2018 Business Insurance Conference
September 26–28, 2018
Chicago, IL

Contractual Risk Transfer: Identifying Differences between Comparative Negligence and Contributory Negligence Jurisdictions

I. Negligence

A. Definition

Negligence is traditionally defined as the failure to use reasonable care, resulting in damage or injury to another. Within the context of a Construction Agreement, one of the most common types of claims and/or lawsuits which may be initiated will be a claim for personal injury or property damage related to the negligent actions of one of the parties. As negligence most often describes a situation in which a person acts in a careless manner, which results in someone else getting hurt or property being damaged, the way that the courts treat the negligent actions of a party in respect to that party's rights to recover damages is a very important topic in the field of Construction Law.

Elements of a Negligence Claim

Whenever a plaintiff initiates a claim based on an allegation of negligence, the plaintiff must first establish that all the elements of negligence have been satisfied. These elements include: Duty, Breach of Duty, Proximate Cause and Damages.

Duty

The element of duty is satisfied when it is decided that the defendant was obligated to act in a certain manner toward the plaintiff. Most often, the standard utilized during the evaluation of whether a duty in fact exists is whether a reasonable person would find that a duty exists under a set of circumstances. Obviously, a specific duty may also be spelled out within the terms of a contract or agreement (e.g., a "standard of care").

Breach of Duty

When establishing whether a defendant failed to properly act in a given scenario, the plaintiff must also establish that the defendant failed to exercise reasonable care in fulfilling its particular duty. This element must be satisfied for a successful negligence claim.

Proximate Cause

As any negligence claim must also prove damages because of the defendant's failure to perform its duty, it is also required that such failure was the proximate cause of the plaintiff's injuries or damage. In a negligence case, an event that is sufficiently related to the injury alleged by the plaintiff can be deemed to be the proximate cause of the injury. The courts have applied a "but-for" test to prove proximate causation (whether the injury would have occurred but for the defendant's actions).

Damages

As stated previously, for a successful negligence claim, actual damage must also be present. It is not enough that a defendant has not exercised reasonable care, the plaintiff must also be able to prove a sustained damage because of the negligence of the defendant.

B. Contributory vs. Comparative Negligence

Contributory Negligence is defined as negligent conduct on the part of a plaintiff or injured party which contributes to the negligence of the defendant in causing the injury or alleged damage. There are several Jurisdictions in the United States which follow the "Pure Contributory Negligence" doctrine which states that an injured party cannot recover any damages if the plaintiff has contributed to the injury or damages in any way. The jurisdictions which follow this rule prohibit recovery in the event the plaintiff's actions have in any way contributed to the loss.

Conversely, the concept of Comparative Negligence serves to apportion damages between the parties based on the proportionate share of fault in any action, claim, or loss. As such, under those Jurisdictions which follow the Comparative Negligence rule, a plaintiff's negligence will not bar recovery, but the amount of awarded damages will be reduced based on the plaintiff's percentage of fault. There are certain States which have adopted a "Pure Comparative Negligence" rule which will allow a plaintiff to recover damages even if said plaintiff is up to 99% at fault (their damages will be reduced, however, based on their degree of fault). Several other States have adopted a "Modified Comparative Negligence" rule which states that a plaintiff cannot recover if their percentage of liability reaches a certain threshold level (e.g., 50% or 51%).

Jurisdictional Treatment

4 States plus the District of Columbia recognize the Pure Contributory Negligence rule:

Alabama, Maryland, North Carolina, Virginia and Washington D.C.

12 States recognize Pure Comparative Negligence:

Arizona, Alaska, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island and the State of Washington

10 States follow the 50% Bar Rule:

Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee and Utah

23 States follow the 51% Bar Rule:

Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, West Virginia, Wisconsin and Wyoming

The last remaining State, South Dakota, follows a hybrid called the "Slight / Gross Negligence Comparative Fault Rule" which deems that a plaintiff is barred from recovery for anything other than slight negligence.

II. Contractual Risk Transfer

A. Importance

Often, one party to an agreement will seek to limit its liability regarding any loss, claim, cause of action or suit related to bodily injury, property damage or both. This limitation of liability is accomplished via the transfer of risk within the provisions of an indemnity or hold harmless clause. In these types of provisions, one party will agree to hold the other party (or number of parties) harmless for several specified actions, errors, omissions, injuries or damages. As such, the indemnifying party are then required to protect the party seeking the indemnity in the event of any financial harm sustained because of the specified actions.

