PROHIBITIONS AGAINST INDEMNIFICATION AGREEMENTS PURPORTING TO INDEMNIFY A PARTY FOR ITS OWN NEGLIGENCE: A 50 STATE SURVEY

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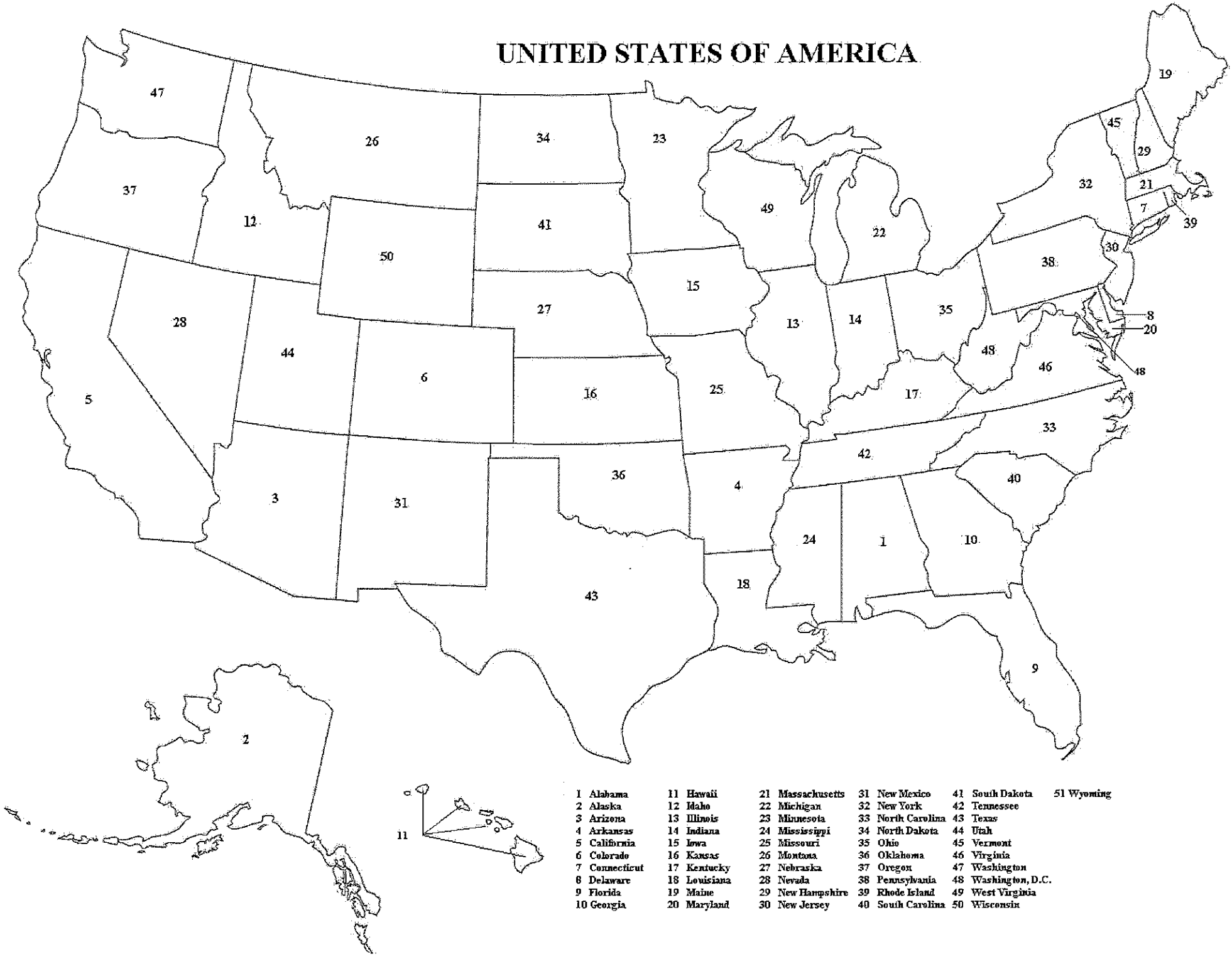
UNITED STATES OF AMERICA



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INTRODUCTION

Indemnity arises where one party is under a duty to reimburse another for a loss suffered to a third-party for which the party seeking indemnity may be responsible to pay damages. This duty can be undertaken in several ways, including through contractual agreement.

Generally, throughout the 50 States (and Washington D.C.), parties are free to provide for indemnity provisions in their contracts, and unless prohibited by statute or public policy, a party may obtain indemnification from another party even in scenarios where the duty to indemnify arises out of the negligence, or even sole negligence, of the party seeking to be indemnified.

This survey, although not meant to provide an in depth review of indemnity in each of the 50 states (and Washington D.C.), contains an overview of allowances and prohibitions (both statutory and common-law) to the ability of a party to seek contractual indemnity for its own negligence. We note that this survey is tailored to indemnification provisions prevalent in contracts in the construction and maintenance of buildings.

ALABAMA

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Generally, contracts of indemnity are enforceable, however, contracts that purport to indemnify a party for another party's intentional conduct are void as a matter of public policy. If the parties to a contract "knowingly, evenhandedly, and for valid consideration intelligently enter into an agreement whereby one party agrees to indemnify the other," the indemnity agreement will be enforced if expressed in clear, unequivocal language. *Industrial Tile, Inc. v. Stewart*, 388 So. 2d 171, 175 (1980). The same rule applies to indemnity against the indemnitee's wrongdoings. The intention to indemnify for the indemnitee's own negligence, even sole negligence, must be clear and unequivocal in the contract. For example, where an agreement provides that the indemnitor will hold the indemnitee harmless "from all damage suits and claims," the Court found this language clear and unequivocal. *McDevitt & Street Co. v. Mosher Steel Co.*, 574 So.2d 794 (Ala. 1991).

ALASKA

Relevant Statute(s) AS § 45.45.900

> A provision, clause, covenant, or agreement contained in, collateral to, or affecting a construction contract that purports to indemnify the promisee against liability for damages for (1) death or bodily injury to persons, (2) injury to property, (3) design defects, or (4) other loss, damage or expense arising under (1), (2), or (3) of this section from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable; however, this provision does not affect the validity of an insurance contract workers' compensation, or agreement issued by an insurer subject to the provisions of AS 21, or a provision, clause, covenant, or agreement of indemnification respecting the handling, containment, or cleanup of oil or hazardous substances as defined in AS 46.

Discussion

Alaska courts construe contractual indemnity agreements to effectuate the reasonable expectations of the parties to the contract. With regard to indemnification for one's own negligence, the interpretation of such a provision varies depending on the nature of the contract.

With commercial contracts, indemnity clauses are evaluated under a "reasonable construction rule." Under this doctrine of interpretation, the unambiguous language of an indemnity clause as reasonably construed should be given effect "even if it does not contain words specifying indemnity for the indemnitee's own negligence." *Manson-Osberg Co. v State*, 552 P.2d 654,659 (1976). Aside from the exceptions discussed below, Alaska permits indemnity for one's own negligence.

In the construction context, any indemnity provision or agreement that purports to indemnify a party for its sole negligence or willful misconduct, or that of its agents or independent contractors directly under control by the party, is void against public policy. This law has been construed broadly to apply to indemnification clauses contained in various types of construction contracts including for the lease of equipment. However, an indemnity clause will not be invalidated merely because there is a theoretical possibility that the clause could be applied to indemnify the indemnitee for conduct governed by the applicable statute. A clause is only invalid and void if the clause is actually applied, as between the contracting parties, to indemnify an indemnitee for the indemnitee's own sole negligence or willful misconduct. Therefore, it is the actual effect of the clause rather than its speculative potential that is relevant.

ARIZONA

Relevant Statute(s) A.R.S. § 32-1159

A. A covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract that purports to indemnify, to hold harmless or to defend the promisee from or against liability for loss or damage resulting from the sole negligence of the promisee or the promisee's agents, employees or indemnitee is against the public policy of this state and is void.

B. Notwithstanding subsection A, a contractor who is responsible for the performance of a construction contract may fully indemnify a person for whose account the construction contract is not being performed and who, as an accommodation, enters into an agreement with the contractor that permits the contractor to enter on or adjacent to its property to perform the construction contract for others.

C. This section applies to all contracts entered into between private parties. This section does not apply to:

1. Agreements to which this state or a political subdivision of this state is a party, including intergovernmental agreements and agreements governed by §§ 34-226 and 41-2586.

2. Agreements entered into by agricultural improvement districts under title 48, chapter 17.

D. In this section:

1. "Architect-engineer professional service contract" means a written or oral agreement relating to the design, design-build, construction administration, study, evaluation or other professional services furnished in connection with any actual or proposed construction, alteration, repair, maintenance, moving, demolition or excavation of any structure, street or roadway, appurtenance or other development or improvement to land.

2. "Construction contract" means a written or oral agreement relating to the construction, alteration, repair, maintenance, moving, demolition or excavation or other development or improvement to land."

