2012 Update: Effectiveness of Written Indemnity Agreements In The District of Columbia

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Indemnity agreements are widely used in the construction and property management industries, and are "insured contracts" under the standard Broad Form CGL policy. In the District of Columbia, such agreements can operate not only to protect the indemnitee from vicarious liability, but also to shift liability for the indemnitee's own negligence to the indemnitor.

In our experience, the effect of these agreements is not always fully appreciated. Clients are advised to ensure that the potential risks and benefits of these agreements are well recognized by their underwriting and claims departments. Underwriters should be vigilant to avoid or account for potential hidden exposures under contractual liability coverage. Conversely, when the insured is in a position of relative bargaining strength, effective use of indemnity agreements and insurance requirements can be a powerful risk management tool.

By the same token, contractual indemnity obligations should be routinely explored in the earliest phase of the claims review process. Substantial savings may be achieved through stringent and persistent demands upon contractual indemnitors and their liability carriers.

This article provides an overview of District of Columbia law on contractual indemnity, with a particular focus on cases in which the indemnitee seeks to shift liability for his own negligence. Readers are advised to consult with an attorney to determine the application of these principles in any specific case.

Introduction

It is well settled that parties to a contract may agree upon an indemnification clause which operates to shift liability for bodily injury and property damage from one party to the other. In most jurisdictions, such contracts are enforceable in the absence of a statutory prohibition. *See* Annot., *Liability of Subcontractor Upon Bond Or Other Agreement Indemnifying General Contractor Against Liability For Damage To Person or Property*, 68 A.L.R. 3d 7, 23 (1976).

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As a matter of public policy, indemnity agreements have long been accepted and enforced as legitimate means by which the business community allocates losses. Allocation of the risk of injury in a construction setting, for example, is commonplace and serves societal interests in promoting economic efficiency by limiting unnecessary costs for duplicative insurance coverage. *See J. W. Bateson Co. v. United States*, 434 U.S. 586, 604 (U.S. 1978) ("indemnity agreements between general contractors and their subcontractors are common today"); *Westinghouse Electric Co. v. Murphy, Inc.*, 425 Pa. 166, 173, 228 A.2d 656, 660, n. 5 (Pa. 1967) ("such contracts are useful to parties involved in construction and similar activities as a means of allocating the responsibility for obtaining insurance"). Where the parties to the agreement are sophisticated commercial entities which negotiated on a level playing field, it is unlikely that a court would find public policy considerations compelling it to release a subcontractor from its contractual obligation to indemnify. *See, e.g., Union Elec. Co. v. Southwestern Bell Tel. L.P.*, 378 F.3d 781, 788 (8th Cir. Mo. 2004); *MacGlashing v. Dunlop Equipment Co., Inc.*, 89 F.3d 932, 940 (1st Cir. 1996); *Krys v. Sugrue (In re REFCO, Inc.)*, 2009 U.S. Dist. LEXIS 130683, 52-53 (S.D.N.Y. 2009).

Properly Worded Indemnity Contracts Are Fully Enforced in the District of Columbia

In the District of Columbia, so long as the language of the indemnification clause is sufficiently broad and clear, the parties' intent will be effectuated.[1] However, disputes frequently arise concerning the proper interpretation and effect of indemnity agreements.

These disputes frequently center on the issue of whether the agreement is meant to protect the indemnitee from liability for its own negligence.[2] It is well settled in the District of Columbia that in order to permit a negligent party to obtain contractual indemnity, "the reviewing court must be firmly convinced that such an interpretation reflects the intention of the parties."[3] *W.M. Schlosser Co., Inc.*, 673 A.2d at 653. *See United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed. 224 (1970). Therefore, if the indemnity agreement is ambiguous on this point, the indemnitee cannot seek indemnity for its own negligence. The determination of whether or not an indemnity agreement is ambiguous must be made by the court, and is not submitted to the jury. *Rivers & Bryan, Inc.*, 628 A.2d at 635; *Harris v. Howard Univ., Inc.*, 28 F. Supp. 2d 1, 14 (D.D.C. 1998).

