees, or without limiting the generality of the foregoing, caused by or resulting or arising from or out of defects in maps, plans, designs, specifications prepared, acquired or used by such architect, engineer, surveyor, owner, or others than the promisor or indemnitor, or

²¹⁴ *Oliver B. Cannon and Son, Inc.*, 394 A.2d at 1165; *Eastern Memorial Consultants v. Grace Lawn Mem'l Park*, 364 A.2d 821,825 (Del. 1976); *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244 , 1255 (Del. 2004).

²¹⁵ *Delle Donne & Assocs., LLP*, 840 A.2d at 1255

²¹⁶ 6 Del. C. § 2704(a) (2004); *Hollingsworth v. Chrysler Corp.*, 58 Del. 236, 208 A.2d 61 (Del. 1965).

²¹⁷ *Blum v. Kauffman*, 297 A.2d 48, 49 (Del. 1972); *Powell v. Interstate Vendaway, Inc.*, 300 A.2d 241, 243 (Del. Super. Ct. 1972).

²¹⁸ *Blum*, 297 A.2d at 49.

²¹⁹ 6 Del. C. § 2704 (2004); *Wenke v. Amoco Chems. Corp.*, 290 A.2d 670, 673 (Del. Super. Ct. 1972) *superseded by statute as stated in J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518 (Del. 2000)(initially, 6 Del. C § 2704(a) was thought to only apply to owners and their affiliated preconstruction professional people who furnish plans, designs, and specifications and then attempt to contract away their duty to stand behind their product but in 1988, 6 Del. C. § 2704(a) was broadened to include anyone in a subcontractor/contractor relationship in the construction context).

their agents, servants or employees, is against public policy and is *void and unenforceable*.²²⁰

Not only does the statute render such attempts unenforceable, it specifically declares them void as a matter of public policy. However, 6 Del. C § 2704 (b), referred to as the “insurance saving provision,” provides that “[n]othing 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.”²²¹ Furthermore, a 2003 amendment to the statute provides that the anti-indemnification provision of subsection (a) does “[n]ot apply to any covenant, promise, agreement, understanding, or other provision in a partnership agreement of a partnership (whether general or limited), limited liability company agreement, trust agreement, certificate of incorporation or bylaw.”²²²

Although the state workers’ compensation law is the exclusive remedy available to a claimant to secure compensation for the injuries sustained as a result of a work-related incident,²²³ third-party actions against employers may also be sustained on a contractual theory of recovery based on express or implied indemnification.²²⁴

§ III – Indemnity Agreements as Insured Contracts.

An agreement to indemnify a third party is an “insured contract” under Delaware law.²²⁵ It has been held that whether an indemnitee seeks coverage from an insurer because it is an additional insured on the policy or because the indemnity agreement is an “insured contract” binding the carrier is a “distinction without a difference.”²²⁶ Furthermore, a carrier affording coverage for an indemnitor’s “insured contract” is obligated on the policy whether the underlying indemnity is void for public policy.²²⁷ “[T]he insurer cannot hide behind § 2704(a) [voiding indemnification by a subcontractor] and refuse to pay coverage ‘to any insured, however identified or designated.’”²²⁸

²²⁰ 6 Del. C. § 2704(a).

²²¹ 6 Del. C. § 2704(b) (2004); *See also St. Paul Fire & Marine Ins. Co. v. Elkay Mfg. Co.*, 2003 Del. Super. LEXIS 13 (Del. Super. Ct. 2003).

²²² 6 Del. C. § 2704(c) (2004).

²²³ *Id.*

²²⁴ *Farrall v. Armstrong Cork Co.*, 457 A.2d 763, 766 (Del. Super. Ct. 1983).

²²⁵ *See Generally Steadfast Ins. Co. v. Eon Labs Mfg., Inc.*, 1998 Del. Super. LEXIS 681 (Del. Super. Ct. 1998); *Hercules Inc. v. Amec Virginia*, 1999 Del. Super. LEXIS 32 (Del. Super. Ct. 1999); *Daimler Chrysler Corp. v. Pa. Nat’l. Mut. Casualty Ins. Co.*, 2004 Del. Super. LEXIS 45, *7 (Del. Super. Ct. 2004).

²²⁶ *Daimler Chrysler Corp.* at *7.

²²⁷ *Id.*; *Chrysler Corp. v. Merrell & Garaguso, Inc.*, 796 A.2d 648 (Del. 2002)

²²⁸ *Daimler Chrysler Corp.* at *6-7.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Under certain circumstances a contractual requirement to purchase insurance may be unenforceable; however, once such insurance is secured, the terms of the insurance policy are enforceable against the insurer.²²⁹ Specifically, while Delaware’s Anti-Indemnity statute codified at 6 Del. C. § 2704(a) would invalidate a contractual provision requiring the purchasing of insurance naming the owner as an insured,²³⁰ the insurance saving provision of 6 Del. C. § 2704(b) preserves the enforceability of the insurance “against losses or damages from any causes whatsoever.”²³¹

While this outcome has been challenged as constituting an “end run” around the clear non-indemnification policy set forth in subsection (a), Delaware courts have concluded that a different outcome would negate the legislative purpose behind the insurance savings provisions of subsection (b).²³² Consequently, regardless of the original validity of a contractual provision requiring the purchase of insurance where a policy is obtained and insurance coverage exists, the insurer may be bound to provide coverage.²³³

FLORIDA

§ I – General Rules of Contractual Indemnity.

Contractual agreements to indemnify another are valid and enforceable in Florida under certain circumstances. However, “contracts of indemnification which attempt to indemnify a party against its own wrongful acts are viewed with disfavor in Florida.”²³⁴ Further, “public policy in Florida prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct.”²³⁵ However, there is an exception to this general rule prohibiting liability insurance coverage for punitive damages when the insured is not personally at fault, and is instead is vicariously liable.²³⁶

A contract for indemnity will not be construed to indemnify the indemnitee against losses resulting from his own sole negligence unless such intention is

²²⁹ *Chrysler Corp.*, 796 A.2d at 649.

²³⁰ *Id.* at 650, 653.

²³¹ *Id.* at 653; 6 Del. C. § 2704 (b).

²³² *Id.*

²³³ *Id.* at 653; *Daimler Chrysler Corp.*, *supra*.

²³⁴ *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So. 2d 487, 489 (Fla. 1979).

²³⁵ *Morgan Int’l Realty, Inc. v. Dade Underwriters Ins. Agency*, 617 So. 2d 455, 459 (Fla. 3rd Dist. Ct. App. 1993).

²³⁶ *Id.*

expressed in clear and unequivocal terms.²³⁷ This general rule has been extended to include cases where the indemnitor and indemnitee are found to be jointly liable.²³⁸

An indemnification agreement stated in general terms will not meet the “clear and unequivocal terms” standard, and thus will not apply to liability resulting from the sole negligence of the indemnitee.²³⁹ Terms and provisions held too general to require indemnity for the indemnitee’s own negligence include an agreement to indemnify “against any and all claims,”²⁴⁰ and an agreement in which a lessee assumed “all responsibility for claims asserted by any person” and agreed to hold harmless the lessor.²⁴¹

Language found sufficient to include indemnification for the indemnitee’s own partial negligence include an agreement by a lessee to “indemnify Lessor and save it harmless from suits . . . occasioned wholly or in part by any act or omission of Lessee,”²⁴² and an agreement to indemnify for “all suits except those resulting from the indemnitee’s sole negligence.”²⁴³

§ II – Exceptions to General Rules of Contractual Indemnity.

Florida places a statutory bar on agreements to indemnify another for its own negligence in the construction context. The applicable statute provides:

. . .

- (2) A construction contract for a public agency or in connection with a public agency’s project may require a party to that contract to indemnify and hold harmless the other party to the contract, their officers and employees, from liabilities, damages, losses and costs, including, but not limited to, reasonable attorney’s fees, *to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party* and persons employed or utilized by the indemnifying party in the performance of the construction contract.
- (3) Except as specifically provided in subsection (2), a construction contract for a public agency or in connection with a public agency’s project may not require one party to indemnify, defend, or hold harmless the other party, its employees, officers, directors, or agents

²³⁷ *University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507, 509 (Fla. 1973); *see also H&H Painting & Waterproofing Co. v. Mech. Masters, Inc.*, 923 So. 2d 1227 (Fla. 4th Dist. Ct. App. 2006).

²³⁸ *Charles Poe*, 374 So. 2d at 489.

²³⁹ *University Plaza*, 272 So. 2d at 512.

²⁴⁰ *Cox Cable Corp. v. Gulf Power Co.*, 591 So. 2d 627, 629 (Fla. 1992).

²⁴¹ *Charles Poe*, *supra*.

²⁴² *Leonard L. Farber Co. v. Jaksch*, 335 So. 2d 847 (Fla. 4th Dist. Ct. App. 1976).

²⁴³ *Department of Transp. v. Whitehurst & Sons, Inc.*, 636 So. 2d 101 (Fla. 1st Dist. Ct. App. 1994).

from any liability, damage, loss, claim, action, or proceeding, and any such contract provision is void as against public policy of this state.²⁴⁴

The implication of the statute is clear: An indemnification agreement to indemnify for the indemnitee's own negligence in public agency construction contracts is void. A recent amendment to the statute allows indemnification for the indemnitee's own negligence if a reasonable monetary limitation is placed on the agreement or if specified consideration is given for the indemnification.²⁴⁵

Closely related to the foregoing is a prohibition on the indemnification of design professionals. This statute provides:

- (1) Notwithstanding the provisions of s. 725.06, if a design professional provides professional services to or for a public agency, the agency may require in a professional services contract with the design professional that the design professional indemnify and hold harmless the agency, and its officers and employees, from liabilities, damages, losses, and costs, including, but not limited to, reasonable attorneys' fees, *to the extent caused by the negligence, recklessness, or intentionally wrongful conduct of the design professional* and other persons employed or utilized by the design professional in the performance of the contract.
- (2) Except as specifically provided in subsection (1), a professional services contract entered into with a public agency may not require that the design professional defend, indemnify, or hold harmless the agency, its employees, officers, directors, or agents from any liability, damage, loss, claim, action, or proceeding, and any such contract provision shall be void as against the public policy of this state.²⁴⁶

§ III – Indemnity Agreements as Insured Contracts.

Under a general liability policy which affords coverage for an “insured contract,” an insured contract includes an insured's agreement to indemnify another.²⁴⁷ However, an indemnity agreement purporting to indemnify for the indemnitee's own negligence must be clear and unequivocal, and in the absence of such a finding, the indemnitor does not assume the tort liability of another, and there is consequently no “insured contract” to which liability coverage extends.²⁴⁸

²⁴⁴ Fla. Stat. § 725.06. (emphasis added).

²⁴⁵ *Id*; see also *Federal Ins. Co. v. Western Waterproofing Co. of America*, 1986 Fla. App. LEXIS 5957 (Fla. 1st Dist. Ct. App. 1986).

²⁴⁶ Fla. Stat. § 725.08 (emphasis added).

²⁴⁷ *Florida Mun. Power Agency v. Ohio Cas. Ins. Co.*, 714 So. 2d 660, 661 (Fla. 5th Dist. Ct. App. 1998) (contract defined “insured contract” as an agreement under which the insured “assume[d] the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’”).

²⁴⁸ *Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So. 2d 336, 337 (Fla. 4th Dist. Ct. App. 1996).

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Where the parties to an agreement mutually agree that one will obtain insurance as part of the bargain to shift the loss from both of them to the insurance carrier solely, if loss occurs, it is irrelevant which party was negligent.²⁴⁹ For example, where a contract contains both a provision that any loss due to the negligence of a contractor shall be borne by that contractor, and a provision that the contractor shall be a named insured jointly with the owner in all policies, the court interprets the contract as having contemplated the shifting of the risk of any party to an insurer, irrespective of negligence.²⁵⁰ Further, a contract in which an owner agrees to provide a contractor with all “necessary insurance” will be construed as that which is necessary to protect the parties from *any and all loss*.²⁵¹

There is some indication that where an indemnitor procures liability insurance in connection with an agreement to indemnify, the indemnification will not be expanded by the policy of insurance. For example, where a tenant was required to obtain certain minimum levels of liability insurance to cover the landlord, it was held that the “insurance coverage does not extend beyond the tenant’s liability.”²⁵² Since the tenant was not liable to indemnify for losses caused by the landlord’s negligence, neither was the tenant’s insurer.²⁵³

Similarly, where a supplier agreed to indemnify a franchisee for losses except those caused by the franchisee’s own negligence, and where the agreement further provided that the supplier would obtain liability insurance, the court limited the franchisee’s rights to coverage to the extent of the underlying indemnification agreement.²⁵⁴ As such, the mere existence of liability insurance did not trump the fact that the indemnity agreement did not extend to losses caused by the franchisee’s negligence, and consequently the policy of insurance did not extend to that liability.²⁵⁵

When the “indemnity language of the contract does not require [the indemnitor] to hold [the indemnitee] harmless for [the indemnitee’s] own negligence,” where the indemnitee is named as an additional insured, “the indemnity language of the

²⁴⁹ *Continental Ins. Co. v. Kennerson*, 661 So. 2d 325 (Fla. 1st Dist. Ct. App. 1995).

²⁵⁰ *Smith v. Ryan*, 142 So. 2d 139 (Fla. 2nd Dist. Ct. App. 1962).

²⁵¹ *Housing Inv. Corp. of Fla. v. Carris*, 389 So. 2d 689 (Fla. 5th Dist. Ct. App. 1980).

²⁵² *University Plaza*, *supra*.

²⁵³ *Id.*

²⁵⁴ *Allianz Insurance*, *supra*.

²⁵⁵ *Id.* The *Allianz* case, unfortunately, raises more questions than it answers. The court limited the indemnitee’s coverage from insurance in this case to the limits set forth in the underlying indemnity agreement. However, the agreement between the supplier and the franchisee required the supplier to name the franchisee as an additional insured (which based on the *Container Corp.* case discussed *infra*, would seem to change the outcome). For some unknown reason, however, the *Container Corp.* court distinguished itself from *Allianz* by stating that “there was no indication in [*Allianz*] that the claimant had been named in the policy as an additional insured.” *Container Corp. of Am. v. Maryland Casualty Co.*, 707 So. 2d 733, 735 n.1 (Fla. 1998). This distinction is at odds with the facts in *Allianz*.

contract is [not] dispositive of the coverage issue.”²⁵⁶ Rather, the “language of the policy is controlling”²⁵⁷ and the indemnitee may be entitled to coverage above and beyond what was promised in the underlying indemnification agreement.

GEORGIA

§ I – General Rules of Contractual Indemnity.

Except in cases prohibited by statute or where a public duty is owed, a party may contractually relieve itself from liability to another for damages or ordinary negligence, and such an agreement is not void as against public policy.²⁵⁸ Furthermore, a party may validly bind itself to indemnify another for that party’s own future acts of negligence,²⁵⁹ except where expressly disallowed by statute. As a matter of public policy, however, an agreement to indemnify a party for the indemnitee’s own negligence will only be enforced if an intention to do so on the part of the indemnitor is expressed in plain, clear and unequivocal terms.²⁶⁰ Absent such an explicitly and expressly stated intent, Georgia courts will not interpret an indemnity agreement as a promise to save the indemnitee from its own negligence.²⁶¹ Every presumption is against such intention, and if there is any ambiguity, the words of the agreement must be construed strictly against the indemnitee.²⁶² “Georgia courts never imply an agreement to indemnify another for one’s own negligence in the absence of express language.”²⁶³ The contract will be scrutinized closely to discover whether such an intent is actually revealed.²⁶⁴

This rule is an expression of the reluctance to cast the burden for negligent actions upon those who are not actually at fault,²⁶⁵ the public policy instead being to encourage the exercise of due care for fear of liability, rather than encourage acts of

²⁵⁶ *Container Corp. of Am.* at 735.

²⁵⁷ *Id.*

²⁵⁸ *Batson-Cook Co. v. Georgia Marble Setting Co.*, 144 S.E.2d 547, 549 (Ga. App. 1965).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 550; *Southern Ry. Co. v. Union Camp Corp.*, 353 S.E.2d 519, 520 (Ga. App. 1987); *Georgia State Tel. Co. v. Scarboro*, 251 S.E.2d 309, 310 (Ga. App. 1978); *Ryder Integrated Logistics, Inc. v. BellSouth Telcoms., Inc.*, 627 S.E.2d 358, 362 (Ga. App. 2006).

²⁶¹ *Union Camp*, *supra* n. 3, at 310; *Georgia Marble Setting*, *supra* n. 1, at 550; *Service Merchandise Co. v. Hunter Fan Co.*, 617 S.E.2d 235, 237 (Ga. App. 2005); *BellSouth Telcoms*, *supra* n. 2, at 362.

²⁶² *Scarboro*, *supra* n. 3, at 310; *Georgia Marble Setting*, *supra* n. 1, at 552; *Scarboro Enterprises, Inc. v. Hirsh*, 169 S.E.2d 182, 185 (Ga. App. 1969); *Hunter Fan Co.*, *supra* n.4, at 237; *BellSouth Telcoms*, *supra* n. 2, at 362.

²⁶³ *Central of Ga. R.R. Co. v. Lester*, 165 S.E.2d 587, 592 (Ga. App. 1968); *BellSouth Telcoms*, *supra* n. 2, at 362.

²⁶⁴ *Georgia Marble Setting*, *supra* n. 1, at 550.

²⁶⁵ *Allstate Ins. Co. v. City of Atlanta*, 415 S.E.2d 308, 309 (Ga. App. 1992).

carelessness, cloaked with the knowledge that an indemnity contract will relieve a party's indifference.²⁶⁶

Consequently, an agreement by one party to indemnify another “against any and all claims” does not “expressly, plainly, clearly and unequivocally” evidence an intent on the part of the indemnitor to indemnify for the indemnitee’s own negligence, and it will not be read as doing so.²⁶⁷ Neither does an agreement to indemnify and hold harmless “from and against all claims, damages, losses and expenses” require indemnification for the indemnitee’s own negligence.²⁶⁸ The duty to indemnify will only be avoided under this rule where the loss or damage is occasioned by the sole negligence of the indemnitee, not where the indemnitor is solely at fault or where the indemnitor and indemnitee are concurrently negligent.

Where the negligence of the indemnitor and indemnitee combine to cause injury, such as where the parties are concurrently negligent, the duty to indemnify arises and is enforceable.²⁶⁹ Consequently, a duty to indemnify in the case of joint negligence arises where the indemnification is for “any and all claims.”²⁷⁰

§ II – Exceptions to General Rules of Contractual Indemnity.

Section 13-8-2(a) of the Official Code of Georgia Annotated provides that “a contract which is against the policy of the law cannot be enforced.” The statute thereafter identifies particular contracts deemed contrary to public policy such as contracts in restraint of trade²⁷¹ and wagering contracts,²⁷² among others.²⁷³ Beyond the types of agreement expressly identified by this statute, the Georgia Supreme Court held as unenforceable on public policy grounds a provision in an insurance policy providing coverage for the loss of a leg only if the leg was severed within 90 days of injury.²⁷⁴

It has been held that a contract will not be considered contrary to public policy unless the legislature has so declared, the consideration of the contract “is contrary to good morals and contrary to law,” or the contract is entered into “for the purpose of

²⁶⁶ *Id.* at 310.

²⁶⁷ *Park Pride Atlanta, Inc. v. City of Atlanta*, 541 S.E.2d 687, 689 (Ga. App. 2000).

²⁶⁸ *Binswanger Glass Co., Inc. v. Beers Constr. Co.*, 234 S.E.2d 363, 366 (Ga. App. 1977).

²⁶⁹ *Id.*

²⁷⁰ *Central of Ga. R.R. Co. v. Georgia Ports Auth.*, 379 S.E.2d 540, 542 (Ga. App. 1989)

²⁷¹ O.C.G.A. § 13-8-2(a)(2).

²⁷² O.C.G.A. § 13-8-2(a)(4).

²⁷³ O.C.G.A. § 13-8-2(a)(1)(contracts tending to corrupt legislation or the judiciary); O.C.G.A. § 13-8-2(a)(3)(contracts to evade or oppose the revenue laws of another country) and (a)(5)(contracts of maintenance or champerty).

²⁷⁴ *Strickland v. Gulf Life Ins. Co.*, 242 S.E.2d 148, 149 (Ga. 1978).

affecting an illegal or immoral agreement or doing something which is in violation of law.”²⁷⁵

A separate statutory provision deems void and unenforceable certain agreements to indemnify relating to the construction, repair or maintenance of buildings. This statute reads in relevant part:

[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, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee is against public policy and is void and unenforceable, provided that this subsection shall not affect the validity of any insurance contract, workers’ compensation, or agreement issued by an admitted insurer.²⁷⁶

While an agreement to indemnify another generally for “any and all claims” is not deemed to create an obligation to indemnify for an indemnitee’s own sole negligence absent plain and unequivocal language creating such an obligation,²⁷⁷ an agreement to indemnify for “all claims” or “any and all claims” which implicates the provisions of O.C.G.A. § 13-8-2(b) will be assumed to extend to the indemnitee’s sole negligence even if the agreement does not so expressly provide,²⁷⁸ and will be struck down as violative of the public policy of the state. This outcome reflects the court’s intention to enforce the will of the legislature in enacting O.C.G.A. § 13-8-2²⁷⁹ through a broad reading of the statute, rather than applying a rule of strict statutory construction.²⁸⁰

The diametrically opposite interpretations applied to general agreements to indemnify on the one hand, and agreements implicating the provisions of O.C.G.A. §

²⁷⁵ *Department of Transp. v. Brooks*, 328 S.E.2d 705, 713 (Ga. 1985).

²⁷⁶ O.C.G.A. § 13-8-2(b).

²⁷⁷ See n. 10 and accompanying discussion.

²⁷⁸ *Frazer v. City of Albany*, 245 Ga. 399, 265 S.E.2d 581, 583 (1980); see also, *Federal Paper Board Co., Inc. v. Harbert-Yeargin, Inc.*, 53 F.Supp. 2d 1361, 1371-1373 and cases cited therein; *Morgan v. Westinghouse Corp.*, 579 F.Supp. 867 (N.D. Ga. 1984); *Reliance Ins. Co. of Ill. v. Richfield Hospitality Servs., Inc.*, 92 F.Supp. 2d 1329, 1335-1336 (N.D. Ga. 2000).

²⁷⁹ *Country Club Apartments, Inc. v. Scott*, 271 S.E.2d 841, 842 (Ga. 1980)(overruling numerous decisions of the Georgia Court of Appeals rendered subsequent to the enactment of O.C.G.A. § 13-8-2(b) and which “failed to give effect to th[e] [public] policy” stated in the statute.); see also *Frazer v. City of Albany*, 265 S.E.2d 581, 583 (Ga. 1980).

²⁸⁰ See *Morgan v. Westinghouse Elec. Corp.*, 579 F. Supp. 867, 869-870 (N.D. Ga. 1984) (noting earlier Georgia precedent applying a rule of strict construction to the predecessor statute to O.C.G.A. § 13-8-2(b) because it was in derogation of the common law).

13-8-2 on the other, has been described as creating a “catch-22,” and an “ambush [on] many unsuspecting indemnitees.”²⁸¹

Under the first line of Georgia authority, the absence of an explicit acknowledgment in the contract that “any claim” includes a claim of negligence dooms the indemnitee’s hope for indemnification when it is liable based on its own negligence. Under the line of authority that holds that “any claim” can include a claim of negligence, however, the indemnitee loses because Georgia “public policy” disallows indemnification for [certain] claims of negligence.²⁸²

Applying the prohibition of O.C.G.A. § 13-8-2(b) in the context of a lease agreement, the court struck as contrary to public policy a provision in a building lease agreement in which one party agreed to indemnify and save harmless another “against and from all claims . . . by any cause whatsoever”²⁸³ since this constituted an agreement to indemnify one party for the party’s own sole negligence in connection with the lease of a building. In similar reliance upon the statute, the court struck an exculpatory provision in a lease agreement in which the tenant released and held harmless the landlord “from any and all damages to both person and property . . . whether due to negligence of Landlord.”²⁸⁴ In a case involving the installation of elevators in a building, the court voided on grounds of public policy an indemnity provision in which a general contractor assumed “complete responsibility for any accident to persons or property, howsoever caused” and agreed to indemnify and hold harmless “against all loss, damage, claims, liability or expense.”²⁸⁵

The prohibition contained in O.C.G.A. § 13-8-2(b) and the outcome of the three immediately preceding cases are avoided, however, where the indemnitor purchases liability insurance for purposes of satisfying the loss or damage to which the indemnity extends.²⁸⁶

§ III – Indemnity Agreements as Insured Contracts.

The Georgia Court of Appeals has implicitly, but not expressly, acknowledged that an agreement to indemnify another meets the definition in the standard general liability policy excepting from the exclusion for contractually assumed liability an “insured contract.”²⁸⁷ In each of the cases, coverage was ultimately deemed excluded on other grounds. It consequently cannot be said that Georgia has

²⁸¹ *Richfield Hospitality Servs.*, *supra* n. 25, at 1336.

²⁸² *Id.* at 17.

²⁸³ *City of Albany*, *supra* n. 26, at 584.

²⁸⁴ *Country Club Apartments, Inc. v. Scott*, 267 S.E.2d 811, 813-814 (Ga. App. 1980).

²⁸⁵ *Westinghouse Elec.*, *supra* n. 27, at 870.

²⁸⁶ *Richfield Hospitality Servs.*, *supra* n. 25, at 1336; *Tuxedo Plumbing & Heating Co. v. Lie-Nielsen*, 262 S.E.2d 794, 795-796 (Ga. 1980).

²⁸⁷ See *Park Pride Atlanta*, *supra* n. 10, at 691; *Capital Alliance Ins. Co., Inc. v. Cartwright*, 512 S.E.2d 666, 668 (Ga. App. 1999)(arguably applying Alabama law); *Barge & Co., Inc. v. Employer’s Mut. Liab. Ins. Co.*, 295 S.E.2d 851, 856 (Ga. App. 1982).

expressly recognized that an insured's agreement to indemnify constitutes an "insured contract" within the meaning of the general liability policy.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

In an early case predating the enactment of the predecessor statute to O.C.G.A. § 13-8-2, the court considered the obligation of a subcontractor to indemnify the general contractor for injuries to a subcontractor's employee pursuant to an agreement by the subcontractor to indemnify for "any and all . . . losses, expenses, damages, demands and claims" arising out of the performance of work by the subcontractor. Consistent with the general rule, the court held the provision evidenced no intent on the part of the subcontractor to indemnify for the contractor's own negligence.²⁸⁸ The court ruled as an aside that the contractor carried liability insurance for liability arising from its own negligence and that the subcontractor carried liability insurance which covered its own negligent acts. In the court's view, these facts strengthened the probability that the contract did not contemplate indemnity against the indemnitee's negligent acts and indicated that the contractor was not relying solely, if at all, upon the indemnity agreement with the subcontractor in the event of its own negligent acts.²⁸⁹

Clauses in leases and other contracts in which the parties clearly express their mutual intent to shift the risk of loss or damage to insurance do not violate O.C.G.A. § 13-8-2(b)²⁹⁰ The rule is stated as follows:

where parties to a business transaction mutually agree that insurance will be provided as part of the bargain, such agreement must be construed as providing mutual exculpation to the bargaining parties who must be deemed to have agreed to look solely to the insurance in the event of loss and not to liability on the part of the opposing party.²⁹¹

Application of this rule is premised upon the legal fiction that "exculpation is not indemnification"²⁹² even where the actual language of the agreement provides for indemnification.

In *Tuxedo v. Lie-Nielsen*,²⁹³ a building owner retained the services of a plumbing contractor to undertake work which resulted in a fire loss. The written agreement between the owner and contractor provided that "Owner shall be responsible for procuring and maintaining fire insurance with extended coverage upon the structures and improvements of the property..."²⁹⁴ The owner's insurer paid the loss and suit

²⁸⁸ *Georgia Marble Setting*, *supra* n. 1, at 552.

²⁸⁹ *Id.*

²⁹⁰ *Lie-Nielsen*, *supra* n. 33, at 795-796.

²⁹¹ *Id.* (quoting *General Cigar Co. v. Lancaster Leaf Tobacco Co.*, 323 F.Supp. 931, 941 (D. Md. 1971)).

²⁹² *McAbee Constr. Co. v. Georgia Kraft Co.*, 343 S.E.2d 513, 515 (Ga. App. 1986).

²⁹³ *Lie-Nielsen*, *supra* n. 33.

²⁹⁴ *Id.* at 795.

was then initiated in the owner/insured's name against the contractor in the amount of the claim. On these facts, the court deemed the contractual provision respecting insurance a "waiver of subrogation" in which insurance coverage was obtained for the benefit of both and in which the owner and contractor waived their claims against each other for any fire loss. The court held the predecessor statute to O.C.G.A. § 13-8-2 inapplicable since neither party agreed to indemnify for the other's sole negligence. Rather, the insurance clause shifted the risk of loss to the insurance company regardless of which party was at fault.²⁹⁵

Where a contractor agreed to indemnify a property owner for the owner's sole negligence causing injury to an employee of the contractor or its subcontractors, the indemnity was enforceable based upon a provision in the agreement in which the contractor agreed to keep insurance in force for the benefit of the owner and contractor "with cross liability clauses."²⁹⁶ The court held the two provisions together showed the parties intended coverage by insurance, not ultimate indemnification of the owner against its own negligence.²⁹⁷ O.C.G.A. § 13-8-2 was deemed inapplicable because there was no agreement to indemnify for the sole negligence of any party. "Rather, the insurance clause shifts the risk of loss to the insurance company regardless of which party is at fault."²⁹⁸

O.C.G.A. § 13-8-2(b) was held inapplicable to an agreement between a landlord and tenant containing a "waiver of subrogation" provision providing that the parties "waive any and all rights of recovery against the other . . . for loss or damage to such waiving party or its property . . . arising from any cause insured against under the standard form of fire insurance policy. . . ."²⁹⁹ The court expressly rejected the contention that the waiver was unenforceable because there was no specific provision in the agreement actually requiring one or both parties to obtain insurance.³⁰⁰ Since in the court's view the waiver of subrogation would not apply in the absence of insurance, there was no necessity to include a mandatory insurance provision to clearly express the parties' intent to look solely to the insurer in the event of a loss.³⁰¹

The foregoing has been expressly recognized by the Georgia Supreme Court:

[s]ubrogation requires the existence of a contract to pay (insurance) and the actual payment of the claim; in the absence of insurance and payment thereunder, there can be no subrogation and hence no waiver. Accordingly, the absence of an express requirement to maintain insurance does not alone

²⁹⁵ *Id.* at 796.

²⁹⁶ *McAbee*, *supra* n. 39 at 515.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Glazer v. Crescent Wallcoverings, Inc.*, 451 S.E.2d 509, 511-513 (Ga. App. 1994).

³⁰⁰ *Id.* at 512.

³⁰¹ *Id.* (also holding that the waiver of subrogation between the landlord and tenant precluded an action for contribution against the landlord by the third parties against whom the tenant sought to recover for the loss).

diminish the clarity of the[] parties' intent; inasmuch as subrogation arises only upon the payment of an insured claim, the parties' mutually-bargained-for covenant to waive subrogation patently contemplates the existence of insurance coverage and would be rendered meaningless in the absence of the same. A requirement that the parties purchase insurance is a significant indication that they intended to shift the risk of loss, but it is not essential to a valid and legal waiver of subrogation and where their intent so to do is otherwise clear, that agreement will be upheld.³⁰²

This is true even to the extent the agreement containing the waiver of subrogation clause excepts the landlord's own negligence should the available insurance not cover the loss.³⁰³

A provision in a lease agreement providing for mandatory insurance covering the risk of loss is not alone determinative of an intention by the parties to exculpate one another and to look only to insurance.³⁰⁴ Thus, where insurance is addressed, but the agreement further expresses an intention for one party to be liable for damage not covered by insurance if the party's conduct caused or contributed to the loss, no waiver will be deemed intended.³⁰⁵

Exculpatory language in an agreement not termed a "waiver of subrogation" and which spoke in terms of "insurable hazards" rather than insured causes was unenforceable and violative of O.C.G.A. § 13-8-2(b) since the language did not necessarily contemplate the purchase of insurance and did not limit itself to circumstances involving insurance.³⁰⁶

While the Georgia appellate courts have not addressed the issue, it is quite unlikely that an insured's contractual agreement to indemnify another combined with an obligation by the insured/indemnitor to identify the indemnitee as an additional insured on a policy of liability insurance will enable the insurer to limit its exposure for loss to the scope of the indemnity provision where the coverage issued is broader than the indemnity. Rather, the insurer would be on the risk to the full extent of the coverage afforded to the indemnitee/additional insured.

HAWAII

§ I – General Rules of Contractual Indemnity.

Contracts of indemnity are enforceable, including those that purport to indemnify the indemnitee for its own acts of negligence.³⁰⁷ But "contracts of

³⁰² *May Dep't Store v. Center Developers, Inc.*, 471 S.E.2d 194, 197-98 (Ga. 1996).

³⁰³ *Id.*

³⁰⁴ *See Alimenta Processing Corp. v. South Ga. Pecan Co.*, 364 S.E.2d 84, 86 (Ga. App. 1987).

³⁰⁵ *Id.* at 85.

³⁰⁶ *Central Warehouse & Dev. Corp. v. Nostalgia, Inc.*, 435 S.E.2d 230 (Ga. App. 1993). *But see, May, supra*, and *Glazer, supra*, placing some restrictions on its application.

³⁰⁷ *See Straub Clinic & Hospital, Inc. v. Chicago Ins. Co., et al*, 665 P.2d 176 (Haw. App. 1983).

indemnity are strictly construed, particularly where the indemnitee claims that it should be held safe from its own negligence.”³⁰⁸ In such an instance, “the indemnity agreement must be a ‘clear and unequivocal’ assumption of liability.”³⁰⁹ There is, however, no necessary “talismanic recitation” that satisfies this requirement, “and an express statement that the indemnification applied to the indemnitee’s own negligence does not appear necessary.”³¹⁰

One case suggests a burden on the part of the indemnitor to expressly exclude certain types of indemnity, as opposed to the more common burden on the indemnitee to expand the scope of the indemnity. “[I]f an indemnitor is contractually obligated to indemnify for its negligence, it is obligated to indemnify for both its sole and concurrent negligence unless the indemnity contract clearly and unequivocally specifies otherwise.”³¹¹

§ II – Exceptions to General Rules of Contractual Indemnity.

In the construction context, a party cannot be indemnified for its sole negligence.³¹² Section 431:10-222 of the Haw. Rev. Stat. provides as follows:

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, pertinence or appliance, including moving, demolition or excavation connected therewith, purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or willful misconduct of the promisee, the promisee’s agents or employees, or indemnitee is invalid as against public policy, and is void and unenforceable; provided that this Section shall not affect any valid worker’s compensation claim under Chapter 386 or any other insurance contract or agreement issued by an admitted insurer upon any insurable interest under this Code.³¹³

Also, indemnity agreements may be voided where there is a disparity in bargaining power and the parties do not deal at arms length.³¹⁴ But this has never

³⁰⁸ *Kamali v. Hawaiian Electric Co.*, 504 P.2d 861 (Haw. 1972).

³⁰⁹ *Espaniola v. Cawdrey Mars Joint Venture*, 707 P.2d 365, 369 (Haw. 1985). See also *Keawe v. Hawaiian Electric Co.*, 649 P.2d 1149 (Haw. 1982).

³¹⁰ *Kole v. AMFAC, Inc.* 665 F. Supp. 1460, 1463 (D. Haw. 1987).

³¹¹ *Straub Clinic & Hospital, Inc. v. Chicago Ins. Co., et al.*, 665 P.2d 176 (Haw. App. 1983) Whereas most of the case law suggests that a contract of indemnity must “clearly and unequivocally” express an intention to indemnify an indemnitee for its own acts of negligence, the *Straub* case suggests that the contract of indemnity must be clear and unequivocal with respect to the indemnitor’s intent to *exclude* acts of negligence on the part of the indemnitee from its responsibility to indemnify. *Straub*, however, stands alone in this regard.

³¹² See *Espaniola*, *supra*; see also H.R.S. § 431:10-222.

³¹³ H.R.S. § 431:10-222.

³¹⁴ *Kole*, 665 F. Supp. at 1464 citing *Southern Pacific Transportation Co. v. Nielsen*, 448 F.2d 121, 123 (10th Cir. 1971).

occurred in a reported decision. In the one case that discusses the exception, the court concluded that the parties dealt at arms length with one another, finding that the transaction giving rise to the contract of indemnity did not require the parties to align interests.³¹⁵

§ III – Indemnity Agreements as Insured Contracts.

Limited authority suggests an insurer has a duty to provide coverage for contractual liability assumed by its insured via an indemnity provision with a third party.³¹⁶ Courts will look to the terms of the policy in order to determine the extent of coverage.

In *Liberty Mutual*, a subcontract agreement contained an indemnity provision that required the subcontractor to indemnify the contractor. The subcontractor had obtained a comprehensive general liability policy covering its activities in connection with the subcontract. While performing work in connection with the subcontract, an employee of the subcontractor was injured. The contractor's workers' compensation carrier was found liable for a portion of the injuries sustained by the employee. Thereafter, the contractor's carrier sued the subcontractor for recovery of the amount paid to the employee. In the underlying suit, the court found that the subcontractor was liable for all of the workers compensation damages as an employer.

The contractor's carrier thereafter sued the subcontractor's insurer for recovery of the payment to the employee. The court found that the subcontractor's insurer was not liable to the contractor's carrier, because the subcontractor's policy contained an exclusion for liability assumed by subcontractor pursuant to any payment of workers compensation benefits.³¹⁷ The court held that the subcontractor's liability arose not from the indemnity provision, but from a separate duty to pay workers compensation.³¹⁸ The court concluded that the "subcontractor's obligation falls squarely within the exception (e) of the policy. As a beneficiary of Subcontractor's policy, Contractor's subrogee, [contractors carrier], is only entitled to benefits accruing to subcontractor."³¹⁹

The court continued with a discussion regarding instances in which the contractual liability of an indemnitor flowing to an indemnitee may become a covered loss. But the court found that the policy provisions in these instances differed from the one at bar.³²⁰

³¹⁵ *Kole*, 665 F. Supp. at 1464

³¹⁶ *Liberty Mutual Ins. Co. v. United National Ins. Co., Ltd.*, 731 P.2d 167 (Haw. 1987).

³¹⁷ *Id.* at 170.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Although a few cases discuss instances in which an agreement to indemnify refers to an agreement to procure insurance, the effect of this situation has never been addressed, other than as provided above.³²¹ Consequently, the existence of insurance does not appear to create any greater or lesser duty on the part of the insurer, other than to provide coverage as provided in the policy.

IDAHO

§ I – General Rules of Contractual Indemnification.

“Freedom of contract is a fundamental concept underlying the law of contracts and is an essential element of the free enterprise system.”³²² Consequently, Idaho law allows parties to contract for indemnification in most circumstances, but the obligation to indemnify is strictly construed, particularly in those cases in which the agreement was drafted by the party to be indemnified. Additionally, the status [of indemnitee is interpreted narrowly].³²³ The extent of the indemnification obligation based upon an indemnification contract must be determined by its provisions.³²⁴

Idaho law allows a party to indemnify another party for the latter party’s sole negligence, even in the context of personal injury. An exception in the context of construction contracts is discussed in Section II. Although there is little case law on the topic, the Supreme Court of Idaho has specifically allowed such indemnification in a lease agreement,³²⁵ and noted several factors which “cut against” the general policy that “a contractual provision should not be construed to permit an indemnitee to recover for his own negligence.”³²⁶ The court stated in dicta that an explicit reference to indemnification for the indemnitee’s negligence would be dispositive, but was not absolutely required. As there was no such explicit language in the contract at issue, the court looked to the language employed in the indemnification clause which contained a “hold harmless” provision “which, although not talismanic, is nonetheless indicative of a specific intent to encompass indemnification for the indemnitee’s negligence.”³²⁷ Additionally, the language of the clause obligated the tenant to hold the landlord harmless for *any* liability incurred, again evidencing an intent to indemnify the indemnitee for the indemnitee’s sole negligence. The court also determined that the placement of the indemnity clause directly after a specific provision respecting the purchase of insurance indicated an intent to place the onus of indemnification on the tenant by requiring him to purchase insurance to fund the

³²¹ See, e.g., *Liberty Mutual, supra*.

³²² *Rawlings v. Layne & Bowler Pump Co.*, 465 P.2d 107, 110 (Idaho 1970)

³²³ *Barnett v. Eagle Helicopters*, 831 P.2d 560, 564 (Idaho Ct. App. 1992).

³²⁴ *Martin v. Lyons*, 558 P.2d 1063, 1066 (Idaho 1977).

³²⁵ The indemnity language in the agreement at issue read “The tenant shall hold harmless the landlord for any liability as a result of the rodeo performances . . .”

³²⁶ *Bonner County v. Panhandle Rodeo Assoc., Inc.*, 620 P.2d 1102, 1105 (Idaho 1980).

³²⁷ *Id.*

indemnity. The court was further persuaded by the fact that there was no disparity of bargaining power between the contracting parties.³²⁸

When an indemnity obligation requires one party to “indemnify and save harmless” another party, that language has been held to require the indemnitor to fund the indemnitee’s defense by either defending or paying the defense costs (including attorneys’ fees and investigative expenses).³²⁹

§ II – Exceptions to General Rules of Contractual Indemnity.

Idaho has codified a prohibition on indemnification in construction contracts which purports to indemnify another party against liability for damages arising out of bodily injury or damage to property resulting from the sole negligence of the indemnitee. The statute provides:

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, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.

Idaho Code 29-114.

§ III – Indemnity Agreements as Insured Contracts.

There is no Idaho case law discussing indemnity agreements as insured contracts, but by implication these appear to be covered insured contracts. The term “insured contracts” has only been uttered once by the Idaho appellate courts (and never by the U.S. District Court of Idaho), and that was in a dissent in an underinsured motorist case before the Idaho Supreme Court in a lengthy quotation from an Ohio Supreme Court case.³³⁰ In a case involving an insurance policy indicating that there is coverage for underlying written contractual agreements, the Idaho Supreme Court found that these contracts, there a lease agreement, must be covered as “the very object of the contract is for this extended coverage.”³³¹ Idaho law declares that when an ambiguity in an insurance policy is created because a policy appears to provide coverage (for example, insured contracts), but then the exclusions appear to take this coverage away, the ambiguity is to be construed against the insurer and in favor of coverage.³³²

³²⁸ *Id.*

³²⁹ *Farber v. State*, 682 P.2d 630, 632 (Idaho 1984).

³³⁰ *Blackburn v. State Farm Mut. Auto. Ins. Co.*, 697 P.2d 425, 431 (Idaho 1985).

³³¹ *Bonner County*, *supra*, at 1106.

³³² *Id.* at 1106-1107. *See also Gordon v. Three Rivers Agency, Inc.*, 903 P.2d 128, 131 (Idaho 1995).

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

The existence of an indemnity clause directly following a provision for insurance is indicative of an intent to place the burden of indemnification upon the indemnitor for the indemnitee's negligence by requiring the indemnitor to purchase insurance to fund the indemnity.³³³

ILLINOIS

§ I – General Rules of Contractual Indemnity.

As a general rule, contractual agreements to indemnify are enforceable in Illinois. "Indemnification agreements are contracts, and, as such, are to be construed like any other contract. In construing indemnity contracts, the primary focus is to give effect to the intention of the parties."³³⁴

While it has been said that indemnity clauses are disfavored and must be strictly construed, that canon of interpretation is limited by two considerations.³³⁵ First, the "strict construction" rule is inapplicable if a contract clearly provides for indemnification or defense, since a court may not strictly construe an indemnity contract in a manner which conflicts with the intent of the parties.³³⁶ Furthermore, when a contract does not seek to indemnify a party against its own conduct or negligence, the rule of strict construction cannot be invoked.³³⁷

Because of the inherent public policy implications of agreements in which one party agrees to indemnify another for the other's own negligence, such agreements are subject to the rule of strict construction.³³⁸ "It is quite generally held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract, or such intention is expressed in unequivocal terms."³³⁹ Because an agreement to indemnify another for that party's own negligence is considered

³³³ *Bonner County*, *supra*, at 1105.

³³⁴ *Scott Stainless Steel, Inc. v. NBD Chicago Bank*, 625 N.E.2d 293, 297 (Ill. App. Ct. 1993); *accord Applied Indus. Materials Corp. v. Mallinckrodt, Inc.*, 102 F. Supp. 2d 934, 939 (N.D. Ill. 2000).

³³⁵ *Applied Indus.*, 102 F. Supp. 2d at 939.

³³⁶ *Id.*

³³⁷ *Id.* at 943. There is precedent to the effect that all indemnity agreements are subject to a rule of strict construction. *See e.g. Ervin v. Sears, Roebuck & Co.*, 469 N.E.2d 243, 249 (Ill. App. Ct. 1984). The facts of such cases typically involve an agreement to indemnify for one's own negligence. *See Illinois Bell Tel. Co. v. Highland Park*, 572 N.E.2d 1267, 1275 (Ill. App. Ct. 1991); *Bates v. Select Lake City Theater Operating Co.*, 397 N.E.2d 75, 77 (Ill. App. Ct. 1979). The Illinois state and federal courts continue to articulate different rules of construction for garden-variety indemnity agreements as compared with those involving indemnity for one's own negligence. *See Burns v. Ford Motor Co.*, 331 N.E.2d 325, 331 (Ill. App. Ct. 1974); *Applied Indus.*, 102 F. Supp. 2d at 943.

³³⁸ *McNiff v. Millard Maintenance Serv. Co.*, 715 N.E.2d 247, 249 (Ill. App. Ct. 1999).

³³⁹ *Barger v. Scandroli Constr. Co.*, 347 N.E.2d 207, 208 (Ill. App. Ct. 1976); *See also Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp.*, 70 N.E.2d 604, 607 (Ill. 1946).

“unusual and extraordinary,” the rule has more recently been said to require the intent to indemnify to be stated “beyond doubt by express stipulation.”³⁴⁰

In considering the intent of the parties, an indemnity agreement is to “be given a fair and reasonable interpretation based upon a consideration of all of its language and provisions.”³⁴¹ In this context, indemnification for “any and all claims” has been read as indicating an intention that the indemnitee be indemnified for his own negligence, with no necessity for a specific reference to indemnification for the indemnitee’s own negligence.³⁴² The same conclusion was reached in an agreement to indemnify “from any loss, claim demand [or] liability . . . whether or not any negligence . . . by [indemnitee] is alleged to have contributed thereto, in whole or in part.”³⁴³ The intent to indemnify for another’s negligence has also been found to exist in an agreement to indemnify for “all claims,”³⁴⁴ and in an agreement to indemnify for injury “regardless of the cause or causes.”³⁴⁵

In a construction case predating the Illinois Construction Contract Indemnification for Negligence Act discussed below, however, the court found no intent on the part of a subcontractor to indemnify a contractor for the contractor’s own negligence where the agreement was to indemnify for “any and all claims and damages . . . arising out of . . . the work, or caused in whole or in part by any fault or neglect of Sub-Contractor. . . .”³⁴⁶ In a contractor’s agreement to hold an owner harmless from “all claims for injury . . . and for damages to or loss of property, attributable directly or indirectly to the operations of [Contractor],” the language failed to explicitly and unequivocally cover indemnity for the owner’s negligence.³⁴⁷ Likewise, a subcontractor’s agreement “to indemnify [the contractor] against [the subcontractor’s] negligence” was not sufficient to provide indemnification for the contractor’s negligence.³⁴⁸

³⁴⁰ *McNiff, supra*, 715 N.E.2d at 249 (internal citations omitted); *accord Ralston v. Gallo Equip. Co.*, 749 F. Supp. 179, 180-181 (N.D. Ill. 1990).

³⁴¹ *Hader v. St. Louis Southwestern Ry. Co.*, 566 N.E.2d 736, 742 (Ill. App. Ct. 1991).

³⁴² *Economy Mechanical Indus., Inc. v. T.J. Higgins Co.*, 689 N.E.2d 199, 202-203 (Ill. App. Ct. 1997).

³⁴³ *North Am. Van Lines, Inc. v. Pinkerton Security Sys., Inc.*, 1996 U.S. Dist. LEXIS 17838, at 6 - 11 (N.D. Ill. 1996).

³⁴⁴ *Higgins v. Kleronomos*, 459 N.E.2d 1048, 1052 (Ill. App. Ct. 1984).

³⁴⁵ *Hader, supra*, 566 N.E.2d at 742-743. This was so notwithstanding the reference to “negligence” in the indemnity provision.

³⁴⁶ *Barger v. Scandrol Constr. Co.*, 347 N.E.2d 207, 208 (Ill. App. Ct. 1976).

³⁴⁷ *Kelley v. Marathon Oil Co.*, 676 F.2d 1388, 1390 (7th Cir. 1982).

³⁴⁸ *Dowling v. Otis Elevator Co.*, 549 N.E.2d 866, 870 (Ill. App. Ct. 1989).

§ II – Exceptions to General Rules of Contractual Indemnity.