Discussion

An agreement to indemnify another for the other party's negligence, other than in construction contracts, does not violate public policy. However, indemnity of this nature is strictly construed and not enforced unless the intent is expressed in clear and unequivocal terms. Where an indemnity provision is silent as to its application to the negligence of another party (i.e., a general indemnity provision), an indemnitee is entitled to indemnification for a loss resulting in party for an indemnitee's passive negligence, but not active negligence. Active negligence exists where an indemnitee has personally participated in an affirmative act of negligence, knew of or permitted negligent acts, or has filed to perform a precise duty the indemnitee agreed to perform. Passive negligence is mere nonfeasance such as the failure to discover a dangerous condition, perform a duty imposed by law, or take adequate precautions against hazards inherent in employment.

ARKANSAS

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Although Arkansas courts generally disfavor contracts indemnifying for one's own negligence, they are enforceable as long as the intent to indemnify is expressed in clear and unequivocal language. If the language is not clear, unequivocal, and wholly unambiguous, the agreement will be struck down as void. Any contract or provision of this type is strictly scrutinized.

However, a broadly worded indemnification agreement may extend to indemnification for the indemnitee's own negligence, and the indemnity agreement will be limited only to the extent the indemnitee is the sole proximate cause of the injury.

Where an agreement specifically refers to the indemnitee's own negligence, an even broader reading is warranted, and the indemnity agreement will be enforced even if the indemnitee's negligence is the sole proximate cause of the injury.

CALIFORNIA

Relevant Statute(s) Ann.Cal.Civ.Code § 2782

(a) Except as provided in Sections 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable; provided, however, that this section shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer as defined by the Insurance Code

(b) (1) Except as provided in Sections 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into before January 1, 2013, that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable.
(2) Except as provided in Sections 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into on or after January 1, 2013, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable.

(c) (1) Except as provided in subdivision (d) and Sections 2782.1,2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract entered into on or after January 1, 2013, with the owner of privately owned real property to be improved and as to which the owner is not acting as a contractor or supplier of materials or equipment to the work, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the owner from, liability are unenforceable to the extent of the active negligence of the owner, including that of its employees.
(2) For purposes of this subdivision, an owner of privately owned real property to be improved includes the owner of any interest therein, other than a mortgage or other interest that is held solely as security for performance of an obligation.
(3) This subdivision shall not apply to a homeowner performing a home improvement project on his or her own single family dwelling.

(d) For all construction contracts, and amendments thereto, entered into after January 1, 2009, for residential construction, as used in Title 7 (commencing with Section 895) of Part 2 of Division 2, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract, and amendments thereto, that purport to insure or indemnify, including the cost to defend, the builder, as defined in Section 911, or the general contractor or contractor not affiliated with the builder, as described in subdivision (b) of Section 911, by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, other servants, or other independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties. Nothing in this subdivision shall prevent any party from exercising its rights under subdivision (a) of Section 910. This subdivision shall not affect the obligations of an insurance carrier under the holding of Presley Homes, Inc. v. American States Insurance Company (2001) 90 Cal.App.4th 571. Nor shall this subdivision affect the obligations of a builder or subcontractor pursuant to Title 7 (commencing with Section 895) of Part 2 of Division 2.

(e) Subdivision (d) does not prohibit a subcontractor and builder or general contractor from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement does not waive or modify the provisions of subdivision (d) subject, however, to paragraphs (1) and (2). A subcontractor shall owe no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless and until the builder or general contractor provides a written tender of the claim, or portion thereof, to the subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants, including, but not limited to, information provided pursuant to subdivision (a) of Section 910, relating to claims caused by that subcontractor's scope of work. This written tender shall have the same force and effect as a notice of commencement of a legal proceeding. If a builder or general contractor tenders a claim for construction defects, or a portion thereof, to a subcontractor in the manner specified by this provision, the subcontractor shall elect to perform either of the following, the performance of which shall be deemed to satisfy the subcontractor's defense obligation to the builder or general contractor:

(1) Defend the claim with counsel of its choice, and the subcontractor shall maintain control of the defense for any claim or portion of claim to which the defense obligation applies. If a subcontractor elects to defend under this paragraph, the subcontractor shall provide written notice of the election to the builder or general contractor within a reasonable time period following receipt of the written tender, and in no event later than 90 days following that receipt. Consistent with subdivision (d), the defense by the subcontractor shall be a complete defense of the builder or general contractor of all claims or portions thereof to the extent alleged to be caused by the subcontractor, including any vicarious liability claims against the builder or general contractor resulting from the subcontractor's scope of work, but not including claims resulting from the scope of work, actions, or omissions of the builder, general contractor, or any other party. Any vicarious liability imposed upon a builder or general contractor for claims caused by the subcontractor electing to defend under this paragraph shall be directly enforceable against the subcontractor by the builder, general contractor, or claimant.

(2) Pay, within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees and costs, on an ongoing basis during the pendency of the claim, subject to reallocation consistent with subdivision (d), and including any amounts reallocated upon final resolution of the claim, either by settlement or judgment. The builder or general contractor shall allocate a share to itself to the extent a claim or claims are alleged to be caused by its work, actions, or omissions, and a share to each subcontractor to the extent a claim or claims are alleged to be caused by the subcontractor's work, actions, or omissions, regardless of whether the builder or general contractor actually tenders the claim to any particular subcontractor, and regardless of whether that subcontractor is participating in the defense. Any amounts not collected from any particular subcontractor may not be collected from any other subcontractor.

(f) Notwithstanding any other provision of law, if a subcontractor fails to timely and adequately perform its obligations under paragraph (1) of subdivision (e), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory damages, consequential damages, and reasonable attorney's fees. If a subcontractor fails to timely perform its obligations under paragraph (2) of subdivision (e), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory and consequential damages, as well as for interest on defense and indemnity costs, from the date incurred, at the rate set forth in subdivision (g) of Section 3260, and for the builder's or general contractor's reasonable attorney's fees incurred to recover these amounts. The builder or general contractor shall bear the burden of proof to establish both the subcontractor's failure to perform under either paragraph (1) or (2) of

subdivision (e) and any resulting damages. If, upon request by a subcontractor, a builder or general contractor does not reallocate defense fees to subcontractors within 30 days following final resolution of the claim as described above, the subcontractor shall have the right to pursue a claim against the builder or general contractor for any resulting compensatory and consequential damages, as well as for interest on the fees, from the date of final resolution of the claim, at the rate set forth in subdivision (g) of Section 3260, and the subcontractor's reasonable attorney's fees incurred in connection therewith. The subcontractor shall bear the burden of proof to establish both the failure to reallocate the fees and any resulting damages. Nothing in this section shall prohibit the parties from mutually agreeing to reasonable contractual provisions for damages if any party fails to elect for or perform its obligations as stated in this section.

(g) A builder, general contractor, or subcontractor shall have the right to seek equitable indemnity for any claim governed by this section.

(h) Nothing in this section limits, restricts, or prohibits the right of a builder, general contractor, or subcontractor to seek equitable indemnity against any supplier, design professional, or product manufacturer.

(i) As used in this section, "construction defect" means a violation of the standards set forth in Sections 896 and 897."

Discussion

Generally, parties may contractually agree to provide indemnity for the indemnitee's own active negligence as long as the agreement contains "sufficiently specific language." *E.L. White, Inc. v. City of Huntington Beach*, 579 P.2d 505, 511 (1978), An indemnity agreement providing for indemnification against an indemnitee's own negligence must be clear and explicit. This is strictly construed against the indemnitee. In the absence of an express provision, the indemnification agreement will be construed to provide indemnity only if the indemnitee has been no more than passively negligent. A general indemnity clause will not be construed to provide indemnity for loss resulting in part from an indemnitee's active negligence absent sufficiently specific language.

Contracts that purport to indemnify oneself from their own fraud, willful injury to the person or property of another, or a willful or negligent violation of law are void against public policy. However, an agreement to indemnify one for a wrongful act that has already been committed is valid as long as that act is not a felony. Indemnification agreements for injury caused solely by an indemnitee's negligent or willful misconduct are prohibited. Indemnification agreements are permitted when the loss or injury is due only in part to the indemnitee's negligence or willful misconduct.

COLORADO

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Indemnity agreements are generally enforceable in Colorado as long as the parties' intent to indemnify is clear and unambiguous. An indemnity agreement holding an indemnitee harmless for its own negligence must do so in clear and unequivocal language. However, it is not necessary to specifically state that one party will indemnify the other for its own negligence, it is enough that a contract provides that "part A will indemnify party B from all claims, liabilities," etc. *Public Service of Colorado v. United Cable Television of Jeffco, Inc.*, 829 P.2d 1280, 1284 (Colo. 1992). This standard is more relaxed in the commercial setting, as liability insurance is frequently used as a means of covering the indemnification obligation. *Id.* However, provisions that seek to indemnify a party for intentional wrongdoing are void as against public policy and unenforceable.

CONNECTICUT

Relevant Statute(s) C.G.S.A. § 52-572k

(a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee's agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer.

(b) The provisions of this section shall apply to covenants, promises, agreements or understandings entered into on or after the thirtieth day next succeeding October 1, 1977.

