As a form of contractual risk transfer, indemnification provisions are used to mitigate financial risk by shifting legal liability from one party (indemnitee) to another (indemnitor). This type of clause is frequently utilized in the construction industry where multiple parties – such as owners, engineers, contractors and subcontractors – operate to define who will be held liable, should a claim be filed. However, the issue of whether these clauses are enforceable varies from state to state through the passage of “anti-indemnity” statutes. Additionally, while the state legislatures provide the text of these statutes, the courts in each jurisdiction determine how these statutes apply to either enforce or invalidate indemnification provisions. For example, Virginia courts recently clarified how these provisions can be used.

If an accident or injury occurs on-site, an indemnification agreement protects the indemnitee by requiring the indemnitor to indemnify and bear the costs associated with the defined loss, including defense fees and incurred damages. For example, if a subcontractor is hired and their employee is hurt on the job, even if the injury is the contractor’s (indemnitee’s) fault, the indemnification clause could transfer responsibility for the claim to the subcontractor (indemnitor).

Because this type of contractual risk transfer is not legally enforceable in every state as some courts believe it is against public policy, it is critically important for construction companies to be aware of their state’s anti-indemnity statute(s) and understand how the courts interpret and apply these statutes in order to ensure that their indemnification agreements will be enforceable in their jurisdiction. There are three common types of indemnification agreements used in construction contracts:
- **Broad Form Indemnification** is the strongest form of indemnification. Under this clause, the indemnitor is liable even for the defense and damages of the indemnitee’s actual or alleged sole negligence.

- **Intermediate Form Indemnification** indemnifies a party for its own negligence, except for the actual or alleged sole negligence of the indemnitee. This clause is triggered if both parties are determined to be at least partially at fault.

- **Limited Form Indemnification** does not shift any of the indemnitee’s liability to the indemnitor. At best, limited form indemnification will obligate the indemnitor to pay for the defense of the indemnitee against claims determined to have been caused solely by the acts or omissions of the indemnitor.

For construction companies and contractors operating in the Commonwealth of Virginia, close attention will need to be paid to indemnification provisions as recent case law in Virginia indicates that both Broad Form and Intermediate Form Indemnification are now prohibited. Currently, the language of Virginia’s anti-indemnity statute reads: “Any provision contained in any contract relating to construction…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.”

While this was previously interpreted to mean that only Broad Form Indemnification was prohibited, the Virginia Courts have clarified the scope of the statute. Because the phrases “caused by” and “resulting solely from” apply separately, the Court interpreted the statute as voiding any indemnification provision that attempts to transfer liability for damages from the negligence of the indemnitee to the indemnitor, regardless of the indemnitor’s responsibility. As such, construction contracts which contain Intermediate Form Indemnification will not be enforceable for any agreement for which Virginia law will apply.
When evaluating contracts and vendor agreements, construction companies should consult their insurance broker to ensure anti-indemnity statutes are interpreted correctly and all contractual clauses will apply as they are intended, given state regulations. As demonstrated above, the court’s interpretation of specific provisions can change quickly and without notice. Working with your insurance broker will help identify solutions that reduce risk for your specific operation, while also ensuring you are up to date on any judicial modifications that could affect the extent of your risk transfer to others.

IAN MITCHELL
Producer
IMitchell@grahamco.com
810 7th Street NE
Washington, D.C., 20002
202-664-5636

CHRISTA SOLFANELLI, ESQ.
Esquire, Associate General Counsel
CSolfanelli@grahamco.com
1 Penn Square West 25th Floor
Philadelphia, PA, 19102
215-701-5273