



Legal ALERT!

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Court of Appeals Permits Partial Contractual Indemnification

It is well known that New York General Obligations Law § 5-322.1, as in most states, precludes a party from being indemnified for its own negligence. Historically, it seemed clear from the cases that the statute meant two things: (1) that a party could not be indemnified for any liability attributable to its own negligence; and (2) that a purely non-negligent party could obtain full indemnification from those parties with whom it contracted. That is to say that indemnification was either zero or 100%.

However, until recently it was unclear whether a *partially* negligent party could obtain indemnification for that portion of liability for which it was not responsible. For example, if an owner was found 10% negligent, could it seek indemnification from a contractor for the remainder of its liability (90%)? This issue was recently put to rest in the affirmative in a recent decision from the Court of Appeals.

In *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008), the Court of Appeals concluded that a party can seek partial indemnification from another party, so long as the contract does not attempt to indemnify the party for its own negligence.

In order to obtain partial indemnification, the contractual provision should state that indemnification is permitted “to the fullest extent permitted by law.” The Court of Appeals expressly noted that such language shows an intention by the parties to limit indemnification to that portion of liability for which the indemnitee is not negligent. Lower appellate courts have also held that a provision stating “regardless of whether or not the claim is caused in part by a party indemnified hereunder” also expresses an intention to permit partial indemnification. See e.g. *Dutton v. Charles Pankow Builders, Ltd.*, 296 A.D.2d 321 (1st Dep’t 2002).

Based on the foregoing, the newly clarified current state of the law in New York is that if a party is found partially negligent it can obtain partial or proportional contractual indemnification from the party with whom it contracted, so long as the agreement includes the language cited above.

It should be noted that the standard AIA forms (A201 relating to Owner/Contractor agreements and A401 relating to Contractor/Subcontractor agreements) include both key phrases, i.e. “to the fullest extent permitted by law” and the “regardless if caused by a party indemnified hereunder.” Consequently, when enforcing AIA contracts, courts in New York should permit partial indemnification. ■

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