Agreements to indemnify for another party's negligence in the construction, alteration, repair or maintenance of a building are void by statute in Illinois.³⁵⁰ The Construction Contract Indemnification for Negligence Act provides:

With respect 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 for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.³⁵⁰

The statute is constitutional and not violative of equal protection.³⁵¹ By its express terms, the statute is inapplicable to construction bonds or insurance contracts,³⁵² and this limitation has been upheld.³⁵³ However, the statute has been held inapplicable to an action seeking contribution from another on the grounds that the other is jointly liable for injuries since pursuit of contribution is not tantamount to indemnification for one's own negligence.³⁵⁴

An agreement to indemnify another for his own willful misconduct is void as against public policy,³⁵⁵ but this rule is inapplicable to contracts of insurance.³⁵⁶

§ III – Indemnity Agreements as Insured Contracts.

The coverage of a liability insurance policy extends to an insured's agreement to indemnify notwithstanding an exclusion for an insured's "assumption of liability in a contract or agreement" if the policy contains the common exception for "a contract or agreement pertaining to your business... under which you assume the tort liability of another."³⁵⁷ Under the terms of the policy, an "insured contract" is "one in which one of the contracting parties agrees to indemnify the other from and against that other party's own negligence."³⁵⁸ If the indemnification provision fails to "clearly and explicitly or unequivocally" express an intention to indemnify for the negligence of the indemnitee, however, it is unenforceable, and there is no assumption of tort

³⁵⁰ 740 ILCS § 35/1.

³⁵¹ *Davis v. Commonwealth*, 336 N.E.2d at 884.

³⁵² 740 ILCS § 35/3.

³⁵³ *Capua v. W.E. O'Neil Constr. Co.*, 367 N.E.2d 669, 670 (Ill. 1977).

³⁵⁴ *See Braye v. Archer-Daniels-Midland Co.*, 676 N.E.2d 1295, 1304 (Ill. 1997).

³⁵⁵ *Davis v. Commonwealth Edison Co.*, 336 N.E.2d 881, 885 (Ill. 1975)(citing Restatements of Contracts § 575); *Dixon Distrib. Co. v. Hanover Ins. Co.*, 641 N.E.2d 395, 401 (Ill. 1994).

³⁵⁶ *Dixon, supra*, 641 N.E.2d at 401.

³⁵⁷ *Hankins v. Pekin Ins. Co.*, 713 N.E.2d 1244, 1246 (Ill. App. Ct. 1999).

³⁵⁸ *Id.* at 1248.

liability and no “insured contract” so coverage is not afforded for the agreement to indemnify.³⁵⁹

A broader reading of the term “tort liability” was more recently reached, however, where the court held that coverage existed for the assumption of “tort liability” in an insured contract endorsement, which liability was broader than merely “negligence liability.”³⁶⁰ The court determined that use of the term “tort liability” leaves “open the possibility that its insured could agree to be responsible for another party’s liability in a tort action even if that liability was not based on that party’s own negligence.”³⁶¹ The court rejected the notion that an agreement to indemnify for the negligence of another in the construction context should be held void where a contract of insurance covered the agreement to indemnify, since the insured would then be paying for coverage for which it could never obtain the benefit.³⁶²

In a case in which an insured agreed to indemnify a third party *and* name the third party/indemnitee as an “additional insured” under a liability insurance policy, but in which the third party was inadvertently not so named, the “insured contract” exception to the exclusion for contractually assumed liability did not operate to extend a defense to the third party/indemnitee under the insurance policy.³⁶³ In the court’s view, the “insured contract” exception created an obligation to defend the named insured for a claim arising under that “insured contract,” but not to defend the third party with whom the named insured had contracted.³⁶⁴

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Consistent with the Illinois statute exempting contracts of insurance from the statutory prohibition on indemnity agreements in the construction industry, a party’s agreement to obtain liability insurance for the work is valid.³⁶⁵ Such agreements are permissible because an agreement to obtain insurance is not tantamount to indemnification: an insurer, rather than the party obtaining the insurance, bears the risk of injury or damage.³⁶⁶ However, an agreement to obtain insurance which is satisfied by a self-insurance program will be interpreted to be an agreement to indemnify and will be held void.³⁶⁷

³⁵⁹ *Id.*

³⁶⁰ *Michael Nicholas, Inc. v. Royal Ins. Co. of Am.*, 748 N.E. 2d 786, 791 (Ill. App. Ct. 2001).

³⁶¹ *Id.*

³⁶² *Id.* at 791-92.

³⁶³ *Alliance Syndicate, Inc. v. Parsec, Inc.*, 741 N.E.2d 1039, 1041-1042 (Ill. App. Ct. 2000).

³⁶⁴ *Id.* at 1045-46.

³⁶⁵ *See USX Corp. v. Liberty Mut. Insur. Co.*, 645 N.E.2d 396, 400 (Ill. App. Ct. 1994).

³⁶⁶ *Id.* at 401.

³⁶⁷ *Id.* at 403.

Further, if the agreement to obtain insurance is inextricably linked to an otherwise void indemnity agreement, such as an agreement to indemnify a third party for its own negligence in the construction context, both the indemnification and the insurance agreement are void.³⁶⁸

An agreement to procure insurance or name another as an additional insured in the construction context need not meet the test of *Westinghouse* and *Barger*,³⁶⁹ and therefore need not explicitly state that the insurance will cover the promisee's own negligence to be effective.³⁷⁰ This is the outcome because the promisor assumes no responsibility aside from paying the insurance premiums, and there is consequently no public policy implication for the coverage to extend to the promisee's own negligence even absent an express statement of such intent.³⁷¹ An agreement to name an indemnitee as an additional insured contained within an unenforceable agreement to indemnify is only valid, however, if the agreement to name the party as an additional insured is "not inextricably tied" to the void indemnity agreement.³⁷²

Additional insured endorsements purporting to afford broader coverage than the named insured's underlying agreement to indemnify or obtain insurance coverage are broadly construed and exclusions to coverage narrowly construed.

In *Mobil Oil Corp. v. Maryland Cas. Co.*,³⁷³ an independent contractor, B.M.W. Constructors, Inc., was hired to repair a flare system at Mobil Oil's refinery. Under the contract, B.M.W. was to obtain liability insurance in the amount of \$250,000 for each occurrence/\$500,000 aggregate for bodily injury arising from work performed by B.M.W. at the refinery and liability insurance naming and covering Mobil "as their interests may appear." B.M.W. secured a policy which provided \$1,000,000 in coverage per occurrence, and \$6,000,000 aggregate. The court rejected the insurer's contention that coverage should be limited to the amount of coverage identified in the underlying agreement and found Mobil entitled to the full extent of coverage under the policy. The court stated simply: "If [the insurer] truly intended to limit coverage, it readily could have done so by adding its own restrictive language to the insurance policies."³⁷⁴

Where a subcontractor agrees to indemnify a contractor only for damages occasioned by the subcontractor's own negligence and also secures coverage for the

³⁶⁸ *Juretic v. USX Corp.*, 596 N.E.2d 810, 812-13 (Ill. App. Ct. 1992).

³⁶⁹ See *Barger v. Scandrol Constr. Co.*, 347 N.E.2d 207, 208 (Ill. App. Ct. 1976); See also *Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp.*, 70 N.E.2d 604, 607 (Ill. 1946); *Jokich v. Union Oil Co.* 574 N.E.2d 214, 218 (Ill. App. Ct. 1991).

³⁷⁰ *Duffy v. Poulos Bros. Constr. Co.*, 587 N.E.2d 1038, 1042 (Ill. App. Ct. 1991); *Jokich v. Union Oil Co.*, 574 N.E.2d 214, 218 (Ill. App. Ct. 1991); accord *Chicago Housing Auth. v. Federal Sec., Inc.*, 161 F.3d 485, 490 (7th Cir. 1998). But see *Coverdill v. Lurgi Corp.*, 496 N.E.2d 1007 (Ill. App. Ct. 1986) and *Svenson v. Miller Builders, Inc.*, 392 N.E.2d 628 (1979). Although there is conflicting law on this issue, it appears that the *Duffy* line of cases is the current state of the law in Illinois.

³⁷¹ *Duffy*, 587 N.E.2d at 1042.

³⁷² See *Tanns v. Ben A. Borenstein & Co.*, 688 N.E.2d 667, 669-71 (Ill. App. Ct. 1997).

³⁷³ 681 N.E.2d 552, 555 (Ill. App. Ct. 1997).

³⁷⁴ *Id.* at 559.

contractor as an additional insured not limited to the extent of the subcontractor's agreement to indemnify, the contractor obtains the full benefit of the coverage under the policy.³⁷⁵ The court concluded that if the insurer wanted to limit coverage, "it could have done so by stating that the level of insurance provided to additional insureds is only that level which is required under the contract between the additional insured and the named insured."³⁷⁶

Further, in *National Union Fire Ins. Co. v. Glenview Park Dist.*,³⁷⁷ an endorsement was issued by the insurer extending the named insured's coverage to anyone the named insured had "agreed by contract . . . to include as an Insured with respect to operations performed by or on behalf of the Named Insured." Coverage was not afforded for "damages arising out of the *negligence* of the Additional Insureds."³⁷⁸ An employee of the named insured was injured and sued the named and additional insured for a statutory remedy created pursuant the Illinois Structural Work Act. The insurer denied coverage, contending that the violation of the Structural Work Act "implied" negligence. Holding that the exclusion for negligence reached claims for common law negligence only and not statutory torts, the court reasoned that if the insurer "intended the term 'negligence' to include allegations that the additional insured had committed a statutory tort, such as a violation of the Structural Work Act, it could have easily modified its insurance policy to so provide."³⁷⁹

INDIANA

§ I - General Rules of Contractual Indemnity.

The obligation to indemnify under Indiana law can arise from an express contract.³⁸⁰ "The scope of the indemnity clause limits a party's duty to indemnify, . . . but an indemnity contract should be construed to cover all losses and damages to which it reasonably appears that the parties intended it to apply."³⁸¹ "[C]ontracts providing for indemnification of one's own negligence are valid if knowingly and willingly made."³⁸² Indemnification provisions covering a party's own negligence are strictly construed, and will not be interpreted to apply to the

³⁷⁵ *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980, 981-83 (Ill. App. Ct. 1995).

³⁷⁶ *Id.* at 982-983.

³⁷⁷ 632 N.E.2d 1039, 1040-1041 (Ill. 1994).

³⁷⁸ *Glenview Park*, 632 N.E.2d at 1040-1041 (emphasis added).

³⁷⁹ *Id.* at 1042.

³⁸⁰ *R. N. Thompson & Assocs. v. Wickes Lumber Co.*, 687 N.E.2d 617, 619 (Ind. Ct. App. 1997).

³⁸¹ *Allied-Signal, Inc. v. Acme Service Corp.*, 1992 U.S. Dist. LEXIS 9690, at *15 (N.D. Ind. May 8, 1992) (internal citations omitted).

³⁸² *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1221 (Ind. Ct. App. 1983). *See also Moore Heating*, 583 N.E.2d at 145.

indemnitor's own negligence unless such an obligation is expressed in "clear and unequivocal terms."³⁸³

Courts follow a two-step analysis to determine whether a party has knowingly and willingly accepted to indemnify another for the other's own negligence:

First, the indemnification clause must expressly state in clear and unequivocal terms that negligence is an area of application where the indemnitor . . . has agreed to indemnify the indemnitee . . . The second step determines to whom the indemnification clause applies.³⁸⁴

Since courts disfavor clauses whereby the indemnitee is relieved of its own negligence, and because such clauses obligate one party to pay for the negligence of another,³⁸⁵ the language of such an indemnity clause must both define the area of application, that is, negligence, and also define to whom the clause applies.³⁸⁶ "[T]he language of the indemnification clause must reflect the indemnitor's knowing and willing acceptance of the burden and must express the burden in clear and unequivocal terms."³⁸⁷

"For example, if a clause simply states that a subcontractor shall indemnify a general contractor for any negligence which arises from the job, it is sufficient to show that the clause applies to negligence but is insufficient to inform the subcontractor that it must indemnify the general contractor for acts of the general contractor's own negligence. The claim of negligence which arises from the job could have been caused by the negligence of the general contractor, the subcontractor, third persons, or a combination of them."³⁸⁸ But including a clause which states that the agreement will apply regardless of "whether or not it is alleged that [the indemnitee] in any way contributed to the alleged wrongdoing or is liable due to a nondelegable duty" will be sufficient to cover indemnity for at least the indemnitee's concurrent negligence.³⁸⁹ Also, the actual word "negligence" need not be used in the agreement,³⁹⁰ however there must be "language of negligence," such as terms like "liability, claims and suits," and contract provisions which contemplate

³⁸³ *Plan-Tec*, 443 N.E.2d at 1221.

³⁸⁴ *Hagerman Constr. Corp. v. Long Elec. Co.*, 741 N.E.2d 390, 392 (Ind. Ct. App. 2000).

³⁸⁵ *Ogilvie v. Steele*, 452 N.E.2d 167, 170 (Ind. Ct. App. 1983) (although one may contract to be indemnified for its own negligence "courts disfavor such indemnification clauses because it is a harsh burden to obligate one party to pay for the negligence of the other party"). See also *Ft. Wayne Cablevision v. Indiana & Michigan Electric Co.*, 443 N.E.2d 863, 868 (Ind. Ct. App. 1983) ("This policy of disfavor is directed at indemnification duties which the indemnitor did not knowingly assume. It does not invalidate such clauses simply because they might provide broad protection for the indemnitee").

³⁸⁶ *Hagerman*, 741 N.E.2d at 392.

³⁸⁷ *Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols*, 583 N.E.2d 142, 145 (Ind. Ct. App. 1991).

³⁸⁸ *Id.* at 145-146.

³⁸⁹ *Id.* The agreement in *Moore Heating* expressly excluded claims arising from the indemnitee's sole negligence, and thus the agreement could have only covered the joint or concurrent negligence of the indemnitee.

³⁹⁰ *Id.* at 146.

“losses, fines, and expenses . . .”³⁹¹ The concern is simply that the terms of the agreement make the indemnitor “aware of the burden it [is] accepting.”³⁹²

In a railroad agreement, where the parties agreed to indemnify each other whenever damage or injury arose from “the trains, locomotives, cars or equipment of one party only being involved,” the agreement was sufficient to require indemnification for the indemnitee’s own negligence as long as it was only the indemnitor’s property that was involved in the loss.³⁹³

In contrast, where the indemnity agreement refers only to the indemnitor’s negligence, and limits its scope to the fault of the indemnitor or its agents, the agreement will not be read to cover the indemnitee’s sole negligence.³⁹⁴ Thus, if the agreement covers losses “only to the extent” they are caused in whole or in part by the indemnitor, the agreement will not reach the indemnitee’s negligence.³⁹⁵

An indemnification clause providing for indemnity for “all losses and liability”, if it includes a provision for attorneys fees, will be construed broadly enough to encompass fees for prosecuting the claim for indemnification. The clause will not be narrowly construed so as to limit the defense obligation to fees incurred in defending the original action for which indemnity is sought.³⁹⁶

There may be no right to indemnity, however, if the parties have unequal bargaining power or if the contract is otherwise unconscionable.³⁹⁷ A party seeking to enforce an indemnity contract entered into between parties with extremely unequal bargaining power has the burden of proving that the provision was explained to the other party and that there was a meeting of the minds.³⁹⁸ This rule is simply an extension of the requirement that an indemnitor fully appreciate the burden it is undertaking, and an indemnity provision may be unenforceable where such things as unequal bargaining power, or “fine print” indemnity clauses which are not identified to the indemnitor, are present.³⁹⁹ Determining unequal bargaining power is a question of fact, and “the mere fact that one party has submitted a form contract in

³⁹¹ *Exide Corp. v. Millwright Riggers, Inc.*, 727 N.E.2d 473, 480 (Ind. Ct. App. 2000) (citing *Moore Heating*). See also *Allied-Signal*, 1992 U.S. Dist. LEXIS 9690 (“use of words such as ‘growing out of the performance of this order’ or ‘resulting from or arising in connection with’ in indemnification agreements is evidence that the parties intended the indemnity agreement to provide broad protection”) (internal citations omitted).

³⁹² *Ft. Wayne Cablevision*, 443 N.E.2d at 868.

³⁹³ *Ogilvie*, 452 N.E.2d at 171.

³⁹⁴ *Hagerman Constr.*, 741 N.E.2d at 393-394.

³⁹⁵ *Id.*

³⁹⁶ *Tacks Steel Corp. v. ARC Constr. Co.*, 821 N.E.2d 883 (Ind. Ct. App. 2005).

³⁹⁷ See *Weaver v. American Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971).

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 147.

sophisticated business transactions between sophisticated business entities [does not establish] a disparity in bargaining power.”⁴⁰⁰

A claim by a third-party against an employer for contractual indemnification for injuries to an employee is not barred by the Workers Compensation Act.⁴⁰¹

§ II – Exceptions to General Rules of Contractual Indemnity.

A clause in a construction or design contract purporting to indemnify the promisee from his sole negligence or willful conduct is against public policy and is unenforceable.⁴⁰²

All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract except those pertaining to highway contracts, which purport to indemnify the promisee against liability for:

- (1) Death or bodily injury to persons;
- (2) Injury to property;
- (3) Design defects; or
- (4) Any other loss, damage or expense arising under either (1), (2) or (3);

from the sole negligence or willful misconduct of the promisee or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable.

The statute applies to any construction contract, whether or not it is for “new” construction.⁴⁰³

This statute only applies, however, where the indemnity agreement purports to relieve the indemnitee of its sole negligence.⁴⁰⁴ The Court of Appeals has rejected the contention that the statute applies to any agreement whereby the indemnitee is indemnified for its own negligence.⁴⁰⁵ Thus, an agreement in the construction context indemnifying the indemnitee for its concurrent or contributory negligence is permissible.⁴⁰⁶

⁴⁰⁰ *Sink & Edwards, Inc. v. Huber, Hunt & Nichols, Inc.*, 458 N.E.2d 291, 296 (Ind. Ct. App. 1984). *See also Maxon Corp. v. Tyler Pipe Industries, Inc.*, 497 N.E.2d 570, 577 (Ind. Ct. App. 1986) (“When, as here, the imposition of a broad indemnification clause is attempted without the express assent of the proposed indemnitor, and when that clause is placed in relative obscurity on the back of an invoice, it is unconscionable”).

⁴⁰¹ *Sink & Edwards*, 458 N.E.2d at 297.

⁴⁰² IND. CODE ANN. § 26-2-5-1 (2006).

⁴⁰³ *LTV Steel Co. v. Northwest Eng’g & Constr.*, 845 F. Supp. 1295, 1298 (N.D. Ind. 1994).

⁴⁰⁴ *Moore Heating*, 583 N.E.2d at 147-148.

⁴⁰⁵ *Id.* at 148.

⁴⁰⁶ *Id.*

Also, the statute by its terms only applies to construction contracts, a term which has been narrowly construed. The purpose of the statute “is to protect employees in the construction industry and the public from irresponsible contractors who have shifted their own liability onto a subcontractor whose insurance does not cover contract liability.”⁴⁰⁷ “[A] construction contract involves hazardous construction work requiring safe working conditions and ultimately a safe product Construction work means to build, erect, or create.”⁴⁰⁸ A contract for maintenance of an existing structure would therefore not fall within the scope of the statute,⁴⁰⁹ nor would a lease agreement,⁴¹⁰ nor would a licensing agreement.⁴¹¹

Indiana has recognized a public policy prohibition on indemnity agreements in favor of common carriers in certain situations:

[W]e believe the rule to be well established that a railway company acting as a common carrier may not contract for indemnity against its own tort liability when it is performing either a public or quasi public duty such as that owing to a shipper, passenger, or servant, and that such contracts are void as against public policy.⁴¹²

This rule is dependent on the railroad acting as a common carrier, and “[a]n indemnification clause in a lease is not void or voidable as against public policy simply because the indemnitee is charged with a nondelegable duty to the public or third persons.”⁴¹³ “[A] railroad company when called upon to perform a service which it is not compelled to perform by the very nature of its operation as a common carrier, may, under proper conditions, contract against its liability for negligence for the reason that it is then acting in the capacity of a private carrier.”⁴¹⁴

§ III – Indemnity Agreements as Insured Contracts.

While effect has been given to the standard CGL policy exclusion for liability assumed by the insured under a contract or agreement,⁴¹⁵ it does not appear that the courts have addressed the extent to which an agreement to indemnify falls within the exception to the exclusion for “insured contracts.” The policy definition of an “insured contract” has been cited as an exception to exclusions otherwise applicable to claims for “property damage” and “bodily injury,” but the case in which the exception was cited involved a claim under the policy’s “personal injury” coverage,

⁴⁰⁷ *Ogilvie*, 452 N.E.2d at 169-170 (citing *Ft. Wayne Cablevision*).

⁴⁰⁸ *Id.* (citing *Ft. Wayne Cablevision*) (other internal citations omitted).

⁴⁰⁹ *Bethlehem Steel Corp. v. Sercon Corp.*, 654 N.E.2d 1163, 1167 (Ind. Ct. App. 1995).

⁴¹⁰ *Orville Milk Co. v. Beller*, 486 N.E.2d 555, 561 (Ind. Ct. App. 1985).

⁴¹¹ *Ft. Wayne Cablevision*, 443 N.E.2d at 871.

⁴¹² *Pennsylvania R. Co. v. Kent*, 198 N.E.2d 615, 619 (Ind. Ct. App. 1964).

⁴¹³ *Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist.*, 796 N.E.2d 1216, 1223 (Ind. Ct. App. 2003).

⁴¹⁴ *Kent*, 198 N.E.2d at 619.

⁴¹⁵ *See Selleck v. Westfield Ins. Co.*, 617 N.E.2d 968 (Ind. Ct. App. 1993).

which did not contain an “insured contract” exception to the contractual liability exclusion.⁴¹⁶

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

The standards applicable to agreements to indemnify are not applied in the context of an agreement to obtain insurance:

[W]here neither party has a legal duty to insure but each foresees the potential of a loss occurring by negligence or accident, the reasonable expectation of both in expressly imposing the duty to insure against the loss upon one of them is that the other will be protected as fully as if he had assumed the duty himself. There is no need to apply to such agreements the standard applied to indemnity agreements. With agreements to insure, the risk of loss is not intended to be shifted to one of the parties; it is intended to be shifted to an insurance company in return for a premium payment. Neither party intends to assume a potential liability; rather both are demonstrating “normal” business foresight in avoiding liability and allocating it to an insurer.⁴¹⁷

Unlike agreements to indemnify, agreements to procure insurance or name another party as an “additional insured” do not require clear and explicit terms:

As a matter of interpretation, indemnification agreements that require one party to compensate the other party for the other party’s own negligence are construed much more strictly than insurance agreements. A stricter reading is given to such indemnification clauses because indemnification for another party’s own negligence is a harsh burden that a party would not lightly accept... Therefore, such indemnification provisions will not be held to provide complete indemnity unless the indemnity is expressed in clear and unequivocal terms.

In contrast, an agreement to insure is an agreement to provide both parties with the benefits of insurance regardless of the cause of the loss (excepting wanton and willful acts) An agreement to insure differs from an agreement to indemnify in that, with an agreement to insure, the risk of loss is not intended to be shifted to one of the parties, but is instead intended to be shifted to an insurance company. [cit]. Neither party intends to assume a potential liability because both are demonstrating appropriate business foresight in avoiding liability by allocating it to an insurer. [cit]. Therefore, standard rules of contract interpretation apply to insurance agreements, rather than the strict construction given to self-indemnification clauses.⁴¹⁸

⁴¹⁶ See *Exec. Builders, Inc. v. Motorists Ins. Cos.*, 2001 U.S. Dist. LEXIS 6775 (S.D. Ind. Mar. 30, 2001).

⁴¹⁷ *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284, 286-287 (Ind. Ct. App. 1979). See also *S.C. Nestel, Inc. v. Future Constr., Inc.*, 836 N.E.2d 445 (Ind. Ct. App. 2005).

⁴¹⁸ *Exide Corp.*, 727 N.E.2d at 482 (internal citations omitted).

As such, an agreement to obtain insurance may be valid and enforceable even though a parallel indemnity agreement in the same instrument is not.⁴¹⁹

Since an agreement to obtain insurance does not invoke the same concerns as an agreement to indemnify another for the other's own negligence, an agreement to obtain insurance should not be invalidated due to the provisions of § 26-2-5-1 regarding indemnity agreements in the construction context.⁴²⁰ In dicta, the Seventh Circuit has stated that "[t]he potential invalidity of the indemnification provision does not affect the enforceability of the insurance provision because, under Indiana case law, the two are separate provisions applying in separate circumstances."⁴²¹

An agreement to obtain insurance is typically considered a "waiver of subrogation" between the contracting parties.⁴²² "In an arrangement where one party agrees to purchase insurance for the benefit of both parties, the first party in effect agrees to waive the intended insured's liability Thus, the party who agreed to purchase insurance has no cause of action against the party for whose benefit the insurance was intended regardless of the fault of this intended insured."⁴²³ The result is that the insurer for the named insured loses its subrogation rights against the "intended insured", and "the first party's insurance carrier has no subrogation cause of action against the intended insured."⁴²⁴

"[A]n agreement to provide insurance constitutes an agreement to limit the recourse of the party acquiring the policy solely to its proceeds even though the loss may be caused by the negligence of the other party to the agreement."⁴²⁵ The implicit waiver of subrogation is based on the assumption that the parties intended the insurance to cover certain risks, and "the foregoing assumption is valid only if the agreement to insure includes the risk which results in the loss and at the time the loss occurs, i.e., there is a meeting of the minds on the risks against which the parties are to be insured and the period of time the parties are to be so insured."⁴²⁶

An agreement to obtain insurance will not be read to waive subrogation rights to one not privy to the contract.⁴²⁷ Thus, an agreement to obtain insurance between an owner and a general contractor will not extend to waive subrogation rights against a

⁴¹⁹ *Id.*

⁴²⁰ See *Doherty v. Davy Songer, Inc.*, 195 F.3d 919, 923 n. 1 (7th Cir. 1999).

⁴²¹ *Id.*

⁴²² *Indiana Erectors v. Trustees of Ind. Univ.*, 686 N.E.2d 878, 880 (Ind. Ct. App. 1997) (citing *LeMaster Steel Erectors Inc. v. Reliance Insurance Co.*, 546 N.E.2d 313, 316-17 (Ind. Ct. App. 1989)).

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Morsches Lumber*, 388 N.E.2d at 285.

⁴²⁶ *Midwestern Indem. Co. v. Leffler Constr. Co.*, 463 N.E.2d 1130, 1132 (Ind. Ct. App. 1984).

⁴²⁷ See *Indiana Erectors*, *supra*.

subcontractor, if insurance in favor of that subcontractor is not contemplated by the terms of the agreement.⁴²⁸

IOWA

§ I – General Rules of Contractual Indemnity.

Indemnity agreements are enforceable in Iowa,⁴²⁹ according to the terms of the agreement.⁴³⁰ “Generally, no particular language is required to support indemnification, and a written agreement can be established without specifically expressing the obligation as indemnification.”⁴³¹ “If a contractual provision for indemnity is present, liability is controlled by this provision, and not by the issue of whether the tortious conduct of the respective parties was ‘active’ or ‘passive’, primary or secondary.”⁴³²

Intent is the controlling consideration. An indemnification agreement is created when the words used in the agreement “express an intention by one party to reimburse or hold the other party harmless for any loss, damage, or liability.”⁴³³ And while a contract for indemnification is ordinarily subject to the same rules of construction as other contracts,⁴³⁴ several unique rules apply in construing indemnity contracts.⁴³⁵ Where “an indemnification is not given by one in the insurance business but is given incident to a contract whose main purpose is not indemnification, the indemnity provision must be construed strictly in favor of the indemnitor.”⁴³⁶ “Also, an indemnity contract is strictly construed against the drafter, . . .”⁴³⁷

Courts have also “crafted a special rule of construction for indemnification contracts when [] such contracts purport to relieve the indemnitee from liability for its own negligence.”⁴³⁸ Under such circumstances, courts will not “permit an

⁴²⁸ *Id.*, 686 N.E.2d at 882. See also *LeMaster*, *supra*.

⁴²⁹ *Herter v. Ringland-Johnson-Crowley Co.*, 492 N.W.2d 672, 674 (Iowa 1992). See also *Evans v. McComas-Lacina Constr. Co.*, 641 N.W.2d 841, 844 (Iowa 2002) (“Contractual indemnity is not disfavored...”).

⁴³⁰ *McComas-Lacina Constr.*, 641 N.W.2d at 844.

⁴³¹ *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 (Iowa 2002) (citing *Jenckes v. Rice*, 93 N.W. 384 (Iowa 1903)).

⁴³² *Hysell v. Iowa Public Service Co.*, 534 F.2d 775, 785 (8th Cir. 1976).

⁴³³ *McNally & Nimergood*, 648 N.W.2d at 570.

⁴³⁴ See *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 916 (Iowa 1975).

⁴³⁵ See *Pugh v. Prairie Constr. Co.*, 602 N.W.2d 805, 809 (Iowa 1999).

⁴³⁶ *Id.* (internal citations omitted).

⁴³⁷ *Id.*

⁴³⁸ *Cochran v. Gehrke Constr.*, 235 F. Supp. 2d 991, 994 (N.D. Iowa 2002) (citing *McNally & Nimergood*, 648 N.W.2d at 571).

indemnitee to recover for its own negligence unless the intention of the parties is clearly and unambiguously expressed.”⁴³⁹

In applying this rule, courts look to two aspects of the agreement to determine whether a party is to be indemnified for its own negligence. First, courts look for specific language in the contract regarding the fault of the indemnitee.⁴⁴⁰ For instance, language indicating that the indemnitor agrees to indemnify the indemnitee “from any and all claims...even though the [indemnitee] may have caused or contributed thereto” clearly and unambiguously covers the indemnitee’s own negligence.⁴⁴¹ Conversely, language which provides that the indemnitor will indemnify the indemnitee “from and against...all claims... caused by, arising from, incident to, connected with or growing out of the work to be performed under this contract regardless of whether such claim is alleged to be caused, in whole or in part, by negligence or otherwise on the part of the [indemnitor]” is insufficient to impose liability for the indemnitee’s negligence.⁴⁴²

In addition to looking for specific language addressing the fault or negligence of the indemnitee, courts will construe indemnity contracts to include indemnification for an indemnitee’s own negligence if the intent of the contract contemplates such indemnification, regardless of the terms used.⁴⁴³ Iowa’s rule of construction thus does not actually require the contract to specifically mention the indemnitee’s negligence or fault as long as this intention is otherwise clearly expressed by the words of the agreement.⁴⁴⁴

The courts’ tendency to find broad indemnification clauses to be insufficient to create indemnity for an indemnitee’s own negligence is thus “only a guideline, not a strict principle.”⁴⁴⁵ “In each case, the intent of the parties will control as revealed by

⁴³⁹ *McNally & Nimergood*, 648 N.W.2d at 571. See also *Thornton v. Guthrie County Rural Elec. Coop. Ass’n*, 467 N.W.2d 574, 576 (Iowa 1991) (“The general rule is that an indemnity agreement will not be construed to relieve the indemnitee from the effect of its own negligence unless the agreement provides for it in ‘clear and unequivocal’ language.”); *Herter*, 492 N.W.2d at 674 (“The enforceability of such contracts [purporting to relieve the indemnitee of its own negligence] turns on whether the indemnifying language is ‘clear and unequivocal’”).

⁴⁴⁰ *McNally & Nimergood*, 648 N.W.2d at 571.

⁴⁴¹ *Employers Mut. Cas. Co. v. Chicago & N.W. Transp. Co.*, 521 N.W.2d 692, 694 (Iowa 1994). See also *Thornton*, 467 N.W.2d at 576-77 (indemnification imposed “ ‘regardless of whether [damages were] caused in part by [the indemnitee]’ ”).

⁴⁴² See, e.g., *Trushcheff v. Abell-Howe Co.*, 239 N.W.2d 116, 134 (Iowa 1976).

⁴⁴³ *Herter*, 492 N.W.2d at 674.

⁴⁴⁴ See, e.g., *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156, 160 (Iowa 1986) (finding that contract in which subcontractor agreed to indemnify for damages “caused in part by a party indemnified hereunder” covered indemnitee’s own negligence).

⁴⁴⁵ *McNally & Nimergood*, 648 N.W.2d at 572 (stating that it “is not our rule” that an indemnity contract needs “to contain a specific reference to the indemnitee’s own negligence” before indemnification of the indemnitee would be permitted).

the language of the agreement,” and the courts will not “impose any special requirement that specific language be used to express that intent.”⁴⁴⁶

An indemnity agreement can support a claim by a third party against an employer for indemnification where the indemnitee has been held liable for an employee’s injury.⁴⁴⁷ The Supreme Court has adopted the view that an employer’s immunity under the Iowa Workers Compensation Act “is only against actions for damages on account of the employee’s injury; a third party’s action for indemnity is not exactly for ‘damages’ but for reimbursement, and it is not ‘on account of’ the employee’s injury, but on account of breach of an independent duty owed by the employer to the third party.”⁴⁴⁸ “Thus, an indemnity claim by a third party against the injured plaintiff’s employer is viable under Iowa law, if it is based on an ‘independent duty’ of the employer to the third party claiming indemnity.”⁴⁴⁹ The independent duty cannot be a general duty of care; without some specific duty or a contractual obligation owed to the indemnitee/third party, indemnity from the employer will not be permitted.⁴⁵⁰

A party may also obtain indemnity for damages which it occasioned, including recovering for its own damages as opposed to recovering amounts paid to a third party.⁴⁵¹ In other words, the indemnitee could recover for its own damages under an indemnity agreement, even when it caused part of those damages and even though there was no third party claim against the indemnitee.⁴⁵²

§ II – Exceptions to General Rules of Contractual Indemnity.

The Iowa Comprehensive Petroleum Underground Storage Tank Fund Act limits the use of indemnity agreements by providing that an insurance, indemnification, or similar risk-sharing or risk-shifting agreement “shall not be effective to transfer any liability for costs recoverable” for corrective actions taken under the Act.

An insurance, indemnification, hold harmless, conveyance, or similar risk-sharing or risk-shifting agreement shall not be effective to transfer any liability for costs recoverable under this section. The fund, board, or department of natural resources may proceed directly against the owner or operator or other allegedly responsible party. This section does not bar any

⁴⁴⁶ *Id.* See also *Cochran*, 293 F. Supp. 2d at 995 (describing the rule set out in *McNally & Nimergood*, *supra*, as “the current formulation of the rule in Iowa for contracts purporting to provide indemnity for an indemnitee’s own negligence . . .”); *Northern Natural Gas Co. v. Roth Packing Co.*, 323 F.2d 922 (8th Cir. 1963) (“If the intention to indemnify is apparent from the whole instrument, it will be construed as a contract of indemnity, although it is called by some other name by the parties.”).

⁴⁴⁷ See *McComas-Lacina Constr.*, 641 N.W.2d at 844.

⁴⁴⁸ *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W. 2d 783, 785 (Iowa 1987).

⁴⁴⁹ *Cochran*, 235 F. Supp. 2d at 1001. The “independent duty” must be a duty that is of “a specific, defined nature,” not simply a “general duty” such as the duty not to harm another through tortious acts. *Id.* at 1103.

⁴⁵⁰ *Hysell*, 534 F.2d at 783.

⁴⁵¹ See *Payne Plumbing*, 382 N.W.2d at 160.

⁴⁵² *Id.*

agreement to insure, hold harmless, or indemnify a party to the agreement for any costs or expenditures under this chapter, and does not modify rights between the parties to an agreement, except to the extent the agreement shifts liability to an owner or operator eligible for assistance under the remedial account for any damages or other expenses in connection with a corrective action for which another potentially responsible party is or may be liable. Any such provision is null and void and of no force or effect.⁴⁵³

A “corrective action” is one to minimize, eliminate, or clean up a release to protect the public health and welfare or the environment. Corrective action includes, but is not limited to, excavation of an underground storage tank for the purposes of repairing a leak or removal of a tank, removal of contaminated soil, and cleansing of groundwaters or surface waters.⁴⁵⁴ The prohibition on indemnification agreements is not absolute, however, as it bars such agreements only to the extent they shift liability to an owner or operator “eligible for assistance under the remedial account for any damages or other expenses in connection with a corrective action for which another potentially responsible party is or may be liable.”⁴⁵⁵ In all other cases, an agreement to insure, hold harmless, or indemnify a party for any costs or expenditures under the Act is allowed.⁴⁵⁶ The statutory prohibition has been narrowly construed, and the Iowa Supreme Court has rejected the argument that the prohibition evidences any legislative intent to impose liability on oil producers who are not otherwise responsible parties.⁴⁵⁷

Under the Iowa Business Corporation Act, a corporation may typically indemnify an individual who is a party to a proceeding because the individual is a director of the corporation, and where the director acted in good faith for the best interests of the corporation⁴⁵⁸ but a corporation is generally prohibited from indemnifying a director in two situations:

[A] corporation shall not indemnify a director under this section in either of the following circumstances:

- a. In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection 1.
- b. In connection with any proceeding with respect to conduct for which the director was adjudged liable on the basis that the director received a

⁴⁵³ IOWA CODE § 455G.13 (8).

⁴⁵⁴ IOWA CODE § 455G.2(6)

⁴⁵⁵ IOWA CODE § 455G.13 (8).

⁴⁵⁶ *Id.*

⁴⁵⁷ *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N.W.2d 359 (Iowa 2000).

⁴⁵⁸ IOWA CODE § 490.851(1).

financial benefit to which the director was not entitled, whether or not involving action in the director's official capacity.⁴⁵⁹

Courts have also recognized a common-law prohibition on agreements to indemnify involving public utilities, finding Iowa law to be in accord with the RESTATEMENT (SECOND) OF CONTRACTS, § 575:

A bargain for exemption from liability for the consequences of a willful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if . . .

one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.⁴⁶⁰

This rule is not applicable, however, where the entity charged with public service is not rendering the public service to the other party to the indemnity contract.⁴⁶¹ The same public policy considerations which counsel against indemnity agreements by public utilities apply to agreements in which a common carrier, such as a railroad, attempts to relieve itself from liability for its own negligence.⁴⁶² But, there is no prohibition on a common carrier obtaining an indemnity agreement from another party "when the railroad is not acting in its public capacity."⁴⁶³

With respect to indemnity agreements in the construction context, while the Supreme Court has described as "sound policy" statutes in other jurisdictions prohibiting certain indemnification agreements in construction contracts,⁴⁶⁴ neither the state legislature nor the courts have created any such prohibition.

⁴⁵⁹ IOWA CODE § 490.851(4). *See also* IOWA CODE § 501.412 (4) (applying above-described prohibition on indemnification to directors of closed cooperatives); IOWA CODE § 512B.9(2) (prohibiting the indemnification of officers and members of fraternal benefit societies under certain defined circumstances).

⁴⁶⁰ *Northern Natural Gas*, 323 F.2d at 927-928. *See also Fire Asso. of Philadelphia v. Allis Chalmers Mfg. Co.*, 129 F. Supp. 335, 351 (D. Iowa 1955) (finding the rule § 575 to be the law of Iowa).

⁴⁶¹ *Fire Asso. of Philadelphia*, 129 F. Supp. at 352.

⁴⁶² *Employers Mut. Cas.*, 521 N.W.2d at 695.

⁴⁶³ *Id.* *See also Chicago G. W. R. Co. v. Farmers Produce Co.*, 164 F. Supp. 532 (D. Iowa 1958).

⁴⁶⁴ *Pugh*, 602 N.W. 2d at 809.

§ III – Indemnity Agreements as Insured Contracts.

An agreement to indemnify may constitute an “insured contract,” if it meets a particular insurance policy’s definition of “insured contract.”⁴⁶⁷ This includes an oral agreement to indemnify.⁴⁶⁸

For an “insured contract” to be covered under a liability policy, the underlying indemnity agreement must be sufficiently specific to create an indemnification obligation on the insured.⁴⁶⁷ And coverage for an “insured contract” may exist, absent policy language to the contrary, where the liability assumed by the insured would otherwise be imposed by law on the insured.⁴⁶⁸

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

It does not appear that any cases have addressed the interplay between an indemnity agreement and a parallel agreement to obtain insurance. Since intent is the primary concern in construing indemnity contracts, however, it is likely that an indemnity agreement accompanied by an agreement to obtain insurance for the benefit of the indemnitee could be read together to discern the parties’ intent as to the scope of the indemnity agreement.

Iowa Courts have addressed agreements in which one party agrees to name another as an “additional insured” under the named insured’s policy of insurance.⁴⁶⁹ Courts carefully examine whether the particular loss which is argued to be included within the scope of the “additional insured” agreement is actually covered by the terms of the policy.⁴⁷⁰ If the policy does not cover the loss and fails to provide the coverage the indemnitee believed it bargained for with the indemnitor, courts will deny coverage and will require the indemnitee/additional insured to look to the indemnitor / named insured for recourse.⁴⁷¹

Where an indemnitor is not a named defendant in an injured party’s successful action against an indemnitee (for instance, where an employee brings suit against a third party but not against his employer), courts will not allow the indemnitor to
⁴⁶⁶*Id.* at 606.

⁴⁶⁷See *Rapid Leasing, Inc., v. National American Ins. Co.*, 263 F.3d 820 (8th Cir. 2001) (finding a lease agreement not to be an “insured contract” because it was not specific enough to create an obligation on the insured to indemnify the indemnitee for its own negligence).

⁴⁶⁸ *John Deere Ins. Co.*, 650 N.W.2d at 607.

⁴⁶⁹ See generally *Regent Ins. Co. v. Estes Co.*, 564 N.W.2d 846 (Iowa 1997).

⁴⁷⁰ In *Regent*, a subcontractor’s employee was injured when tresses installed by the contractor collapsed. After the employee collected a judgment against the contractor, the subcontractor’s insurer brought a declaratory judgment action seeking a determination that the policy did not afford coverage for the employee’s claim against the contractor because the injuries were the sole result of the contractor’s negligence. In finding in favor of the insurer, the court ruled that the insurer was not liable to the contractor under the indemnification clause or as an additional insured because the language of the two provisions specifically limited coverage to liability arising out of the subcontractor’s work. *Id.* at 847-849.

⁴⁷¹ *Id.* at 849. See also *City of Cedar Rapids v. Insurance Co. of N. Am.*, 562 N.W.2d 156, 157-159 (Iowa 1997) (noting that if the indemnitor failed to procure for the indemnitee the full extent of liability coverage that was required under the lease agreement (pursuant to the indemnitor’s agreement to name the indemnitee as an additional insured), the party seeking indemnification must look to the indemnitor for recourse, not the insurance company).

escape its duty to indemnify under an indemnity agreement or its contractual duty to provide “additional insured” coverage to the indemnitee until a finding of fact is made with respect to the indemnitor’s own negligence.⁴⁷²

KANSAS

§ I – General Rules of Contractual Indemnity.

Express contracts of indemnity are generally valid and enforceable.⁴⁷³ Contracts of indemnity are construed in accordance with the general rules for the construction of contracts.⁴⁷⁴ The cardinal rule in constructing a contract of indemnity is to ascertain the intention of the parties and to give effect to that intention if it can be determined consistently with legal principles.⁴⁷⁵ It should be noted, however, that a contract that exempts a party from liability or negligence is not favored by the law and is strictly construed against the party relying on it.⁴⁷⁶ A party who has fairly and voluntarily entered an express contract of indemnity is bound thereby, notwithstanding whether it was unwise or disadvantageous to him.⁴⁷⁷ Further, a contract clause that limits liability does not have to be supported by separate consideration.⁴⁷⁸

A party may even contract away responsibility for its own negligence,⁴⁷⁹ if there exists no vast disparity in bargaining power between the parties.⁴⁸⁰ Exculpation of liability for one’s own negligence is generally disfavored and subject to strict construction and expression by “clear and unequivocal language.”⁴⁸¹ The acceptable

⁴⁷² See *IBP, Inc. v. DCS Sanitation Mgmt. Svcs., Inc.*, 498 N.W.2d 425, 428 (Iowa Ct. App. 1993). In *IBP, Inc.*, the indemnitor’s employee was injured while working at the indemnitee’s place of business. After the employee recovered from the indemnitee, the indemnitee brought an action against the employer and its insurer. The appeals court found that a question of fact as to whether the indemnitee or the indemnitor caused the employee’s injury precluded summary judgment since the issue of whether the indemnitor/employer was responsible for the employee’s injury was not previously litigated.

⁴⁷³ *Biermann v. Fleming Cos., Inc.*, No. 89-2201-O, 1990 U.S. Dist. LEXIS 17831 at *7 (D. Kan. Dec. 17, 1990); see, e.g., *Griffin v. Rogers*, 653 P.2d 463, 467-68 (Kan. 1982) (cessionaires bound to indemnify park authority under “hold harmless” clause in contract); *Dennis v. Southeastern Kansas Gas Co., Inc.*, 610 P.2d 627, 633 (Kan. 1980) (plaintiffs bound by judgment for indemnity).

⁴⁷⁴ *Bartlett v. Davis Corp.*, 547 P.2d 800, 807 (Kan. 1976).

⁴⁷⁵ *Id.*

⁴⁷⁶ *Cason v. Geis Irrigation Co. of Kansas*, 507 P.2d 295, 299 (Kan. 1973); *Zenda Grain & Supply Co. v. Farmland Indus., Inc.*, 894 P.2d 881, 887 (Kan. App. 1995).

⁴⁷⁷ *Willie v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 905 (Kan. 1976); *Moler v. Melzer*, 942 P.2d 643, 645 (Kan. App. 1997).

⁴⁷⁸ *Moler*, *supra* at 645.

⁴⁷⁹ *Johnson v. Board of County Commissioners of Pratt County*, 913 P.2d 119, 136 (Kan. 1996); *Corral v. Rollins Protective Svcs. Co.*, 732 P.2d 1260, 1263 (Kan. 1987); *Zenda Grain & Supply Co.*, *supra* at 887.

⁴⁸⁰ *Belger Cartage Serv., Inc. v. Holland Constr. Co.*, 582 P.2d 1111, 1119 (Kan. 1978) (quoting *Kansas City Power and Light Co. v. United Tel. Co.*, 458 F.2d 177, 179 (10th Cir. 1972)).

⁴⁸¹ *Elite Professionals, Inc. v. Carrier Corp.*, 827 P.2d 1195, 1203 (Kan. App. 1992).

example of “clear and unequivocal” language was set forth in *Corral v. Rollins Protective Servs. Co.*⁴⁸² and cited with approval in *Zenda Grain*⁴⁸³ and *Elite Professionals*.⁴⁸⁴

There must be no possibility that any other meaning can be ascribed to a contract for indemnity; “mere general broad and seemingly all-inclusive language in the indemnifying agreement is not sufficient to impose liability for the indemnitee’s own negligence.”⁴⁸⁵ Indemnification clauses must specifically address the issue of the indemnitee’s negligence if it is to apply to negligent acts of the indemnitee.⁴⁸⁶

The “exclusive remedy” provisions of the Kansas Workers Compensation Acts does not bar third-party claims against an employer for indemnity when those claims are based upon an express indemnification agreement.⁴⁸⁷

§ II – Exceptions to General Rules of Contractual Indemnity.

Indemnity agreements that violate a state statute or public policy⁴⁸⁸ are void and unenforceable.⁴⁸⁹ An indemnity contract would therefore become unenforceable if, by statute, a party owes a duty to the general public and then, by contract, attempts to

⁴⁸² *Corral* at 732 P.2d at 1263, which stated in pertinent part:

The parties agree that if loss or damage should result from the failure of performance or operation or from defective performance or operation or from improper installation or servicing of the [Rollins] System, that Rollins’ liability, if any, for the loss or damage thus sustained shall be limited . . . and that the provisions of this paragraph shall apply if loss or damage . . . results . . . from negligence . . . of Rollins, its agents or employees.

⁴⁸³ “We conclude that in order to protect itself from its own negligence, malfeasance, or mismanagement, an entity must employ language similar to the clause in *Corral*. Those drafting hold harmless clauses in the future should look to that language and follow it carefully.” *Zenda Grain & Supply Co. v. Farmland Indus., Inc.*, 894 P.2d 881, 888 (Kan. App. 1995).

⁴⁸⁴ The indemnity clause in *Corral* “in our view, is a clear and unequivocal expression of exemption from liability for negligence. It is a statement of exculpatory purpose beyond any peradventure of a doubt. No comparable clear and unequivocal language appears in the printed warranty and disclaimer here involved.” *Elite Professionals, Inc.*, 827 P.2d at 1203.

⁴⁸⁵ *Butters v. Consolidated Transfer & Warehouse Co., Inc.*, 510 P.2d 1269, 1273 (Kan. 1973); see also *Bartlett v. Davis Corp.*, 547 P.2d 800, 808 (Kan. 1976), stating “[w]hile the intent to indemnify against the results of an indemnitee’s negligence must be clear it is not necessary that an indemnity agreement contain specific or express language covering . . . an owner’s negligence if the intention to afford protection clearly appears from the contract, the surrounding circumstances and the purposes and objects of the parties.”

⁴⁸⁶ See *Zenda Grain & Supply Co.*, 894 P.2d at 888; *Elite Professionals, Inc.*, 827 P.2d at 1203.

⁴⁸⁷ *Estate of Bryant v. All Temperature Insulation*, 916 P.2d 1294 (Kan. App. 1996) (reversing trial court and directing judgment be entered for crane owner because the indemnification was a contractual obligation completely independent of the general contractor’s status of a statutory employer under the Workers Compensation Act).

