# A Contractor's Guide:
# Nebraska's Anti-Indemnity Statute

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## TABLE OF CONTENTS

## I. INTRODUCTION

Nebraska's anti-indemnity statute[1] is a source of concern for construction contractors looking to avoid risk and liability. The statute has the potential to render many agreements void as against public policy. Accordingly, construction contractors must be familiar with Nebraska's anti-indemnity statute; including its purpose, caselaw, and judicial interpretation. Moreover, understanding Nebraska's anti-indemnity statute allows contractors to better take advantage of the legal landscape. This Note seeks to provide contractors with the appropriate knowledge to navigate that landscape.

First, this Note provides a general background on pertinent construction trends including indemnity, anti-indemnity statutes, insurance, and the rising cost of litigation. These issues are paramount when understanding the purpose behind Nebraska's anti-indemnity statute. Also, these issues are important when understanding the statute's caselaw and judicial interpretation.

Second, this Note provides contractors with an understanding of how they can better protect themselves from Nebraska's anti-indemnity statute; by drafting provisions that comply with the statute's (1) purpose & prohibition, (2) scope & coverage, (3) insurance requirements, and (4) additional considerations. This Part seeks to provide a detailed analysis of these issues while also supplying sample provisions that comply with Nebraska's anti-indemnity statute. Moreover, this Part provides industry guidance when balancing the law with the desire to shift risk and liability.

## II. BACKGROUND

It is difficult for a contractor to navigate Nebraska's anti-indemnity statute without first understanding general industry trends; including indemnity, anti-indemnity statutes, insurance,

[1] NEB. REV. STAT. § 25-21,187(1).

and the rising cost of litigation. It is also important for a contractor to fully understand Nebraska's anti-indemnity statute. This Part seeks to provide a background of these issues.

### A. Indemnity

The success of any business depends on the management of risks. This is especially true in the construction industry where millions of workplace injuries occur every year.[2] In 2015, the construction industry accounted for 21% of all workplace fatalities while only accounting for 4% of the Nation's workforce.[3] Moreover, nearly every construction worker will have at least one work-related injury during their career.[4] Because of the inherent dangers, and subsequent liabilities created by doing business in construction, construction lawyers have constantly been tasked with finding new ways to mitigate liability.

Many construction contractors have used indemnity provisions to manage their liability.[5] In general, indemnity provisions shift liability from one contracting party to another.[6] For example, a subcontractor may agree to indemnify a prime contractor, owner, or other interested party for claims arising out of its work.[7] This contractual obligation protects the prime contractor, owner, and other party from any secondary liability that may arise from the subcontractor's own negligence.[8] As a result, the subcontractor is contractually obligated to pay for any claims or

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[2] Gregory D. Podolak & Tiffany Casanova, *Contractual Indemnity Anti-Indemnity Statutes and Additional Insured Coverage*, Brief, Summer 2018, at 30, 32.

[3] BUREAU OF LABOR STATISTICS, CONSTRUCTION, INDUSTRIES AT A GLANCE (last visited Feb. 2, 2019) https://www.bls.gov/iag/tgs/iag23.htm (illustrating 64% of all construction-related deaths were due to one of four causes: falls, struck by object, electrocution, and caught-in or between categories).

[4] SAFETY+HEALTH, CONSTRUCTION WORKERS EXPERIENCE HIGHER RATES OF INJURY, PREMATURE DEATH: STUDY, NAT'L SAFETY COUNCIL (last visited Feb. 8, 2019) https://www.safetyandhealthmagazine.com/articles/construction-workers-experience-higher-rates-of-injury-premature-death-study-2.

[5] Jeffrey M. Hummel & Z. Taylor Schulz, INDEMNIFICATION PRINCIPLES AND RESTRICTIONS ON CONSTRUCTION PROJECTS, CON. BRIEF NO. 2005-8 (2005).

[6] Podolak et al., *supra* note 2, at 31.

[7] William Allensworth, Ross J. Altman, Allen Overcash, & Carol J. Patterson, *Construction Law*, FORUM ON CONSTRUCTION LAW p. 263 (2009).

[8] *Id.*

damages that arise.[9] Thus, indemnity provisions have given contractors, owners, and designers an enormous incentive to use indemnity provisions-—shifting as much liability as possible.[10]

One of the most common ways to shift liability is to require one party to defend and reimburse another party against certain types of losses or expenses.[11] In this regard, there are generally three forms of indemnity provisions that are used: (1) broad form, including the sole negligence of the indemnitee, (2) intermediate form, including all but the sole negligence of the indemnitee, and (3) limited form, including only the negligence of the indemnitor.[12]

As a result, contractual indemnity has become very prevalent in construction contracts, including Master Service Agreements, Joint Venture Agreements, Work Orders, Purchase Agreements, and Real Estate Conveyances.[13] In fact, indemnity provisions have become so prevalent, that many standard provisions now exist for companies to use in their agreements.[14] Theses standard provisions have broadened indemnity to include a wide array of construction liability, such as environmental claims, personal injuries, property damage, regulatory compliance, and administrative penalties.[15]

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[9] *See* Kuhn v. Wells Fargo Bank of NEB., N.A., 278 Neb. 428, 436, 771 N.W.2d 103, 112 (2009) ("Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay."); Cerny v. Todco Barricade Co., 273 Neb. 800, 733 N.W.2d 877 (2007); Warner v. Reagan Buick, 240 Neb. 668, 483 N.W.2d 764 (1992).

[10] Hummel et al., *supra* note 5 ("For example, in theory, an owner could contractually require a contractor to indemnify the owner for all damages and losses incurred by the owner on a project, regardless of whether the owner was responsible for those damages and losses.").

[11] Dean B. Thomson and Colin Bruns, *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States*, THE AMERICAN COLLEGE OF CONSTRUCTION LAWYERS JOURNAL.