Discussion

Indemnity agreements against one's own negligence are enforceable in Connecticut so long as the intention to do so is expressed in clear and unequivocal language. As the above statute indicates, indemnification provisions in construction contracts for either party's own acts of sole negligence are prohibited under Connecticut law. Other than in the construction context, where such agreements are against public policy, Courts conduct a case-by-case analysis of the agreement. For example, In case involving a lease agreement where the lessor agreed to indemnify the lessee against "any and all liabilities," the court found for the lessor as the use of "any and all" was all encompassing. *See Burkle v. Car and Truck Leasing Co., Inc.*, 467 A.2d 1255 (Conn. App. 1983).

DELAWARE

Relevant Statute(s) 6 Del.C. § 2704

(a) A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement (including but not limited to a contract or agreement with the State, any county, municipality or political subdivision of the State, or with any agency, commission, department, body or board of any of them, as well as any contract or agreement with a private party or entity) relative to the construction, alteration, repair or maintenance in the State of a road, highway, driveway, street, bridge or entrance or walkway of any type constructed thereon in the State, and building, structure, appurtenance or appliance in the State, including without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee or indemnitee or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons or damage to property caused partially or solely by, or resulting partially or solely from, or arising partially or solely out of the negligence of such promisee or indemnitee or others than the promisor or indemnitor, or its subcontractors, agents, servants or employees, is against public policy and is void and unenforceable, even where such covenant, promise, agreement or understanding is crystal clear and unambiguous in obligating the promisor or indemnitor to indemnify or hold harmless the promisee or indemnitee from liability resulting from such promisee's or indemnitee's own negligence. This section shall apply to all phases of the preconstruction, construction, repairs and maintenance described in this subsection, and nothing in this section shall be construed to limit its application to preconstruction professionals such as designers, planners and architects; provided, however, that this section shall not apply to any obligation owed to the Department of Transportation pursuant to a contract awarded under Title 17 or Chapter 69 of Title 29.

(b) Nothing in subsection (a) of this section shall be construed to void or render unenforceable policies of insurance issued by duly authorized insurance companies and insuring against losses or damages from any causes whatsoever.

(c) Subsection (a) of this section does not apply to any covenant, promise, agreement, understanding, or other provision in a partnership agreement of a partnership (whether general or limited), limited liability company agreement, trust agreement, governing instrument of a trust, certificate of incorporation or bylaw.

Discussion

Generally, agreements by which an indemnitee is indemnified against its own negligence are valid as long as the intent to do so is also in clear and unequivocal terms. Interestingly, attorneys' fees and expenses may be recovered where an indemnitor is successful in defending a claim for indemnity regardless of whether the indemnity provision provides for such fees and expenses. *See Delle Donne & Assoc., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244 (Del. 2004).

Exceptions:

Parties to a construction contract may not enter into an indemnification agreement whereby another party would be responsible for their own negligence. Such agreements are expressly prohibited and void as a matter of public policy.

FLORIDA

Relevant Statute(s) F.S.A. § 725.06

(1) 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. Notwithstanding the foregoing, the monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity of contract with such owner shall not be less than $1 million per occurrence, unless otherwise agreed by the parties. Indemnification provisions in any such agreements, contracts, or guarantees may not require that the indemnitor indemnify the indemnitee for damages to persons or property caused in whole or in part by any act, omission, or default of a party other than:

(a) The indemnitor;

(b) Any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or

(c) The indemnitee or its officers, directors, agents, or employees. However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton or intentional misconduct of the indemnitee or its officers, directors, agents or employees, or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of the indemnitor or any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees.

(2) A construction contract for a public agency or in connection with a public agency's project may require a party to that contract to indemnify and hold harmless the other party to the contract, their officers and employees, from liabilities, damages, losses and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party and persons employed or utilized by the indemnifying party in the performance of the construction contract.

(3) Except as specifically provided in subsection (2), a construction contract for a public agency or in connection with a public agency's project may not require one party to indemnify, defend, or hold harmless the other party, its employees, officers, directors, or agents from any liability, damage, loss, claim, action, or proceeding, and any such contract provision is void as against public policy of this state.

(4) This section does not affect any contracts, agreements, or guarantees entered into before the effective date of this section or any renewals thereof.

Discussion

Indemnification contracts that attempt to indemnify a party for its own wrongful acts are generally disfavored in Florida. To indemnify against losses resulting from one's own sole negligence, the language intending to do so must be expressed in clear and unequivocal terms. For example, an agreement where lessee was obligated to assume "all responsibility for claim asserted by another person," was upheld. *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So. 2d 487 (Fla. 1979). However, language providing for indemnity "against any and all claims" was held to be too general to require indemnity for a parties own negligence. *See Cox Cable Corp. v. Gulf Power Co.*, 591 So. 2d 627 (Fla. 1992).

An indemnification agreement to indemnify for the indemnitee's own negligence in construction contracts is voice and unenforceable. However, as the above statute provides, 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" such an obligation will be enforced.

GEORGIA

Relevant Statute(s) Ga. Code Ann., § 13-8-2

(a) A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:
    (1) Contracts tending to corrupt legislation or the judiciary;
    (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;
    (3) Contracts to evade or oppose the revenue laws of another country;
    (4) Wagering contracts; or
    (5) Contracts of maintenance or champerty.

(b) A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, 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 purchase 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.

Discussion

Unless prohibited by public policy as demonstrated above, indemnification agreements are generally enforceable as Georgia courts tend to enforce contractual language as intended and executed by the parties to the contract.

The aforementioned statute went into effect on May 11, 2011. An indemnity provision is unenforceable if (1) it relates in some way to a contract for construction, alteration, repair or maintenance of property and (2) it contains a promise to indemnify a party for damages arising from that own party's sole negligence. *Kennedy Development Co., Inc. v. Camp, et al*, 290 Ga. 257 (2011). The first part has been interpreted broadly,

including real property leases, design contracts, contracts with subcontractors, commercial and residential leases, in addition to traditional construction contracts. For example the Courts have struck down indemnification provisions providing for indemnity "against and from all claims by any cause whatsoever," and "from any and all damages to both person and property whether due to negligence of landlord." *See respectively*, *Frazer v. City of Albany,* 245 Ga. 399 (1980) and *Country Club Apartments, Inc. v. Scott*, 267 S.E. 811 (Ga. App. 1980).

HAWAII

Relevant Statute(s) HRS § 431:10-222

> Any covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition or excavation connected therewith, purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or willful misconduct of the promisee, the promisee's agents or employees, or indemnitee, is invalid as against public policy, and is void and unenforceable; provided that this section shall not affect any valid workers' compensation claim under chapter 386 or any other insurance contract or agreement issued by an admitted insurer upon any insurable interest under this code.

Discussion

Contracts of indemnity are generally enforceable, including those that indemnify the indemnitee for its own acts of negligence. However, contracts/provisions indemnify one for its own negligence are strictly construed. As such, there must be a clear and unequivocal assumption of liability. There is no specific language that needs to be included in the provision, and in fact, courts have placed the burden ofon the indemnitor, not the indemnitee, to exclude such indemnity. *See Kole v. AMFAC, Inc.*, 665 F. Supp. 1460 (D. Haw. 1987). However, with respect to construction contracts as described in the above statute, a party cannot be indemnified for its sole negligence.

IDAHO

Relevant Statute(s) I.C. § 29-114

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.
>
> This act will not be construed to affect or impair the obligations of contracts or agreements, which are in existence at the time the act becomes effective.

Discussion

Indemnification provisions are valid but strictly construed in Idaho, particularly where a party seeks indemnity for its own sole negligence, even in the context of personal injury. However, as the above statute provides, there is a prohibition on indemnification in construction contracts that purport to indemnify another party against liability for damages arising from the sole negligence of the indemnitee.

ILLINOIS

Relevant Statute(s) 740 ILCS 35/1

> § 1. With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

Discussion

Indemnification agreements will be upheld where their terms evince a clear intent to indemnify. In interpreting such agreements, Courts look to the intent of the parties. However, provisions where a party agrees to indemnify another for the other's own negligence are more strictly construed, requiring clear, explicit, unequivocal terms. *Barger v. Scandroli Constr. Co.*, 347 N.E.2d 207, 208 (Ill. App. Ct. 1976). Provisions requiring indemnity "from any losses, claim demand or liability whether or not any negligence of the indemnitee is alleged to have contributed thereto, in whole or in part," and for "all claims, regardless of their cause or causes," have been upheld to provide indemnity for one's own negligence. *North American Van Lines, Inc. v. Pinkerton Security Sys., Inc.*, 8 F.3d 452 (N.D.Ill. 1996). However, as provided in the above statute, agreements to indemnify for another party's negligence in contracts pertaining to construction, alteration, repair or maintenance of a building are void.

INDIANA

Relevant Statute(s) IC 26-2-5-1

> Sec. 1. All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract except those pertaining to highway contracts, which purport to indemnify the promisee against liability for:
>
> (1) death or bodily injury to persons;
>
> (2) injury to property;
>
> (3) design defects; or
>
> (4) any other loss, damage or expense arising under either (1), (2) or (3);
>
> from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable.

