

Construction Law Practice Tip: Anti-indemnity Statutes Are Not Always What They Appear To Be

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PRACTICES Construction Litigation

Don't judge an anti-indemnity statute by its language. Check the case law. Virginia's anti-indemnity statute is a case in point.¹

Commentators sort anti-indemnity statutes into two categories, depending on whether they bar broad or intermediate full-indemnity form indemnity provisions. A broad form indemnity provision transfers the risk of loss to the indemnitor regardless of the extent of the indemnitee's fault. The indemnitor must indemnify the indemnitee even if the latter is 100 percent at fault. Legislatures in several states have enacted statutes that prohibit such draconian provisions, generally in the construction industry context and to protect subcontractors who wield inferior bargaining power vis-à-vis owners and general contractors. For example, Virginia's anti-indemnity statute bars as "against public policy" and "void and unenforceable" construction contract provisions that purport

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.²

Some surveys of "50-state" anti-indemnity statutes have relied on the italicized language above to classify Virginia in the group of states that bar broad form anti-indemnity provisions.

But the Virginia Supreme Court has held otherwise. In *Uniwest Constr, Inc. v. Amtech Elevator Servs.*, two employees of subcontractor Amtech sued general contractor Uniwest after their scaffold collapsed in an elevator shaft.³ The subcontract contained a broad form indemnity provision in favor of Uniwest. The Court voided the provision because it reached beyond the negligence of Amtech, which violated Virginia Code § 11-4.1. The Court reasoned that because

the phrases "caused by" and "resulting solely from" are disjunctive in the statute, it voids any indemnification provision that reaches damage caused by the negligence of the indemnitee, even if the damage does not result solely from the negligence of the indemnitee.⁴

In other words, the Court held that the term "solely" applied only to the expression "resulting from," leaving the expression "caused by" unqualified. This textual interpretation means that Virginia's anti-indemnity statute also bars intermediate full-indemnity provisions. These provisions require the indemnitor to pay all the damages if he is partially at fault. Only if the indemnitee is fully at fault is the indemnitor free from the duty to indemnify. An intermediate full-indemnity provision is "so broad that it indemnifies the indemnitee from its own negligence" and, therefore, "violates Code § 11-4.1 and is void."

In addressing a separate point of error, the Court upheld an intermediate partial-indemnity form indemnity provision, whereby the indemnitor pays damages "to the extent" of his fault.⁵ If the

indemnitor is 40% responsible, he must indemnify the indemnitee for 40% of the damages. Virginia's anti-indemnity statute, therefore, allows intermediate partial-indemnity provisions and prohibits broad and intermediate full-indemnity provisions.

¹ Va. Code Ann. § 11-4.1.

² *Id.* (emphasis added).

³ Actually, one employee and another's estate. 699 S.E.2d 223 (Va. 2010), *opinion withdrawn in part on rehearing but leaving construction of anti-indemnity statute unaffected*, *Uniwest Constr, Inc. v. Amtech Elevator Servs.*, 714 S.E.2d 560 (Va. 2011); see also *Sharom Prum v. Linde Gas N.A. LLC*, 2016 Va. Cir. LEXIS 106 (Va. Cir. 2016) ("indemnification provision in a construction contract that reaches damage caused by an initial defendant's negligence is void, even if the damage does not result solely from the negligence of the initial defendant.").

⁴ *Id.* at 230.

⁵ *Id.* at 225, 230.