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[1] *See N.P.P. Contrs. v. John Canning & Co.*, 715 A.2d 139, 141-143 (D.C. 1998); *Grunley Constr. Co. v. Conway Corp.*, 676 A.2d 477 (D.C. 1996); *W.M. Schlosser Co., Inc. v. Maryland Drywall Co., Inc.*, 673 A.2d 647, 653 (D.C. 1996); *Rivers & Bryan, Inc. v. HBE Corp.*, 628 A.2d 631, 635-36 (D.C. 1993); *Princemont Constr. Corp. v. B&O RR Co.*, 131 A.2d 877 (D.C. Mun. App. 1957); *Bland v. L'Enfant Plaza North, Inc.*, 473 F.2d 156, 157 (D.C. Cir. 1972); *Lesmark, Inc. v. Pryce*, 334 F.2d 942 (D.C. Cir. 1964)*Moses-Ecco Co. v. Roscoe-Ajax Corp.*, 320 F.2d 685, 687-88 (D.C. Cir. 1963); *Potomac Plaza Terraces, Inc. v. Q.S.C. Products, Inc.*, 868 F.Supp. 346, 354 (D.D.C. 1994); *Mead v. National Railroad Passenger Corp.*, 676 F.Supp. 92 (D. Md. 1987) (interpreting D.C. law).

[2] It should be noted that some states prohibit such agreements, or refuse to enforce them as against public policy.

[3] This standard is drawn in part from the law governing exculpation agreements, which cannot be enforced unless they are "spelled out with such clarity that the intent to negate the usual consequences of tortious conduct is made plain." *Maiatico v. Hot Shoppes, Inc.*, 287 F.2d 349, 350-351 (D.C. Cir. 1961); *Moore v. Waller*, 930 A.2d 176, 181 (D.C. 2007). *See Moses-Ecco Co.*, 320 F.2d at 687-688 (analogizing indemnity agreements to exculpation agreements). An indemnity agreement that permits a negligent party to obtain indemnity is akin to an exculpation agreement, in that it shields a negligent party from paying damages.

"[N]o particular form or words are needed" to demonstrate that the contracting parties intended to permit a negligent party to recover contractual indemnity. *W.M. Schlosser Co., Inc.*, 673 A.2d at 654 (quoting *Moses-Ecco Co.*, 320 F.2d at 688). *See Seckinger*, 397 U.S. at 211, n. 15 (recognizing that while some courts require contractual language explicitly referencing liability for the indemnitee's own negligence, that is not the universal rule). Rather, the scope of an indemnity agreement "may be so broad and comprehensive that although it contains no express stipulation indemnifying against a party's own negligence, it accomplishes the same purpose." *Princemont Constr. Corp.*, 131 A.2d at 878. In such cases, "the presumption is that if the parties had intended some limitation of the all-embracing language, it would be expressly stated." *Id.*

For example In *N.P.P. Contrs.*, 715 A.2d at 140-142, the court found the general contractor was entitled to indemnity for its own negligence pursuant to the following indemnity provision:

> The Subcontractor [Canning] shall indemnify and save harmless the Contractor [N.P.P.] and Owner from any and all claims and liabilities for property damage and personal injury, including death, arising out of or resulting from or in connection with the execution of the work.

Id. at 140. The court noted that the subcontractor had amended other provisions to limit the scope of its liability, but failed to do so with respect to the indemnity provision. *Id.* The court refused to consider the testimony of the general contractor concerning his subjective intent in entering into the indemnity clause, because the contract unambiguously permitted the general contractor obtain indemnity. *Id.* at 142.

Subtle Differences In Wording Can Have Big Effects

In determining whether indemnity agreements unambiguously cover liability for the indemnitee's own negligence, District of Columbia courts carefully and closely analyze the language of these agreements. The result often turns on the inclusion or modification of only a few words.

As quoted more fully above, the D.C. Court of Appeals has held that an agreement requiring indemnification for "any and all claims . . . arising out of or resulting from or in connection with the execution of the work," encompasses the indemnitee's sole or concurrent negligence. *N.P.P. Contrs.*, 715 A.2d at 140-142; *W.M. Schlosser Co., Inc.*, 673 A.2d at 653. Likewise, in *Moses-Ecco Co.*, 320 F.2d at 687-88, the subcontractor was required to indemnify a negligent general contractor under a provision requiring indemnification "against any loss, because of injury or damage to persons or property arising or resulting from the performance of this contract."

