Express and Implied Indemnity in Construction Litigation

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Taking calculated risks.
That is quite different from being rash.
– George S. Patton

Joe Hardhat, Inc. had the subcontract to install doorknobs at a new 48 story mixed-use community in Baltimore's Inner Harbor. After completion the owner sued the general contractor, who sued the subcontractor for the costs of repair and counsel fees. Joe is looking at minor, if any, damages related to the doorknobs, but crushing claims of counsel fees.

Almost every construction contract has an indemnity agreement. General contractors are generally required to indemnify the owner and sometimes the architect, against claims and liability. General contractors generally demand that subcontractors indemnify them and the owner against claims and liability.

1. What is an Indemnity Agreement?

Indemnity is a "duty to make good any loss, damage, or liability incurred by another."[1] Indemnity requires three parties: (1) an indemnitor, (2) an indemnitee and (3) a claimant. For example, an injured worker (claimant), makes a claim against the building owner, the indemnitee, who calls upon the general contractor (the indemnitor) to reimburse it for its payment to the injured worker. Indemnity is a not remedy for two party losses, such as an agreement to pay another for their own bodily injury or property damage.

2. Indemnity agreements can be express or implied.

Most construction contracts contain an express indemnity agreement that sets out the terms explicitly. The parties agree to risk allocation in advance of the work. Indemnity can also be implied, where one tortfeasor's negligence is active and a second tortfeasor's negligence is passive.[2] For example when a tortfeasor is (1) vicariously liable, (2) fails to discover a defect in a chattel supplied by another, (3) fails to discover a defect in work performed by another, (4) fails to discover a dangerous condition on land created by another.[3] However, if there is joint participation in the tort, indemnity is barred.[4]

[1] Black's Law Dictionary (10th ed. 2014).
[2] *Richards v. Freeman*, 179 F. Supp. 2d 556 (D. Md 2002).
[3] *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 721, 923 A.2d 971, 993 (2007), *aff'd,* 403 Md. 367, 942 A.2d 722 (2008), citing *Max's Of Camden Yards v. A.C. Beverage*, 172 Md. App. 139, 148, 913 A.2d 654, 659 (2006).
[4] *Adams v. NVR Homes, Inc.*, 135 F. Supp2d 675, 712 (D. Md. 201)

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3. Divisions of an Express Indemnity Agreement.

Indemnity agreements have three parts: (1) who is being indemnified; (2) the covered acts or triggering event; and (3) the eligible claim-type. The principal indemnitee(s) is specifically named. Frequently others, such as the indemnitee's employees, agents, independent contractors are also entitled to indemnity.

The act that triggers an indemnity agreement comes in three iterations: (1) the negligent acts of the indemnitor; (2) the concurrent negligence of the indemnitor and the indemnitee; (3) the sole negligence of indemnitee, where the indemnitor is not negligent.[5]

The eligible claim-type generally includes personal injury, death, property damage or defective design.

4. Anti-Indemnity Statutes

Overreach by owners and general contractors has led 46 states to enact anti-indemnity statutes that limit or prohibit enforcing indemnification agreements.[6] In Maryland the construction-related anti-indemnity statute reads as follows.

§ 5-401. Indemnity agreements relating to construction services prohibited

Md. Code Ann., Cts. & Jud. Proc. § 5-401 (West), reads, in pertinent part:

(a)(1) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition, and excavating connected with those services or that work, 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,

[5] *Mass Transit Admin. v. CSX Transp., Inc.,* 349 Md. 299, 317, 708 A.2d 298, 307 (1998).

[6] IRMI, Contractual Insurance Requirements and Anti-Indemnity Statutes < https://www.irmi.com/articles/expert-commentary/contractual-requirements-anti-indemnity-statutes>.

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> or the agents or employees of the promisee or indemnitee, is against public policy and is void and unenforceable.

The statute does not void the entire contractual provision. Rather, it applies the Blue Pencil Rule to strike the promises to indemnify the indemnitee for its sole negligence."[7] If a contract can be construed as reflecting two agreements, one providing for indemnity if the indemnitee is solely negligent and one providing for indemnity if the indemnitee and indemnitor are concurrently negligent, "only the former agreement is voided by the statute."[8] Sole fault indemnity agreements are permitted outside the construction context.

In Maryland, as in most states, indemnity contracts are not construed to indemnify a person against his own negligence unless the agreement expressly so provides "in those very words or other unequivocal terms."[9]

5. Construction Contracts

The commonly used AIA Form A201 "General Conditions for the Contract for Construction" contains the following indemnity provision, in pertinent part:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or

[7] *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 304 Md. 183, 195, 498 A.2d 605, 611 (1985).
[8] *Heat & Power Corp. v. Air Prod. & Chemicals, Inc.,* 320 Md. 584, 593, 578 A.2d 1202, 1206 (1990).
[9] *Crockett v. Crothers,* 264 Md. 222, 227, 285 A.2d 612, 615 (1972).

