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Passing the Buck: Legal Limitations on Transferring Construction Risks

Legal Limitations on Allocating Risk Through Indemnification Agreements

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LEGAL LIMITATIONS ON ALLOCATING RISK THROUGH INDEMNIFICATION AGREEMENTS¹

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“Risk allocation” issues are routinely encountered in contract negotiation and dispute resolution processes in the construction industry. Construction contracts often include limitation of liability clauses as well as other risk-limiting and/or shifting provisions such as “no damage for delay” clauses and indemnification provisions.

Contractual indemnity is a risk allocation device whereby the parties to a contract use indemnity provisions to apportion, or in some instances completely shift, the responsibility for future third party claims.² A distinction should be made between indemnity provisions and limitations of liability provisions. Indemnity provides protection against third party claims (claims made by strangers to the contract). Limitations of liability provisions, on the other hand, allow contracting parties to allocate risks, define remedies, and limit liabilities between themselves. Even the courts often confuse these two concepts.³ The focus of this paper is on indemnification, and more specifically, the enforceability of indemnity provisions that attempt to allocate the risk of particular types of liability.

As a part of the development and adoption of comparative fault or modified comparative negligence statutes, most states have enacted statutes that modify or in some way limit the scope of indemnity provisions insofar as they attempt to shift responsibility for the sole negligence of one party to another. These statutes, as well as statutory or judicially created exemptions, may apply to certain types of indemnity agreements or agreements to indemnify certain parties.

Part I of this paper focuses on the enforceability of indemnification provisions in which a party requires indemnity for its own sole, joint, or concurrent negligence. Part II discusses the

ability of parties to require waivers of immunity under a state's worker's compensation laws.

Finally, Part III gives suggestions on how to draft enforceable indemnity provisions.

I. THE ENFORCEABILITY OF INDEMNIFICATION AGREEMENTS

A. Purpose and Intent of Indemnity or "Hold Harmless Agreements"

Indemnification clauses, also referred to as "hold harmless agreements," are intended to shift all or a portion of the liability from one party ("indemnitee") to another ("indemnitor") "in a manner that would not have occurred in a predictable manner under common law in the absence of the contract."⁴

The scope of the "liability" that is to be shifted from the indemnitee to the indemnitor should always be of concern to the contract negotiator/draftsman. The scope of a contractual indemnity provision may range from a fairly narrow obligation to reimburse the indemnitee for any actual damages that it is required to pay to a third party *after* there is a judicial or arbitral finding of fault and assessment of damages to a very broad front-end responsibility to either pay for counsel retained for, and directed by, the indemnitee, or retain competent counsel and defend (at the expense of the indemnitor) the indemnitor based upon allegations in a "claim" which, if proven, would come within the scope of the indemnity provision. These so-called "defense clauses" apply and require the indemnitor to retain and pay for counsel throughout the course of a dispute without regard to the presence or ultimate finding of fault on the part of the indemnitor.⁵

Additionally, the type of damages that are subject to the indemnity clause may vary from actual damages attributable to the negligence of the indemnitee to "fines," "penalties" and "in-house staff" costs and expenses. It should be noted that by the negotiated language of an

indemnity clause, a party may agree to be responsible for duties, i.e. a duty to defend, and damages that are only recoverable because they are included in a contractual indemnity clause. These duties and/or damages would not be imposed upon the party under the common law. For this reason, it is possible to assume responsibilities under a contractual indemnity provision that are not insured or insurable.⁶

B. Typical Indemnity Provisions

For purposes of this paper, we will assume that there are three basic types of contractual indemnity obligations, with one variation that is applicable to all three.

1. Broad or “Work Related” Scope Indemnity With Duty to Defend Provision

The “broad” or “work-related” indemnification obligation requires the indemnitor to save and hold harmless the indemnitee from all liabilities arising from the project, including the indemnitee’s sole negligence. A simple broad form indemnification clause could be drafted as follows:

Subcontractor A agrees to defend, indemnify and hold harmless General Contractor B from any and all damages, liabilities, losses or expenses (including attorneys’ fees, costs and expenses of litigation) due to personal injury or property damage, or both, including, but not limited to, any and all claims, demands, causes of action, proceedings or suits for bodily injury, illness, disease, death, property damage or loss, loss of use, maintenance, cure, or wages arising from or on account of the performance or non-performance of the [work or services] of Subcontractor A, the fault of Subcontractor A or which are caused in part or in whole by any act or omission, whether passive or active, of General Contractor B and any person directly or indirectly employed by General Contractor B.

According to its language, Subcontractor A would be responsible for defending, at its sole expense, and, to the extent required, paying for any monetary settlement or judgment of General Contractor B, for any lawsuit or arbitration premised upon the work performed by

Subcontractor A. This obligation would exist without regard to the “fault” of Subcontractor A and without regard to the “fault” or the degree of fault of Contractor B.

In most states, the ultimate reliability and enforceability of this type of indemnification clause is highly suspect since it may be held to be contrary to the philosophy underlying almost all “anti-indemnification” statutes in force, and therefore, void and unenforceable. These statutes will be discussed more fully below.

2. Intermediate Scope Indemnity With Duty to Defend Provision

The “intermediate” indemnification obligation requires the indemnitor to save and hold harmless the indemnitee for all liability except that which arises out of the indemnitee’s sole negligence. Therefore, under an intermediate form indemnification agreement, the indemnitor’s indemnity obligation will extend to liability arising from acts in which the indemnitee is jointly or concurrently negligent. A typical intermediate form indemnification agreement could be drafted as follows:⁷

Subcontractor A agrees to defend, indemnify and hold harmless General Contractor B from any and all damages, liabilities, losses or expenses (including attorneys’ fees, costs and expenses of litigation) due to personal injury or property damage, or both, including, but not limited to, any and all claims, demands, causes of action, proceedings or suits for bodily injury, illness, disease, death, property damage or loss, loss of use, maintenance, cure, or wages arising from or on account of the performance or non-performance of the [work or services] of Subcontractor A, the fault of Subcontractor A or which are caused in part or in whole by any act or omission, whether passive or active, of Subcontractor A, except for such damages, liability, losses, expenses (including attorneys’ fees, costs and expenses of litigation), which are caused by the sole negligence of General Contractor B.

In about half of the states, the ultimate reliability and enforceability of this type of indemnification clause is highly suspect since it may be held to be void and unenforceable.

3. Limited Scope or Comparative Fault Indemnity With Defense Provisions

The “limited” or “comparative fault” indemnification obligation makes the indemnitor responsible only to the extent of his/its own fault or negligence. “Fault” may be defined to include “breach of contract” and negligence or may be limited to “negligent errors, acts or omissions.”⁸ Such an agreement might be drafted as follows:

Subcontractor A agrees to defend, indemnify and hold harmless General Contractor B from any and all damages, liabilities, losses or expenses (including attorneys’ fees, costs and expenses of litigation) due to personal injury or property damage, or both, including, but not limited to, any and all claims, demands, causes of action, proceedings or suits for bodily injury, illness, disease, death, property damage or loss, loss of use, maintenance, cure, or wages arising from or on account of any negligent error, act or omission of Subcontractor, provided that under no circumstances shall Subcontractor A be responsible for the negligence of Contractor B.

