



Spring 2015

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NSPII News

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The President's Message from Michael E. Jacobs



Plans have been finalized for the Advanced Insurance Fraud Seminar on November 9 and 10 in Louisville, KY. Thirteen different topics will be offered on Monday followed on Tuesday by an all day mock trial

presentation incorporating some of the concepts presented in certain classes on Monday. This year's lineup includes several noted national speakers on Monday and the mock trial will feature live jury deliberations to be viewed by the audience after the closing arguments.

The site of this year's Advance Insurance Fraud Seminar in Louisville is being held at the historic Brown Hotel. The hotel fea-



tures a four star restaurant and many amenities including stunning art deco architecture, conveniently located near Louisville's Fourth Street live entertainment district.

Louisville offers some unique opportunities for family getaways in advance or after the seminar, including multiple museums, natural sites and cultural attractions. Details can be found on the website at www.nspii.com/seminars/national-seminar-10/louisville-area-information-23

National's new efforts, started this year, to recruit National Directors to join NSPII and potentially attend the seminar have met with some success already. However, the Society needs your assistance in helping identify and recruit new members. The National Board set recruitment goals in January and it and the Public Relations Committee have been working more closely with the Coalition Against Insurance Fraud and others in the industry to keep our membership strong and to provide support for our chapters.

The process of completing the webinar section of the website is nearing an end. Look for an announcement shortly regarding the ability to purchase webinars from some of our great seminars in the near future.

Again, the National Board will be sending representatives to the Coalition against Insurance Fraud meeting in June to give them an update on what NSPII is doing: recruiting national leaders in the anti-fraud movement to join NSPII and attend our seminars, making selected seminars available through our website and promoting the National Seminar.

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News From Our Ohio Chapter *(cont'd.)*

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On August 25, 2015, the Ohio Chapter will have a lunch and learn at Der Dutchman in Mansfield. Attorney Bill Chris will speak on ethics. Mr. Chris is a former bar counsel for the Akron Bar Association. This hour long presentation will provide ethics credit for those in the insurance industry.

Candidates for election to open positions are being sought. They include two board positions and Second Vice President. The election committee is chaired by Michael Jacobs. If you have interest, please contact him at michaeljacobs@mcgowanandjacobs.com or his office (513) 844-2000 ext. 219.

In September, the Ohio Chapter will wrap up its educational year with a public sector presentation by Adam Roy and Brian Churchwell at the State Fire Marshal's office in Reynoldsburg on September 30th. This all day presentation will include opening remarks by a representative of the State Fire Marshal's Office followed by a Homeland Security presentation and in the afternoon, attendees will watch a burn cell followed by an exercise in arc mapping. Additional topics are anticipated to be added for this all day seminar.

How Far Can You Go? Contracting Construction Indemnification for Your Own Negligence, *by Andrew L. Smith, Esq., Smith, Rolfes & Skavdahl Co., L.P.A.*

In the world of construction law, parties holding the leverage in preparing the terms and conditions of construction contracts and project agreements routinely attempt to require subcontractors, design professionals, and other agents, partner, or independent contractors to indemnify them, *even if* resulting liability or damage is the fault of the other superior party. Subcontractors and other parties sometimes feel forced to enter into such contracts to obtain work and outbid others.

So what exactly is indemnification? To indemnify another party is to completely compensate that party for loss or damage that has already occurred. A simple example of indemnification occurs when you submit an insurance claim to your insurance company for wind or hail damage to your home. The insurance company agrees to pay for the loss, even though the damage was not in any way the fault of your insurer.

Depending on your state's laws, an indemnification provisions may be unenforceable. Many states view such indemnification clauses as violating public policy or interpret the clauses as ex-

culpatory provisions used by sophisticated parties against less sophisticated, less powerful parties. Courts tend to strictly construe application of indemnification clauses, and will only enforce indemnification provisions where the obligation to indemnify is unequivocal.

State law on the topic is broken down into three distinct categories discussed in greater detail below.

Sole Negligence

First, some states narrowly prohibit indemnification clauses seeking to indemnify liability for *sole* negligence. Alaska, Arkansas, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, New Jersey, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin fit into this category.

