

NEWSLETTERS

Broad Indemnification Provisions Could Result In No Indemnification On Public Projects

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The Michigan Court of Appeals overturned a trial court's grant of summary disposition in favor of a contractor and subcontractor under Michigan's anti-indemnity statute late last year, finding that the statute does not apply retroactively to a contract entered into prior to its effective date. But it is also a reminder to carefully draft contracts, especially for public works projects.

Under the Michigan anti-indemnity statute, a contract on a public works project will be void and unenforceable if it requires the contractor to assume liability for or indemnify the public entity in an amount greater than its own degree of fault. In *In re Estate of Koch*, 2017 WL 6502821 (Mich Ct App 2017), the estate of a deceased construction worker sought to impose liability on a subcontractor and the project engineer for the decedent's death, which was caused by an explosion at the Village of Dexter's Wastewater Treatment Plant. The engineer then sought indemnification from the contractor and subcontractor. The trial court found that Michigan's anti-indemnity statute applied retroactively and the engineer therefore could not seek indemnification for its own negligence. The Court of Appeals disagreed, reinstated the engineer's indemnification claims and remanded the case to the trial court, where it was pending at press time.

Dexter sought to upgrade the sludge handling process at its Wastewater Treatment Plant. As a result, Dexter contracted with an engineer to both design the upgrades and for contract administration, construction engineering, construction observation, and construction staking services. Dexter also hired a general contractor to make the upgrades, who in turn hired a subcontractor to perform a portion of the work. The storage of sludge creates a build-up of methane gases. As a result, no "hot" work could be performed while the storage tanks still contained sludge. On the morning of the explosion, the engineer took pictures of the job site in which a subcontractor can be seen using a hot torch near a storage tank that still contained sludge. Shortly thereafter, an explosion occurred and killed an employee of the subcontractor.

The deceased's estate sued Dexter, the general contractor, and the engineer for negligence resulting in death. The engineer sought indemnification from the general contractor and a subcontractor. Both parties refused, and the engineer filed for summary disposition. The trial court found two alternate grounds to deny the engineer's motion. First, Michigan's anti-indemnity statute prohibited the engineer from seeking indemnification of damages caused by its own negligence. Second, the

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contract documents contained two indemnity provisions that were inconsistent, and thus created an ambiguity.

On appeal, the Court of Appeals first addressed whether the anti-indemnity statute should apply retroactively. The Michigan anti-indemnity statute provides, in pertinent part:

When entering into a contract with a Michigan-licensed architect, professional, engineer ... or a contract with a contractor ..., a public entity shall not require the ... engineer ... or the contractor to defend the public entity or any other party from claims ... for any amount greater than the degree of fault of the ... engineer ... or the contractor and that of his or her respective sub consultants or subcontractors. A contractor provision executed in violation of this section is against public policy and is void and unenforceable.

The court conceded that if the Michigan anti-indemnity statute applied, then the trial court was correct and the engineer would be prohibited from seeking indemnification. However, the appeals court found that the trial court incorrectly applied the anti-indemnity statute retroactively.

The Court of Appeals recognized that, generally, statutes are presumed to operate only prospectively unless the legislature clearly manifests intent to make application retroactive. The court analyzed the language of the anti-indemnity statute to conclude that the legislature did not intend for the retroactive application of the statute and noted in its ruling that Section 691.991(2) speaks of contract formation throughout:

...it provides that “when entering into a contract,” a public entity “shall not require” a general contractor or subcontractor to indemnify it beyond that entity’s degree of fault. And “a contract executed in violation of this section is against public policy and is void and unenforceable.”

The Court of Appeals reasoned that a contract provision that was executed before the effective date of Section 691.991(2) could not be executed in violation of that section. That fact, coupled with no clear, express language concerning retroactivity, led the court to conclude that the anti-indemnity statute could only be applied prospectively.

The court also determined that the two separate indemnification provisions created an ambiguity. One indemnity provision required the general contractor and subcontractor to indemnify the engineer for all damages, regardless of who caused them. The other indemnity provision required the general contractor and subcontractor to indemnify the engineer for those damages only caused by their own negligence. The appeals court found that these provisions irreconcilably conflict because it is impossible for either the general contractor or the subcontractor to comply with both provisions. Finally, the court reversed the trial court’s decision to construe the contracts against the drafter reasoning that extrinsic evidence and other rules of contract interpretation should be applied first. The Court of Appeals therefore declined to construe the provisions against the engineer in the first instance and left interpretation of the ambiguities to the jury.

This case illustrates the need for careful contract drafting on public works

projects. An indemnification provision that is drafted too broadly may be ruled invalid and unenforceable as a whole if drafted in violation of the Michigan anti-indemnification statute.

For more information about this topic and the issues raised in this article, please contact Scott R. Murphy (smurphy@btlaw.com).

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