Discussion

Contracts providing indemnity for one's own negligence are valid if knowingly and willingly made. The intent to indemnify for one's own negligence must be in clear and unequivocal terms and will be strictly construed.

However, a provision in a construction or design contract purporting to indemnify the promise from his sole negligence or willful conduct is void as against public policy in Indiana. The statute applies to any construction contract, whether or not it is for new or existing construction. *LTV Steel Co. v. Northwest Eng'g & Constr.*, 845 F. Supp. 1295, 1298 (N.D. Ind. 1994).

IOWA

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Indemnity provisions are generally enforceable in Iowa, according to the agreed-upon terms of the parties that entered into the contract. Indemnification provisions that purport to relieve an indemnitee from liability for its own negligence, or sole negligence, will be strictly construed. Thus, the intent of the parties must be clearly and unambiguously expressed. Courts look for specific language finding fault on behalf of the indemnitee and the intent of the parties, regardless of the language used. For example, language providing for indemnification "from any claims, even though the indemnitee may have caused or contributed thereto" was upheld. *See Employers Mut. Cas. Co. v. Chicago & N.W. Transport Co.*, 521 N.W.2d 692, 694 (Iowa 1994). However, language providing for indemnity "from and against all claims, caused by, arising from, incident to, connected with or growing out of the work to be perform under this contract regardless of whether such claim is alleged to be caused, in whole or in part, by negligence or otherwise on the part of the indemnitor" was struck down. *See Trushcheff v. Abell-Howe Co.,* 239 N.W.2d 116, 134 (Iowa 1976).

KANSAS

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Express contracts of indemnity are generally enforceable in Kansas. A contract that exempts a party from its own liability or negligence is generally disfavored and will be strictly construed, but will be upheld where there exists no vast disparity in bargaining power between the parties. Thus, the intent to enter into any such agreement must be expressed in clear and unequivocal terms and specifically address the issue of the indemnitee's own negligence. There must be no possibility that any other meaning can be ascribed to a contract for indemnity; broad language will be construed against the indemnitor. *Butters v. Consolidated Transfer & Warehouse Co., Inc.*, 510 P.2d 1269, 1273 (1973).

Indemnity agreements that violate a statute or public policy are void. There are no statutes that specifically bar indemnification for one's own negligence in a construction context. An indemnity contract would be unenforceable if, by statute, a party owes a duty to the general public and then, by contract, attempts to relieve itself from its negligence acts in contravention to said statute. The statute must have been passed for the protection of the public welfare or safety. *Hunter v. American Rentals*, 371 P.2d 131 (1962).

KENTUCKY

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Indemnification provisions that purport to relieve an indemnitee from liability for its own negligence will be strictly construed in Kentucky. Therefore, the intent to enter into such an agreement must be expressed in clear and unequivocal terms, and no other meaning can ascribed to the provision. Thus, a contractor or owner may recover indemnity even where they were indisputably negligent.

LOUISIANA

Relevant Statute(s) LSA-R.S. 38:2216(G)

> G. It is hereby declared that any provision contained in a public contract, other than a contract of insurance, providing for a hold harmless or indemnity agreement, or both,
> (1) From the contractor to the public body for damages arising out of injuries or property damage to third parties caused by the negligence of the public body, its employees, or agents, or,
> (2) From the contractor to any architect, landscape architect, engineer, or land surveyor engaged by the public body for such damages caused by the negligence of such architect, landscape architect, engineer, or land surveyor
> is contrary to the public policy of the state, and any and all such provisions in any and all contracts are null and void.

Discussion

Indemnification provisions in contracts will be given their full effect in Louisiana, as evinced by the words in the contract. An obligation to indemnify must arise from an unequivocal express agreement in a contract. Contracts whereby the indemnitee is indemnified against his own negligence are strictly construed and such an intention must be expressed in clear, unambiguous terms. *McGill v. Cochran-Sysco Foods*, 818 So.2d 301, 305 (La. App. 2002). Words such as "any and all liability" are not enough. *Adams v. Falcon Equipment Corp.*, 717 So.2d 282 (La. App. 1998).

There are a few limited exceptions. Any agreement pertaining to a well for oil, gas, water, or drilling for minerals that requires indemnification for negligence or fault on the part of the indemnitee or its agents is void as against public policy. Further, per the above statute, there is a prohibition on indemnification for one's own negligence in a public construction contract context.

MAINE

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Indemnification agreements, including agreements for an indemnitee's own negligence, are enforceable in Maine so long as the intent is clearly and explicitly expressed. Though indemnity agreements for one's own negligence are generally frowned upon, they have been upheld where there is clear and unequivocal language demonstrating the parties' intent to enter into such an agreement. Terms such as "any and all claims," in connection with," or "arising out of from or out of any occurrence," are not sufficient. *See emery Waterhouse Co. v. Lea, et al.*, 467 A.2d 986 (Me. 1983).

There is no prohibition on indemnification for an indemnitee's own negligence in construction or maintenance contracts. The only exception is that an employer may not be indemnified in contravention to Maine's Workers' Compensation statute.

MARYLAND

Relevant Statute(s) MD Code, Courts and Judicial Proceedings, § 5-401

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

(2) This subsection does not affect the validity of any insurance contract, workers' compensation, any general indemnity agreement required by a surety as a condition of execution of a bond for a construction or other contract, or any other agreement issued by an insurer.

Discussion

Indemnification contracts, including for an indemnitee's own negligence, are enforceable under Maryland law, as public policy favors freedom of contract. However, the contract must clearly indicate the intention of the parties to enter into an indemnity provision for another party's negligence. There are no specific words allowing for such indemnity. For example a providing holding a party harmless from "all liability of every kind" was upheld to allow indemnification for a party's sole negligence. *Mass Transit Admin. V. CSX Transp.*, 349 Md. 299, 304 (Md. App. 1998).

There are, however, certain exceptions. A party cannot excuse its own liability for intentional acts or for willful, wanton, reckless, or grossly negligent behavior. Further, the contract cannot be so one-sided that it is evident that there was unequal bargaining power. Finally, per the above statute, construction contracts containing indemnity for injuries caused solely by the indemnitee's own negligence are unenforceable and void. This prohibition does not apply when the loss or injury is only partially due to the indemnitee's negligent conduct.

MASSACHUSETTS

Relevant Statute(s)

M.G.L.A. 149 § 29C

> Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water or other utility line, which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents or subcontractors, shall be void.

M.G.L.A 149 § 15

> Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, shall be deemed to be against public policy and void.

Discussion

Indemnity agreements are generally enforceable in Massachusetts. Provisions that indemnify an indemnitee against its own negligence are also enforceable and are construed fairly (as opposed to strictly, as in other jurisdictions). Massachusetts courts will reasonably construe any indemnity agreement in order to give effect to the intent of the parties. *Shea v. Bay State Gas Co.*, 418 N.E.2d 597 (Mass. 1981).

In construction contracts, indemnity agreements that indemnify an indemnitee for his own sole negligence are prohibited. However, full indemnification is not prohibited where the indemnitee is only partially negligent or concurrently negligent. *See Herson v. New Boston Garden Corp.*, 66 N.E. 2d 907 (Mass. App. Ct. 1996) A contractual indemnification clause is also valid and enforceable against a subcontractor where the clause was limited to indemnification for injuries or damages caused by or resulted from

the acts or omissions of the subcontractor, its agents, or employees. *Collins v. Kiewit Constr. Co.*, 2 Mass. L. Rep. 416 (Mass. Super. Ct. 1994). Courts do not look to the specific facts of a case, but look solely at the indemnity language in the contract. If the indemnity agreement is not invalid on its face and contains a savings clause which provides for indemnity "to the fullest extent of the law", such a clause will be read to allow indemnity to the full extent permitted by §29C. *Sheehan v. Modern Cont'l/Healy* 822 N.E.2d 305 (Mass. App. Ct. 2005). Moreover, since § 29C only speaks to indemnity, a contract providing for the "duty to defend" on behalf of the subcontractor which would otherwise violate §29C is enforceable. *Id.*

Also, with regard to lease agreements, Courts, unlike in the construction context, will look to the actual facts of the action to determine the scope of the indemnification provision. Broadly worded provision required indemnity arising from "any" cause, will be invalidated, even if the intent was not to provide for indemnity for the landlord's own negligence.

MICHIGAN

Relevant Statute(s) M.C.L.A. 691.991

> Sec. 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Discussion

Indemnification contracts are valid under Michigan law. An express indemnity contract is strictly construed against the drafter. The indemnitor's obligation to indemnify the indemnitee must be described clearly and unambiguously. Indemnification for one's own negligence that is not a crime, civil wrong, or contrary to statute or public policy is no illegal, and such a provision is allowed unless it provides for an exemption for one's own willfully inflicted harm, or harm caused by gross or wanton negligence. *Klann v. Hess Cartage Co.* 214 N.W.2d 63 (Mich. App. 1973). Furthermore, an indemnitee cannot be protected from its sole negligence.

MINNESOTA

Relevant Statute(s)

M.S.A. § 337.02:

> An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegatees; or (2) an owner, a responsible party, or a governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws.