[12] *Id.*

[13] Cressinda "Chris" D. Schlag, *Indemnity for Environmental Damage: Methods for Structuring an Enforceable Indemnification Agreement for Environmental Claims and Liabilities*, 36 E. MIN. L. FOUND. § 8.03 (2015).

[14] *Id.*

[15] *Id.*

### B. Anti-Indemnity Statutes

In response to the potential unfairness of broad indemnity provisions, Nebraska[16] and 43 other states have enacted anti-indemnity statutes.[17] These statutes generally treat indemnity provisions in one of two ways: (1) the state prohibits indemnification for the indemnitee's sole negligence, or (2) the state prohibits indemnification for the indemnitee's sole or partial negligence.[18] Courts have consistently held that anti-indemnity statutes are enforceable and will void indemnity agreements that do not comply.[19] Provisions that do not comply are often struck down as against public policy.[20] In this context, public policy generally focuses on the scope of the indemnity provision and the degree to which it shifts liability.[21] However, public policy may vary from state-to-state.

Currently, there are seven states (and the District of Columbia) that have no anti-indemnity statute, or have a provision that applies only in limited circumstances.[22] These states include Alabama, Maine, Nevada, North Dakota, Pennsylvania, Vermont, Wisconsin, Wyoming, and the District of Columbia.[23] These states have resisted the trend to enact anti-indemnity statutes in the construction context.[24] However, this does not mean that all indemnity agreements are valid in these states.[25] Some courts have ruled against agreements that indemnify an indemnitee for its own

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[16] *See* NEB. REV. STAT. § 25-21,187 (limiting the liability that can be shifted by contractual indemnity).
[17] Schlag, *supra* note 13. *See e.g.,* Kegler Brown Hill & Ritter, *Anti-Indemnity Statutes in the 50 States*, FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC., (2013), http://www.keglerbrown.com/content/uploads/2013/10/ASA-Anti-Indemnity-Chart-2013.pdf.
[18] Thomson et al., *supra* note 11.
[19] Hummel et al., *supra* note 5.
[20] *Id*.
[21] Thomson et al., *supra* note 11.
[22] *Id*.
[23] *Id*.
[24] *Id.*
[25] *Id.*

negligence.[26] Conversely, some courts have allowed parties to indemnify for their own negligence, so long as the parties clearly manifest their intent in writing.[27]

By contrast, the majority of states have enacted one of two types of anti-indemnity statute. The first type of anti-indemnity statute voids indemnity provisions for losses or damages arising from the indemnitee's sole negligence.[28] There are fifteen states that have adopted sole negligence statutes; including Alaska,[29] Arkansas,[30] Georgia,[31] Hawaii,[32] Idaho,[33] Indiana,[34] Maryland,[35]

[26] *See e.g.,* City of Montgomery v. JYD Intern., Inc., 534 So. 2d 592, 594 (Ala. 1988) ("Agreements by which one party agrees to indemnify another for the consequences of the other's acts or omissions are carefully scrutinized," and such an agreement "is enforceable only if the indemnity provisions are unambiguous and unequivocal."); Emery Waterhouse Co. v. Lea, 467 A.2d 986, 993 (Me. 1983)("[W]hen purportedly requiring indemnification of a party for damage or injury caused by that party's own negligence, such contractual provisions, with virtual unanimity, are looked upon with disfavor by the courts, and are construed strictly against extending the indemnification to include recovery by the indemnitee for his own negligence."); George L. Brown Ins. v. Star Ins. Co., 237 P.3d 92, 97, 126 Nev. Adv. Op. No. 31 (Nev. 2010) ("[A] contract of indemnity will not be construed to indemnify a party against loss or damage resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."); Bridston by Bridston v. Dover Corp., 352 N.W.2d 194, 196, 18 Ed. Law Rep. 1047 (N.D. 1984) ("It is almost universally held that an indemnity agreement will not be interpreted to indemnify a party against the consequences of his own negligence unless that construction is very clearly intended."); Ocean Spray Cranberries, Inc. v. Refrigerated Food Distributors, Inc., 2007 PA Super 311, 936 A.2d 81, 83 (2007) ("[I]f parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification."); Tateosian v. State, 183 Vt. 57, 67, 2007 VT 136, 945 A.2d 833, 841 (2007) ("[A]n indemnity clause covers the sole negligence of the indemnitee only where it clearly expresses that intent."); Bialas v. Portage County, 70 Wis. 2d 910, 912, 236 N.W.2d 18, 19 (1975) ("This court has consistently upheld the validity of indemnity contracts . . . Such agreements are liberally construed when they deal with the negligence of the indemnitor, but are strictly construed when the indemnitee seeks to be indemnified for his own negligence."); Northwinds of Wyoming, Inc. v. Phillips Petroleum Co., 779 P.2d 753, 758 (Wyo. 1989) ("A contract of indemnity purporting or claimed to relieve one from the consequence of his failure to exercise ordinary care must be strictly construed. Accordingly, it is frequently stated as the general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it.").

[27] Thomson et al., *supra* note 11.

[28] Allen Holt Gwyn, Paul E. Davis, *Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law*, Constr. Law., Summer 2003, at 26.

[29] ALASKA STAT. § 45.45.900.

[30] ARK. CODE ANN. §§ 4-56-104, 22-9-214.

[31] GA. CODE ANN. § 13-8-2(B), (C).

[32] HAWAII REV. STAT. § 431:10-222.

[33] IDAHO CODE § 29-114.

[34] IND. CODE § 26-2-5-1, § 26-2-5-2.

[35] MD. CODE ANN. § 5-401.

