2013 DRAFTING REQUEST

Bill

Received:	**11/21/2012**	Received By:	**agary**
Wanted:	**As time permits**	Same as LRB:	
For:	**Frank Lasee (608) 266-3512**	By/Representing:	**Rob Kovach**
May Contact:		Drafter:	**agary**
Subject:	**Courts - immunity liability** **Fin. Inst. - UCC**	Addl. Drafters:	**phurley**
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Sen.Lasee@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Indemnification clauses in contracts for the sale of goods or services

Instructions:

Wants redraft of 2011 SB-562, but limited to just services, not goods

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	agary 11/21/2012	evinz 11/21/2012		_______ _______			
/P1	phurley 12/4/2012		rschluet 11/21/2012	_______ _______	sbasford 11/21/2012		
/P2		evinz 12/4/2012	phenry 12/4/2012	_______ _______	lparisi 12/4/2012		
/1	phurley	evinz	jfrantze	_______	mbarman		

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
	1/23/2013	12/13/2012	12/14/2012	_______	12/14/2012		
/2		evinz 1/23/2013	rschluet 1/23/2013	_______ _______	lparisi 1/23/2013	srose 3/14/2013	

FE Sent For:

Not needed

<END>

2013 DRAFTING REQUEST

Bill

Received:	**11/21/2012**	Received By:	**agary**
Wanted:	**As time permits**	Same as LRB:	
For:	**Frank Lasee (608) 266-3512**	By/Representing:	**Rob Kovach**
May Contact:		Drafter:	**agary**
Subject:	**Courts - immunity liability** **Fin. Inst. - UCC**	Addl. Drafters:	**phurley**
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Sen.Lasee@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Indemnification clauses in contracts for the sale of goods or services

Instructions:

Wants redraft of 2011 SB-562, but limited to just services, not goods

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	agary 11/21/2012	evinz 11/21/2012		_______ _______			
/P1	phurley 12/4/2012		rschluet 11/21/2012	_______ _______	sbasford 11/21/2012		
/P2		evinz 12/4/2012	phenry 12/4/2012	_______ _______	lparisi 12/4/2012		
/1	phurley	evinz	jfrantze	_______	mbarman		

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
	1/23/2013	12/13/2012	12/14/2012	_______	12/14/2012		
/2		evinz 1/23/2013	rschluet 1/23/2013	_______ _______	lparisi 1/23/2013		

FE Sent For:

<END>

2013 DRAFTING REQUEST

Bill

Received:	**11/21/2012**	Received By:	**agary**
Wanted:	**As time permits**	Same as LRB:	
For:	**Frank Lasee (608) 266-3512**	By/Representing:	**Rob Kovach**
May Contact:		Drafter:	**agary**
Subject:	**Courts - immunity liability** **Fin. Inst. - UCC**	Addl. Drafters:	**phurley**
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Sen.Lasee@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Indemnification clauses in contracts for the sale of goods or services

Instructions:

Wants redraft of 2011 SB-562, but limited to just services, not goods

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	agary 11/21/2012	evinz 11/21/2012		_______ _______			
/P1	phurley 12/4/2012		rschluet 11/21/2012	_______ _______	sbasford 11/21/2012		
/P2		evinz 12/4/2012	phenry 12/4/2012	_______ _______	lparisi 12/4/2012		
/1		evinz	jfrantze	_______	mbarman		

12/13

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
		12/13/2012	12/14/2012	_______	12/14/2012		
		/2 eev 1/23/13					

FE Sent For:

<END>

2013 DRAFTING REQUEST

Bill

Received: **11/21/2012**

Received By: **agary**

Wanted: **As time permits**

Same as LRB:

For: **Frank Lasee (608) 266-3512**

By/Representing: **Rob Kovach**

May Contact:

Drafter: **agary**

Subject: **Courts - immunity liability**
Fin. Inst. - UCC

Addl. Drafters: **phurley**

Extra Copies:

Submit via email: **YES**
Requester's email: **Sen.Lasee@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Indemnification clauses in contracts for the sale of goods or services

Instructions:

Wants redraft of 2011 SB-562, but limited to just services, not goods

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	agary 11/21/2012	evinz 11/21/2012		_______ _______			
/P1	phurley 12/4/2012		rschluet 11/21/2012	_______ _______	sbasford 11/21/2012		
/P2		evinz 12/4/2012	phenry 12/4/2012	_______ _______	lparisi 12/4/2012		

/1 eev 12/13/12   lb 12/14

FE Sent For:

<END>

2013 DRAFTING REQUEST

Bill

Received:	**11/21/2012**	Received By:	**agary**
Wanted:	**As time permits**	Same as LRB:	
For:	**Frank Lasee (608) 266-3512**	By/Representing:	**Rob Kovach**
May Contact:		Drafter:	**agary**
Subject:	**Courts - immunity liability** **Fin. Inst. - UCC**	Addl. Drafters:	**phurley**
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Sen.Lasee@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Indemnification clauses in contracts for the sale of goods or services

Instructions:

Wants redraft of 2011 SB-562, but limited to just services, not goods

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	agary 11/21/2012	evinz 11/21/2012		1/14			
/P1			rschluet 11/21/2012	ph	sbasford 11/21/2012		

FE Sent For:

<END>

2013 DRAFTING REQUEST

Bill

Received:	**11/21/2012**	Received By:	**agary**
Wanted:	**As time permits**	Same as LRB:	
For:	**Frank Lasee (608) 266-3512**	By/Representing:	**Rob Kovach**
May Contact:		Drafter:	**agary**
Subject:	**Courts - immunity liability** **Fin. Inst. - UCC**	Addl. Drafters:	**phurley**
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Sen.Lasee@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Indemnification clauses in contracts for the sale of goods or services

Instructions:

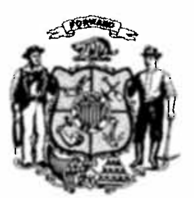
Wants redraft of 2011 SB-562, but limited to just services, not goods

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	agary	/p1 eev 11/21/12	/p1 eev 11/21/12				

FE Sent For:

<END>



State of Wisconsin
2011 – 2012 LEGISLATURE

LRB-3784/1
ARC:jld:jf

2011 SENATE BILL 562

March 15, 2012 – Introduced by Senator LASEE. Referred to Committee on Senate Organization.