In *Bland v. L'Enfant Plaza North, Inc.*, 473 F.2d at 157, the general contractor was entitled to indemnification against its own sole negligence based upon the following contractual language:

> The subcontractor agrees to indemnify and save harmless the owner and general contractor against loss or expense by reason of liability imposed upon the owner or general contractor for damage because of bodily injuries . . . accidentally sustained by a person . . . *whether or not such injuries . . . are due or claimed to be due to any negligence of the subcontractor, his employees, his agents or servants*.

Id. (emphasis added). The court ruled that this language plainly encompassed liability for the indemnitee's sole negligence, because any other interpretation "would largely strip the clause of any meaning." In other words, since the indemnity agreement applied to a case where the subcontractor was not negligent, and in such a case the general contractor could only be subject to liability as a result of its own sole negligence, the indemnity agreement must require the subcontractor to indemnify the general contractor for its own sole negligence. *Id. See also Princemont Const. Corp. v. B&O RR Co.*, 131 A.2d 877 (D.C. 1957).

On the other hand, in *District of Columbia v. Murtaugh*, 728 A.2d 1237, 1245 (D.C. 1999), a contract providing for indemnity "against any and all claims or liability arising from or based on, or as a consequence or result of, any act, omission or default of the Contractor . . . in the performance of, or in connection with, any work required, contemplated, or performed under the contract" was not sufficiently broad to encompass indemnity against the District's own negligence. The court rested its decision on the case of *District of Columbia v. Royal*, 465 A.2d 367 (D.C. 1983), a case interpreting an identical clause and reaching the same result. The *Royal* court, in turn, relied on *District of Columbia v. C. F. & B.*, 442 F.Supp. 251, 254 (D.D.C. 1977), where the court held that an agreement requiring a contractor to "indemnify the government from any and all claims . . . to which said government may be subjected at any time . . . on account of any injuries to persons or damage to property or premises that occur as a result of any act or omission of the Principal" did not provide for indemnification against the District's own negligence.[4]

Courts in other jurisdictions have held that when a contract requires indemnity for liability "arising or resulting *in whole or in part* from the fault, negligence, wrongful act or wrongful omission" of the indemnitor, the indemnitee would be able to shift liability for his own *concurrent* negligence. *United States v. Hollis*, 424 F.2d 188, 191 (4th Cir. 1970). *See Rush v. Norfolk Elec. Co.*, 70 Mass. App. Ct. 373, 874 N.E.2d 447 (Mass. App. Ct. 2007); *Hagerman Constr. v. Copeland*, 1998 Ind. App. LEXIS 2046 (Ind. Ct. App. 1998); *Rhoades v. United*

[4] In *CF&B*, the court explained that this language was "virtually indistinguishable" from an agreement to pay indemnity for the indemnitor's "fault or negligence," and pointed to a Supreme Court decision holding that such an agreement would not encompass claims arising from the indemnitee's sole negligence. *Seckinger*, 397 U.S. 212-213. Notably, *Seckinger* held that if both the indemnitee and the indemnitor were negligent, the indemnitor would be liable to the extent of its comparative negligence. However, since D.C. is a contributory negligence jurisdiction, the *Seckinger* holding was modified such that the indemnitor would have no liability whatsoever in a case of concurrent negligence. *C. F. & B.*, 442 F.Supp. at 257.

States, 986 F. Supp. 859, 867 (D. Del. 1997) (interpreting indemnity clause limited to damage "caused or contributed to" by indemnitor); *Edward E. Gillen Co. v. United States*, 825 F.2d 1155 (7th Cir. 1987); *Harbenski v. Upper Peninsula Power Company, et al.*, 118 Mich. App. 440, 325 N.W.2d 785 (Mich. App. 1982). However, this clause would not be triggered unless the indemnitor was at least partly negligent, so the indemnitee could not recover for his own *sole* negligence. *Binswanger Glass Co. v. Beers Construction Co.*, 141 Ga.App. 715, 234 S.E.2d 363 (Ga. App. 1977).