⁴⁸⁸ By “public policy,” we have referred to a principle of law which holds that no citizen can lawfully do that which injures the public good. See *Master Builders Ass’n v. Carson*, 296 P. 693, 694 (Kan. 1931).

⁴⁸⁹ *Hunter v. American Rentals*, 371 P.2d 131 (Kan. 1962).

relieve itself from its negligent acts in violation of the statute.⁴⁹⁰ The statute, however, must be passed for the protection of the public welfare or safety, which would necessarily result in one violating a duty owed to the public.⁴⁹¹ Any indemnity contract contrary to such public policy will be unenforceable if it interferes with public welfare or safety.⁴⁹²

§ III – Indemnity Agreements as Insured Contracts.

Kansas courts have not determined whether an express indemnification agreement constitutes an “insured contract” within the meaning of the exception to the commercial general liability policy exclusion for contractually assumed liability.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Kansas courts have permitted agreements that require the procurement of insurance for the benefit of a party with respect to its obligation to indemnify for any and all liability.⁴⁹³ There is no statutory, common law or public policy prohibition against contracting to procure insurance as long as such a contract is not illegal or directly against public policy.⁴⁹⁴

In *McIntosh* the United States Court of Appeals for the Tenth District applied Kansas law to find that an additional insured was covered under a policy of insurance of the named insured and that such coverage was not dependent upon or limited to a determination of who was negligent.⁴⁹⁵ Kansas state courts, however, have not issued any rulings directly pertaining to this issue.⁴⁹⁶ The Tenth Circuit bolstered its position with several citations to courts of other jurisdictions.⁴⁹⁷ In doing so, it was implied that whenever there is a potential conflict between an express contract of indemnity requiring certain coverage and a competing insurance policy within which an indemnitee is named as an additional insured, the coverage afforded by the additional insured policy will control.⁴⁹⁸

⁴⁹⁰ *Hunter*, 371 P.2d at 133.

⁴⁹¹ *Id.* at 133.

⁴⁹² *Id.*; see also *Talley v. Skelly Oil Co.*, 433 P.2d 425 (Kan. 1967); *Deines v. Vermeer Mfg. Co.*, 752 F. Supp. 989 (D. Kan. 1990); *Jarvis v. Jarvis*, 758 P.2d 244 (Kan. App. 1988) (holding that an agreement that limits a party’s freedom to choose an attorney is void and unenforceable as against public policy).

⁴⁹³ *New Hampshire Inc., Co. v. Fox Midwest Theatres, Inc.*, 457 P.2d 133, 136 (Kan. 1969).

⁴⁹⁴ *Belger Cartage Serv., Inc. v. Holland Constr. Co.*, 582 P.2d 1111, 1118 (Kan. 1978).

⁴⁹⁵ *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 255-256 (10th Cir. 1993).

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 254-255.

⁴⁹⁸ *Id.* at 255.

KENTUCKY

§ I – General Rules of Contractual Indemnity.

Agreements to indemnify will be construed to cover only such losses, damages or liability as reasonably appear intended by the parties.⁴⁹⁹ A contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from the latter's negligence unless such intention is expressed in unequivocal terms.⁵⁰⁰ Furthermore, such an interpretation will not be given a contract unless no other meaning can be ascribed to it and every presumption is against such an interpretation.⁵⁰¹ Nonetheless, the agreement to indemnify another for that party's sole negligence is not against public policy in Kentucky.⁵⁰²

An indemnity provision need not specifically state that the indemnity will cover "negligence" in order for the courts to uphold an indemnity obligation in favor of a negligent indemnitee.⁵⁰³ The broad language of the clauses in those cases manifested clear intent to cover even negligent acts of the indemnitee as a matter of law.⁵⁰⁴

§ II – Exceptions to General Rules of Indemnity.

Kentucky has no statutory prohibition on the enforceability of contractual agreements to indemnify. Thus, contrary to the statutory provision enacted in many states, a contractor or owner may recover indemnity even where the contractor or owner was indisputably negligent.⁵⁰⁵ As noted, Kentucky does not favor clauses which provide indemnity for one's own negligence but will uphold such provisions "where it is not improbable that a party would undertake such an indemnification of another..."⁵⁰⁶

§ III – Indemnity Agreements as Insured Contracts.

Kentucky has not yet had occasion to determine whether an insured's contractual agreement to indemnify another constitutes an "insured contract" within

⁴⁹⁹ 42 C.J.S., Indemnity, § 12; *Employer's Mutual Liability Ins. Co. of Wisconsin v. Griffin Construction Co.*, 280 S.W.2d 179, 182 (Ky. 1955).

⁵⁰⁰ *Id.*; 27 Am. Jur., Indemnity, § 15.

⁵⁰¹ *Employer's Mutual, supra*; *Mitchell v. Southern Ry. Co.*, 74 S.W. 216 (Ky. 1903).

⁵⁰² *Fosson v. Ashland Oil & Refining Co.*, 309 S.W.2d 176, 178 (Ky. 1957).

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*; *cf Employers Mutual Liability Ins. Co. of Wisconsin, supra* (finding the terms of the contract not sufficiently broad or unequivocal to impose upon the contractor liability for injuries to employees caused by the electric company's negligence and holding proper interpretation of the contract to mean that the contractor would hold the electric company harmless if the contractor's negligence was the sole or primary cause of the injury).

⁵⁰⁵ *Blue Grass Restaurant Co., Inc., v. Franklin*, 424 S.W.2d 594 (Ky. 1968) (affirming trial court's ruling that a restaurant leasee fully indemnify the motel pursuant to language in the lease agreement even though the motel constructed the subject area in violation of an ordinance and was therefore negligent per se).

⁵⁰⁶ *Fosson, supra* at 178.

the meaning of the exception to the exclusion for contractually assumed liability in the form CGL policy.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Kentucky places significance on requirements for insurance when evaluating the intent of contractual indemnity provisions. In *Fosson v. Ashland Oil & Refining Co.*, 309 S.W.2d 176 (Ky. 1957), a contractor’s employee was electrocuted while working on Ashland’s property. The employee was employed by Fosson at the time of the accident. The decedent’s estate sued Ashland (the owner) and obtained a verdict. Ashland then filed a third-party complaint against Fosson (the contractor) pursuant to the indemnity provision in the construction contract.⁵⁰⁷

In defense, the contractor argued that agreements to indemnify against the indemnitee’s own negligence, here the owner, were only valid in “switch contracts” or “siding agreements,” neither of which applied to *Fosson*’s facts.⁵⁰⁸ The Court disagreed, stating that indemnity provisions that provide indemnity for one’s own negligence, while disfavored, are not against public policy.⁵⁰⁹ The Court continued: “[i]t is significant also that the contractor was required to carry liability insurance *satisfactory to the owner*.”⁵¹⁰ The Court stated that it was not basing its decision on the type of insurance carried by the contractor, however, and elected not to discuss the contractor’s contention that the presence of insurance not be considered as part of the record.⁵¹¹

LOUISIANA

§ I – General Rules of Contractual Indemnity.

In Louisiana, contracts of indemnity are enforceable.⁵¹² The general rules which govern the interpretation of other contracts apply in construing a contract of indemnity.⁵¹³ When the common intent of the parties and the words of the contract are clear and lead to no absurd consequences, no further interpretation may be made

⁵⁰⁷ The subject clause read: “The Contractor shall indemnify the Owner against all claims, demand, liens, taxes, loss or damages of any character suffered by the Owner and shall save the Owner harmless from all liability growing out of *or* incurred in the prosecution of said work or arising from any operations, acts, or omissions of Contractor.” (emphasis supplied by the Court).

⁵⁰⁸ *Fosson, supra* at 178.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.* (emphasis supplied by the Court).

⁵¹¹ *Id.*

⁵¹² *Adams v. Falcon Equip. Corp.*, 717 So. 2d 282, 287 (La. App. 1998).

⁵¹³ *Adams*, 717 So. 2d at 287; *Range Ins. Co. v. Shop Rite, Inc.*, 921 So. 2d 1040 (La. App. 2006).

in search of the parties' intent.⁵¹⁴ But, a contract of indemnity is not enforceable unless it contains an express agreement to indemnify.⁵¹⁵

An obligation to indemnify must arise from an unequivocal express agreement in the contract.⁵¹⁶ The controlling question in determining whether an indemnity agreement is enforceable is “whether the risk that resulted in the injury was one contemplated by the parties to the contract.”⁵¹⁷ The party seeking to enforce the agreement bears the burden of proof.⁵¹⁸

“A contract of indemnity, whereby the indemnitee is indemnified against the consequences of his own negligence, is strictly construed and such a contract will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent acts *unless* such an intention is expressed in unequivocal terms.”⁵¹⁹ “Where there is doubt as to indemnification for an indemnitee’s own negligence, then liability, usage, custom, or equity may not be used to interpret a contract expansively in favor ‘of the indemnitee.’”⁵²⁰ “[I]f the provision is still in doubt after applying the general rules of construction and interpreting the provision in light of the contract as a whole, . . . there is a presumption that the parties did not intend to indemnify an indemnitee against losses resulting from his own negligent act.”⁵²¹

Louisiana follows the majority view that general words such as “any and all liability” do not necessarily import intent to impose an obligation so extraordinary and harsh as to render an indemnitor liable to an indemnitee for damages occasioned by the sole negligence of the latter.⁵²²

§ II – Exceptions to General Rules of Contractual Indemnity.

There are three statutory prohibitions on agreements to indemnify in Louisiana.

First, any agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state which requires

⁵¹⁴ *Id.*; *McGill v. Cochran-Sysco Foods*, 818 So. 2d 301, 305 (La. App. 2002); La. Civ. Code Ann. art. 2046.

⁵¹⁵ *Bagwell v. South Louisiana Elec. Coop. Assoc. v. South Central Bell Tel. Co.*, 228 So. 2d 555, 561 (La. App. 1969).

⁵¹⁶ *Soloco, Inc. v. Dupree*, 758 So. 2d 851, 856 (La. App. 2000).

⁵¹⁷ *Id.* at 855 (quoting *Perkins v. Rubicon, Inc.*, 563 So. 2d 258, 259 (La. 1990)); *Kelly v. Sneed*, 660 So. 2d 118 (La. App. 1995).

⁵¹⁸ *McGill*, 818 So. 2d at 306.

⁵¹⁹ *Id.*; *Adams*, 717 So. 2d at 287; *Polozola v. Garlock, Inc.*, 343 So. 2d 1000, 1003 (La. 1967); *Perkins*, 563 So. 2d at 259.

⁵²⁰ *Adams*, 717 So. 2d at 287.

⁵²¹ *Id.*; *Sovereign Ins. Co. v. Texas Pipeline Co.*, 488 So. 2d 982, 983 (La. 1986); *Berry v. Orleans Parish Sch. Bd.*, 830 So. 2d 283, 285 (La. 2002).

⁵²² *Arnold v. Stupp Corp.*, 205 So. 2d 797, 799 (La. App. 1967); *Berry*, 830 So. 2d at 285.

indemnification for negligence or fault (strict liability) on the part of the indemnitee or its agents and employees is null and void and against public policy.⁵²³

This statutory prohibition is known as the Louisiana Oilfield Indemnity Act (“LOIA”).⁵²⁴ LOIA voids indemnity agreements only to the extent that the contractual indemnitee is found either negligent or strictly liable.⁵²⁵ This statute has its genesis in Louisiana’s commitment to protect subcontractors from the “inequity” foisted on such entities by indemnity provisions and work agreements pertaining to wells for oil and gas.⁵²⁶

Second is a statute providing that

. . . any provision contained in a public contract, other than a contract of insurance, providing for a hold harmless or indemnity agreement, or both, (1) from the contractor to the public body for damages arising out of injuries or property damage to third parties caused by the negligence of the public body, its employees or agents, or, (2) from the contractor to any architect, landscape architect, engineer, or land surveyor engaged by the public body for such damages caused by the negligence of such architect, landscape architect, engineer, or land surveyor, are contrary to the public policy of the state of Louisiana, and any and all such provisions in all public contracts are null and void.⁵²⁷

Finally, any provision or requirement of any agreement which purports to provide for the defense, indemnification, or other relief of liability on behalf of any sheriff directed to seize property under any writs of *feri facias*, seizure and sale, or other writ issued by a court of competent jurisdiction or venue, commanding and directing that the property be seized, is also null and void and against public policy.⁵²⁸ This provision is based upon the inequities and injustices resulting from the refusal of sheriffs to seize certain immovable property despite issuance of a writ directing the sheriff to do so without advance grant of blanket indemnification.⁵²⁹

§ III – Indemnity Agreements as Insured Contracts.

Louisiana courts have recognized that an insured’s contractual agreement to indemnify a third-party constitutes an insured contract within the meaning of an insurance policy covering an insured’s agreement to assume the tort liability of

⁵²³ La. Rev. Stat. Ann. § 9:2780; *See Knapp v. Chevron USA, Inc.*, 781 F.2d 1123 (5th Cir. 1986); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996); *Roberts v. Energy Dev. Corp.*, 235 F.3d 935 (5th Cir. 2000); *Am. Home Assur. Co. v. Chevron, USA, Inc.*, 400 F.3d 265 (5th Cir. 2005).

⁵²⁴ *Roberts*, 235 F.3d. at 937; *Chevron*, 400 F.3d at 266.

⁵²⁵ *Chevron*, 400 F.3d at 266.

⁵²⁶ *Id.* at 269.

⁵²⁷ La. Rev. Stat. Ann. § 38:2216(G); *Systems Contractors Corp. v. Williams & Assocs. Architects*, 769 So. 2d 777, 781 (La. Ct. App. 2000).

⁵²⁸ La. Rev. Stat. Ann. § 13:3889(B).

⁵²⁹ La. Rev. Stat. Ann. § 13:3889(A).

another.⁵³⁰ As such, agreements to indemnify fall outside the general exclusion for contractually assumed liability.⁵³¹

§ IV – Operation of An Agreement to Indemnify Containing Reference to Insurance.

“Additional insured” and other contractual arrangements designed to circumvent the prohibition of the LOIA are unenforceable.⁵³² “[T]he LOIA is aimed at preventing the shifting of the economic burden of insurance coverage or liability onto an independent contractor.”⁵³³ In fact, the LOIA states that any provision in any agreement arising out of the operations, services, or activities listed in the statute which includes a waiver of subrogation, an additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of LOIA, shall be null and void and of no force and effect.⁵³⁴ A recognized exception to this prohibition exists where the indemnitor purchases insurance for both itself and the indemnitee, and the indemnitee reimburses the indemnitor for the portion of the premium corresponding to the cost of covering the indemnitee.⁵³⁵ In this instance, the court reasoned that “if the principal pays for its own liability coverage . . . no shifting occurs.”⁵³⁶

While the statute prohibiting the indemnification of a public body for its own negligence does not expressly provide that the shifting of such a risk to insurance is void, such a prohibition has been read into the statute based upon the language of the LOIA.⁵³⁷ However, where the public body is not being indemnified for its own negligence, but only for the negligence of a third party, the indemnification is not a violation of the statute.⁵³⁸ Presumably, efforts to shift the risk where both parties bear the cost of the insurance are valid in the context of this statute.

MAINE

§ I – General Rules of Contractual Indemnity.

Contractual agreements for indemnification, including agreements covering an indemnitee’s own negligence, are generally recognized and enforceable in Maine, as

⁵³⁰ *Hutchins v. Hill Petroleum Co.*, 609 So. 2d 306, 310 (La. App. 1992), *aff’d* by 623 So. 2d 649 (La. 1993).

⁵³¹ *Id.*

⁵³² La. Rev. Stat. Ann. § 9:2780(G).

⁵³³ *Marcell v. Placid Oil Co.*, 11 F.3d 563, 569 (5th Cir. 1994).

⁵³⁴ La. Rev. Stat. Ann. § 9:2780(G).

⁵³⁵ *Hodgen v. First Oil Corp.*, 87 F.3d 1512, 1529 (5th Cir. 1996) (citing *Marcell*, 11 F.3d at 569).

⁵³⁶ *Id.* (quoting *Marcell*, 11 F.3d at 569).

⁵³⁷ *Dominique v. H & S Constr. Co.*, 546 So. 2d 913, 918 (La. App. 1989), *rev’d on other grds*, 551 So. 2d 622 (La. 1989).

⁵³⁸ *Id.*

long as the intent of the parties is expressed clearly and explicitly in the contract.⁵³⁹ When interpreting indemnity agreements, the general rules of contract interpretation apply.⁵⁴⁰ Courts will look for clear terms such as “indemnify,” “reimburse” and “hold harmless.”⁵⁴¹ “Like any other contractual provision, an indemnification clause should be interpreted according to its plain, unambiguous language. Thus, indemnification claims based on contracts must rest upon a ‘clear, express, specific and explicit contractual provision’ under which the indemnitor has agreed to assume the duty to indemnify.”⁵⁴²

As a general rule, indemnity agreements covering loss caused by an indemnitee’s own negligence are not favored by the courts.⁵⁴³ Courts, however, have enforced agreements wherein the mutual intention of the parties is clear.⁵⁴⁴ Broad terms such as “any and all claims,” “in connection with,” or “arising from or out of any occurrence” are not sufficient.⁵⁴⁵ Without an express, written intent to indemnify a party for its own negligence, the courts will not obligate one to indemnify another for the other party’s negligence:

Indemnity clauses to save a party harmless from damages due to negligence may lawfully be inserted in contracts...But, when purportedly requiring indemnification of a party for damage or injury caused by that party’s own negligence, such contractual provisions, with virtual unanimity, are looked upon with disfavor by the courts, and are construed strictly against extending the indemnification to include recovery by the indemnitee for his own negligence. It is only where the contract on its face by its very terms clearly and unequivocally reflects a mutual intention on the part of the parties to provide indemnity for loss caused by negligence of the party to be indemnified that liability for such damages will be fastened on the indemnitor, and words of general import will not be read as expressing such an intent and establishing by inference such liability.⁵⁴⁶

In *McGraw v. S.D. Warren Co.*, the owner of a paper mill hired a contractor to “provide demolition and construction services on a project to rebuild its pulp mill.”⁵⁴⁷ The contract between the owner and contractor contained an indemnity provision, which made the contractor “responsible for and shall continuously

⁵³⁹ See *Emery Waterhouse Co. v. Lea, et al*, 467 A.2d 986 (Me. 1983); see also, *Hardy v. St. Clair*, 739 A.2d 368 (Me. 1999).

⁵⁴⁰ See *International Paper Co. v. A & A Brochu*, 899 F. Supp. 715 (Me. 1995).

⁵⁴¹ *Doyle v. Bowdoin College*, 403 A.2d 1206, 1208 (Me. 1979)(as explained in *Hardy* at 369).

⁵⁴² *Int’l Paper*, 899 F. Supp. at 717; see also *Devine v. Roche Biomedical Laboratories, Inc.*, 637 A.2d 441 (Me. 1994).

⁵⁴³ *Emery*, 467 A.2d at 993; see also *Int’l Paper*, 899 F. Supp. at 719.

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*(internal citations omitted); see also *Hardy*, 739 A.2d 368; *McGraw v. S.D. Warren Company, et al*, 656 A.2d 1222 (Me. 1995); see generally *Doyle*, 403 A.2d 1206.

⁵⁴⁷ *McGraw*, 656 A.2d at 1223.

maintain protection of all the work and property in the vicinity of the work from damage or loss from any cause arising in connection with the contract and any work performed thereunder.”⁵⁴⁸ One of the contractor’s employees brought an action against the owner of the paper mill after becoming sick from exposure to toxic emissions from a smoke stack.⁵⁴⁹ The owner sought indemnity from the contractor per the indemnity clause in the contract.⁵⁵⁰ The Supreme Judicial Court of Maine, relying on its holding in *Emery Waterhouse v. Lea*, held that the contractor was not obligated to indemnify the owner for its own negligence “[b]ecause there is no clear and unequivocal language in the contract at issue that reflects ‘a mutual intention... to provide indemnity for loss caused by [contractor’s] negligence.’”⁵⁵¹

§ II – Exceptions to General Rules of Contractual Indemnity.

Indemnity agreements subjecting an employer to liability beyond that prescribed in the Maine Worker’s Compensation Act⁵⁵² are generally void, absent a clear and explicit waiver of the statutory right to immunity from suit by the employer.⁵⁵³

Under the Workers’ Compensation Act, employers who provide workers’ compensation coverage for their employees are generally immunized from suits arising out of workers’ injuries.⁵⁵⁴ The applicable statute provides that “[a]n employer who has secured the payment of compensation...is exempt from civil actions...involving personal injuries sustained by an employee arising out of and in the course of employment, or for death resulting from those injuries.”⁵⁵⁵ The statutory right to immunization from suit, however, may be waived by the employer pursuant to an indemnity agreement.⁵⁵⁶

In *Fowler v. Boise Cascade*, the operator of a paper mill contracted with a painting company to paint portions of the mill.⁵⁵⁷ One of the painting company’s employees fell into a hole at the mill, was injured, and received worker’s compensation benefits.⁵⁵⁸ The employee thereafter sued the operator of the paper

⁵⁴⁸ *Id.* at 1224.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*; *Emery*, 467 A.2d at 993; *see also Gatley v. United Parcel Service, Inc.*, 662 F. Supp. 200, 203 (D. Me. 1987)(as there was “no clear and unequivocal agreement regarding indemnification for intentional torts,” the refused to enforce the indemnification agreement.)

⁵⁵² Me. Rev. Stat. Ann. Tit. 39-A, § 104 (2005).

⁵⁵³ *See Fowler v. Boise Cascade*, 948 F.2d 49, 55 (1st Cir. 1991).

⁵⁵⁴ Me. Rev. Stat. Ann. Tit. 39-A, § 104; *Diamond International Corp. v. Sullivan*, 493 A.2d 1043, 1045 (Me. 1985); *see also Int’l Paper*, 899 F. Supp. at 718.

⁵⁵⁵ Me. Rev. Stat. Ann. Tit. 39-A, § 104.

⁵⁵⁶ *Fowler*, 948 F.2d at 55.

⁵⁵⁷ *Id.* at 52.

⁵⁵⁸ *Id.*

mill, who tendered the defense to the painting company pursuant to “an indemnity clause, an insurance procurement clause and a subrogation clause” in their contract.⁵⁵⁹ The operator argued that the indemnity and insurance procurement clauses entitled him to indemnity from the employer.⁵⁶⁰ Relying on *Diamond International Corp. v. Sullivan*, the court held that an indemnity clause is only enforceable against an employer if it specifically and explicitly waives the immunity of the workers’ compensation act.⁵⁶¹ Determining that the language of the clauses pertaining to the procurement of insurance and indemnity did not state specifically that the employer agreed to waive its immunity under the statute, the court denied the operator’s request for indemnification.⁵⁶²

Employers can contractually waive the state workers’ compensation immunity provided the waiver meets strict standards by either specifically stating the intent to waive immunity or stating that the indemnitor assumes any potential liability for actions by the employees.⁵⁶³ For example, an indemnification clause hidden on the back of a non-contract document under an obfuscatory title will not waive the statutory employer immunity, while the language “Purchaser shall in no way be liable for any claims for personal injuries (including death) whether the same be injuries to its employees or to other persons...” in the body of a contract under the title “Independent Contractor Status and Indemnification” would waive immunity.⁵⁶⁴

§ III – Indemnity Agreements as Insured Contracts.

The Law Courts of Maine have not addressed whether an agreement to indemnify is an “insured contract” within the meaning of the exception to the exclusion for contractually assumed liability in the form Commercial General Liability policy.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

The courts have held that the common law principle disfavoring a party from being excused for its own negligence without express written agreement is as applicable to insurance procurement clauses as it is to indemnity clauses.⁵⁶⁵ If there is no provision in a procurement clause that explicitly provides that one party will be responsible for the other’s sole negligence, then the indemnification and procurement clauses must be read together, and the clear intent of the parties will govern.⁵⁶⁶

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* at 57; *Diamond*, 493 at 1048.

⁵⁶² *Id.* at 54.

⁵⁶³ *See Int’l Paper*, 899 F. Supp. at 718.

⁵⁶⁴ *Id.* (citing *Diamond*, 493 at 1048).

⁵⁶⁵ *See Fowler*, 948 F.2d at 57.

⁵⁶⁶ *Id.* at 58.

In general, insurance procurement clauses operate as waivers of insurer subrogation rights.⁵⁶⁷ Unlike an indemnity agreement wherein one party agrees to indemnify another for its own negligence, “allocation of risk to insurers through waivers of subrogation are encouraged by the law.”⁵⁶⁸

It is universally held that “upon payment of a loss the insurer is entitled to pursue those rights against a third party whose negligence or wrongful act caused the loss.”⁵⁶⁹ The courts allow an insured to “defeat the insurance company’s rights of subrogation by entering into an agreement of release with the wrongdoer before the policy is issued, or after the policy is issued but prior to the loss.”⁵⁷⁰ Such a release agreement destroys an insurers’ right to subrogation, even in situations where the insurer is unaware of the release agreement.⁵⁷¹

In *Emery Waterhouse Co. v. Lea*, a tenant sued the landlord for damages suffered as a result of a break in the building’s main water lines.⁵⁷² The lease agreement had both an indemnity provision and a mutual exculpation clause.⁵⁷³ Under the indemnity provision, the tenant agreed to indemnify the landlord for any and all damages to the property, but under the exculpatory clause, the parties, in general terms, released each other to the extent of their own insurance coverage and agreed that subrogation claims by their respective insurers were precluded.⁵⁷⁴ The court ruled that the landlord was not entitled to recover from the tenant because the indemnity provision did not apply to the landlord’s own negligence.⁵⁷⁵ With regard to the tenant, despite his failure to “secure from its insurer the necessary modification of its insurance policy to bring it in compliance” with the release agreement, recovery was precluded on the basis that “the [tenant] was not in fact impeded in any way from recovering its loss under the insurance contract.”⁵⁷⁶ Recognizing an insured’s right to contract away its insurer’s entitlement to subrogation,⁵⁷⁷ the court held that “exculpatory agreements releasing a party to the agreement from liability caused by that party’s own negligence do not contravene

⁵⁶⁷ See *Acadia Insurance Co. v. Buck Construction Co.*, 756 A.2d 515, 519-520 (Me. 2000); *Reliance National Indemnity, et al, v. Knowles Industrial Services, Corp, et al*, 868 A.2d 220 (Me. 2005).

⁵⁶⁸ *Id.* at 520.

⁵⁶⁹ *Emery*, 467 A.2d at 994.

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² *Id.* at 988.

⁵⁷³ *Id.* at 992-994.

⁵⁷⁴ *Id.* at 992-993.

⁵⁷⁵ *Id.* at 992-993.

⁵⁷⁶ *Id.* at 994.

⁵⁷⁷ *Id.* (“an insured may defeat the insurance company’s rights of subrogation by entering into an agreement of release with the wrongdoer before the policy is issued, or...after the policy is issued, but prior to loss.”)

public policy and are enforceable on the occasion of a subsequent loss even though the agreement itself was entered into after the issuance of the policy.”⁵⁷⁸

As it pertains to agreements to procure insurance, “clauses in construction contracts imposing insurance procurement responsibility operate as waivers of subrogation against builders even for damage occasioned by the builders’ negligence, unless the contract provides otherwise.”⁵⁷⁹ In *Acadia Insurance Co. v. Buck Construction Co.*, the insurer of a property owner brought a subrogation claim against a construction company for money paid to a property owner resulting for property damage from a fire caused by the construction company.⁵⁸⁰ The terms of the construction contract required the owner to maintain fire insurance and the construction company was to maintain general liability insurance, worker’s compensation, and builders’ risk insurance.⁵⁸¹ In precluding the insurer’s subrogation claim, the court held, “[b]y agreeing to carry a particular type of insurance, an owner has agreed to look solely to the insurer and releases the builder from responsibility when there is loss or damage flowing from the insured, it has no right to recover from the builder.”⁵⁸²

MARYLAND

§ I – General Rules of Contractual Indemnity.

Contractual agreements to indemnify are enforceable.⁵⁸³ Public policy favors freedom of contract.⁵⁸⁴ “Contracts made by promisors, other than commercial insurers, to indemnify for loss ‘arising out of’ a given activity of the indemnitor are interpreted and applied in the same manner as commercial insurance contracts made by commercial insurers”.⁵⁸⁵ The rule common in many states that insurance policies are to be interpreted more strictly against the insurer is inapplicable.⁵⁸⁶ Exculpatory clauses in contracts will be enforced absent legislation to the contrary.⁵⁸⁷

Additionally, indemnity may be implied by law in certain circumstances. “Quasi-contractual” indemnification, or indemnification “arising out of a ‘contract

⁵⁷⁸ *Id.* at 995

⁵⁷⁹ *Acadia*, 756 A.2d at 519-520.

⁵⁸⁰ *Id.* at 515.

⁵⁸¹ *Id.* at 516.

⁵⁸² *Id.*

⁵⁸³ See generally, *Mass Transit Admin. v. CSX Transp.*, 349 Md. 299, 304 (Md. App. 1998).

⁵⁸⁴ *Wolf v. Ford*, 335 Md. 525, 531 (Md. App. 1994).

⁵⁸⁵ *MTA*, 349 Md. at 317.

⁵⁸⁶ *G.E. Tingall & Co., Inc. v. Reliance National Insurance Co.*, 102 F. Supp. 2d 300, 304 (D. Md. 2000) (citations omitted).

⁵⁸⁷ *Wolf*, 335 Md. at 531.

implied by law,”” may be imposed based upon the circumstances.⁵⁸⁸ Implied indemnification may arise between persons liable for tort.⁵⁸⁹ However, one who is actively negligent cannot obtain tort indemnification.⁵⁹⁰

Contracts to indemnify against one’s sole negligence are also enforceable.⁵⁹¹ However, the contract must clearly indicate the intention of the parties to do so.⁵⁹² “The general rule is that contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms.”⁵⁹³

Yet, no “magic words” are required. Courts have held that general provisions can include a party’s own negligence. A provision to hold a party harmless from “liability of every kind” has been held to include liability based solely on the indemnified party’s own negligence.⁵⁹⁴

§ II – Exceptions to General Rules of Contractual Indemnity.

There are three general exceptions or circumstances under which public policy will not permit an exculpatory clause in a contract.⁵⁹⁵ “A party will not be permitted to excuse its liability for intentional acts or for the more extreme forms of negligence, i.e. reckless, wanton or gross.”⁵⁹⁶ Additionally, a contract “cannot be the product of unequal bargaining power.”⁵⁹⁷ Finally, exculpatory agreements will not be enforced in transactions affecting public interest.⁵⁹⁸

This third category includes performance of public services such as public utilities, common carriers, innkeepers, etc.⁵⁹⁹ This category is also a catch-all and includes transactions not easily definable for categorization, but so important to the public that an exculpatory clause would be “offensive” such that the community

⁵⁸⁸ *Franklin v. Morrison*, 350 Md. 144, 154-155 (Md. App. 1998) (citations omitted).

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.* at 163.

⁵⁹¹ *MTA*, 349 Md. at 308-309; *Crockett v. Crothers*, 264 Md. 222, 227 (Md. App. 1972).

⁵⁹² *MTA*, *supra*, at 309.

⁵⁹³ *Crockett*, 264 Md. at 227.

⁵⁹⁴ *MTA*, 349 Md. at 300-303, 307. MTA agreed to “indemnify, save harmless, and defend CSXT from any and all casualty losses, claims, suits, damages or liability of every kind arising out of the Contract Service under this Agreement. . . .” The Court found that “the indemnification provision in the instant matter applies to CSXT’s liability based solely on its own negligence.”

⁵⁹⁵ *Wolf*, 335 Md. at 531-532.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* Note that Maryland has codified two such exceptions that will be discussed herein.

⁵⁹⁸ *Id.*

⁵⁹⁹ *Wolf*, 335 Md. at 531-532.

would pronounce it invalid.⁶⁰⁰ The courts are to consider the totality of the circumstances to determine if such an exception applies.⁶⁰¹

Two statutory provisions explicitly nullify certain agreements to indemnify. First, construction contracts containing indemnity for injury caused solely by the indemnitee's negligent conduct are unenforceable. The applicable code section provides:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with it, purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the *sole negligence* of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. This section does not affect the validity of any insurance contract, workers' compensation, or any other agreement issued by an insurer.⁶⁰²

This code section does not nullify agreements for indemnification, however, when the loss or injury is due only in part to the indemnitee's negligent conduct.⁶⁰³

Maryland has enacted a similar statute in the landlord-tenant context:

If the effect of any provision of a lease is to indemnify the landlord, hold the landlord harmless, or preclude or exonerate the landlord from any liability to the tenant, or to any other person, for any injury, loss, damage, or liability arising from any omission, fault, negligence, or other misconduct of the landlord on or about the leased premises or any elevators, stairways, hallways, or other appurtenances used in connection with them, and not within the exclusive control of the tenant, the provision is considered to be against public policy and void. An insurer may not claim a right of subrogation by reason of the invalidity of the provision.⁶⁰⁴

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* at 534-535.

⁶⁰² *Md. Code Ann., Courts and Judicial Proceedings* §5-401 (emphasis added). Note this section was previously codified as § 5-305.

⁶⁰³ *Bethlehem Steel Corp. v. G.C. Zarnas and Co., Inc.*, 304 Md. 183, 195 (Md. App. 1985).

⁶⁰⁴ *Md. Code Ann., Real Property* § 8-105.

By its express terms, this code section does not apply if the property is within the exclusive control of the tenant.⁶⁰⁵

Additionally, the Workers' Compensation Act limits the liability of an employer in suits related to injuries sustained by an employee.⁶⁰⁶ Absent an express waiver or an agreement to assume an obligation for contribution or to indemnify, an employer cannot be liable to a third party.⁶⁰⁷ An employer cannot be found liable to a third party based upon a theory of implied or quasi-contractual indemnity.⁶⁰⁸

§ III – Indemnity Agreements as Insured Contracts.

A Maryland Federal Court recently concluded that an insured's agreement to indemnify another constitutes an "insured contract" within the meaning of a liability insurance policy.⁶⁰⁹ In fact, "[c]ourts should construe 'insured contract' provisions broadly, in favor of coverage."⁶¹⁰

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

A promise to obtain insurance is different from a promise to indemnify.⁶¹¹ Where a contract contains an indemnity provision and an agreement to obtain insurance, the indemnitor has agreed to provide insurance coverage that is co-extensive of the agreement to indemnify.⁶¹² This is consistent with the policy of freedom of contract.⁶¹³

⁶⁰⁵ *Prince Phillip Partnership v. Cutlip*, 321 Md. 296, 302-303 (Md. App. 1990). The definition of what constitutes "property within the exclusive control" of the tenant is not always obvious. In *Cutlip*, a landlord did not comply with building codes when he failed to construct handicapped restrooms in common areas of an office building. The tenant, a physician, had a handicapped patient who fell while using a restroom in the lobby of the physician's office. The patient sued the landlord, only. The landlord impleaded the physician, seeking to enforce a provision in the lease requiring the physician to indemnify the landlord.

The Court held that the negligence of the landlord was not on the portion of the leased premises within the exclusive control of the tenant. Rather, the court found that the failure to construct the handicapped restroom in the common area rendered the office of the physician a common area as patrons had no choice but to use those restrooms. The court held that the negligence of the landlord related to common areas such that the indemnification provision of the lease was void pursuant to the code.

⁶⁰⁶ *Md. Code Ann., Labor and Employment* § 9-101, *et. seq.*

⁶⁰⁷ *American Radiator and Standard Sanitary Corp. v. Mark Engineering Co.*, 230 Md. 584, 590 (1963).

⁶⁰⁸ *Id.*

⁶⁰⁹ *Ryland Mortg. Co., Inc. v. Travelers Indem. Co. of Illinois*, 177 F. Supp. 2d 435, 441 (2001).

⁶¹⁰ *Utica Mut. Ins. Co. v. Miller*, 130 Md. App. 373 (Md. Ct. Spec. App. 2000), *cert. denied*, 359 Md. 31 (2000) (citing *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 492-493 (5th Cir. 2000)).

⁶¹¹ *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 593-594, n2 (1990) (citing *Bethlehem Steel, supra*, 304 Md. 183, *dissenting opinion*, Rodowsky, J.)

⁶¹² *Id.*

⁶¹³ *Tingall*, 102 F. Supp. 2d at 304 (citations omitted).

It has been suggested that a general contractor cannot require a subcontractor to obtain insurance to cover the general contractor's sole negligence.⁶¹⁴ Such a requirement would be violative of the statutory provision voiding agreements to indemnify for an indemnitee's sole negligence in the construction context.⁶¹⁵

Yet, once the insurance policy has been issued and paid for, it is valid and will be enforced even if the wrong party paid the premiums.⁶¹⁶ The first principle of construction is to apply insurance policies as written when there is no ambiguity in the contract.⁶¹⁷ If a contractor procures insurance that is broader than is required under the contract, the policy is valid and the insurer would be obligated to the limits of coverage.⁶¹⁸

The policy considerations that weigh against enforcing agreements to indemnify one for one's own negligence are inapplicable to insurance contracts.⁶¹⁹ Insurance contracts generally have as their primary purpose the indemnification against one's own negligence.⁶²⁰ Also, an insurer is rarely an unwary or uninformed promisor in need of protection.⁶²¹

MASSACHUSETTS

§ I - General Rules of Contractual Indemnity.

Contractual agreements to indemnify are enforceable and are subject to the same rules of construction applicable to contracts generally.⁶²² "Massachusetts courts employ the general rules of contract interpretation to construe indemnification provisions. As with any contract, a written indemnification agreement is to be interpreted in light of its language, background and purpose."⁶²³ This is particularly true when the contracting parties are commercial entities.⁶²⁴

Where commercial entities have negotiated on a level playing field before entering their contractual arrangements, it is not necessary to explore the theoretical underpinnings of the indemnity doctrine . . . [a]greements voluntarily made . . . are not to be lightly set aside on the ground of public

⁶¹⁴ *Heat & Power Corp.*, 320 Md. at 595.

⁶¹⁵ *Id.*

⁶¹⁶ *Id.*

⁶¹⁷ *MTA*, 349 Md. at 312.

⁶¹⁸ *Heat & Power Corp.*, 320 Md. at 596.

⁶¹⁹ *Id.*

⁶²⁰ *Id.*

⁶²¹ *Id.*

⁶²² *Laiho v. CONRAIL*, 4 F. Supp. 2d 45 (D. Mass. 1998).

⁶²³ *Id.*, at 50 (internal citations omitted).

⁶²⁴ *Kelly v. Dimeo, Inc.*, 581 N.E.2d 1316 (Mass. App. Ct. 1991).

policy or because as events have turned it may be unfortunate for one party.⁶²⁵

The determination that an indemnity provision is valid and in accordance with public policy is a question of law for a court.⁶²⁶ The fact that public policy bars certain exculpatory clauses, however, does not mean that indemnity agreements which implicate that public policy are per se invalid. For example, while a common carrier may not contractually exculpate itself from liability vis-à-vis its passengers, the carrier is not prohibited from obtaining indemnification from another commercial entity to whom it owes no duty as a passenger.⁶²⁷ In the same vein, although it cannot seek tort-based indemnity, a tortfeasor can recover express contractual indemnity from an injured party's employer even though the employer is protected by the worker's compensation bar.⁶²⁸ The tortfeasor can even go so far as to assign its rights to contractual indemnification to the injured employee, thus creating a situation where the employee will recover directly from his employer any amounts owed by the employer under the indemnity agreement with the tortfeasor.⁶²⁹

Decisions from the past twenty years show a departure from the general rule which required that indemnity agreements be construed strictly against the indemnitee:

The rule that indemnity contracts are to be strictly construed against the indemnitee no longer [applies] in Massachusetts. The modern rule is that contracts of indemnity are to be fairly and reasonably construed in order to ascertain the intention of the parties and to effectuate the purpose sought to be accomplished. Courts are expected to give effect to the parties' intentions at the time of the agreement and to give them reasonable meaning.⁶³⁰

Similarly, the rule followed in most jurisdictions – which rejects indemnity for the indemnitee's own negligence absent express and unambiguous language to the contrary – has been abandoned.⁶³¹ Since contracts of indemnity are to be fairly and reasonably construed in order to ascertain the intention of the parties, "something less than an express reference in the contract to losses from the indemnitee's

⁶²⁵ *Id.*, at 1318 (internal citations omitted).

⁶²⁶ *Martino v. Mobil Oil Corp.*, 1987 U.S. Dist. LEXIS 1311 (D. Mass. Jan. 29, 1987).

⁶²⁷ *Id.*

⁶²⁸ See *Whittle v. Pagani Bros. Constr. Co.*, 422 N.E.2d 779 (Mass. 1981); *Connolly v. Pope Housing, Inc.*, 4 Mass. L. Rep. 267, 1995 Mass. Super. LEXIS 118 (Mass. Super. Ct. 1995).

⁶²⁹ See *Spellman v. Shawmut Woodworking & Supply, Inc.*, 840 N.E.2d 47 (Mass. 2006).

⁶³⁰ *MacGlashing v. Dunlop Equip. Co.*, 89 F.3d 932, 940 (1st Cir. 1996) (internal citations omitted). See also *N. Am. Site Developers, Inc. v. MRP Site Dev., Inc.*, 827 N.E.2d 251, 255 (Mass. App. Ct. 2005) (the "rule that indemnity agreements are to be strictly construed against the indemnitee [is] not followed in Massachusetts").

⁶³¹ *Shea v. Bay State Gas Co.*, 418 N.E.2d 597 (Mass. 1981). See also *Post v. Belmont Country Club*, 805 N.E.2d 63 (Mass. App. Ct. 2004) (explaining distinction between Massachusetts and other jurisdictions which provide for strictly construing indemnity provisions, deciding any ambiguity against the indemnitee, and requiring clear and certain terms to indemnify the indemnitee for its own negligence).

negligence as indemnifiable will suffice to make them so if the intent otherwise sufficiently appears from language and circumstances.”⁶³² “In Massachusetts, where there is nothing to require strict construction of the clause under general contract rules, ‘contracts of indemnity are to be fairly and reasonably construed in order to ascertain the intention of the parties and to effectuate the purpose sought to be accomplished.’”⁶³³

Although there is earlier authority from the Supreme Judicial Court which adheres to the general rule that “. . . a contract will not be construed as indemnifying one against his own negligence or that of his employees unless express language unequivocally so requires,”⁶³⁴ this authority has been implicitly overruled. The Appeals Court in *Shea* relied on the above-quoted passage from *Walworth* and held that an agreement which did not specifically provide for indemnification for the indemnitee’s own negligence was not enforceable.⁶³⁵ By reversing the Appeals Court, and by citing cases which did not require express language regarding the indemnitee’s own negligence, the Supreme Judicial Court implicitly overruled and abandoned the rule from *Walworth*. Since the *Shea* decision in 1981, *Walworth* has been cited only once by a majority of the Supreme Judicial Court, and then only for the proposition that “. . . a person is liable for his own negligent acts, absent an express agreement to the contrary.”⁶³⁶ Although the lease agreement at issue in *Seaco* included an indemnity provision, the case did not directly address issues of contractual indemnity. And in one post-*Shea* Appeals Court decision, the court cited *Walworth* for certain principles, but then cited *Shea* for the proposition that it is not “necessary that an indemnity clause state expressly that it covers the indemnitee’s negligence.”⁶³⁷

Thus, the general rule requiring express language to indemnify one for his own negligence has been abandoned. The rule from *Shea*, that the scope of the indemnity agreement will be determined by ascertaining the intention of the parties, now applies.

§ II - Exceptions to General Rules of Contractual Indemnity.

Massachusetts has enacted statutory prohibitions on certain indemnity agreements, specifically in the construction and landlord/tenant contexts.

MASS. GEN. LAWS ch. 149, § 29C (2006), provides:

⁶³² *Shea*, 418 N.E.2d at 600 (internal citations omitted). See also *Speers v. H. P. Hood, Inc.*, 495 N.E.2d 880, 881 (Mass. App. Ct. 1986) (“. . . where the sense is reasonably clear, an indemnity provision may be read to cover situations of indemnitee’s negligence although there is no explicit statement to that effect. . . .”); *Callahan v. A. J. Welch Equip. Corp.*, 634 N.E.2d 134, 138 (Mass. App. Ct. 1994) (“The mere fact that an indemnity clause does not expressly provide for indemnity even where the indemnitee is negligent will not preclude the right to indemnity if the intent sufficiently appears in the language and circumstances attending its execution.”).

⁶³³ *Post*, 805 N.E.2d at 69.

⁶³⁴ *New York, N. H. & H. R. Co. v. Walworth Co.*, 162 N.E.2d 789, 792 (Mass. 1959).

⁶³⁵ *Shea v. Bay State Gas Co.*, 404 N.E.2d 683 (Mass. App. Ct. 1980).

⁶³⁶ *Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 948 (Mass. 2002).

⁶³⁷ *Aho v. Blanchette*, 463 N.E.2d 1203, 1205 (Mass. App. Ct. 1984).

Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water or other utility line, which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents or subcontractors, shall be void.⁶³⁸

“A contractual indemnification clause is, however, valid and enforceable against the subcontractor where the clause is limited to indemnification for injuries or damages which were caused by or resulted from the acts or omissions of the subcontractor, its employees, agents, or subcontractors.”⁶³⁹ A valid indemnification clause involving a subcontractor will be triggered even where the employee of the subcontractor which is negligent is the same employee that is injured,⁶⁴⁰ and full indemnification from the subcontractor will be required even where the indemnified general contractor is partially negligent:

We discern nothing in our case law or the language or history of § 29C that prevents parties from agreeing to full indemnification in the event of concurrent negligence. If the Legislature had intended that indemnification provisions in construction contracts be interpreted to reflect the application of our comparative negligence statute, or to preclude indemnification when the injured claimant is an employee of the subcontractor, it could have said so.⁶⁴¹

Thus, “§ 29C does not proscribe full indemnification when the conduct of the subcontractor is only a partial cause of the injury. Otherwise put, § 29C does not prohibit contractual indemnity arrangements whereby the subcontractor agrees to assume indemnity obligations for the entire liability when both the subcontractor and the general contractor or owner are causally negligent.”⁶⁴²

To enforce any agreement by a subcontractor to indemnify another, the evidence must establish “a causal link between the liability incurred by the general contractor and something that the subcontractor, or its subcontractors, did or did not do to bring about the injury or damage, [or else] the general contractor may not be indemnified and a contractual provision purporting to do so is unenforceable.”⁶⁴³ For example, a subcontractor which agrees to indemnify the general contractor for the acts of a sub-

⁶³⁸ MASS. GEN. LAWS ch. 149, § 29C (2004).

⁶³⁹ *Collins v. Kiewit Constr. Co.*, 2 Mass. L. Rep. 416, 1994 Mass. Super. LEXIS 684, at *7 (Mass. Super. Ct. 1994).

⁶⁴⁰ *See Collins v. Kiewit Constr. Co.*, 667 N.E.2d 904 (Mass. App. Ct. 1996).

⁶⁴¹ *Id.* at 907 (internal citations).

⁶⁴² *Herson v. New Boston Garden Corp.*, 667 N.E.2d 907, 914 (Mass. App. Ct. 1996).

⁶⁴³ *Erland Constr. Co. v. Park Steel Corp.*, 671 N.E.2d 953 (Mass. App. Ct. 1996).

subcontractor will be held to that indemnity agreement if the sub-subcontractor or its employees are negligent.⁶⁴⁴

To determine if an agreement to indemnify executed by a subcontractor is invalid, the courts do not look to the specific facts of the case, but instead look solely at the language of the agreement.⁶⁴⁵ “In determining the validity of an indemnity provision under § 29C, it is upon the language of the indemnity clause that we focus rather than upon a finding of the facts of the particular accident and an assessment of fault of the parties.”⁶⁴⁶ Thus, even where there may be evidence that the subcontractor was negligent, it will not be required to indemnify the general contractor if the indemnity agreement at issue violates the terms of § 29C.⁶⁴⁷ If the indemnity agreement is not invalid on its face and contains a “savings clause” which provides for indemnity to “the fullest extent permitted by law”, such a clause will be read to allow indemnity to the full extent permitted by § 29C.⁶⁴⁸ Similarly, since the statute only speaks in terms of “indemnity”, language in a contract which requires the subcontractor to defend claims which would otherwise be violative of § 29C are enforceable.⁶⁴⁹

Moreover, the public policy promoted by § 29C will likely be enforced even where the contract contains a choice of law provision.⁶⁵⁰ If “a strong public policy of Massachusetts would be violated by enforcing a contract provision based upon the application of a foreign law, the Courts will strike the offending provision.”⁶⁵¹ Thus, an indemnity agreement which includes a choice of law provision that fails to account for the provisions of § 29C will essentially be ignored.

As a matter of public policy, certain indemnification agreements in the landlord/tenant context are also prohibited:

Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or

⁶⁴⁴ *See id.*

⁶⁴⁵ *See Herson*, 667 N.E.2d 907.

⁶⁴⁶ *Id.* at 914.