1 AN ACT *to create* 895.449 of the statutes; **relating to:** indemnification
2 provisions in contracts for the sale of goods or services.

Analysis by the Legislative Reference Bureau

Current law generally affords parties to a contract freedom to determine the terms of the contract, and these contract terms are enforceable in court. However, there are exceptions. In commercial contracts, the obligations of good faith, diligence, reasonableness, and care established by law cannot be disclaimed by contract. In contracts for the sale of goods, if the court finds that any clause of the contract was unconscionable at the time it was made, the court may refuse to enforce the contract, enforce only the remainder of the contract without the unconscionable clause, or limit the application of the unconscionable clause to avoid any unconscionable result.

Under this bill, any provision in a contract for the sale of goods or services that indemnifies or holds harmless a party from or against liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, or that requires another person to provide a defense to the party in connection with an assertion of liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, is against public policy and void.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 895.449 of the statutes is created to read:

2 **895.449 Certain indemnification provisions void.** (1) In this section,
3 "goods" has the meaning given in s. 402.105 (1) (c).

4 (2) Notwithstanding s. 401.302, any provision in a contract for the sale of goods
5 or services that indemnifies or holds harmless a party from or against liability for
6 loss or damage resulting from that party's own negligence or intentional acts or
7 omissions, or that requires another person to provide a defense to the party in
8 connection with an assertion of liability for loss or damage resulting from that party's
9 own negligence or intentional acts or omissions, is against public policy and void.

10 **SECTION 2. Initial applicability.**

11 (1) This act first applies to contracts that are entered into on the effective date
12 of this subsection.

13 (END)

Rose, Stefanie

From: Rose, Stefanie
Sent: Monday, November 26, 2012 11:55 AM
To: Kovach, Robert
Subject: Per your request
Attachments: 13-0601/P1

Stefanie Rose
Program Assistant
Wisconsin Legislative Reference Bureau
(608) 266-3561
Stefanie.Rose@legis.wisconsin.gov

Hurley, Peggy

From: Kovach, Robert
Sent: Thursday, November 29, 2012 10:32 AM
To: Hurley, Peggy
Subject: RE: Indemnification Bill Draft

I was afraid you would say that...I'll ask Marc and get back to you.

Rob Kovach
Chief of Staff
Office of Senator Frank Lasee
(608) 266-3512

my guess: save labor law = 101.11 safe place stats
look at 29.885(7)(c) excep: ≠ liability unless gen con maintains supervision & control?
Or just say ≠ subcontract in construction is a contractor required to cease under 101.9 ...

From: Hurley, Peggy
Sent: Thursday, November 29, 2012 10:28 AM
To: Kovach, Robert
Subject: RE: Indemnification Bill Draft

Hi Rob,

I'm afraid I don't know what a "save labor law" is – can you elaborate? I am also a bit confused because you ask for an exemption *for* "save labor laws," but the email from Bentley Government Affairs seems to ask for an exemption *to* the "save labor law." Those two ideas appear to contradict each other. If you could find out for me exactly what kind of exemption you seek to carve out, we can proceed.

As far as how many states have laws like this on their books, I can ask our reference department to look at that once we finalize this bill.

Peggy

From: Kovach, Robert
Sent: Thursday, November 29, 2012 10:21 AM
To: Hurley, Peggy
Subject: FW: Indemnification Bill Draft

Dear Peggy,

See Marc's note below, if we can make an exemption for "save labor laws" then we should have a bill that should make it through the system.

Also, Frank would like to know how many states have laws like this on their books. Is that something we can find out?

Thank you!

Rob Kovach
Chief of Staff
Office of Senator Frank Lasee
(608) 266-3512

From: Bentley Gov't Affairs [mailto:bentleygov@charter.net]
Sent: Tuesday, November 27, 2012 1:26 PM
To: Kovach, Robert
Subject: Re: Indemnification Bill Draft

Hi Rob:

Thank you for the meeting today, I thought it went well. After talking to Jim Boulion of AGC, he indicated that if we create an exemption to the "Save Labor law" that he may agree. Can you have Peggy look into that as an exemption to our bill? Let me know.

Marc Bentley
President

Bentley Gov't Affairs
P.O. Box 1532
Madison, WI 53701-1532

608 698 0707

----- Original Message -----
From: Kovach, Robert
To: Marc Bentley
Sent: Monday, November 26, 2012 11:58 AM
Subject: Indemnification Bill Draft

Dear Marc,

Here is the current Indemnification bill draft. I have a call into the drafter to see if he can meet with us tomorrow.

Rob Kovach
Chief of Staff
Office of Senator Frank Lasee
(608) 266-3512

AGC of Wisconsin
AGC of Greater Milwaukee

To:	Wisconsin State Legislators
From:	Jim Boullion, Director of Gov. Affairs, AGC of Wisconsin Mike Fabishak, AGC of Greater Milwaukee
Date:	February 1, 2010
Re:	Risk Transfer between Contractors

Construction projects inherently involve a large amount of risk for building owners, general contractors, subcontractors and workers. That risk is addressed through various means such as workers compensation and safety laws, safety training, legal contracts, bonding and insurance among others. The guiding principle in managing these risks is to allocate them to those best able to handle them.

