

INDEMNITY AND RISK SHIFTING IN CONSTRUCTION CONTRACTS: MY FAULT.....YOUR PROBLEM

By Kelly Gagliuso

One of the most difficult tasks I face in negotiating contracts for construction clients is to convince them to take seriously the indemnity and waiver provisions found in most standard contracts. General indemnity provisions, in which one party agrees to take responsibility for risks or problems associated with its own performance of the contract, are necessary and commonplace in construction contracts. Recently, however, a new breed of indemnity provision has taken hold in which one party attempts to shift all risk associated with the performance of the contract, including responsibility for that party's *own* negligence, to the other party. In other words, "*it's my fault, but it's your problem.*" These exculpatory contract clauses can take the form of an indemnity provision or "release and waiver" language incorporated into a business contract.

For example, assume that ABC General Contracting enters into a contract with E-Z Painters to complete interior painting work for a new retail building ABC is constructing in Nashua, New Hampshire. In the subcontract agreement between E-Z and ABC, the following indemnity provision appears:

E-Z agrees to indemnify and hold ABC harmless from any and all claims or damages arising out of the performance of the contract, whether caused by the negligence of E-Z, ABC or any of their respective agents or employees. E-Z expressly releases ABC and waives all rights of action against ABC for any such claims or damages.

During the course of construction, ABC agrees to provide scaffolding for E-Z's use. The scaffolding falls due to improper modifications made to it by employees of ABC and an employee of E-Z is injured. The employee collects workers compensation and the insurance carrier successfully sues ABC on a negligence theory to recover the benefits it paid to the employee. ABC then sues E-Z for reimbursement of these damages, citing E-Z's duty to indemnify it for any claims arising out of the contract, even if they resulted from ABC's negligence. Could E-Z be forced to reimburse ABC under the above indemnity provision?

To the astonishment of many of my contractor clients, the answer is yes. This type of risk shifting is not prohibited by New Hampshire law. In fact, the New Hampshire Supreme Court has specifically upheld provisions which shift the risk of one party's negligence to another on the theory that "as a matter of efficiency and freedom of choice, parties should be able to contract freely about their affairs... parties may bargain for various levels of risk and benefit as they see fit." *Barnes v. New Hampshire Karting Assn*, 128 N.H. 102, 106 (1986). The Court has ruled that this principal is especially applicable in the construction industry where the risk of injury is typically shifted to the contractor's insurance carrier. See, *Commercial Union Assur. Co. V. Brown Co.*, 120 N.H. 620, 625 (1980). Unfortunately, these exculpatory provisions are not often spotted by the contractor or subcontractor to whom the risk is shifted until a claim is made or an injury is suffered.

The ability to shift risk is not without limits. The intent to shift risk for one's own negligence to another party must be very clearly expressed in the indemnity or release language of the contract. The Court will not generally "read between the lines" to find such a provision. Additionally, common carriers, innkeepers, public utilities, or other business entities charged with a duty of service to the public cannot contractually rid themselves of liability for negligence by requiring patrons to sign releases or waivers. New Hampshire courts will also refuse to uphold risk shifting provisions where one party is at an obvious disadvantage in bargaining power and, as a practical matter, has no reasonable alternative but to agree to the shifting of risk in order to obtain a needed service. When this disparity in bargaining power exists, the

party to whom the risk is shifted is not deemed to have freely chosen to enter in to the contract and the indemnity provision will not be enforced.

In the context of many business contracts, however, this disparity in bargaining power does not exist and the risk shifting provision will be enforceable. I see these provisions most frequently in agreements pertaining to commercial construction, but they appear in many different sorts of business contracts, including commercial leases, transportation agreements and agreements which pertain to a business activity which is inherently risky or dangerous.

Fortunately, indemnity and waiver provisions are generally negotiable. You can and should try to eliminate or scale back an indemnity provision that is so broad as to require you to take responsibility for the negligence of another party who is not your agent, subcontractor, or employee. It is essential, however, that this negotiation take place before the contract is implemented or a problem arises. After a careful review of a proposed contract, your attorney or contract administrator can identify exculpatory indemnity provisions and help you negotiate an acceptable level of risk for you company.