Michigan,[36] New Jersey,[37] South Carolina,[38] South Dakota,[39] Tennessee,[40] Virginia,[41] and West Virginia.[42] Sole negligence statutes void contracts requiring the indemnitor to account for all losses based on the indemnitee's sole negligence.[43] Needless to say, these states have determined such agreements to be against public policy. Therefore, even if the indemnitee is 100% at fault, an agreement by one party to indemnify another party for its own sole negligence will be held invalid.[44]

The second form of anti-indemnity statute voids indemnity provisions for losses or damages arising from the indemnitee's sole or partial negligence.[45] There are twenty-seven states that prohibit sole and partial negligence; including Arizona,[46] California,[47] Colorado,[48] Connecticut,[49] Delaware,[50] Florida,[51] Illinois,[52] Iowa,[53] Kansas,[54] Kentucky,[55] Louisiana,[56]

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[36] MICH. COMP. LAWS § 691.991.
[37] N.J. STAT. ANN. §§ 2A:40A-1, 2A:40A-2.
[38] S.C. CODE ANN. § 32-2-10.
[39] S.D. CODIFIED LAWS § 56-3-18.
[40] TENN. CODE ANN. § 62-6-123. *But see* Posey v. Union Carbide Corp., 507 F. Supp. 39 (D. Tenn. 1980) (limiting the availability of additional insured coverage when the underlying contract between the named insured and additional insured violates the statute).
[41] VA. CODE ANN. § 11-4.1.
[42] Thomson et al., *supra* note 11.
[43] Hummel et al., *supra* note 5.
[44] Thomson et al., *supra* note 11.
[45] Gwyn et al., *supra* note 28, at 26.
[46] ARIZ. REV. STAT. §§ 41-2586, 34-226, 32-1159.
[47] CAL. CIV. CODE §§ 2782(a)–(b), 2782.05, 2783.
[48] COLO. REV. STAT. § 13-21-111.5.
[49] CONN. GEN. STAT. § 52-572k.
[50] DEL. CODE ANN. TIT. 6, § 2704. *See also* Chrysler Corp. v. Merrell & Garaguso, Inc., 796 A.2d 648 (Del. 2002) (explaining one party to a construction contract may not agree to indemnify the other party for the latter's own negligence, but the requirement to purchase insurance may or may not be unenforceable dependent on circumstances).
[51] FLA. STAT. § 725.06.
[52] 740 ILL. COMP. STAT. 35/1.
[53] IOWA CODE ANN. § 537A.5.
[54] KAN. STAT. ANN. § 16-121(b).
[55] KY. REV. STAT. ANN. § 371.180.
[56] LA. STAT. ANN. § 9:2780.1.

Massachusetts,[57] Minnesota,[58] Mississippi,[59] Missouri,[60] Montana,[61] Nebraska,[62] New Hampshire,[63] New Mexico,[64] New York,[65] North Carolina,[66] Ohio,[67] Oklahoma,[68] Oregon,[69] Rhode Island,[70] Texas,[71] Utah,[72] and Washington.[73] These statutes prohibit indemnity outright and only allow an indemnitor to indemnify an indemnitee to the degree of its own fault.[74] The indemnitor cannot be held liable for the indemnitee's negligence to any degree.[75]

Ultimately, these statutes reflect a belief that it is against public policy to require a non-negligent party to take responsibility for another party's negligence.[76] Although freedom of contract is a strong legal principle, potential unfairness could be created when a general contractor has the power to shift its own negligence to another party.[77] Furthermore, under these circumstances, there would be little incentive for a contractor to perform safely.[78] As a result, many

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[57] MASS. GEN. LAWS ch. 149, § 29C. *See also* Kelly v. Dimeo, Inc., 581 N.E.2d 1316 (Mass. App. Ct. 1991) (allowing full indemnity).
[58] MINN. STAT. § 337.01, § 337.02.
[59] MISS. CODE ANN. § 31-5-41.
[60] MO. REV. STAT. § 434.100.
[61] MONT. CODE ANN. §§ 28-2-2111, 18-2-124.
[62] NEB. REV. STAT. § 25-21,187(1).
[63] N.H. REV. STAT. § 338-A:1, A:2.
[64] N.M. STAT. ANN. § 56-7-1.
[65] N.Y. GEN. OBLIG. LAW §§ 5-322.1., 5-324.
[66] N.C. GEN. STAT. § 22B-1.
[67] OHIO REV. CODE ANN. § 2305.31.
[68] OKLA. STAT. TIT. 15, § 221.
[69] OR. REV. STAT. § 30.140.
[70] R.I. GEN. LAWS § 6-34-1.
[71] TEX. CIV. PRAC. & REM. CODE §§ 130.002(1), (2); 130.005 (stating that this chapter does not apply to the negligent acts of contractors); Foster, Henry, Henry, & Thorpe, Inc. v. J.T. Constr. Co. Inc., 808 S.W.2d 139, 141 (Tx. App. 1991) (finding that this statute only applies when the indemnification agreement requires indemnity for loss caused by the design professional, as opposed to the contractor).
[72] UTAH CODE ANN. §§ 13-8-1(1)–(3).
[73] WASH. REV. CODE § 4.24.115.
[74] James O'Connor, *Wrestling with Reform: Indemnification Agreements, the Statutory Bars, Promises to Procure, and Insurance Products for the Construction Industry*, No. 1 J. OF THE AM. C. OF CONSTRUCTION LAW. 4; Nebraska's statute aligns with this notion, reading, "In the event that a public or private [construction] contract . . . [seeks] to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable." NEB. REV. STAT. § 25-21,187.
[75] Thomson et al., *supra* note 11.
[76] *Id.*
[77] Hummel et al., *supra* note 5.
[78] *Id*.

states have enacted anti-indemnity statutes aimed at limiting the scope of indemnity provisions. More specifically, states have placed the financial responsibility of accidents and injuries on the party responsible, namely, the general contractor.[79] While the merits of this public policy may be debatable, anti-indemnity statutes have become more prevalent in the United States.[80]