It has come to our attention that a proposal *(LRB-3333/3)* is being circulated to change this finely balanced system to insulate one group from responsibility from those risks. That proposal would prohibit the use of "hold harmless" contract provisions that allow a subcontractor to indemnify an owner or general contractor from liability claims that arise from that subcontractors work. **AGC of Wisconsin and AGC of Greater Milwaukee strongly oppose these changes!** We support the current law which allows all interested parties to freely negotiate contract terms and insurance coverage that fit the circumstances of each job.

The overall principle of their proposal, that "everyone should be responsible for their own negligent acts" sounds good on the surface, but "fairly" allocating risk and liability on a construction site is a much more complicated matter than it first appears:

1. **Wisconsin's unique "Safe Place" statute puts general contractors at higher risk –** In Wisconsin, general contractors are expressly subject *(sec. 101.01 (10), Wis. Stats.)* to a higher "Safe-Place" liability standard *(sec. 101.11, Wis. Stats.)* than in other states. This higher liability standard allows an aggressive lawyer to add the general contractor as a defendant in nearly every construction site lawsuit as a "deep pocket" regardless of how much, if any, negligence they might actually have. However, if an employee of a subcontractor is injured on a jobsite, the subcontractor is protected from lawsuits by Wisconsin's Workers Compensation law. It is true that AGC of America has developed standard contract documents called the *ConsensusDOCS* which do not include "hold harmless" clauses. These contracts are generic documents designed to be used in most states. However, because our Safe Place statute is much broader than in other states, hold harmless clauses are necessary in Wisconsin to allow the subcontractors who are in direct control of their employees and their workspace to insure this liability.

2. **Is there a problem?** - Despite the fact that both sides of this issue can bring individual "horror stories" of unfair liability cases, do these few cases really represent a wide spread problem that requires changing the law? It does not appear so to us. Because the current system has been used successfully for many years, everyone in the construction business knows, or should know, what risks they are exposing themselves to when they sign a contract. All responsible contractors have the ability to get insurance to cover those risks and build the price of that insurance into their costs. If they can not get insurance, then they should question whether or not they should take on that job.

3. **Reduced Safety** – Without hold harmless contract provisions, general contractors lose a tool to encourage subcontractors to use safe practices. This is necessary because general contractors do not have direct supervision or control of the subcontractor's employees. Including hold harmless provisions in construction contracts places the risk of loss on the contractors who are on the "front lines" and in direct daily control of their employees. This creates a greater incentive for them to have an active and effective safety program that will prevent injuries and damages in the first place.

4. **Other States** - While other states have put some limits on hold harmless clauses, most of them are very limited in what they do. In fact, over half of the states we researched only limit hold harmless clauses that required someone to indemnify another who was solely negligent for an incident. Most importantly, none of those states have a law similar to Wisconsin's Safe Place statute that imposes passive liability on the owner or general contractor.

5. **More Litigants, More Legal Fees** - This change would add a layer of litigation to determine how much liability each party has. Under the current law, the liability determination can be allocated to the entity in control of their workers and work area. The current system focuses on the issues; this change would focus on allocating blame.

6. **Freedom to Contract** – This proposal would prohibit mutually agreed to contract provisions. The State should not take away a tool that allows the private sector to allocate financial risk to the entities that are best able to control and correct it. Some hold harmless contract provisions are more inclusive than others. GC's and subcontractors have the freedom to not sign these agreements if they are too onerous.

7. **No Free Ride for GC's** - If a subcontractor has inadequate insurance or resources to cover the liability that they agree to in a contract, the general contractor or owner can still end up in court and be liable for damages. This is a disincentive to hire subcontractors who are unable to bear the burden of risk that they claim they can assume and insures that employees and the public are protected.

The bottom line is that changing the state law regarding who will pay for damages that arise out a construction project involves many players and complicated issues. Everyone involved in these projects including workers, State, local and private building owners, general contractors, subcontractors, insurance companies, bonding companies and attorneys has an interest in reducing injuries and allocating the risk to prevent it to the most appropriate place. The current law does that and should be maintained. **We urge you not support or cosponsor legislation to change this law.**

Please contact the AGC of Wisconsin or AGC of Greater Milwaukee if you have any questions or would like to discuss this issue further.

AGC of Wisconsin
AGC of Greater Milwaukee

To: Workers Compensation Advisory Council

From: Jim Boullion, Director of Gov. Affairs, AGC of Wisconsin
Brian Mitchell, AGC of Greater Milwaukee

Date: July 8, 2011

Re: Prohibition of Hold Harmless and Indemnification Clauses

Associated General Contractors of Wisconsin and AGC of Greater Milwaukee strongly oppose item 16 on the list of management proposals that would prohibit the use of hold harmless and similar contract provisions.

This proposal takes away the right of private entities to freely enter into contracts to allocate and manage the liability risks associated with the employees of the subcontractors they have hired to work on construction sites.

These contract provisions are necessary because Wisconsin building owners and general contractors are perceived as "deep pockets" that are very often brought into lawsuits over subcontractor employee injuries, even though they were not in control of the subcontractor's employees or their work environment. Current contract law allows the liability risk (paying for the liability insurance) to be placed with the entity where the risk and safety issues can best be controlled - with the workers' own employer.