⁶⁴⁷ *See Harnois v. Quannapowitt Dev.*, 619 N.E.2d 351 (Mass. App. Ct. 1993) (“a contractual obligation to indemnify is void whenever it provides for indemnification by a subcontractor regardless of the fault of the indemnitee, or its employees, agents or subcontractors, and this is so even if the indemnitee could prove at trial that the injured employee of the subcontractor was negligent”). *But compare Callahan, supra* (comparing the indemnity agreement in *Harnois* which would on its face require indemnity from the subcontractor for injuries not caused by the subcontractor, with an indemnity agreement (found to be valid) which only required indemnity in the event of the subcontractor’s negligence).

⁶⁴⁸ *Sheehan v. Modern Cont’l/Healy*, 822 N.E.2d 305, 306 n. 2 (Mass. App. Ct. 2005).

⁶⁴⁹ *Id.* (citing *Herson, supra*).

⁶⁵⁰ *Hayes v. May Department Stores Company*, 1994 Mass. Super. LEXIS 123 (Mass. Super. Ct., Dec. 13, 1994).

⁶⁵¹ *Id.*, at *3.

exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, shall be deemed to be against public policy and void.⁶⁵²

The purpose of § 15 “is to make void an indemnity provision which potentially has the effect of insulating a lessor from liability for the lessor’s negligence.”⁶⁵³

Unlike the prohibition on indemnification by subcontractors discussed above, courts addressing ch. 186, § 15 look at the actual facts of the case and determine whether the indemnity agreement, as applied to the particular facts, has the effect of indemnifying the lessor for its own negligence.⁶⁵⁴ The effect, however, is that any agreement which is broadly worded such that a lessee will be forced to indemnify the lessor for injuries arising from “any” cause will be invalidated. This is because if the landlord is not negligent, there is no need for the indemnity agreement, and if the landlord is negligent, seeking indemnity would run afoul of the statute.⁶⁵⁵

Further, the public policy goals of § 15 have been limited to non-governmental entities/tenants.⁶⁵⁶

[T]he statute voids indemnity agreements in leases because they are contrary to public policy; the statute is designed to protect lessees . . . the statute is inapplicable where the lessee is a governmental entity that freely chooses to enter a contract that normally would be void for public policy reasons where the voiding statute is designed to protect contracting parties in the same position as the governmental entity.⁶⁵⁷

The protection afforded by § 15, and the public policy behind the statute, is not limited to the indemnity context. In the case of a residential lease, “absent an express provision in a lease establishing a tenant’s liability for loss from a negligently started fire, the landlord’s insurance is deemed held for the mutual benefit of both parties.”⁶⁵⁸ This rule does not apply, however, to commercial leases.⁶⁵⁹

⁶⁵² MASS. GEN. LAWS ch. 186, § 15 (2006).

⁶⁵³ *Knous v. Mehrez*, 10 Mass. L. Rptr. 47, 49 (Mass. Super. Ct. 1999).

⁶⁵⁴ *See id.* *See also Hudson v. Atiniz*, 1 Mass. L. Rep. 332, 1993 Mass. Super. LEXIS 192 (Mass. Super. Ct. 1993).

⁶⁵⁵ *See Knous*, 10 Mass. L. Rptr. 47, *Blanchard v. Soc’y for the Pres. of New Eng. Antiquities*, 15 Mass. L. Rep. 390, 2002 Mass. Super. LEXIS 437 (Mass. Super. Ct. 2002).

⁶⁵⁶ *See Connolly*, 4 Mass L. Rep. 267.

⁶⁵⁷ *Id.*, at *8.

⁶⁵⁸ *Peterson v. Silva*, 704 N.E.2d 1163, 1165 (Mass. 1999).

⁶⁵⁹ *See Seaco*, 761 N.E.2d 946.

§ III - Indemnity Agreements as Insured Contracts.

An agreement to indemnify would generally fall within a liability policy exclusion for liability assumed in a contract.⁶⁶⁰

It has been recognized, however, that a contractual undertaking to indemnify constitutes an “insured contract” as that term is used in the CGL policy.⁶⁶¹ Although the trial court in *Garnet* did not find any enforceable indemnity agreement for which coverage could be afforded, the implication from the decision is that coverage may extend to indemnity agreements as “insured contracts.”⁶⁶² *Garnet* was affirmed by the Appeals Court, which held that the applicability of the “insured contract” exception requires that the insured expressly agree to indemnify another, either in writing or orally, and that a claim for “implied” contractual indemnity did not fall within the exception for “insured contracts.”⁶⁶³

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Due to the abandonment of strict rules applicable to indemnity agreements, and the adoption of the modern rule of interpreting indemnity agreements to ascertain the intent of the parties without concern for express language regarding indemnification for the indemnitee’s own negligence, agreements to obtain insurance are viewed as further evidence of the parties’ intent.⁶⁶⁴ “Often the presence of a requirement that the indemnifying party purchase insurance sheds light on the parties’ intention to indemnify and defend against claims.”⁶⁶⁵ Since *Shea, supra*, courts have repeatedly relied on agreements under which the indemnitor is to procure insurance as evidence to support a finding that a broadly-worded indemnification agreement covers the indemnitee’s own negligence.⁶⁶⁶

For example, in *Speers*, a case in which an independent contractor (BSG) agreed to indemnify a dairy plant owner (Hood) against injuries arising from the work under the contract, and simultaneously agreed to procure liability insurance which would cover the indemnity agreement, the Appeals Court stated:

Here we have a common situation in which *Speers* would ordinarily have worker’s compensation through his relation to his own employer, BSG. Hood, however, is exposed to possible common law liability at the suit of

⁶⁶⁰ See *Aetna Casualty & Surety Co. v. Cotter*, 522 N.E.2d 1013 (Mass. App. Ct. 1988).

⁶⁶¹ See *Garnet Constr. Co. v. Acadia Ins. Co.*, 15 Mass. L. Rep. 472, 2002 Mass. Super. LEXIS 492 (Mass. Super. Ct. 2002).

⁶⁶² *Id.*

⁶⁶³ See *Garnet Constr. Co. v. Acadia Ins. Co.*, 814 N.E.2d 23 (Mass. App. Ct. 2004).

⁶⁶⁴ See *Henkels & McCoy v. Boston & Me. Corp.*, 2000 Mass. Super. LEXIS 196 (Mass. Super. Ct. Feb. 25, 2000).

⁶⁶⁵ *Id.*, at *9.

⁶⁶⁶ See *Speers*, 495 N.E.2d 880; *Martino v. Mobil Oil Corp.*, 1987 U.S. Dist. LEXIS 1311 (D. Mass. Jan. 29, 1987); *Cohen v. Steve’s Franchise Co.*, 927 F.2d 26 (1st Cir. 1991).

Speers. Quite naturally, Hood wants to shed this possible responsibility toward a worker not part of its force, and proceeds to shift it to the worker's own employer, the independent contractor temporarily on the premises to do a particular job. It is expected that BSG will obtain insurance to meet this contract-assumed risk.⁶⁶⁷

An agreement to obtain insurance is considered evidence that a parallel indemnity agreement is meant to cover the indemnitee's sole negligence, since the indemnitor can procure insurance which covers losses arising from the indemnitee's sole negligence.⁶⁶⁸

In addition, an agreement by a subcontractor to obtain insurance does not run afoul of the prohibitions of § 29C addressed above.

The statute does not address an insurance policy as a form of indemnification, and it can only be assumed that if the Legislature intended for insurance policies to be included it would have said so. Furthermore, the purpose of having subcontractor's insurance name general contractors as "additional insured" is the strong likelihood that the general contractor would be a party in a negligence action.⁶⁶⁹

Thus, where a subcontractor agrees to obtain liability insurance for the benefit of the general contractor, § 29C will not bar enforcement of that insurance agreement.⁶⁷⁰

The same exception applies to the statutory prohibition on indemnity agreements in lease contracts.⁶⁷¹ A contractual requirement that the lessee provide insurance coverage does not run afoul of ch. 186, § 15.⁶⁷² Thus, although an agreement to obtain insurance will effectively shield a lessor from liability, such an agreement is not technically an indemnification agreement. Therefore, § 15 should not be implicated and the agreement to obtain such insurance should be enforced.

Finally, although not directly addressed in relation to an indemnity agreement, "the policy underlying the use of waiver of subrogation clauses in construction contracts" has been recognized.⁶⁷³ "A waiver of subrogation is useful in such projects because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits, and yet protects the contracting parties from

⁶⁶⁷ *Speers*, at 882, (internal citations omitted).

⁶⁶⁸ *Id.*

⁶⁶⁹ *Cosica v. Constrs. Collaborative, Inc.*, 16 Mass. L. Rep. 628, 2003 Mass. Super. LEXIS 258 (Mass. Super. Ct. 2003) (internal citations omitted).

⁶⁷⁰ *See id.*

⁶⁷¹ *See Bergstresser v. Cooke*, 12 Mass. L. Rep. 466, 2000 Mass. Super. LEXIS 477 (Mass. Super. Ct. 2000).

⁶⁷² *Id.*, at *23.

⁶⁷³ *Haemonetics Corp. v. Brophy & Phillips Co.*, 501 N.E.2d 524 (Mass. App. Ct. 1986).

loss by bringing all property damage under the all risks builder's property insurance.⁷⁶⁴

MICHIGAN

§ I – General Rules of Contractual Indemnity.

A contract may expressly provide for a right of indemnification under Michigan law.⁶⁷⁵ General contract law governs the requisites and validity of contracts of indemnity.⁶⁷⁶ Foremost, the cardinal rule in the interpretation of indemnification contracts is to ascertain the intention of the parties.⁶⁷⁷ Courts determine intent by considering not only the language of the contract, but also the circumstances surrounding the contract, including the situation of the parties.⁶⁷⁸ An express indemnity contract is construed strictly against its drafter, and the indemnitor's obligation to indemnify the indemnitee must be described clearly and unambiguously.⁶⁷⁹

§ II – Exceptions to General Rules of Indemnity.

Indemnity against the consequences of an act that is not a crime, civil wrong, or contrary to statute or public policy is not illegal.⁶⁸⁰ Public policy does not prevent the making of a contract of indemnification against the consequences of one's own negligence, unless the contract exempts one from the consequences of willfully inflicted harm, or harm caused by gross or wanton negligence.⁶⁸¹ An indemnification provision may not protect an indemnitee from its sole negligence.⁶⁸²

Although the Worker's Compensation Act limits an employee's right to recover against his employer, it does not preclude indemnification of a contractor by the employer.⁶⁸³ Indemnity will not be enforced where the relationship between the contracting parties is essentially that of employer and employee, or where the party claiming to be exempt is charged with a public duty.⁶⁸⁴

⁶⁷⁴ *Id.*, at 526.

⁶⁷⁵ *Martin v. City of East Lansing*, 642 N.W.2d 700 (Mich. App. 2001).

⁶⁷⁶ *Pritts v. J. I. Case Co.*, 310 N.W.2d 261, 264 (Mich. App. 1981).

⁶⁷⁷ *Zurich Ins. Co. v. CCR & Co.*, 576 N.W.2d 392, 395 (Mich. App. 1997).

⁶⁷⁸ *Chrysler Corp v. Brenca Contractors, Inc.*, 381 N.W.2d 814, 817 (Mich. App. 1985).

⁶⁷⁹ *Skinner v. D-M-E Corp.*, 335 N.W.2d 90, 92 (Mich. App. 1983) (citing *Fireman's Fund American Ins. Co. v. General Electric Co.*, 253 N.W.2d 748 (Mich. App. 1977)).

⁶⁸⁰ *McLouth Steel Corp. v. A.E. Anderson Constr. Corp.*, 210 N.W.2d 448 (Mich. App. 1973).

⁶⁸¹ *Klann v. Hess Cartage Co.*, 214 N.W.2d 63, 65 (Mich. App. 1973).

⁶⁸² *Fishbach-Natkin Co. v. Power Porcess Piping, Inc.*, 403 N.W.2d 569, 571-72 (Mich. App. 1987).

⁶⁸³ *McLouth Steel Corp.*, 210 N.W.2d at 450-52

⁶⁸⁴ *Blazic v. Ford Motor Co.*, 166 N.W.2d 636, 638 (Mich. App. 1968).

By statute, indemnity agreements entered into in construction projects whereby the indemnitee is indemnified for his own sole negligence are unenforceable.⁶⁸⁵ Such provisions are not automatically void, but will only become so if the indemnitee seeks to enforce the provision in the face of his sole negligence.⁶⁸⁶

§ III – Indemnity Agreements as Insured Contracts.

An insurance policy may cover indemnity liability in contracts where the insured assumes a third party's tort liability, or "liability imposed by law in the absence of any contract or agreement."⁶⁸⁷ This type of indemnity falls under the "insured contract" exception to the exclusion for contractual liability. But an obligation to indemnify a third party may be excluded from coverage if the third party is liable solely because of a contract.⁶⁸⁸ As stated by the Court in *Lebow Associates, Inc. v. Detroit Bank and Trust*,

[a] provision in a liability policy specifically excluding from coverage liability contractually assumed by the insured is operative only in situations where the insured would not be liable to a third party except for the fact that he assumed liability under an express agreement. Conversely such a provision is inoperative when the liability of the insured assumed under an express contract with the third party is coextensive with the insured's liability imposed by law.⁶⁸⁹

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Where an insured agrees to indemnify an entity identified as an additional insured under a policy of insurance issued to the indemnitor, the insurer may be forced to pay any judgment against the insured, as well as its legal expenses defending the action against the additional insured.⁶⁹⁰

A contractual obligation to procure insurance does not extinguish a concurrent express contractual right to indemnification contained within the same contract.⁶⁹¹ If the parties intend to waive claims against each other, where insurance covers any loss, they can include a waiver clause within the contract.⁶⁹²

⁶⁸⁵ Mich. Comp. Laws §691.991 (2005); *see generally Burdo v. Ford Motor Co.*, 588 F.Supp. 1319 (E.D. Mich. 1984).

⁶⁸⁶ *Fishbach-Natkin Co.*, 403 N.W.2d at 571-72

⁶⁸⁷ *Dale Osburn, Inc. v. Auto Owners Ins. Co.*, 2003 Mich. App. LEXIS 2887, *13-14 (2003) (unpublished).

⁶⁸⁸ *Id.*, at *13-15.

⁶⁸⁹ *Lebow Associates, Inc. v. Detroit Bank and Trust*, 439 F. Supp. 1288, 1291 (E.D. Mich. 1977).

⁶⁹⁰ *See generally Lebow Associates*, 439 F. Supp. 1288.

⁶⁹¹ *Wausau Underwriters Insurance Company v. Ajax Paving Industries, Inc.*, 671 N.W.2d 539, 544 (Mich. App. 2003).

⁶⁹² *Id.*

MINNESOTA

§ I – General Rules of Contractual Indemnity.

Contractual indemnity is permitted in Minnesota “[w]here there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.”⁶⁹³ “A contract of indemnity should be construed to cover all losses, damages or liabilities which reasonably appear to have been within the contemplation of the parties, but not those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them.”⁶⁹⁴ Claims for indemnity do not accrue until the person entitled to the indemnity has sustained damage either by paying a loss or discharging a liability that should properly be the responsibility of another.⁶⁹⁵

The rules for establishing a contract for indemnity mirror those for other contracts, and consideration is a necessary component.⁶⁹⁶ Likewise, the rules of construction for indemnity contracts follow those of general contract law.⁶⁹⁷ These rules include construing a contract to give effect to the intention of the parties,⁶⁹⁸ interpreting the language of a contract in accordance with its plain and ordinary meaning;⁶⁹⁹ and considering the contract as a whole.⁷⁰⁰

“Agreements seeking to indemnify a party for losses resulting from that party’s own negligent acts are not favored in the law and are not construed in favor of indemnification, unless such intention is expressed in clear and unequivocal terms.”⁷⁰¹ Agreements for indemnity of another’s negligence should attempt to encompass specific facts regarding what, where and when the agreement is in effect.⁷⁰² The courts use a test that analyzes the facts in a temporal, geographical or

⁶⁹³ *Ploog v. Ogilvie*, 309 N.W.2d 49, 54 (Minn. 1981) (quoting *Hendrickson v. Minnesota Power & Light Co.*, 104 N.W.2d 843, 848 (1960)), *superseded on other grounds*, *Zamberletti v. Zamberletti*, 1989 Minn. Ct. App. LEXIS 1190, at *4 (Minn. Ct. App. Nov. 7, 1989).

⁶⁹⁴ *FMC Corp. v. Northern Pump Co.*, 1985 U.S. Dist LEXIS 20314, at *7 (D. Minn. Apr. 29, 1985).

⁶⁹⁵ *Leisure Dynamics, Inc., v. Falstaff Brewing Corp.*, 298 N.W.2d 33, 38 (Minn. 1980).

⁶⁹⁶ *Elk River Concrete Products Co. v. American Casualty Co.*, 129 N.W.2d 309, 316 (Minn. 1964).

⁶⁹⁷ *Chicago v. Famous Brands, Inc.*, 324 F.2d 137, 140 (8th Cir. 1963).

⁶⁹⁸ *See Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997).

⁶⁹⁹ *See Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002).

⁷⁰⁰ *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990).

⁷⁰¹ *Oster v. Medtronic, Inc.*, 428 N.W.2d 116, 118 (Minn. Ct. App. 1988).

⁷⁰² *See R.E.M. IV, Inc., v. Robert F. Ackermann & Associates, Inc.*, 313 N.W.2d 431, 433-34 (Minn. 1981) (holding sub-contractor was not required to indemnify general contractor for general contractor’s own negligence where contractual indemnification provision of subcontract did not extend to damage which occurred after work covered by subcontract was completed).

causal relationship to the work performed and the injury.⁷⁰³ Indemnity agreements have been held inapplicable when the injury occurred after work which was not contemplated by the agreement.⁷⁰⁴

§ II – Exceptions to General Rules of Contractual Indemnity.

Building and construction contracts of indemnity are given special attention in Minnesota, and the scope of allowable indemnity within such contracts is limited. Section 337.02 of the Minnesota Statutes provides:

An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates; or (2) an owner, a responsible party, or a governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws.

The statutory prohibition of MINN. STAT. § 337.02 ensures that each party will be responsible for its own negligent acts or omissions.⁷⁰⁵ This prohibition does not apply to the following:

[A]n agreement by which a promisor that is a party to a building and construction contract indemnifies a person, firm, corporation, or public agency for whose account the construction is not being performed, but who, as an accommodation, permits the promisor or the promisor's independent contractors, agents, employees, or delegates to enter upon or adjacent to its property for the purpose of performing the building and construction contract.⁷⁰⁶

Also, the limitation on indemnity agreements in building and construction contracts does not affect an agreement to procure insurance coverage.⁷⁰⁷

Every employer must carry workers' compensation insurance or seek a written exemption permitting self-insurance.⁷⁰⁸ The Workers' Compensation Act prevents a general contractor from shifting his responsibilities under the act via an indemnity

⁷⁰³ *Fossum v. Kraus-Anderson Construction Co.*, 372 N.W.2d 415, 417 (Minn. Ct. App. 1985); *see generally Anstine v. Lake Darling Ranch*, 233 N.W.2d 723 (Minn. 1975) (defining the purpose and intent of an indemnity agreement).

⁷⁰⁴ *See generally Fossum*, 372 N.W.2d at 418.

⁷⁰⁵ *Holmes v. Watson-Fosberg Co.*, 488 N.W.2d 473, 475 (Minn. 1992).

⁷⁰⁶ MINN. STAT. § 337.03 (2005).

⁷⁰⁷ *Van Vickie v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 241 (Minn. Ct. App. 1996); *see also* MINN. STAT. § 337.05.

⁷⁰⁸ MINN. STAT. §176.181 (2005).

agreement.⁷⁰⁹ Allowing a general contractor to shift its workers' compensation expenses by means of an indemnification provision would contravene the public policy at the core of the act, which requires employers to bear the burden of their employee's work-related injuries.⁷¹⁰

Nonetheless, a party to an indemnity agreement can bring an action for indemnity against the employer of the injured party despite the immunity of the Workers' Compensation Act.⁷¹¹

§ III – Indemnity Agreements as Insured Contracts.

Minnesota courts have suggested that an insurance policy may cover indemnity liability in contracts where the insured assumes a third party's tort liability.⁷¹² This type of indemnity falls under the "insured contract" exception to the exclusion for contractually assumed liability. A contractual obligation to pay defense costs, however, may not fall within the purview of an insured contract provision.⁷¹³

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

While indemnity provisions in building and construction contracts which attempt to provide indemnity for one's own negligence are normally unenforceable by statute,⁷¹⁴ there is a significant statutory exception where there is insurance coverage for the benefit of others.⁷¹⁵

The contract for indemnity must contain clear and unequivocal language which shifts liability for all such claims and for those which require the purchase of insurance to cover all of such claims.⁷¹⁶ When the meaning of an agreement is uncertain, all doubts and ambiguities must be resolved against the one who prepared the agreement.⁷¹⁷ Agreements to procure insurance have been construed more broadly than agreements to indemnify.⁷¹⁸

⁷⁰⁹ *D.W. Hutt Consultants, Inc., v. Construction Maintenance Sys., Inc.*, 526 N.W.2d 62, 65 (Minn. Ct. App. 1995).

⁷¹⁰ *Id.*

⁷¹¹ *Carlson v. Smogard*, 215 N.W.2d 615 (1974); *see also* MINN. STAT. § 176.061 (2005).

⁷¹² *Soo Line R.R. Co. v. Brown's Crew Car*, 2003 Minn. Ct. App. LEXIS 289, at *7-8 (Minn. Ct. App. Mar. 11, 2003).

⁷¹³ *Id.* at *13-14 (citing *Progressive Cas. Ins. Co. v. Brown's Crew Car*, 27 F. Supp. 2d 1288, 1293 (D. Wy. 1998)).

⁷¹⁴ MINN. STAT. § 337.02 (2005).

⁷¹⁵ MINN. STAT. § 337.05 (2005).

⁷¹⁶ *Katzner v. Kelleher Constr.*, 545 N.W.2d 378, 382 (Minn. 1996).

⁷¹⁷ *Salminen v. Frankson*, 245 N.W.2d 839, 841 (Minn. 1976).

⁷¹⁸ *Lift-Stak & Stor, Inc. v. Lumbermens Mutual Casualty Co.*, 2000 Minn. Ct. App. LEXIS 1021, at *6 (Minn. Ct. App. Sept. 26, 2000).

In instances where the risk of loss is one directly related to and arising out of the work performed under the subcontract, the parties are free to place the risk of loss upon an insurer by requiring one of the parties to insure against that risk.⁷¹⁹ There is no indication that a contractual obligation to procure insurance extinguishes a concurrent express contractual right to indemnification contained within the same contract. If the parties intend to waive claims against each other, where insurance covers any loss, they must presumably include a waiver clause within the contract.

MISSISSIPPI

§ I – General Rules of Contractual Indemnity.

As a general matter, contractual agreements for indemnification are recognized and enforceable in Mississippi.⁷²⁰ To be enforceable, the parties must have expressed the intention to indemnify in clear and unequivocal terms in the language of the agreement.⁷²¹

This same rule applies where the indemnification clause protects the indemnitee against his own negligence.⁷²² Language to the effect that one party will indemnify the other against “any and all claims” is interpreted to provide indemnification not only in the case of concurrent negligence on the part of the contracting parties, but also where the indemnitee is solely negligent.⁷²³ Mississippi has specifically rejected the rule adhered to in some states which requires express language protecting an indemnitee against his own negligence.⁷²⁴ So long as it may be gleaned from the language of the agreement that the parties intended for such indemnification, the contract will be enforced as written, and the rules do not change where there are varying degrees of fault by the parties.⁷²⁵

Indemnification provisions in lease agreements are also valid, but to enforce a provision indemnifying the indemnitee for his own negligence in this context, a heightened standard is applied. Specifically, it must be shown that the parties have equal bargaining power (such as in the case of a commercial lease), that the indemnification implicates only private interests and not public concerns, and that the clause does not permit a party to escape liability for his violation of a common

⁷¹⁹ *Holmes*, 488 N.W.2d at 475.

⁷²⁰ *Lorenzen v. South Cent. Bell Tel. Co.*, 546 F. Supp. 694, 697 (S.D. Miss. 1982), *aff’d*, 701 F.2d 408 (5th Cir. 1983); *Mississippi Power Co. v. Roubicek*, 462 F.2d 412, 414 (5th Cir. 1972).

⁷²¹ *Id.*

⁷²² *Lorenzen*, 546 F.Supp. at 697.

⁷²³ *Id.*

⁷²⁴ *Blain v. Finley*, 226 So. 2d 742, 746 (Miss. 1969) (holding express language unnecessary and finding the term “fully indemnify and save harmless . . . from all such claims for damages . . . arising out of or in anywise connected with the . . . work” sufficient to protect indemnitee from his own negligence); see also *Martin v. Sears, Roebuck & Co.*, 24 F.3d 765, 767 (5th Cir. 1994); *Certain London Mkt. Ins. Cos. v. Pa. Nat’l Mut. Cas. Ins. Co.*, 269 F. Supp. 2d 722, 728 (N.D. Miss. 2003).

⁷²⁵ *Id.*

law duty.⁷²⁶ Common law duties in the lessor/lessee context include the lessor's duty to keep common areas reasonably safe⁷²⁷ and the lessee's duty not to commit waste.⁷²⁸

An agreement to indemnify another will not be enforced if the damage for which indemnity is sought is not causally connected to that for which indemnity was given, such as where an individual was injured exiting a type of railroad car which was not operable in the railroad facility with respect to which the indemnitor had agreed to indemnify.⁷²⁹

§ II – Exceptions to General Rules of Contractual Indemnity.

There are limits on the enforceability of agreements to hold harmless and indemnify. A contract which protects a utility against its own negligence is void on grounds of public policy.⁷³⁰ This rule stems from the public policy requiring that utility companies exercise the highest degree of care at all times.⁷³¹ Likewise, a common carrier cannot by contract shift its tort liability to a third party.⁷³²

By statute, hold harmless provisions in construction related agreements which protect against an indemnitee's own negligence are void and unenforceable.⁷³³ The applicable statute provides in relevant part:

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, every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.⁷³⁴

The statute's prohibition is expressly inapplicable to construction bonds and insurance contracts.⁷³⁵

⁷²⁶ *Kroger Co. v. Chimneyville Properties, Ltd.*, 784 F. Supp. 331, 348 (S.D. Miss. 1991).

⁷²⁷ *Id.* at 349.

⁷²⁸ *Id.* at 347.

⁷²⁹ *Illinois Cent. R.R. v. Standard Oil Co.*, 292 F. Supp 337, 339-40 (S.D. Miss. 1968).

⁷³⁰ *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1206 (Miss. 1998).

⁷³¹ *Id.*

⁷³² *Illinois Cent. R.R.*, 292 F. Supp at 340.

⁷³³ Miss. Code Ann. § 31-5-41 (2004); *Ramsey v. Georgia-Pacific Corp.*, 597 F.2d 890, 892 (5th Cir. 1979).

⁷³⁴ *Id.*

⁷³⁵ Miss. Code Ann. § 31-5-41.

The statute is not implicated where the indemnitee is not itself negligent and seeks indemnity from the indemnitor.⁷³⁶ Rather, it is only where the indemnitee is negligent and seeks indemnification for his own negligence that the agreement to indemnify is rendered void.⁷³⁷ Even if the indemnity provision specifically provides indemnification for the indemnitee's own negligence, the statute will not void the indemnity where it is established that the damage or injury was not caused by any negligent act on the part of the indemnitee.⁷³⁸

Where an agreement permitting the use and maintenance of attachments to utility poles was characterized as a licensing agreement, it was outside the scope of the statute.⁷³⁹ The statute only reaches indemnification of a person or entity undertaking the construction, maintenance or repair, not the circumstances where the indemnification is by the person or entity engaged in this conduct for the benefit of a third party.⁷⁴⁰

§ III – Indemnity Agreements as Insured Contracts.

The Mississippi appellate courts have not addressed the extent to which an insured is covered for its indemnification of another where a liability policy excludes contractually assumed liability, but excepts from the exclusion 'insured contracts' defined to include the insured's assumption of a third party's tort liability.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Although an indemnification agreement may validly require that the indemnitor acquire liability insurance fully covering the indemnitee's liability,⁷⁴¹ the affect of such a requirement on the agreement to indemnify was not reached.

The reported Mississippi cases do not address the outcome of an indemnification agreement requiring that the indemnitee be named an additional insured and in which the policy purports to grant coverage beyond the scope of the underlying indemnity. Applying general principles of insurance law, it is probable that the insurance carrier would not be permitted to limit its liability to the indemnitee based on the restrictive language in the indemnity agreement. In the first instance, insurance contracts are construed liberally in Mississippi, favoring coverage for the insured.⁷⁴² Furthermore, "where there is doubt as to the meaning of an insurance

⁷³⁶ *American Cynamid Co. v. Campbell Constr. Co.*, 864 F. Supp. 580, 584 (S. D. Miss. 1994).

⁷³⁷ *Id.*

⁷³⁸ *Id.*, see also *Blain* at 746.

⁷³⁹ *Heritage Cablevision v. New Albany Elec. Power Sys. of the City of New Albany*, 646 So. 2d 1305, 1312 (Miss. 1994).

⁷⁴⁰ *Illinois Cent. Gulf R.R. Co. v. International Paper Co.*, 889 F.2d 536, 538 (5th Cir. 1989).

⁷⁴¹ *Deviney Constr. Co. v. Mississippi Power & Light Co.*, 151 So. 2d 904, 905 (Miss. 1963).

⁷⁴² *Mississippi Farm Bureau Mut. Ins. Co. v. Jones*, 754 So. 2d 1203, 1204 (Miss. 2000); *Burton v. Choctaw County*, 730 So. 2d 1, 8 (Miss. 1997); *State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So. 2d 1371, 1373 (Miss. 1981); *Cruse v. Aetna Life Ins. Co.*, 369 So. 2d 762, 764 (Miss. 1979).

contract, it is universally construed most strongly against the insurer, and in favor of the insured and a finding of coverage.”⁷⁴³

MISSOURI

§ I – General Rules of Contractual Indemnity.

It is the general rule that indemnity contracts will be construed to cover only such losses, damages or liability reasonably intended by the parties.⁷⁴⁴ Consequently, the interpretation of a contract is a question of law for a court to decide utilizing an objective and not a subjective test.⁷⁴⁵ When construing the meaning of contract language, words are viewed in light of the meaning that would ordinarily be understood by the layperson.⁷⁴⁶ Further, language that is reasonably open to different constructions is typically considered ambiguous.⁷⁴⁷ “[I]n a private contract, where the parties stand on a substantially equal footing, one may legally agree to indemnify the other against the results of the indemnitee’s own negligence.”⁷⁴⁸ But a contract of indemnity “will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms.”⁷⁴⁹ In the absence of such clear expression, or where any doubt exists as to the intention of the parties, Missouri courts will not construe a contract of indemnity to indemnify against the indemnitee’s own negligence.⁷⁵⁰ The rules applicable to the construction of contracts generally also apply to indemnification agreements.⁷⁵¹

Where a subcontractor on a construction project agreed to indemnify the contractor and others against any and all claims “only to the extent caused” in whole or in part by the negligence of the subcontractor,⁷⁵² the Missouri Supreme Court found that the phrase “to the extent caused” expressed an intention to limit the indemnitor’s liability to the portion of fault attributed to the indemnitor.

The preferred construction of the indemnification provision at issue, one that provides a reasonable meaning to each phrase of the provision, requires

⁷⁴³ *Universal Underwriters Ins. Co. v. Ford*, 734 So. 2d 173, 176 (Miss. 1999).

⁷⁴⁴ *Kansas City Power and Light Co. v. Federal Construction Corp.*, 351 S.W.2d 741, 745 (Mo. 1961).

⁷⁴⁵ *United Fire & Cas. Co. v. Gravette*, 182 F.3d 649, 656 (8th Cir 1999).

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.*

⁷⁴⁸ *Kansas City Power and Light Co.*, 351 S.W.2d at 745.

⁷⁴⁹ *Id.*; *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 105 (Mo. 2003); *Fed. Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160, 166 (Mo. App. 2005).

⁷⁵⁰ *Parks v. Union Carbide Corp.*, 602 S.W.2d 188, 190 (Mo. 1980); *Southwestern Bell Telephone Co. v. J.A. Tobin Construction Co.*, 536 S.W.2d 881, 885 (Mo. App. 1976).

⁷⁵¹ *Teter v. Morris*, 650 S.W.2d 277, 282 (Mo. App. 1982); *see also, Burns & McDonnell Engineering Co. v. Torson Construction Co.*, 834 S.W.2d 755, 758 (Mo. App. 1992).

⁷⁵² *Nusbaum*, 100 S.W.3d 105-106.

nothing more than that [the indemnitor] indemnify [the indemnitee] for [the indemnitor's] negligence even if [the indemnitee] participates in part in [the indemnitor's] negligent conduct. To hold otherwise would make the intended expression to limit liability to the acts of indemnitor meaningless. (Citations omitted).⁷⁵³

§ II – Exceptions to General Rules of Indemnity.

Missouri has enacted a statute precluding indemnity related to certain construction contracts. The statute provides: “[I]n any contract or agreement for public or private construction work, a party’s covenant, promise or agreement to indemnify or hold harmless another person from that person’s own negligence or wrongdoing is void as against public policy and wholly unenforceable.”⁷⁵⁴ But there are nine exceptions under the statute:

- (1) A party’s covenant, promise or agreement to indemnify or hold harmless another person from the party’s own negligence or wrongdoing or the negligence or wrongdoing of the party’s subcontractors and suppliers of any tier;
- (2) A party’s promise to cause another person or entity to be covered as an insured or additional insured in an insurance contract;
- (3) A contract or agreement between state agencies or political subdivisions or between such governmental agencies;
- (4) A contract or agreement between a private person and such governmental entities for the use or operation of public property or a public facility;
- (5) A contract or agreement with the owner of the public property for the construction, use, maintenance or operation of a private facility when it is located on such public property;
- (6) A permit, authorization or contract with such governmental entities for the movement of property on the public highways, roads or streets of this state or any political subdivision;
- (7) Construction bonds, or insurance contracts or agreements;
- (8) An agreement containing a party’s promise to indemnify, defend or hold harmless another person, if the agreement also requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recover the cost of the required insurance in its contract price; provided, however, that in such case the party’s liability under the indemnity obligation shall be limited to the coverage and limits of the required insurance; or

⁷⁵³ *Id.* at 106-107.

⁷⁵⁴ Mo. Rev. Stat § 434.100(1) (2006)

(9) Railroads regulated by the Federal Railroad Administration.⁷⁵⁵

For purposes of the statute, “construction work” includes, but is not limited to, “the construction, alteration, maintenance or repair of any building, structure, highway, bridge, viaduct, or pipeline, or demolition, moving or excavation connected therewith,” and includes “the furnishing of surveying, design, engineering, planning or management services, or labor, materials or equipment, in connection with such work.”⁷⁵⁶ The provisions of this Anti-Indemnity Statute apply only to contracts or agreements entered into after August 28, 1999.⁷⁵⁷

§ III - Indemnity Agreements as Insured Contracts.

Missouri courts have not squarely addressed whether and under what circumstances an agreement to indemnify constitutes an “insured contract” in the context of the typical exception to the general liability policy exclusion for contractually assumed liability. Various cases could be cited to support this outcome, and suggest that the indemnity of a third party by the insured is an “insured contract.”⁷⁵⁸ Based upon the policy of finding the broadest possible coverage, there seems little doubt that a Missouri court would recognize the “insured contract” exception to a policy exclusion and find an agreement to indemnify for tort liability to constitute an “insured contract.”

§ IV - Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Parties to a contract may allocate the risk of loss by agreeing that one party shall maintain insurance in order to save harmless the other party from liability.⁷⁵⁹ Even in a construction setting, a party may include, or promise to include, another party as an insured or an additional insured under an insurance contract.⁷⁶⁰

The courts have not expressly addressed the extent of an insurer’s obligation to an indemnitee in light of the underlying agreement of the insured to indemnify the additional insured. As noted above, Missouri applies the general rule that insurance contracts are interpreted strictly against the insurer and in favor if the insured. Consequently, it is doubtful that an insurer would prevail on an argument that its duty to indemnify an additional insured under a policy of liability insurance could be

⁷⁵⁵ *Id.* at subsection (2).

⁷⁵⁶ *Id.* at subsection (3).

⁷⁵⁷ *Id.* at subsection (4).

⁷⁵⁸ *Kramer v. Ins. Co. of North America*, 54 S.W.3d 613, 615-616 (Mo. App. 2001) (recognizing “insured contracts” as exceptions to exclusions in insurance policies); *See also, Cincinnati Ins. Co. v. Venetian Terrazzo, Inc.*, 198 F. Supp. 2d 1074, 1078 (E.D. Mo. 2001) (discussing defendant’s argument that policy exclusion did not apply because of “insured contract” provision, but deciding the case on different grounds); *See also, United Fire & Cas. Co.*, 182 F.3d 649, 656 (8th Cir 1999) (survivors in a wrongful death case alleged they were entitled to indemnity under the “insured contract” exception in the insured’s commercial automobile policy).

⁷⁵⁹ Mo. Rev. Stat. § 434.100(2) (2006).

⁷⁶⁰ *Id.*

limited by the named insured's underlying indemnity agreement, where no such limitation was placed on the coverage at the time the policy was written.

MONTANA

§ I – General Rules of Contractual Indemnity.

Indemnity is statutorily defined in Montana as a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or some other person.⁷⁶¹ Montana courts have “long recognized the legality of indemnity clauses and that they should be liberally construed in favor of the party intended to be indemnified.”⁷⁶² A party may contract for indemnification against its own negligence, whether sole or concurrent.⁷⁶³ To uphold an indemnification agreement for damages caused by negligent acts of the indemnitee, however, the contractual indemnity provision must be expressed in clear and unequivocal terms.⁷⁶⁴

Thus, in *Ryan Mercantile Co. v. Great N. R.R. Co.*, the court found that an indemnity agreement using phrases such as “any and all personal injuries”, “of every name and nature which may in any manner arise”, and “whether due or not due to the negligence of [indemnitee]” demonstrated the parties’ intent that the lessee would cover any claim made against the lessor for damages, no matter where on the premises mentioned in the lease such claim arose. Additionally, the court held that this language showed that the parties had in mind that the sole negligence of the lessor would be no bar to the lessee’s indemnity obligation.⁷⁶⁵

Similarly, in a case involving a contract for seismic exploration testing, the court found a contractor’s agreement to indemnify “against all claims, liabilities, demands, causes of action and judgments” resulting “in whole or in part” from “the negligent acts or omissions or willful misconduct” of the contractor or its employees, unambiguously enabled the indemnitee to enforce the agreement where there was concurrent negligence of the contractor and the indemnitee.⁷⁶⁶

⁷⁶¹ Mont. Code Ann. §28-11-301 (2005).

⁷⁶² See *Lesofski v. Ravalli Cty. Elec. Coop.*, 439 P.2d 370, 371-72 (Mont. 1968).

⁷⁶³ *Ryan Mercantile Co. v. Great N. R.R. Co.*, 294 F.3d 629, 633 (9th Cir. 1961).

⁷⁶⁴ *Id.*; see also *Slater v. Central Plumbing & Heating Co.*, 912 P.2d 780, 782 (Mont. 1996) (finding that subcontractor did not have to indemnify general contractor for his own negligent acts as contract was not clear and unambiguous); *Amazi v. Atlantic Ricfield Co.*, 816 P.2d 431, 433 (Mont. 1991) (“In order for a contract to indemnify a party against its own negligence, such indemnification must be expressed in ‘clear and unequivocal terms’”); *Sweet v. Colburn School Supply*, 639 P.2d 521, 523 (Mont. 1982); *Lesofski*, 439 P.2d at 372.

⁷⁶⁵ *Ryan Mercantile Co. v. Great N. R.R. Co.*, 294 F.2d at 633.

⁷⁶⁶ *Amazi*, 816 P.2d at 433.

§ II – Exceptions to General Rules of Contractual Indemnity.

Montana has recently enacted legislation barring indemnification for a party's own negligence in the construction context.⁷⁶⁷ Mont. Code Ann. § 28-2-2111 provides that:

[A] construction contract provision that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract . . . for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party . . . is void as against the public policy of this state.⁷⁶⁸

The statute does allow indemnity provisions which act to indemnify a party for all negligence other than his own.⁷⁶⁹

An agreement to indemnify a person “against an act thereafter to be done is void if the act be known by such person, at the time of doing it, to be unlawful.”⁷⁷⁰ The courts have noted, however, that modern insurance contracts typically provide coverage for a host of tortious activities. Thus, “the need to reduce financial risks and promote economic stability in modern society has rendered this statute applicable only to conduct defined as criminal.”⁷⁷¹

⁷⁶⁷Mont. Code Ann. § 28-2-2111 (2005).

⁷⁶⁸ *Id.*

⁷⁶⁹ Mont. Code Ann. § 28-2-2111 in its entirety states:

(1) Except as provided in subsections (2) and (3), a construction contract provision that requires one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party or the other party's officers, employees, or agents is void as against the public policy of this state.

(2) A construction contract may contain a provision:

(a) Requiring one party to the contract to indemnify, hold harmless, or insure the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, only to the extent that the liability, damages, losses, or costs are caused by the negligence, recklessness, or intentional misconduct of a third party or of the indemnifying party or the indemnifying party's officers, employees, or agents; or

(b) Requiring a party to the contract to purchase a project-specific insurance policy, including but not limited to an owner's and contractor's protective insurance, a project management protective liability insurance, or a builder's risk insurance.

(3) This section does not apply to indemnity of a surety by a principal on a construction contract bond or to an insurer's obligation to its insureds.

(4) As used in this section, “construction contract” means an agreement for architectural services, alterations, construction, demolition, design services, development, engineering services, excavation, maintenance, repair, or other improvement to real property, including any agreement to supply labor, materials, or equipment for an improvement to real property.

⁷⁷⁰ Mont. Code Ann. § 28-11-302 (2005).

⁷⁷¹ *First Bank (N.A.)-Billings v. Transamerica Ins. Co.*, 679 P.2d 1217, 1220 (Mont. 1984).

A long standing statute in Montana also provides that, “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.”⁷⁷² Most cases have been careful to point out that this statutory provision⁷⁷³ applies to exculpatory clauses, but not to indemnity clauses. Contracts for indemnity purporting to relieve one from the results of his failure to exercise ordinary care are not ordinarily contrary to public policy.⁷⁷⁴ The *Ryan Mercantile* court, in addressing the predecessor statute to Mont. Code Ann. § 28-2-702, reasoned: “Neither law nor public policy prevents the ordinary contractor from buying from a third party indemnity from the pecuniary result of his own negligence. That is legitimate as insurance.”⁷⁷⁵ The agreement between the parties that the lessee would hold the lessor harmless from any judgment, was not contrary to public policy under the statute.⁷⁷⁶

While a recent Montana district court held that Mont. Code Ann. § 28-2-702 precluded a defendant from being indemnified for his own negligence, it is not clear that the underlying indemnity agreement would in any event even have been sufficient under the clear and unambiguous standard needed to uphold an indemnification for the sole or concurrent negligence of the indemnitee.⁷⁷⁷ The Supreme Court’s language was likewise not instructive as to the enforceability of the indemnity clause on public policy grounds, and it does not appear that this recent case would overrule the line of cases discussed above acknowledging the general validity of indemnity agreements.⁷⁷⁸

Montana has also prohibited by statute contractual indemnity claims against an employer for injuries to an employee for which a third-party has paid. An indemnitee cannot rely on a contractual indemnity agreement to circumvent the employer’s immunity under the worker’s compensation act:

For all employments covered under the Workers’ Compensation Act or for which an election has been made for coverage under this chapter, the provisions of this chapter are exclusive. Except as provided in part 5 of this chapter for uninsured employers and except as otherwise provided in the Workers’ Compensation Act, an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers’ Compensation Act or for any claims for contribution or indemnity

⁷⁷² Mont. Code Ann. § 28-2-702 (2005) (originally enacted 1895).

⁷⁷³ Mont. Code Ann. § 28-2-702.

⁷⁷⁴ *Id.*

⁷⁷⁵ *Ryan Mercantile*, 294 F.2d at 635.

⁷⁷⁶ *Id.* at 636.

⁷⁷⁷ *Langemo v. Montana Rail Link, Inc.*, 38 P.3d 782, 786 (2001).

⁷⁷⁸ *Id.*

asserted by a third person from whom damages are sought on account of such injuries or death.⁷⁷⁹

This statute has been applied to bar a claim for contractual indemnity against an employer who had paid workers' compensation benefits to the injured party.⁷⁸⁰

§ III – Indemnity Agreements as Insured Contracts or Incidental Contracts.

It does not appear that the Montana courts have addressed whether an agreement to indemnify another for the indemnitee's tort liability falls within the "insured contract" exception to the standard CGL policy exclusion for contractually assumed liability.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

In *Anaconda Co. v. General Accident Fire and Life Assurance Corp.*, the owner required his general contractor to name him as an additional insured on his liability policy, insuring against "risks of any kind relating to the construction" at owner's smelter facilities.⁷⁸¹ A subcontractor's employee was later injured when the owner's employee dropped a plank some thirty feet, striking and injuring the subcontractor's employee.⁷⁸² The injured employee filed suit against the owner, alleging that the negligence of the owner's employee caused his injury.⁷⁸³ The owner made a formal demand to the general contractor's insurer, requesting a defense, and the insurance company denied coverage.⁷⁸⁴ In the ensuing case to determine whether the insurer owed a duty to defend the owner, the Supreme Court overturned a lower court's entry of summary judgment in favor of the owner. Despite the seemingly broad language of coverage, the court stated that even though it was undisputed that the injured party was injured in the course of performing the underlying contract, questions of fact remained as to whether the owner's employees were performing work within the scope of the underlying contract when they caused the injury. While the contract did not state that the "injuring" party had to be acting within the scope of the contract, the court read this provision into the agreement. "Were we to focus merely on the activities of the injured workman and not the activities of the named insureds, we would render application of [the contract] overly broad and make [the insurer] the insurer of all [of the owner's] activities at the Smelter that resulted in injuries to anyone working pursuant to the contract, regardless of control and benefit. This Court will place no such burden on anyone."⁷⁸⁵

⁷⁷⁹ Mont. Code Ann. § 39-71-411 (2005).

⁷⁸⁰ *Raisler v. Burlington N. Ry.*, 717 P.2d 535 (Mont. 1985).

⁷⁸¹ *Anaconda Co. v. General Accident Fire and Life Assurance Corp.*, 616 P.2d 363 (Mont. 1980).

⁷⁸² *Id.* at 363-66.

⁷⁸³ *Id.*

⁷⁸⁴ *Id.*

⁷⁸⁵ *Id.* at 366.

The reported cases do not address the outcome of an indemnification agreement requiring the indemnitee be named an additional insured and in which the policy purports to grant coverage beyond the scope of the underlying agreement.

NEBRASKA

§ I – General Rules of Contractual Indemnification.

Generally, Nebraska law defines a contract of indemnity as “the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.”⁷⁸⁶ “An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.”⁷⁸⁷ Otherwise, the parties are presumed to intend that the indemnitee shall not be indemnified for a loss caused by his own negligence.⁷⁸⁸

The general rules governing construction and interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in determining rights and liabilities of the parties thereunder.⁷⁸⁹ An indemnity contract should be construed so as to ascertain and give effect to the intention of the parties to it, if that can be done consistent with legal principles.⁷⁹⁰ In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at the time of making the contract.⁷⁹¹

Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee.⁷⁹² In the absence of notice or tender of defense, the amount to be indemnified is a question of fact rather than being conclusively established by the prior judgment.⁷⁹³ Any failure to notify the indemnitor does not preclude recovery against the indemnitor on the indemnity contract, but leaves the indemnitee with the burden of proving the amount for which it is entitled to be indemnified.⁷⁹⁴

⁷⁸⁶ *Lyhane v. Durtschi*, 13 N.W.2d 130, 134 (Neb. 1944).

⁷⁸⁷ *Omaha Public Power Dist. v. Natkin & Co.*, 227 N.W.2d 864, 867 (Neb. 1975); *Peter Kiewit Sons Co. v. O'Keefe Elevator Co. Inc.*, 213 N.W.2d 731, 732 (Neb. 1974). See also *Anderson v. Nashua Corp.*, 560 N.W.2d 446, 450 (Neb. 1997).

⁷⁸⁸ *Peter Kiewit Sons Co.*, 213 N.W.2d at 733.

⁷⁸⁹ *Currency Services Inc. v. Passer*, 133 N.W.2d 19, 21 (Neb. 1965).

⁷⁹⁰ *Peter Kiewit Sons Co.*, 213 N.W.2d at 732.

⁷⁹¹ *Woodmen of World Life Ins. Soc. v. Peter Kiewit Sons' Co.*, 241 N.W.2d 674, 678 (Neb. 1976).

⁷⁹² *Insurance Co. of North America v. Hawkins*, 246 N.W.2d 878, 881 (Neb. 1976).

⁷⁹³ *Id.*

⁷⁹⁴ *Id.*

A cause of action for indemnity pursuant to the terms of an indemnity contract does not accrue until the loss occurs, i.e. moneys are paid by the indemnitee, thereby triggering the indemnity obligation.⁷⁹⁵ The statute of limitations for indemnity does not start to run until the indemnitee is found liable to a third party.⁷⁹⁶

Nebraska law allows indemnification by an employer to a third-party for injuries to the employer's employee.⁷⁹⁷ While the employee would not be able to directly maintain the action against the employer, based upon the immunity provided to the employer by the Nebraska Worker's Compensation Act, an express contract of indemnity is interpreted to create a contractual duty of reimbursement to the third-party, thereby circumventing the immunity afforded by the Worker's Compensation Act.⁷⁹⁸

§ II – Exceptions to General Rules of Contractual Indemnity.