As a rule, this type of agreement is enforceable in every state because it does not attempt to shield any party to the agreement from its own negligence.

4. “Defense” Provisions

A special note has to be made of the “duty to defend” obligation in indemnity clauses. The inclusion of a duty to defend provision can be very problematic for indemnitor and indemnitee.

The inclusion of the phrase “defend” in each of the three typical indemnity clauses set forth above normally is interpreted to create an obligation on the part of the indemnitor to provide a defense to the indemnitee to a covered claim, even where there is no ultimate finding of liability on the part of the indemnitor.⁹ This obligation to defend may take the form of some variation of the following scenarios:¹⁰

- a) The selection of an attorney to represent the interest of the indemnitee, at the expense of the indemnitor, with some form of approval from the indemnitee of the attorney selected;
- b) The payment of fees and expenses of an attorney selected by indemnitee;
- c) The representation of the interest of the indemnitee by an attorney already retained by the indemnitor to represent the indemnitor's interests in the underlying action or dispute.

The "duty to defend" obligation can have very legitimate applications. However, in our view, it is frequently requested in circumstances where it is inapplicable. Its inclusion in circumstances in which it is inapplicable is likely to result in a refusal to honor the defense request at the beginning of a dispute. Additionally, if there is any fault on the part of the indemnitee, the presence of a defense provision may cause a court to view the entire clause as against public policy because of the unfairness of the result occasioned by the shifting of all attorneys' fees, costs and expenses to the indemnitor.

There may also be issues of whether the indemnitor is entitled to have the cost of the defense of the indemnitee covered by its insurance or whether it must bear some of those costs outside of, or in addition to, the deductible obligations under its insurance policy. In this respect, if the defense of the indemnitor is provided as a part of its insurance coverage, the insurance carrier may decline to pay for the provision of defense for the indemnitee unless and until there is a finding of fault that is within the scope of the policy. Even where the carrier determines that the costs of defense are within the scope of the policy, these costs are subject to the deductible, per claim and aggregate

limits of the policy. The carrier may have questions about the reasonableness of the attorneys' fees, costs and expenses that were incurred in the defense. Finally, there may be apportionment issues in circumstances in which the indemnitee has some fault in the creation of the liability and the apportionment of the defense costs that are incurred.

C. Enforceability of Indemnity Agreements

It is difficult if not impossible to make accurate broad or general pronouncements regarding the enforceability of indemnity agreements in construction contracts. Not only are there differences in the scope of the indemnity obligation itself, but each state's legislation and case law places varying limitations on the enforceability of indemnity agreements in construction contracts. To date, forty-two states have enacted some form of so-called "anti-indemnity" statute applicable to all or part of the construction industry.

All states that have anti-indemnification statutes void indemnity provisions that require "broad" form indemnity, which frees the indemnitee from liability for its own "sole" negligence. Some anti-indemnification statutes allow "intermediate" indemnity obligations, while others make comparative fault or limited indemnity the only form of indemnity agreement that is enforceable. Most state statutes are applicable to both public and private construction contracts, while a few are limited to public contracts¹¹ or to agreements where the indemnitee is a design professional.¹² Conversely, some states have no "anti-indemnification" statutes at all, and are guided by the common law rules relating to enforceability of indemnity agreements. Therefore, it is extremely important that anyone attempting to allocate the risks of a construction project by virtue of an indemnification clause in a construction contract be familiar with state statutes and common law that may affect the enforceability of such a provision.¹³

1. Enforceability of Indemnification Provisions That Require Indemnity Against One's Own Negligence Or Fault

Under traditional common-law principles, contractual indemnity agreements are valid and enforceable unless contrary to public policy. At common law, contracts providing for indemnification of a party's own negligence were not considered contrary to public policy.¹⁴ However, courts do not favor agreements that weaken the obligations of parties to remain vigilant in the protection of construction workers and the general public, and will require that such indemnity clauses clearly show the indemnity language does not have this result or that the parties had an improper intention.¹⁵ In many instances, particularly in cases where the indemnitee was solely or principally responsible for the damages, courts have held that there can be indemnification for the indemnitee's negligence only if this intention is **explicitly** stated in the contract.¹⁶

The enforceability of indemnity agreements is primarily governed by state statute and, as noted above, the majority of states have anti-indemnification statutes in one form or another.¹⁷ In fact, as of the date of this paper, the only states that do not have some sort of statute prohibiting the use of indemnification agreements in construction contracts are: Alabama, Arkansas, Iowa, Kansas, Kentucky, Maine and Vermont. Wyoming has declared invalid indemnification agreements contained in contracts used in the oil, gas, water and mining industries, but this bar does not apply to indemnification contracts regarding any "surface estate" or any other type of construction contract.¹⁸

It is believed by many that anti-indemnification statutes insure that parties involved in a construction project retain an incentive to provide a safe workplace for employees, reasoning that allowing a contractor, owner, or architect to be free from liability as a result of his own

negligence reduces the incentive for site safety. These statutes are also believed to “level the playing field” for small contractors and suppliers who are often powerless to truly negotiate favorable indemnity agreements.

The oldest anti-indemnification statutes simply void agreements holding a person harmless from the effects of his illegal acts.¹⁹ These types of statutes codify the common-law rule that indemnification agreements contrary to public policy are void.²⁰ It should be noted, however, that the common-law rules invalidating indemnity agreements that insulate a party from the consequences of its unlawful acts only apply if such indemnification induces the commission of the illegal act.²¹ Therefore, agreements to indemnify parties for violations of site safety may be enforceable because they do not “induce” a party to violate such laws. For example, an agreement to indemnify a party who was found to be “absolutely liable” for violation of a scaffolding act is enforceable.²² In other words, parties may be able to enforce indemnity agreements that ultimately transfer the responsibility for site safety. However, it is important to remember that such indemnity provisions must comply with other relevant statutes and case law. Many anti-indemnification statutes do not allow a party to insulate itself from liability that results from the party’s own negligence. Otherwise, indemnitees would never have an incentive to insure site safety and public safety. The Illinois Supreme Court in *Davis v. Commonwealth Edison Co.* articulated this principle in discussing the purpose behind the enactment of anti-indemnification statutes:²³

It is generally known that indemnity and hold-harmless agreements are most widely used in the construction industry. The legislature . . . may have considered that the widespread use of these agreements in the industry may have removed or reduced the incentives to protect workers and others from injury. . . .The statute would thwart attempts to avoid the consequences of liability and thereby insure a continuing motivation for persons responsible for construction activities to take accident prevention measures and provide safe working conditions.²⁴

a. Indemnification Against One's "Sole" Negligence

Many states have anti-indemnification statutes that void indemnity provisions in construction contracts arising from the "sole negligence" of the indemnitee. Because these statutes focus on a party's "sole" negligence, they generally will not invalidate indemnity provisions that indemnify against the indemnitee's joint or concurrent negligence. Eleven states—Arizona, Georgia, Idaho, Maryland, Michigan, New Jersey, South Carolina, South Dakota, Tennessee, Washington, and West Virginia—have statutes voiding indemnity provisions for the indemnitee's sole negligence.²⁵ The Idaho statute is a typical example of this type of statute:

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.