In a typical Construction Contract indemnification, a lower tier contractor will be obligated to return the upper tier party to the same financial condition that existed prior to the loss or claim. (Additionally, the lower tier contractor will also be required to fund all defense costs related to the defense of such claim).

Hold Harmless provisions serve a similar purpose wherein they will protect the upper tier party from those liability effects stemming from the injury, claim or suit in question. The Hold Harmless provisions will place the lower tier contractor in the shoes of the upper tier party, thereby shielding the upper tier party from liability.

Consequently, Indemnity and Hold Harmless language (and Contractual Risk Transfer protocols in general) serve an immense benefit to an upper tier party when executing an agreement related to construction.

Up-Stream Parties

As stated, whenever a General Contractor is hiring a Subcontractor (and any subsequent lower-tier subcontractors) to perform work or provide services, the Agreement tied to such services will invariably contain a few indemnities or hold harmless provisions. Moreover, the General Contractor will also include a list of indemnified parties within such provisions which will include the Owner, Lender and other upper tier parties.

Most States, however, will articulate that the protections offered by any such language be limited to those instances where the indemnifying party is deemed negligent, or more importantly, will eliminate the rights of the upper tier party to be protected for its own negligent actions. For example, within NYS, General Obligations Law 5-322.1, any language which purports to indemnify a party within an agreement related to construction, renovations, or remodeling for such party's own negligence will be deemed void and unenforceable. As such, it is of importance that the drafting of such provisions bears in mind the applicable jurisdiction governing the Agreement, as well as the court's treatment of such language.

Down-Stream Parties

For the Subcontractor executing these types of agreements and agreeing with these types of provisions, the important thing to consider is that the concept of limitation of liability must be recognized and that any provisions which seek to place all liability on the Subcontractor, regardless of fault, should be analyzed and negotiated in advance prior to execution. It is of paramount importance to recognize that there are certain types of provisions which purport to have a Subcontractor indemnify a party for that party's own negligence, and these types of provisions must be understood and most often rejected during the negotiation period.

B. Types

Contractual Risk Transfer may be accomplished in a few ways. For the purposes of this discussion, however, we will focus our attention on the Insurance Requirements which should be included within any agreement transmitted to a Down-Stream Party, as well as the Indemnity Provisions to be included within any such agreement.

Insurance Requirements

Typical Insurance Requirements will include a Subcontractor's and any lower-tier subcontractor's obligation to maintain always during the performance of any work, insurance policies with the limits and endorsements specified within the contract language. There will also typically be a reference to allowable Am Best ratings for size and strength of Carrier, as well as the limit of allowable deductible or self-insured retention.

Coverage should be required on a primary/non-contributory basis and will also be required to be "occurrence" based (apart from Professional Liability). While a Certificate evidencing such coverage is always required, it is also a very prudent requirement to state that complete copies of the policies may also be requested, and that Subcontractor must furnish same with promptness.

Additional requirements also include Waiver of Subrogation, Notice of Cancellation and the provision of coverage for all Additional Insureds via appropriate endorsements. One thing to be cognizant of is a recent trend within the industry as related to the requirement of Privity of Contract between parties when seeking AI status. It should be noted that certain Blanket Additional Insured Endorsements will restrict coverage to those parties "with whom" the Subcontractor has agreed within a written contract or agreement to provide additional insured status to.

This has proven to create several issues recently as it is very rare that all parties granted AI status will execute the agreement with a Subcontractor. As such, it is imperative to identify which AI endorsements will be acceptable and careful attention must be paid to ensure that no such privity requirement exists.

An example of the type of AI Endorsement which requires Privity of Contract is the CG 20 33. This endorsement reads that *Who is an insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.* The operative language within this endorsement is the phrase "when you and such person or organization have agreed in writing". This restricts AI status to only those entities executing the agreement.

Inversely, the CG 20 38, has an added paragraph which states that included as an additional insured is "any other person or organization you are required to add as an additional insured under the contract or agreement described above". This distinction is key in adding any other party who may be listed within the agreement as an additional insured and eliminates the concern related to privity.

Indemnity provisions within a contract are only as good as the indemnifying party's ability to satisfy its indemnity obligations. As the AI requirements are separate and distinct from the indemnity clause, it must be noted that in these scenarios where privity is required, a Subcontractor may believe that their insurance will cover a loss, however, the loss may be

denied by the insurance carrier due to this concern, and consequently, through the indemnity provision, the Subcontractor may be on the hook for the loss out of its own pocket.