Both sides of this issue can bring forward unfortunate examples of "unfair" cases of liability shifting. But this proposal completely insulates only the subcontractors from that liability, even though they are the ones who are in direct control of the day to day operations and safety procedures for their employees. A change to Wisconsin's liability and contract laws that provides maximum protection for subcontractors while leaving other project participants with additional and often uncontrollable exposure to risks would not result in a fair or reasonable system.

Finally, this proposal is a major public policy decision that deserves a full public hearing and discussion. It should not be lightly incorporated into the Wisconsin Workers Compensation Advisory Council's Workers Compensation repair bill.

Associated General Contractors of Wisconsin and AGC of Greater Milwaukee urge you to oppose this proposed change and not include it in the final legislative proposal of Workers Compensation Advisory Council.

Please contact the AGC of Wisconsin or AGC of Greater Milwaukee if you have any questions or would like to discuss this issue further.

Thank you for your consideration.

1 AN ACT to create a statute; relating to: agreements relating to

2 contractor liability.

Statement of Purpose: Commercial Business Anti-Indemnification Liability Statute:

Under current law, a party contracting with any Contractor is generally free to agree to the terms under which the Contractor will provide the agreed upon goods or services.

This Amendment prohibits, and renders void and unenforceable, any provision of an agreement with any Contractor from that requires the Contractor to indemnify, hold harmless, or require the Contractor to provide a defense to the "promisee" or its employees or affiliates from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the promisee or its employees or affiliates. A Contractor includes a vendor whether an individual or a business entity that enters into a contract, covenant or agreement with a promisee. A "promisee" is a person, including an individual or a business entity, that enters into a contract, covenant or agreement with a Contractor. An "affiliate" of the promisee includes agents of the promisee and independent contractors directly responsible to the promisee. A "Contractor Agreement" means any agreement, regardless of whether it is written, oral, express, or implied, between a Contractor and a promisee covering the terms of the Contractor's obligations under said Agreement and the Contractor's entrance on property for the purpose of performing said obligations.

PLEASE CALL ATTORNEY
WILLIAM LAST
(866) 904-4725
(650) 425-7679

Indemnity Clauses: What Are They And What Risks Do I Assume When I Have One In My Contract?

By

William C. Last, Jr. and Frederick J. Northrop
Attorneys at Law

Contractors are regularly am faced with or making demands for indemnification when someone is injured on the job or there is a claim of defective workmanship. Increasingly, subcontractors are being asked to shoulder obligations of defense and sometimes indemnification which may have little or nothing to do with the work they perform or the products they install. Moreover, these obligations are sometimes uninsurable and coverage is frequently contested when it exists.

Indemnity construction contract clauses are, along with additional insured provisions, the primary contractual vehicles for shifting the risk associated with bodily injury and property damage connected with a construction project. Project owners, typically at the insistence of their insurance carriers, use indemnity contract clauses to shift a disproportionate share of the risk of third party personal injury, property damage, and intellectual property claims to general contractors. In turn, general contractors are passing that risk on to their subcontractors. Many prime contracts actually require them to do so.

Indemnity provisions are often written extremely broadly to protect not only the owner and general contractor, but architects and others connected with the project. Such clauses impose obligations which exceed available insurance coverage and they typically extend well

beyond the completion of the project. As a result, the cost of complying with these contract clauses has increased the financial burden placed on general contractors and subcontractors. The provisions are often presented on a "take it or leave it" basis, without any real opportunity to bargain or negotiate.

An Overview of Indemnity Clauses

Indemnity is the shifting of a loss or liability from one party to another. Equitable or implied indemnity involves a claim where the law implies a right of indemnification as a matter of justice. Contractual indemnification involves indemnity based on the agreement of the parties. These terms typically involve a party agreeing to indemnify, defend, and hold a party harmless against a list of possible harms. The scope of the indemnity is triggered based upon a pre-determined threshold. The definition of the scope of harms and the style of the threshold define exactly how much risk the subcontractor assumes.

Indemnity clauses are the key contractual devices used to shift liability risks associated with a construction project from one party to another. In essence, one party (the indemnitor) promises to pay the other party's (the indemnitee) attorney's fees and any judgment within a defined scope of claims.

In the construction industry, project owners seek to shift the risks of claims and losses from themselves to the design professionals and the general contractor and, sometimes, its subcontractors. In turn, the general contractor will want to shift those risks, along with its own risks, to the subcontractors and suppliers. For example, the project owner who seeks to shift the risk to the general contractor will include in the contract with the general, a clause that clearly and expressly obligates the general to defend the owner from liability and pay any damages that may result from the performance

of the work. The exact scope of the risk is, in general, controlled by the terms of the agreement and the scope of the work itself. The scope may be limited to third party claims of personal injury and property damage, but can also be extended to regulatory fees and fines and intellectual property claims.

However, under California law there are limitations as to how much of that risk can be shifted. By statute, you cannot have another party indemnify you against damages that result from your sole negligence, or willful negligence. With some exceptions any such clause in a contract is void as a matter of law. Additionally, any contract which seeks to exempt a person for his or her fraud, willful injury, or violation of law is likewise void.

Past California appellate courts have categorized indemnity clauses into three basic types. Recent decisions have moved away from these categories, but they remain a part of the parlance. For the purposes of explaining these three types of indemnity clauses, this article will assume that the general contractor is the one seeking indemnity (indemnitee) from the subcontractor (indemnitor).

A ***Type I Clause*** is one that clearly and explicitly provides that the subcontractor will indemnify the general contractor regardless of any negligence, active or passive, of the general contractor whether or not the general contractor is concurrently responsible. Under this type of clause, the general contractor is indemnified whether the liability results from his negligence alone, or from his negligence combined with that of the subcontractor or others. Civil Code Section 2782 limits such provisions such that a party cannot contract for indemnity against injuries caused by his or her sole negligence or willful misconduct or that of his or her agents, employees, or independent contractors. Civil Code Section 1668 declares any contract which even indirectly seeks to exempt a person from liability for his or her fraud, willful injury to another, or

violation of law is void as against public policy.