This act will not be construed to affect or impair the obligations of contracts or agreements, which are in existence at the time the act becomes effective [May 18, 1971].²⁶

Arizona's and New Jersey's statutes include provisions that specifically void indemnification of a design professional's sole negligence in addition to that of the other parties to a construction contract.²⁷

Five states—Alaska, Hawaii, California, Indiana, and Virginia—possess variations of this type of statute. Alaska, Hawaii, California and Indiana's statutes broaden the statutory language to void agreements indemnifying against both the indemnitee's "sole negligence" and "willful misconduct."²⁸ In Virginia, indemnity agreements in construction contracts are void if the

agreement requires the contractor, the architect or professional engineer to indemnify another party against liability resulting from the sole negligence of the indemnitee.²⁹

b. Indemnification Against Joint or Concurrent Negligence

There are several state statutes which void agreements that purport to indemnify a party against his or her negligence, regardless of whether liability or damages were caused in whole or in part by the indemnitee or whether the indemnitee's negligence was sole or concurrent. These statutes invalidate not only the broad form indemnity provision, but the intermediate form as well. In other words, in these states, parties will not be able insulate themselves from their own negligence through the use of indemnification clauses in construction contracts.

Connecticut, Illinois, Minnesota, Mississippi, Missouri, Nebraska, Ohio, Oregon and Rhode Island all have statutes that void indemnity provisions in construction contracts that indemnify a party against its own negligence, regardless of whether damages were caused by the party's joint or concurrent negligence.³⁰ Illinois' statute is a typical anti-indemnification statute prohibiting indemnity of any kind for one's own negligence:

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.³¹

New York and North Carolina also have statutes that void agreements indemnifying against liability caused by the indemnitee's negligence, but use a slightly different linguistic formula. These statutes look at whether liability is caused "in whole or in part" by the indemnitee's negligence.³²

Seven states—Delaware, New Hampshire, New Mexico, New York, Pennsylvania, South Dakota and Texas—void agreements that indemnify a design professional from his or her own negligence.³³ These states, with the exception of New York and South Dakota, do not prohibit others, including owners, contractors and subcontractors from entering into broad and intermediate form indemnification agreements. As discussed above, New York and South Dakota both have separate statutory provisions that expressly restrict indemnity clauses for all parties to a construction contract.³⁴

Colorado and Louisiana have anti-indemnification statutes that apply only to construction contracts with public entities.³⁵ These statutes void any agreement to indemnify a public entity from that public entity's own negligence. California, in addition to its anti-indemnification statute that applies to all parties, also has a provision that prohibits indemnity agreements with public entities that relieve the public entity from liability for its own negligence.³⁶ Florida, Massachusetts and North Dakota all have a variation of this type of statute. Florida's 1999 and 2001 versions of its anti-indemnification statute create an exemption if: (1) the indemnification agreement contains a monetary limitation and is part of a project's specifications or bid documents; or (2) the indemnitee has given specific consideration for the indemnification provision.³⁷ Subsections (1) and (2) are stated in the disjunctive—the satisfaction of either one is sufficient to render an otherwise invalid construction contract indemnification clause enforceable under the statute.³⁸

The Massachusetts anti-indemnification statute is narrow in that it only applies to subcontractors. Specifically, Massachusetts voids indemnity agreements that require a subcontractor to indemnify personal injuries or damages to property not caused by the subcontractor.³⁹ North Dakota voids any provision that would make the contractor liable for the

errors and omissions of the owner or his agents in the plans and specifications of the construction contract.⁴⁰ Utah's anti-indemnification statute voids indemnity provisions in construction contracts to the extent they require the indemnitor to indemnify the indemnitee for injury, damage or loss caused by the fault of the indemnitee or others.⁴¹ One exception to the statute is indemnity agreements that require construction managers, contractors, subcontractors or suppliers to hold the owner harmless against joint or concurrent liability. As long as the owner is not operating in the capacity of a construction manager, contractor, subcontractor or supplier,⁴² and the indemnity provisions apportions the fault of the owner among the parties on a pro-rata basis based on proportional share of fault of each of the parties to the construction contract, the indemnity provision is enforceable.⁴³ Therefore, in Utah, under certain circumstances, an owner may be indemnified against its own negligence.

2. Agreements to Indemnify Against the Vicarious Liability of Indemnitee Due the Acts and Omissions of Indemnitor Are Generally Enforceable

None of the statutes referenced above have any impact on an indemnitor's promise to indemnify against damages caused by the sole negligence of the indemnitor. Therefore, agreements to insulate the indemnitee against claims arising from vicarious liability due to the activities of the indemnitor are enforceable in almost every state.⁴⁴

3. Specific Exemptions to Anti-Indemnification Statutes

Several states have anti-indemnification statutes that provide a specific exclusion for certain types of contracts. In other states, the courts have read exemptions into the statute where none exist. The most common exemptions are insurance contracts, construction bonds and worker's compensation.

Rhode Island and Minnesota's statutes expressly exclude all three of the most common exemptions from the ambit of their anti-indemnification statutes. Alaska, California, Connecticut, Georgia, Hawaii, Illinois, Minnesota, North Carolina, Rhode Island, Virginia and Wyoming have statutory exemptions for both insurance contracts and worker's compensation. Four states, Illinois, Mississippi, Nebraska and Ohio have exemptions for both insurance contracts and construction bonds. Delaware, Louisiana and Texas have a statutory exemption for insurance contracts only. Indiana excludes indemnification agreements in construction projects that are uninsurable at standard insurance rates.⁴⁵

Several states provide other statutory exceptions in addition to the most common ones. Some states exempt owners of the property for whom the construction is going to be performed.⁴⁶ Arizona, California, Michigan and Minnesota also exempt agreements to indemnify adjacent landowners for whom work is not being performed but who allow contractors on their property to accommodate the performance of a construction contract for others. Specifically, Minnesota's statute states that the anti-indemnification statute:

[Does] not apply to an 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.