M.S.A. § 337.03

> An agreement by which a promisor that is a party to a building and construction contract indemnifies a person, firm, corporation, or public agency for whose account the construction is not being performed, but who, as an accommodation, permits the promisor or the promisor's independent contractors, agents, employees, or delegates to enter upon or adjacent to its property for the purpose of performing the building and construction contract.

Discussion

Express indemnification contracts are valid and enforceable in Minnesota. Indemnification agreements limiting one's liability for its own negligence are disfavored and strictly construed and thus will only be enforced if there is clear and unequivocal language evincing an intent to enter into such an agreement. When interpreting such indemnification agreements, courts analyze the facts of the specific case in a temporal, geographical or causal relationship to work performed and the injury sustained. *See Fossum v. Kraus-Anderson Construction Co.*, 372 N.W.2d 415. (Minn. Ct. App. 1985).

Indemnification for another party's negligence is prohibited in construction contracts. The above statute ensures that each party responsible is held liable for its own negligence. However, the prohibition does not apply to a contractor or owner who simply enters into a construction contract to allow a contractor or owner access to its property for purposes of performing the construction contract.

MISSISSIPPI

Relevant Statute(s) Miss. Code Ann. § 31-5-41

> With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.
>
> This section does not apply to construction bonds or insurance contracts or agreements.

Discussion

Clear and unequivocal terms will give effect to any indemnification agreement in Mississippi, including such agreements that provide for indemnity for one's own or sole negligence. Mississippi has specifically rejected a rule that requires express language protecting an indemnitee against his own negligence, so long as it can be understood from the language that such an intention was made. For example, unlike some other states, language providing indemnity for "any and all claims" is sufficient to provide for indemnity for one's own or sole negligence. *Lorenzen v. South Cent. Bell Tel. Co.*, 546 F.Supp 694 (S.D. Miss. 1982). However, indemnification provisions in lease agreement which seek to indemnify a landlord for his/its own negligence is subject to a higher standard. For such a provision to be upheld, it must be shown that (1) the parties have equal bargaining power (commercial leases), (2) that the indemnification implicates only a private interest, and (3) that the clause does not permit a party to escape liability for a violation of a common law duty (such as a lessor's duty to keep common law areas safe). *Kroger Co. v. Chimneyville Properties, Ltd.*, 784 F.Supp. 331 (S.D.Miss. 1991). Also, as the above statute provides, any agreement purporting to indemnify an indemnitee for his own sole negligence in a construction contract is prohibited in Mississippi.

MISSOURI

Relevant Statute(s) V.A.M.S. 434.100

1. Except as provided in subsection 2 of this section, in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable.

2. The provisions of subsection 1 of this section shall not apply to:

   (1) A party's covenant, promise or agreement to indemnify or hold harmless another person from the party's own negligence or wrongdoing or the negligence or wrongdoing of the party's subcontractors and suppliers of any tier;
   (2) A party's promise to cause another person or entity to be covered as an insured or additional insured in an insurance contract;
   (3) A contract or agreement between state agencies or political subdivisions or between such governmental agencies;
   (4) A contract or agreement between a private person and such governmental entities for the use or operation of public property or a public facility;
   (5) A contract or agreement with the owner of the public property for the construction, use, maintenance or operation of a private facility when it is located on such public property;
   (6) A permit, authorization or contract with such governmental entities for the movement of property on the public highways, roads or streets of this state or any political subdivision;
   (7) Construction bonds, or insurance contracts or agreements;
   (8) An agreement containing a party's promise to indemnify, defend or hold harmless another person, if the agreement also requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recover the cost of the required insurance in its contract price; provided, however, that in such case the party's liability under the indemnity obligation shall be limited to the coverage and limits of the required insurance; or
   (9) Railroads regulated by the Federal Railroad Administration.

3. For the purposes of this section, "construction work" shall include, but not be limited to, the construction, alteration, maintenance or repair of any building, structure, highway, bridge, viaduct, or pipeline, or demolition, moving or excavation connected therewith, and shall include the furnishing of surveying, design, engineering, planning or management services, or labor, materials or equipment, in connection with such work.

4. The provisions of this section shall apply only to contracts or agreements entered into after August 28, 1999.

Discussion

Contracts that purport to indemnify an indemnitee from his own negligence will be strictly construed and thus will only be enforceable is there is clear and unequivocal language in the agreement that demonstrates the parties' intent to be so bound. In the absence of clear and unequivocal language, or where any doubts exists as to the intention of the parties, Missouri courts will not construe a contract of indemnity to indemnify against the indemnitee's own negligence. *Parks v. Union carbide Corp.*, 602 S.W.2d 188 (Mo. 1980).

Construction contracts (as defined in section 3, above) may not contain provisions that indemnify an indemnitee for his sole negligence, subject to the nine exceptions listed above. Therefore, contracts indemnifying an indemnitee for his own negligence will be valid if it fits into one of the aforementioned exceptions.

MONTANA

Relevant Statute(s) MCA § 28-2-2111.

(1) Except as provided in subsections (2) and (3), a construction contract provision that requires one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party or the other party's officers, employees, or agents is void as against the public policy of this state.

(2) A construction contract may contain a provision:

(a) requiring one party to the contract to indemnify, hold harmless, or insure the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, only to the extent that the liability, damages, losses, or costs are caused by the negligence, recklessness, or intentional misconduct of a third party or of the indemnifying party or the indemnifying party's officers, employees, or agents; or

(b) requiring a party to the contract to purchase a project-specific insurance policy, including but not limited to an owner's and contractor's protective insurance, a project management protective liability insurance, or a builder's risk insurance.

(3) This section does not apply to indemnity of a surety by a principal on a construction contract bond or to an insurer's obligation to its insureds.

(4) As used in this section, "construction contract" means an agreement for architectural services, alterations, construction, demolition, design services, development, engineering services, excavation, maintenance, repair, or other improvement to real property, including any agreement to supply labor, materials, or equipment for an improvement to real property.

Discussion

Other than in the construction context, indemnity agreements intending to indemnify a party for its own or sole negligence, to be enforceable, must be clear and unequivocal. *Slater v. Central Plumbing and Heating Co.*, 275 Mont. 266 (1996). For example, where a lease agreement provided that the lessee would indemnify the lessor for "any and all personal injuries...of every name and nature which may arise...whether or

due or not due to the negligence of the indemnitee," it will be upheld to provide for indemnity of the lessor for its own or sole negligence. *Ryan Mercantile Co. v. Great N. R.R. Co.*, 294 F.3d 629 (9th Cir. 1961).

NEBRASKA

Relevant Statute(s) Neb. Rev. St. § 25-21,187.

> In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. This subsection shall not apply to construction bonds or insurance contracts or agreements.

Discussion

Generally, an indemnitee may be indemnified against his own negligence if the agreement includes express language stating the same or if the agreement provides clear and unequivocal language that that is the parties' intention.

Notably, in order for an indemnitor in the construction context to enforce the above statute, he must raise it as an affirmative defense, and failure to raise it will be deemed a waiver. *Union Pacific Railroad Co. v. Kaiser Agricultural Chem. Co.*, 425 N.W.2d 872 (Neb. 1988). Furthermore, if an indemnity provision in a construction contract does provide for indemnity for the indemnitee's own negligence, only that portion of the provision will be struck, and the remainder of the provision will be valid. *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 443 N.W.2d 872 (Neb. 1989).

An agreement that indemnifies against one's own negligence in the construction setting, however, is unenforceable as against public policy.

NEVADA

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Indemnification agreements, while strictly construed, are generally enforceable. The party seeking indemnification from his own negligence must demonstrate such intention clearly and unequivocally in express terms.

Notably, in a case involving a contractor and subcontractor indemnity agreement, the Nevada Supreme Court held that: "an indemnitor's duty to defend an indemnitee is generally limited to those claims directly attributed to the indemnitor's scope of work and does not include defending against the negligence of other subcontractors or the indemnitee's own negligence." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc.*, 255 P.3d 268, 279 (Nev. 2011).

Furthermore, an indemnity agreement between a contractor and subcontractor was limited to the extent that the subcontractor caused damages; and therefore the subcontractor did not have a duty to indemnify contractor after a jury found that the subcontractor did not proximately cause the accident that led to negligence action against both the contractor and subcontractor. *United Rentals Hwy. Techs. v. Wells Cargo*, 289 P.3d 221, 226 -227 (Nev. 2012)

NEW HAMPSHIRE

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Case law allows for indemnification for a party's own negligence, however, courts highly disfavor them and require that they are expressed clearly and unequivocally. Contracts which provide for indemnification of party against his own future acts of negligence are generally not prohibited, especially in the construction setting. *Commercial Union Assur.*, 20 N.H. 620, 419 A.2d 1111 (N.H. 1980).

Specifically, the Supreme Court held that "express language is not necessary to obligate a contractor to protect against injuries resulting from the owner's negligence where the parties' intention to afford such protection is clearly evident." *Commercial Union Assur. Co. v. Brown Co.*, 120 N.H. 620, 623, 419 A.2d 1111, 1113 (N.H. 1980).

