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## California Anti-Indemnity Statutes and Contractual Additional Insured Requirements

By Michael J. Yates

Contractual agreements between owners and general contractors and/or between general contractors and subcontractors routinely include “indemnity” and/or “additional insured” provisions. Indemnity provisions typically require one party (typically the subcontractor or general contractor, or the “indemnitor”) to indemnify the other (typically the general contractor and/or owner, or the “indemnitee”) for any losses or claims arising out of the indemnitor’s actions. “Additional insured” provisions typically require one party to purchase insurance naming a contractor, owner or others as an insured party on the Commercial General Liability policy. These provisions are typically disfavored by subcontractors because these provisions shift financial responsibility to the subcontractor even when


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the subcontractor may not be at fault for the loss. Moreover, subcontractors have argued that indemnitees may not have the incentive to exercise care to avoid losses because the indemnified party is not responsible for its own actions.

Based upon these concerns, along with the idea that subcontractors may not have equal bargaining power in their negotiations with general contractors, most state legislatures have enacted statutes limiting the scope of legal liability that one party may contractually transfer to another. These statutes, also known as "anti-indemnity statutes," work differently depending on the specific language in each state statute. For example, most state statutes forbid indemnification when the negligence alleged arises from the indemnitee's sole negligence. On the other hand, many anti-indemnification statutes allow indemnitees to contractually assign their liability to indemnitors if the indemnitees are only *partially* responsible for the loss. This subtle but substantial difference in statutory language can result in significant difference regarding who pays the loss under contractual indemnification clauses.

On the other hand, "additional insured" provisions typically do not violate state anti-indemnity statutes. As a result, many commentators believe that well-drafted "additional insured" provisions essentially circumvent state anti-indemnity statutes. In response, a handful of states have passed amended or additional statutes to close this additional insured "loophole." For example, Colorado prohibits "any provision in a construction agreement that requires a person to *indemnify, insure, or defend in litigation another person* against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee" as void against public policy and unenforceable. *See* Colo. Rev. State. § 13-21-111.5 (emphasis added). While Colorado is one of the few states that has closed the "additional insured loophole" as of the date of this publication, the

law on this important topic is in a constant state of flux. Thus, it is important to understand if and how anti-indemnification statutes work in your particular state or states. A chart identifying the status of anti-indemnification statutes and additional insured provisions in states in which our law firm maintains an office is set forth below.

| State | Bars Indemnity for sole negligence of indemnitee | Bars Indemnity for both sole and partial negligence of indemnitee | Closes Additional Insured Loophole | Comments |
|---|---|---|---|---|
| Arizona | Yes (for private work). | Yes (for public work only). | No. | A.R.S. §§ 32-1159, 34-226, 41-2586. Exception for entry onto adjacent land. |
| California | Yes. | Yes, for residential construction defect claims with respect to subcontractor obligations. | No. | Cal. Civ. Code §§ 2782. Exception for entry onto adjacent land. |
| Colorado | Yes. | Yes. | Yes. | Col. Rev. Stat. §§ 13-50.5-102, 13-21-111.5. |
| Nevada | Not addressed by statute. | Not addressed by statute. | No. | Contractual indemnity provisions have been strictly construed in recent court cases |
| Utah | Yes. | Yes. | No. | Utah Code § 13-8-1 |

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| | | | | exception permits indemnity of owner. |

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