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> anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. . . .

Let's take a closer look at this clause. The purpose of the first phrase, "to the fullest extent permitted by law…" , is to prevent a court from voiding the entire clause in the event it is found in violation of an anti-indemnity statute.[10]

The purpose of the second clause, "the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them", is to identify who is being indemnified. Note the clause sweeps in not only the owner, but also the architect, the architect's consultants, agents and employees of any of them.[11]

The third clause defines the scope of what will be reimbursed; that is "claims, damages, losses and expense, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work…." Therefore, the clause covers indemnity for pre-litigation claims and demands as well as claims that have been reduced to a judgment. Further, "expenses" is specifically defined to include attorney fees and other expenses incurred by the indemnitee. The claim need not be caused by the insured's negligence, but merely "arise" out of or "result" from the indemnitor's work. The phrase "arising out of" is frequently construed extremely broadly as meaning causation-in-fact" that is "but-for" causation.[12]

The next clause limits the scope of the damages that are covered by the agreement to "bodily injury, sickness, disease or death, or

[10] *Brooks v. Judlau Contracting, Inc.,* 11 N.Y.3d 204, 210, 898 N.E.2d 549, 552 (2008) ("the phrase…"to the fullest extent permitted by law" limits rather than expands a promisor's indemnification obligation"); *cf. Nerenhausen v. Washco Mgmt. Corp.,* 2017 WL 1398267, at *5 (D. Md. Apr. 18, 2017) (*dicta*) (agreement doesn't mention the indemnitee's sole negligence, but requires a broad reading)

[11] The clause provides not only for indemnity but that the owner be held harmless. While indemnity means an indemnitor agrees to reimburse and indemnitee for losses resulting from a claim brought by a third-party. A hold harmless provision is an agreement that one party will not make claims against another party. So the indemnitor agrees both to reimburse the indemnitee and to refrain from bringing claims against the indemnitee. However, courts generally do not distinguish between indemnity and hold harmless provisions. *See e.g. O'Brien & Gere Engineers, Inc. v. City of Salisbury,* 222 Md. App. 492, 526, 113 A.3d 1129, 1149 (2015), *aff'd,* 447 Md. 394, 135 A.3d 473 (2016) ("Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims…''); *First National Bank v. Bankers' Trust Co.,* 151 Misc. 233, 271 N.Y.S. 191, 197 (1934) ("Hold harmless" means to fully compensate the indemnitee for all loss or expense.)

[12] *See, e.g., Mass Transit Admin. v. CSX Transp., Inc.,* 349 Md. 299, 708 A.2d 298, 307 (Md.1998); *N. Assurance Co. of Am. v. EDP Floors, Inc.,* 311 Md. 217, 533 A.2d 682, 688-89 (Md.1987); *Nat'l Indem. Co. v. Ewing,* 235 Md. 145, 200 A.2d 680, 682 (Md.1964).

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to injury to or destruction of tangible property". Thus, design defects within the project itself are outside the indemnity agreement.[13]

The next clause, "[b]ut only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . .", limits the liability of the indemnitor in two ways. First, the liability to the indemnitor must result from losses caused by the indemnitor or one of its subcontractors or employees. Second, indemnitor is only responsible for reimbursing the indemnitee for the portion of the indemnitee's liability resulting from the indemnitor's negligence. Thus, the duty to indemnify is more contribution than indemnity and limited to the indemnitor's comparative fault.[14]

The next clause, "[r]egardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder . . .", is intended to prevent an indemnitor from arguing that the contributory negligence of one of the indemnitees bars indemnity.

The final clause, "[s]uch obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18", is designed to preserve the indemnitor's rights outside the express indemnity agreement, such as equitable indemnity, in the event the indemnity clause is stricken by a court.

6. Conclusion

Indemnity agreements perform the beneficial purpose of allocating risk prior to a project, usually to the party best able to control the risk. In construction contracts this usually flows downstream, from owner to general contractor to subcontractor. The indemnity agreement generally found in AIA documents indemnifies a broad group of parties, for an expansive set of eligible claim-types. However, it is limited to negligent acts and the damages that flow from those acts. Understanding the risk allocation process prior to the project is critical to prevent unwelcome surprises.

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[13] *Bd. of Managers of 125 N. 10th Condo. v. 125North10, LLC*, 51 Misc. 3d 585, 595, 25 N.Y.S.3d 825, 834 (N.Y. Sup. 2016).
[14] *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 106-107 (Mo. 2003); *Dillard v. Shaughnessy, Fickel & Scott Architects, Inc.,* 884 S.W.2d 722, 724–25 (Mo. Ct. App. 1994); *MSI Constr. Managers, Inc. v. Corvo Iron Works, Inc.,* 208 Mich.App. 340, 527 N.W.2d 79, 81 (1995); *Braegelmann v. Horizon Dev. Co.,* 371 N.W.2d 644, 646 (Minn.App.1985).