A ***Type II Clause*** is one that provides that the subcontractor will indemnify the general contractor for liability without expressly stating that it covers the active negligence of the general contractor. For example the clause may promise indemnity against liability "however same may be caused;" or "arising from the use of the premises, facilities, or services of;"or "which might arise in connection with agreed work;" or "caused by or happening with the equipment or the condition, maintenance, possession or operation or use thereof;" or "from any and all claims for damages to personal property by reason of the use of leased property."

Under Type I and II Clauses, the general contractor is indemnified for his or her own acts of "passive negligence." Under Type I Clauses the general contractor is also indemnified against claims based on his or her "active negligence." Passive negligence exists when there is a mere nonfeasance (failure to act); and active negligence exists when the party participates in the affirmative act of negligence. The crux of the difference is whether or not the party has had some direct participation in the negligent act that resulted in the liability for which indemnity is being sought. Under a Type II Clause if the general contractor actively participated in the negligent act, he or she would not be able to seek contractual indemnity, but could still use equitable indemnity to seek an allocation of the loss between it and the subcontractor.

It should be noted that under both Type I and Type II Clauses, there is no need to show that the subcontractor is actually at fault for the injury. All that needs to be shown is that the alleged loss falls within the scope of the clause. An extreme case, arising in Pennsylvania, involved a slip and fall accident which occurred in a grocery store during renovation. The plaintiff tripped in a hole in the floor. The owner sought indemnity from the general contractor who sought

indemnity from the electrical subcontractor who happened to be working in the area of the accident. The court there held that because the indemnity clause required indemnification against damages arising from the *location* of the subcontractor's work rather than from the work itself, the subcontractor was required to indemnify the general contractor.

A ***Type III Clause***, provides that the subcontractor will indemnify the general contractor for the general contractor's liability caused by the subcontractor, but does not provide indemnification for liability that was caused by anyone else. Under a Type III Clause, any negligence on the part of the general contractor, either active or passive, will eliminate contractual indemnification against the subcontractor whether or not he or she contributed to the general contractor's liability. The general contractor would still be able to Type II and Type III clauses are sometimes called "general indemnity agreements."

Aside from the obligation to indemnify itself, most indemnity clauses encompass a duty to defend, as well. This duty is also subject to statutory and contractual definition. Owners and general contractors are increasingly including provisions which obligate the indemnitor to defend claims based on *allegations* within the scope of the indemnity clause. In this regard the courts have held that the subcontractor is obligated to defend claims for which it was ultimately held blameless. As if this were not onerous enough, many provisions now attempt to give the indemnified party nearly unlimited control over that defense. Given that such claims frequently present conflicts which prevent a single law firm from defending all the indemnified parties, the potential liability flowing from such clauses is staggering.

Statutory Attempts to Limit the Clauses

A number of national construction trade associations have been proactive in seeking legislation in the fifty states to limit the risk that subcontractors take on when they sign subcontracts that have the most stringent of indemnity clauses. The results have varied from state to state.

For example, in California, there are the following statutes

Civil Code Section 2782(a) voids provisions in construction contracts which indemnify against liability arising from the sole negligence or willful misconduct of the indemnitee or of the indemnitee's agents, employees, or independent contractors directly responsible to the indemnitee or for defects in designs provided by them. The provision does not apply to insurance contracts however and there are specified exceptions as to accommodation agreements, indemnification of engineers providing inspection services, certain limitations as to design defects, and hazardous waste identification by an engineer or geologist.

Civil Code Section 2782(b) voids provisions indemnifying public agencies for their active negligence.

Civil Code Section 2782(c) voids provisions in residential construction contracts executed after January 1, 2009 which purport to insure, indemnify, or provide a defense by a subcontractor in favor of a builder or general contractor as to claims for construction defects to the extent that claims arise from the negligence of the indemnitee or its agents, employees, or independent contractors or from defects in designs by them. Subsequent subdivisions of the statute outline rules for providing a defense and other details.

Civil Code Section 2782.8 prevents public agencies from requiring design professionals to indemnify them except to the extent the claims arise from the professional's negligence, reclessness, or willful misconduct.

Civil Code Sections 2782.9 through 2782.96 contain provisions restricting indemnity provisions where the project is subject to a Wrap-Up insurance policy.

Other states have enacted similar laws and some have gone farther in limiting the risks which can be transferred to subcontractors. For example, New Mexico Code Section 56-7-1 broadly forbids agreements which require a party to indemnify, hold harmless, or defend the indemnitee for claims arising from the indemnified party's negligence, act, or omission.

Other states with legislation in this area include Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia The degree of protection varies among them. Some have statutes very similar to California's, others more akin to New Mexico's.

In California, subcontractors' have seeking new legislation that would encompass all subcontracting work, would bar an indemnitee from obtaining contractual indemnity from a subcontractor except for losses incurred because of the subcontractor's or its agent's negligence, violation of law, or other wrongful act or omission, and then only in proportion to the subcontractor's proportionate liability.

Suggestions

When you are considering submitting a bid or proposal for a project, obtain the terms and conditions of the contracts that you will be required to sign for that project. Examine your contracts to confirm if you have, or can obtain, the appropriate insurance coverages. Also ask your insurance professional to review the contract requirements before you submit your proposal or bid.

Until the law is changed so that indemnity obligations are standardized, contractors should closely review such obligations and be familiar with their legal obligations under such clauses.