In addition to adjacent landowners, Arizona's statute also exempts construction contracts in which a public entity is a party, as do statutes in New Jersey, North Carolina and South Dakota.⁴⁷ Florida exempts contracts between design professionals and public agencies where the agency requires:

[T]he design professional [to] 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.⁴⁸

Some states, such as North Carolina and South Carolina, exclude agreements with public utilities, while New Jersey, North Carolina, Oregon and South Carolina exempt agreements with railroads.

In addition to the statutory exemptions to their anti-indemnification statutes, several states' courts have carved exemptions into the statute. As noted above, many states expressly exclude ordinary insurance contracts, (which are themselves indemnification agreements), from the terms of the statute. Additionally, courts have been willing to uphold agreements to procure insurance on behalf of another party as an exemption to anti-indemnification statutes, even when such insurance will indemnify a party against its own sole or concurrent negligence. For example, the Supreme Court of Georgia in *Tuxedo Plumbing & Heating Co. v. Lie-Nielsen*⁴⁹ first recognized such an exception to Georgia's anti-indemnification statute. The Georgia statute voids agreements that require an indemnitor to indemnify an indemnitee for injuries resulting from the sole negligence of the indemnitee. The Court found that because the insurance clause did not expressly require that the one indemnify the other and hold him harmless from his own sole negligence, it could be enforced.⁵⁰

Other courts have also refused to apply anti-indemnification statutes to contractual provisions to procure insurance by reasoning that under an indemnity agreement, the promisor agrees to assume all responsibility and liability for any injuries or damages. Under an agreement to obtain insurance, however, the promisor "merely agrees to procure the insurance and pay the premium on it."⁵¹ Furthermore, some courts have found that the statutory exception to the anti-

indemnification statutes exempting insurance agreements validates and therefore makes enforceable obligations on a party to obtain coverage.⁵² Several courts have agreed with this approach⁵³ while others have not.⁵⁴

Finally, the courts of New York have read an exemption into the New York statute allowing indemnification agreements between architects and engineers. In *Perkins & Will v. Syska & Hennessey & Garfinkel*,⁵⁵ the Court stated: “The indemnification illegalized by . . . the General Obligations Law is one by the owners, contractors, subcontractors or suppliers for the architects’ and the engineers’ negligence and is not addressed to indemnification between the architect and the engineers.”⁵⁶

II. WAIVERS OF IMMUNITY UNDER WORKER’S COMPENSATION LAWS

Under all states’ worker’s compensation statutes, construction workers who are injured at the project site are required to be compensated by the employer regardless of the employer’s responsibility for the injury. Because the amount paid is usually dictated by statute, employees rarely feel that they are being fully compensated for their loss. Employees are precluded from bringing suit against their employer for damages related to their injuries pursuant to all states’ worker’s compensation statutes. Therefore, workers injured on the job who do not believe they have been adequately compensated by worker’s compensation frequently sue one or more third parties for their injuries. In the construction context, this may mean a worker will try to sue the owner, architect, engineer, contractor, subcontractor or any other party who may have acted negligently in its duties to protect the worker from injury on the job site. Where possible, these third parties may try to avoid this risk through indemnification clauses that require the employer to reimburse the third party for any tort liability that they may incur.

In deciding whether such a clause can be enforced, it must be determined whether the indemnity provision runs afoul of the relevant state's anti-indemnification provision.

Additionally, an analysis must be done to determine whether a state's worker's compensation laws prohibit the enforcement of such a provision.

Generally speaking, an employer who is complying with a state's worker's compensation statute is immune from indemnification actions instituted by third parties who may be held liable for an employee's workplace injury.⁵⁷ This is true even if a complying employer enters into an express indemnity agreement with the third party, unless the indemnity agreement includes an express waiver that refers "specifically to this particular immunity."⁵⁸ Most courts have recognized that an employer may expressly waive the immunity (also referred to as the exclusivity) provision of worker's compensation statutes.⁵⁹ The operative word, however, is "express." Courts will only enforce a waiver in an indemnity clause if the waiver is "clearly and specifically" contained in the clause either by so stating or by stating that the indemnitor assumes potential liability for actions brought by its own employees.⁶⁰ This rule may have been codified by the worker's compensation statute of a particular state. For example, the Pennsylvania Workers' Compensation Act specifically states:

(b) In the event injury or death to an employe[e] is caused by a third party, then such employe[e] . . . may bring . . . [her] action at law against such third party, but the employer . . . shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, ***unless liability for such damages, contributions, or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable.*** . . .⁶¹

It should be noted that some states will grant a waiver of immunity where there is no such express language. The courts of Pennsylvania, New Jersey and Wisconsin have held that an express indemnification contract that is broadly written is sufficient to waive an employer's

worker's compensation immunity.⁶² For example, in *Schaub et al. v. West Bend Mutual et al.*,⁶³ the Wisconsin Court of Appeals reversed the trial court's dismissal of a third party complaint of a general contractor based upon an indemnity agreement because the agreement was not required to specifically say that the subcontractor waives immunity from suit under Wisconsin's Worker's Compensation Act. The agreement provided in relevant part:

Indemnification and Insurance. a. Subcontractor agrees to save harmless and defend Owner and Contractor from any and all claims, demands, judgments and costs of suit or defense, including attorneys' fees, and indemnify and reimburse Owner and Contractor for any expense, damage or liability incurred by Owner and Contractor . . . for personal injury . . . arising or alleged to have arisen, whether directly or indirectly, on account of or in connection with any work done by Subcontractor under this Subcontract⁶⁴

This, however, seems to be the exception rather than the rule—the terms of this indemnification provision are too general to constitute a waiver of immunity pursuant to most state's worker's compensation statutes. As a general rule, unless indemnification is expressly provided for by contract, a third party may not seek indemnification from an employer.

There are a few states whose statutes expressly forbid indemnification agreements to the extent that those agreements modify liability under the relevant workman's compensation statute. In these states, it is unlikely that an employer would be able to agree to waive its immunity under a workman's compensation statute, regardless of whether there was express agreement to that effect. Nevada, for example, has one such statute.⁶⁵ The Nevada courts have broadly construed this statute to reject indemnity agreements that would be valid in other states. For example, in *Aetna Casualty & Surety Co. v. L.K. Comstock & Co., Inc.*,⁶⁶ the Court invalidated an indemnity agreement between the indemnitee employer of an injured workman and another person. The Court reasoned that an indemnification agreement to which an employer is a party must, by its terms, alter the employer's "precise" liability as set out in the Nevada Workman's Compensation

Act, and that such agreements are therefore void. Kentucky also has a statute that declares unlawful the requirement by any employer that another employer waive its remedies under the worker's compensation statute as a condition of contract.⁶⁷

III. DRAFTING INDEMNITY PROVISIONS

Because of the wide variety of anti-indemnification statutes and case law, few broad generalizations can be made in drafting indemnity provisions. Nevertheless, there are a few “rules of thumb” to consider:

- Do your homework! Because every state has different statutes, case law and rules of interpretation, it is important to do sufficient legal research with regard to the relevant jurisdiction. Furthermore, be cognizant of which version of a state statute applies. Many states' anti-indemnification statutes have undergone recent amendments and the version that is on the books at the time the lawsuit is filed may not be the version that is applicable to that particular contract. For example, a construction contract enacted in 1999 may be governed under the 1999 anti-indemnification statute.⁶⁸
- Choose your language carefully. In those states that invalidate agreements indemnifying against the “sole” negligence of the indemnitee, expressly limit the indemnification agreement to situations where the injury is caused jointly or concurrently by the negligence of the indemnitee. Note that at least one court has invalidated an indemnity clause that stated the indemnitor agreed to indemnify the indemnitee for “any claims” on the basis that such a provision includes indemnity for a party's sole negligence.⁶⁹ The best way to avoid this problem is to insert a general indemnification clause that states: “[The Indemnitor] assumes no liability

for the sole negligence or willful misconduct of [the Indemnitee].” In states that invalidate agreements in which the indemnitor assumes liability that is caused by the joint or concurrent negligence of the indemnitee, make sure the indemnitor only indemnifies the indemnitee to the extent of the indemnitor’s negligence.

- Every construction contract should have the indemnity provision and the requirement to procure insurance in separate clauses. As discussed above, most states possessing anti-indemnification statutes hold that agreements to purchase insurance do not fall within the scope of the statute and, thus, enforce those agreements regardless of whether the practical effect is to indemnify parties against their own negligence.
- Waivers of immunity under a State’s Worker’s Compensation Statute should be stated in unequivocal terms. Parties should expressly state that the employer is waiving its immunity under the relevant worker’s compensation statute.
- Be sensitive to the scope of the insurance coverages that may apply to or fund the indemnification provisions that are being negotiated.
- Do not agree to indemnification provisions that may impose burdens on the non-insurance assets of your client without a specific conversation with and approval by the client.
- In drafting indemnification clauses, be alert to the inclusion of defense provisions and their implications for your client.
- In general, make sure that you understand all of the language that is included in the indemnification provisions and explain them in common sense terms to your client.

¹ The common law recognized a right to indemnity without the existence of an express contractual provision in circumstances where there was some preexisting legal relationship or a duty imposed by statutory or common law between the “primary tortfeasor” and the “secondary tortfeasor.” *Ringsby Truck Lines, Inc. v. Bradfield, et al.*, 193 Colo. 151 (Colo. 1973). The issue of common law indemnity has been rendered more complex and unpredictable by the enactment of comparative negligence statutes, the abolition of joint and several liability among joint tortfeasors and related types of so-called “tort reform” legislation. The scope of this presentation is limited to the issues regarding the application of contractual indemnity provisions in construction contracts.

² See generally *Lee Way Motor Freight v. Yellow Transit Lines, Inc.*, 251 F.2d 97 (10th Cir. 1957); *Myers Bldg. Indust. Ltd. v. Interface Technology Inc.*, 13 Cal. App. 4th 949, 17 Cal. Rptr. 2d 242 (1993) (“A clause which contains the words ‘indemnify’ and ‘hold harmless’ is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons). It should be noted that there is a distinction between an indemnity clause and a limitation of liability clause.

³ See *City of Dillingham v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271, 1272 (Alaska 1994). In *CH2M Hill*, the Supreme Court of Alaska refused to enforce a limitation of liability clause whereby the Owner agreed to limit the engineer’s liability to the Owner and to all construction contractors, subcontractors, material suppliers, and all others associated with the Project based on the argument that the limitation of liability clause violated Alaska’s anti-indemnity statute. Cf. *Ralph Korte Const. Co. v. Springfield Mechanical Co.*, 54 Ill. App. 3d 445, 369 NE.2d 561 (1977) (“The instant case, however, does not involve injury suffered by a construction worker or a member of the general public but instead, damage suffered by one of the contracting parties due to the alleged negligence of another. . . .our consideration is limited to the question of whether the agreement, as applied to the instant facts, falls within the penumbra of the indemnity statuteWe find that it does notThe agreement, as here applied, does not remove or reduce any incentives to protect workers and others from injury since it does not involve any question of liability to a third party. . . .The instant case does not involve an action for indemnification but is simply an action for negligence between the contracting parties”).

⁴ Robert L. Meyers & Debra A. Perlam, *Risk Allocation Through Indemnity Obligations in Construction Contracts*, 40 S.C. L. REV. 898, 990 (1989).

⁵ At times, the lawyers that have already been retained by indemnitor who is a party to the same action may assume the defense obligation. However, conflicts may prevent the availability of this option, and there are many situations in which the defense provisions of a broad form indemnity clause could be invoked where the indemnitor is not a party to the action or proceeding.

⁶ The assumption of obligations to indemnify a party for its sole negligence may be excluded from professional liability and commercial general liability insurance policies. Additionally, even where the basic provisions of an indemnity clause are within the scope of such insurance

policies, damages such as “fines,” liquidated damages and/or other penalties may be specifically excluded from such coverage.

⁷ The language of many indemnity clauses is based upon standard contract forms prepared and distributed by the American Institute of Architects (“AIA”) and other professional groups. In general, courts require that indemnification clauses that indemnify a party against his or her own negligence “expressly and unambiguously” state an intent to do so. At least one court has cited AIA Doc. A201 Sec. 4.18.1 as a clause that would meet the necessary specificity requirements. *Shea v. Bay State Gas Co.*, 404 N.E.2d 683 (Mass. 1980).

⁸ In most professional service contracts, there is a “standard of care” provision that requires the professional to provide all services in accordance with the applicable standard of care or applicable professional practice standards. Where such provisions exist, a negligent error, act or omission committed by the indemnitor resulting in damage to the indemnitee would also be a breach of this provision of the contract.

⁹ An indemnitor may avoid the potential obligation to assume the defense before a determination of fault by deleting the phrase “defend.” However, a party may still receive a “tender of defense” based upon the scope of the indemnity language, which lays the foundation for a subsequent claim from the indemnitee for the reimbursement of the attorneys’ fees, costs and expenses of litigation incurred by indemnitee. It is generally true that the indemnitee must have been found to be liable on a basis that falls within the scope of the indemnity clause before such a claim would have any merit. The deletion of this phrase would avoid the situation in which a tender of defense was made and accepted in a circumstance that was ultimately found to be outside the scope of the indemnity obligation owed by the indemnitor. Of course, this would be after the indemnitor has expended significant sums in the defense of the claims against the indemnitee.

¹⁰ Various confidentiality and conflicts issues may need to be addressed in some of these scenarios. Beyond noting the need to identify and consider them, a discussion of these issues is outside the scope of this paper.

¹¹ See COLO. REV. STAT. §13-50.5-102 (2001); LA. REV. STAT. ANN. § 38-2216(G) (West 2001).