### C. Insurance

In response, many contractors have attempted to circumvent anti-indemnity statutes by requiring their subcontractors name them, as "additional insureds" in insurance policies. Often, it is common in construction contracts to require all general contractors and subcontractors to carry contractual general liability (CGL) insurance.[81] A CGL policy will include payment for any defense, cost, settlement, or judgment arising out of a claim related to that party's work.[82] In addition, many states have allowed injured workers to sue a general contractor, even after successfully claiming worker's compensation from the subcontractor.[83] This liability is typically created when the general contractor hires a subcontractor and creates a vicarious responsibility.[84]

In this respect, the protected party is the "named insured" under the policy.[85] An "additional insured" is the one added to the named insured's CGL policy.[86] As an additional insured, the party is protected by the same CGL policy as the named insured.[87] Thus, a contractor may transfer its liability through a subcontractor's CGL policy.[88] The subcontractor pays for the policy, or in other

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[79] *Id*.
[80] Thomson et al., *supra* note 11.
[81] Trisha Strode, *From the Bottom of the Food Chain Looking Up: Subcontractors and the Full Costs of Additional Insured Endorsements*, CONSTR. L., Summer 2005, at 21.
[82] *Id.*
[83] Brian Cubbage, *Indemnity & Insurance Requirements from the Sub's Point of View*, CFMA: BUILDING PROFITS, May/June 2003, at 3, www.cfma.org/documents/Cubbage%20M_J%2003.pdf.
[84] John H. Mathias, Jr. & Timothy W. Burns, *General Contractor and Subcontractor's Insurers: The Additional Insured Provision*, 89 ILL. B.J. 526, 526 (Oct. 2001); Strode, *supra* note 81, at 22.
[85] *Id.*
[86] Thomson et al., *supra* note 11.
[87] *See id.*
[88] *Id.*

words, the insurance that protects the contractor.[89] This strategy is based on the notion that additional insured coverage is different than indemnity coverage, and that the procurement of insurance cannot be prohibited by an anti-indemnity statute.[90] Indeed, many courts have held that the requirements to procure insurance are distinct and different from the requirement to indemnify.[91]

Furthermore, additional insured contracts generally follow one of two forms, either a "standard" form, such as the Insurance Services Office (ISO) form,[92] or a "manuscript" form, created by an insurance company for a specific situation.[93] In a recent update, the ISO form added a "savings clause," meant to preserve additional insured provisions in lieu of an anti-indemnity statute:[94] The savings clause provides that insurance will be afforded to an additional insured "only . . . to the extent permitted by law."[95] As a result, the savings clause preserves an additional insured's contractual coverage, even if its indemnity provision is somehow rendered void or unenforceable because of an anti-indemnity statue.[96]

Although indemnity agreements and agreements to procure insurance have distinct and different requirements, many states have expanded their anti-indemnity statutes to prohibit additional insured status, as well.[97] However, given the ambiguities in many of anti-indemnity statutes, it is difficult to predict the results of the ISO standard provision in any given state.[98]

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[89] *See id.*
[90] *Id.*
[91] *See* Strode, *supra* note 81, at 21, 22.
[92] Monica L. Freeman, Recent Changes To ISO Standard Forms And Endorsements For Commercial General Liability Coverage, Neb. Building Chapter Resources (last visited Feb. 8, 2019) https://agcnebuilders.presencehost.net/resources/recentchangestoisostandardformsandendorsementsforcommercialgeneralliabilitycoverage.html ("On April 1, 2013, the Insurance Services Office, Inc. ("ISO") began implementing new Commercial General Liability ("CGL") forms and endorsements.").
[93] *See* Strode, *supra* note 81, at 21.
[94] Freeman, *supra* note 92.
[95] Shanda K. Pearson, *"THE TIMES THEY ARE A-CHANGIN"D' 2013 Revisions to ISO's Commercial General Liability Coverage Forms*, 55 No. 8 DRI For Def. 20 (2013).
[96] *Id.*
[97] Thomson et al., *supra* note 11.
[98] *Id.*

Nevertheless, unless a state's statute explicitly denies the procurement of additional insured coverage, the courts have generally upheld its use.[99]

### D. Increasing Rate of Litigation

As noted, indemnity agreements and agreements to procure insurance have become standard and common in the construction industry. The risks and liability of construction projects can also be quite great.[100] Accordingly, disputes over indemnity and insurance procurement have corresponded with an increased rate of litigation.[101] In this regard, the most common disputes are whether a party had an obligation to cover a specific claim, another party's conduct or actions, and the enforceability of specific language.[102]

One example of this type of litigation would be a dispute over the "arising out of" language commonly found in indemnity and insurance agreements.[103] This is illustrated in *Peter Kiewit Sons*

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[99] *Id.* "In the eight states that do not have anti-indemnity statutes, the insuring party's . . . 2013 ISO AI endorsement can cover another party's partial (but not sole) negligence, as there is no state law that prohibits such an agreement . . . [In the states] that prohibit broad form indemnity agreements for sole negligence, one (Arkansas) expressly provides that an agreement to name a party as an additional insured does not violate the statute. In addition, eight of these states include an insurance 'savings' clause which clarifies that the statute does not affect the validity of an agreement to procure insurance (or in some states, certain specified types of insurance contracts) . . . [In the states] that prohibit indemnity for sole and partial negligence, eighteen of them include an insurance "savings" clause, establishing which types of insurance contracts are saved or not affected (and more recently, some states clarify which types of clauses are not saved) by the anti-indemnity statute. Of [the] states [that] have express restrictions in their anti-indemnity statutes on clauses requiring a party to provide additional insured coverage for the AI's negligence." (internal citations omitted).

