

Legal Scope

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Advertising Material

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Different State Approaches to Indemnification

Last month's Legal Scope Newsletter discussed indemnity clauses under Pennsylvania law. One of the distinctions in Pennsylvania law is that a party can contractually agree to be responsible for the full payout on a loss, even if the loss was *solely* caused by another party. These "sole negligence" indemnity clauses are often prohibited by statute in other states.

For example, Maryland Code, Courts and Judicial Proceedings, Section 5-401, provides that any construction contract requiring indemnification of the other party's sole negligence is void and unenforceable.

Still, in Maryland, an indemnity clause could potentially be enforceable if it provides for coverage of a loss that was *partially* caused by another party. Under this scenario, for example, if the loss was partially caused by a subcontractor and also partially caused by a contractor, then the loss was not caused by sole negligence, and it would still be an enforceable indemnity clause under Maryland law. Pennsylvania allows for a party to indemnify an entire loss, regardless of whether it was partially or solely caused by another party.

Some states' anti-indemnification statutes go further and *prohibit* any contractual indemnification that obligates a party to pay for any portion of the loss that was caused by the other party. Oregon is an example of this type of anti-indemnification statute. O.R.S. section 30.140 provides that any construction contract clause is void if it requires indemnification for injuries caused "in whole or in part" by another party. Minnesota also has a similar statute (Minn.Stat. section 337.02), as do several other states such as California (Civ. Code 2782). Under these statutes, a party is generally only allowed to indemnify to the extent that losses are attributable to its own acts.

Further compounding the analysis of indemnity clauses: not all contract clauses are worded the same, and outcomes often depend on the unique factual circumstances from which the loss arose. Litigating indemnification clauses can be particularly unpredictable due to these various factors.

Indemnification is a risk-shifting concept, and, relatedly, additional insurance clauses also shift risk. It is common for contracts to require not only indemnity, but also additional insured status. This factor can further complicate the analysis because, for example, in Maryland, while sole negligence is prohibited in indemnification clauses, it may be possible to require a party to procure additional insured status to cover sole negligence. This would effectively act as an end-around to Maryland's anti-indemnification statute. At least one appellate judge has written non-binding *dicta* indicating that these types of additional insured obligations should also be void, but the Maryland Court of Appeals has not yet ruled on the specifics of any given case.

In contrast, Oregon Courts have held that contractual obligations to procure additional insurance for another party's negligence are also unenforceable, which accords with the spirit of the anti-indemnity statute.

When entering or litigating construction contracts, it is advisable to seek legal counsel to ensure a full understanding of the risks and obligations found in these complex clauses, especially when working across various state lines.

The Numbers:

5.5%

- Year-to-date total construction increase through March 2018 (total value, not seasonally adjusted, compared to 2017).
- Total private construction year-to-date has increased 5.1%.
- Total public construction year-to-date has increased 6.7%.

Source(s): U.S. Census Bureau, Release CB18-64, Monthly Construction Spending, March 2018 (Table 2) (May 1, 2018).



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Legal Scope is written by Jeffrey Bright, an attorney licensed in Pennsylvania and Maryland. For more information, contact Bright Law Firm. This newsletter is not legal advice. Unlike this newsletter, legal advice is specifically tailored to the facts, law and objectives unique to each circumstance. **To join or remove yourself from this subscription list, email jbright@bright-lawfirm.com.**