



Gary P. Kraus
Onebane Law Firm
P. O. Box 3507
Lafayette, Louisiana 70502
337-237-2660
krausg@onebane.com
www.onebane.com

CONSTRUCTION CONTRACT INDEMNITY **PROVISIONS NOW LIMITED BY STATUTE**

In 2010, the Louisiana Legislature for the first time by statute limited "hold-harmless" provisions in construction contracts, when it passed "Certain Contract Provisions Invalid; Motor Carrier Transportation Contracts; Construction Contracts" (La. R.S. 9:2780.1). The statute has only prospective application as it is only applicable to contracts signed after January 1, 2011. The statute uses an inclusive definition of "construction contract" to give it broad application with few listed exceptions. Typically, construction contracts have indemnity or hold-harmless provisions by which a subcontractor is required to protect the general contractor and/or owner of the project from all claims for damages. This law invalidates any indemnity that protects the indemnitee or third party from liability for its own fault, and voids provisions requiring the indemnitor to make the indemnitee and/or third party an additional insured on the indemnitor's insurance. [The indemnitor is the entity providing the protection, while the indemnitee is the party receiving the protection in such an indemnity clause.] The statute also nullifies contractual selection of another state's law to govern such contracts, which would have the effect of avoiding this provision.

In an effort to cover all construction contracts, the statute broadly defines "construction contract" as "... any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition, or excavation. . . ." La. R.S. 9:2780.1 A(2)(a). It includes everything from design to construction including maintenance, and from alteration to any improvement to real property. The definition does have limitations, as it states that "... no deed, lease, easement, license or other instrument granting an interest in the right to possess property . . ." is a construction contract, even if it includes the right to design, construct, renovate, repair, or maintain improvements. La. R.S. 9:2780.1 A(2)(a). The definition is also limited in that "construction contract" does not include

". . . (i) Any dirt or gravel road used for access to oil and gas wells and associated facilities" or "(ii) Oil flow lines or gas gathering lines used in association with transportation of production from oil and gas wells from the point that the oil and gas becomes commingled for transportation to oil storage facilities or gas transmission lines." La. R.S. 2780.1 A.(2)(b). While gravel or dirt roads to oil and/or gas facilities and certain flow lines are excluded, "construction contracts" for any facility, and roads or lines not within those descriptions are generally included.

The statute's wide impact is to negate the use of indemnity clauses that are generally accepted in the construction industry. The statute invalidates any clause which ". . . purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending or holding harmless, the indemnitee from and against liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control" La. R.S. 9:2780.1 B. While the long quote is not necessary to reference the statute, it is important to emphasize the length to which the legislature went to include all possible such indemnities. The provision makes unenforceable any provision in a contract that requires a party to indemnify, defend and hold harmless the indemnitee from liability, loss or damage that arises from the fault of that indemnitee, or its employee or agent, or from a third party over which the indemnitor has no control.

A typical construction contract between subcontractor and general contractor (as an example) requires the subcontractor to indemnify the general contractor and the owner without limitation. In contracts signed after 1/1/11, such an indemnity provision is null and void under this statute. There is no possible indemnification by that subcontractor of the general contractor (who is an "indemnitee" under the language of the act) or the owner (who is a "third party" under the act) as to any claim, regardless of whether it arose from the actions of either the general contractor or the owner or not, as the clause is totally unenforceable. Under the statute, a "hold-harmless" provision should be enforceable only if it seeks to have the general contractor and the owner defended and indemnified for damages arising solely from the fault of the subcontractor (indemnitor) or someone other than the general contractor or owner (indemnitees). The language of this statute is very similar to such a provision in the Oilfield Anti-Indemnity Act (La. R.S. 9:2780). Louisiana courts have previously interpreted that provision to invalidate the entire indemnity section of the contract, regardless of how it was sought to be enforced. Meloy v. Conoco, Inc., 86-1466 (La. 04/06/87), 504 So. 2d 833, 838.

The statute also voids any attempt contractually to shift the risk of personal injury or property damage to the indemnitor through insurance by also invalidating ". . . any provision, clause, covenant or agreement contained in, collateral to, or affecting. . . construction contract which purports to require an indemnitor to procure liability insurance covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control. . . ." La. R.S. 9:2780.1 C. This provision does not prevent the indemnitee from requiring an indemnitor to provide proof of insurance for the obligations covered by the contract. La. R.S. 9:2780.1 C. Contractors who have in place favorable indemnities or insurance provisions with subcontractors before January 1, 2011, are likely to try to keep such contracts in place, as they appear to still be enforceable. While this statute is the most recent expression of the legislature, it states that it is not intended to affect the Oilfield Anti-indemnity Act (La. R.S. 9:2780), or La. R.S. 38:2195 which prohibits similar

provision in public contracts. Therefore, in addition to the limitations described above, this provision will not affect oilfield contracts or public contracts, as each is defined in those laws.

In an attempt to avoid such statutes, general contractors through a choice of law provision elect another state's law to apply to disputes under construction contracts. However, La. R.S. 9:2780.1 D requires the laws of Louisiana to govern any construction contract to be performed in Louisiana. Any provision in conflict with this section is null. Choice-of-law provisions are usually invalid if in conflict with certain provisions or statutes described as the "public policy of this state." Silverman v Mike Rogers Drilling Co., Inc., 45,119 (La. App. 2 Cir. 04/14/10), 34 So.3d 1099, 1101. Such a clause in a construction contract for construction in Louisiana will probably be invalid, given that Section D dictates the law of Louisiana will now apply to all construction contracts for construction occurring in Louisiana.

Louisiana's new construction contract anti-indemnity act is broad in scope and will invalidate the standard or typical indemnity provision in construction contracts. The act, with few exceptions to its breadth, also voids any requirement to make those seeking indemnity an additional insured. By making this statute the "public policy" of Louisiana, those seeking indemnity will probably not be able to avoid its effect by contractually electing another state's law in the contract. The risk landscape in construction contracts has been dramatically altered by this new statute.

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