

## AGREEMENTS TO INDEMNIFY PARTIES FOR THEIR OWN NEGLIGENCE NOT ENFORCEABLE

By Henry L. Goldberg, Esq. and Robert W. Napoles, Esq.

In the course of negotiating contracts, parties are often faced with demands to indemnify other parties upstream in the construction food chain. Owners may demand of contractors, and contractors, in turn, of subcontractors, language asserting that a party will provide complete and total indemnification against any and all claims for injuries or property damage regardless of fault or cause. What is the effect of such comprehensive indemnification clauses under New York Law?

Fortunately, there are limits to a party's exposure in the face of such provisions. Section 5-322.1 of New York's General Obligations Law provides, in effect, that any language in a contract to provide construction services purporting to indemnify a party for their own actual negligence is void and unenforceable as against public policy. In other words, while an owner or GC can require a subcontractor to indemnify them for the actions of the subcontractor, its agents or even unrelated third-parties, they cannot force it to assume responsibility for the acts of the owner or GC itself.

It should be noted that a contractor can be required to purchase insurance indemnifying other persons for their own negligence; this is not against public policy and is actually encouraged. Accordingly, insurance requirements and/or additional insured provisions are not affected by this provision and will be enforced by New York courts. Also, the statute does not prevent an owner or general contractor from passing along liability which is purely vicarious in nature, and not the result of their actual negligent actions, such as statutory liability under Labor Law ' 240(1) or 241.

Recent case law involving Labor Law ' 240 illustrates the interplay between the statutes when dealing with site accidents. In Celia Gomez v. The National Center for Disability Services Inc., 762 N.Y.S.2d 51 (1st Dep't June 12, 2003), the owner sought to be dismissed from a construction accident lawsuit prior to trial based upon a contractual indemnification clause contained in the subcontract between the general contractor and the injured worker=s subcontractor/employer. The owner asserted that it was not negligent, and that any liability on its

behalf was purely pursuant to the strict liability provisions of Labor Law 240(1) or 241(6). However, based upon evidence of notice to the owner of drainage problems on the site's roof which allegedly led to the plaintiff's injuries, the court held that there was a possibility that the owner could be found negligent in its own right, aside from the statutorily created strict liability. As a result, the question of the enforceability of the indemnity agreement was deferred to the trial, and the owner was compelled to establish at trial that it did not actually contribute to the accident's causation.

Similarly in Osman Tulovic v. Chase Manhattan Bank, N.A., 2003 N.Y. App. Div. LEXIS 11095 (2d Dept. October 27, 2003), the court declined a pretrial motion to strike a contractual indemnity provision in a cleaning service's contract with respect to an accident where the contractor's employee tripped on the exposed rebar on a loading dock that was being renovated. The court reasoned that, because the owner could theoretically be found fault free, despite the open and obvious defect, it would decline to resolve the issues of liability and the contractor, like the owner in the Gomez, case, must wait for an apportionment of fault at trial.

These recent appellate cases illustrate that attempts to shift liability on a construction site through the use of indemnity agreements will be carefully scrutinized by the courts, with an eye towards finding the parties which were actively negligent. Owners and general contractors seeking to enforce all encompassing indemnities against subcontractors will only succeed if they can establish that they were completely free of active negligence in a given incident, and that their only liability was based on strict or vicarious statutory liability. If a party is potentially responsible for an occurrence due to its own negligent acts (or omissions) any enforcement of an indemnity agreement would have to wait until an apportionment of fault at trial.

Accordingly, it is vital to carefully scrutinize the facts and circumstances of each case and the respective parties potential contribution to the causation of an accident, before agreeing to indemnify another party and assume its defense.

If the indemnified individual is liable solely because of statutorily created vicarious liability (such as an owner of a vehicle driven by another), then that indemnified individual can enforce the

indemnity clause. However, if the party is also liable for its own contributing acts, or omissions, then, pursuant to the General Obligations Law, it cannot enforce such clauses.

© Goldberg & Connolly 2003