Note that indemnity for design professionals is barred. *N.H. Rev. Stat. Ann. § 338-A:1.*

NEW JERSEY

Relevant Statute(s) N.J. Stat. Ann. § 2A:40A-1.

> A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, relative to the construction, alteration, repair, maintenance, servicing, or security of a building, structure, highway, railroad, appurtenance and appliance, including moving, demolition, excavating, grading, clearing, site preparation or development of real property connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents, or employees, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workmen's compensation or agreement issued by an authorized insurer.

Discussion

Generally, agreements to indemnify another for the indemnitee's own negligence are not enforceable unless an expression of intent to indemnify is unequivocal. *Mantilla v. NC Mall Assocs.*, 770 A.2d 1144, 1148 (N.J. 2001). The agreement must make a specific reference to the indemnitee's negligence. There is a statutory bar on indemnification contracts with respect to construction, repair and maintenance or service of buildings based on the indemnitee's sole negligence. Note that this is different from indemnitee's partial negligence--of which there is no public policy bar on such an indemnity agreement. This allows for indemnity for the indemnitee own negligence, as long as the indemnitee's negligence is not the sole cause of the damage.

NEW MEXICO

Relevant Statute(s) N.M. Stat. Ann. § 56-7-1.

A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

B. A construction contract may contain a provision that, or shall be enforced only to the extent that, it:

(1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents; or

(2) requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.

Discussion

Indemnity agreements are generally enforceable; and there is no requirement for an express reference to the indemnitee's negligence. As such, broadly worded indemnity provisions allowing for indemnity for the indemnitee's own negligence, such as "all actions, suits, demands, damages, losses, or expenses," will be upheld. Such agreements will be enforced as long as they do not clearly contravene some positive law or rule of public morals. *City of Atesia v. Carter*, 610 P.2d 198 (N.M. App. 1980). In the maintenance of buildings (and construction setting), indemnity contracts against one's own negligence are against public policy and unenforceable. Courts will strike the offending language from an indemnity agreement, and enforce the remainder of it. *Sierra v. Garcia*, 746 P.2d 1105 (N.M. 1987).

NEW YORK

Relevant Statute(s)

NY Gen. Oblig. § 5-321. (Lease Agreements)

> Agreements exempting lessors from liability for negligence void and unenforceable. Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

NY Gen. Oblig. § 5-322.1. (Construction Contracts)

> 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

NY Gen. Oblig. § 5-323. (Building Service or Maintenance)

> Every covenant, agreement or understanding in or in connection with or collateral to any contract or agreement affecting real property made or entered into, whereby or whereunder a contractor exempts himself from liability for injuries to person or property caused by or resulting from the negligence of such contractor, his agent, servants or employees, as a result of work performed or services rendered in connection with the construction, maintenance and repair of real property or its appurtenances,

shall be deemed to be void as against public policy and wholly unenforceable.

Discussion

Generally, indemnification agreements are enforceable, including indemnity for one's own negligence, however, they are strictly construed and must show a "clear and unmistakable intent to indemnity". See *Heimback v. Metropolitan Transp. Auth.*, 75 N.Y.2d 387 (NY 1990). Where the intent is unclear, courts require extrinsic evidence of intent. *Commander Oil Corp. v. Advanced food Serv. Equip.*, 991 F.2d 49 (2nd Cor. 1993). A greater scrutiny is place on such a provision where the indemnitee is actively, as opposed to passively, negligent. Language providing for indemnification "against all claism and demands of whatsoever kind and nature," have been upheld. *Kurek v. Port Chester Housing Authority*, 18 N.Y.2d 450 (1966). On the other hand, language providing for indemnity for "other obligations and liabilities arising in the ordinary course of business," is too broad to allow for indemnity for one's own negligence. *Levine v. Shell Oil*, 28 N.Y.2d 205 (1971) Furthermore, a party cannot be indemnified for it gross negligence or intentional, willful, or criminal misconduct..

The General Obligations Law provides for a myriad of prohibitions for indemnity for one's own negligence in several contexts, among them, lease agreements, construction contracts, and contracts for the service and maintenance of a building. For instance, in the construction context, in order for an indemnification provision not to be void as against public policy, it must contain language limiting indemnification to the indemnitee for partial negligence. Language to the effect that "to the fullest extent of applicable law" the subcontractor will indemnify the general contractor for liability "regardless of whether the general contractor is partially negligence...excluding only liability created by the general contractor's sole and exclusive negligence" would be enforceable. *Brooks v. Judlau Contr., Inc.*, 11 NY3d 204 (2008).

NORTH CAROLINA

Relevant statute(s) N.C.G.S.A. § 22B-1.

> Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees. This section shall not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer, nor shall this section apply to promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee. This section shall not apply to contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1.

Discussion

Generally, indemnity contracts for one's own negligence are not favored and are strictly construed and such language must be clear and unambiguous. If the contract is private and the public's interest is not affected, the contract will not be held as against public policy. *See Sylva Shops Ltd. Partnership v. Hibbard*, 623 S.E.2d 785 (N.C. App. 2006)

A construction indemnity agreement may indemnify a promisee from damages arising from the negligence of the promisor; however, any provision seeking to indemnify the promisee from its own negligence is unenforceable. *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Associated Scaffolders and Equipment Co., Inc.*, 157 N.C.App. 555 (2003).

NORTH DAKOTA

Relevant Statute(s)

N.D. Cent Code § 9-08-02

> All contracts which have for their object, directly or indirectly, the exempting of anyone from responsibility for that person's own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

N.D. Cent Code § 9-08-02.1.

> Any provision in a construction contract which would make the contractor liable for the errors or omissions of the owner or the owner's agents in the plans and specifications of such contract is against public policy and void.

Discussion

Generally, parties a re permitted to contract for indemnification in any way that is not in breach of public policy. Indemnity clauses are strictly construed, specifically courts will look to see if the language is clear and for an "unmistakable intent" to indemnify. *K/D Weatherbeaters, Inc. v. Gull Lake Industries*, 698 F.2d 954, 956 (8th Cir. 1983). Indemnity may be made in an express agreement or it may be implied. Indemnity may even be for a parties sole negligence, so long as the intent is very clearly expressed. *Rupp v. American Crystal Sugar Co.*, 465 N.W.2d 614 (N.D. 1991).

OHIO

Relevant Statute(s) R.C. § 2305.31

> A covenant, promise, agreement, or understanding in, or in connection with or collateral to, 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, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.

Discussion

Generally, the scope of indemnity in a contract is determined by the express intent of the parties. Provisions that allow for indemnification for an indemnitee's own negligence are strictly construed and will not be held as such unless it is demonstrated in "clear and unequivocal terms" and "beyond doubt and by express stipulation." *Kay v. The Pennsylvania Rd. Co. v. The Orr Felt & Blanket Co.*, 103 N.E.2d 751, 752-753 (1952). This standard is eased where the agreement is made in a commercial setting, and language such as "for any and all harms however caused," has been upheld. *Glaspell v. Ohio Edsion Co.*, 29 Ohio St. 3d 44 (1987). The purpose of the statute voiding indemnification for an indemnitee's own negligence in the construction context encourage employers to provide employees with a safe work place.

OKLAHOMA

Relevant Statute(s)

OKLA. Stat. tit. 15, §15-42

> An agreement to indemnify a person against an act thereafter to be done is void if the act be known by such person at the time of doing it to be unlawful.

OKLA. Stat. tit. 15, §15-427.

> In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:
>
> 1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.
>
> 2. Upon an indemnity against claims or demands, or damages or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.
>
> 3. An indemnity against claims or demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands or liability incurred in good faith, and in the exercise of reasonable discretion.
>
> 4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity; but the person indemnified has the right to conduct such defense, if he chooses to do so.
>
> 5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former.
>
> 6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action of proceedings against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.
>
> 7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is applicable if he had a good defense upon the merits, which, by want of ordinary care, he failed to establish in the action.

Discussion

Indemnity agreements against one's own negligence are strictly construed and three criteria must be met in order for such an agreement to be valid. *Noble Steel, Inc. v. Williams Brothers Concrete Const. Co.*, 49 P.3d 766, 770 (Okla. Civ. App. Div. 4 2002). Namely, the agreement must: express intent in unequivocally clear language; result from an arm's length transaction between parties of equal bargaining power; and not violate public policy. *Id.*

The most prominent issue in the Oklahoma courts has been that of clear and unequivocal intent in the contract. The courts have held that "[I]ndemnity agreements will not be construed to obligate the indemnitor to indemnify the indemnitee against losses arising from the indemnitee's own negligence unless the contract makes it unequivocally clear that that is what the parties intended." *Wallace v. Sherwood Const. Co., Inc.*, 877 P.2d 632, 634 (Okl. App. 1994). Interestingly, as shown above, interpretation of indemnity agreements is codified by statute.

OREGON

Relevant Statute(s) O.R.S. § 30.140

(1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.

(2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors.

(3) As used in this section, "construction agreement" means any written agreement for the planning, design, construction, alteration, repair, improvement or maintenance of any building, highway, road excavation or other structure, project, development or improvement attached to real estate including moving, demolition or tunneling in connection therewith.