This article, ©2011, was written by William C. Last, Jr. and Fred Northrop. Mr. Last is an attorney who has been specializing in Construction Law for over 30 years.. In addition to belonging to a number of construction trade associations, Mr. Last holds a California "A" and "B" license. He can be contacted at 415-764-1990 or 650-696-8350. A number of his past articles can be found on his website (lhfconstructlaw.com). This bulletin is published periodically to provide general information about current legal issues. The articles are not intended to be a substitute for the advice of an attorney as to a specific problem. If you have a specific legal question or need legal advice, you should contact an attorney.

Last & Faoro
Attorneys At Law
520 South El Camino Real
Suite 430
San Mateo, CA 94402

TF: (866) 904-4725
Tel: 650-425-7679
Fax: (650) 696-8365

Email Directions

© 2012 by Last & Faoro. All rights reserved. Disclaimer Site Map

FirmSite® by FindLaw, a Thomson Reuters business.

Client Alert

pillsbury

Construction Law | Construction Counseling & Dispute Resolution

Litigation | Real Estate

October 19, 2011

Shifting of Liability Nixed by New California Contractor's Law

by John R. Heisse, Robert A. James, and Christopher R. Rodriguez

After January 1, 2013, under new California law, "Type I" indemnity provisions covering the indemnitee's concurrent active negligence will no longer be enforceable, and owners' and contractors' ability to shift the costs of defense to downstream subcontractors and suppliers will be limited.

On October 9, 2011, California Governor Edmund G. Brown, Jr. signed into law Senate Bill 474, which relates to indemnity provisions in commercial construction contracts. The new law, which will apply to construction contracts entered into on and after January 1, 2013, broadens the class of indemnity provisions that are unenforceable under California law. It also imposes stricter limitations upon the ability of contractors to require their subcontractors and suppliers to cover the costs of defense in litigation.

Prohibition of Certain Type I Indemnity Provisions

Under existing law, provisions in construction contracts whereby a downstream contractor or subcontractor indemnifies an owner or upstream contractor against liability caused by the upstream indemnitee's "sole negligence or willful misconduct" are unenforceable. See Cal. Civ. Code § 2782(a). Additionally, provisions in construction contracts on public projects are unenforceable if they impose on the contractor, or relieve the public agency from, liability for the public agency's own "active negligence." Cal. Civ. Code § 2782(b).

Given these standards, it has become increasingly common on construction projects for owners and general contractors to include "Type I" indemnity provisions in contracts with downstream contractors and subcontractors. Under a "Type I" indemnity provision, the downstream contractor/subcontractor agrees to indemnify the owner or contractor, even against liability caused by the upstream owner/contractor's own "active negligence." On private construction projects, such indemnity provisions are enforceable under California law as long as the alleged liability does not arise from the "sole negligence or willful misconduct" of the upstream owner/contractor.[1]

■

[1] There are exceptions under existing law for, among other things, agreements to indemnify made with professional engineers involving liability for design defects. See Cal. Civ. Code § 2782.5. Additionally, existing law sets forth different requirements and prohibitions for residential construction contracts entered on or after January 1, 2009.

Under the new law, such "Type I" indemnity provisions will no longer be enforceable. Newly added California Civil Code section 2782.05 provides that contract clauses that purport to require a subcontractor to "insure or indemnify" a contractor, construction manager or other subcontractor against claims for damages that relate to the active negligence or willful misconduct of the indemnitee, or for defects in design, or against claims that do not arise out of the scope of work of the indemnitor, are unenforceable. Furthermore, although section 2782.05 expressly does not apply to direct contracts with public agencies or direct contracts with owners of privately owned real property, public agencies and private owners are already prohibited from including Type I indemnity provisions in their direct contracts. See Cal. Civ. Code § 2782(b)(2) and 2782(c)(1) (newly added under SB 474). The new law expands the coverage of that prohibition to include downstream subcontractors and suppliers of goods.

Restrictions on Allocation of Defense Costs

Another key change in the law is that, under section 2782.05, contractors will no longer be able to broadly force downstream subcontractors/suppliers to pay for the costs of defending against claims in litigation. Under existing law, contract provisions requiring downstream subcontractors and suppliers to pay for the costs of defending against claims—other than claims for the "sole negligence or willful misconduct" of the indemnitee—are enforceable. Thus, owners and general contractors are, to a significant extent, able to allocate the costs of litigation to subcontractors and their insurers. Such indemnities, by which the downstream party assumes the burden of handling the entirety of claims that arise at least in part from the performance or negligent performance of work by that party, are a near universal aspect of real property development. When a claim is tendered, one party is responsible for responding to the plaintiff and for disposing of the matter—rather than having an owner, a financer, a tenant, a developer, a general contractor and other professionals all having to hire lawyers and participate in the process. The exposure is handled by arranging for insurance at each level, and the cost of that insurance is passed along in the bids and prices for the indemnitor's work.

Under the new law, however, owners and contractors will have a far more limited ability to allocate the costs of defense to downstream subcontractors and suppliers. The restrictions contained in section 2782.05 prohibiting indemnity for one's own active negligence specifically extend to the "costs to defend" claims in litigation. Although the new law *does* allow contractors, subcontractors and suppliers to make agreements concerning coverage of defense costs, such agreements are strictly governed by section 2782.05(e). Among other things, section 2782.05(e) provides that a subcontractor owes no defense or indemnity obligation to a general contractor unless and until the general contractor has provided a written tender of the claim, including (a) information from the claimant relating to the claims caused by that subcontractor's scope of work and (b) a written statement explaining how the reasonable allocated share of fees and costs was determined. The subcontractor also has the opportunity to present information to the general contractor showing that another party is responsible for the claim. The subcontractor is not required to pay more than "a reasonable allocated share" of the general contractor's defense fees and costs.