However, the issue has been addressed in recent years by several courts applying D.C. law. In *Red Roof Inns, Inc. v. Scottsdale Ins. Co.*, 419 Fed. Appx. 325, 330-332 (4th Cir. 2011), the court enforced an indemnity agreement that explicitly applied to liability arising from "any action or omission of [the indemnitee], negligent or otherwise." In *Simoes v. Amtrak*, 2011 U.S. Dist. LEXIS 56983, 19-20 (D.N.J. 2011), the contractor was required to pay indemnity for Amtrak's own negligence because the contract provided for indemnity "irrespective of any negligence on [Amtrak's] part." Finally, in *Cevasco v. AMTRAK*, 606 F. Supp. 2d 401, 409-410 (S.D.N.Y. 2009), the court stated that an agreement to indemnify Amtrak for claims arising from injuries occurring on Amtrak's premises was broad enough to including claims arising from Amtrak's own negligence, noting that the agreement made no reference to "the acts or omissions of either party."

Given the subtlety of these linguistic distinctions, the most effective way to analyze a contractual indemnity agreement under D.C. law is to carefully compare the language of the agreement at hand to the language of the various indemnity contracts that have been ruled on by D.C. courts. To facilitate this analysis, we have attached a chart setting forth full-length quotes of the indemnity agreements that have been addressed in reported D.C. cases, together with the decision reached by the court in each case.

Insurance Requirement Shows Parties' Intent To Allocate Risk

Indemnity provisions must be understood in the context of the contract as a whole. In determining the scope of an indemnity clause, courts often look to whether the contract requires the indemnitor to procure insurance naming the indemnitee as an insured. Such a requirement is a strong indication of the parties' intent to fully shift the risks and the business costs of liability exposure to the indemnitor. *See Eastern Airlines, Inc. v. Insurance Company of North America*, 758 F.2d 132, 134 (3d Cir. 1985) (provisions requiring procurement of insurance "manifest an intent to shift the risk"); *Willey v. Minnesota Mining & Manufacturing Co.*, 755 F.2d 315, 324 (3d Cir. 1985) ("insurance clause is evidence of parties' intent to place liability as close as possible to party ultimately responsible for the injury"); *State v. PacifiCorp*, 236 Ore. App. 326, 335 (Or. Ct. App. 2010) ("a provision in an indemnity agreement that requires the indemnitor to carry liability insurance is evidence of the intent of the parties as to the scope of the indemnity obligation"), *modified, adhered to on reconsideration*, 237 Ore. App. 228 (Or. Ct. App. 2010).

Underwriters frequently employ site and operations limitations to identify the scope of the insured undertaking (*i.e.* language providing that the indemnitee is an additional insured for claims arising out of the operations of the named insured on a particular project). Consideration should be given to additional stipulations, excluding unintended exposures (such as

environmental claims), or limiting coverage to vicarious liability arising solely from the alleged negligence of the named insured.

Conclusion

When properly drafted, indemnity clauses are enforceable in the District of Columbia, and can be a powerful risk management tool. Such clauses should also be a critical element of the claims review process. However, when a party seeking indemnity is found to be negligent, D.C. courts will often be hesitant to enforce an indemnity provision. Thus, care must be taken in drafting these provisions to ensure that they have their intended effect. When a claim for contractual indemnity is filed, the indemnity agreement should not necessarily be taken at face value. Rather, it must be carefully analyzed, in the context of the agreement as a whole, to determine how it will be enforced.

