



Be Certain to Reserve Your Indemnification Rights- It's All in the Drafting

Typically construction contracts require lower tier subcontractors to indemnify the general contractor or upstream subcontractors for any damages arising out of the work at the lower tier levels. The general rule of law in New York, however, is that if the party being indemnified is in any way at fault itself, it loses the benefit of the indemnification provision and the indemnity clause will not be enforced.

Common sense would dictate that the parties should, share liability proportionately, but in New York there is an "all or nothing" rule. Even one percent responsibility will deprive the indemnitee (GC or senior subcontractor) of any protection.

However, recent legal developments will now allow for such a proportional allocation of liability and the enforcement of the protection afforded by indemnity provisions, if, but only if, the indemnification provision is "correctly" drafted.

Over a decade ago, in a pair of cases, the New York Court of Appeals (NY's highest court) held that indemnification agreements that granted contractors full indemnification from their subcontractor's for occurrences, claims or losses on a project, regardless of the amount of negligence caused by the contractor itself, were not enforceable under NY's General Obligations Law §5-322.1. That decision was based on the fact that §5-322.1 was enacted in order to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others. However, in deciding those cases, the court noted that whether or not §5-322.1 would allow enforcement of a partial indemnification agreement was irrelevant to its decision and it would not address the issue. That question was left unanswered until the Court of Appeals again recently confronted the issue a decade later.

Significantly, the Court of Appeals has now decided that a contractor, which is partially at fault, could enforce an indemnification provision against its subcontractor for that portion of damages attributable to the negligence of the subcontractor that is providing the indemnity, provided that the indemnifications clause was worded in a particular manner.

The court specifically relied upon the language of the indemnification provision itself, which stated, in relevant part:

The Subcontractor shall, **to the fullest extent permitted by law**, hold the Contractor and the Owner . . . harmless from any and all liability, costs, damages, attorneys' fee, and expenses from any claims or causes of action of whatever nature **arising from the Subcontractor's work**, including all claims relating to its subcontractors, suppliers or employees, or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by the Subcontractor. . . (Emphasis added.)

Focusing on the term "to the fullest extent permitted by law" and the provision's emphasis on the acts of the subcontractor, the court determined that enforcing the provision would not cause the subcontractor to indemnify the contractor for its own negligence, but rather only for those acts attributable to the indemnifying subcontractor. Accordingly, the court held that a partially negligent contractor would be permitted to seek and obtain partial contractual indemnification from a subcontractor so long as the indemnification provision does not purport to indemnify the contractor for its own negligence.

G&C Commentary

Despite the well-established rule in New York, many construction contracts contain broad clauses that nevertheless attempt to seek full indemnity for all claims. These clauses will not ordinarily be enforceable in New York if the contractor was to any degree at fault.

It is important that indemnification provisions, therefore, be carefully worded. Court decisions continue to address whether other variants of the indemnification clause at issue in these cases are enforceable. As the recent Court of Appeals decision makes clear, a simple phrase limiting the subcontractor's indemnification obligations to "the extent permitted by law" or similar language clarifying that the indemnification is sought only to the extent that the damage was not caused by the contractor's own negligence, will allow a contractor to obtain partial indemnification, even where partially at fault, from the acts of lower-tier parties with whom it, contracts.

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