The new restrictions governing the allocation of defense costs do not apply to direct contracts with public agencies or private owners. Thus, although the law prohibits all "Type I" indemnity clauses, public agencies and private owners may continue to require contractors to cover the costs of defending claims in litigation, as is customary under existing law.

Accordingly, the new law places general contractors—i.e., those that contract directly with public agencies or private owners—in a potentially precarious position. If a public agency or private project owner requires a general contractor to agree to an indemnity provision that allocates the costs of defense to the general

contractor, that general contractor will not be able to fully allocate that risk to its downstream subcontractors and suppliers. Rather, any indemnity provision in the general's contract with its subcontractor will be limited by section 2782.05 and subject to the specific requirements of section 2782.05(e). Specifically, although general contractors will only be able to force their subcontractors/suppliers to cover a "reasonable allocated share" of defense costs and subcontractors/suppliers will have statutory mechanisms for challenging allocations, public agencies/private owners may be able to force the general contractors to pay up-front for all defense costs and general contractors will have no available mechanisms for challenging the public agency/private owner.

General contractors should therefore make the public agencies and private owners with whom they contract aware of this nuance in the law. Where possible, they should seek to negotiate indemnity provisions that are consistent with the indemnity provisions they will be allowed to negotiate with subcontractors and suppliers. However, public owners typically contract using public procurement procedures that offer no opportunity for bidders to negotiate. Therefore, contractors should encourage their industry groups to (a) lobby public owners to address these issues in advance in the contracts for which they are soliciting bids or (b) lobby government officials to amend the law in order to remove the burdens placed upon contractors.

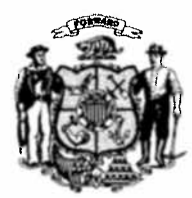
If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work or the authors of this alert.

John R. Heisse (bio)
San Francisco
+1.415.983.1543
john.heisse@pillsburylaw.com

Robert James (bio)
San Francisco
+1.415.983.7215
robert.james@pillsburylaw.com

Christopher Rodriguez (bio)
Sacramento
+1.916.329.4720
christopher.rodriguez@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.
© 2011 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.



State of Wisconsin
2011 – 2012 LEGISLATURE

LRB–3784/1
ARG:jld:jf

2011 SENATE BILL 562

March 15, 2012 – Introduced by Senator LASEE. Referred to Committee on Senate Organization.

1 AN ACT *to create* 895.449 of the statutes; **relating to:** indemnification
2 provisions in contracts for the sale of goods or services.

Analysis by the Legislative Reference Bureau

Current law generally affords parties to a contract freedom to determine the terms of the contract, and these contract terms are enforceable in court. However, there are exceptions. In commercial contracts, the obligations of good faith, diligence, reasonableness, and care established by law cannot be disclaimed by contract. In contracts for the sale of goods, if the court finds that any clause of the contract was unconscionable at the time it was made, the court may refuse to enforce the contract, enforce only the remainder of the contract without the unconscionable clause, or limit the application of the unconscionable clause to avoid any unconscionable result.

Under this bill, any provision in a contract for the sale of goods or services that indemnifies or holds harmless a party from or against liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, or that requires another person to provide a defense to the party in connection with an assertion of liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, is against public policy and void.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 895.449 of the statutes is created to read:

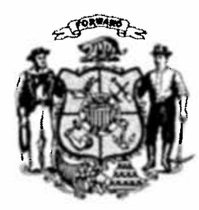
2 **895.449 Certain indemnification provisions void.** **(1)** In this section,
3 "goods" has the meaning given in s. 402.105 (1) (c).

4 **(2)** Notwithstanding s. 401.302, any provision in a contract for the sale of goods
5 or services that indemnifies or holds harmless a party from or against liability for
6 loss or damage resulting from that party's own negligence or intentional acts or
7 omissions, or that requires another person to provide a defense to the party in
8 connection with an assertion of liability for loss or damage resulting from that party's
9 own negligence or intentional acts or omissions, is against public policy and void.

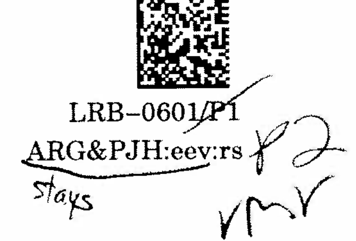
10 SECTION 2. **Initial applicability.**

11 (1) This act first applies to contracts that are entered into on the effective date
12 of this subsection.

13 (END)

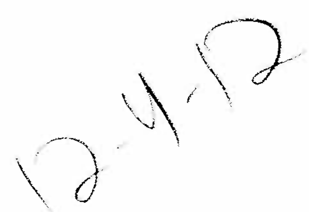


State of Wisconsin
2013 – 2014 LEGISLATURE



LRB-0601/P1
ARG&PJH:eev:rs

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION



1 AN ACT *to create* 895.44 of the statutes; **relating to:** indemnification provisions
2 in contracts for the sale of services.

Analysis by the Legislative Reference Bureau

Current law generally affords parties to a contract freedom to determine the terms of the contract, and these contract terms are enforceable in court. However, there are exceptions.

Under this bill, any provision in a contract for the sale of services that indemnifies or holds harmless a party from or against liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, or that requires another person to provide a defense to the party in connection with an assertion of liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, is against public policy and void.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 **SECTION 1.** 895.44 of the statutes is created to read:

4 **895.44 Certain indemnification provisions void.** Any provision in a
5 contract for the sale of services that indemnifies or holds harmless a party from or
6 against liability for loss or damage resulting from that party's own negligence or

1 intentional acts or omissions, or that requires another person to provide a defense
2 to the party in connection with an assertion of liability for loss or damage resulting
3 from that party's own negligence or intentional acts or omissions, is against public
4 policy and void.