The Nebraska legislature has enacted a statute which prohibits indemnification provisions in construction related contracts for a party's own negligence. Pursuant to Nebraska Revised Statute §25-21, 187(1):

In the event that 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 contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. This subsection shall not apply to construction bonds or insurance contracts or agreements.

Parties seeking to invoke the protection of this code section will need to raise it, as a failure to raise it may be deemed a waiver.⁷⁹⁹ This code section will not operate to invalidate a provision in a contract which requires one party to provide liability insurance for the sole negligence of the other party.⁸⁰⁰ Additionally, if there is an indemnification provision in a construction contract which includes indemnification for one's own negligence and includes obligations for indemnification in other circumstances, only the portion prohibited by section 25-21,187 is stricken from the

⁷⁹⁵ *Lyhane*, 13 N.W.2d at 135 (Neb. 1944).

⁷⁹⁶ *Wood River v. Geer-Melkus Constr. Co.*, 444 N.W.2d 305, 311 (Neb. 1989); *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 271 Neb. 810 (2006).

⁷⁹⁷ *Union Pacific Railroad Co. v. Kaiser Agricultural Chem. Co.*, 425 N.W.2d 872, 879 (Neb. 1988); *Harsh Int'l v. Monfort Indus.*, 662 N.W.2d 574, 580 (Neb. 2003).

⁷⁹⁸ *Id.*

⁷⁹⁹ *Day v. Toman*, 266 F.3d 831, 835 (8th Cir. 2001)

⁸⁰⁰ *Anderson*, 560 N.W.2d at 449.

indemnification clause and the language remaining may be interpreted to impose liability on the indemnitor.⁸⁰¹

In an unusual case involving interplay of Interstate Commerce Commission regulations and the common law, the Nebraska Supreme Court held that “an indemnification clause in a trip lease of operating equipment by a licensed motor carrier, subject to ICC regulations, which obligates the lessor to reimburse the lessee for any payment made on account of any accident, claim, or suit arising out of the operation of the equipment during the term of the lease is unenforceable as against public policy.”⁸⁰² The Court was concerned that such a clause would enable the lessee to circumvent the requirements of the Interstate Commerce Commission that authorized and required carrier lessees to exert actual control over the leased equipment and the borrowed drivers.⁸⁰³

§ III – Indemnity Agreements as Insured Contracts.

Nebraska law implicitly recognizes that the exclusion found in most insurance policies against coverage for liability assumed by the insured under any contract or agreement may bar coverage for agreements to indemnify another, depending upon the language of the exclusion.⁸⁰⁴ Similarly, where the policy specifically provides coverage for an “insured contract” which is defined under the policy as “that part of any other contract or agreement pertaining to your business ...under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization,” this express provision is viewed as an exception to the above-referenced exclusion, and coverage is deemed to exist provided the indemnification provision falls within the definition in the policy of “insured contract.”⁸⁰⁵ Generally, parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.⁸⁰⁶

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

An indemnitee may require another to insure losses incurred by reason of his or her own negligence if the contract contains express language to that effect or

⁸⁰¹ *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 443 N.W.2d 872, 875-876 (Neb. 1989).

⁸⁰² *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*, 207 N.W.2d 368, 371 (Neb. 1973).

⁸⁰³ *Id.*

⁸⁰⁴ *Royal Indem. Co. v. Aetna Casualty & Surety Co.*, 229 N.W.2d 183, 188 (Neb. 1975)(In a case involving an indemnification provision: “Although it is possible that the case might have quite simply been disposed of on the grounds that a clause in the insurance policy of Empire Insurance Company provided that the policy did not apply ‘to liability assumed by the insured under any contract or agreement,’ nevertheless, the court proceeded to point out that even if that clause were ignored . . .”).

⁸⁰⁵ *Day v. Toman*, 266 F.3d 831, 835-836 (8th Cir. 2001).

⁸⁰⁶ *Neff Towing Serv. v. United States Fire Ins. Co.*, 652 N.W.2d 604, 609-610 (Neb. 2002); *Mefferd v. Sieler & Co.*, 676 N.W.2d 22, 25 (Neb. 2004).

contains clear and unequivocal language established this intention.⁸⁰⁷ This is essentially the same standard applied to analyze the validity of indemnification agreements requiring one to indemnify another for the one's own negligence.⁸⁰⁸ The express language of Nebraska Revised Statute § 25-21, 187(1) provides that the prohibition on indemnity for one's own negligence does not apply to "insurance agreements." Although no case appears to have explicitly held that "insurance agreements," as that term is used in the statute, include agreements to insure which are found within the ambit of indemnification provisions, the law seems relatively clear that these insurance provisions are excluded from the statute's reach. In an unpublished opinion, the Court of Appeals of Nebraska implied that "insurance agreements," as defined by this statute, includes agreements to provide insurance which are contained in indemnification provisions.⁸⁰⁹ Similarly, the Supreme Court of Nebraska has held that this statute does not render an agreement to provide insurance for one's own negligence invalid because of its exception for insurance agreements.⁸¹⁰ The agreement in that case did not reference indemnity, however, but relied instead solely on insurance.⁸¹¹

NEVADA

§ I – General Rules of Contractual Indemnity.

Express agreements to indemnify are enforceable in Nevada, but they are strictly construed.⁸¹² Ambiguous indemnity contracts will be interpreted against the indemnitee, particularly when the indemnitee was the drafter of the agreement.⁸¹³ An agreement in which indemnity extends to the indemnitee for his own negligence is enforceable, but the provision "must clearly and unequivocally express the indemnitor's assumption of liability for the negligent acts of the indemnitee."⁸¹⁴ The requirement to "clearly and unequivocally" set forth the indemnitor's liability will only be satisfied by an express statement that the indemnitor is agreeing to indemnify the indemnitee for the indemnitee's own negligence, and a broad hold harmless clause will not satisfy this requirement.⁸¹⁵

⁸⁰⁷ *Anderson*, 560 N.W.2d at 449; see also *Peter Kiewit Sons Co.*, *supra*.

⁸⁰⁸ See, e.g., *Omaha Public Power Dist*, 227 N.W.2d at 867; *Peter Kiewit Sons Co.*, 213 N.W.2d at 732.

⁸⁰⁹ *Cole v. Kiewit Constr. Co.*, 1997 Neb. App. LEXIS 79, p. 18 (Neb. Ct. App. 1997).

⁸¹⁰ *Anderson*, 560 N.W.2d at 449.

⁸¹¹ *Id.*

⁸¹² *Calloway v. City of Reno*, 939 P.2d 1020, 1028 (Nev. 1997). The *Calloway* decision has since been withdrawn and replaced by 993 P.2d 1259 (Nev. 2000). However, the republished decision did not address the indemnification issues mentioned above. Accordingly, the earlier decision remains good law as for the propositions set forth above.

⁸¹³ *Id.*

⁸¹⁴ *Id.*

⁸¹⁵ *Id.*

§ II – Exceptions to General Rules of Contractual Indemnity.

In *Calloway v. City of Reno*, the Nevada Supreme Court addressed an indemnity provision contained in the application for a building permit and mentioned no rule of law preventing, on the basis of public policy, the indemnification of an indemnitee for his own negligence in the construction context.⁸¹⁶ Accordingly, such provisions are presumably enforceable subject to the rule of strict construction noted above, and the requirement of clear and unequivocal language.

As with other areas of law, Nevada case law on indemnity is not extensive, and Nevada courts consequently take guidance from the case law of other jurisdictions. Since most states regard indemnity clauses that indemnify the indemnitee for his own negligence (for example, in the construction and mining context) as void on principles of public policy, it is easy to envision a scenario where it will be argued that Nevada should adopt a similar view. The counter-argument is that other states precluding indemnity in these contexts have codified public policy in the form of state statutes. Nevada has not. Accordingly, it might be argued that, in the absence of such statutes, indemnification agreements are enforceable in whatever context they may arise.

Additionally, one might argue that the public policy behind the Nevada statutes which address the common law theories of equitable indemnification and contribution might apply to contractual indemnity. NRS § 17.225(1) states that “where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.” This same statute further states that no tortfeasor is compelled to contribute beyond his or her own equitable share of the entire liability – which would seem to conflict with an indemnity provision covering the indemnitee’s own negligence.⁸¹⁷ However, NRS § 17.265 provides:

Except as otherwise provided in NRS § 17.245 [addressing good faith settlements], the provisions of NRS §§ 17.225 to 17.305, inclusive, do not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution.

While the “right of indemnity under existing law” is not defined by statute, it could certainly be argued that *Calloway* qualifies as “existing law” which establishes a right to indemnity for one’s own negligence, as long as the clause is sufficiently clear.

§ III – Indemnity Agreements as Insured Contracts.

The Nevada courts have not considered whether an agreement to indemnify is an “insured contract” within the meaning of the exception of a liability insurance policy to the form exclusion for contractually assumed liability. But Nevada rules of contract interpretation will guide this determination, whereby “the language should be examined from the viewpoint of one not trained in law or in the insurance

⁸¹⁶ See generally, *id.*

⁸¹⁷ NRS § 17.225(2).

business; terms should be understood in their plain, ordinary and popular sense.”⁸¹⁸ “In particular, an insurer wishing to restrict the coverage of a policy should employ language which clearly and distinctly communicates to the insured the nature of the limitation.”⁸¹⁹ Any ambiguity or uncertainty in an insurance policy must be resolved against the insurer and in favor of the insured,⁸²⁰ but the contract will also be given a construction which will fairly achieve its object of providing coverage for the loss to which the insurance relates.⁸²¹

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

There is nothing in Nevada law to indicate that indemnity agreements requiring insurance are to be treated any differently than any indemnity provision silent on the purchase of insurance. That is, they will be enforced in accordance with *Calloway*, *supra*.⁸²²

NEW HAMPSHIRE

§ I – General Rules of Contractual Indemnity.

Contracts of indemnification which purport to indemnify a party against its own wrongful acts are looked upon with disfavor in New Hampshire.⁸²³

While indemnification agreements which seek to relieve a party from the consequences of its own future negligence are strictly construed, these contracts are generally not prohibited or void on public policy grounds.⁸²⁴ Such agreements will be enforced where the indemnitor clearly and unequivocally agrees by the terms of the contractual agreement to indemnify the indemnitee against his own negligence.⁸²⁵ “The indemnity provision, however, need not state explicitly the parties’ intent to provide indemnity for the negligence of another. Express language is not necessary ‘where the parties’ intention to afford protection for another’s negligence is clearly evident.’”⁸²⁶

An agreement to indemnify for “any and all claims and demands, actions and causes of action, damages, costs, loss of service, expenses and compensation,

⁸¹⁸ *National Union Fire Insurance Co. v. Reno’s Executive Air, Inc.*, 682 P.2d 1380, 1382 (Nev. 1984); *see also Home Indemnity Co. v. Desert Palace, Inc.*, 468 P.2d 19, 21 (Nev. 1970).

⁸¹⁹ *Id.*; *see also Harvey’s Wagon Wheel v. MacSween*, 606 P.2d 1095, 1098 (Nev. 1980).

⁸²⁰ *Harvey’s* at 1098.

⁸²¹ *National Union*, 682 P.2d at 1383.

⁸²² *Calloway*, *supra*.

⁸²³ *See Merimac Sch. Dist. V. Nat’l Sch. Bus. Serv., Inc.*, 661 A.2d 1197 (N.H. 1995).

⁸²⁴ *Id.*

⁸²⁵ *Id.* at 1199.

⁸²⁶ *Id.* (internal punctuation omitted).

including, but no [sic] limited to any and all claims for personal injury and/or death and property damages which may, in any way, arise from or out of the operations of the [indemnitor] pursuant to the terms of this Agreement,” was broad enough to reach the indemnitee’s own negligence where it arose in connection with the indemnitor’s operations under the contract.⁸²⁷

An indemnitee can maintain an action for indemnity against the employer of an injured party despite the worker’s compensation bar, as the contractual right to indemnity is an independent obligation owed to the indemnitee.⁸²⁸

§ II – Exception to General Rules of Contractual Indemnity.

New Hampshire expressly prohibits indemnity of design professionals.⁸²⁹ In this regard,

Any agreement or provision whereby an architect, engineer, surveyor or his agents or employees is sought to be held harmless or indemnified for damages and claims arising out of circumstances giving rise to legal liability by reason of negligence on the part of any said persons shall be against public policy, void and wholly unenforceable.⁸³⁰

§ III – Indemnity Agreements As Insured Contracts.

An insured’s contractual agreement to indemnify another, in relation to its business, constitutes an “incidental contract” within the meaning of a policy covering “any contract or agreement relating to the conduct of the named insured’s business.”⁸³¹

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

The Supreme Court of New Hampshire has addressed the effect of an agreement to purchase insurance in the context of a “waiver of subrogation” executed in conjunction with an agreement to indemnify.⁸³² Although exculpatory agreements are generally unenforceable in New Hampshire, a “waiver of subrogation,” by which parties agree to waive claims against each other and look to insurance for their losses, is permissible:

[Waivers of subrogation] exist in the contract as part of a larger comprehensive approach to indemnifying the parties involved in the construction project, allocating the risks involved, and spreading the costs of different types of insurance. These paragraphs do not present the same

⁸²⁷ *Id.*

⁸²⁸ *Wentworth Hotel v. F. A. Gray, Inc.*, 110 N.H. 458, 272 A.2d 583 (1970).

⁸²⁹ N.H. REV. STAT. ANN. § 338-A:1 (2004).

⁸³⁰ *Id.*

⁸³¹ *White Mountain Cable Constr. Corp. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993).

⁸³² *Chadwick v. CSI, Ltd.*, 137 N.H. 515, 629 A.2d 820 (1993).

concerns as naked exculpatory provisions . . . the insurance provisions of the standard AIA contract are not designed to unilaterally relieve one party from the effects of its future negligence, thereby foreclosing another party's avenue of recovery. Instead, they work to ensure that injuries or damage incurred during the construction project are covered by the appropriate types and limits of insurance, and that the costs of that coverage are appropriately allocated among the parties.⁸³³

Even where there is a parallel indemnity agreement, such that the parties indicate an intention that one would assume the risk of loss, a waiver of subrogation clause may preclude a claim between the contracting parties. In *Chadwick*, the waiver of subrogation clause provided that it was effective even though one party may owe an indemnity obligation,⁸³⁴ and as such, a waiver of subrogation clause that by its terms trumps any parallel indemnity obligation will control.

NEW JERSEY

§ I – General Rules of Contractual Indemnity.

New Jersey courts generally recognize the enforceability of express indemnification agreements contained within commercial contracts.⁸³⁵ Parties in a commercial setting are allowed to freely negotiate the allocation of tort liability regardless of fault.⁸³⁶ Generally, agreements to indemnify another for the indemnitee's own negligence, either partial or sole, are not enforceable unless an intent to indemnify is unequivocally spelled out in the contract.⁸³⁷ There is no general public policy impediment to an indemnitor undertaking to indemnify the indemnitee with respect to the indemnitee's own negligence.⁸³⁸ "[I]ndemnification agreements . . . may be worded so broadly and clearly as to provide for absolute indemnification of the [indemnitee], even though the [indemnitee]'s negligence, sole or concurring, active or passive, caused the injury."⁸³⁹

Indemnification agreements allocating tort liability are interpreted in accordance with the general rules governing construction of contracts, but when an indemnity clause is ambiguous, it is strictly construed against the indemnitee.⁸⁴⁰ Thus, "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

⁸³³ *Id.*, 137 N.H. at 523.

⁸³⁴ *Id.* at 524.

⁸³⁵ *Mantilla v. NC Mall Assocs.*, 770 A.2d 1144, 1148-49 (N.J. 2001).

⁸³⁶ *Gulf Oil Corp. v. ACF Indust., Inc.*, 534 A.2d 1025, 1028 (N.J. Sup. Ct. App. Div. 1987); *Stier v. Shop Rite of Manalapan*, 492 A.2d 1055 (N.J. Sup. Ct. App. Div. 1985).

⁸³⁷ *Mantilla*, 770 A.2d at 1148; *Ramos v. Browning Ferris Indus., Inc.*, 510 A.2d 1152, 1159 (N.J. 1986).

⁸³⁸ *Leito v. Damon G. Douglas Co.*, 693 A.2d 1209, 1211 (N.J. Sup. Ct. App. Div. 1997).

⁸³⁹ *Stier v. Shop Rite of Manalapan*, 492 A.2d 1055, 1059 (N.J. Sup. Ct. App. Div. 1985); *Romnell v. United States Steel Corp.*, 168 A.2d 437, 443 (N.J. Sup. Ct. App. Div. 1961).

⁸⁴⁰ *Ramos*, 510 A.2d at 1159; *Mantilla*, 770 A.2d at 1150-51.

terms.”⁸⁴¹ To bring a negligent indemnitee within the scope of an indemnification agreement, the agreement must specifically reference the negligence of fault of the indemnitee.⁸⁴²

Although agreements indemnifying the indemnitee for its own negligent acts are “perhaps antithetical to the policy of compelling tortfeasors to bear responsibility for conduct heedless of the risk to others,” the practical result of such agreements, whether through traditional insurance or otherwise, is the rightful allocation of financial responsibility as part of the general bargaining process.⁸⁴³

§ II – Exceptions to General Rules of Contractual Indemnity.

There is a statutory prohibition on indemnification agreements related to the construction, repair, maintenance or service of buildings, highways and railroads.⁸⁴⁴ While the statute barred all indemnification agreements within the scope of the statute when originally enacted, a 1983 amendment extends the prohibition only to contracts which indemnify for the indemnitee’s “sole negligence.” The statute reads in relevant part:

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 . . . purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents, or employees, is against public policy and is void and unenforceable, provided that this section shall not affect the validity of any insurance contract . . . or agreement issued by an authorized insurer.

One purpose of the amendment was to allow indemnification in the case of contributory negligence.⁸⁴⁵ Consequently, there is no public policy bar for a party to a construction contract to indemnify another for the indemnitee’s own negligence, so long as the indemnitee is not solely at fault.⁸⁴⁶ This principle “derives from the judicial recognition that ordinarily the financial responsibility for the risk of injury during the course of a construction project is shifted in any event by the primary parties to their insurance carriers.”⁸⁴⁷ The impact of the indemnity agreement is to allow the parties to allocate between themselves the total acquired insurance

⁸⁴¹ *Ramos*, 510 A.2d at 1159.

⁸⁴² *Azurak v. Corporate Property Investors*, 814 A.2d 600, 601 (N.J. 2003).

⁸⁴³ *Leitao*, *supra*; see also *Jamison v. Ellwood Consol. Water Co.*, 420 F.2d 787, 789 (3rd Cir. 1970).

⁸⁴⁴ N.J. Stat. § 2A:40A-1.

⁸⁴⁵ L. 1983, c. 107; see *Secallus v. Muscarelle*, 586 A.2d 305, 306-07 (N.J. Super. Ct. App. Div. 1991).

⁸⁴⁶ *Leitao*, *supra*, at 1211; *Carvalho v. Toll Bros. & Devs.*, 675 A.2d 209, 215 (N.J. 1996); *Bradford v. Kupper Assoc.*, 662 A.2d 1004 (N.J. Super. Ct. App. Div. 1995).

⁸⁴⁷ *Doloughy v. Blancher Constr. Corp.*, 352 A.2d 613 (N.J. 1976, *overruled on other grounds*, *Azurak*, 814 A.2d at 601).

protection for the project.⁸⁴⁸ “The parties ought to be free to determine how the insurance burdens will be distributed between them and who will pay for a specific coverage for a specific risk.”⁸⁴⁹

The prohibition for indemnification of a third party’s “sole negligence” is inapplicable to agreements “made directly with a railroad relative to construction, alteration, repair, maintenance or access upon, under or across the right-of-way of an operating railroad.”⁸⁵⁰

Agreements attempting to indemnify architects, engineers, or surveyors for losses resulting from their sole negligence are against public policy and are statutorily void and unenforceable.⁸⁵¹ The statute provides in relevant part:

A covenant, promise, agreement . . . whereby an architect, engineer, surveyor or his agents . . . shall be indemnified or held harmless for damages . . . caused by or resulting from the sole negligence of an architect, engineer, surveyor or his agents . . . arising either out of (1) the preparation or approval . . . of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions . . . provided such giving or failure to give is the cause of the damage claim, loss or expense, is against public policy and is void and unenforceable.⁸⁵²

This statute is inapplicable to limitation of liability clauses, as distinguished from agreements to indemnify.⁸⁵³

§ III – Indemnity Agreements as Insured Contracts.

New Jersey law recognizes that an indemnification agreement can constitute an “insured contract” such that the standard exclusion in a liability insurance policy for contractually assumed liability does not apply to an insured’s agreement to indemnify another.⁸⁵⁴ While an insured’s common law duty to indemnify is not covered under an insurance policy, an insured’s contractual agreement to indemnify another constitutes an assumption of “tort liability” giving rise to an “insured contract” and application of the exception to the exclusion.⁸⁵⁵

⁸⁴⁸ *Id.*

⁸⁴⁹ *Leitao, supra*, at 1211.

⁸⁵⁰ N.J. Stat. § 2A:40A-3.

⁸⁵¹ N.J. Stat. § 2A:40A-2.

⁸⁵² *Id.*

⁸⁵³ *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159, 164 (N.J. Super. Ct. Law Div. 1996).

⁸⁵⁴ *Hackensack Water Co. v. General Accident Fire & Life Assurance Co.*, 202 A.2d 706 (N.J. Super. Ct. App. Div. 1964).

⁸⁵⁵ *Id.*

Similarly, courts have recognized that “[i]t is not unusual for liability insurance policies to exclude from coverage liability assumed by an insured under a contract not defined in the policy, generally one in which the insured agrees to indemnify to save harmless a third party.”⁸⁵⁶ The general rule with respect to exclusionary provisions is that they do not preclude coverage, even if liability is assumed by contract, where the insured would have been liable regardless of his contractual undertaking.⁸⁵⁷ Put another way, the liability assumed by a contract not defined in the underlying policy is excluded from coverage under such exclusionary clause only where the contractual obligation was one which would not have been independently imposed upon the insured by law.⁸⁵⁸ Although these general rules are instructive, it is important to note that no New Jersey court has specifically applied these rules to a contract containing an “insured contract” exception to the general exclusion for contractually assumed liability.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Mutual agreements to shift the risk of loss or damage to insurance do not violate the public policy of New Jersey.⁸⁵⁹ The distribution of risk in this manner entails no elements of injustice and does not conflict with the public interest.⁸⁶⁰ The rule is stated as follows:

[P]rovisions in leases and other commercial agreements . . . whether couched in language of *indemnity or exculpation* or imposing obligations with respect to obtaining insurance, are to be viewed realistically as normal, common-sense efforts by businessmen to allocate between them the cost or expense of risks of property damage. They contemplate that such risks will be covered by insurance, and the only practical feature of such bargains ordinarily is the decision as to who is to bear the cost of insurance.⁸⁶¹

Under the foregoing rule, mutual agreements to allocate risks to insurers will be realistically construed to provide “mutual exculpation” to the bargaining parties and to “accord with the understanding of reasonable businessmen.”⁸⁶² The bargaining parties are deemed to have agreed to look solely to their insurance and to have

⁸⁵⁶ *Karadis Bros. Painting Co., v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 292 A.2d 42 (N.J. Super. Ct. Ch. Div. 1972).

⁸⁵⁷ *Id.*

⁸⁵⁸ *Id.*

⁸⁵⁹ *Continental Ins. Co. v. Boraie*, 672 A.2d 274, 277 (N.J. Sup. Ct. Law Div. 1995); *Mayfair Fabrics v. Henley*, 234 A.2d 503 (N.J. Sup. Ct. Law Div. 1967).

⁸⁶⁰ *Mayfair Fabrics*, *supra*, at 508.

⁸⁶¹ *Mayfair Fabrics*, *supra*, at 507 (emphasis added); *see also Buscaglia v. Owens-Corning Fiberglass*, 172 A.2d 703 (N.J. Sup. Ct. App. Div. 1961), *aff’d*, 178 A.2d 208 (N.J. 1962).

⁸⁶² *Mayfair Fabrics*, *supra*, at 507; *Mortgage Corp. of N.J. v. Manhattan Sav. Bank*, 177 A.2d 326 (N.J. Sup. Ct. Law Div. 1962).

relieved each other from liability.⁸⁶³ At least one New Jersey court has held that, “parties should be free to distribute this burden [the risk of injury] as they desire, and that the court should therefore approach a contract of *indemnity* in the same manner as any other contract which distributes various insurance burdens between and among the parties.”⁸⁶⁴

Although New Jersey courts have applied the foregoing rules to indemnification agreements which are specifically tied to a promise to obtain insurance to cover the indemnity obligation,⁸⁶⁵ no New Jersey court has discussed whether such an arrangement to procure insurance runs afoul of general public policy prohibitions on indemnification agreements. The general approach taken by the courts seems to imply that indemnity agreements will not be subject to general public policy prohibitions if they provide that the indemnitor will obtain liability insurance sufficient to cover the potential risk involved, however, this issue has never been specifically addressed.

The New Jersey courts have not addressed the extent to which an insurer’s obligations to an indemnitee pursuant to an additional insured endorsement interplay with the underlying agreement on the part of the insured to indemnify the additional insured. New Jersey applies the general rule respecting the interpretation of policies of insurance, however, whereby they are strictly construed against the insurer and in favor of the insured. It is consequently doubtful that an insurer would prevail on an argument that its duty to indemnify an additional insured under a policy of liability insurance could be limited by the named insured’s underlying indemnity obligation where no such limitation is placed on the coverage at the time it is written.

NEW MEXICO

§ I – General Rules of Contractual Indemnity.

Express contracts of indemnity are enforceable under New Mexico law.⁸⁶⁶ “Enforcing express contracts of indemnity is no more than enforcing the loss distribution agreed to by the contracting parties.”⁸⁶⁷ Accordingly, there exists strong public policy to enforce indemnity contracts, “unless they clearly contravene some positive law or rule of public morals.”⁸⁶⁸

New Mexico does not require an express reference to the indemnitee’s negligence as a condition precedent to his being held harmless for his own negligence.⁸⁶⁹ Rather, broad indemnification provisions which hold the indemnitee

⁸⁶³ *Mayfair Fabrics*, *supra*, at 507.

⁸⁶⁴ *Cozzi*, *supra*, at 74 (emphasis added).

⁸⁶⁵ See generally, *Mayfair Fabrics*, *supra*; *Buscaglia*, *supra*; *Cozzi*, *supra*.

⁸⁶⁶ *City of Artesia v. Carter*, 610 P.2d 198 (N.M. App. 1980).

⁸⁶⁷ *Id.* at 201.

⁸⁶⁸ *Id.* (finding that the workmen’s compensation statute does not bar an indemnity claim by a third party against an employer when that claim is based on an express claim of indemnity).

⁸⁶⁹ *Eichel v. Goode, Inc.*, 680 P.2d 627 (N.M. 1984).

harmless for “all actions, suits, demands, damages, losses or expenses” have been held sufficient to provide indemnification for losses caused by the actions of the indemnitee.⁸⁷⁰ But the scope of the provision must be clearly drafted. Applying New Mexico law, the Tenth Circuit has held that the language of an indemnification provision must clearly and unequivocally set forth the intention of the parties to provide indemnification to the indemnitee for his own negligence.⁸⁷¹ Broad clauses, such as that mentioned above, must clearly manifest an intent to cover all damages in order to be deemed to contain the unequivocal terms needed to enforce the indemnification.⁸⁷²

§ II – Exceptions to General Rules of Contractual Indemnity.

New Mexico limits by statute the availability of contractual indemnity in construction contracts. New Mexico Statute (“N.M. Stat.”) § 56-7-1(A) provides that indemnity provisions in construction contracts that purport to hold the indemnitee harmless from injury or damages caused or resulting “in whole or in part” from the indemnitee’s own acts or omissions are against public policy and unenforceable.⁸⁷³ Pursuant to N.M. Stat. § 56-7-1(E), “indemnify” and “hold harmless” are defined to include requirements to name the indemnified party as an additional insured in the indemnitor’s insurance coverage “for the purpose of providing indemnification for any liability not otherwise allowed in this section.”⁸⁷⁴

The statute articulates the circumstances under which indemnity provisions and insurance clauses in a construction contract will be held valid. First, clauses that indemnify the indemnitee for losses caused by or arising from the acts or omissions of the indemnitor will be enforceable.⁸⁷⁵ Second, N.M. Stat. § 56-7-1(B)(2) clarifies that provisions requiring a contractor to purchase a “project-specific insurance policy” are valid.⁸⁷⁶

Based upon the broad “in whole or in part” language of N.M. Stat. § 56-7-1(A), New Mexico courts will invalidate expansive indemnification clauses.⁸⁷⁷ The indemnification provision need not mention the negligence of the indemnitee to be found unenforceable. Rather, when the scope of an indemnity is broad enough to include the acts or omissions of the indemnitee, it will be invalidated. Moreover, once an indemnification provision is found to be in violation of the New Mexico

⁸⁷⁰ *Id.* at 631.

⁸⁷¹ *Tyler v. Dowell, Inc.*, 274 F.2d 890, 895 (10th Cir. 1960)

⁸⁷² *Metropolitan Paving Co. v. Gordon Herkenhoff & Associates, Inc.*, 341 P.2d 460, 463 (N.M. 1959).

⁸⁷³ N.M. STAT. § 56-7-1(A)

⁸⁷⁴ N.M. STAT. § 56-7-1(E).

⁸⁷⁵ N.M. STAT. § 56-7-1(B)(1).

⁸⁷⁶ N.M. STAT. § 56-7-1(B)(2).

⁸⁷⁷ See *Sierra v. Garcia*, 746 P.2d 1105 (N.M. 1987) (finding an indemnification provision which indemnified the contractor and owner from damages and losses “however caused resulting directly or indirectly from or connected with the performance of this subcontract” to run afoul of N.M. Stat. § 56-7-1 (A)); see also *Metropolitan Paving Co.*, 341 P.2d at 463.

statute, courts will not redact the offending portions and enforce the remaining indemnity obligations. Instead, the entire indemnity clause is voided.⁸⁷⁸

New Mexico has a similar anti-indemnity statute pertaining to contracts related to “any well for oil, gas, or water, or mine for any mineral.”⁸⁷⁹ In this context, any agreement that purports to indemnify the indemnitee for damages “arising from the sole or concurrent negligence of the indemnitee” is void and unenforceable.⁸⁸⁰ New Mexico courts have interpreted this provision to mean “that the indemnitee cannot contract away liability for his own percentage of negligence.”⁸⁸¹

Like the statutory prohibition on certain construction related indemnity agreements, the statute invalidating certain indemnity agreements in the mining context also directly addresses insurance contracts. Specifically, N.M. Stat. § 56-7-2 (C) provides:

A provision in an insurance contract indemnity agreement naming a person as an additional insured or a provision in an insurance contract or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement described in Subsections A and B of this section, be void, is against public policy and void.

The New Mexico legislature has acted to prevent additional insured loopholes to its anti-indemnification statute. This statutory provision comports with decisions of the New Mexico Supreme Court, holding that allowing an indemnitor to provide insurance to cover an indemnitee for the indemnitee’s own negligence contradicts New Mexico public policy to promote safety.⁸⁸²

§ III – Indemnity Agreements as Insured Contracts.

There is no New Mexico case law addressing coverage for an agreement to indemnify as a “insured contract.” Where unambiguous, however, an express policy exclusion for an insured’s agreement to indemnify a third party will be enforced.⁸⁸³ “The purpose of these contractual exclusion clauses is not to make the insurer

⁸⁷⁸ *Sierra*, 746 P.2d at 1105.

⁸⁷⁹ N.M. Stat. § 56-7-2(A).

⁸⁸⁰ *Id.*; see also *Guitard v. Gulf Oil Co.*, 670 P.2d 969 (N.M. App. 1983).

⁸⁸¹ *Guitard*, 670 P.2d at 972.

⁸⁸² First, the public policy behind § 56-7-2(A), is to promote safety. The indemnitee, usually the operator of the well or mine, will not be allowed to delegate to subcontractors his duty to see that the well or mine is safe. Our interpretation furthers the public policy behind the statute, which is to promote safety. Both the operator and the subcontractor will have incentive to monitor the safety of the operation knowing that they will be responsible for their respective percentage of negligence.

Amoco Production Co. v. Action Well Service, Inc., 755 P.2d 52, 55 (N.M. 1988).

⁸⁸³ *Bernalillo County Deputy Sheriff’s Ass’n v. County of Bernalillo*, 845 P.2d 789 (N.M. 1992).

underwrite its insured's contracts, but to limit coverage to the insured's tort liability."⁸⁸⁴

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

There is nothing in New Mexico case law to indicate that indemnification agreements that require the indemnitor to procure insurance to cover his indemnification obligations impact the enforceability of the indemnity clause. However, it should be noted that an indemnification agreement that is otherwise invalid will not be validated simply because the obligation is insured.⁸⁸⁵ The plain language of N.M. STAT. § 56-7-1 and § 56-7-2 precludes such an outcome.⁸⁸⁶

NEW YORK

§ I – General Rules of Contractual Indemnity.

Contractual agreements to indemnify are enforceable in New York.⁸⁸⁷ Such agreements are strictly construed, however, and a duty to indemnify will not be found unless there is manifestation of a "clear and unmistakable intent to indemnify."⁸⁸⁸ If the parties' intent is unclear from the writing, the court is required to consider extrinsic evidence of intent, and the intent must be "unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion."⁸⁸⁹

While "it is well accepted that one cannot ordinarily be indemnified for its own negligence"⁸⁹⁰ under New York law, where there is "unmistakable intent" to do so, indemnification for the indemnitee's own negligence will be enforced.⁸⁹¹ By way of example, an agreement to indemnify for "any and all loss . . . occasioned directly or indirectly by the act of negligence of the indemnitor or otherwise . . ." expresses a

⁸⁸⁴ *Id.* at 793 (citing, *Commercial Union Insurance Co. v. Basic American Medical, Inc.*, 703 F.Supp. 629, 632-33 (E.D. Mich. 1989)).

⁸⁸⁵ *Amoco Production*, 755 P.2d at 55.

⁸⁸⁶ See N.M. STAT. §§ 56-7-1(E); 56-7-2(C) (invalidating the practice of using insurance to avoid the anti-indemnification policies of the State).

⁸⁸⁷ *Haynes v. Kleinewefers & Lembo Corp.*, 921 F.2d 453 (2nd Cir. 1990).

⁸⁸⁸ *Heimbach v. Metropolitan Transp. Auth.*, 553 N.E.2d 242 (N.Y. 1990) (articulating the standard one must satisfy in order to have a valid and enforceable indemnity agreement); *Bank of Am. Corp. v. Braga Lemgruber*, 385 F. Supp. 2d 200, 226 (S.D.N.Y. 2005) (same).

⁸⁸⁹ *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 51 (2nd Cir. 1993).

⁸⁹⁰ *Wells Fargo Financial, Inc. v. Fernandez*, 2001 U.S. Dist. LEXIS 162, at *6 (S.D.N.Y. 2001).

⁸⁹¹ See *Rolon v. U.S. Amada, Ltd.*, 1997 U.S. Dist. LEXIS 18315, at *14-15 (S.D.N.Y. 1997).

clear intent to indemnify another for the indemnitee's negligence.⁸⁹² Likewise, an agreement providing for indemnification "whether . . . damages or injuries be attributable to negligence of the contractor or his employees or otherwise," extends indemnity for the indemnitee's own negligence.⁸⁹³

The extent to which a contractual agreement to indemnify will be enforced in the case of an indemnitee's own negligence is also impacted by common law concepts of active, as opposed to merely passive, negligence. Where an indemnitee is actively negligent, even greater scrutiny is applied to the indemnification clause.⁸⁹⁴ Agreements to indemnify which were upheld in the case of an indemnitee's active negligence include an agreement to hold harmless the indemnitee "against all claims and demands . . . of whatsoever kind or nature"⁸⁹⁵ and an agreement to indemnify "against any and all liability . . . including any and all expense, legal or otherwise."⁸⁹⁶

On the other hand, New York courts disfavor catchall phrases that attempt to seek broadly sweeping indemnification. For example, a phrase indemnifying for "other obligations and liabilities arising in the ordinary course of business" fails to clearly establish an unmistakable intent to assume an obligation to indemnify.⁸⁹⁷ Further, one New York court found that words of limitation following the terms of the indemnity did not demonstrate "unmistakable intent" to indemnify for the indemnitee's own negligence.⁸⁹⁸

§ II – Exceptions to General Rules of Contractual Indemnity.

By statute in New York, a construction agreement containing an indemnification clause requiring the promisor to indemnify the promisee in relation to liability arising out of injuries caused by the promisee is against public policy and

⁸⁹² *Levine v. Shell Oil Co.*, 269 N.E.2d 799 (N.Y. 1971) (listing cases which upheld indemnification language); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 19 (2nd Cir. 2002) ("[W]here there is all-encompassing language in an indemnification agreement, the New York Court of Appeals has divined the 'unmistakable intent of the parties' to indemnify against the indemnitee's negligent acts.").

⁸⁹³ *Jordan v. City of New York*, 3 A.D.2d 507, 511 (N.Y. App. Div. 1957) (a city can recover against the contractor if the contract affirmatively indemnifies it against its own active negligence or such intention is expressed in unequivocal terms), *aff'd*, 5 N.Y.2d 723 (1958).

⁸⁹⁴ *Rolon*, 1997 U.S. Dist. LEXIS 18315, at *14-15.

⁸⁹⁵ *Kurek v. Port Chester Housing Auth.*, 18 N.Y.2d 450, 455-56 (N.Y. 1966).

⁸⁹⁶ *Levine*, *supra*.

⁸⁹⁷ *Haynes*, 921 F.2d at 457-58 (affirming summary judgment of the district court challenged by appellant company that dismissed appellant's counterclaim against appellee corporation for indemnification, which was sought according to the terms of the parties' sale and purchase agreement for reimbursement for the settlement of a personal injury case. The agreement lacked the indemnification obligation because it did not indicate an unmistakable intent to reimburse - purchase and sale agreement provided for the assumption of certain enumerated liabilities as well as "other obligations and liabilities arising in the ordinary course of... business")(further holding that if the issue had been over the enumerated liabilities, then indemnification would be valid).

⁸⁹⁸ *Heimbach*, *supra* (liability upheld on other grounds as Court held that tort liability was expressly assumed rather than relying on indemnification principles).

unenforceable.⁸⁹⁹ An indemnification agreement between a general contractor and subcontractor can only be enforced where the general contractor has been found partially negligent in an action brought by an employee of the subcontractor against the general.⁹⁰⁰ If indemnification agreements contemplate full, rather than partial, indemnification, the agreements are unenforceable under the statute.⁹⁰¹ The relevant statute provides in pertinent part:

[a] covenant, promise, agreement or understanding in, or in connection with ... a contract or agreement relative to the construction, alteration, repair or maintenance of a building ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.⁹⁰²

The statute was enacted to prevent the prevalent practice in the construction industry of requiring subcontractors to assume liability for the negligence of others.⁹⁰³ The New York legislature concluded that such “coercive” bidding requirements unnecessarily increased the cost of construction by limiting the number of contractors able to obtain the necessary hold harmless insurance and unfairly imposed liability on subcontractors for the negligence of others over whom they had no control.⁹⁰⁴

One may not be indemnified for intentional criminal conduct or intentional tortious conduct,⁹⁰⁵ or willful, reckless or grossly negligent misconduct,⁹⁰⁶ but one whose intentional act causes an unintended injury may be indemnified.⁹⁰⁷ Other exceptions to the general rule allowing indemnification include acts of bad faith, breach of trust, dishonesty, willful, reckless or grossly negligent misconduct, and self-dealing.⁹⁰⁸

⁸⁹⁹ *Potter v. M.A. Bongiovanni, Inc.*, 271 A.D.2d 918 (N.Y. App. Div. 2000); *Yansak v. Blackburn Group, Inc.*, 2004 NY Slip Op 24564, at *5 (N.Y. Misc. 2004).

⁹⁰⁰ *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 794-95 (N.Y. 1997).

⁹⁰¹ General Obligations Law § 5322.1. *Itri Brick & Concrete, supra*. (however, the indemnity contract is enforceable if it is found that contractor was free from negligence and instead issue centers around vicarious liability).

⁹⁰² General Obligations Law § 5322.1 [1].

⁹⁰³ *Itri Brick & Concrete, supra*.

⁹⁰⁴ *Id.*

⁹⁰⁵ *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 400 (N.Y. 1981).

⁹⁰⁶ *Id.*

⁹⁰⁷ *Id.*

⁹⁰⁸ *In re: Joan & David Halpern Inc.*, 248 B.R. 43 (2000).

§ III – Indemnity Agreements as Insured Contracts.

New York impliedly recognizes that an insured's agreement to indemnify another constitutes an "insured contract" within the meaning of the exception in the form general liability insurance policy to the exclusion for contractually assumed liability.⁹⁰⁹ In another case, a contract to indemnify another was deemed to constitute "liability assumed under a contract."⁹¹⁰ An insured contract drafted with "unmistakable intent" language is valid.⁹¹¹

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

New York courts have not specifically addressed whether the existence of an insurance policy naming the indemnitee as an "additional insured" and providing coverage in an amount or type greater than what was promised under the indemnification agreement entitles the indemnitee to coverage/indemnification beyond the scope of the original indemnity agreement.

New York courts may, however, potentially use an agreement to procure insurance as evidence of the scope of a given indemnity agreement. For example, in *Covert v. Binghamton*⁹¹², the court reviewed parallel indemnity and insurance agreements, under which the general contractor was to provide insurance for its own work and provide insurance covering the indemnitee-city. The court stated:

Given the broad contractual indemnification clause, [the contractor] would be required to indemnify the City for any liability for injuries incurred by the City. The inclusion of the clause requiring [the contractor] to obtain insurance coverage for its contractual liability for injuries clearly indicates the intent of the parties that, in the event of the City's being held liable for a personal injury caused by anyone's negligence, the loss should be charged

⁹⁰⁹ See e.g., *Hailey v. New York State Elec. & Gas Corp.*, 214 A.D.2d 986 (N.Y. App. Div. 1995) (stating as a fact that policy which excluded from coverage claims for bodily injury to an employee of the insured was not applicable because insured had provided exception to the exclusion which provided coverage for assuming "the tort liability of another to pay damages because of bodily injury to a third person" which constituted an "insured contract" and further stating that parties conceded that "effect of the exclusion and the exception thereto is to deny coverage for claims for contribution and common-law indemnification while covering the insured for claims or contractual indemnification")(ultimate holding of case was based on anti-subrogation rule).

⁹¹⁰ *Dairyalea Coop. v. Rossal*, 64 N.Y.2d 1, 8-9 (N.Y. 1984) (stating that "there is no question that the Aetna policy protected not only R&H as an insured but Dairyalea as well, for its definition of 'insured' included the statement that, '[a]nyone liable for the conduct of an insured described above is an insured but only to the extent of liability.'").

⁹¹¹ *Maksymowicz v. New York Bd. of Educ.*, 232 A.D.2d 223 (N.Y. App. Div. 1996) ("The ruling here contains an 'insured contract' clause, under which the exclusion for employee injuries 'does not apply to liability assumed by the insured under an 'insured contract', defined as 'that part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of 'bodily injury'. . . to a third person. Clearly, the asbestos removal contract is an 'insured contract' included within the coverage of the policy.'") (holding based on anti-subrogation rule).

⁹¹² 117 Misc. 2d 1075, 459 N.Y.S.2d 721 (N.Y. Sup. Ct. 1983).

to [the contractor] and be borne by the insurance carrier which insured either [the contractor's] contractual liability or the City's liability.⁹¹³

Thus, the indemnity agreement was used as a basis to define the scope of coverage for the insurance purchased pursuant to the contract. Although not decided in the context of an insurance dispute, the court recognized some interplay between the indemnity and insurance provisions.

NORTH CAROLINA

§ I – General Rules of Contractual Indemnity.

Contractual agreements to indemnify are enforceable in North Carolina.⁹¹⁴ When interpreting a contract of indemnity, the general rules of contract construction apply.⁹¹⁵ This includes giving effect to the intention of the parties.⁹¹⁶ Where the language of the agreement is clear and unambiguous, the court must interpret it as written.⁹¹⁷

While an indemnity contract which purports to relieve the indemnitee from liability for its own negligence or the negligence of its employees is not favored by the law and will be strictly construed, such an indemnity provision is not against public policy where the contract is private and the interest of the public is not involved, and where there is no gross inequality in bargaining power.⁹¹⁸ Although the issue of contractual indemnification for an intentional tort has not been ruled upon by the courts, one court expressly indicated that although its ruling did not reach that question, a contractual provision which was construed to relieve another defendant from liability for its intentional torts would be void as against public policy.⁹¹⁹

§ II – Exceptions to General Rules of Indemnity.

There are several exceptions to the general rules regarding indemnity.

Pursuant to statute, construction indemnity provisions cannot hold one party responsible for the negligence of another.⁹²⁰ “A promise or agreement entered into in

⁹¹³ *Id.* at 1078.

⁹¹⁴ See *Kaleel Builders, Inc. v. Ashby*, 587 S.E.2d 470, 474 (N.C. App. 2003), *cert. denied*, 595 S.E.2d 152 (N.C. 2004).

⁹¹⁵ *Kirkpatrick & Assoc. v. Wickes Corp.*, 280 S.E.2d 632, 634 (N.C. App. 1981).

⁹¹⁶ *Dixie Container Corp. v. Dale*, 273 N. C. 624, 160 S.E.2d 708 (1968).

⁹¹⁷ *Kirkpatrick*, 280 S.E.2d at 634.

⁹¹⁸ See *New River Crushed Stone, Inc. v. Austin Powder Co.*, 210 S.E.2d 285, 287 (N.C. App. 1974).

⁹¹⁹ See *Lewis v. Dunn Leasing Corp.*, 244 S.E.2d 706, 709 (N.C. App. 1978).

⁹²⁰ N.C. GEN. STAT. § 22B-1.

connection with construction/physical labor⁹²¹ that purports to indemnify a promisee against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from negligence of the promisee, in whole or in part, the promisee's independent contractors, agents, employees, or indemnities, is void and not enforceable."⁹²² In other words, a construction agreement may purport to indemnify one party from damages arising from negligence of the other party, but any provisions seeking to indemnify a party from its own negligence is void.

The indemnity provisions to which this statute applies are those construction indemnity provisions which attempt to hold one party responsible for the negligence of another and this rule does not affect insurance contracts or any agreement issued by an insurer.⁹²³

By exempting insurance contracts from N.C. GEN. STAT § 22B-1, the court held that the legislature intended to prevent insurance policies which name the buyer of construction services as an insured from being invalidated.⁹²⁴

§ III – Indemnity Agreements as Insured Contracts.

The agreement to indemnify another is an “insured contract” within the meaning of the exception to the form commercial general liability insurance policy exclusion for contractual liability, applicable where the insured agrees to assume the tort liability of another.⁹²⁵ Giving effect to the plain language of this exception to the contractual liability exclusion, it has been held that the assumption of tort liability speaks to the liability of the indemnitee, not to the tort liability of the insured/indemnitor.⁹²⁶

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Unlike the rule in many states, an agreement to obtain insurance to cover liability for an agreement to indemnify will not render enforceable, even on a limited

⁹²¹ Construction defined as “design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith.”

⁹²² *Id.* (A contract whereby a promisor agrees to indemnify a promisee or the promisee's independent contractors, agents, employees, or indemnities against liability for damages resulting from the sole negligence of the promisor, its agents or employees is not affected in any way by N.C. GEN. STAT. § 22B-1).

⁹²³ See *Bridgestone/Firestone, Inc. v. Ogden Plant Maintenance Co. of North Carolina*, 548 S.E.2d 807 (N.C. App. 2001), *cert. denied*, 556 S.E.2d 297 (N.C. 2001), *aff'd*, 559 S.E.2d 786 (N.C. 2002).

⁹²⁴ See *Miller Brewing Co. v. Morgan Mechanical Contractors, Inc.* 368 S.E.2d 438 (N.C. App. 1988), *cert. denied*, 373 S.E.2d 110 (N.C. 1988).

⁹²⁵ See *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Assoc. Scaffolders and Equipment Co., Inc.*, 579 S.E.2d 404 (N.C. App. 2003).

⁹²⁶ *Harleysville Mut. Ins. Co. v. Reliance Nat'l Ins. Co.*, 256 F.Supp. 2d 413 (M.D.N.C. 2002).

basis, an indemnity which is prohibited by N.C. GEN. STAT. § 22B-1.⁹²⁷ In fact, the carrier of the insured/indemnitor may properly deny a defense to the insured on the basis that the liability for which the insured seeks coverage arises from a void contractual obligation.⁹²⁸ This was the outcome notwithstanding that at the point in time the request for a defense is made, the agreement may not yet have been adjudicated.⁹²⁹

NORTH DAKOTA

§ I – General Rules of Contractual Indemnity.

