

Comparative Indemnity Provisions in Construction Contracts - An Equitable Allocation of Risk Or A Cause For Increased Litigation

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Recent modifications to indemnity provisions in standard form contracts have created confusion as to whether the indemnity obligation created is a comparative one. A comparative fault form requires the indemnitor to indemnify the indemnitee “only to the extent of” his own fault. A typical provision reads as follows: “the subcontractor will indemnify the general contractor against any claims, damages, losses and expenses arising out of the performance of the contractor’s work, **but only to the extent caused** in whole or in part by the negligent or willful acts or omissions of the contractor.” The phrase “but only to the extent caused” creates a comparative indemnity obligation. Although comparative indemnity is in theory a more equitable approach to the allocation of risk between parties, it leads to disagreements between the parties as to the extent of the comparative obligation and the ultimate allocation of risk. The result is increased litigation.

The majority of courts that have interpreted similar language have held it to create a comparative indemnity obligation. In MSI Constr. Managers, Inc. v. Corvo Iron Works, Inc., 527 N.W.2d 79 (1995), the Court of Appeals of Michigan was asked to interpret an indemnity clause that used the phrase: “to the extent caused in whole or in part by any negligent act or omission of the Subcontractor”. The Court held that this phrase required the subcontractor to indemnify the contractor, but only to the extent of the subcontractor’s negligence. A jury had found the general contractor 65% negligent and the subcontractor 35% negligent for the plaintiff’s injuries. The Court of Appeals instructed the trial court to enter an order requiring the general contractor to pay 65% and the subcontractor the remaining 35% of the judgment to the plaintiff. The subcontractor was not required to indemnify the general contractor for its own negligence.

Similarly, in Mautz v. J.P. Patti Company, 688 A.2d 1088 (N.J. Super. Ct. App. Div. 1997), the New Jersey Appellate Court concluded that under a similar indemnity provision, a duty to indemnify should be applied comparatively among the indemnitor and the indemnitee. The provision required the indemnitor, a subcontractor, to indemnify the indemnitee, a general contractor, for claims, damages, losses and expenses resulting from the performance of the subcontractor’s work “to the extent caused in whole or in part by any negligent act or omission

of the subcontractor” Id. at 1091. The Court held that the clause was “clear and unambiguous” and required the subcontractor to indemnify the general contractor, but only to the extent that the claim is caused by the subcontractor’s negligence. Id. at 1092.

The New Jersey Court agreed with the interpretation by a Minnesota Court of Appeals of an identical indemnity provision in a construction accident case. The Minnesota court observed,

[t]he additional phrase, ‘to the extent caused,’ however, suggests a ‘comparative negligence’ construction under which each party is accountable ‘to the extent’ their negligence contributes to the injury Under the terms of this indemnification clause, the general contractor is not contractually entitled to indemnification from the subcontractor to the extent the damages were caused by the general contractor’s own negligence.

Braegelmann v. Horizon Development Co., 371 N.W.2d 644, 646-47 (Minn.Ct.App. 1985). The New Jersey Court termed the interpretation of the clause a “‘comparative negligence’ analogy.” Id. at 1093.

Other courts have interpreted such comparative negligence language in indemnity provisions in the same manner. See, e.g., Brown v. Boyer-Washington Blvd. Assoc., 856 P.2d 352 (Utah 1993) (subcontractor required to indemnify general contractor for claim arising out of its negligence, but only to the extent caused in whole or in part by negligent acts or omissions of subcontractor); Hagerman Constr. Corp. v. Long Electric Co., 741 N.E.2d 390 (Ind.App. 2000) (the clause “but only to the extent” clearly limits to the subcontractor’s obligation to indemnify the general contractor to the extent it is negligent); Dillard v. Shaughnessy, Fickel and Scott Architects, Inc., 884 S.W.2d 722 (Missouri Ct. App. 1994) (in interpreting language “to the extent caused in whole or in part,” the court determined that the general contractor was required to indemnify the owner and architect only for that portion of fault which was ascribed to the general contractor or the subcontractors).

If the purpose of an indemnity provision is to shift to a subcontractor responsibility, and the insurance burdens, for claims connected with the subcontractor’s work, a comparative indemnity obligation frustrates this purpose. The fact that the ultimate allocation of responsibility, in practice, must await a determination by a factfinder (judge, jury, or arbitrator)

prevents a shift of responsibility only until after the parties have incurred significant costs assessing fault. In the end, this process benefits the party bringing the claim.