All policy language should be reviewed to ensure that the phrase "when you and such person have agreed in writing" is not present, otherwise AI status will not apply to any party not executing the Agreement, and the indemnification may force a down-stream party to pay any loss directly out of pocket.

Each State's Treatment of an Indemnity Provision

Each of the 50 States handles the indemnity provisions within an Agreement in a unique way (although there are many similarities between some states) and as such, it is worth noting the differences between each of the 50 State's treatment of contractual indemnity.

The three types of Indemnity Agreements which are seen most typically are as follows: Limited, Intermediate and Broad Form. Each jurisdiction treats these types of indemnity clauses differently and forty-five (45) states have enacted some form of an anti-indemnity statute which limit the enforcement of certain types of indemnity agreements in construction contracts.

How the Executing Party may respond to Provisions Addressing Indemnity

As stated, each state treats an indemnity provision differently, and as such, it is important to note the distinction between each particular state's treatment of an indemnity clause and how such treatment may impact a party's ability to respond to a proposed contractual provision.

For example, within the State of California, within the context of a Construction Contract, neither a public or private owner can force a subcontractor to indemnify or insure another party for that party's "active negligence or willful misconduct". Additionally, within the same Civil Code section, there is a statutory treatment of a subcontractor's requirement to name a GC, CM or another Subcontractor as an Additional Insured. This Statute, Civil Code 2782(a) prohibits insuring such parties for their own negligent actions also.

This statutory text takes a broad form indemnity prohibition further than many other states as it expressly prohibits insuring a party against its own negligence, not just indemnifying a party in such situations. Inversely, the State of Pennsylvania has no limitation or prohibition on any Broad Form Indemnity provision. In fact, provided the language is clear and unambiguous, in Pennsylvania, a party may indemnify another party for its own negligent acts, errors or omissions.

It is important to note the distinctions which exist from jurisdiction to jurisdiction when proposing modifications to an agreement which is presented for execution. One party may often be able to point to a statutory prohibition on certain types of indemnity provisions which will make the negotiation process painless and straight forward.

III. Case Law Related to Risk Transfer

A. Contributory Negligence Jurisdictions

Bar on Recovery

Contributory Negligence is negligent conduct on the part of the injured party which in some way contributes to the injury or damage alleged within a case. In States which follow the "pure contributory negligence" rule, a damaged party cannot recover any damages even if it is only 1% at fault. In these jurisdictions, even the slightest amount of contributory negligence will bar all recovery, regardless of how egregious the defendant's conduct may be. There are 4 States, as well as the District of Columbia which subscribe to this philosophy.

These states are Alabama, Maryland, North Carolina, Virginia and Washington D.C. In Alabama, the controlling case law is *John Cowley & Bros., Inc. v. Brown, 569 So.2d 375 (Ala. 1990).* This decision sets the tone that any entitlement to damages is defeated in the event plaintiff is negligent. In Maryland, the controlling case law is *Board of County Comm'r of Garrett County v. Bell Atlantic, 695 A.2d 171 (Md. 1997).* This decision articulates that if a plaintiff contributes to his damages, he will be barred from recovery. Similarly, North Carolina, Virginia and D.C. have similar case law which will be discussed.

A. Comparative Negligence Jurisdictions

Pure Comparative Jurisdictions

In a Pure Comparative Negligence Jurisdiction, a plaintiff may recover damages even if it is 99% at fault in a case. Although the amount of recovery will be reduced in proportion to fault, there is no bar to recovery in these states. There are 12 states which recognize this treatment and proportionate reduction in damages (without bar) and they are: Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and the State of Washington.

Each of these states has a controlling case decision or statutory regulation which dictates that recovery will not be barred regardless of percentage of fault.

Modified Comparative Jurisdictions

The remaining states follow some form of a modified comparative negligence rule which holds each party responsible for its own pro rata share of negligent conduct (like the pure comparative negligence jurisdictions) however, if a plaintiff's own negligence reaches a certain threshold, either 50% or 51%, then the party is barred from recovery (like pure contributory negligence).

50% Rule

The states which follow the 50% rule, meaning a party cannot recover if it is 50% or more at fault are: Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee and Utah.

51% Rule

Twenty-Three (23) states follow the 51% rule which bars recovery if a party is 51% or more at fault. These states are: Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, West Virginia, Wisconsin and Wyoming.

There is 1 State which utilizes a "slight/gross negligence" system and that State is South Dakota. In South Dakota, if the plaintiff's negligence is slight and the defendant's negligence is gross, the fault of each party is compared, and damages are awarded pro rata. However, if this is not the case, the plaintiff is barred from recovery