¹² See DEL. CODE ANN. tit. 6 §2704 (2001); N.H. REV. STAT. ANN. §338-A:1 (2001); N.J. STAT. ANN. § 2A:40A-2 (West 2001); N.M. STAT. ANN. § 56-7-1 (Michie 2001) (stating that all indemnity clauses are void for liability caused in whole or in part by the negligence of the indemnitee unless the indemnity provision provides that the indemnity does not extend to claims arising out of the preparation or approval of maps, drawings surveys, change orders, designs or specifications by the indemnitee or the giving or failure to give directions or instructions); N.Y. GEN. OBLIG. LAW § 5-324 (McKinney 2001); PA. STAT. ANN. tit. 68 § 491 (2001); S.D. CODIFIED LAWS ANN. § 56-3-16 (Michie 2001); TX. CIV. PRAC & REM. CODE § 130.002 (West 2001); VA. CODE ANN. § 11-4.4 (Michie 2001) (voiding indemnity agreements relating to the design of a

construction project in which the architect or professional engineer performing such work agrees to indemnify another party for damages arising from the sole negligence of the indemnitee).

¹³ In order to allow for the maximum degree of predictability and the achievement of intended results, it is necessary to be familiar with the laws of the jurisdiction whose substantive laws may apply and select one that is appropriate by the inclusion of a choice of laws provision. Furthermore, some states have anti-indemnification statutes that void indemnity agreements in contracts other than construction contracts. Such statutes are outside the scope of this paper. Furthermore, there will be no attempt to discuss the concepts of common law or implied indemnity. The purpose of this paper is to provide a framework express or contractual indemnification clauses only.

¹⁴ See, e.g., *Mustas v. Inland Construction, Inc.*, 19 Wis. 2d 194, 120 N. W. 2d 95, 121 N. W. 2d 274 (1963); *Schwartz v. Merola Bros. Constr. Corp.*, 290 N.Y. 145, 48 N.E.2d 299 (1943); *John E. Branagh & Sons v. Witcosky*, 242 Cal. App.2d 835, 51 Cal. Rptr. 844 (1966).

¹⁵ See, e.g., *Craig Constr. Co. v. Hendrix*, 568 S.2d 752 (Ala. 1990); *Northwinds of Wyoming, Inc. v. Philips Petroleum Co.*, 779 P.2d 753 (Wyo. 1989); *Payne Plumbing & Heating Co. v. Mob McKiness Excavating & Grading, Inc.* 382 N.W.2d 156, 160 (Iowa 1986); *Emery Waterhouse Co. v. Lea*, 467 A.2d 986 (Me. 1983); *Reynolds Metals Co. v. J.U. Schickli & Bros*, 548 S.W.2d 841 (Ken. 1977); *Bartlett v. Davis Corp.*, 547 P.2d 800 (Kan. 1976); *Lamoile Grainco v. St. Johnsbury & LaMoille County RR*, 369 A.2d 1389 (Vt. 1976); *Uelk v. Directory Distrib. Ass'n, Inc.*, 803 S.W.2d 632, 635 (Mo. Ct. App. 1991).

¹⁶ See, e.g., *Freed v. Great A. & P. Tea Co.*, 401 F.2d 266 (6th Cir. 1968) (intention of parties must be “clear and unambiguous” necessitating a clause such as “including damage from indemnitee's own negligence”); *City of Beaumont v. Graham*, 441 S.W.2d 829 (Tex. 1969) (indemnitor's promise to indemnify for his negligent acts does not extend to indemnification for indemnitee's negligence); *Young v. Anaconda American Brass Co.*, 43 Wis. 2d 36, 168 N.W.2d 112 (1969) (indemnitor not liable for such portion of total liability attributable to act of indemnitee unless indemnity contract by express provision and strict construction so provides). Other courts do not require that indemnification for the indemnitee's negligence be specifically or expressly stated in the contract if this intention otherwise appears with clarity. See, e.g., *Auto Owners Mut. Ins. Co. v. Northern Ind. Pub. Serv. Co.*, 414 F.2d 192 (7th Cir. 1969); *Eastern Gas & Fuel Associates v. Midwest-Raleigh, Inc.*, 374 F.2d 451 (4th Cir. 1967); *Unitec Corp. v. Beatty Safway Scaffold Co.*, 358 F.2d 470 (9th Cir. 1966); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410 (5th Cir. 1958). At least one court has interpreted the absence of language clearly stating that the contracting parties intend to indemnify against the “sole” negligence of the Indemnitee as evidence of an intent on the part of the contracting parties not to allow for indemnification against another party's sole negligence. See *Kerulis v. Tatera*, 55 Ill. App.3d 428, 371 N.E.2d 37 (1976).

¹⁷ The prevalence of such statutes is due to the lobbying efforts of the Associated General Contractors (“AGC”) in 1966-1967. At that time, a dispute had arisen between the AGC and the

American Institute of Architects (“AIA”) over an indemnity clause the AIA had included in its A201 (the General Conditions of the Contract incorporated by reference to A101, the Standard Form of Agreement Between Owner and Contractor), which was published in 1966. *See* Justin Sweet, *The American Institute Of Architects: Dominant Actor in the Construction Documents Market*, 1991 WIS. L. REV. 317, 339 (1991). The contractors feared that they would be either unable to purchase insurance to protect against the added burden imposed by these indemnification agreements or that the cost of insurance would skyrocket. Either result, it was feared, would force the smaller contractor out of the construction industry. Therefore, in order to fight the proposed indemnification provision, the AGC lobbied anti-indemnification legislation to the states and succeeded in convincing legislatures to limit the enforceability of indemnification clauses in construction contracts. *See id.* Furthermore, many states continue to encroach upon the construction industry’s ability to enter into indemnity agreements by expanding upon existing legislation.

¹⁸ *See* WYO. STAT. ANN. §30-1-133 (Michie 2001). The District of Columbia also does not have any anti-indemnification legislation.

¹⁹ Montana and Oklahoma have versions of this type of anti-indemnification statute. *See* MONT. CODE ANN. § 28-11-302 (2001); OKLA. STAT. tit. 15, §422 (2001).

²⁰ In general, courts will not enforce contracts made in derogation of statutes designed to protect the public. *See, e.g.*, CORBIN, CORBIN ON CONTRACTS § 1512, at 711 (1962); III S. WILLISTON, WILLISTON ON CONTRACTS § 1630, at 2865-66 (1920). Williston quotes Lord Mansfield on the correct statement of the legal principle: “*Ex dolo malo non oritur action,*” or, no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.

²¹ RESTATEMENT (SECOND) OF CONTRACTS § 192.

²² *See Slater v. Central Plumbing & Heating Co.*, 993 P.2d 654, (Mont. 1999). However, in *Slater*, the indemnitee was not seeking indemnification for its own negligence—only for the proportionate share of a concurrently negligent party.

²³ 61 Ill. 2d 494, 336 N.E.2d 881 (1975).