(4) This section does not apply to:

(a) Any real property lease or rental agreement between a landlord and tenant whether or not any provision of the lease or rental agreement relates to or involves planning, design, construction, alteration, repair, improvement or maintenance as long as the predominant purpose of the lease or rental agreement is not planning, design, construction, alteration, repair, improvement or maintenance of real property; or

(b) Any personal property lease or rental agreement.

(5) No provision of this section shall be construed to apply to a "railroad" as defined in ORS 824.200.

Discussion

Generally, indemnification agreements with respect to one's own negligence are enforceable when the intent of the parties is expressed clearly and explicitly. *Southern Pacific Co. v. Morrison-Knudsen Co.*, 338 P.2d 665 (Or. 1959). Even when ambiguous, the courts will determine the parties' intent by looking at the surrounding circumstances, however, ambiguities will be construed against the drafting party. *Cook v. Southern Pacific Transp. Co.*, 623 P.2d 1125, 1128 (Or. Ct. App. 1981). Notably, courts will apply the "rule of harshness" when interpreting such a provision to determine is enforcement of

the provision circumvents the original intent of the parties, and focus on the "possibility of a harsh and inequitable result that would fall on one party immunizing the other party from the consequences of his or her own negligence." *Cook v. Southern Pacific Transp. Co.*, 623 P.2d 1125 (Or. Ct. App. 1981).

The above statute does not prohibit indemnity provisions seeking to have an indemnitee indemnified for its own nelgience. What is barred is a contractors ability to obtain indemnity for another's negligence. *Clarendon Nat. Ins. Co. v. American States Ins. Co.*, 688 F.Supp.2d 1186, 1190 (D. Or. 2010).

PENNSYLVANIA

Relevant Statute(s) There are no relevant statutes on point.

Discussion

Indemnity agreements are strictly construed and courts will refrain from looking beyond the plain meaning of the contract. *Coatman v. Lower Allen Leisure Enter.*, 42 Pa. D. & C.3d 19, 24-25 (1985). The Pennsylvania Supreme Court held that "[t]he law has been well settled in this Commonwealth for 87 years that if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language." *Ruzzi v. Butler Petroleum Co.,* 527 Pa. 1, 588 A.2d 1 (1991). For example, a provision that provides for indemnity for "all loss, cost or expenses…arising form accident to…laborers employed in the work" would not be enforced to allow for indemnity for an indemnitee's own negligence. *Perry v. Payne* 66 A. 553, 557 (Pa. 1907). However, a provision indemnifying a buyer "from any and all claims… whether the same results from negligence of buyer or buyer's employees or otherwise," was upheld. *Westinghouse Elec. Co. v. Murphy, Inc.*, 228 A.2d 656 (Pa. 1967).

RHODE ISLAND

Relevant Statute(s) R.I. Gen Laws § 6-34-1

> (a) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, 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 with a building, structure, highway, road, appurtenance, or appliance, pursuant to which contract or agreement the promisee or the promisee's independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, the promisee's independent contractors, agents, employees, or indemnitees, is against public policy and is void; provided that this section shall not affect the validity of any insurance contract, worker's compensation agreement, or an agreement issued by an insurer.
>
> (b) Nothing in this section shall prohibit any person from purchasing insurance for his or her own protection or from purchasing a construction bond.

Discussion

Indemnity agreements may be created expressly or impliedly, and are strictly construed against the party seeking indemnification. *Helgerson v. Mammoth Mart, Inc.*, 335 A.2d 339, 341 (R.I. 1975). This right is preserved by statute. R.I. Gen. Laws § 10-6-9. In order to indemnify against one's own negligence, however, the contract must be explicit in the parties' intention and clearly and unequivocally expressed.

Where an otherwise valid indemnity provision, in a construction contract, is invalid due to allowance for indemnity for an indemnitee's own negligence, court will not strike the entire provision, but will modify it to extract the voided language and enforce the remainder of the provision. *Cosimini v. Atkinson-Kiewit Joint Venture*, 877 F.Supp. 68, appeal dismissed 98 F.3d 1333 (1995).

SOUTH CAROLINA

Relevant Statute(s)

S.C. Code Ann § 32-2-10.

> Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

S.C. Code Ann § 27-40-330(a)(3).

(a) A rental agreement may not provide that the tenant: (3) agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.

Discussion

Generally, the law provides that indemnity agreements are enforceable, unless such an agreement contradicts public policy. *Laurens Emergency Med. Specialist v. M.S. Bailey & Sons Bankers*, 584 S.E.2d 375, 377 (S.C. 2003). Indemnity clauses are strictly construed and will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in "clear and unequivocal terms." *Federal Pacific Elec. v. Carolina Production Enterprises*, 298 S.C. 23, 26-27 (S.C. App. 1989). Although the term "any and all claims" may allow for indemnification for an indemnitees own concurrent negligence, it is unsettled whether it extends to an indemnitees sole negligence.

SOUTH DAKOTA

Relevant Statute(s)

S.D. Codified Laws § 53-9-1.

> Contract provisions contrary to law, unlawful. A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful.

S.D. Codified Laws § 53-9-3.

> Contracts against public policy. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law.

S.D. Codified Laws § 56-3-18.

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against the policy of the law and is void and unenforceable.

Discussion

Other than the prohibitions set forth in the above statutes, the general rule for a party to be indemnified of the consequences of its own negligence is that "the language of the indemnity agreement must be clear and unequivocal." *Chicago & N.W. Transp. Co. v. V & R Sawmill, Inc.*, 501 F.Supp. 278, 281 (D.C.S.D. 1980). Although no specific words are necessary, any doubts are resolved against the indemnitee. The intention of the parties will be the key in determining intent, courts, however, prohibit indemnity for a promisee's sole negligence. This is viewed as against public policy and therefore, void. It is noteworthy, that the prohibition against indemnity for an indemnitee's negligence in the construction context is limited to the indemnitee's sole negligence.

TENNESSEE

Relevant Statutes T. C. A. § 62-6-123.

> A covenant promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees or indemnitee, is against public policy and is void and unenforceable.

Discussion

Indemnity agreements for one's own negligence are strictly construed and a party's intent to be indemnified for its own negligence must be "clear and unequivocal." *Power Equip. Co. v. J.A. Jones Const. Co.*, No. 844, 1989 Tenn. App. LEXIS 108, at *4 (Tenn. Ct. App. Feb. 10, 1989).

An exception to indemnity agreements is provided in the referred statute with respect to the construction industry. The statute restricts indemnification for one's sole negligence. This is interpreted as including agreements related to the construction of a building and any services for the same. *Carroum v. Dover Elevator Co.*, 806 S.W.2d 777, 780 (Tenn. Ct. App. 1990); *T. C. A. § 62-6-123.* Furthermore, as the statutory bar to indemnity in the construction setting is limited to sole negligence, concurrent negligence of the indemnitor and indemnitee precludes recovery unless the contract states otherwise in "clear and unequivocal terms." *Kellogg Co. v. Sanitors, Inc.*, 496 S.W.2d 472, 473 (Tenn. 1973).

TEXAS

Relevant Statute(s) There are no relevant statutes on point.

Discussion

Generally, indemnification agreements are interpreted using the typical rules of construction in order to determine the parties' intent. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 284 (Tex. 1998). The law views indemnity contracts that relieve a party from consequences due to his own negligence as an "extraordinary shift of risk." *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). Therefore, Texas employs two fair notice requirements: the express negligence doctrine; and the conspicuousness requirement. *Id.* The express negligence test require the intent of the indemnity provision allowing for the indemnity of the indemnitee's own negligence must be specifically state in the agreement. The conspicuous requirement provides that there must be some language in the agreement to attract the attention of the a reasonable person, e.g., capital letters. If the indemnitor has actual notice or knowledge of the indemnity agreement, these notice requirements are not necessary. Note that these requirements are a replacement to the "clear and unequivocal" standard; which was abandoned in 1987. *See Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987).

Two exceptions to indemnity agreements can be found in the Texas Civil Practice and Remedies Code. They are, the: Oilfield Anti-Indemnity Act; and architects and engineers' anti-indemnity statute. *V.T.C.A, Civil Practice & Remedies Code § 130.002 (a)(1)(A).*

UTAH

Relevant Statute(s)

(1) For purposes of this section:

(a) "Construction contract" means a contract or agreement relative to the design, construction, alteration, repair, or maintenance of a building, structure, highway, appurtenance, appliance, or other improvement to real property, including moving, demolition, or excavating, connected to the construction contract between:

(i) a construction manager;

(ii) a general contractor;

(iii) a subcontractor;

(iv) a sub-subcontractor;

(v) a supplier; or

(vi) any combination of persons listed in Subsections (1)(a)(i) through

(b) "Indemnification provision" means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:

(i) the damages arise out of:

(A) bodily injury to a person;

(B) damage to property; or

(C) economic loss; and

(ii) the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees.

(2) Except as provided in Subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable.