[100] *See* BUREAU OF LABOR STATISTICS, *supra* note 3 (showing in 2015, the construction industry accounted for 21% of all workplace fatalities while only accounting for 4% of the Nation's workforce); SAFETY+HEALTH, *supra* note 4 (nearly every construction worker will have at least one work-related injury during their career).

[101] *See generally*, Schlag, *supra* note 13 (as indemnity agreements and agreements to procure insurance become more prevalent, litigation over enforceability and scope has also increased).

[102] *See* Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc., 191 Neb. 50, 213 N.W.2d 731 (1974) ("The parties are presumed to intend that the indemnitee shall not be indemnified for a loss occasioned by his own negligence unless the language of the contract affirmatively expresses an intent to indemnify for such loss."); Union Pac. R. Co. v. Kaiser Agr. Chem. Co., 229 Neb. 160, 160, 425 N.W.2d 872, 874 (1988) ("An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts."); Ins. Co. of N. Am. v. Hawkins, 197 Neb. 126, 130, 246 N.W.2d 878, 881 (1976) ("Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee."). *See also*, Schlag, *supra* note 13.

[103] *See* Lawrence A. Steckman & James J. Cleary, Jr., *Construction Industry AIE's: Problems of Contract Interpretation and Solutions,* 65 DEF. COUNS. J. 78, 90 (1998).

*Co. v. O'Keefe Elevator Co.*, where the Nebraska Supreme Court examined an alleged indemnification agreement:

> The Subcontractor covenants to indemnify and save harmless and exonerate the Contractor and the Owner of and from all liability, claims and demands for personal injury and property damage *arising out of* the work undertaken by the Subcontractor, its employees, agents, its subcontractors, and *arising out of* any other operation no matter by whom performed for and on behalf of the Subcontractor.[104]

The court presumed that the language *arising out of* did not refer to an agreement that would indemnify the indemnitee for its own negligence because the contract did not affirmatively express that intent.[105] Of course, this was disputed by the parties in the case.[106] The court held: "[T]he contract is ambiguous and must be construed against the contractor who wrote it. So construed, the contract does not disclose a right in the contractor to recover for a loss occasioned by contractor's negligence."[107]

Thus, the *Peter Kiewit Sons* holding serves as a general example of why contractors must understand anti-indemnity statutes and caselaw. Moreover, it serves as an important example for why contractors must be weary of the specific language within their provisions.

## III. NEBRASKA'S ANTI-INDEMNITY STATUTE

Contractors can protect themselves from Nebraska's anti-indemnity statute by drafting indemnity provisions that comply with the statute's (1) purpose & prohibition, (2) scope & coverage, (3) insurance requirements, and (4) additional considerations. This Part seeks to provide a detailed analysis of these issues while also supplying sample provisions that comply with

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[104] Peter Kiewit Sons Co. v. O'Keefe Elevator Co., 191 Neb. 50, 53, 213 N.W.2d 731, 733 (1974) (internal citations omitted).
[105] *Id.*
[106] *Id.*
[107] *Id.* ("Even if the indemnity provision could be said to be ambiguous, it would necessarily have to be construed against the contractor who wrote it.").

Nebraska's anti-indemnity statute. Accordingly, this Part provides guidance for those practicing construction law in Nebraska.

### A. Purpose & Prohibition

Contractors must draft their indemnity provisions to comply with Nebraska's anti-indemnity statute. This means complying with the purpose and prohibition of that statute. The purpose of Nebraska's anti-indemnity statute is to render construction contracts void and unenforceable where one party shifts the risks and liabilities created by its own fault.[108] The hope, is that by prohibiting parties from contracting away their own negligence, they will be more mindful of their contractual performance, and create a safer workplace for their employees.[109] The purpose of Nebraska's anti-indemnity statute is accomplished by stating, "In the event that a . . . [construction] contract or agreement . . . contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such *person's own negligence*, then . . . [that contract or agreement] *shall be void as against public policy* and wholly unenforceable.[110]

The statute accomplishes its purpose by clearly providing that a person (or legal entity) cannot be indemnified for its own negligence.[111] However, the statute does not speak to creating a safer workplace. The statute only states that indemnity against a party's own negligence will be void as against public policy. Public policy, as articulated by the courts, is to create and encourage a safer workplace.[112] The courts made this conclusion by analyzing the statute's legislative history

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[108] *Id.* ("The purpose of anti-indemnity statutes is to prohibit avoidance by parties to construction contracts of all risks created by their own fault associated with contract performance, to require employers to provide employees with a safe place to work, and to preclude delegating to subcontractors such duty.").
[109] *See id.*; Greis Trucking & Excavating, Inc. v. Union Pac. R.R. Co., No. 8:12CV3160, 2013 WL 12108068, at *4 (D. Neb. May 28, 2013).
[110] NEB. REV. STAT. § 25-21,187(1) (emphasis added).
[111] *See id.*
[112] Kuhn v. Wells Fargo Bank of NEB., N.A., 278 Neb. 428, 445, 771 N.W.2d 103, 118 (2009).

and intent.[113] Thus, the statute prohibits indemnity for one's own negligence with the purpose of creating a safer workplace.[114]

Nebraska's anti-indemnity statute is not unique in this regard. In general, the purpose of anti-indemnity statutes is to prohibit the avoidance of parties in construction contracts to shift self-created liability.[115] This is also consistent with the idea of fairness.[116] For example, it would be considered unfair for one party to indemnify another: whereby after the agreement, the indemnitee neglects all safety precautions because it has no obligation to pay for the damages. This could also create a very dangerous construction workplace. Ultimately, this could create both unfairness and a dangerous workplace. This is the exact situation that the Nebraska anti-indemnity statute is aimed to prevent.

Accordingly, contractors must draft their indemnity provisions to exclude indemnification for an indemnitee's "own negligence." An example provision might read: "the Subcontractor's obligations under this paragraph expressly excludes only total liability created by the sole and exclusive negligence of the Contractor."[117] In this provision, the language is clear that the subcontractor will not be liable for the contractor's own negligence. This type of provision would comply with Nebraska's anti-indemnity statute and would almost certainly survive any level of judicial scrutiny.