Case Citation	Indemnity Clause	Applicable to Liability Arising Out of Indemnitee's Negligence?
Simoes v. Amtrak, 2011 U.S. Dist. LEXIS 56983 (D.N.J. 2011)	The contractor [CCC] agrees to defend, indemnify and hold harmless Amtrak, its officers, directors, employees, agents, servants, successors, assigns and subsidiaries, irrespective of any negligence on their part, from and against any and all losses and liabilities, . . . claims, causes of action, suits, costs and expenses incidental thereto (including cost of defense and attorney's fees), which any or all of them may hereafter incur, be responsible for or pay as a result of injury . . . to any person . . . arising out of or in any degree directly or indirectly caused by or resulting from activities of or work performed by the contractor, contractor's officers, employees, agents, servants, subcontractors, or any other person acting for or by permission of the contractor.	Yes
Red Roof Inns, Inc. v. Scottsdale Ins. Co., 419 Fed. Appx. 325 (4th Cir. 2011)	11. Indemnity and Insurance. . . . Contractor [S&W] shall defend, protect, indemnify and hold Customer [Red Roof Inns] harmless from and against any liability, loss, cost, threat, suit, demand, claim and expense . . . for damages to property or person which may arise out of or in connection with any negligent act or omission of Contractor in connection with its performance under this Agreement . . . . It is intended by the parties hereto that the indemnification obligations of Contractor under this Section shall extend to any damages resulting from any action or omission of Customer, negligent or otherwise, except for damages arising out of the intentional or willful misconduct of Customer. 12. Injury or Death. . . . In addition, Contractor, its employees and agents hereby waive and release Customer . . . from any and all claims, demands, causes of action for injury to property or person . . . arising out of or in connection with Contractor's performance under this Agreement . . . whether or not caused or contributed to by the negligence of Customer . . . . Contractor further agrees to defend, protect, indemnify, and hold Customer harmless from and against any and all costs, losses, claims and expenses . . . as a result of claims or suits arising out of injury to or death of any of Contractor's employees . . . in connection with their performance under this Agreement, whether or not caused or contributed by the negligence of Customer, its employees or agents	Yes
Cevasco v.	68.1 Contractor agrees to defend, indemnify and hold	Yes (under

AMTRAK, 606 F. Supp. 2d 401 (S.D.N.Y. 2009)	harmless Amtrak . . . irrespective of any negligence or fault on their part, from and against any and all losses and liabilities, penalties, fines, forfeitures, demands, claims, causes of action, suits, costs, and expenses incidental thereto (including costs of defense and attorneys' fees), which any or all of them may hereafter incur, be responsible for or pay as a result of injury or death of any person . . . arising out of or in any degree directly or indirectly caused by or resulting from materials, products or equipment supplied by, or from activities of, or Work performed by Contractor . . . . 68.2 Contractor shall be responsible for all damages and expenses on account of injuries (including death) to any of its employees, agents or subcontractors while on the premises of Amtrak and shall indemnify, defend, and hold Amtrak harmless from all claims or damage suits which may arise in consequence of such injuries.	either 68.1 or 68.2)
District of Columbia v. Murtaugh, 728 A.2d 1237 (D.C. 1999)	The Contractor shall indemnify and save harmless the District and all of its officers, agents and servants against any and all claims or liability arising from or based on, or as a consequence or result of, any act, omission or default of the Contractor, his employees, or his subcontractors, in the performance of, or in connection with, any work required, contemplated or performed under the Contract.	No
N.P.P. Contrs. v. John Canning & Co., 715 A.2d 139 (D.C. 1998)	The Subcontractor [Canning] shall indemnify and save harmless the Contractor [N.P.P.] and Owner from any and all claims and liabilities for property damage and personal injury, including death, arising out of or resulting from or in connection with the execution of the work.	Yes
Grunley Constr. Co. v. Conway Corp., 676 A.2d 477 (D.C. 1996)	The Subcontractor shall indemnify and save harmless Contractor and Owner from any and all claims and liabilities for property damage and personal injury, including death, arising out of or resulting from or in connection with the execution of the work.	Yes
W.M. Schlosser Co., Inc. v. Maryland Drywall Co., Inc., 673 A.2d 647 (D.C. 1996)	The subcontractor shall promptly indemnify and save and hold harmless the General Contractor and the Owner from any and all claims, liabilities and expenses for property damage or personal injury; including death, arising out of or resulting from or in connection with the execution of the work provided for in this Agreement.	Yes
Rivers & Bryan, Inc. v. HBE Corp., 628 A.2d 631 (D.C. 1993)	Subcontractor agrees to observe and comply with all federal, state and local statutes and/or ordinances relating to the performance of this subcontract (including the Occupational Safety and Health Act of 1970, as amended), * to assume all responsibilities of the Contractor thereto, and to indemnify and	No