Indemnity agreements are construed by North Dakota courts using the ordinary rules of contract interpretation.⁹³⁰ The intent of the parties is to be gleaned from the entirety of the contract rather than from isolated provisions contained therein.⁹³¹

Parties are permitted to contractually indemnify others in any desired fashion which does not contravene public policy.⁹³² Permissible indemnification includes indemnification for the indemnitee's sole negligence, so long as the parties' intent to so indemnify is "very clearly" expressed by the language of the agreement.⁹³³ Such a clear intention is deemed to exist where the agreement provides for the purchase of insurance and additional insured status for the indemnitee.⁹³⁴ So long as insurance is required in a specified amount and the indemnitee is named as an additional insured in the policy, other phraseology creating indemnification for the indemnitee's sole negligence is unnecessary.⁹³⁵ This is because "there could be no purpose for the insurance provision other than to protect [the indemnitee] from the consequences of its own negligent acts."⁹³⁶

⁹²⁷ See *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Assoc. Scaffolders and Equipment Co., Inc.*, 579 S.E.2d 404 (N.C. App. 2003).

⁹²⁸ *Id.*

⁹²⁹ *Id.*

⁹³⁰ See *Vanderhoof v. Gravel Products, Inc.*, 404 N.W.2d 485, 491 (N.D. 1987).

⁹³¹ See *id.* See also *Spagnolia v. Monasky*, 660 N.W. 2d 223, 228 (N.D. 2003) N.D. Cent. Code § 9-07-06 (2006).

⁹³² See *Vanderhoof*, *supra*. See also N.D. Cent. Code § 9-08-02; *Barnsness v. Gen. Diesel & Equip. Co.*, 422 N.W.2d 819 (N.D. 1988).

⁹³³ *Rupp v. American Crystal Sugar Co.*, 465 N.W.2d 614, 616 (N.D. 1991), quoting *Bridston v. Dover Corp.*, 352 N.W.2d 194, 196 (N.D. 1984).

⁹³⁴ See *id.* at 617.

⁹³⁵ See *id.*

⁹³⁶ *Bridston* at 197.

An indemnification provision which protects the indemnitee from stated categories of damage by “any person or persons” pertains only to claims of third parties, and does not indemnify as to claims between the contracting entities.⁹³⁷

Applied principles of indemnity law permit contracting parties to circumvent the exclusive remedy provision of the Workers Compensation law.⁹³⁸ Despite an employer’s immunity from suit by its own employees for work-related injuries, the employer is liable for such injuries where it has expressly agreed to indemnify a third party tortfeasor.⁹³⁹

§ II – Exceptions to General Rules of Contractual Indemnity.

The exception to the general North Dakota rule supporting complete freedom of contract appears in the construction context.⁹⁴⁰ A construction designer may not shift liability to a contractor for design defects.⁹⁴¹ N.D. Cent. Code 9-8-02.1 provides as follows:

Any provision in a construction contract which would make the contractor liable for the errors or omissions of the owner or his agents in the plans and specifications of such contract is against public policy and void.⁹⁴²

Although this exception to the liberal rules of indemnity is expressly stated in North Dakota’s statutory law, no appellate court has applied it in striking as unenforceable an indemnity provision.

§ III – Indemnity Agreements as Insured Contracts.

The North Dakota courts have not been called upon to determine whether an agreement to indemnify another constitutes an insured contract in the context of the exception to the exclusion for contractually assumed liability in the form general liability policy. However, the North Dakota Supreme Court’s interpretation of the exclusion itself – which requires the “assumption of liability” by the insured to be operative – necessarily leads to the conclusion that an agreement to indemnify for another’s tort liability is an insured contract.⁹⁴³

⁹³⁷ *Olander Contracting Co. v. Gail Wachter Investments*, 643 N.W.2d 29, 36 (N.D. 2002), *rev’d on other grounds by* 663 N.W.2d 204 (N.D. 2003).

⁹³⁸ *See Barnsness* at 824.

⁹³⁹ *See id.*

⁹⁴⁰ *See* N.D. Cent. Code § 9-08-02.1.

⁹⁴¹ *See id.*

⁹⁴² *Id.*

⁹⁴³ *ACUITY v. Burd & Smith Constr., Inc.*, 2006 N.D. 187, 2006 N.D. LEXIS 191 (Aug. 24, 2006); *Fisher v. Amer. Family Mut. Ins. Co.*, 1998 N.D. 109, P5, 579 N.W.2d 599.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Several reported cases cite to indemnity agreements requiring insurance, and as discussed in Section I, these often involve the extension of “additional insured” status to the indemnitee, whereby the promisor agrees in the indemnification provision to obtain a specified amount of insurance and include the promisee as an additional insured under the policy.⁹⁴⁴ None of the reported cases expressly decide the scope of coverage afforded the indemnitee/additional insured in light of the underlying indemnity.

OHIO

§ I – General Rules of Contractual Indemnity.

The scope of a contractual agreement to indemnify is determined by the intent of the parties as expressed in the contract.⁹⁴⁵ Under Ohio law, “contracts of indemnity purporting to relieve one from the results of his failure to exercise ordinary care shall be strictly construed, and will not be held to provide such indemnification unless so expressed in clear and unequivocal terms.”⁹⁴⁶

A contract of indemnity will not be construed to indemnify against the negligence of the indemnitee unless the contract clearly expresses the intention of the parties to indemnify for the indemnitee’s own negligence “beyond doubt and by express stipulation.”⁹⁴⁷ Such agreements cannot be inferred or implied in the contract, and there is a general presumption against indemnifying a party for that party’s own negligent acts.⁹⁴⁸

While an indemnity agreement will typically be strictly construed, a commercial agreement does not necessarily need to expressly mention indemnity to be enforced. “[W]hile clauses limiting the liability of the drafter are ordinarily to be strictly construed, we need not do so when such burden of indemnification was assented to in a context of free and understanding negotiation.”⁹⁴⁹ Agreements between sophisticated parties are not necessarily narrowly construed (as opposed to contracts of adhesion), and the contract need not include the word “negligence” if it otherwise uses words such as “for any and all harms however caused.”⁹⁵⁰

⁹⁴⁴ See *Rupp* at 616; *Bridston* at 196.

⁹⁴⁵ *Worth, et al. v. Aetna Casualty and Sur. Co., et al.*, 513 N.E.2d 253, 256 (Ohio 1987) *rev’d in part* (other grounds), *Worth, et al. v. Aetna Casualty and Sur. Co., et al.*, 540 N.E.2d 249 (Ohio 1989); *Cleveland Window Glass Door v. National Sur. Co.*, 161 N.E. 280, 281 (Ohio 1928).

⁹⁴⁶ *Kay v. The Pennsylvania Rd. Co. v. The Orr Felt & Blanket Co.*, 103 N.E.2d 751, 752 - 753 (Ohio 1952) (quoting *George H. Drugledy Lumber Co. v. Erie Rd. Co.*, 102 Ohio St. 236, 131 N.E. 723 (1921)).

⁹⁴⁷ *Id.*

⁹⁴⁸ *Id.*

⁹⁴⁹ *Glaspell v. Ohio Edison Co.*, 29 Ohio St. 3d 44, 505 N.E.2d 264 (1987).

⁹⁵⁰ *Id.*

An agreement which covers “any injury, loss or damage to any person or property on the premises for any event, including, but not limited to, fire, flood, mildew, theft, or any other cause” would “clearly and unambiguously encompass[] an act of negligence” on the part of the indemnitee.⁹⁵¹ In contrast, if the language of the agreement only includes some losses (i.e. the bailee’s use of the property), then the agreement will not reach the indemnitee’s own negligence.⁹⁵²

An employer can waive its immunity from actions by third parties for indemnification arising out of the injuries of employees, if there is an express agreement on the part of the employer giving rise to the third party’s right of indemnification.⁹⁵³

§ II – Exceptions to General Rules of Contractual Indemnity.

While agreements to indemnify another are generally enforceable in Ohio, certain types of indemnity agreements are prohibited based upon principles of public policy.⁹⁵⁴ Ohio Rev. Code Ann. § 4123.82(a) provides:

[All] contracts and agreements are void which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workers or their dependents for death, injury, or occupational disease occasioned in the course of the worker’s employment, or which provide that the insurer shall pay a compensation, or which indemnify the employer against damages when the injury, disease, or death arises from the failure to comply with any lawful requirement for the protection of the lives, health, and safety of the employees, or when the same is occasioned by the willful act of the employer or any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages.

The purpose of § 4123.82(a) is to prevent competition with the State insurance fund, and “to prevent liability insurance companies from underwriting workman’s compensation insurance in cases where employers were authorized by the Industrial Commission to pay compensation under Ohio Rev. Code Ann. § 4123.25.”⁹⁵⁵

Ohio Rev. Code Ann. § 2305.31 similarly renders certain indemnity provisions in construction agreements void on the basis of public policy. The provision governs agreements to indemnify relating to the construction, repair, or maintenance of buildings, and reads in relevant part:

⁹⁵¹ *Krach v. Kotoch Family Ltd. Partnership*, 1996 Ohio App. LEXIS 1219 (Ohio Ct. App., Mar. 29, 1996).

⁹⁵² *Burkette v. Chrysler Industries, Inc.*, 48 Ohio App. 3d 35, 547 N.E.2d 1223 (1988).

⁹⁵³ *Williams v. Ashland Chemical Co.*, 52 Ohio App. 2d 81, 368 N.E.2d 304 (1976).

⁹⁵⁴ *Glaspell, supra*; Ohio Rev. Code Ann. § 2305.31.

⁹⁵⁵ Ohio Rev. Code Ann. § 4123.25; *LoGuidice v. Harris*, 128 N.E.2d 842, 845 - 846 (Ohio Ct. App. 1954) (agreement between attorney and client/claimant under the Workman’s Compensation Act which purported to indemnify an employer against loss pursuant to a consent judgment finding the client eligible to participate in the insurance fund, held to be void in accordance with § 4123.82).

[a] covenant, promise, agreement, or understanding in, or 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, pursuant to which contract or agreement the promisee, or its independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees or indemnities against liability for damages arising out of bodily injury to persons or damaged property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnities is against public policy and void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the State of Ohio for his own protection or from purchasing a construction bond.⁹⁵⁶

The effect of this statutory provision is to bar the use of indemnity agreements in construction-related contracts wherein the promisor provides indemnification to the promisee for its own acts of negligence regardless of whether such negligence is sole or concurrent.⁹⁵⁷ The public policy objective underlying section 2305.31 is to encourage employers to provide employees with safe conditions at the workplace.⁹⁵⁸ This statutory prohibition does not preclude the purchase of a commercial liability insurance policy for public works construction projects, as these policies are not considered indemnity agreements within the scope of § 2305.31.⁹⁵⁹

§ III – Indemnity Agreements as Insured Contracts.

It has been expressly recognized that an agreement to indemnify another for the other's tort liability meets the definition in a liability insurance policy excepting from the exclusion for contractually assumed liability an "insured contract."⁹⁶⁰ The "other" for which the insured assumes liability does not need to be a party to a contract with the insured.⁹⁶¹

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

While Ohio Rev. Code Ann. § 2305.31 prohibits indemnity agreements wherein the promisor agrees to indemnify the promisee for damages resulting from the sole negligence of the promisee, public policy does not preclude contracts whereby a

⁹⁵⁶ Ohio Rev. Code Ann. § 2305.31.

⁹⁵⁷ *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.*, 699 N.E.2d 127, 129 (Ohio Ct. App. 1997); *Kendall v. U.S. Dismantling Co.*, 485 N.E.2d 1047 (Ohio 1985).

⁹⁵⁸ *Lamb v. Armco, Inc.*, 518 N.E.2d 53, 55 - 56 (Ohio Ct. App. 1986).

⁹⁵⁹ *Stickovich v. City of Cleveland*, 757 N.E.2d 50, 61 Ohio Ct. App. 2001).

⁹⁶⁰ *Legge Assocs. v. Dayton Power & Light Co.*, 1997 U.S. App. LEXIS 8702 (6th Cir., Apr. 22, 1997) (applying Ohio law).

⁹⁶¹ *Id.*

party requires another to obtain insurance coverage as an additional insured.⁹⁶² However, the Court of Appeals has rendered conflicting decisions with regard to whether or not the additional insured agreement will extend coverage to the promisee for the promisee's own negligent acts.

For example, in *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.*, a subcontractor agreed to name the contractor as an additional insured under a commercial liability insurance policy.⁹⁶³ After one of the subcontractor's employees was injured, the contractor's insurer defended the worker's compensation claim, and settled with the employee. The contractor subsequently sought indemnification from the subcontractor's insurer. The main issue before the court was "whether an agreement by a construction subcontractor to name its general contractor as an additional insured on the subcontractor's general commercial insurance policy constitutes an indemnity agreement prohibited by Ohio Rev. Code Ann. § 2305.31."⁹⁶⁴ The court held that the additional insured agreement was inapplicable because Ohio Rev. Code Ann. § 2305.31 prohibited coverage for the contractor's own negligent acts. The court found that the "additional insured agreement as a whole did not violate public policy, but that the express language of the policy did not afford coverage under the circumstances."⁹⁶⁵

In a contrasting decision, the Court of Appeals in *Stickovich v. City of Cleveland* found that compulsory public liability insurance did not contravene the public policy objectives of Ohio Rev. Code Ann. § 2305.31. In that case, a contractor responsible for constructing a bridge for the City of Cleveland named the municipality as an additional insured on its liability insurance contract.⁹⁶⁶ During construction, a crane, operated at the direction of the contractor by an unlicensed operator who had been drinking alcohol, touched an electric power line injuring two employees of an independent subcontractor.⁹⁶⁷

The insurer, Commercial Union, argued that its liability insurance coverage was void and against public policy, and that the trial court erred in finding "that the additional insured clause in the contractor's general commercial liability insurance policy provided coverage for the additional insured's own negligence."⁹⁶⁸ Commercial Union contended that providing coverage for the additional insured's own negligence contravened public policy and violated Ohio Rev. Code Ann. § 2305.31.⁹⁶⁹

⁹⁶² *Buckeye Union*, 699 N.E.2d at 134.

⁹⁶³ *Id.* at 128.

⁹⁶⁴ *Id.*

⁹⁶⁵ *Id.*

⁹⁶⁶ *Stickovich*, 757 N.E.2d at 58; *Brzeczek v. Standard Oil Co.*, 447 N.E.2d 760, 763 (Ohio Ct. App. 1982) (finding that § 2305.31 did not prohibit a contractor from purchasing insurance for the employer's protection against its own negligence).

⁹⁶⁷ *Stickovich*, 757 N.E.2d at 53.

⁹⁶⁸ *Id.* at 59.

⁹⁶⁹ *Id.*

The Court of Appeals disagreed, finding that “Section 2305.31 does not invalidate commercial liability insurance coverage for construction projects,”⁹⁷⁰ and that “a commercial liability insurance policy is not a construction indemnity agreement within the scope of Section 2305.31.”⁹⁷¹ The court distinguished between indemnity agreements and liability insurance contracts, finding:

[As] a matter of common understanding, usage, and legal definition, an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risk of loss of the members of the public at large in consideration of the payment of a premium. There are, however, other risk-shifting agreements which are not insurance contracts. These include the customary private indemnity agreement where affording the indemnity is not the primary business of the indemnitor and is not the subject of governmental regulation but is merely ancillary to a furtherance of some other independent transactional relationship between the indemnitor and the indemnitee. The indemnitee is, thus, not the essence of the agreement creating the transactional relationship but is only one of its negotiated terms.⁹⁷²

Because the risk in a liability insurance contract is shifted to the commercial liability insurer rather than the contractor/promisor, the court held that these types of agreements are distinguishable from indemnity agreements and are not prohibited by Section 2305.31.⁹⁷³

OKLAHOMA

§ I – General Rules of Contractual Indemnity.

An indemnity contract is interpreted under Oklahoma law according to the general rules of contract interpretation.⁹⁷⁴ The intention of the parties must be ascertained based upon the whole contract, and the intent of the parties will be given effect if it can be done within the bounds of the law.⁹⁷⁵ But an express statutory

⁹⁷⁰ *Id.* at 60.

⁹⁷¹ *Id.* at 61.

⁹⁷² *Stickovich*, 757 N.E.2d at 61, citing *Britton v. Smythe Cramer Co.*, 743 N.E.2d 960, 972 - 973 (Ohio Ct. App. 2000).

⁹⁷³ *Id.*

⁹⁷⁴ *Wallace v. Sherwood Constr. Co., Inc.*, 877 P.2d 632, 634 (Okla. Ct. App. 1994) (citing *Luke v. American Surety Co. of N.Y.*, 114 P.2d 950 (Okla. 1941)); see also OKLA. STAT. tit. 15, § 427 (2005).

⁹⁷⁵ *Id.*; see also OKLA. STAT. tit. 15, § 152 (2005) (“A contract must be so interpreted as to give effect to the mutual intention of the parties, as if existed at the time of contracting, so far as the same is ascertainable and lawful.”); OKLA. STAT. tit. 15, § 157 (2005) (“The whole of a contract is to be taken together, so as to give effect to every part. . .”).

provision enumerates particular rules of interpretation applicable to indemnity agreements that must be applied absent a contrary intention in the agreement.⁹⁷⁶

“Agreements to indemnify a party against its own negligence or liability are strictly construed.”⁹⁷⁷ In order for such an indemnity agreement to be enforceable, the agreement must meet the following three conditions: “(1) the parties must express their intent to exculpate in unequivocally clear language; (2) the agreement must result from an arm’s-length transaction between parties of equal bargaining power; and (3) the exculpation must not violate public policy.”⁹⁷⁸ Thus, an indemnity agreement obligating the indemnitor to indemnify the indemnitee against losses arising from the indemnitee’s own negligence is enforceable if the contract makes the parties’ intent unequivocally clear.⁹⁷⁹

§ II – Exceptions to General Rules of Contractual Indemnity.

Oklahoma prohibits indemnification for known unlawful acts.⁹⁸⁰ Title 15, Section 422 of the Oklahoma statutes provides: “An agreement to indemnify a

⁹⁷⁶ The statute provides:

In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.
2. Upon an indemnity against claims or demands, or damages or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.
3. An indemnity against claims or demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands or liability incurred in good faith, and in the exercise of reasonable discretion.
4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity; but the person indemnified has the right to conduct such defense, if he chooses to do so.
5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former.
6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action of proceedings against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.
7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is applicable if he had a good defense upon the merits, which, by want of ordinary care, he failed to establish in the action.

OKLA. STAT. tit. 15, § 427 (2005).

⁹⁷⁷ *Noble Steel, Inc. v. Williams Brothers Concrete Constr. Co.*, 49 P.3d 766, 770 (Okla. Ct. App. 2002) (citing *Transportation Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1420 (10th Cir. 1990)).

⁹⁷⁸ *Id.*

⁹⁷⁹ *Wallace*, 877 P.2d at 634 (citing *Webb v. Western Carter County Water & Sewage Corp.*, 575 P.2d 124, 126 (Okla. Ct. App. 1977)).

⁹⁸⁰ OKLA. STAT. tit. 15, § 422 (2005).

person against an act thereafter to be done is void if the act be known by such person at the time of doing it to be unlawful.”⁹⁸¹

§ III – Indemnity Agreements as Insured Contracts.

Oklahoma recognizes “insured contracts” as an exception to the contractual exclusion for “liability assumed under any contract or agreement.”⁹⁸² In *Federal Ins. Co. v. Tri-State Ins. Co.*,⁹⁸³ the district court found that the agreement to indemnify contained in the parties’ Agreement was an “insured contract,” and that coverage therefore existed based upon an exception to the exclusion for contractually assumed liability. The Tenth Circuit, however, found absent coverage based upon a separate, unrelated exclusion.⁹⁸⁴

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Oklahoma courts have not addressed the interface between an agreement to procure insurance and an indemnity agreement. In *Federated Rural Electric Insurance Co. v. Williams*,⁹⁸⁵ the Court of Appeals enforced an indemnity agreement and an agreement to procure insurance; however, the court did not address any limitations or expansions of the general rules of indemnity based upon the agreement to purchase insurance.⁹⁸⁶

OREGON

§ I – General Rules of Contractual Indemnity.

Contractual agreements for indemnification, including agreements covering an indemnitee’s own negligence, are generally recognized and enforceable in Oregon, as long as the intent of the parties is expressed clearly and explicitly in the contract.⁹⁸⁷ When reviewing indemnity agreements, normal rules of contract interpretation apply.⁹⁸⁸ Indemnity agreements are to be interpreted like other contracts in that the courts should give weight to the plain meaning of the language employed.⁹⁸⁹ If the language of the agreement is ambiguous, “it must be interpreted in light of the surrounding circumstances and the situation of the parties so as to

⁹⁸¹ *Id.*

⁹⁸² See *Federal Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998).

⁹⁸³ *Id.*

⁹⁸⁴ *Id.*

⁹⁸⁵ 2002 Okla. Civ. App. LEXIS 65, at * 17 (Okla. Ct. App. Apr. 26, 2002).

⁹⁸⁶ *Id.*

⁹⁸⁷ See generally *Southern Pacific Co. v. Morrison-Knudsen Co.*, 338 P.2d 665 (Or. 1959); *Southern Pacific Co. v. Layman*, 145 P.2d 295 (Or. 1943).

⁹⁸⁸ *Cook v. Southern Pacific Transp. Co.*, 623 P.2d 1125, 1128 (Or. Ct. App. 1981).

⁹⁸⁹ *Id.*

effectuate the parties' intent."⁹⁹⁰ Ambiguities are generally construed against the drafter.⁹⁹¹

As a general rule, indemnity agreements purporting to reach an indemnitee's own negligence are not favored by the courts.⁹⁹² However, courts have enforced agreements wherein a party is immunized "from the consequences of his or her own negligence" under certain circumstances.⁹⁹³ "If contractual language clearly and explicitly provides that a party will be indemnified for a particular loss, even if caused by that party's negligence, the inquiry ends, and the provision is enforced."⁹⁹⁴ Conversely, if the terms of the agreement are ambiguous and the intent of the parties unknown, the courts look beyond the language of the agreement to determine whether it should be enforced.⁹⁹⁵

The first Oregon decision to address an agreement to indemnify an indemnitee for its own negligence was *Southern Pacific Company v. Layman*.⁹⁹⁶ In *Layman*, the Supreme Court of Oregon held that an indemnity agreement between a railroad and a farmer who built a private road over the railroad's right of way was unenforceable due to the "harshness" of the agreement.⁹⁹⁷ Specifically, the agreement required the farmer to indemnify the railroad "against any and all loss, damage, injury, cost and expense of every kind and nature, from any cause whatsoever."⁹⁹⁸ Approximately 20 years after the agreement was executed, a harvesting machine owned by a third party "was struck and practically demolished" by one of the railroad's trains.⁹⁹⁹ It was undisputed that the railroad's negligence caused the accident.¹⁰⁰⁰ The railroad was sued by the third party and tendered its defense to the farmer, who declined. The railroad thereafter sued the farmer claiming a right to contractual indemnification. Upon analyzing the indemnity agreement, the court refused to enforce it because "[i]t could result in subjecting a farmer to a ruinous liability arising out of the negligence of the plaintiff in the operation of its trains, an operation over which it had no control."¹⁰⁰¹ The court did not believe "that for the mere privilege of passing over the plaintiff's tracks the defendant intended to assume such a risk, or that the railway

⁹⁹⁰ *Id.*

⁹⁹¹ *Id.*

⁹⁹² See *Estey v. Mackenzie Engineering Inc.*, 927 P.2d 86 (Or. 1996).

⁹⁹³ *Id.* at 88.

⁹⁹⁴ *Blanchfill v. Better Builds, Inc.*, 982 P.2d 53, 57 (Or. Ct. App. 1999); see also, *Morrison-Knudsen Co.*, 338 P.2d 665; *Layman*, 145 P.2d 295.

⁹⁹⁵ *Id.* at 57.

⁹⁹⁶ See *Layman*, 145 P.2d 295.

⁹⁹⁷ *Id.*

⁹⁹⁸ *Id.* at 296.

⁹⁹⁹ *Id.*

¹⁰⁰⁰ *Id.*

¹⁰⁰¹ *Id.*

intended to impose it.”¹⁰⁰² While acknowledging that the language of the agreement was “broad and general enough to include loss caused solely by the plaintiff’s negligence,” the harsh reality of allocating all of the risk onto the farmer made indemnification under the circumstances unintended.¹⁰⁰³

Layman and its progeny laid the groundwork for what is presently known as the “rule against harshness.”¹⁰⁰⁴ When the intent of the parties is unclear from the contract, this rule is utilized by the courts to determine how risk is allocated and whether enforcing the agreement may circumvent the original intent of parties.¹⁰⁰⁵ In general, courts are required under the rule to focus “not only the language of the contract, but also on the possibility of a harsh and inequitable result that would fall on one party by immunizing the other party from the consequences for his or her own negligence.”¹⁰⁰⁶

§ II – Exceptions to General Rules of Contractual Indemnity.

Oregon places a statutory bar on agreements to indemnify another for its own negligence in the construction context.¹⁰⁰⁷ The applicable statute provides:

[A]ny provision in a construction agreement that requires a person or that person’s surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.¹⁰⁰⁸

However, the statute does not prohibit agreements to indemnify another for the indemnitor’s own negligence:¹⁰⁰⁹

This section does not affect any provision in a construction agreement that requires a person or that person’s surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor’s agents, representatives or subcontractors.

¹⁰⁰² *Id.*

¹⁰⁰³ *Id.* at 297.

¹⁰⁰⁴ See *Cook*, 623 P.2d at 1130; see also, *Morrison-Knudsen Co.*, 338 P.2d at 673 (enforcing an indemnity clause similar to the clause at issue in *Layman* after finding that the privilege conferred on the parties fell “far short of being a ‘mere privilege’ with a ‘comparatively small risk.’”)

¹⁰⁰⁵ *Id.* at 1130.

¹⁰⁰⁶ *Estep*, 927 P.2d at 88; see also, *Steele v. Mt. Hood Meadows Oregon, Ltd.*, 974 P.2d 794 (Or. Ct. App. 1999) (relying on *Layman*, the court refused to enforce an indemnification agreement printed on a skier’s lift ticket requiring the skier to indemnify the ski resort for all personal injury claims because the agreement was unclear as to whether the parties intended the agreement to apply to the ski resort’s negligence, nor was it likely that the skier would give a claim arising from such negligence.)

¹⁰⁰⁷ See Or. Rev. Stat. § 30.140 (2006).

¹⁰⁰⁸ Or. Rev. Stat. § 30.140(1).

¹⁰⁰⁹ Or. Rev. Stat. § 30.140(2).

The plain meaning of the statute is therefore clear: in the construction context, an agreement of one to indemnify another for the other's own negligence is void, but an agreement to indemnify an indemnitee for the indemnitor's negligence is valid.¹⁰¹⁰

Indemnity agreements subjecting an employer to liability beyond that prescribed under the worker's compensation statute are also void.¹⁰¹¹ The applicable statute provides:

(1)(a) The liability of every employer who satisfies the duty required by ORS 656.017 (1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions, except as specifically provided otherwise in this chapter.

(b) This subsection shall not apply to claims for indemnity or contribution asserted by a railroad, as defined in ORS 824.020, or by a corporation, individual or association of individuals which is subject to regulation pursuant to ORS chapter 757 or 759.

(c) Except as provided in paragraph (b) of this subsection, all agreements or warranties contrary to the provisions of paragraph (a) of this subsection entered into after July 19, 1977, are void.¹⁰¹²

The plain meaning of this statute is also clear: the worker's compensation statute provides the exclusive liability by an employee against an employer, thereby rendering void indemnification agreements creating liability of an employer proscribed under the statute.¹⁰¹³

Indemnity agreements executed by parents of a minor with a personal injury claim are also invalid.¹⁰¹⁴ In *Ohio Casualty Insurance Co. v. Mallison*, parents of an unborn child were involved in an automobile accident with the insured.¹⁰¹⁵ After the minor's birth, but prior to discovering the minor's injuries, the parents settled with the insured and executed a release.¹⁰¹⁶ Contained in the release was an indemnity provision that required the parents to hold the insured and its insurer harmless for

¹⁰¹⁰ *Id.*; see also, *Hays v. Centennial Floors, Inc.*, 893 P.2d 564 (Or. Ct. App. 1995).

¹⁰¹¹ See Or. Rev. Stat. § 656.018 (2006).

¹⁰¹² *Id.*

¹⁰¹³ *Id.*; see also, *Roberts v. Gray's Crane & Rigging, Inc.*, 697 P.2d 985 (Or. Ct. App. 1985) (indemnity agreement was void as lessee's duty to provide worker's compensation coverage was its exclusive liability to its workers).

¹⁰¹⁴ See generally, *Ohio Casualty Insurance Co. v. Mallison*, 354 P.2d 800 (Or. 1960).

¹⁰¹⁵ *Id.* at 801.

¹⁰¹⁶ *Id.*

any injuries suffered by the minor.¹⁰¹⁷ Once the minor's injuries were discovered, the parents brought suit against the insured on the minor's behalf.¹⁰¹⁸ The minor recovered a judgment, which was paid by the insurance company.¹⁰¹⁹ The insurer subsequently attempted to enforce the indemnity provision of the release against the parents to recover the cost of the amount of the judgment.¹⁰²⁰ The Supreme Court of Oregon, in finding that a parent's "interest in personal gain at the settlement table may well influence him to sacrifice the best interests of the child," invalidated the agreement as contrary to public policy.¹⁰²¹

§ III – Indemnity Agreements as Insured Contracts.

Oregon courts have not specifically addressed whether an agreement to indemnify is an "insured contract" within the meaning of the general liability policy.¹⁰²²

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

An indemnity agreement which explicitly states that the indemnitor will not indemnify the indemnitee for the indemnitee's own negligence does not preclude the indemnitee from obtaining the benefit of the indemnitor's insurance policy if, as per the agreement between the parties, the indemnitee is listed as an additional insured on the indemnitor's insurance policy.¹⁰²³ Based on the language of the insurance policy, an "additional insured" may be entitled to the same coverage as a named insured, including coverage for its own negligence, if the insurance policy fails to describe different coverage for additional insureds.¹⁰²⁴ Such coverage exists in spite of the fact that the indemnity agreement between the named insured and the

¹⁰¹⁷ *Id.*

¹⁰¹⁸ *Id.*

¹⁰¹⁹ *Id.*

¹⁰²⁰ *Id.*

¹⁰²¹ *Id.* at 806.

¹⁰²² However, in *Holman Erection Co., Inc. v. Northwestern Steel Construction Co.*, 920 P.2d 1125 (Or. Ct. App. 1996) an "insured contract" in an indemnity agreement context is briefly discussed. In *Holman*, a subcontractor entered into an indemnity agreement with a contractor and an agreement to procure insurance on the contractor's behalf. The subcontractor's employee was injured and sued the contractor, who tendered the defense to the subcontractor and its insurer. The tender was denied, and the contractor sued the subcontractor for indemnification and breach of contract. The court found that the insurer of the subcontractor had no duty to defend the lawsuit on the basis that: 1) the subcontractor, under the terms of the insurance policy, could not be held liable for the employee's injuries, despite the indemnity agreement, pursuant to the exclusivity rule of the Workers' Compensation Act, § Or. Rev. Stat. 656.018; and 2) breach of contract claims are not covered under the general liability policy. Although the general liability policy contained an "insured contract" provision, the court implied that it did not apply because it only pertained to injuries suffered by third parties (and not the employees of the indemnitor). As such, the court made no reference as to the general application of "insured contracts" in Oregon jurisprudence.

¹⁰²³ See *Hartford Accident and Indemnity Co. v. U.S. Natural Resources, Inc.*, 897 F. Supp. 466, 471 (D. Or. 1995).

¹⁰²⁴ *Id.*

additional insured explicitly states that the named insured will not indemnify the additional insured for the additional insured's negligence.¹⁰²⁵

Additionally, in the worker's compensation context, an agreement to procure liability insurance is not the same as an agreement to indemnify.¹⁰²⁶ Thus, a breach of contract claim against an employer for its failure to procure liability insurance would not be precluded by the exclusivity provision of the Worker's Compensation Act, § Ore. Rev. Stat. 656.018, although a claim to enforce an indemnity agreement against the employer would be.¹⁰²⁷

In *Montgomery Elevator Co. v. Tuality Community Hospital*, the Court of Appeals held that a breach of contract claim brought against a hospital for its failure to procure insurance was not precluded under Oregon's Worker's Compensation Act because: 1) the statute only applied to compensable damages; and 2) an agreement to procure insurance is not an indemnity agreement.¹⁰²⁸ Specifically, in *Tuality*, the defendant hospital contracted with plaintiff to provide elevator repairs and maintenance.¹⁰²⁹ Per the maintenance agreement, the hospital agreed to procure comprehensive liability insurance "protecting plaintiff from personal injury and property damage claims from all persons, including defendant's employees."¹⁰³⁰ Despite the agreement, the hospital failed to purchase the insurance.¹⁰³¹ A hospital employee was subsequently injured while using the hospital's elevator.¹⁰³² After settling with the injured employee, plaintiff sued the hospital for breach of contract as a result of its failure to procure insurance that would have covered the claim.¹⁰³³ In response, the hospital denied responsibility, asserting that "agreements to purchase insurance are identical to indemnity agreements," and therefore precluded under the Worker's Compensation Act, § Ore. Rev. Stat. 656.018.¹⁰³⁴ The Court of Appeals disagreed.¹⁰³⁵

First, the court held that the exclusivity rule of § Ore. Rev. Stat. 656.018 only applied to compensable injuries and not breach of contract claims.¹⁰³⁶ The

¹⁰²⁵ See generally, *Id.*

¹⁰²⁶ See, *Montgomery Elevator Co. v. Tuality Community Hospital, Inc.*, 790 P.2d 1148 (Or. Ct. App. 1990).

¹⁰²⁷ *Id.*

¹⁰²⁸ *Id.* at 1149-1150.

¹⁰²⁹ *Id.* at 1148.

¹⁰³⁰ *Id.*

¹⁰³¹ *Id.*

¹⁰³² *Id.*

¹⁰³³ *Id.*

¹⁰³⁴ *Id.* at 1148-1149.

¹⁰³⁵ *Id.* at 1149.

¹⁰³⁶ *Id.* at 1149-1150.

agreement to procure insurance “was intended to protect the non-employer from liability for tort claims rather than to relieve the employer from its responsibility to provide worker’s compensation coverage.”¹⁰³⁷ As such, the breach of contract claim did not come within the statutory proscription of § Ore. Rev. Stat. 656.018 because it did not arise out of compensable injuries.¹⁰³⁸ The court therefore held that the agreement to procure insurance was not precluded under § Ore. Rev. Stat. 656.018, even though the indemnity provision contained in the maintenance agreement pursuant to which the company was to be indemnified by the hospital from all losses and liabilities was void under the same statute.¹⁰³⁹

Additionally, the court found agreements to procure insurance and agreements to indemnify to be significantly different.¹⁰⁴⁰ “Under an indemnity contract, payment by the insured is a prerequisite to the insurer’s duty of reimbursement; under an insurance contract, the insurer’s obligation attaches as soon as liability is established, and payment by the insured is immaterial.”¹⁰⁴¹ Had the hospital purchased insurance, its obligation to the plaintiff would have been met, and “the insurer would have been responsible for any claim that occurred.”¹⁰⁴² Conversely, under an indemnification agreement, the hospital, not its insurer, would have to assume all responsibility for the plaintiff and its injuries.¹⁰⁴³ As such, the hospital was deemed to have breached its contract to procure insurance for the plaintiff and was therefore ordered to reimburse plaintiff for its loss.¹⁰⁴⁴

In the construction context, an agreement requiring a party to procure liability insurance coverage naming the other as an additional insured is void under § Ore. Rev. Stat. 30.140.¹⁰⁴⁵ In *Walsh Construction Co. v. Mutual of Enumclaw*, the Court of Appeals interpreted § Ore. Rev. Stat. 30.140 to prohibit “not only ‘direct’ indemnity arrangements between parties to construction agreements but also ‘additional insurance’ arrangements by which one party is obligated to procure insurance for losses arising in whole or in part from the other’s fault.”¹⁰⁴⁶

In *Walsh*, the plaintiff, general contractor, entered into a construction agreement with the defendant, subcontractor, wherein the subcontractor was required to procure

¹⁰³⁷ *Id.* at 1149.

¹⁰³⁸ *Id.*

¹⁰³⁹ *Id.* at 1148, fn. 1.

¹⁰⁴⁰ *Id.*

¹⁰⁴¹ *Id.* at 1150.

¹⁰⁴² *Id.*

¹⁰⁴³ *Id.*

¹⁰⁴⁴ *Id.*

¹⁰⁴⁵ *Walsh Construction Co. v. Mutual of Enumclaw*, 76 P.3d 164 (Or. Ct. App. 2003), review granted, 92 P.3d 122 (Or. 2004), *aff’d*, 104 P.3d 1146 (Or. 2005).

¹⁰⁴⁶ *Id.* at 168.

liability insurance naming the general contractor as an additional insured.¹⁰⁴⁷ The subcontractor obtained the required insurance.¹⁰⁴⁸ The subcontractor's employee was subsequently injured and sued the general contractor.¹⁰⁴⁹ The general contractor tendered the defense to the subcontractor's insurer, Mutual of Enumclaw, which denied the claim, asserting that the agreement to procure insurance naming the general contractor as an additional insured violated § Ore. Rev. Stat. 30.140 (which places a statutory bar on agreements to indemnify another for its own negligence in the construction context).¹⁰⁵⁰ After settling with the employee, the general contractor initiated a breach of contract claim against the insurer "premised under its status as an 'additional insured'" under the subcontractor's policy.¹⁰⁵¹ The general contractor relied on the court's holding in *Tuality* that an agreement to procure insurance is different than an agreement to indemnify.¹⁰⁵² The Court, in distinguishing its holding in *Tuality*, held that § Ore. Rev. Stat. 30.140 was designed to prevent a party with leverage in the construction context from shifting exposure for its own malfeasance to one of a lesser financial position, such as a subcontractor.¹⁰⁵³ Thus, requirements to procure insurance in the construction context are void as the courts view such mandates as another form of shifting risk, an action strictly precluded under § Ore. Rev. Stat. 30.140.¹⁰⁵⁴

PENNSYLVANIA

§ I – General Rules of Contractual Indemnity.

Agreements of indemnity for loss or damage are enforceable in Pennsylvania¹⁰⁵⁵ but are not favored by the law and are consequently construed strictly against those seeking their protection.¹⁰⁵⁶ Although the extent of liability under an indemnity agreement is to be determined by the intent of the parties, given application of the rule of strict construction, indemnification provisions are an exception to the general rule of contract interpretation in which words and phrases are given their plain and ordinary meaning.¹⁰⁵⁷

¹⁰⁴⁷ *Id.* at 165.

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *Id.*

¹⁰⁵¹ *Id.*

¹⁰⁵² *Id.* at 166.

¹⁰⁵³ *Id.* at 168-169.

¹⁰⁵⁴ *Id.*

¹⁰⁵⁵ *Schroeder v. Gulf Refining Co.*, 300 Pa. 405, 411, 150 A. 665 (1930).

¹⁰⁵⁶ *Coatman v. Lower Allen Leisure Enter.*, 42 Pa. D. & C.3d 19, 24-25 (1985).

¹⁰⁵⁷ See *Deskiewicz v. Zenith Radio Corp.*, 561 A.2d 33, 34 (Pa. Super. Ct. 1989); *Fulmer v. Duquesne Light Co.*, 543 A.2d 1100 (Pa. Super. Ct. 1988).

Because an agreement to indemnify for another's negligence is so unusual and extraordinary, there is no presumption that the indemnitor intended to assume such a responsibility unless it is expressed in unequivocal terms,¹⁰⁵⁸ commonly referred to as the "Perry-Ruzzi Rule."¹⁰⁵⁹ A generally worded indemnification clause will not be construed to indemnify the indemnitee for liability resulting from the indemnitee's own negligence¹⁰⁶⁰ "unless an agreement to do so is expressed in unequivocal terms."¹⁰⁶¹ "No inference from words of general import can establish such indemnification."¹⁰⁶² An unambiguous agreement to indemnify another for the indemnitee's own negligence is enforceable, however, and does not run afoul of public policy.¹⁰⁶³

Consequently, a construction agreement providing indemnity to the owner for "all loss, cost or expense . . . arising from accidents to . . . laborers employed in the . . . work" does not create indemnity for the owner's own negligence.¹⁰⁶⁴ However, where a seller agreed to indemnify a buyer "from any and all claims . . . whether the same results from negligence of Buyer or Buyer's employees or otherwise," an intent to indemnify for the buyer's own negligence was found to exist.¹⁰⁶⁵

In considering contractual indemnity provisions, the Pennsylvania courts have applied concepts applicable to common law indemnity, in one case interpreting an indemnity agreement to extend to the indemnitee's passive negligence, as distinguished from its active negligence.¹⁰⁶⁶ In a later case, however, the court found notions of primary and secondary liability to be inapplicable to written contracts of indemnity.¹⁰⁶⁷

§ II – Exceptions to General Rules of Contractual Indemnity.

While an agreement to indemnify may be enforceable where the foregoing standard is met, indemnification tantamount to exculpation from liability for

¹⁰⁵⁸ *Perry v. Payne*, 66 A. 553, 557 (Pa. 1907); *Greer v. City of Philadelphia*, 795 A.2d 376, 378-379 (Pa. 2002); see also, *Ocean Spray Cranberries, Inc. v. Refrigerated Distributors, Inc.*, 2006 Phila. Ct. Com. Pl. LEXIS 229 (2006)(analyzing the application of the Perry-Ruzzi rule in indemnification actions involving personal injury versus property damage, upholding the long standing rule that provisions to indemnify for another party's negligence are to be narrowly construed requiring a clear and unequivocal agreement before a party may transfer its liability to another party).

¹⁰⁵⁹ *Ocean Spray Cranberries, Inc.*, at 21.

¹⁰⁶⁰ *Deskiewicz*, at 35.

¹⁰⁶¹ *Hershey Foods Corp. v. General Elec. Serv. Co.*, 619 A.2d 285, 288 (Pa. Super. Ct. 1992).

¹⁰⁶² *Hershey Foods*, at 288, citing, *Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1 (Pa. 1991).

¹⁰⁶³ See *Woodburn v. Consolidation Coal Co.*, 590 A.2d 1273 (Pa. Super. Ct. 1991); *Deskiewicz, supra*; *DiPietro v. City of Philadelphia*, 496 A.2d 407, 410 (Pa. Super. Ct. 1985).

¹⁰⁶⁴ *Perry v. Payne, supra*.

¹⁰⁶⁵ *Westinghouse Elec. Co. v. Murphy, Inc.*, 228 A.2d 656 (Pa. 1967).

¹⁰⁶⁶ *Urban Redevelopment Auth. of Pittsburgh v. Norelco Corp.*, 422 A.2d 563, 569 (Pa. Super. 1980).

¹⁰⁶⁷ *Fulmer*, at 1101-1102.

violation of a statute intended to protect human life is void on grounds of public policy.¹⁰⁶⁸ This rule serves two purposes: it avoids a loss of incentive on the part of a party to use reasonable care to avoid its own negligence and maintains an insurer's interest in loss prevention and inspection since the insurer also remains on the risk.¹⁰⁶⁹

Similarly, an indemnification provision in which one charged with a public duty is indemnified by the victim for the indemnitor's wrongdoing is unenforceable on grounds of public policy.¹⁰⁷⁰ As between joint tortfeasors, indemnification by one against another is enforceable even where a public safety statute is implicated so long as the indemnification is not for the sole negligence of the indemnitee.¹⁰⁷¹

An agreement by a partner in a registered limited liability partnership to indemnify another partner arising from negligent or wrongful acts committed by the other partner is enforceable¹⁰⁷² but not for willful misconduct or recklessness of the indemnitee.¹⁰⁷³ A contract involving an architect, engineer, surveyor or their agents in which the architect shall be indemnified or held harmless, is void as against public policy and wholly unenforceable.¹⁰⁷⁴

§ III – Indemnity Agreements as Insured Contracts.

Pennsylvania has interpreted an insured's agreement to indemnify another as an assumption of tort liability so as to place the indemnification within the policy exception for an "insured contract" and outside the exclusion for contractually assumed liability.¹⁰⁷⁵ Where the insured merely assumes a contractual obligation which does not amount to an assumption of liability in tort, however, the agreement to indemnify is not an "insured contract" and the policy exclusion applies.¹⁰⁷⁶

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

To the extent an insured purchases a policy of insurance to cover its underlying indemnity agreements with another party, the indemnified party receives no greater rights (unless named as an "additional insured") than it could against the named

¹⁰⁶⁸ *Warren City Lines, Inc. v. United Refining Co.*, 287 A.2d 149, 151 (Pa. Super. Ct. 1971).

¹⁰⁶⁹ *Id.* at 151 - 152.

¹⁰⁷⁰ *DeFrancesco v. Western Pa. Water Co.*, 478 A.2d 1295 (Pa. Super. Ct. 1984).

¹⁰⁷¹ *Fulmer v. Duquesne Light Co.*, *supra*.

¹⁰⁷² 15 Pa. Cons. Stat. § 8204 (2004).

¹⁰⁷³ 15 Pa. Cons. Stat. § 8510 (2005).

¹⁰⁷⁴ 68 Pa. Stat. § 491 (2005).

¹⁰⁷⁵ *Brooks v. Colton*, 760 A.2d 393 (Pa. 2000); *Tremco, Inc. v. Mfrs. Ass'n Ins. Co.*, 832 A.2d 1120-1122 (Pa. Super. Ct. 2003).

¹⁰⁷⁶ *Hertz Corp. v. Smith*, 657 A.2d 1316 (Pa. 1995).

insured directly.¹⁰⁷⁷ Where the underlying indemnity agreement limits the circumstances in which the named insured will be liable to the third-party, coverage under an insurance policy referring to that indemnity agreement may be limited in the same way.¹⁰⁷⁸ If an underlying indemnity provision only covers the indemnitor's negligence, then the insurance policy secured to cover that indemnity agreement may not extend to losses outside the indemnitor's negligence, i.e., the indemnitee's strict liability.¹⁰⁷⁹

Additionally, the rule that agreements to indemnify for one's own negligence be strictly construed applies to agreements to obtain insurance.¹⁰⁸⁰ Whether an express agreement to indemnify for one's own negligence or an agreement to obtain insurance which will cover losses for one's own negligence is at issue, the "same principles are applicable because to hold otherwise would be to put the indemnitor at the mercy of the indemnitee's negligent conduct."¹⁰⁸¹

Where an indemnified party is named as an "additional insured" on a policy with its indemnitor, the language of that policy, rather than the underlying indemnity agreement, controls.¹⁰⁸² Even where an indemnitor (named insured) may be able to avoid liability for direct indemnity, that fact is irrelevant to the determination of the indemnitee's rights as an additional insured.¹⁰⁸³ The underlying indemnity agreement does not control "the legal relationship between [an additional insured] and [the insurer]."¹⁰⁸⁴ Rather, the insurance agreement naming the indemnitee as "additional insured" "provides independent rights" to the indemnitee.¹⁰⁸⁵ If the insurer wishes to restrict coverage to the limits expressed in the underlying indemnity agreement or otherwise, it must so state in the policy.¹⁰⁸⁶

¹⁰⁷⁷ *Lincoln Ins. Co. v. ITO Corp. of Ameriport*, 18 Pa. D. & C.3d 607, 610 - 611 (1980).

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ *Id.*

¹⁰⁸⁰ *DiPietro v. City of Philadelphia*, 496 A.2d 407, 410 (Pa. Super. Ct. 1985).

¹⁰⁸¹ *Id.*

¹⁰⁸² *Township of Springfield v. Ersek*, 660 A.2d 672, 675 (Pa. Commw. Ct. 1995).

¹⁰⁸³ *Id.*

¹⁰⁸⁴ *Id.*

¹⁰⁸⁵ *Id.* at 676.

¹⁰⁸⁶ *Id.*

RHODE ISLAND

§ I – General Rules of Contractual Indemnity.

In Rhode Island, the right of indemnity may be created expressly or implied by a contract.¹⁰⁸⁷ The right to indemnity is statutorily preserved.¹⁰⁸⁸ While a party may contract to indemnify another for the other party's own negligence, a contract will not be construed to indemnify the indemnitee against its own negligence unless the parties' intention to do so is clearly and unequivocally expressed in the contract.¹⁰⁸⁹

Contractual indemnity provisions are interpreted using basic contract principles.¹⁰⁹⁰ In interpreting these provisions, a court "should review the agreement in its entirety, construe provisions with reference to one another where possible, and read the contract as 'a rational business instrument which will effectuate the apparent intention of the parties.'"¹⁰⁹¹ Indemnity provisions are to be strictly construed against the party alleging the right to indemnification,¹⁰⁹² and courts will look for clear and unambiguous language in the contract evidencing the parties' intent to indemnify.¹⁰⁹³

Express contractual indemnity provisions may be utilized to circumvent the exclusive remedy immunity of worker's compensation when an employer is sued by a third-party to whom the employer owes contractual indemnification when the third-party is sued by the employer's employee.¹⁰⁹⁴

§ II – Exceptions to General Rules of Contractual Indemnity.

