Louisiana UNDER CURRENTS

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NEW ANTI-INDEMNITY ACT FOR DESIGN PROFESSIONALS AND CONTRACTORS IN LOUISIANA: LA. R.S. 9:2780.1

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The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

During the 2010 Regular Session, Senate Bill No. 625 by Senator Martiny (R, Dist.10) and Representative Ligi (R, Dist. 79), was passed by the Louisiana State Legislature. Senate Bill No. 625 was signed by Governor Jindal on June 23, 2010, and became Act No. 492, effective August 15, 2010. Act No. 492 enacts La. R.S. 9:2780.1, which provides that certain types of indemnity and insurance provisions contained in construction contracts will be deemed invalid under Louisiana law. This new law applies prospectively only.

Basically, La. R.S. 9:2780.1 provides that parties who execute "construction contracts" after January 1, 2011, will only be allowed to assume responsibility for any damages arising from their own fault. La. R.S. 9:2780.1 further provides that these parties will not be required to furnish insurance/defense for the acts, omissions, or fault of others.

Specifically, La. R.S. 9:2780.1 provides:

*B. Notwithstanding any provision of law to the contrary, any clause, covenant, or agreement contained in, collateral to, or affecting a…**construction contract** which purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage arising from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control, is contrary to the public policy of this state and is **null, void, and unenforceable**.* (emphasis added).

C. Notwithstanding any provision of law to the contrary, any clause, covenant, or agreement contained in, collateral to, or affecting a…construction contract which purports to require an indemnitor to procure liability insurance covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control is null, void and unenforceable. However, nothing in this Section shall be construed to prevent the indemnitee from requiring the indemnitor to provide proof of insurance for obligations covered by the contract. (emphasis added).

This new anti-indemnity law will apply to design professional contracts. The term "construction contract" as defined by La. R.S. 9:2780.1 means:

Any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property, including any moving, demolition, or excavation..." (emphasis added).

However, the term "**construction contract**" shall NOT include any design, construction, alteration, renovation, repair, or maintenance of any road used to access oil and gas wells and associated facilities or oil or gas lines used in the transportation or production from oil and gas wells.

According to the testimony of Senator Martiny, and others, before the Senate Commerce Committee, this new law was enacted as part of a long line of tort reform. Senator Martiny explained that it was "patently unfair" to have provisions in contracts that force parties to indemnify others for damages that do not arise out of their own fault; and thus, that such provisions should be deemed against Louisiana's public policy. Senator Martiny further explained that twenty (20) other states have already enacted provisions similar to those found in La. R.S. 9:2780.1. Therefore, based on this testimony before the Senate Commerce Committee, the rationale behind the adoption of this new law is to make liability based solely upon one's fault.

There are two exceptions to this construction contract anti-indemnity act. La. R.S. 9:2780.1 is not intended to alter the provisions found in two other statutes which already contain anti-indemnity provisions for oil and gas work and public works contracts, La. R.S. 9:2780 (oil and gas) and La. R.S. 38:2195 (public contracts). Specifically, public entities are already prohibited from assuming liability for damages caused by others with whom the public entity contract.

With the adoption of La. R.S. 9:2780.1, architects and engineers, who execute contracts governed by Louisiana law, will no longer be strong armed into accepting contractual responsibility for damages caused by the fault of other parties, to provide professional services, pursuant to an indemnity clause. Additionally, architects and engineers will be prevented from insuring against the acts and omissions of other parties with whom they contract.

Not all indemnity is nullified, only indemnity for someone else's fault. Accordingly, an engineer can still be required by contract to indemnify an architect who is sued because the engineer's plans were negligently prepared.

This anti-indemnity act will have some impact on AIA standard form contracts. For example, §3.18 in the A201-2007 General Conditions includes language which purports to require a contractor to indemnify an Owner for damages arising out of the OWNER'S fault. That clause will become null in on January 1, 2011.

However, La. R.S. 9:2780.1 will have no effect on the insurance clause contained in current standard AIA agreements. The A201-1997 allowed the Owner to require the Contractor to purchase liability insurance for the Owner, Architect and Contractor (§11.3), but the 2007 version deleted that requirement and now says simply "the Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance (§11.2). Based on the testimony presented to the Senate Commerce Committee, any provisions requiring a contractor to carry builder's risk insurance (e.g., §11.3 in the A201-2007) will not be affected by this new law.

We do not anticipate this anti-indemnity act will affect Limitation of Liability clauses which many design professionals are inserting in their contracts. Those LOL clauses are recognized in a separate Civil Code article, and are treated differently than indemnity, even though both concepts attempt to contractually shift liability.

The indemnification clauses rendered null by this statute are fairly common, although not commonly used when problems arise on a project. Good lawyers are always looking for leverage and a clause which indemnifies someone for his or her own fault is usually good leverage. That leverage, however, will vanish in January.

A & S Commentary:

Even with the passing of the new law, it is important that you remember that indemnity clauses may still present problems. The best way to deal with these clauses is to delete them entirely, but if this cannot be accomplished, be sure that you only indemnify others for "damages" to the extent they arise from your negligence acts, errors or omissions.

One area of concern not specifically addressed by the new law, arises when another party asks you to indemnify them for their "cost and expenses, including reasonable attorney fees". The new law is not clear on how it will address these types of expenses. If you are found non-negligent, the law may protect you. However, if you are found to be negligent, insurers will not typically pay for these types of expenses incurred by others. Louisiana law does not recognize these items when determining "damages", therefore agreeing to this type of language creates a "contractual liability" that is normally excluded under professional liability insurance policies.