	hold harmless Contractor from all penalties, damages or other loss resulting from subcontractor's failure to do so. Subcontractor shall pay the cost of permits and licenses required to perform this subcontract. * Subcontractor is not responsible for others who are not in conformance with OSHA.	
Mead v. National Railroad Passenger Corp., 676 F.Supp. 92 (D. Md. 1987)	[T]o protect, indemnify and save harmless AMTRAK from and against any suit, claim, damage and expense by reason of any accident, injuries, or damages which may occur as a result of the work performed by HOLLAND. HOLLAND shall be responsible for all damages and expenses on account of injuries (including death) to any of the employees of AMTRAK while on the premises of AMTRAK in connection with operations performed or to be performed under the contract and HOLLAND shall defend at its sole expense all claims or damage suits, whether against AMTRAK or HOLLAND which may arise in consequence of such injuries.	Yes
General Elevator Co. v. District of Columbia, 481 A.2d 116 (D.C. 1984)	An indemnity clause in the contract provided that appellant would indemnify the District for "any and all claims . . . on account of any injuries to persons . . . that occur as a result of any act or omission of [appellant] . . . in the prosecution of the work under this Contract." The following section stated that appellant would not be liable "for personal injury . . . if it is proved that it was beyond [appellant's] control and not due to [its] negligence."	No
District of Columbia v. Royal, 465 A.2d 367 (D.C. 1983)	The Contractor shall indemnify and save harmless the District and all of its officers, agents and servants against any and all claims or liability arising from or based on, or as a consequence or result of, any act, omission or default of the Contractor, his employees, or his subcontractors, in the performance of, or in connection with, any work required, contemplated or performed under the Contract.	No
District of Columbia v. C. F. & B., 442 F.Supp. 251 (D.D.C. 1977)	[S]hall save harmless and indemnify the government from any and all claims, delays, suits, costs, charges, damages, counsel fees, judgment, and decrees to which said government may be subjected at any time . . . on account of any injuries to persons or damage to property or premises that occur as a result of any act or omission of the Principal in connection with the prosecution of the work and shall pay the same, then this obligation to be void, otherwise to remain in full force and virtue.	No
Bland v. L'Enfant Plaza North, Inc., 473	The subcontractor agrees to indemnify and save harmless the owner and general contractor against loss or expense by reason of liability imposed upon the owner or general contractor for	Yes

F.2d 156, (D.C. Cir. 1972)	damage because of bodily injuries . . . accidentally sustained by a person . . . whether or not such injuries . . . are due or claimed to be due to any negligence of the subcontractor, his employees, his agents or servants.	
Lesmark, Inc. v. Pryce, 334 F.2d 942 (D.C. Cir. 1964)	Should any person or persons or property be damaged or injured . . . by the contractor . . . in the course of the performance by them of this agreement, or otherwise resulting from any action or operation under this agreement, whether by negligence or otherwise, said contractor shall alone be liable, responsible and answerable therefor and does hereby agree . . . to hold harmless and indemnify the Owner.	Yes
Moses-Ecco Co. v. Roscoe-Ajax Corp., 320 F.2d 685 (D.C. Cir. 1963)	The Subcontractor (Moses-Ecco) agrees in the performance of this contract . . . that he will at all times indemnify and save harmless the Owner and the Contractor (Roscoe-Ajax) against any loss, because of injury or damage to persons or property arising or resulting from the performance of this contract, including any and all loss, cost, damage or expense which the Owner and/or Contractor may sustain or incur on account of any claim, demand or suit made or brought against them or either of them by or on behalf of any employee of (Moses-Ecco).	Yes
Princemont Constr. Corp. v. B&O RR Co., 131 A.2d 877 (D.C. Mun. App. 1957)	To assume all liability for any and all loss and damage to property and claims for injury to or death of persons in connection with or growing out of the use of said premises.	Yes