Indemnity agreements in construction contracts in which a party seeks indemnification from another for the consequences of its own or its agent's

¹⁰⁸⁷ *Helgerson v. Mammoth Mart, Inc.*, 335 A.2d 339, 341 (R.I. 1975) (explaining an action for indemnity may also arise as an equitable remedy to compel the party primarily liable to hold the one secondarily liable harmless).

¹⁰⁸⁸ R.I. GEN. LAWS § 10-6-9 (2004).

¹⁰⁸⁹ *Corrente v. Conforti & Eisele Co.*, 468 A.2d 920, 922 (R.I. 1983); *Rhode Island Hosp. Trust Nat'l Bank v. Dudley Serv. Corp.*, 605 A.2d 1325, 1327 (R.I. 1992).

¹⁰⁹⁰ *Cosimini v. Atkinson-Kiewit Joint Venture*, 877 F. Supp. 68, 72 (D. R.I. 1995).

¹⁰⁹¹ *Id.* (quoting *Taunton Mun. Lighting Plant v. Quincy Oil Inc.*, 503 F. Supp. 235, 237 (D. Mass. 1980)).

¹⁰⁹² *Muldowney v. Weatherking Products, Inc.*, 509 A.2d 441, 443 (R.I. 1986).

¹⁰⁹³ *Chapman v. Vendresca*, 426 A.2d 262, 264 (R.I. 1981); *Rhode Island Hosp. Trust Nat'l Bank*, *supra* at 1327.

¹⁰⁹⁴ *Cosentino v. A.F. Lusi Construction Co.*, 485 A.2d 105, 108 (R.I. 1984) ("action for contract indemnification from [an] employer is not an action based upon the employee's injury but rather is an action for reimbursement based upon an expressed contractual obligation . . . [t]his obligation is independent of any statutory duty the employer may owe an employee.").

negligence are against public policy and void.¹⁰⁹⁵ Rhode Island General Law § 6-34-1(a)¹⁰⁹⁶ provides:

[An] 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, pursuant to which contract or agreement the promisee or the promisee's independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, the promisee's independent contractors, agents, employees, or indemnitees, is against public policy and is void; provided that that this section shall not affect the validity of any insurance contract, worker's compensation agreement, or an agreement issued by an insurer.

The legislature did not prohibit the use of all indemnification contracts in the construction industry.¹⁰⁹⁷ A general contractor may seek indemnification from a subcontractor for claims resulting from the negligence of the subcontractor or its employees.¹⁰⁹⁸

Unless the circumstances indicate bad faith or deliberate overreaching on the part of the promisee, an otherwise void indemnity provision will be modified and enforced by the courts.¹⁰⁹⁹ For example, in *Cosimini v. Atkinson-Kiewit Joint Venture*,¹¹⁰⁰ an injured employee brought suit against the general contractor after the subcontractor/employer paid the employee workers' compensation benefits. The subcontractor and contractor had entered into a contract containing an indemnity agreement and a corresponding insurance procurement clause. The indemnity agreement required the subcontractor to indemnify the contractor even if the contractor was partially negligent. Based on the clear language of the contract, the contractor brought a third-party claim against the subcontractor for indemnity. The court held that the indemnity provision was void as against public policy as announced in General Law § 6-34-1.¹¹⁰¹ But rather than invalidate the entire indemnity provision, the court modified the indemnity provision and enforced only the portion in compliance with General Law § 6-34-1.¹¹⁰²

¹⁰⁹⁵ *Cosentino*, 485 A.2d at 107.

¹⁰⁹⁶ This statutory provision was enacted in 1976 and does not apply to indemnity agreements which pre-date the enactment. See *Vaccaro v. E.W. Burman, Inc.*, 484 A.2d 880, 881 (R.I. 1984).

¹⁰⁹⁷ *Id.*

¹⁰⁹⁸ *Id.*

¹⁰⁹⁹ *Gormly v. I. Lazar & Sons, Inc.*, 926 F.2d 47, 50 (1st Cir. 1991).

¹¹⁰⁰ 877 F. Supp. 68 (D. R.I. 1995).

¹¹⁰¹ *Id.* at 71.

¹¹⁰² *Id.*

§ III – Indemnity Agreements as Insured Contracts.

Rhode Island law is inconclusive as to whether an agreement to indemnify is an “insured contract” within the meaning of a general liability insurance policy. In the only case to touch upon the issue, the Federal Court for the District of Rhode Island recognized that other jurisdictions have allowed coverage for contractually assumed liability, but ultimately determined that an employment contract would not amount to such a contract.¹¹⁰³

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Rhode Island courts have not explicitly addressed the operation of General Law § 6-34-1 where an indemnity obligation is joined with an insurance-procurement requirement.¹¹⁰⁴ It appears, however, that if an agreement to procure insurance is linked to an otherwise void indemnity agreement, General Law § 6-34-1 does not nullify the insurance procurement clause.¹¹⁰⁵ As stated above, the court may limit the scope of the indemnity obligation and, thereby narrow the scope of the insurance coverage.¹¹⁰⁶

In *Cosimini*, the court also analyzed whether the insurance procurement obligation should be limited to the scope of indemnity. The insurance procurement clause indicated that “insurance shall cover performance of the above indemnity obligation[.]”¹¹⁰⁷ The court reasoned that “[t]he scope of the insurance that [the subcontractor] was obligated to procure is determined by the scope of the indemnity obligation, as it is legally required to be performed.”¹¹⁰⁸ Because the court narrowed the subcontractor’s performance obligation under the indemnity clause, the insurance clause, by its own language, was equally limited.¹¹⁰⁹

A more recent case, *A.F. Lusi Constr., Inc. v. Peerless Ins. Co.*,¹¹¹⁰ implies that insurance procurement clauses containing an agreement to indemnify a contractor for its own negligence will not be struck down by operation of Rhode Island General Law § 6-34-1.¹¹¹¹ Although the court in *Peerless* did not ultimately decide whether § 6-34-1 invalidates insurance procurement agreements, it cited to other jurisdictions with similar statutory provisions that have upheld agreements by a subcontractor to

¹¹⁰³ *Foxon Packaging Corp. v. Aetna Casualty & Surety Co.*, 905 F. Supp. 1139, 1145 (D. R.I. 1995) (further holding that insurance cannot be afforded for intentional discrimination).

¹¹⁰⁴ *A.F. Lusi Constr., Inc. v. Peerless Ins. Co.*, 847 A.2d 254, 265-66 (R.I. 2004).

¹¹⁰⁵ *Cosimini*, 877 F. Supp. at 72.

¹¹⁰⁶ *Id.*

¹¹⁰⁷ *Cosimini*, 877 F. Supp. at 71.

¹¹⁰⁸ *Id.* at 72-73.

¹¹⁰⁹ *Id.*

¹¹¹⁰ 847 A.2d 254, 265-66 (R.I. 2004).

¹¹¹¹ *Id.*

purchase insurance for a general contractor, even though the insurance would have the practical effect of indemnifying the general contractor against the claims for damages resulting from the general contractor's own negligence.¹¹¹²

SOUTH CAROLINA

§ I – General Rules of Contractual Indemnity.

South Carolina law allows a party to contractually relieve itself from liability for ordinary negligence, except where such an agreement is against public policy.¹¹¹³ As a result, a contract that includes a provision “in which a first party is liable to a second party for a loss or damage the second party might incur to a third party” is enforceable.¹¹¹⁴

A contract of indemnity is construed “in accordance with the rules for the construction of contracts generally,”¹¹¹⁵ and the courts focus primarily on the intent of the parties¹¹¹⁶ which is determined from the language used in the contract.¹¹¹⁷ “If that language is clear and unambiguous, it must be given its plain and usual meaning.”¹¹¹⁸ If coverage for a loss appears to be reasonably within the contemplation of the parties, the court will interpret the contract of indemnity to cover such losses.¹¹¹⁹

As it is unusual, however, for an indemnitor to indemnify an indemnitee for losses resulting from the indemnitee's own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed.¹¹²⁰ A contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.¹¹²¹

Whether an agreement to indemnify for “any and all claims” reaches the sole negligence of the indemnitee is uncertain.¹¹²² Indeed, the South Carolina Court of

¹¹¹² *Id.*

¹¹¹³ *Laurens Emergency Med. Specialist v. M.S. Bailey & Sons Bankers*, 584 S.E.2d 375, 377 (S.C. 2003).

¹¹¹⁴ *Id.* at 377 (citing *Campbell v. Beacon Mfg. Co., Inc.*, 438 S.E.2d 271, 272 (S.C. Ct. App. 1993)).

¹¹¹⁵ *Campbell*, 438 S.E.2d at 272.

¹¹¹⁶ *Id.*

¹¹¹⁷ *Id.*

¹¹¹⁸ *Id.*

¹¹¹⁹ *Id.*

¹¹²⁰ *Federal Pacific Electric v. Carolina Production Enterprises*, 378 S.E.2d 56, 57 (S.C. Ct. App. 1989).

¹¹²¹ *Id.* at 57 (citing *Murray v. The Texas Co.*, 174 S.E. 231, 232 (S.C. 1934) (“[A] provision [in] a contract relieving one of the parties thereto from liability for...its own negligence should be clear and explicit.”)).

¹¹²² *Id.*

Appeals has noted that there are no less than three different interpretations of this phrase.¹¹²³

In *Federal Pacific Electric v. Carolina Production Enterprises*, the Court of Appeals noted that the “Supreme Court has yet to choose which of the views it favors on the question of what constitutes a sufficient expression of the intent of the parties concerning the indemnification of the indemnitee for its own negligence.”¹¹²⁴ In finding that the indemnity clause at issue in *Federal Pacific* did not satisfy the “clear and unequivocal” standard, the court held that “the use of the general terms ‘indemnify. . . against any damage suffered or liability incurred. . . or any loss or damage of any kind in connection with the Leased Premises during the term of [the] lease’ does not disclose an intention to indemnify for consequences arising from [the indemnitee’s] own negligence.”¹¹²⁵ In reaching its conclusion, the court in *Federal Pacific* relied upon an earlier decision, which held:

While it is true that the language used in the [indemnity] provision . . . is broad and comprehensive, it is . . . provocative of some doubt. The [oil company] itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the [distributor] agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt . . . in favor of the [distributor], and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the [oil] company.¹¹²⁶

At the very least then, this holding was a rejection of the notion that words generally describing indemnity for the indemnitee’s own negligence is sufficient.

§ II – Exceptions to General Rules of Contractual Indemnity.

Contracts “that are in violation of law or opposed to sound public policy” are void in South Carolina, and the courts will not enforce them.¹¹²⁷ On the other hand, South Carolina courts are cautioned not to void contracts on “doubtful grounds of

¹¹²³ Some courts hold that “the ‘clear and unequivocal terms’ requirement is satisfied only by a specific reference in the indemnity clause to the indemnitee’s negligence.” *Federal Pacific* at 57. Other courts take the view that “words of general import are sufficient to satisfy the ‘clear and unequivocal terms’ requirement and that a specific reference to the indemnitee’s negligence is therefore not necessary.” *Id.* Still other courts “look at the entire contract and any other factors manifesting the intention of the parties to determine whether they ‘clearly and unequivocally’ expressed the intent to indemnify the indemnitee for its own negligence.” *Id.*

¹¹²⁴ *Id.*

¹¹²⁵ *Id.* at 58-59.

¹¹²⁶ *Id.* at 58 (quoting *Murray v. The Texas Co.*, 174 S.E. 231, 232 (S.C. 1934)).

¹¹²⁷ *Batchelor v. American Health Ins. Co.*, 107 S.E.2d 36, 38-39 (S.C. 1959) (citing *Weeks v. New York Life Insurance Co.*, 122 S.E. 586 (S.C. 1924)).

public policy.”¹¹²⁸ Rather, it is better for the legislature to first determine what types of contracts should be void as against public policy.¹¹²⁹

“Public policy” in South Carolina is derived from the state’s “established law . . . as found in its Constitution, statutes, and judicial decisions.”¹¹³⁰ A statute provides that hold harmless clauses in construction contracts, where a party is indemnified for his sole negligence, are void as against public policy.¹¹³¹ S. C. Code Ann. § 32-2-10 provides in pertinent part, that “a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance . . . purporting to indemnify the promisee . . . against liability for damages . . . resulting from the sole negligence of the promisee . . . is against public policy and unenforceable.”¹¹³²

Another South Carolina statute prohibits a tenant from limiting the liability of a landlord or indemnifying the landlord for liability in a rental agreement.¹¹³³ Under S.C. Code Ann. § 27-40-330(a)(3), “A rental agreement may not provide . . . that the tenant agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.”¹¹³⁴

§ III – Indemnity Agreements as Insured Contracts.

The South Carolina courts have not specifically addressed whether and when an indemnity agreement is an “insured contract” within the meaning of a liability insurance policy. In *BP Oil Co. v. Federated Mutual Ins. Co.*, Federated Mutual Insurance Company (“Federated”) had a duty to defend one of BP Oil Company’s (“BP”) distributors, Wilkerson Fuel Company, Inc. (“Wilkerson”), in any suit alleging damages covered by the policy.¹¹³⁵ BP’s complaint against Wilkerson alleged that Wilkerson was liable to BP based upon indemnity provisions contained in two written agreements BP and Wilkerson had entered into for Wilkerson to distribute BP petroleum products in South Carolina.¹¹³⁶ Federated *admitted* that the two written agreements were “insured contracts” within the meaning of its policy.¹¹³⁷

¹¹²⁸ *Batchelor, supra.* at 39; (citing *Crosswell v. Connecticut Indemnity Association*, 28 S.E. 200, 205 (S.C. 1897)).

¹¹²⁹ *Id.*

¹¹³⁰ *Id.* at 38.

¹¹³¹ *See generally*, S.C. Code Ann. § 32-2-10.

¹¹³² S.C. Code Ann. § 32-2-10.

¹¹³³ S.C. Code Ann. § 27-40-330(a)(3).

¹¹³⁴ *Id.*

¹¹³⁵ *BP Oil Co. v. Federated Mutual Ins. Co.*, 496 S.E.2d 35 (S.C. Ct. App. 1998).

¹¹³⁶ *Id.* at 40-41.

¹¹³⁷ *Id.* (emphasis added).

Because the Federated policy covered “insured contracts,” the court held that Federated had a duty to defend Wilkerson.¹¹³⁸

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

There do not appear to be any decisions specifically addressing the effect of an indemnification agreement requiring the purchase of insurance or requiring the indemnitee to be named as an additional insured under the indemnitor’s liability policy.

However, where parties mutually agree to shift the risk of loss or damage to an insurance company as opposed to each other, South Carolina recognizes that such an agreement does not violate public policy and is enforceable.¹¹³⁹ In addition, waiver of subrogation clauses are consistently upheld because “they apply only to property losses, they waive subrogation only to the extent covered by first party insurance, and they merely give effect to the parties’ agreement to allocate risk.”¹¹⁴⁰

In *Summit Contractors vs. General Heating & Air Conditioning, Inc.*, a subcontractor and general contractor entered into an agreement with a waiver of subrogation provision.¹¹⁴¹ While working at the construction site, the subcontractor’s employee caused a fire by negligent soldering, which caused extensive property damage.¹¹⁴² The insurer paid the contractor \$935,000 under its property loss policy.¹¹⁴³ The insurer then pursued subrogation rights against the subcontractor for the fire damage to the construction site.¹¹⁴⁴ The subcontractor, in turn, asserted as a defense the waiver of subrogation clause found in its contract with the contractor.¹¹⁴⁵

The court upheld the subcontractor’s argument and enforced the waiver of subrogation clause.¹¹⁴⁶ In reaching its decision, the court noted that the contract provisions provided that “even though Subcontractor must fully indemnify Contractor for damage to the *property of others*, Contractor waives subrogation for

¹¹³⁸ *Id.*

¹¹³⁹ *Summit Contractors Inc. v. General Heating & Air Conditioning, Inc.*, 595 S.E.2d 472 (S.C. 2004).

¹¹⁴⁰ *Id.* at 476.

¹¹⁴¹ *Id.* at 474.

¹¹⁴² *Id.* at 473.

¹¹⁴³ *Id.* at 473-74.

¹¹⁴⁴ *Id.* at 473.

¹¹⁴⁵ *Id.*

¹¹⁴⁶ *Id.* at 476.

damage to the construction site to the extent covered by property insurance.”¹¹⁴⁷ As a result, the court found “no conflict within the waiver of subrogation clause.”¹¹⁴⁸

SOUTH DAKOTA

§ I – General Rules of Contractual Indemnity.

Generally, in order to relieve a party of the consequences of its own negligence, the language of an indemnity or hold harmless agreement must be clear and unequivocal.¹¹⁴⁹ “Any doubts are to be resolved in favor of the indemnitor.”¹¹⁵⁰ Indemnification for an indemnitee’s sole negligence is disallowed.¹¹⁵¹ The key to interpreting an indemnity agreement is the intention of the parties.¹¹⁵² Courts in South Dakota have found the intent to indemnify against a party’s negligence, even though the term “negligence” is not actually used, where such intent is clearly expressed.¹¹⁵³ In the construction context, “[c]ontracts of indemnity are strictly construed in favor of a subcontractor as against the contractor and unless the language employed clearly and definitely shows an intention to indemnify courts do not read into a written contract indemnity provisions not expressly set forth therein.”¹¹⁵⁴

As an example of South Dakota’s analysis of controversial provisions, the court in *Chicago & N. W. Transp. Co. v. V & R Sawmill, Inc.*,¹¹⁵⁵ considered two separate indemnity clauses before declaring both invalid. The case involved both a lease and a licensing agreement between a railroad (lessor/licensor) and an adjacent sawmill (lessee/licensee). An employee of the sawmill was injured by a train, and the railroad settled the case. Prior to settlement, the railroad never contacted the sawmill or tendered the defense.¹¹⁵⁶ The United States District Court for the District of South Dakota considered whether the railroad was entitled to indemnity from the sawmill pursuant to the indemnity provisions of the lease and/or licensing agreement.¹¹⁵⁷ The court held the lease agreement lacked a clear manifestation of intent to indemnify for

¹¹⁴⁷ *Id.* (emphasis added)

¹¹⁴⁸ *Id.*

¹¹⁴⁹ *Chicago & N. W. Transp. Co. v. V & R Sawmill, Inc.*, 501 F. Supp. 278, 281 (D. S.D. 1980); *Schull Constr. Co. v. Koenig*, 121 N.W.2d 559, 561 (S.D. 1963).

¹¹⁵⁰ *Becker v. Black & Veatch Consulting Eng’rs*, 509 F.2d 42, 46 (8th Cir. 1974).

¹¹⁵¹ S.D. Codified Laws § 56-3-18.

¹¹⁵² *United States v. Seckinger*, 397 U.S. 203 (1970); *Becker*, *supra*, at 46.

¹¹⁵³ *Becker*, *supra*, at 45-46(interpreting South Dakota law); *Chicago & N. W. Transp. Co.*, *supra*, at 282.

¹¹⁵⁴ *Schull Constr. Co.*, 121 N.W.2d at 562.

¹¹⁵⁵ 501 F. Supp. 278 (D. S.D. 1980).

¹¹⁵⁶ *Id.* at 279-80.

¹¹⁵⁷ *Id.* at 281-83.

the railroad's own negligence but found otherwise in regards to the pertinent license provision.¹¹⁵⁸

These conflicting findings were based on the specific language of each provision. The lease language was quite general, providing that "Lessee also agrees to indemnify and hold harmless the Lessor against loss, damage or injury to the person or property of the Lessee, or any other person, while on or about the leased premises..."¹¹⁵⁹ Conversely, the license was more specific:

...Licensee agrees to assume and pay for all loss or damage to property whatsoever, and injury to or death of any person,...however arising from or in connection with the existence, construction, maintenance, repair, renewal, reconstruction, operation, use or removal of said facility...; and the Licensee forever indemnifies the Railway Company against...any and all claims, demands, law suits or liability for any such loss..., **even though the operation of the Railway Company's railroad may have caused or contributed thereto.**¹¹⁶⁰

Despite the clear manifestation of an intent to indemnify for the railroad's sole negligence, the court held the provision void under South Dakota law because it required indemnification in a situation where the railroad was *solely* negligent.¹¹⁶¹ The court reasoned that it had to first determine whether an indemnity claim could even be made.¹¹⁶² "To sustain an indemnity claim against the indemnitor, the indemnitee must prove legal liability to the injured party unless the defense has been tendered and refused by the indemnitor."¹¹⁶³

Since there was no tender, the railroad had to prove its liability to the injured party.¹¹⁶⁴ The requisite proof of liability was established through evidence that the train did not sound a warning device prior to approaching the intersection, in violation of S.D. Codified Laws § 49-25-2. Although the court relied on S.D. Codified Laws § 56-3-18¹¹⁶⁵ to invalidate the indemnity, its opinion seemingly acknowledged an alternative basis for voiding the clause due to S.D. Codified Laws § 53-9-3, which, as a matter of public policy, prohibits persons from contracting to

¹¹⁵⁸ *Id.* at 282.

¹¹⁵⁹ *Id.* at 279.

¹¹⁶⁰ *Id.* at 279-280 (emphasis added).

¹¹⁶¹ *Id.* at 283-84 (based on the evidence at trial, the only way the railroad could have been liable to the injured employee was if the train failed to sound its bell or whistles).

¹¹⁶² *Id.* at 282.

¹¹⁶³ *Id.* (citing S.D. Codified Laws § 56-3-13 and *MO Pac. R.R. Co. v. AR Oak Flooring Co.*, 434 F.2d 575, 580 (8th Cir. 1970)).

¹¹⁶⁴ *Id.*

¹¹⁶⁵ Providing that agreements to indemnify another for his sole negligence in the construction context are void as against public policy.

exempt anyone from responsibility for violation of a law whether willful or negligent.¹¹⁶⁶

§ II – Exceptions to General Rules of Indemnity.

The South Dakota legislature has declared several types of contractual provisions void, including:

1) Indemnification agreements for a promisee's *sole negligence*:

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, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the *sole negligence* of the promisee, his agents or employees, or indemnitee, is against the policy of the law and is void and unenforceable.¹¹⁶⁷

2) Contract provisions contrary to law:

A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful.¹¹⁶⁸

3) Contracts against public policy:

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law.¹¹⁶⁹

4) Contracts to exempt a common carrier for willful or wanton misconduct or fraud:

A common carrier cannot be exonerated from liability for willful or wanton misconduct, fraud, or willful wrong of himself or his servant by any agreement made in anticipation thereof.¹¹⁷⁰

¹¹⁶⁶ *Chicago & N.W. Transp. Co., supra*, at 283.

¹¹⁶⁷ S.D. Codified Laws § 56-3-18 (emphasis added).

¹¹⁶⁸ S.D. Codified Laws § 53-9-1.

¹¹⁶⁹ S.D. Codified Laws § 53-9-3.

¹¹⁷⁰ S.D. Codified Laws § 49-2-9.

§ III – Indemnity Agreements as Insured Contracts.

The South Dakota courts have not addressed whether and under what circumstances an agreement to indemnify is an “insured contract” within the meaning of the exception to the form exclusion for contractually assumed liability.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

South Dakota has not had occasion to address the impact of insurance requirements on the application of enforceability of related indemnity provisions.

TENNESSEE

§ I – General Rules of Contractual Indemnity.

Tennessee Courts will enforce contractual indemnity agreements.¹¹⁷¹ The Tennessee Supreme Court, in *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, specifically noted that, “the allocation of risk agreed to by parties with equivalent bargaining powers in a commercial setting serves a particularly valid purpose where, as here, the contract delineates the parties’ duty to obtain and bear the cost of insurance . . . Thus, even broad transfers of liability, where unambiguous, should be honored.”¹¹⁷²

However, courts strictly construe contracts that provide indemnification against one’s own negligence.¹¹⁷³ In this context, the intention of the parties must be expressed in clear and unequivocal terms.¹¹⁷⁴ For example, where the agreement only provided that “[l]iability for injury, disability and death of workmen and other persons caused by the operation, handling or transportation of the equipment during the Rental Period shall be assumed by the [lessee-indemnitee],”¹¹⁷⁵ the agreement was held not to reach the indemnitor’s own negligence.¹¹⁷⁶ “‘Mere general, broad, and all inclusive language in the indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee’s own negligence.’”¹¹⁷⁷

One indemnity agreement can address separate indemnity obligations. For example, the first paragraph of the following agreement did not reach anything but

¹¹⁷¹ *Pitt v. Tyree Organization Limited*, 90 S.W.3d 244, 252 (Tenn. Ct. App. 2002); *Greene v. Greene*, No. E2005-01394-COA-R3-CV, 2006 Ten. App. LEXIS 158, at *7 (Tenn. Ct. App. March 7, 2006) (quoting *Honeycutt v. Honeycutt*, 152 S.W.2d 556, 561 (Tenn. Ct. App. 2003)).

¹¹⁷² *Planters Gin*, 78 S.W.3d 885, 892-93 (Tenn. 2002).

¹¹⁷³ *Power Equip. Co. v. J. A. Jones Constr. Co.*, No. .844, 1989 Tenn. App. LEXIS 108, at *4 (Tenn. Ct. App. February 10, 1989).

¹¹⁷⁴ *Id.* at *4-5.

¹¹⁷⁵ *Id.* at *3-4.

¹¹⁷⁶ *Id.* at *5-6.

¹¹⁷⁷ *Id.* at *5 (quoting *Wajtasiaak v. Morgan County*, 633 S.W.2d 488, 490 (Tenn. Ct. App. 1982)); see also *Crum v. Colman-Cocker Textile Machinery Co.*, 467 F. Supp. 6, 7 (E.D. Tenn. 1978).

the indemnitor's negligence, but the second paragraph, relating to claims by the indemnitor's employer, covered even the indemnitee's negligence:

INDEMNITY: Contractor shall indemnify and save Purchaser harmless from and against all losses or damages, and all claims, demands, suits, actions, payments and judgments, including attorney's fees, arising from personal injuries (including death), losses or damages to property, or otherwise, brought or recovered against Purchaser by reason of any act or omission of Contractor (or any of his sub-contractors) in the execution or guarding of the work, or by reason of any liens, claims, demands and debts for all labor performed and for all equipment and materials furnished under this Contract.

Contractor shall be responsible for the conduct and safety of his employees and his sub-contractors and the employees thereof in the performance of the work hereunder and while on the premises of the Purchaser, and the Contractor agrees that he will hold the Purchaser and his officers and employees harmless and indemnify them from and against any and all claims of any of such employees for personal injuries suffered by any of such employees in the performance of such work or while on the premises of the Purchaser.¹¹⁷⁸

Tennessee also recognizes the purportedly "universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by 'clear and unequivocal terms.'"¹¹⁷⁹ Thus, a clause that "[t]he contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury arising in connection with this contract," did not reach the concurrent negligence of the indemnitor and indemnitee.

An employer can be held liable pursuant to a contract for indemnity, despite the "exclusive remedy" provision of the Tennessee Workers' Compensation Act, Tenn. Code Ann. § 50-6-108.¹¹⁸⁰

§ II – Exception to General Rules of Contractual Indemnity.

Tennessee has adopted several exceptions to the general rule permitting agreements to indemnify for one's own negligence:

¹¹⁷⁸ *Kellogg Co. v. Sanitors, Inc.*, 496 S.W.2d 472, 473 (Tenn. 1973).

¹¹⁷⁹ *Kroger Co. v. Glem*, 387 S.W.2d 620, 626 (Tenn. 1964); *Farmers Mut. Of Tenn. V. Athens Ins. Agency*, 145 S.W.3d 566, 569 (Tenn. Ct. App. 2004).

¹¹⁸⁰ *Easter v. Exxon Co.*, 699 S.W.2d 168, 170 (Tenn. Ct. App. 1985). *But see Summers v. Command Systems, Inc.*, No. 02A01-9104-CV-0054, 1991 Tenn. App. LEXIS 803, at *4 (Tenn. Ct. App. October 10, 1991) (holding that, where no such agreement exist, Tenn. Code Ann. § 50-6-108 will bar noncontractual indemnity).

By statute, indemnity agreements relative to construction contracts, wherein a party is indemnified for his sole negligence, are deemed void as against public policy.¹¹⁸¹

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, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees, or indemnitee, is against public policy and is void and unenforceable.¹¹⁸²

This statute is broadly construed: "Looking at the natural and ordinary meaning of this statute, we interpret it to include any agreement relative to the construction of a building. Thus a contract to provide certain services relative to a building under construction under a separate contract would be included under T.C.A. § 62-6-123 and any provision purporting to indemnify or hold harmless the promisee against liability arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee is against public policy and is void and unenforceable."¹¹⁸³

In addition, residential rental agreements in certain counties may not limit the liability of the landlord or indemnify the landlord for liability.¹¹⁸⁴ Under Tenn. Code Ann. § 66-28-203(a)(2), "No rental agreement may provide that the tenant . . . (2) Agrees to the exculpation or limitation of any liability of the landlord to the tenant arising under law or to indemnify the landlord for that liability or the costs connected with such liability." This statute applies to "counties having a population of more than sixty-eight thousand (68,000) according to the 1970 federal census or any subsequent federal census," but does not apply "in counties having a population according to the 1990 federal census or any subsequent federal census, of:

not less than	nor more than
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80,000	83,000
92,200	92,500
118,400	118,700
140,000	145,000

¹¹⁸¹ *Planters Gin*, 78 S.W.3d at 893; see also *Elliott Crane Service, Inc. v. H. G. Hill Stores, Inc.*, 840 S.W. 2d 376 (Tenn. Ct. App. 1992); *Trinity Indus. v. McKinnon Bridge Co.*, 77 S.W.3d 159, 174 (Tenn. Ct. App. 2001); Tenn. Code Ann. § 62-6-123.

¹¹⁸² Tenn. Code Ann. § 62-6-123.

¹¹⁸³ *Carroum v. Dover Elevator Co.*, 806 S.W.2d 777, 780 (Tenn. Ct. App. 1990).

¹¹⁸⁴ *Planters Gin*, 78 S.W.3d at 893; Tenn. Code Ann. § 66-28-203(a)(2).

In *Crawford v. Buckner*, the Court held that an exculpatory clause in a residential lease releasing a landlord from liability for future acts of negligence, even when executed in a county not covered by Tenn. Code Ann. § 66-28-203, was void as contrary to public policy.¹¹⁸⁵ Likewise, in *Olsen v. Molzen*, the Court found that an exculpatory contract signed by a patient as a condition of receiving medical treatment was contrary to public policy and void.¹¹⁸⁶ And in *Adams v. Roark*, the Court held that indemnity clauses as to damages caused by gross negligence or willful conduct on the part of the indemnified party were invalid.¹¹⁸⁷

§ III – Indemnity Agreements as Insured Contracts.

Tennessee recognizes an agreement to indemnify a third party for the third party's tort liability by an insured as an "insured contract" within the meaning of a liability insurance policy excepting such assumption of liability from an exclusion for contractually assumed liability¹¹⁸⁸

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

A facially unambiguous agreement in a lease, whereby the lessee agrees to hold the lessor harmless, ascribes a meaning which is "inescapable" when joined with an agreement on the part of the lessee to insure the contents of items stored on the lease property, and when joined with a waiver of subrogation provision.¹¹⁸⁹ Consequently, where the lessee received payment for its loss from its property insurance carrier, and the carrier then pursued a subrogation action in the name of the lessee against the lessor, the hold harmless and waiver of subrogation provisions precluded the subrogation action.¹¹⁹⁰ The broad hold harmless provision was held to apply notwithstanding that the alleged negligence of the lessor causing the damage arose out of the lessor's maintenance of premises other than that leased by the lessor.¹¹⁹¹

Where a named insured subcontractor broadly agrees to indemnify a contract or for damage or injury arising out of the acts or omissions of the subcontractor, and agreed to purchase insurance coverage covering this assumed liability and such coverage is obtained, the carrier owes direct duties of defense and indemnity to the contractor where it is established that a liability for which the contractor paid was the result of the acts or omissions of the insured subcontractor.¹¹⁹²

¹¹⁸⁵ *Crawford v. Buckner*, 839 S.W.2d 754, 760 (Tenn. 1992); see also *Planters Gin*, 78 S.W.3d at 893.

¹¹⁸⁶ *Olsen v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977); see also *Planters Gin*, 78 S.W.3d at 893.

¹¹⁸⁷ *Adams v. Roark*, 686 S.W.2d 73, 75-76 (Tenn. 1985); see also *Planters Gin*, 78 S.W.3d at 893.

¹¹⁸⁸ *York v. Vulcan Materials Co.*, 63 S.W.3d 384, 387 (Tenn. Ct. App. 2001).

¹¹⁸⁹ *Id.* at 390; *Planters Gin*, 78 S.W.3d at 893.

¹¹⁹⁰ *Id.*

¹¹⁹¹ *Id.*

¹¹⁹² *York*, 63 S.W.3d 384.

TEXAS

§ I – General Rules of Contractual Indemnity.

Ordinarily, the Texas courts “construe indemnity agreements under the normal rules of contract construction” in their attempt to determine the parties’ intent.¹¹⁹³ Determining the intent of the parties requires the courts to examine and consider the entire writing in an effort to “harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.”¹¹⁹⁴ Thus, no provision taken alone will be given controlling effect. Rather, all the provisions will be construed with reference to the whole instrument.¹¹⁹⁵

Various courts of appeals have held that indemnity obligations are not lightly inferred¹¹⁹⁶ and, “as a general rule,” indemnity contracts will be strictly construed in favor of the indemnitor.¹¹⁹⁷

In contrast to other indemnity agreements, Texas law views contracts that “exculpate a party from the consequences of its own negligence” to constitute an “extraordinary shifting of risk.”¹¹⁹⁸ Thus, Texas has developed two types of fair notice requirements for such agreements – the express negligence doctrine and the conspicuousness requirement.¹¹⁹⁹ Whether an indemnity agreement meets the express negligence test and is sufficiently conspicuous is a question of law for the court.¹²⁰⁰ If the indemnitor has actual notice or knowledge of the indemnity agreement, these fair notice requirements need not be met.¹²⁰¹ Furthermore, in 2005, the Texas Court of Appeals emphasized that, “[t]he application of the fair notice requirements has been ‘explicitly limited to releases and indemnity clauses in which one party exculpates itself from its own future negligence.’”¹²⁰²

¹¹⁹³ *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 284 (Tex. 1998).

¹¹⁹⁴ *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951).

¹¹⁹⁵ *Myers v. Gulf Coast Minerals Mgt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962).

¹¹⁹⁶ *Turboff v. Gertner, Aron & Ledet Inv.*, 840 S.W.2d 603, 612 (Tex. App. – Corpus Christi 1992, writ dis’m).

¹¹⁹⁷ See, *inter alia*, *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457, 461 (Tex. App. – San Antonio 1995, writ dism’d); *Safeco Ins. Co. of America v. Gaubert*, 829 S.W.2d 274, 281 (Tex. App. – Dallas 1992, writ denied); *Atchison, T. & S. F. Ry. v. Denton*, 475 S.W.2d 821, 832 (Tex. App. – Amarillo 1971, writ ref’d n.r.e.).

¹¹⁹⁸ *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

¹¹⁹⁹ *Id.*; see also *Green Inter, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997).

¹²⁰⁰ *Dresser Indus.*, 853 S.W.2d at 509.

¹²⁰¹ *Id.* at 508 n. 2.

¹²⁰² *OXY USA, Inc. v. Southwestern Energy Prod. Co.*, 161 S.W.3d 277, 283 (Tex. App. – Corpus Christi 2005).

In 1987, Texas abandoned the “clear and unequivocal” rule and adopted the “express negligence” rule in *Ethyl Corp. v. Daniel Construction Co.*¹²⁰³ The express negligence test requires “that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract.”¹²⁰⁴

The express negligence rule applies to any agreement which relieves a party in advance of responsibility for its own negligence, whether that agreement is labeled an indemnity or a release.¹²⁰⁵ The doctrine will also be applied to indemnity agreements which cover strict liability claims and agreements for comparative indemnity.¹²⁰⁶ The express negligence test *does not* apply to additional insured provisions in insurance policies.¹²⁰⁷

The conspicuousness requirement mandates “that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it.”¹²⁰⁸ In 1993, the Texas Supreme Court adopted the requirements of the Uniform Commercial Code for indemnities which relieve a party in advance from the consequences of its own negligence:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color. But in a telegram any stated term is “conspicuous.”¹²⁰⁹

Thus, language in capital headings and language in contrasting type is conspicuous.¹²¹⁰

One Texas court has held that the conspicuousness of an indemnity agreement is shown by objective factors on the face of the contract and does not vary according to “the subjective sophistication and experience of each party against whom the agreement may be asserted.”¹²¹¹

¹²⁰³ 725 S.W.2d 705 (Tex. 1987).

¹²⁰⁴ *Id.* at 708.

¹²⁰⁵ *Dresser Indus.*, 853 S.W.2d at 507.

¹²⁰⁶ *Houston Lighting & Power Co. v. Atchison, T. & S.F. Ry.*, 890 S.W.2d 455, 459 (Tex. 1994).

¹²⁰⁷ *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 806 (Tex. 1992), *cert. denied*, 114 S. Ct. 76, 510 U.S. 820, 126 L. Ed. 2d 45 (1993).

¹²⁰⁸ *Dresser Indus.*, 853 S.W.2d at 508 (*quoting* *Ling & Co. v. Trinity Sav. & Loan Ass’n*, 482 S.W.2d 841, 843 (Tex. 1972)) (bracket in original).

¹²⁰⁹ *Id.* at 511 (*quoting* Tex. Bus. & Com. Code Ann. § 1.201(10)).

¹²¹⁰ *Id.*

¹²¹¹ *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, 901 S.W.2d 789, 792 (Tex. App. – Houston [14th Dist.] 1995, *writ denied*).

Ultimately, “[i]n the absence of an extraordinary shifting of risk, the Supreme Court has ‘resisted expanding the fair notice requirements.’”¹²¹²

§ II – Exceptions to General Rules of Contractual Indemnity.

While Texas has several statutes which limit the enforceability of indemnity contracts,¹²¹³ there are two statutory exceptions which have the most potential significance to insurance agreements: the Oilfield Anti-Indemnity Act¹²¹⁴ and the architects and engineers’ anti-indemnity statute.¹²¹⁵

The Oilfield Anti-Indemnity Act “provides that an agreement pertaining to an oil or gas well is void if it purports to indemnify a party from loss or liability for damage arising out of its own negligence.”¹²¹⁶ The prohibition applies to contracts involved in drilling or servicing of oil, gas, or water wells and mineral mines.¹²¹⁷

The Act makes unenforceable any indemnity which protects a party from damages resulting from the “sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee.”¹²¹⁸ If there is insurance supporting the indemnification agreement, the agreement will be enforceable (1) to the full extent of the indemnity if the agreement is “mutual,” or (2) to \$500,000 if the indemnity is “unilateral.”¹²¹⁹ A “mutual” indemnity is an agreement in which the parties agree to indemnify each other and each other’s contractors completely.¹²²⁰ A “unilateral” indemnity, as the name implies, operates to the favor of only the indemnitee – it is not reciprocal to the indemnitor.¹²²¹

The Act only regulates agreements for the purchase of insurance if they are in support of indemnity agreements. It does not “prohibit ‘insurance shifting’ schemes that do not fall within its parameters; rather it *permits* certain indemnity agreements if they are supported by liability insurance and meet the section’s other

¹²¹² *OXY USA, Inc.*, 161 S.W.3d at 283 (quoting *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 193, 47 Tex. Sup. Ct. J. 405 (Tex. 2004)).

¹²¹³ Tex. Labor Code § 417.004 (worker’s compensation); Tex. Transp. Code § 623.0155 (common carrier as condition of hire).

¹²¹⁴ Tex. Civ. Prac. & Rem. Code § 127.001, et seq.

¹²¹⁵ Tex. Civ. Prac. & Rem. Code § 130.001, et seq.

¹²¹⁶ *Getty Oil Co.*, 845 S.W.2d at 803.

¹²¹⁷ Tex. Civ. Prac. & Rem. Code § 127.001(3) - (4).

¹²¹⁸ *Id.* at § 127.003, et seq.

¹²¹⁹ *Id.* at § 127.005.

¹²²⁰ *Id.* at § 127.001(3).

¹²²¹ *Id.* at § 127.001(6).

requirements.”¹²²² Thus, the act will not prohibit an independent contractual obligation to provide a party with additional insured status.¹²²³ Additional insured status will not be prohibited by the Act even if the effect of such an endorsement is to relieve a party for responsibility for its sole negligence.¹²²⁴

The architects and engineers’ anti-indemnity statute makes unenforceable some indemnity agreements running from a contractor, some landowners, of building supplier in favor of a registered architect or engineer.¹²²⁵ The statute applies to indemnification for damage resulting from defects in plans “prepared, approved, or used” by the architect or engineer or from the negligence of the architect or engineer.¹²²⁶ Indemnification of an architect or engineer for liability resulting from the negligent acts of another, including a contractor, is specifically permitted under the statute¹²²⁷ and, as would be expected, the courts have enforced such indemnity agreements.¹²²⁸

§ III – Indemnity Agreements as Insured Contracts.

Texas will find that an indemnity agreement is covered in a general liability policy which provides insured contract coverage.¹²²⁹

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

A risk-shifting agreement which contains both an indemnity and an agreement to procure insurance will ordinarily be enforced as two separate and independent obligations.¹²³⁰ In 1992, the Texas Supreme Court decided *Getty Oil Co. v. Insurance Co. of North America*, which concerned an indemnity agreement containing an agreement to add the indemnitee as additional insured. While the indemnitee was denied indemnification on the basis of *res judicata*, it was permitted

¹²²² *Getty Oil Co.*, 845 S.W.2d at 804 (emphasis in original) (citing Tex. Civ. Prac. & Rem. Code § 127.005).

¹²²³ *Id.* at 805.

¹²²⁴ *Id.*

¹²²⁵ Tex. Civ. Prac. & Rem. Code §§ 130.001, 130.002.

¹²²⁶ *Id.* at § 130.002(a)(1)(A).

¹²²⁷ *Id.* at § 130.005.

¹²²⁸ *Foster, Henry, Henry & Thorpe, Inc. v. J.T. Const. Co.*, 808 S.W.2d 139, 141 (Tex. App. – El Paso 1991, writ denied).

¹²²⁹ *Travelers Ins. Co. v. Chicago Bridge & Iron Co.*, 442 S.W.2d 888, 898 (Tex. Civ. App. – Houston [1st Dist.] 1969, writ ref’d n.r.e.); *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 492-496 (5th Cir. 2000); *Gibson & Assoc., Inc. v. Home Ins. Co.*, 966 F. Supp. 468, 476-77 (N.D. Tex. 1997).

¹²³⁰ See *Getty Oil Co.*, 845 S.W.2d at 798-802; *Coastal Transp. Co. v. Crown Cen. Petroleum Corp.*, 20 S.W.3d 119, 125-29 (Tex. App. – Houston [14th Dist.] 2000, pet. denied); *Certain Underwriters at Lloyds v. Oryx Energy Co.*, 142 F.3d 255, 259-60 (5th Cir. 1998). See also, *Helmerich & Payne Int’l Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 644 (Tex. App. – Houston [14th Dist.] 2005) (citing, *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 806 (Tex. 1992), cert. denied, 114 S. Ct. 76, 510 U.S. 820, 126 L. Ed. 2d 45 (1993)).

to pursue additional insured status. The court noted: “[i]t was determined [in a prior suit] that Getty had no right of indemnity from NL, *but Getty is not attempting to relitigate that issue here. Rather, it is seeking damages for NL’s failure to extend insurance coverage to Getty.*”¹²³¹

As should be evident from the last two sections, Texas will not allow an indemnity agreement to limit additional insured coverage. Under Texas law, limitations which might be found in an indemnity agreement will not be imported into a policy of insurance which adds an indemnitee as an additional insured.¹²³²

UTAH

§ I – General Rules of Contractual Indemnity.

In Utah, the right to indemnification by an express contract or agreement is enforceable if the contract language clearly and unequivocally expresses the parties’ intent to indemnify one another.¹²³³ The language of such provisions must clearly and unequivocally express the parties’ intent to release, shift, or avoid potential liability for loss or injury resulting from particular transactions or occurrences.¹²³⁴

To constitute a clear and unequivocal expression of intent to indemnify for a party’s own negligence, an indemnity agreement need not contain specific language, but must provide a sufficiently clear and unequivocal expression of the parties’ intent.¹²³⁵ For example, a provision that holds a party harmless for “any and all claims, damages, loss and expenses, to the fullest extent permitted by law” for “any death, accident, injury or other occurrence” from visits to a specific location, meets the test for enforceability.¹²³⁶ When interpreting indemnity agreements, Utah courts look at the objectives of the parties and the surrounding facts and circumstances.¹²³⁷

Historically, such express indemnity agreements were strictly construed by the courts.¹²³⁸ Utah courts have more recently relaxed the rule of strict construction and

¹²³¹ *Getty Oil Co.*, 845 S.W.2d at 802 (emphasis added).

¹²³² *Mid-Continent Cas. Co.*, 206 F.3d at 494 n. 8 (“But it is the Policy’s language, not the language in the MSA, which governs the scope of the Policy.”). *See also*, *Helmerich & Payne Int’l Drilling Co.*, 180 S.W. 3d at 645, (citing, *Mid-Continent Cas. Co.*, 206 F.3d at 492-95, to buttress the position that “the language of additional-insured provisions in the contracts at issue were not tied to the validity of the indemnity provisions of the contract and therefore were not affected by the alleged invalidity of the indemnity provisions under applicable anti-indemnity statutes.”).

¹²³³ *Ervin v. Lowe’s Companies, Inc.*, 128 P.3d 11, 15 (Utah Ct. App. 2005); *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 904-905 (Utah Ct. App. 1995); *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1190-91 (Utah 1983).

¹²³⁴ *Russ*, 905 P.2d at 906.

¹²³⁵ *Healey v. J.B. Sheet Metal, Inc.*, 892 P.2d 1047, 1049 (Utah Ct. App. 1995).

¹²³⁶ *Russ*, 905 P.2d at 906.

¹²³⁷ *Ervin*, 128 P.3d at 15.

¹²³⁸ *Russ*, 905 P.2d at 905.

adopted the more lenient “clear and unequivocal” test for enforcing indemnity agreements.¹²³⁹

Express agreements by which one person obtains another person’s agreement to indemnify him from the results for his own negligence are not favored under Utah law and are strictly construed against the indemnitee.¹²⁴⁰ But where the intention to indemnify a person from losses attributable to his own negligence is “clearly and unequivocally expressed” in the contract language, such an indemnity agreement will be upheld.¹²⁴¹ Since relieving one from his own negligence is sometimes declared invalid as being against public policy, such intention is not achieved by inference or implication from general language.¹²⁴²

§ II – Exceptions to General Rules of Contractual Indemnity.

Gross or wanton negligence or intentional misconduct will nullify an indemnity agreement.¹²⁴³ An indemnity agreement may also be invalidated on public policy grounds where it is shown to have resulted from duress, deception, a disparity of bargaining power or negotiations conducted at less than arm’s length.¹²⁴⁴ When determining whether an indemnity provision offends public policy, Utah courts look to the provision’s context, subject and overall purpose.¹²⁴⁵ For example, while generally releases of liability for prospective negligence are enforceable, the Utah Supreme Court recently held that, as a matter of public policy, a parent may not release a minor’s prospective claim to recover damages for negligence caused by another.¹²⁴⁶

An indemnity agreement that contravenes a statute or rule may also violate public policy.¹²⁴⁷ Such a limitation is exemplified by Utah Code Ann. § 13-8-1, which provides that an agreement for the construction, repair, or maintenance of a building which purports to indemnify the promisee for liability resulting from the promisee’s “sole negligence” is void and unenforceable as against public policy.¹²⁴⁸ However, since building code violations, negligent construction, or other liabilities can arise from their finished product, builders and buyers may contract to place

¹²³⁹ *Id.*; see also *Ervin*, 128 P.3d at 15; *Pichover v. Smith’s Management Corp.*, 771 P.2d 664, 667-68 (Utah Ct. App. 1989) (discussing trend to limit rule of strict construction for indemnity agreement).

¹²⁴⁰ *Shell Oil Co.*, 658 P.2d at 1189; *Jankele v. Texas Co.*, 54 P.2d 425 (Utah 1936) (stating that it has been declared to be good doctrine that no person may contract against his own negligence).

¹²⁴¹ *Shell Oil Co.*, 658 P.2d at 1189.

¹²⁴² *Union Pac. R.R. Co. v. El Paso Natural Gas Co.*, 408 P.2d 910 (Utah 1965).

¹²⁴³ *Hawkins v. Peart*, 37 P.3d 1062, 1065 (Utah 2001).

¹²⁴⁴ *Shell Oil Co.*, 658 P.2d at 1189-90

¹²⁴⁵ *Russ*, 905 P.2d at 907.

¹²⁴⁶ *Hawkins*, 37 P.3d at 1066.

¹²⁴⁷ See *Id.* at 1066-67.

¹²⁴⁸ Utah Code Ann. § 13-8-1 (2005).

potential liability for inherent risks of construction sites and similar risks on one of the parties.¹²⁴⁹

Generally, public servants may not contract to escape potential liabilities for their ordinary negligence,¹²⁵⁰ including state agencies, utilities, innkeepers, common carriers, and public warehousemen.¹²⁵¹ Public servants are persons and entities that provide essential and indispensable services such as hospital care and police protection.¹²⁵² and include those who are duty bound to contract with all comers.¹²⁵³

§ III – Indemnity Agreements as Insured Contracts.