²⁴ *Davis*, 61 Ill. 2d at 498-99. In *Davis*, the Court, in justifying the expressed public policy against indemnity agreements in construction contracts, further noted that a person having charge of the work and thus liable for a violation of the Structural Work Act, having arranged the avoidance of the burden of liability, would no longer have the same motivation to lessen the extent of the danger. *Id.*, 61 Ill. 2d at 499. Nebraska’s anti-indemnification statute expressly states that design professionals (architects, engineers and land surveyors) can be held “liable in tort for any case of personal injury to or death of any employee working on a construction project arising out of and in the course of employment on the construction project and occurring as result of a violation of a safety practice by any third party unless the responsibility for supervision of safety practices has

been assumed by contract or by other conduct.” NEB. REV. STAT. ANN. § 25-21,187 (Michie 2001).

²⁵ ARIZ. REV. STAT. § 34-226 (2001)(voids indemnity in construction and architect-engineer professional service contracts); GA. CODE ANN. § 13-8-2 (2001); IDAHO CODE § 29-114 (2001); MD. CTS. & JUD. PROC. CODE. §5-401(2001); MICH. COMP. LAWS § 691.991 (2001) (voids indemnity in construction and design contracts); N.J. STAT. ANN. §§ 2A:40A-1, 2A:40A-2 (West 2001); S.C. CODE ANN. § 32-2-10 (Law. Co-op. 2001); S.D. CODIFIED LAWS 56-3-18 (Michie 2001); TENN. CODE ANN. § 62-6-123 (2001); WASH. REV. CODE § 4.24.115 (2001)(expressly states that an agreement is not void if damages are caused by or resulting from the concurrent negligence of the indemnitee and indemnitor, but only to the extent of the indemnitor’s negligence and only if the agreement expressly provides for such indemnification); W. VA. CODE § 55-8-14 (2001).

²⁶ IDAHO CODE § 29-114 (2000).

²⁷ ARIZ. REV. STAT. § 34-226; N.J. STAT. ANN. § 2A:40A-2.

²⁸ ALASKA STAT. § 45.45.900 (Michie 2001); CAL. CIV. CODE §§ 2782, 2782.5 (West 2001) (voids indemnity provisions in construction contracts that require indemnitor to indemnify indemnitee for indemnitee’s sole negligence or willful misconduct, or for defects in design furnished by the indemnitee or its agents); HAWAII REV. STAT. § 431:10-222 (2001); IND. CODE § 26-2-5-1 (2001) (expressly excludes highway contracts).

²⁹ VA. CODE ANN. §§ 11-4.1 and 11-4.4 (Michie 2001).

³⁰ CONN. GEN. STAT. § 52-572k (2001) (“Construction” includes alteration, repair or maintenance, including moving, demolition and excavation); ILL. COMP. STAT. 35/1 (West 2001); MINN. STAT. §337.01-.03 (2001) (indemnity provision in a building and construction contract is unenforceable except to the extent that the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission of the indemnitor); MISS. CODE ANN. §31-5-41 (2001); MO. REV. STAT. § 434.100 (2001); NEB. REV. STAT. § 25-21,187 (1) (2001); OHIO REV. CODE ANN. § 2305.31 (West 2001); OR. REV. STAT. § 30.140 (2001) (comparative anti-indemnification statute voiding indemnity clauses in construction contracts that require indemnitor to indemnify another against liability for personal injury or damages to property not caused by the fault of the indemnitor); R.I. GEN. LAWS § 5-34-1 (2001).

³¹ ILL. COMP. STAT. 35/1.

³² N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2001); N.C. GEN. STAT. § 22B-1 (2001).

³³ DEL. CODE ANN. tit. 6 § 2704 (2001) (limiting the anti-indemnification statute to indemnity clauses in contracts of preconstruction designers and planners); N.H. REV. STAT. ANN. § 338-A:1 (2001); N.M. STAT. ANN. § 56-7-1 (Michie 2001) (voids indemnity for injuries or damages

caused in whole or in part by the negligence of the indemnitee unless the indemnity provision provides that the indemnity does not extend to claims arising out of the preparation or approval of maps, drawings, surveys, change orders, designs or specifications by the indemnitee or the giving or failure to give directions or instructions by the indemnitee); N.Y. GEN. OBLIG. LAW § 5-324 (2001); PA. STAT. ANN. tit. 68 § 491 (voids indemnity provision in any contract entered into by owners, contractors, subcontractors, or suppliers whereby a design professional is to be indemnified for damages or loss arising out of (1) the preparation or approval by the design professional of design services or (2) the giving or failure to give directions or instructions by the design professional); S.D. CODIFIED LAWS ANN. § 56-3-16 (Michie 2001); TEX. CIV. PRAC. & REM. CODE ANN. § 130.002 (West 2001) (voids indemnity agreements in construction contracts that require a contractor to indemnify an architect or engineer from liability for damage caused by design defects or negligence in the rendition or conduct of the design professional's duties).

³⁴ See N.Y. GEN. OBLIG. LAW § 5-322.1; S.D. CODIFIED LAWS 56-3-18.

³⁵ COLO. REV. STAT. § 13-50.5-102 (2001); LA. REV. STAT. ANN. § 38:2216(G) (West 2001).

³⁶ CAL. CIV. CODE § 2782(b) (West 2001)

³⁷ FLA. STAT. ANN. § 725.06 (West 2001).

³⁸ See *Westinghouse Electric Co. v. Turnberry Co.*, 423 So. 2d 407 (Fla. Dist. Ct. App. 1983); see also *A-T-O, Inc. v. Garcia*, 374 So.2d 533 (Fla. Dist. Ct. App. 1979) (court refused to enforce indemnity agreement because the requirements of the statute were not satisfied). An amendment to the Florida statute in 2000 took out the exceptions and allowed parties to agree to indemnify another party only “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.” The Florida legislature, however, amended the statute again in 2001 so that it closely resembles the 1999 statute.

³⁹ MASS. GEN. LAWS ch. 149, § 29C (2001).

⁴⁰ N.D. CENT. CODE § 9-08-02.1 (2001)

⁴¹ UTAH CODE ANN. § 13-8-1 (2001).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Nevada may be an exception. See Part II, *infra*.

⁴⁵ IND. CODE ANN. § 26-2-5-2 (Michie 2001) (stating “This chapter does not apply to a construction or design contract if liability insurance normally available within the United States

at standard rates cannot be obtained for the facility being constructed or designed because it constitutes a dangerous instrumentality.”)

⁴⁶ See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 130.004.

⁴⁷ See, e.g., ARIZ. REV. STAT. § 32-1159 (C)(1); N.J. STAT. ANN. § 2A:40A-3.

⁴⁸ FLA. STAT. ANN. § 725.08(1) (West 2001). However, the statute does not allow the design professional to require indemnification from the agency. *Id.* at § 725.08(2).