5 **SECTION 2. Initial applicability.**

6 (1) This act first applies to contracts that are entered into on the effective date
7 of this subsection.

8 **(END)**

Insert 2-4

1 NoA INSERT ANALYSIS:

Under the bill, an indemnification provision may be enforced if it is part of a contract for construction work that is entered into by a registered construction contractor.

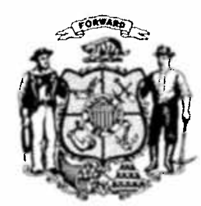
2

3 INSERT 2.4:

4 This section does not apply to a contract for construction services if at least one

5 party to the contract is a person who is required to register as a construction

6 contractor under s. 101.147.



State of Wisconsin
2013 – 2014 LEGISLATURE

LRB-0601/P2
ARG&PJH:eev:ph

stays rmr

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

12-13-12

1 AN ACT *to create* 895.44 of the statutes; **relating to:** indemnification provisions
2 in contracts for the sale of services.

Analysis by the Legislative Reference Bureau

Current law generally affords parties to a contract freedom to determine the terms of the contract, and these contract terms are enforceable in court. However, there are exceptions.

Under this bill, any provision in a contract for the sale of services that indemnifies or holds harmless a party from or against liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, or that requires another person to provide a defense to the party in connection with an assertion of liability for loss or damage resulting from that party's own negligence or intentional acts or omissions (indemnification provision), is generally against public policy and void. Under the bill, an indemnification provision may be enforced if it is part of a contract for construction work that is entered into by a registered construction contractor.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 895.44 of the statutes is created to read:

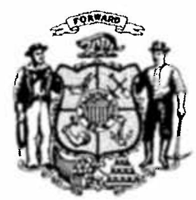
4 **895.44 Certain indemnification provisions void.** Any provision in a
5 contract for the sale of services that indemnifies or holds harmless a party from or

1 against liability for loss or damage resulting from that party's own negligence or
2 intentional acts or omissions, or that requires another person to provide a defense
3 to the party in connection with an assertion of liability for loss or damage resulting
4 from that party's own negligence or intentional acts or omissions, is against public
5 policy and void. This section does not apply to a contract for construction services
6 if at least one party to the contract is a person who is required to register as a
7 construction contractor under s. 101.147.

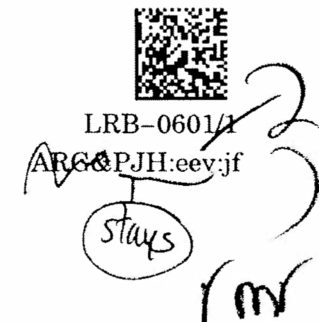
8 **SECTION 2. Initial applicability.**

9 (1) This act first applies to contracts that are entered into on the effective date
10 of this subsection.

11 **(END)**



State of Wisconsin
2013 – 2014 LEGISLATURE



LRB-0601/1
ARG&PJH:eev:jf

2013 BILL

1 AN ACT *to create* 895.44 of the statutes; **relating to:** indemnification provisions
2 in contracts for the sale of services.

Analysis by the Legislative Reference Bureau

Current law generally affords parties to a contract freedom to determine the terms of the contract, and these contract terms are enforceable in court. However, there are exceptions.

Under this bill, any provision in a contract for the sale of services that indemnifies or holds harmless a party from or against liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, or that requires another person to provide a defense to the party in connection with an assertion of liability for loss or damage resulting from that party's own negligence or intentional acts or omissions (indemnification provision), is generally against public policy and void. Under the bill, an indemnification provision may be enforced if it is part of a contract for construction work that is entered into by a registered construction contractor.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 895.44 of the statutes is created to read:

4 **895.44 Certain indemnification provisions void.** Any provision in a
5 contract for the sale of services that indemnifies or holds harmless a party from or

an insurance policy or to

1 against liability for loss or damage resulting from that party's own negligence or
2 intentional acts or omissions, or that requires another person to provide a defense
3 to the party in connection with an assertion of liability for loss or damage resulting
4 from that party's own negligence or intentional acts or omissions, is against public
5 policy and void. This section does not apply to a contract for construction services
6 if at least one party to the contract is a person who is required to register as a
7 construction contractor under s. 101.147.

Nothing in this section limits or affects an employer's recovery under s. 102.29.

8 **SECTION 2. Initial applicability.**

9 (1) This act first applies to contracts that are entered into on the effective date
10 of this subsection.

11 (END)

INSERT ANALYSIS:

Current law generally affords parties to a contract freedom to determine the terms of the contract, and these contract terms are enforceable in court unless the court determines that the terms are against public policy. Current law generally allows a party to enforce a provision in a contract that indemnifies or holds harmless the party from or against liability for loss or damage resulting from that party's own negligence or intentional acts or omissions, or that requires another person to provide a defense to the party in connection with an assertion of liability for loss or damage resulting from that party's own negligence or intentional acts or omissions (indemnification provision).

Under this bill, in a contract for the sale of services, other than an insurance policy, an indemnification provision is generally against public policy and void. Under the bill, an indemnification provision may be enforced if it is part of a contract for construction work that is entered into by a registered construction contractor.

Basford, Sarah

From: Kovach, Robert
Sent: Thursday, March 14, 2013 12:36 PM
To: LRB.Legal
Subject: Draft Review: LRB -0601/2 Topic: Indemnification clauses in contracts for the sale of goods or services

Please Jacket LRB -0601/2 for the SENATE.