

## **Recent Changes to Louisiana's Anti-indemnity Legislation**

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Despite the continued use of indemnity provisions in construction contracts, state legislatures have begun to pass anti-indemnity statutes invalidating such provisions given the public policy concern to protect certain workers on a construction project from another contracting party's attempts to avoid liability through the use of indemnity agreements.<sup>1</sup>

Courts applying anti-indemnity statutes generally uphold the limited form of indemnity wherein the indemnitor is obligated to indemnify the indemnitee only for the indemnitor's own negligence and the intermediate form wherein the indemnitor agrees to indemnify the indemnitee for any and all liability except such liability arising out of the indemnitee's sole negligence.<sup>2</sup> However, courts generally do not uphold the broad form of indemnity in which a party agrees to indemnify another for any liability, including liability resulting from gross negligence or willful misconduct, regardless of which party's negligence introduces the liability.<sup>3</sup>

Louisiana's anti-indemnity legislation is a primary example as to how there is a lack of uniformity in the law regarding the enforceability of indemnity clauses. Louisiana's anti-indemnity legislation is an interesting trend amongst the varying anti-indemnity statutes from state to state. First, as an oil and gas state, Louisiana has a statutory bar, the Louisiana Oil Field Indemnification Act, which invalidates indemnification agreements contained in construction contracts "pertaining to wells for oil, gas or water."<sup>4</sup> Recently, Louisiana enacted a new anti-indemnity statute, La. Rev. Stat. §2780.1, which is unique in that it voids indemnity agreements contained in motor carrier transportation or construction contracts wherein the indemnitor agrees to indemnify another from liability resulting from the negligent or intentional acts or omissions of the indemnitee.

Moreover, the distinction between one's status as an additional insured as opposed to a contractual indemnitee is significant in terms of the application of anti-indemnity statutes.<sup>5</sup> In most states, one's status as an additional insured is a vehicle capable of contravening anti-indemnity legislation and case precedent.<sup>6</sup> However, in some states, anti-indemnity statutes are applicable to those clauses requiring one contracting party to name another as additional insured

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<sup>1</sup> See Buck S. Belter & Melissa A. Orien, *Are Courts Limiting Design Professionals' Ability to Limit Liability?* 30 SPG CONSLAW 17, 28 (2011); See e.g., *American Pecco Corp. v. Concrete Bldg. Systems Co.*, 392 F.Supp. 789 (N.D. Ill. 1975).

<sup>2</sup> See 41 Am. Jur. 2d, *Indemnity* §5 (1994); See Terry J. Galaganski, *Owners and Contractors Protective Liability: An Insurance Tool in Construction*, CONSTRUCTION LAWYER, January 1995 at 12 -13.

<sup>3</sup> See *Id.*

<sup>4</sup> See La. Rev. Stat. § 9:2780.

<sup>5</sup> Philip L. Bruner & Patrick J. O'Connor, Jr., 3 BRUNNER & O'CONNOR CONSTRUCTION LAW §10:82.

<sup>6</sup> See, e.g., *Stickovich v. Cleveland*, 143 Ohio App. 3d 13, 2001-Ohio-4117, 757 N.E.2d 50 (8<sup>th</sup> Dist. Cuyahoga County 2001); *Heat & Power Corp., et al., v. Air Products & Chemicals, Inc.*, 578 A.2d 1202 (Md. App. 1990); *Long Island Lightning Co., et al., American Employers Ins. Co., et al.*, 517 N.Y.S.2d 44 (A.D. 1987); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*, 225 Cal. Rptr. 742 (Cal. Ct. App. 1986).

on the subcontractor's insurance policies.<sup>7</sup>

Until recently, the broad language of Louisiana's new anti-indemnity law under Act 492 had the potential to be applicable to those clauses requiring one contracting party to name another as additional insured on the subcontractor's insurance policies. However, in 2012, the Louisiana State legislature amended Act 492 such that the anti-indemnity statute shall not affect the validity of a contractual provision in a construction contract requiring one party to obtain insurance to insure the obligation to defend, indemnify, or hold harmless, and there is evidence the indemnitor recovered the cost of the required insurance in the contract price.<sup>8</sup> However, the indemnitor's liability under such contractual provision will be limited to the amount of the proceeds that were payable under the insurance policy that the indemnitor was required to obtain.<sup>9</sup>

As a result of the 2012 legislative amendments, the anti-indemnity statute shall also not affect the validity of a contractual provision in a construction contract requiring one party to name the other party an additional insured under its insurance policy provided that such coverage is provided only when the indemnitor is partially liable.<sup>10</sup> Additionally, the 2012 amendments provide that the anti-indemnity statute shall not prohibit any employee from recovering damages, compensation, or benefits under workers' compensation laws or any other claim or cause of action.<sup>11</sup>

In all, contractors and subcontractors often agree to list as additional insureds under their general liability policies the parties with whom they contract. Contractors and subcontractors also often agree to indemnify the persons they name as additional insureds. While these two obligations are distinct, on occasion they are confused. However, it is important to remember that "it is one thing to release the subcontractor from liability for failing to name another additional insured under an unenforceable clause and quite another to relieve an insurer from any duty to defend or indemnify a party on which it has, in fact, conferred additional insured coverage."<sup>12</sup>

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<sup>7</sup> See e.g., Kansas Stat. §16-121(c); Mont Rev. Code §28-2-2111(1); N.M. Stat. §56-7-1(A); Okla. Stat. §15-221(B); Or. Rev. Stat. §30.140(A).

<sup>8</sup> 2012 La. Sess. Law Serv. Act 684 (S.B. 693).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 2012 La. Sess. Law Serv. Act 780 (S.B. 420).

<sup>12</sup> BRUNER & O'CONNOR, *supra*, at § 11:163.