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[113] *See id.*

[114] *Id.*

[115] *See id*. at 445. *See generally* 42 C.J.S. Indemnity § 9 (2007) ("The purpose of statutes making indemnity agreements in construction contracts void and unenforceable is to prohibit avoidance by parties to construction contracts of all risks created by their own fault associated with contract performance, to require employers to provide employees with a safe place to work, and to preclude delegating to subcontractors such duty." (internal citations omitted)).

[116] *See also* State ex rel. Wagner v. United Nat. Ins. Co., 277 Neb. 308, 314, 761 N.W.2d 916, 921 (2009) ("We have continuously upheld the freedom to contract. We have also stated that " ' "[i]t is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands" (internal citations omitted)).

[117] O'Connor, *supra* note 74.

### B. Scope & Coverage

Contractors must also draft their indemnity provisions to comply with the scope and coverage of Nebraska's anti-indemnity statute. The scope and coverage of Nebraska's anti-indemnity statute is limited to construction contracts with provisions indemnifying a party against its own negligence.[118] Thus, litigation surrounding Nebraska's anti-indemnity statute has largely been focused on two issues: (1) whether a party's actions were negligent, and (2) whether the contract or agreement was for 'construction' purposes.[119] Nebraska's anti-indemnity statute provides:

> In the event that a public or private contract or agreement for the *construction* . . . or other work dealing with *construction* . . . contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless *another person from such person's own negligence*, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable.[120]

First, negligence must be determined by a "finder of fact" before an indemnity provision can be challenged for breach.[121] For example, in *Union Pac. R. Co. v. Perrett Const., Ltd*., Union Pacific (UP) asserted that Perrett breached its construction contract when it failed to defend and indemnify UP.[122] However, the court stated that a finder of fact must first determine whether negligence had occurred before a breach of contract claim could be decided.[123] Thus, the court made clear that negligence must be determined by a finder of fact before Nebraska's anti-indemnity statute could be invoked.[124]

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[118] *See* Kuhn, 278 Neb. 428, 445–46, 771 N.W.2d 103, 118–19.
[119] *See id.*; Cole v. Kiewit Const. Co., No. A-95-1268, 1997 WL 412510, at *6 (Neb. Ct. App. May 20, 1997); Union Pac. R. Co. v. Perrett Const., Ltd., No. 8:11CV138, 2012 WL 2368822, at *5 (D. Neb. June 21, 2012); Hiway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc., 232 Neb. 763, 768, 443 N.W.2d 872, 875 (1989).
[120] NEB. REV. STAT. § 25-21,187(1).
[121] Union Pac. R. Co. v. Perrett Const., Ltd., No. 8:11CV138, 2012 WL 2368822, at *5 (D. Neb. June 21, 2012).
[122] *Id.*
[123] *Id.*
[124] *Id.*

In addition, to invoke Nebraska's anti-indemnity statute, the agreement must be for a construction purpose.[125] The statute's scope only covers agreements for "the *construction,* alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such *construction*."[126] However, Nebraska's anti-indemnity statute does not clearly define the boundaries of these terms. For example, is maintenance considered construction?[127] What about insurance for construction?[128] Is a property lease for construction—considered construction? [129] Unfortunately, there is limited caselaw to help us answer these types of questions. Thus, the full-scope of Nebraska's anti-indemnity statute remains open-ended.

However, the scope and coverage of the statute is limited to traditional construction-related parties, such as contractors, engineers, and architects.[130] At least, this was the determination of the Nebraska Supreme Court in *Kuhn v. Wells Fargo Bank of Nebraska*.[131] The court came to this conclusion by applying the intent of the unicameral when enacting the anti-indemnity statute.[132] In fact, that intent was specifically stated to "prohibit . . . *architects* and *engineers* of hold harmless clauses in *construction* contracts. . . "[133] Accordingly, the *Kuhn* court did not apply the anti-

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[125] *See* Kuhn v. Wells Fargo Bank of Nebraska, N.A., 278 Neb. 428, 444, 771 N.W.2d 103, 117–18 (2009).
[126] NEB. REV. STAT. § 25-21,187(1) (emphasis added).
[127] *See* Kuhn, 278 Neb. at 446 ("Based on those principles, and well-reasoned authority from other jurisdictions, we hold that "maintenance of a building," within the meaning of § 25–21,187(1), does not encompass the ordinary activities associated with management of commercial property. To hold otherwise would be to expand the scope of § 25–21,187(1) to void indemnity clauses in contracts well beyond the Legislature's intent.").
[128] Federated Serv. Ins. Co. v. All. Const., LLC, 282 Neb. 638, 648, 805 N.W.2d 468, 477 (2011) ("If an indemnity agreement is invalid under an anti-indemnity statute, then the insurer will not be liable for the subordinate party's contractual liability under the indemnity agreement. But even if an indemnity agreement is invalid, its invalidity does not affect the coverage extended to another party under an additional insured endorsement.").
[129] *See* Kuhn, 278 Neb. at 444 ("Authority is sparse regarding the application of such provisions to leases of real property. Some courts have, without much discussion, applied comparable statutes to real property leases.").
[130] Statement of Intent, L.B. 288, Banking, Commerce & Insurance Committee, 86th Leg., 1st Sess. (Feb. 26, 1979).
[131] *See* Kuhn, 278 Neb. at 443.
[132] *Id.*
[133] *Id*.; Statement of Intent, L.B. 288, Banking, Commerce & Insurance Committee, 86th Leg., 1st Sess. (Feb. 26, 1979) (emphasis supplied).