A typical statute provides 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, re-

pair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract pur-

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chase a project *specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.* (Emphasis added).

See Ga. Code. Ann. § 13-8-2(b).

In the states with “sole negligence” statutes, parties to a construction contract can still implement indemnification clauses requiring indemnification for partial, concurrent, or shared negligence liability. Such sole negligence statutes are strictly construed to only prohibit indemnification clauses mandating indemnification of the promise for actions resulting from the promisor's sole and only negligence. This form of clause is narrow, and provides limited protection against indemnification to subcontractors, design professionals, and other agents, partners, or independent contractors.

Indeed, the purpose of such a statute “is to prevent a building contractor, subcontractor, or owner from contracting away liability for accidents caused solely by that person's negligence, whether during the construction of the building or after the structure is completed and occupied.” *Smith v. Seaboard Coast Line R.R.*, 639 F.2d 1235, 1242 (5th Cir. 1981).

Sole or Partial Negligence (i.e. Any Degree of Negligence)

Second, some states broadly prohibit indemnification clauses seeking to indemnify liability for *sole or partial* negligence. Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York,

North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, and Washington fit into this category.

Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman or any combination thereof wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any. (Emphasis added).

See Fla. Stat. § 725.06(1).

This form of clause is far broader than the sole negligence clause, and provides substantial protection against indemnification to subcontractors, design professionals, and other agents, partners, or independent contractors. For instance, in *Griswold Ready Mix Concrete, Inc. v. Tony Reddick, & Pumpco, Inc.*, 134 So. 3d 985 (Fla. 2012), the indemnification provision at issue was void because the Florida statute prohibited such clauses where liability of the event at issue resulted from a combination the parties named in the

contract, including a general contractor, a subcontractor, and a materialman. Likewise, in *C.J. Mahan Constr. Co. v. Mohawk Re-Bar Servs.*, 2005-Ohio-5427, an indemnity clause in a construction contract between a contractor and a subcontractor was void as against public policy because the language in the agreement clearly indemnified the contractor for damages claimed as a result of the joint or concurrent acts of the contractor and the subcontractor.

No Statute (i.e. Unresolved Liability)

Third, a select few states have not statutorily addressed the issue. Alabama, the District of Columbia, Iowa, Maine, Nevada, Vermont and Wyoming fit into this category. Accordingly, the scope of permissible indemnification provisions in these states has yet to be determined.

Key Considerations

Depending on your state, the scope of permissible indemnification may be limited. You should pay particular attention to the language and limitations of the state statute at issue. Some states provide statutory exceptions. For example, the Florida statute discussed above permits indemnification “if the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any.” Fla. Stat. § 725.06(1).

Most statutes apply to a very broad range of construction projects, including scope-terminology such as “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.” See, e.g., *Ohio Rev. Code. § 2305.31*. However, in certain circum-

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stances, the scope of the project at issue may not be within the grasp of the particular statute. By way of example, in *Lamb v. Armco, Inc.*, 34 Ohio App. 3d 288, 518 N.E.2d 53 (1986), a contract providing full indemnity in relation to a contractor doing maintenance work on a semi-truck trailer, did not fall within the indemnification prohibitions of Ohio's statute.

Furthermore, in some states a defense that a contract is illegal under a specific statute is an affirmative defense, which is waived unless it is properly and timely raised. See, e.g., *Stickovich v. City of Cleveland*, 143 Ohio App. 3d 13, 2001-Ohio-4117, 757 N.E.2d 50.

Final Thoughts

Whether you are a project owner, general contractor, subcontractor, design professional, or other agent, partner, or independent contractor, you need to pay particular attention to the terms of your construction contract or project agreement indemnification provisions.

Depending on your state, the scope of permissible indemnification may be limited or entirely prohibited. You should also pay particular attention to the language of the state statute at issue. Some states provide statutory exceptions permitting certain forms of indemnification.

Don't be left on the hook! Know your state's indemnification laws and limitations.



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Picture Collage from 2015 Ohio Joint Insurance Fraud Seminar



Joe Past, Special Investigator with All-state Insurance Company, received the Investigator of the Year Award.