⁴⁹ 245 Ga. 27, 262 S.E.2d 794 (1980).

⁵⁰ See *id.*, 245 Ga. at 28, 262 S.E.2d at 795-96.

⁵¹ *Zettel v. Paschen Construction Contractors, Inc.* 100 Ill. App. 3d 614, 617-18, 427 N.E.2d 189 (1981).

⁵² See, e.g., *id.*; see also *USX Corp. v. Liberty Mut. Ins. Co.*, 269 Ill. App. 3d 233, 645 N.E.2d 396, (Ill. App. Ct. 1994) (“The explicit preservation of insurance contracts under section 3 of [Illinois’] Indemnity Act was repeatedly held to apply to contracts by a subcontractor to procure insurance on behalf of the contractor as well as to actual insurance agreements between the insured and the insurance carrier.”)

⁵³ See also *Southern Guar. Ins. Co. v. Zantop Int’l Airlines, Inc.*, 767 F.2d 795, 798 n.3 (11th Cir. 1985) (“just as an insured may obtain coverage for his own legal liability, he may agree to indemnify another against liability imposed upon that other by law and obtain insurance coverage to provide against that contingency”); *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 578 A.2d 1202 (Md. Ct. App. 1990) (contractor's obligations under the contract were only to provide insurance coverage to Owner for Owner’s vicarious liability, not for Owner's liability as a result of its own negligence. If, however, Contractor in fact procured insurance which provided broader liability coverage than it was obligated to provide under the construction contract, the insurance policy would be valid and insurer would be obligated to provide coverage purchased by Contractor”); *Jokich v. Union Oil Co. of Calif.*, 214 Ill. App. 3d 906, 574 N.E.2d 214, 158 Ill. Dec. 420 (Ill. App. Ct. 1991); *USX Corp. v. Liberty Mut. Ins. Co.*, 269 Ill. App. 3d 233, 645 N.E.2d 396, 206 Ill. Dec. 391 (Ill. App. Ct. 1994).

⁵⁴ *Amoco Production v. Action Well Service*, 107 N.M. 208, 755 P.2d 52 (N.M. Supr. 1988); *Waddell v. LTV Steel Co., Inc.*, 124 Ohio App. 3d 350, 706 N.E.2d 363 (Ohio Ct. App. 1997).

⁵⁵ 50 A.D.2d 226, 376 N.Y.S.2d 533 (1975), *aff’d*, 41 N.Y.2d 1045, 396 N.Y.S.2d 167, 364 N.E.2d 832 (1977).

⁵⁶ *Id.*, 50 A.D.2d at 234, 376 N.Y.S.2d at 541.

⁵⁷ See, e.g., *Davis v. Consolidated Rail Corp.*, 2 Ohio App.3d 475, 477, 442 N.E.2d 1310 (1981); *Hilzer v. MacDonald*, 169 Colo. 230, 454 P.2d 928 (1969).

⁵⁸ *Brown v. Prime Construction Co.*, 102 Wash. 2d 235, 684 P.2d 73, 75 (1984) (adopting the rule that to constitute a waiver under Washington's worker's compensation statute, an indemnification agreement must expressly provide that (1) the indemnitor is waiving its workmen's compensation defense or (2) the terms of indemnity agreement must cover injury to the indemnitor's employees); *Gerard v. Penn Valley Constructors, Inc.*, 343 Pa. Super. 425, 495 A.2d 210 (1985); *Bevis v. Armco Steel Corp.*, 156 Ohio St. 295, 305-306, 102, N.E. 2d 444, 448-449 (1951).

⁵⁹ See *id.* (recognizing that an employer can expressly "assume an obligation to indemnify, notwithstanding that the provisions of the statutes relative to workmen's compensation would otherwise provide him with immunity from such an obligation. That immunity is obviously not of such a character that it cannot be so waived"). A majority of jurisdictions have decided an express contractual agreement is valid between a third-party and an employer who would otherwise be immune under a workers' compensation statute. See *Rucker Co. v. M & P Drilling Co.*, 653 P.2d 1239 (Okla. 1982); *City of Artesia v. Carter*, 94 N.M. 311, 610 P.2d 198 (1980); *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979); *DeShaw v. Johnson*, 155 Mont. 355, 472 P.2d 298 (1970); *Titan Steel Corp. v. Walton*, 365 F.2d 542 (10th Cir. 1966); but see *Young v. Mobil Oil Corp.*, 85 Or. App. 64, 735 P.2d 654 (1987); *Paul Kreps & Associates v. Matthews & Fritts Construction Co.*, 356 So. 2d 638 (Ala. 1978) (allowing contractual indemnity recovery "would be to allow indirectly what is prohibited directly").

⁶⁰ See *Diamond Int'l Corp. v. Sullivan & Merritt, Inc.*, 493 A.2d 1043 (Me. 1985); *Gatley v. United Parcel Service, Inc. v. Nutter*, 662 F. Supp. 200, 202 (D. Me. 1987). The clause at issue in *Gatley* stated that the employer would assume all liability for any damages or injury, including injury to its own employees, and that benefits payable under worker's compensation would in no way affect the indemnity obligation. *Id.*, 662 F. Supp. at 201-02.

⁶¹ PA. STAT. ANN. tit. 77 § 481 (West 2001) (emphasis added).

⁶² See, e.g., *Ramos v. Browning Ferris Indus. of S. Jersey*, 103 N.J. 177, 191-93, 510 A.2d 1152, 1159-60 (1986) (stating that an employer may waive its immunity under the worker's compensation laws by executing an express indemnification agreement); *Szymanski-Gallagher v. Chestnut Realty*, 409 Pa. Super. 323, 597 A.2d 1225 (1991) (holding that the requirements of § 481(b) are met if there is an express undertaking to indemnify or be liable for damages and that it is not necessary to expressly waive the workers' compensation immunity); *Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co.*, 721 F. Supp. 740, 743 (E.D. Pa. 1989) (holding that a broadly drafted indemnification clause was a sufficient waiver of the employer's workers' compensation immunity).

⁶³ 195 Wis. 2d 181, 536 N.W.2d 123 (Ct. App. 1995)

⁶⁴ *Id.* at 184; 536 N.W.2d at 125.

⁶⁵ NEV. REV. STAT. § 616B.609 (2001).

⁶⁶ 684 F.2d 1267 (9th Cir. 1982).

⁶⁷ KY. REV. STAT. ANN. § 342.700 (Michie 2001).

⁶⁸ One example of this is Florida's anti-indemnification statute, in which the 1999, 2000 and 2001 versions of the statute are all different.

⁶⁹ The Georgia Supreme Court has held that "the phrase 'any claim' includes claims for the indemnitee's sole negligence, even if the agreement does not expressly cover sole negligence." *Frazer v. City of Albany*, 245 Ga. 399, 265 S.E.2d 581, 583 (1980).