indemnity statute to a hold harmless agreement between a tenant and a landlord.[134] The court reasoned that the statute did not apply for two reasons: (1) the parties were non-traditional construction-related parties, and (2) maintenance of the building was not for construction purposes"[135] Although this ruling is consistent with the intent of the anti-indemnity statute, it also serves as an important reminder that legislative intent is a factor when interpreting statutory issues of scope and coverage.[136]

Accordingly, contractors must draft their indemnity provisions to be broad, including all construction related work. They must also recognize whether they are dealing with a traditional construction-related party. If they are not dealing with a traditional construction-related party, the anti-indemnity statute will not apply and the contractor may draft its provision without fear of the statute. However, assuming the party is a traditional construction-related party, an example provision might read: "The Subcontractor agrees to assume entire responsibility and liability for all damages or injury to all persons, and to all property, arising out of or in any manner connected with the execution of the Work under this Subcontract including suits and claims occurring both prior to and subsequent to the completion of the Subcontractor's work . . . and to the fullest extent permitted by law, the Subcontractor shall defend and indemnify the Contractor from all such claims . . . "[137] In this provision, the language is broadly drafted to include all construction related claims.[138] Again, this type of provision would comply with Nebraska's anti-indemnity statute and would almost certainly survive judicial scrutiny.

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[134] *See* Kuhn, 278 Neb. at 443.
[135] *Id.* at 446 ("'Maintenance of a building,' within the meaning of § 25–21,187(1), does not encompass the ordinary activities associated with management of commercial property.").
[136] Kuhn, 278 Neb. 428, 445, 771 N.W.2d 103, 118.
[137] O'Connor, *supra* note 74 (internal citations omitted).
[138] *Id.*

## C. Insurance

A contractor may be able to work around Nebraska's anti-indemnity statute by (1) requiring its subcontractors to name it as an additional insured on its subcontractors' Commercial General Liability (CGL) insurance policy and (2) requiring its subcontractors to obtain contractual liability insurance for injuries or damage by the contractor's own negligence.

**Additional Insured**: First, contractors can likely avoid the risk of an anti-indemnity statute by requiring subcontractors to name them as additional insureds on their subcontractors' GCL policy.[139]

> AI status provides independent rights to the promisee under the promisor's insurance coverage. Contractors operating in states that prohibit one party from indemnifying another party for that party's negligence often try to circumvent this problem by requiring the former to name the other party as an additional insured on the former's insurance policy. This strategy is based on the concept that additional insured coverage is different from indemnity and that agreements to procure insurance will not be subject to limitations otherwise applicable to indemnity agreements. While indemnity agreements and agreements to procure insurance contain separate and distinct requirements, many states' anti-indemnity statutes also address insurance agreements.[140]

Nevertheless, a promise to procure insurance and a promise to indemnify are sufficiently different in the eyes of the courts.[141]

Nebraska's anti-indemnity statute does not prohibit one party from requiring another to procure insurance and name it as an additional insured.[142] However, the additional-insured's coverage must not be "broader than that which [the named insured is] required . . . to provide" and will only apply "to the extent permitted by law."[143] Thus, the courts have evaluated contracts requiring the procurement of insurance by looking for clear and unequivocal language to suggest

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[139] Thomson et al., *supra* note 11 (Maryland's anti-indemnity statute is typical of a sole negligence statute reading).
[140] *See id*.
[141] Woods v. Dravo Basic Materials Co., Inc., 887 F.2d 618, 622 (5th Cir. 1989).
[142] *See* Federated Serv. Ins. Co. v. All. Const., LLC, 282 Neb. 638, 648, 805 N.W.2d 468, 477 (2011).
[143] Nicholas N. Nierengarten, *New Iso Additional Insured Endorsements*, Brief, Fall 2014, at 30, 33–34.

such an agreement. If the contract suggests that the procurement of insurance will be for indemnity purposes, it will be void. This may seem like a splitting of hairs, but it is consistent with both Nebraska's anti-indemnity statute and long-held principles of freedom to contract.

An example of this bifurcation is found in *Anderson v. Nashua Corp*.[144] In *Anderson*, the Court examined Nebraska's anti-indemnity statute and its application to agreements requiring the procurement of insurance.[145] The court first examined an earlier holding, *Hiway 20 Terminal, Inc. v. Tri–County Agri–Supply, Inc.*, where the court found an agreement requiring the subcontractor to procure insurance to *indemnify* the general contractor for the general contractor's own negligence to be "clearly invalid by application of § 25–21,187."[146] In contrast, the *Anderson* agreement did not require the procurement of insurance for *indemnification,* and thus, was valid.[147] In reaching this conclusion, the court placed an exclamation point on the importance of contractual language. Most importantly, the court upheld the freedom of contract in regard to insurance obligations.[148] However, the court also made a point to explicitly prohibit any language suggesting indemnity within those insurance obligations.[149]

After determining a valid agreement to procure insurance, the court explained that "a party to a construction contract (the promisee) may require a subordinate party (which could be a general contractor or subcontractor) to insure losses caused by the promisee's own negligence in two circumstances: if the contract contains (1) express language to that effect or (2) clear and unequivocal language shows that that is the intention of the parties."[150] Furthermore, once a valid agreement requiring procurement is established, and a valid additional insured agreement is

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[144] *See* Anderson v. Nashua Corp., 251 Neb. 833, 837–38, 560 N.W.2d 446, 449 (1997).
[145] *Anderson*, 251 Neb. at 837–38.
[146] *Id*.; Hiway 20 Terminal, Inc. v. Tri–County Agri–Supply, Inc., 232 Neb. 763, 443 N.W.2d 872 (1989).
[147] *Anderson*, 251 Neb. at 838.
[148] *See id.*
[149] *See id.*
[150] Federated Serv. Ins. Co. v. All. Const., LLC, 282 Neb. 638, 646, 805 N.W.2d 468, 475 (2011).