(3) When an indemnification provision is included in a contract related to a construction project between an owner and party listed in Subsection (1)(a), in any action for damages described in Subsection (1)(b)(i), the fault of the owner shall be apportioned among the parties listed in Subsection (1)(a) pro rata based on the proportional share of fault of each of the parties listed in Subsection (1)(a), if:

(a) the damages are caused in part by the owner; and

(b) the cause of the damages defined in Subsection (1)(b)(i) did not arise at the time and during the phase of the project when the owner was operating as a party defined in Subsection (1)(a).

(4) This section may not be construed to affect or impair the obligations of contracts or agreements, that are in existence at the time this section or any amendment to this section becomes effective.

Discussion

Although courts do not require specific language, they do require a "clear and unequivocal" expression of intent in the indemnity agreement to release, shift, or avoid potential liability for loss or injury in order to be enforceable. *Ervin v. Lowe's Companies, Inc.*, 128 P.3d 11, 15 (Utah Ct. App. 2005). For example, a provision providing indemnity for "any and all claims, damages, loss and expenses, to the fullest extent permitted by law...for any and all death, accident, injury or other occurrence" was upheld. *Russ v. Woodside Homes, Inc.* 905 P.2d 901 (Utah Ct. App. 1995). Gross negligence or intentional misconduct will nullify any indemnity agreement.

Cases citing the statute have held that if a clause in a construction contract requires that the promisor personally insure against liability from another's sole negligence, it is unenforceable as against public policy. *Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.*, 27 P.3d 594 (2001);

VERMONT

Relevant Statute(s) There are no relevant statutes on point.

Discussion

Indemnity contracts with respect to one's own negligence are enforceable when the language is clear and "unequivocally indicates that one party is to be indemnified, regardless of whether or not that injury was caused in part by that party." *Hart v. Amour*, 776 A.2d 420, 424 (Vt. 2001). The courts have not articulated any specific language, thus, so long as the intent is clear, the courts will uphold the clause. *Id.* at 422. In arms length business deals between commercial parties that have equal bargaining power, even broad absolute indemnity language is enough to require indemnity for an indemnitee's own negligence. Courts will look harder at such a provision where there are issues of unequal bargaining power, fairness, and risk spreading.

Vermont is one of the few states that has not provided for any limitations on the enforceability of indemnity agreements in certain settings.

VIRGINIA

Relevant Statute(s) Va Code Ann. § 11-4.1

> Any provision contained in any contract relating to the construction, alteration, repair or **maintenance** of a building, structure or appurtenance thereto, including moving, demolition and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings by which the contractor performing such work **purports to indemnify** or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting **solely from the negligence of such other party** or his agents or employees, is **against public policy** and **is void and unenforceable**. This section applies to such contracts between contractors and any public body, as defined in § 2.2-4301.
>
> This section shall not affect the validity of any insurance contract, workers' compensation, or any agreement issued by an admitted insurer.
>
> The provisions of this section shall not apply to any provision of any contract entered into prior to July 1, 1973.

Discussion

Courts follow the plain-meaning rule when interpreting the intent of an indemnity agreement determining enforceability by the "clear and explicit language" in the contract, including where an indemnitee seeks to be indemnified for its own negligence. *Kraft Foods N. Am. v. Banner Eng'g & Sales*, 446 F. Supp. 2d 551, 578 (E.D. Va. 2006). In the construction context, the statute provides that one cannot be indemnified for injury or damage that they solely caused because it goes against public policy. *See supra.*

Note that lease agreements between business entities must also have explicit language in indemnification to be enforceable. *See Green v. Sauder Mouldings, Inc.*, 345 F. Supp.2d 610 (E.D. Va. 2004).

WASHINGTON

Relevant Statute(s) Wash. Rev. Code § 4.24.115

(1) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, a contract or agreement for architectural, landscape architectural, engineering, or land surveying services, or a motor carrier transportation contract, purporting to indemnify, including the duty and cost to defend, against liability for damages arising out of such services or out of bodily injury to persons or damage to property:

> (a) Caused by or resulting from the sole negligence of the indemnitee, his or her agents or employees is against public policy and is void and unenforceable;
>
> (b) Caused by or resulting from the concurrent negligence of (i) the indemnitee or the indemnitee's agents or employees, and (ii) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

(2) As used in this section, a "motor carrier transportation contract" means a contract, agreement, or understanding covering: (a) The transportation of property for compensation or hire by the motor carrier; (b) entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or (c) a service incidental to activity described in (a) or (b) of this subsection, including, but not limited to, storage of property, moving equipment or trailers, loading or unloading, or monitoring loading or unloading. "Motor carrier transportation contract" shall not include agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment.

Discussion

To provide for indemnity for one's sole negligence, the language in the agreement must be "clear and unequivocal." *Northwest Airlines v. Hughes Air Corp.*, 702 P.2d 1192, 1193 (Wash. 1985). This extends to indemnification for one's sole negligence.

Language that provides for indemnity "whether or not caused by the indemnitee's negligence" is sufficient to meet the clear and unequivocal standard for sole negligence. *Northwest Airlines v. Hughs Air Corp.*, 702 P.2d 1192, 1193 (Wash. 1985). In fact, the use of the word liability in such a provision, instead of negligence, is also enforceable. *McDowell v. Austin Co.*, 710 P.2d 192 (Wash. 1985).

Of course, pursuant to statute, in the construction context an indemnity provision indemnifying a party for its sole negligence will be unenforceable. *See McDowell v. Austin Co.*, 710 P.2d 192, 194 (Wash. 1985). Furthermore, to satisfy the statute, indemnity language must specifically state that indemnity is for concurrent negligence to the extent of the indemnitor's negligence. *Id.*

WASHINGTON D. C.

Relevant Statute(s) There are no relevant statutes directly on point.

Discussion

Indemnification agreements for one's own negligence are enforceable in Washington D.C. as long as they contains clear and unambiguous language. However, no party may limit its own liability for gross negligence, willful acts, or fraud, and such agreements are void as against public policy. *Brown v. 1301 K Street Ltd. Partnership*, 31 A.3d 902 (2011).

WEST VIRGINIA

Relevant Statute(s) W. Va. Code, § 55-8-14.

> A covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement entered into on or after the effective date of this section, relative to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of any building, highway, road, railroad, water, sewer, electrical or gas distribution system, excavation or other structure, project, development or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable and no action shall be maintained thereon.
>
> This section does not apply to construction bonds or insurance contracts or agreements.

Discussion

Generally, indemnification agreements are enforceable and the typical rules of contract construction apply to interpret such agreements. Indemnity agreements are encouraged in West Virginia, except when they go beyond mere allocation of potential joint and several liability and seek to indemnify a party against its sole negligence without an appropriate insurance fund. *Dalton v. Childress Service Corp.*, 189 W. Va. 428, 431 (1993).

In the construction setting, indemnity agreements to indemnify a party against its sole negligence are void and unenforceable. This includes the statute provision related to maintenance of any building. We note, however, that courts will not void an agreement even for a party's sole negligence until after a jury has found such a party solely at fault; and "only if it cannot be inferred from the contract that there was a proper agreement to purchase insurance for the benefit of the concerned parties." *Dalton*, 129 W. Va. at 431.

WISCONSIN

Relevant Statute(s) Wi. St. § 895.447.

> (1) Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.
>
> (2) This section does not apply to any insurance contract or worker's compensation plan.
>
> (3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.

Discussion

Generally, courts strictly construe indemnity agreements for one's own negligence, in that there must be a "clear and unequivocal" expression of same in the contract itself. *Roto Zip Tool Corp. v. Design Concepts*, 718 N.W.2d 191 (2006). Such agreements must meet the conspicuousness standard of Wis. Stat. § 401.201(10), which provides that "a term is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it."

The above statute voids agreements that limit or defeat tort liability in the constructions setting. However, this does not necessarily void indemnity agreements. In that context, courts interpret this statute narrowly because it creates a limitation on the common law right to freely contract. *Gerdmann v. U.S. Fire Ins. Co.*, 350 N.W.2d 730, 734 (Wis. Ct. App. 1984).

WYOMING

Relevant Statute(s) There are no relevant statutes directly on point

Discussion

Generally, expressions of intent must be state "very clearly" in "clear and unequivocal terms" in order for courts to hold an indemnity agreement for one's own negligence valid. *Northwinds of Wyoming, Inc. v. Phillips Petroleum Company*, 779 P.2d 753 (Wyo. 1989). Such agreements are strictly construed against the indemnitee. For example, an agreement whereby "contractor shall indemnify and hold company harmless against injury or death of any person...resulting directly or indirectly from any and all acts or omissions of contractor" did not cover he indemnitee's own negligence. *Id.* The test is whether the contract language specifically focuses attention on the fact that by agreement the indemnitor was assuming liability for the indemnitee's own negligence. *Wyoming Johnson, Inc. v. Stag Industries, Inc.*, 662 P.2d 96 (Wyo. 1993).

When an indemnity agreement goes against public policy, it is unenforceable, such as for ones own' negligence with respect to wells for oil, gas or water, or mines for minerals. *Mountain Fuel Supply v. Emerson*, 578 P.2d 1351, 1353 (Wyo. 1978); *Wyo. Stat. § 30-1-131 (2006).*