No Utah court has discussed whether an indemnity agreement is an “insured contract” under a liability insurance policy. Such an argument was advanced in *Smith v. United States Fidelity & Guarantee Co.*, but the court did not reach the issue.¹²⁵⁴ Nevertheless, the case indicates that Utah courts might be receptive to such an argument in the proper factual situation.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Utah courts have held that where the parties have chosen by clear and unequivocal language to require one party to indemnify the other from liability arising from any cause, including the indemnity’s own negligence, a further provision funding that indemnification by the purchase of liability insurance should be construed as any other contractual language, and is not subject to the strict construction rule.¹²⁵⁵ Contracts to obtain insurance coverage to cover liability arising from an additional insured’s own negligence will be upheld.¹²⁵⁶

Utah permits agreements to procure insurance on behalf of another, and such agreements do not violate Utah Code Ann. § 13-8-(1), which prohibits indemnity for a contractor’s sole negligence.¹²⁵⁷ An agreement to obtain insurance is not an agreement of insurance; a person promising to obtain insurance does not by that promise become an insurer and is not responsible for personally insuring or indemnifying another for its own negligence.¹²⁵⁸ An agreement to purchase

¹²⁴⁹ *Russ*, 905 P.2d at 907.

¹²⁵⁰ *Id.*

¹²⁵¹ *Id.*

¹²⁵² *Id.*

¹²⁵³ *Id.*

¹²⁵⁴ *Smith v. United States Fidelity & Guarantee Co.*, 949 P.2d 337 (Utah 1997).

¹²⁵⁵ *Christiansen v. Holiday Rent-A-Car*, 845 P.2d 1316, 1322 (Utah Ct. App. 1992); *see also Freund v. Utah Power & Light Co.*, 793 P.2d at 372-73.

¹²⁵⁶ *Freund*, 793 P.2d at 373.

¹²⁵⁷ *Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.*, 27 P.3d 594, 598 (Utah Ct. App. 2001).

¹²⁵⁸ *Id.* at 598.

insurance does not make the party agreeing to provide the insurance an indemnitor.¹²⁵⁹

In *Christiansen v. Holiday Rent-A-Car*,¹²⁶⁰ the plaintiff in a personal injury suit challenged the trial court's determination that third party defendant Airport Shuttle Parking ("Airport") breached a contractual obligation to secure liability insurance for defendant Holiday Rent-A-Car ("Holiday").¹²⁶¹ As part of a sublease between Airport and Holiday, Airport allegedly agreed to obtain liability insurance that would cover Holiday once the two companies began sharing Airport's facilities.¹²⁶² The plaintiff alleged that Holiday was brought within the scope of Airport's insurance policy, but the policy did not list Holiday as an additional insured.¹²⁶³

The insurance policy contained an exclusion providing that the policy did not apply to liability assumed by the insured under any contract or agreement except an "insured contract."¹²⁶⁴ The policy's definition of "insured contract" included a written lease of premises, such as the sublease agreement between Airport and Holiday.¹²⁶⁵ The Court held that this exception to the exclusion provided coverage for liability claims contractually assumed by Airport under a sublease agreement, but it was not enough that Airport was a party to the sublease agreement.¹²⁶⁶ For the plaintiff's claim against Holiday to survive the exclusion, Airport must have contracted to assume liability under that agreement.¹²⁶⁷ The Court found that this policy provision contemplated the familiar situation where parties to a lease contractually allocate liability as between themselves for injuries sustained by visitors to the property.¹²⁶⁸ The plaintiff argued that under the terms of the sublease, the Airport agreed to indemnify Holiday for judgments levied against Holiday by third parties.¹²⁶⁹

The Court disagreed and held that Airport did not contractually assume Holiday's liability.¹²⁷⁰ Rather, Airport simply agreed to make Holiday an insured on

¹²⁵⁹ *Id.*

¹²⁶⁰ 845 P.2d 1316 (Utah Ct. App. 1992).

¹²⁶¹ *Id.* at 1317.

¹²⁶² *Id.*

¹²⁶³ *Id.* at 1319.

¹²⁶⁴ *Id.* at 1320.

¹²⁶⁵ *Id.*

¹²⁶⁶ *Id.*

¹²⁶⁷ *Id.*

¹²⁶⁸ *Id.*

¹²⁶⁹ *Id.*

¹²⁷⁰ *Id.*

its existing liability policy, which was its sole obligation.¹²⁷¹ Airport did not agree to personally pay judgments against Holiday, and did not assume liability under the sublease for Holiday's negligence.¹²⁷² It did not agree to indemnify nor hold Holiday harmless concerning the shared premises.¹²⁷³ Thus a mere agreement to purchase insurance does not constitute indemnity.

VERMONT

§ I – General Rules of Contractual Indemnity.

Vermont courts generally recognize the enforceability of express indemnification agreements contained within commercial contracts. Where the language of an indemnity agreement is clear, the intention and understanding of the parties must be taken to be that which their agreement declares.¹²⁷⁴ “We interpret the indemnification provisions of a document as we do all other contract provisions – to give effect to the intent of the parties as their intent is expressed in their writing.”¹²⁷⁵ Thus, indemnification clauses expressly covering liability for an indemnitee's own negligence are enforceable.¹²⁷⁶

Where the language of an indemnity agreement “clearly and unequivocally indicates that one party is to be indemnified, regardless of whether or not that injury was caused in part by that party, indemnification is required notwithstanding the indemnitee's active negligence.”¹²⁷⁷ Courts have not required specific or express language referring to the indemnitee's negligence in order to uphold an absolute indemnification clause.¹²⁷⁸ Rather, broad, absolute indemnity language will be enforced if the intent of the parties is clear. Thus, the following clause in a lease agreement was enforced despite the landlord's own negligence: “Tenant agrees to indemnify, hold harmless, and defend Landlord from and against any and all losses, claims, liabilities, and expenses, including reasonable attorney's fees, if any, which

¹²⁷¹ *Id.*

¹²⁷² *Id.*

¹²⁷³ *Id.*

¹²⁷⁴ *Folino v. Hampden Color & Chem. Co.*, 832 F. Supp. 757, 761 (D. Vt., 1993); *Lamoille Grain Co. v. St. Johnsbury and Lamoille County R.R.*, 369 A.2d 1389, 1391 (Vt. 1976).

¹²⁷⁵ *Hamelin v. Simpson Paper (Vt.) Co.*, 702 A.2d 86, 88 (Vt. 1997).

¹²⁷⁶ *Furlon v. Haystack Mountain Ski Area*, 388 A.2d 403, 405 (Vt. 1978).

¹²⁷⁷ *Hart v. Amour*, 776 A.2d 420, 424 (Vt. 2001) (quoting and agreeing with Arizona Supreme Court in *Cunningham v. Goettl Air Conditioning, Inc.*, 980 P.2d 489, 493 (Ariz. 1999)).

¹²⁷⁸ *Id.* at 422; *Hamelin*, 702 A.2d at 89; *Loli of Vt., Inc. v. Stefandl*, 1995 U.S. Dist. LEXIS 20235, *6 (D. Vt. 1995) (finding “Although a specific reference to negligence liability is not essential to effectively immunize a party from such liability, in order for the agreement to have such an effect, ‘words conveying a similar import must appear’”); *Lamoille*, 369 A.2d at 1390 (stating “We do not find that the failure of the contract to literally and specifically excuse the railroad for its own negligence precludes other verbiage from having that same effect.”).

Landlord may suffer or incur in connection with Tenant's use or misuse of premises."¹²⁷⁹

Even where the language of an indemnity agreement is clear and unambiguous, however, courts will only enforce such language in arms-length business deals between commercial parties dividing risks and responsibilities.¹²⁸⁰ Where there are issues of unequal bargaining power, fairness, and risk spreading, the courts may not enforce an absolute indemnity provision on public policy grounds.¹²⁸¹

Also, since the courts are more likely to enforce contracts of indemnity where the parties are sophisticated entities with equal bargaining power, a federal district court has held that a third-party may sustain an action for contractual indemnification against the employer of an injured party. The worker's compensation bar of 21 V.S.A. § 622 is not a bar to a claim for contractual indemnity from the employer.¹²⁸²

§ II – Exceptions to General Rules of Contractual Indemnity.

Vermont is in the minority of states that have not passed legislation limiting the enforceability of contractual indemnity provisions in certain contexts.

§ III – Indemnity Agreements as Insured Contracts.

No Vermont court has specifically addressed the extent to which an insured is covered for its indemnification of another's tort liability where a policy specifically excludes contractually assumed liability, but excepts from this exclusion "insured" or "incidental" contracts. However, a clause in a liability insurance policy which excludes liability assumed by the insured by a contract does not exclude coverage of claims for which the law imposes primary liability on the insured where the insured agrees to protect another against secondary liability.¹²⁸³

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Where parties agree that one of the parties will purchase insurance as part of an underlying agreement, "it is only natural that they assume that the insurance is for their mutual benefit and that the parties will look only to the insurance for loss coverage."¹²⁸⁴ In the landlord/tenant context, the agreement of the parties that the landlord will procure insurance is interpreted to mean that the tenant is an additional insured on the insurance policy.¹²⁸⁵ Thus, the tenant is protected against subrogation

¹²⁷⁹ *Hart*, 776 A.2d at 422.

¹²⁸⁰ *Hamelin*, 702 A.2d at 89.

¹²⁸¹ *Id.*

¹²⁸² *New England Tel. & Tel. Co. v. Central Vt. Pub. Serv. Corp.*, 391 F. Supp. 420, 428 (D. Vt. 1975).

¹²⁸³ *Abajian v. Aetna Cas. and Ins. Co.*, 232 F. Supp. 710, 712 (D. Vt. 1964).

¹²⁸⁴ *Fairchild Square Co. v. Green Mountain Bagel Bakery, Inc.*, 658 A.2d 31, 33 (Vt. 1995).

¹²⁸⁵ *Union Mut. Fire Ins. Co. v. Joerg*, 824 A.2d 586, 590 (Vt. 2003).

claims by the insurer.¹²⁸⁶ The rationale for this rule is that “multiplicity of insurance policies and overlapping coverage in commercial settings is economically inefficient and results in higher overall costs.”¹²⁸⁷

Vermont courts have not specifically addressed whether the existence of an insurance policy naming the indemnitee as an “additional insured” and providing coverage in an amount greater than the amount required to be procured in the underlying indemnification agreement entitles the indemnitee to coverage beyond the scope of the original agreement.

Vermont courts have addressed a similar situation regarding the right of an insurer to make a subrogation claim for insurance coverage paid which exceeded the amount of the insurance coverage required under an underlying construction contract. In *Behr v. Hook*, the owner of a home under construction was required under the standard AIA contract to purchase and maintain property insurance “in the amount of the initial contract plus any later modifications thereto for the entire work.”¹²⁸⁸ The contract also included a waiver of subrogation provision that required the owner, general contractor and subcontractors to waive all rights against each other for damages “to the extent that there is property insurance obtained pursuant to” the contract.¹²⁸⁹

After paying the owner for the owner’s entire loss following a fire, the insurer brought suit against subcontractors, arguing that \$181,000 of \$1.4 million paid to the owner was in excess of the contract provision which required the owner to obtain property insurance.¹²⁹⁰ This amount covered cabinets, plumbing and landscaping which were specifically excluded from the contract.¹²⁹¹ The insurer thus argued that since the contract provision only required the owner to obtain insurance “in the amount of the initial contract plus any later modifications” the amount for which the owner was compensated for the specifically excluded items was recoverable from subcontractors.¹²⁹² The court disagreed. While the owner was not required to obtain insurance that would compensate him for anything more than “the initial contract plus any later modifications,” the owner had gone beyond the requirement and obtained additional insurance coverage.¹²⁹³ Since the waiver of subrogation provision applied to the extent of “property insurance obtained pursuant to the contract,” the subcontractors received the benefit of the additional coverage procured by the owner.¹²⁹⁴ Thus, the insurer could not bring a subrogation action against the

¹²⁸⁶ *Id.*

¹²⁸⁷ *Fairchild*, 658 A.2d at 33; *Joerg*, 824 A.2d at 590.

¹²⁸⁸ *Behr v. Hook*, 787 A.2d 499, 501 (Vt. 2001).

¹²⁸⁹ *Id.*

¹²⁹⁰ *Id.* at 506.

¹²⁹¹ *Id.*

¹²⁹² *Id.*

¹²⁹³ *Behr*, 658 A.2d at 506.

¹²⁹⁴ *Id.*

contractors for the difference between the insurance provided, and the insurance required.¹²⁹⁵

VIRGINIA

§ I – General Rules of Contractual Indemnity.

“Virginia courts adhere to the ‘plain meaning’ rule of interpreting contracts, whereby clear and explicit language in a contract is to be taken in its ordinary signification, and, if the meaning is plain when so read, the instrument must be given effect accordingly . . . and, of course, indemnity agreements are subject to general rules of contract construction.”¹²⁹⁶ In assessing a contractual right of indemnification under Virginia law, the language of the contract must be viewed as a whole, and clear and unambiguous terms should be construed according to their plain meaning.¹²⁹⁷ Of greatest importance are the parties’ intentions, and courts must not insert by construction a term not specifically expressed in the agreement.¹²⁹⁸

An “indemnity agreement is enforceable even if it protects a party from its own negligence, so long as the terms of the agreement are ‘clear and explicit.’”¹²⁹⁹ “It is apparently not against the public policy of Virginia for one to contract against his own negligence in some situations, . . . [but] neither is there a strong policy supporting such agreements to the extent that they should be read into a contract which shows no ambiguity on its face.”¹³⁰⁰ When an agreement indemnifies the indemnitee “from and against all liability for injury or death” and only excepts the indemnitee’s sole negligence, the agreement will be construed to cover the concurrent negligence of the indemnitor and indemnitee.¹³⁰¹

Moreover, the exclusive remedy provision of the Virginia Workers’ Compensation Act, “does not invalidate an express indemnification agreement between an employer and a third party” and an action will still lie against the employer for contractual indemnity based on injuries sustained by an employee.¹³⁰² Similarly, although a common carrier cannot contract to relieve itself of its own

¹²⁹⁵ *Id.*

¹²⁹⁶ *Kraft Foods N. Am. v. Banner Eng’g & Sales*, 2006 U.S. Dist. LEXIS 61702, *66 (E.D. Va., Aug. 25, 2006).

¹²⁹⁷ *Am. Spirit Ins. Co. v. Owens*, 261 Va. 270, 274 (2001).

¹²⁹⁸ *Id.*

¹²⁹⁹ *In re Complaint of Christiansen Marine, Inc.*, 1996 U.S. Dist. LEXIS 10920, 1996 A.M.C. 2353, *28 (E.D. Va. 1996) (internal citations omitted).

¹³⁰⁰ *National Motels, Inc. v. Howard Johnson, Inc.*, 373 F.2d 375, 379 (4th Cir. 1967).

¹³⁰¹ *Richardson-Wayland Electrical Corp. v. Virginia Electric & Power Co.*, 219 Va. 198, 100, 247 S.E.2d 465 (1978).

¹³⁰² *Garrison v. Mustang Manufacturing Co.*, 1992 Va. Cir. LEXIS 256, 28 Va. Cir. 109 (1992).

negligence when acting as a common carrier, it can contract to be indemnified for its own negligence when it is not acting as a common carrier or transporter.¹³⁰³

§ II – Exceptions to General Rules of Contractual Indemnity.

Various public policy considerations place limits on the boundaries of enforceable indemnification in Virginia.

As stated above, common carriers and public utilities may not contract against liability for their own negligence in performing duties in their public capacity, but may enter into an indemnification agreement against their own negligence if they are acting in a purely private capacity.¹³⁰⁴ Even if contracting as a private party, however, a common carrier or public utility may not be indemnified for its own negligence in performing a duty owed to the public.¹³⁰⁵ The statute applicable to common carriers provides as follows:

No contract, receipt, rule, or regulation shall exempt any transportation company from the liability of a common carrier which would exist had no contract been made or entered into and no such contract, receipt, rule, or regulation for exemption from liability for injury or loss occasioned by the neglect or misconduct of such transportation company as a common carrier shall be valid. The liability referred to in this section shall mean the liability imposed by law upon a common carrier for any loss, damage, or injury to freight or passengers in its custody and care as a common carrier.¹³⁰⁶

Similarly, any provision in a construction contract which provides for indemnification for injury or damage caused solely by the indemnitee's negligence is void as against public policy. The applicable code section provides:

Any 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 by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable. This section applies to such contracts between contractors and any public body, as defined in § 2.2-4301.

¹³⁰³ *C. & O. Ry. Co. v. Telephone Co.*, 216 Va. 858, 865 (1976).

¹³⁰⁴ *Richardson-Wayland, supra*, 219 Va. at 201-203.

¹³⁰⁵ *Id.*

¹³⁰⁶ VA. CODE ANN. § 56-119 (2006).

This section shall not affect the validity of any insurance contract, workers' compensation, or any agreement issued by an admitted insurer.¹³⁰⁷

Finally, certain indemnification clauses in contracts involving design professionals are void as against public policy. More specifically:

Any provision contained in any contract relating to the planning or design of a building, structure or appurtenance thereto, including moving, demolition or excavation connected therewith, or any provision contained in any contract relating to the planning or design of construction projects other than buildings by which the architect or professional engineer performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of the performance of the contract, caused by or resulting solely from the negligence of such other party, his agents or employees, is against public policy and is void and unenforceable.

This section shall apply to such contracts between an architect or professional engineer and any public body as defined in § 2.2-4301. Every provision contained in a contract between an architect or professional engineer and a public body relating to the planning or design of a building, structure or appurtenance thereto, including moving, demolition or excavation connected therewith, or relating to the planning or design of construction projects other than buildings by which the architect or professional engineer performing such work purports to indemnify or hold harmless the public body against liability is against public policy and is void and unenforceable. This section shall not be construed to alter or affect any provision in such a contract that purports to indemnify or hold harmless the public body against liability for damage arising out of the negligent acts, errors or omissions, recklessness or intentionally wrongful conduct of the architect or professional engineer in performance of the contract.

This section shall not affect the validity of any insurance contract, workers' compensation, or any agreement issued by an admitted insurer.¹³⁰⁸

§ III – Indemnity Agreements as Insured Contracts.

The Fourth Circuit, applying Virginia law, has held with little discussion that an indemnity agreement, by which the insured assumes the tort liability of another, is an “insured contract” for purposes of the exception in the form commercial general liability insurance policy to the exclusion for contractually assumed liability.¹³⁰⁹

¹³⁰⁷ VA. CODE ANN. § 11-4.1 (2006) (The provisions of this section do not apply to any provision of any contract entered into prior to July 1, 1973).

¹³⁰⁸ VA. CODE ANN. § 11-4.4 (2006).

¹³⁰⁹ *St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 276 (4th Cir. 2004).

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Although not addressed by any Virginia court, the Fourth Circuit has predicted that Virginia courts would rely on valid, enforceable indemnification agreements to give context to and determine the allocation of liability in an insurance dispute.¹³¹⁰ Relying on an Eighth Circuit decision, the Fourth Circuit adopted the view that an indemnity agreement between the insureds or a contract with an indemnification clause may shift an entire loss to a particular insurer. In *St. Paul*, the Fourth Circuit relied on an indemnity clause to place the risk of loss for all claims on the indemnitee's insurer, even though the indemnitors had procured their own policies for their liabilities. Holding that the scope of the underlying indemnity agreement should be decided simultaneous with the coverage issues, the Fourth Circuit predicted that a Virginia court would give priority to the underlying indemnity agreement to allocate responsibility among insurers where there was a concomitant agreement by the parties to purchase insurance to cover losses under the contract.¹³¹¹

WASHINGTON

§ I – General Rules of Contractual Indemnity.

In Washington, contracting parties may agree to indemnify as they choose according to the general rules of contract interpretation. Indemnification for an indemnitee's sole negligence is permissible so long as the arrangement is not prohibited by statute or public policy.¹³¹²

In order to provide indemnification for the indemnitee's sole negligence, such intention must be "expressed in clear and unequivocal terms."¹³¹³ "[T]he general rules that disfavor an agreement to indemnify an indemnitee against its own negligence do not render such a clause void or unenforceable as a matter of law. Instead, what these rules require is that . . . the agreement must be clearly spelled out."¹³¹⁴ Washington courts currently require "that more specific language be used to evidence a clear and unequivocal intention to indemnify the indemnitee's own negligence."¹³¹⁵ This represents a departure from the more general rule of looking "to the entirety of the contract" where the term "negligence" need not be used.¹³¹⁶

Where the parties agree that indemnity will be provided "whether or not caused by [the indemnitee's] . . . negligence," such language is sufficient to meet the more

¹³¹⁰ *Id.*

¹³¹¹ *Id.*

¹³¹² See *Northwest Airlines v. Hughes Air Corp.*, 702 P.2d 1192, 1193 (Wash. 1985).

¹³¹³ *Id.*, citing 41 Am. Jur. 2d Indemnity § 15 (1968) and 42 C.J.S. Indemnity § 7 (1944).

¹³¹⁴ *McDowell v. Austin Co.*, 710 P.2d 192, 194 (Wash. 1985) (internal citations and punctuation omitted).

¹³¹⁵ See *Northwest Airlines* at 1194, citing *Dirk v. Amerco Mktg. Co.*, 565 P.2d 90 (Wash. 1977).

¹³¹⁶ *Id.*

specific requirement permitting indemnification for sole negligence.¹³¹⁷ Furthermore, liability, rather than negligence, may be the “triggering mechanism of an indemnity contract.”¹³¹⁸ Thus, an agreement in which one agrees to “indemnify and save harmless . . . against *all liability* for personal injury, including death resulting therefrom, . . . *caused* or alleged to have been caused, directly or indirectly, by an act or omission, negligent or otherwise, . . .” is enforceable, despite not mentioning negligence.¹³¹⁹

In general, a third party can enforce a written indemnity agreement against an employer for losses the third party has paid to an employee.¹³²⁰ In the construction context, the exclusive remedy provision in the Worker’s Compensation laws may be circumvented in a written indemnity agreement by an express statement that the employer waives immunity under the Washington State Industrial Insurance Act.¹³²¹ Wash. Rev. Code § 4.24.115(2) imposes the additional requirement that the waiver be “mutually negotiated by the parties.”¹³²²

§ II – Exceptions to General Rules of Contractual Indemnity.

Rev. Code Wash. § 4.24.115 limits parties’ ability to enter into indemnity agreements in the construction context. In pertinent part, the provision reads as follows:

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, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:

(1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;

(2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee’s agents or employees, and (b) the indemnitor or the indemnitor’s agents or employees, is valid and enforceable only to the extent of the indemnitor’s negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor’s immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was

¹³¹⁷ *Id.*

¹³¹⁸ *McDowell*, 710 P.2d at 194.

¹³¹⁹ *Id.*

¹³²⁰ *Redford v. City of Seattle*, 615 P.2d 1285, 1287 (Wash. 1980); *Truck Ins. Exch. v. BRE Props.*, 81 P.3d 929 (Wash. Ct. App. 2003).

¹³²¹ Wash. Rev. Code § 4.24.115(2).

¹³²² *Id.*

mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.¹³²³

Contractual language sufficient to satisfy the statute must specifically state that the agreement provides indemnity for concurrent negligence to the extent of the indemnitor's negligence.¹³²⁴

Upon a finding that an indemnity provision purports to indemnify for a party's sole negligence in the construction context, coupled with a factual finding that the injury at issue was caused by the indemnitee's sole negligence, the agreement is rendered ineffective.¹³²⁵ The purpose of the rule is to "prevent injustice, and to insure that a contracting party has fair notice that a large and ruinous award can be assessed against it solely by reason of negligence attributable to the other contracting party."¹³²⁶

§ III – Indemnity Agreements as Insured Contracts.

An agreement to indemnify another for the other's tort liability is an "insured contract" within the exception to the commercial general liability policy exclusion for contractually assumed liability. The concept of "insured contract" generally contemplates a contract in which the insured assumes tort liability it would not have had absent the subject contract.¹³²⁷ Washington courts have given effect to an "insured contract" provision to provide coverage for an indemnity agreement.¹³²⁸

Even though an indemnity agreement qualifies as an "insured contract," such a fact does not always mean that coverage will apply due to the fact that other exclusions may overcome the exception for "insured contracts." For example, with respect to a lease which provided for insurance coverage, coupled with an exception to the contractual liability exclusion for "insured contracts," the *Cle Elum Bowl, Inc.* Court held that the general exclusion for liability incurred on rented property was sufficient to overcome the extension of coverage for the insured contract.¹³²⁹

¹³²³ Wash. Rev. Code § 4.24.115 (2004).

¹³²⁴ See *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 912 P.2d 472, 474 (Wash. 1996). The agreement at issue provided that "[Island's] duty to indemnify [Moen] for liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the concurrent negligence of (a) [Moen or its] agents or employees, and (b) [Island or its] agents or employees, shall apply only to the extent of negligence of [Island or its] agents or employees."

¹³²⁵ See *McDowell*, 710 P.2d at 194.

¹³²⁶ *Id.* at 195 (citing *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721, 722 (Tex. 1971)).

¹³²⁷ *Truck Ins. Exch.*, 81 P.3d at 934-935.

¹³²⁸ See generally, *id.*

¹³²⁹ See *Cle Elum Bowl, Inc. v. North Pacific Ins. Co. Inc.*, 981 P.2d at 872 (Wash. Ct. App. 1999); see also *Mut. of Enumclaw Ins. Co. v. Patrick Archer Constr., Inc.*, 97 P.3d 751 (Wash. Ct. App. 2004) (finding that a specific exclusion overrides a general grant of coverage by endorsement, and no ambiguity results when the two provisions arguably cover the same subject matter).

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Although agreements to procure insurance are found in several cases analyzing indemnity agreements, the Washington Courts have not extensively discussed the effect an agreement to procure insurance has on the indemnity obligation itself. Courts have noted that enforcing third party indemnification agreements in certain situations, such as where liability may otherwise be barred due to worker's compensation immunity, "allows contractors to allocate 'responsibility to purchase insurance' according to their negotiated allocation of risk and potential liabilities."¹³³⁰

In *Truck Ins. Exchange*, a contractor and subcontractor entered into an indemnification agreement whereby the subcontractor was required to indemnify the contractor against claims caused by its acts, omissions or negligence.¹³³¹ The subcontractor was further required, by contract, to procure insurance naming the contractor as an additional insured.¹³³² Despite policy exclusions for injury to an employee of "the insured", the insurance policy was held to extend coverage to both the contractor and the subcontractor where one of the subcontractor's employees was injured. The subcontractor's indemnity obligation was covered by the policy because the court expressly held that the indemnity agreement was an "insured contract" under the policy.¹³³³

A valid "waiver of subrogation" provision in an indemnification agreement insulates only the promisor from liability to the extent of the promisee's insurance coverage.¹³³⁴ For example, an indemnification provision which requires that the owner and general contractor obtain insurance to cover all claims arising under the contract between the owner and general contractor, and expressly waives subrogation rights to the extent of insurance coverage, affords no relief to a subcontractor not a party to the contract itself.¹³³⁵ Even where the parties arguably intended a 'standard' waiver (which would have included subcontractors) and provided that the waiver applied to *all* claims, because the waiver as drafted was found to have been negotiated by the contracting parties, the subcontractor was excluded from its scope.¹³³⁶

Washington courts reject the rule that "co-insured status for any loss under a builder's risk policy automatically insulates the co-insured from subrogation by the

¹³³⁰ *Truck Ins. Exch.* at 934, citing *McDowell*, 710 P.2d at 192.

¹³³¹ *Id.* at 931.

¹³³² *Id.* at 930.

¹³³³ *Id.* at 935 (insured contract was exception to the exclusion for injury to an employee of the insured).

¹³³⁴ See *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d 724, 725 (Wash. 1992).

¹³³⁵ *Id.* at 728-729 (despite reference to *all* claims, waiver provision does not support finding that the parties agreed not to sue *anyone*).

¹³³⁶ *Id.*

insurer for damage to all property covered therein.”¹³³⁷ Rather, the scope of protection rests soundly within the parameters of the indemnification agreement itself.¹³³⁸

WEST VIRGINIA

§ I – General Rules of Contractual Indemnity.

Contractual agreements to indemnify are enforceable.¹³³⁹ Ordinary rules of contract construction apply when interpreting the language of an indemnity contract.¹³⁴⁰ This includes the rules governing the requisites and validity of contracts.¹³⁴¹ A valid written agreement using plain and unambiguous language should be enforced according to its plain intent and should not be construed.¹³⁴²

Except as discussed below, indemnity agreements are encouraged in West Virginia. “[P]ublic policy demands that indemnity agreements be permitted unless they go beyond mere allocation of potential joint and several liability and indemnify against the sole negligence of the indemnitee without an appropriate insurance fund”¹³⁴³

§ II – Exceptions to General Rules of Contractual Indemnity.

Agreements to indemnify a party against its sole negligence in connection with construction activities are void and unenforceable.¹³⁴⁴ W.Va. Code § 55-8-14 provides as follows:

A covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement entered into on or after the effective date of this section [June 6, 1975], 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, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the indemnitee, his agents or employees is

¹³³⁷ *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 7 P.3d 861, 870 (Wash. Ct. App. 2000).

¹³³⁸ *Id.*

¹³³⁹ *Dalton v. Childress Service Corp.*, 189 W. Va. 428, 431 (1993).

¹³⁴⁰ *Vankirk v. Green Construction Company*, 195 W. Va. 714, 720 (1995) (citation omitted).

¹³⁴¹ *Dawson v. Norfolk and Western Railway Co.*, 197 W. Va. 10, 17 (1996)

¹³⁴² *Id.*

¹³⁴³ *Dalton*, 189 W. Va. at 431.

¹³⁴⁴ *W. Va. Code* § 55-8-14.

against public policy and is void and unenforceable and no action shall be maintained thereon.

The code section does not effect agreements for indemnification which exclude indemnification for an indemnitee's sole negligence.¹³⁴⁵

However, courts will not automatically void an agreement to indemnify, even for a party's sole negligence. Rather, the courts will void a broad indemnity agreement only if the indemnitee is actually found by a jury to be solely at fault, and only if it cannot be inferred from the contract that there was a proper agreement to purchase insurance for the benefit of the concerned parties.¹³⁴⁶ "A contract that provides in substance that A shall purchase insurance to protect B against actions arising from B's sole negligence does not violate the statute as public policy encourages both the allocation of risks and the purchase of insurance."¹³⁴⁷ Consequently, a facially void indemnity will be saved by an agreement to purchase insurance covering the indemnity obligation.

Employers who participate in the workers' compensation scheme are protected from liability for the injury or death of an employee.¹³⁴⁸ This protection extends to suits filed by third parties against the employer.¹³⁴⁹ Liability against an employer is exclusive under the statute unless the employer waives the immunity by entering into a contractual agreement to indemnify.¹³⁵⁰

§ III – Indemnity Agreements as Insured Contracts.

The courts recognize that an insured's agreement to indemnify another constitutes an "insured contract" within the meaning of a general liability policy.¹³⁵¹ In a general commercial liability policy, a party with an insured contract stands in the shoes of the insured for coverage purposes.¹³⁵²

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

As noted above, a third party stands in the shoes of the insured pursuant to an "insured contract."¹³⁵³

¹³⁴⁵ *W. Va. Code* § 55-8-14; *Dalton*, 189 W. Va. at 431.

¹³⁴⁶ *Dalton*, 189 W. Va. at 431.

¹³⁴⁷ *Id.*

¹³⁴⁸ *W. Va. Code* § 23-2-6.

¹³⁴⁹ *Pasquale v. Ohio Power Company*, 187 W. Va. 292, 301 (1992) (citing *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440 (1982)); *Belcher v. J. H. Fletcher & Company*, 498 F. Supp. 629, 631 (S.D. W. Va. 1980).

¹³⁵⁰ *Valloric v. Dravo Corp.*, 178 W. Va. at 17, n3 (citation omitted); *Belcher*, 498 F. Supp. at 631.

¹³⁵¹ *Marlin v. Wetzel County Board of Education*, 212 W. Va. 215, 221-222 (2002).

¹³⁵² *Id.* (citing *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385 (1998)).

¹³⁵³ *Id.*

As also noted, the purchase of insurance will remedy an allegedly void indemnity based upon the agreement to indemnify for another's sole negligence. In *Dalton*, *supra*, a party agreed to indemnify another against all liabilities attributed to indemnitor, (arguably) including liability for the indemnitee's sole negligence.¹³⁵⁴ The agreement furthermore required the indemnitor to obtain insurance that covered all of the indemnitor's potential liability under the indemnity clause.¹³⁵⁵ The ultimate issue was whether the indemnitee could enforce the indemnity agreement.¹³⁵⁶ In finding the indemnity enforceable, the court characterized the indemnity clause as "really only an agreement to purchase insurance . . ."¹³⁵⁷

WISCONSIN

§ I - General Rules of Contractual Indemnity.

Wisconsin courts have consistently upheld the validity of indemnity contracts.¹³⁵⁸

It is a settled rule in this state that indemnity agreements are to be broadly construed where they deal with the negligence of the indemnitor, but strictly construed where the indemnitee seeks to be indemnified for his own negligence . . . The obligation to indemnify an indemnitee for its own negligence must be clearly and unequivocally expressed in the agreement. General language will not suffice.¹³⁵⁹

A contract of indemnity will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms.¹³⁶⁰ If the parties agree to indemnify the indemnitee for his own negligence, such indemnity agreements are strictly construed and must satisfy the conspicuousness standards in WIS. STAT. § 401.201(10).¹³⁶¹ "A term is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it."¹³⁶²

¹³⁵⁴ *Dalton*, 189 W. Va. at 429.

¹³⁵⁵ *Id.* at 430.

¹³⁵⁶ *Id.* at 429.

¹³⁵⁷ *Id.* at 432.

¹³⁵⁸ *Herchelroth v. Mahar*, 153 N.W.2d 6 (Wis. 1967); *Mustas v. Inland Constr., Inc.*, 120 N.W.2d 95 (Wis. 1963); *Mikula v. Miller Brewing Co.*, 701 N.W.2d 613 (Wis. Ct. App. 2005).

¹³⁵⁹ *Roto Zip Tool Corp. v. Design Concepts*, 713 N.W.2d 191 (2006) (citing *Spivey v. Great Atlantic & Pacific Tea Co.*, 255 N.W.2d 469, 472 (Wis. 1977)) (other internal citations omitted).

¹³⁶⁰ *Spivey*, 255 N.W.2d at 472; *but see Herchelroth*, 153 N.W.2d at 9 (construing an indemnification agreement drawn in general language as intending to protect the indemnitee for its own negligent acts; however, it was clear from the record, that no other purpose could be served by the agreement other than to protect the indemnitee's responsibility for his negligent acts).

¹³⁶¹ *Deminsky v. Arlington Plastics Machinery*, 657 N.W.2d 411, 422-23 (Wis. 2003).

¹³⁶² WIS. STAT. § 401.201(10) (2003).

The Wisconsin Supreme Court, in *Spivey v. Great Atlantic & Pacific Tea Co.*, stated that an agreement to indemnify a party against its own negligence is not against public policy, but that it would not so construe a contract unless it is apparent that such result was clearly intended.¹³⁶³ “Such agreements are liberally construed when they deal with the negligence of the indemnitor, but are strictly construed when the indemnitee seeks to be indemnified for his own negligence.”¹³⁶⁴ This rule of strict construction, however, cannot be used to defeat the clear intent of the parties:

If the agreement clearly states that the indemnitee is to be covered for losses occasioned by his own negligent acts, the indemnitee may recover under the contract. Additionally, if it is clear that the purpose and unmistakable intent of the parties in entering into the contract was for no other reason than to cover losses occasioned by the indemnitee's own negligence, indemnification may be afforded.¹³⁶⁵

§ II – Exceptions to General Rules of Indemnity.

Although WIS. STAT. § 895.49, voids agreements in construction contracts that limit or eliminate tort liability,¹³⁶⁶ this does not necessarily extend to indemnity agreements. “Since the statute limits the common law right to freely contract, courts interpret it narrowly, placing the least possible restriction on the common law right.”¹³⁶⁷

The statute specifically provides as follows:

Certain agreements to limit or eliminate tort liability void.

(1) Any provision to limit or eliminate tort liability as a part of or in connection with 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, is against public policy and void.

(2) This section does not apply to any insurance contract or workers compensation plan.

(3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.¹³⁶⁸

¹³⁶³ *Spivey*, 255 N.W.2d at 472.

¹³⁶⁴ *Bialas v. Portage County*, 236 N.W.2d 18, 19 (Wis. 1975).

¹³⁶⁵ *Spivey*, *supra*, at 63-64; *see also Hastreiter v. Karau Buildings, Inc.*, 205 N.W.2d 162 (Wis. 1973) (reasoning it was the intent of the parties to hold the indemnitee harmless even though he was negligent, because there was an explicit provision requiring a public liability insurance that was intended to protect the indemnitee from the effects of his own negligence).

¹³⁶⁶ WIS. STAT. § 895.49 (2006).

¹³⁶⁷ *Gerdman v. U.S. Fire Ins. Co.*, 350 N.W.2d 730, 734 (Wis. Ct. App. 1984) (citing *Wisconsin Bankers Ass'n v. Mutual Savings and Loan Ass'n*, 291 N.W.2d 869, 876-77 (Wis. 1980)).

¹³⁶⁸ WIS. STAT. § 895.49 (2006).

The Wisconsin Court of Appeals explained the impact of the statute in *Gerdman v. U.S. Fire Ins. Co.*¹³⁶⁹ In that case, the contractor contended that an indemnity clause requiring the contractor to indemnify the owner was void pursuant to WIS. STAT. § 895.49. The court held that the indemnification clause was not void under § 895.49 because it did not attempt to relieve the owner from liability, but merely required the contractor to indemnify the owner against loss that stemmed from liability.¹³⁷⁰ The court stated that the statute did not void indemnity agreements, and should be narrowly construed.¹³⁷¹

§ III - Indemnity Agreements as Insured Contracts.

While Wisconsin has acknowledge the “insured contract” exception to the contractual liability exclusion in the form general liability policy,¹³⁷² it did not apply the exception. In *Nu-Pak, Inc. v. Wine Specialists International, Ltd.*, the indemnitee sought coverage under the indemnitor’s policy on the theory that the indemnitor had assumed tort liabilities.¹³⁷³ The claim, however, was based on the indemnitor’s *own* tort liabilities, as opposed to any that it had assumed under the indemnity agreement. The court held that “insured contract” provision did not apply as the liabilities were the indemnitor’s own and not those of a third party.

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Under Wisconsin law, parties to a contract may allocate the risk of loss by agreeing that one party shall maintain insurance in order to save harmless the other party from liability. An insurance procurement clause will be construed to provide the extent of coverage required by the indemnity agreement.¹³⁷⁴

In *Michael A.P. v. Solsrud*,¹³⁷⁵ a subcontractor’s injured employee brought suit against the general contractor. In turn, the general contractor sued the subcontractor and his insurer based on an indemnity agreement. The indemnity contract required the subcontractor to procure commercial liability coverage. Since the subcontractor’s obligation to indemnify the general contractor was limited to liability incurred because of the subcontractor’s negligence, the court similarly limited the insurance coverage to the extent of the indemnity obligation.¹³⁷⁶ Thus, an insurer’s obligation will likely be limited to the scope of its insured’s indemnity obligation.

¹³⁶⁹ 350 N.W.2d 730.

¹³⁷⁰ *Id.* See also *Abroahams v. Wisconsin Tel. Co.*, 367 N.W.2d 242 (Wis. Ct. App. 1985) (holding an indemnity agreement between a company and a contractor was not void under WIS. STAT. § 895.49 because the agreement merely made the contractor the insurer if damages resulted and did not limit or eliminate the company’s tort liability).

¹³⁷¹ *Id.*

¹³⁷² *Nu-Pak, Inc. v. Wine Specialties Int’l, Ltd.*, 643 N.W.2d 848, 855-56 (Wis. Ct. App. 2002).

¹³⁷³ *Id.*

¹³⁷⁴ See *Michael A.P. v. Solsrud*, 514 N.W.2d 879 (Wis. Ct. App. 1994).

¹³⁷⁵ *Id.*

¹³⁷⁶ *Michael A.P.*, 514 N.W.2d at 879.

WYOMING

§ I – General Rules of Contractual Indemnity.

Wyoming courts have consistently recognized and enforced contracts of indemnity, except where such agreements are against public policy.¹³⁷⁷ However, in order to enforce a contract of indemnity or any other contract claiming to relieve one from the consequences of his failure to exercise ordinary care, the parties must express their intention very clearly.¹³⁷⁸

As a general rule, “...a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it.”¹³⁷⁹ Under this rule of strict construction, an agreement which stated only that the “Contractor shall indemnify and hold Company harmless against . . . injury or death of any person . . . resulting directly or indirectly from any and all acts or omissions of Contractor . . . in connection with the performance of any work provided for herein” would not cover the indemnitee’s own negligence.¹³⁸⁰ Further, “mere general, broad and seemingly all inclusive language in an indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee’s own negligence.”¹³⁸¹

Courts look upon contracts that serve to exculpate one from consequences of their own negligent actions with disfavor.¹³⁸² “Therefore, an agreement for indemnity is construed strictly against the indemnitee, particularly when the indemnitee was the drafter of the instrument.”¹³⁸³ The test is “whether the contract language specifically focuses attention on the fact that by the agreement the indemnitor was assuming liability for indemnitee’s own negligence.”¹³⁸⁴ For example, a provision in a subcontract that obligated the subcontractor to the general contractor *in the same respect that the general contractor was obligated to the owner under the prime contract* was “not a clear and unequivocal agreement to indemnify the general contractor on account of its own negligence.”¹³⁸⁵

“In cases where there is an express contractual provision for indemnity and the parties raise as alternative theories of indemnity, breach of contract or passive negligence, the courts usually hold that the express contractual provision for

¹³⁷⁷ *Northwinds of Wyoming, Inc. v. Phillips Petroleum Company*, 779 P.2d 753 (Wyo. 1989).

¹³⁷⁸ *Id.* at 758.

¹³⁷⁹ *Id.* (citing *Wyoming Johnson, Inc. v. Stag Industries, Inc.*, 662 P.2d 96 (Wyo. 1983)).

¹³⁸⁰ *Id.*

¹³⁸¹ *Wyoming Johnson, Inc. v. Stag Industries, Inc.*, 662 P.2d 96, 99 (Wyo. 1993).

¹³⁸² *Wyoming Johnson, Inc.*, 662 P.2d at 99.

¹³⁸³ *Id.*

¹³⁸⁴ *Id.*

¹³⁸⁵ *Id.* (emphasis added).

indemnity governs, and that the theories of breach of contract or passive negligence should not be allowed to enlarge upon or expand the express contractual provision for indemnity.”¹³⁸⁶ The rationale behind this policy is that the parties knowingly and “adequately set out their intention in the express contractual agreement with respect to indemnity.”¹³⁸⁷ It is important to enforce contractual indemnity provisions due to the fact that the parties themselves have dealt with the question of indemnity in the written contract and have intended for this specific issue to be resolved in a manner in which they mutually agree upon, rather than following some general common law rule to govern their rights and liabilities in a particular situation.¹³⁸⁸

Also, where there is concurrent negligence, the parties must be especially clear in their intent to indemnify.¹³⁸⁹ “Where the injury was caused by concurrent negligence of the indemnitor and the indemnitee, the courts have frequently read into contracts of indemnity exceptions for injuries caused in part by the indemnitee, although there is authority to the contrary.”¹³⁹⁰ “Even the fact that the contract requires the indemnitor to hold the indemnitee harmless from damage caused by the indemnitor’s ‘negligent acts and omissions’ has been held insufficient to make the indemnity clause applicable in a case where the indemnitee’s negligence concurred with that of the indemnitor to cause the injury.”¹³⁹¹ “If the indemnitee means to throw the loss upon the indemnitor for a fault in which he himself individually shares, he must express that purpose beyond any pre-adventure of doubt.”¹³⁹²

“Although the Wyoming Worker’s Compensation Act bars an employee and those claiming under him from suing the employer, the Act does not bar other third-parties sued by the employee from bringing an action against the employer for indemnity based on a contract between the employer and the third-party.”¹³⁹³

§ II – Exceptions to General Rules of Contractual Indemnity.

Indemnity contracts that are deemed against public policy are unenforceable. Wyoming Statute § 30-1-131 voids and makes unenforceable any agreement to the extent it seeks to indemnify an indemnitee for its own negligence regarding any work pertaining to wells for oil, gas or water, or mines for minerals.¹³⁹⁴ The statute provides:

¹³⁸⁶ *Id.* at 102.

¹³⁸⁷ *Id.*

¹³⁸⁸ *Id.* at 101.

¹³⁸⁹ *Amoco Prod. Co. v. EM Nominee Pshp. Co.*, 2 P.3d 534, 541 (Wyo. 2000); *Wyoming Johnson, Inc.*, 662 P.2d at 99.

¹³⁹⁰ *Wyoming Johnson, Inc.*, 662 P.2d at 99 (citing 41 Am. Jur.2d Indemnity, §16, pp. 703, 704 (1968)).

¹³⁹¹ *Id.*

¹³⁹² *Id.*

¹³⁹³ *Northwinds of Wyoming*, 779 P.2d at 754.

¹³⁹⁴ *Mountain Fuel Supply v. Emerson*, 578 P.2d 1351, 1353 (Wyo. 1978).

- (a) All agreements, covenants or promises contained in, collateral to or affecting any agreement pertaining to any **well for oil, gas or water**, or mine for any mineral, which purport to indemnify the indemnitee against loss or liability for damages for:
 - (i) Death or bodily injury to persons;
 - (ii) Injury to property; or
 - (iii) Any other loss, damage, or expense arising under either (i) or (ii) from:
 - (A) The sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee or any independent contractor who is directly responsible to such indemnitee; or
 - (B) From any accident which occurs in operations carried on at the direction or under the supervision of the indemnitee or an employee or representative of the indemnitee or in accordance with methods and means specified by the indemnitee or employees or representatives of the indemnitee, are against public policy and are void and unenforceable to the extent that such contract of indemnity by its terms purports to relieve the indemnitee from loss or liability for his own negligence. This provision shall not affect the validity of any insurance contract or any benefit conferred by the Worker's Compensation Law [§§ 27-14-101 through 27-14-805] of this state.¹³⁹⁵

This section reflects the legislative determination that such indemnification provisions are against public policy.¹³⁹⁶

§ III – Indemnity Agreements as Insured Contracts.

An insured's contractual agreement to indemnify another constitutes an "insured contract" within the meaning of an insurance policy covering an insured's agreement to assume the tort liability of another where this intent is clearly expressed.¹³⁹⁷ Courts will still look to the policy to determine the scope of the coverage for an "insured contract," but if the policy is ambiguous as to what types of indemnity agreements are covered by the policy, coverage will likely be afforded.¹³⁹⁸

¹³⁹⁵ WYO. STAT. § 30-1-131 (2006).

¹³⁹⁶ *Northwinds of Wyoming, Inc.*, 779 P.2d at 757; *Cities Serv. Co. v. Northern Prod. Co.*, 705 P.2d 321, 326 (1985).

¹³⁹⁷ *Gainsco Insurance Company v. Amoco Production Company*, 53 P.3d 1051 (Wyo. 2002); see also *Progressive Casualty Insurance Company v. Brown's Crew Car of Wyoming, Inc.*, 27 F. Supp. 2d 1288, 1293 (Wyo. 1998) (United States District Court for the District of Wyoming inferred that an indemnification and hold harmless could be considered an insured contract within the terms of the policy).

¹³⁹⁸ *Gainsco Ins. Co.*, 53 P.3d at 1066 (policy excluded insured contract covering the "indemnitee's sole tort liability" as it could not be determined if "sole" meant 100% liability or "sole" vis-à-vis the insured).

§ IV – Operation of An Agreement to Indemnify Referring to or Requiring Insurance.

Wyoming has analyzed issues where an indemnity agreement or typical construction contract has required the parties to look to insurance for the allocation of the risks and not to each other for purposes of indemnity.¹³⁹⁹

In *Berger v. Teton Shadows, Inc.*, the parties specifically provided in their contract that the owner was required to purchase the necessary insurance to cover losses from fire, tornado or other like catastrophes that may occur and damage the project.¹⁴⁰⁰ During the construction of the project, a fire occurred as a result of the subcontractor's negligence.¹⁴⁰¹ The owner sued the subcontractor, and the subcontractor filed a cross-claim against the owner.¹⁴⁰²

The Wyoming Supreme Court found that where a contract was unambiguous and intended for the owner to carry fire insurance, thus shifting the risk of loss to the owner's insurance carrier, it was enforceable and limited the owner's recovery to the proceeds of its insurance policy.¹⁴⁰³ As a result, the parties in *Berger* were forced to look to the insurance company for recovery and could not hold each other responsible notwithstanding an indemnification agreement between them.

¹³⁹⁹ *Berger v. Teton Shadows, Inc.*, 820 P.2d 176 (Wyo. 1991).

¹⁴⁰⁰ *Id.* at 177.

¹⁴⁰¹ *Id.* at 176.

¹⁴⁰² *Id.*

¹⁴⁰³ *Id.* at 177-178.



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