

Indemnity for One's Own Negligence or Strict Liabilities

By John A. Washburn, Gould & Ratner LLP
jwashburn@gouldratner.com

There is a common misconception that one may not be indemnified for one's own negligence or strict liability under Illinois law. Some clarification is warranted. There are a few statutes which effectively void indemnification against one's own negligence or strict liability as void against public policy. These statutes involve construction contracts, real property leases, bailment agreements and contracts regarding health care. Regarding bailments, a contract between a warehouse and its customer may not shift liability for damages due to the warehouse's failure to exercise due care, but the contract may limit the amount of liability of the warehouse. The statute regarding real property leases does not apply to clauses in non-residential leases exempting the landlord from liability for property damage. If these statutes are not involved, one can be indemnified for one's own negligence or strict liability provided the indemnity contract or provision is clear and explicit to the effect that the parties intended the indemnitee to be indemnified against its own negligence or strict liability.

Examples of contracts where such indemnifications or exculpations have been upheld include an agreement between a railroad and a trucking company hired to pick up tractor trailers from the railroad; an equipment purchase contract for an asphalt storage silo, a contract between a railroad and a terminal company, an equipment sublease, and an exculpatory release between drivers and a motor speedway.

Language stating that the indemnitor would assume all liability for injuries on the premises, whether any of the same shall be contributed to by the sole or partial negligence of the indemnitee, has been held to be sufficiently clear to require the indemnitor to indemnify the indemnitee for its own negligence. *Burlington Northern Railroad Company v. Pawnee Motor Service, Inc.*, 171 Ill. App. 3d 1043 (First Dist. 1988). A provision stating that a party would indemnify another against liability regardless of the cause or causes of an accident has been held to be broad enough to cover the indemnitee's own negligence in so ruling. *Hader v. St. Louis Southwestern Railway Company*, 207 Ill. App. 3d 1001 (Fifth Dist. 1991). The Illinois language requiring indemnification for any claims which may be attributable to any defect in equipment regardless of when such defect shall be discovered has also been held to be specific enough to require indemnification. *Patton v. T. O. F. C., Inc.*, 79 Ill. App. 3d 94 (First Dist. 1979).

The importance of clear drafting cannot be stressed too much with respect to this issue. The Illinois Supreme Court has stated that the contractual provisions involved are so varied that each must stand on its own language and little is to be gained by an attempt to analyze, distinguish or reconcile the decisions. The only guidance is that the agreement must be given a fair and reasonable interpretation based upon a consideration of all its languages and provisions, *Tatar v. Maxon Construction Co.*, 54 Ill. 2d 64, 67 (1973).

Unless such a construction is required by clear and implicit language of the contract or such intention is expressed in unequivocal terms, an indemnity will not be construed as indemnifying one against his negligence, *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.*, 395 Ill. 429 (1946). Where language does not explicitly require indemnification for one's own negligence, a court will not require such indemnification. The courts have held that it is not enough to hold the indemnitee harmless from any and all claims, actions, damages, liability and expense. *Karsner v. Lechters Illinois, Inc.*, 331 Ill. App. 3d 474, (Third Dist. 2002). This will be particularly true if the loss would fall on one who did not control the means of accident prevention. *Bates v. Select Lake Theatre Operating Co., Inc.*, 78 Ill. App. 3d 153 (First Dist. 1979).

As indicated by the above examples, there is nothing wrong with an indemnitee requiring an indemnitor to indemnify the indemnitee against the indemnitee's own negligence provided the agreement is not a lease, construction contract, health provide contract or bailment agreement.

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