established, the additional insured has "the same coverage rights and obligations as the principal insured under the policy."[151] The court went on to explain:

> The main reason for including this requirement is so that the promisee of the additional insured agreement will not be limited to the coverage that the insurer owes for the subordinate party's contractual liability under an indemnity agreement in the construction contract. If an indemnity agreement is invalid under an anti-indemnity statute, then the insurer will not be liable for the subordinate party's contractual liability under the indemnity agreement. But even if an indemnity agreement is invalid, its invalidity does not affect the coverage extended to another party under an additional insured endorsement.[152]

In other words, if the additional insured agreement clearly and unequivocally expresses the parties' intent to insure against tort liability for negligence, the agreement will be upheld as valid. Accordingly, the court concluded that the language of the parties' agreement illustrated an intent for the policy to include insurance for claims arising out of the subcontractor's operations, even if the injury or damage was caused by the contractor's own negligence, and that the insurer's coverage of the contractor's negligence did not exceed the terms of the agreement.[153]

Therefore, contractors must draft their indemnity provisions to include express, clear and unequivocal language, that makes their intentions clear. An example provision might read: " . . . and to the fullest extent permitted by law, the Subcontractor shall defend and indemnify the Contractor from all such claims, including without limitation claims for which the Contractor may be or may be claimed to be liable . . . " or "including without limitation claims for which the Contractor may be or may be claimed to be liable by reason of its own independent negligence . . . "[154] This type of provision makes clear that the intention of the provision is to require the procurement of insurance, *not* to indemnify the contractor. Thus, the contractor

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[151] *Federated Serv. Ins. Co.*, 282 Neb. at 647.
[152] *Id.* at 648 (internal citations omitted).
[153] Union Pac. R.R. Co. v. Colony Nat'l Ins. Co., No. 8:13CV84, 2016 WL 1676699, at *6 (D. Neb. Apr. 26, 2016).
[154] O'Connor, *supra* note 74 (internal citations omitted).

becomes an additional insured on the subcontractor's general contractual liability coverage—protecting itself from liability.

**General Contractual Liability Insurance**: Second, contractors can likely avoid risk created by Nebraska's anti-indemnity statute by requiring subcontractors to obtain contractual liability insurance, thus, underwriting the indemnity provision requiring it to assume tort liability. The purpose of contractual liability insurance is to cover the tort liability of third parties assumed by the named insured—specifically indemnification agreements.[155] Contractual liability coverage creates an exception to the anti-indemnity statute that has been increasingly recognized by developing caselaw.[156]

> The rationale for this exception is that as the liability is no longer imposed on the party with inferior bargaining power, the original rationale for the rule is no longer served, so an exception is called for. Thus, in many jurisdictions, the indemnitee should be able to enforce the contract provision requiring indemnification for a liability arising from the indemnitee's sole negligence as long as the contract also requires the indemnitor to maintain contractual liability coverage.[157]

To obtain the benefit of the indemnitor's contractual liability coverage, the indemnitee must prove: (1) an enforceable indemnification agreement; (2) timely tender of the defense of the third-party lawsuit to the indemnitor; (3) that the indemnitee's actions for which it was sued fall within

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[155] *See e.g.*, Wielinski & Jack P. Gibson, Broad Form Property Damage Coverage, pp. 38–41 (International Risk Management Institute 1992).

[156] *See* McAbee Const. Co. v. Georgia Kraft Co., 178 Ga. App. 496, 343 S.E.2d 513, 515 (1986); Bosio v. Branigar Organization, Inc., 154 Ill. App. 3d 611, 107 Ill. Dec. 105, 506 N.E.2d 996 (2d Dist. 1987); Heat & Power Corp. v. Air Products & Chemicals, Inc., 320 Md. 584, 578 A.2d 1202 (1990); Kinney v. G.W. Lisk Co., Inc., 76 N.Y.2d 215, 557 N.Y.S.2d 283, 556 N.E.2d 1090 (1990); K.L.M.N.I., Inc. v. 483 Broadway Realty, 117 A.D.3d 654, 987 N.Y.S.2d 316 (1st Dep't 2014); Malecki, Insuring Sole Fault Indemnity, in Malecki on Insurance, Sept 1995, at 1, 4; Parkerson, The Enforceability of Broad Form Hold Harmless Clauses, in Risk Report, Mar 1994, at 1, 7–8. *But see* Certain London Market Ins. Companies v. Pennsylvania Nat. Mut. Cas. Ins. Co., 106 Fed. Appx. 884 (5th Cir. 2004) (Miss. law); Posey v. Union Carbide Corp., 507 F. Supp. 39 (M.D. Tenn. 1980); People v. Nogel, 137 Ill. App. 3d 392, 92 Ill. Dec. 1, 484 N.E.2d 516 (4th Dist. 1985); Motor Vehicle Cas. Co. v. GSF Energy, Inc., 193 Ill. App. 3d 1, 140 Ill. Dec. 233, 549 N.E.2d 884 (1st Dist. 1989); Hurlburt v. Northern States Power Co., 549 N.W.2d 919 (Minn. 1996); Pennsylvania Nat. Mut. Cas. Ins. Co. v. Associated Scaffolders and Equipment Co., Inc., 157 N.C. App. 555, 558, 579 S.E.2d 404, 407 (2003); City of Wilmington v. North Carolina Natural Gas Corp., 117 N.C. App. 244, 450 S.E.2d 573 (1994).

[157] Contractual liability coverage may circumvent anti-indemnity statutes, Insurance Coverage of Construction Disputes § 10:16 (2d ed.).

the scope of the parties' indemnification agreement; and (4) damages, which would include defense expenses and any amounts paid by way of settlement or award.[158] It has been firmly established that contractual liability coverage is intended to protect the indemnitee from third party claims.[159] However, the coverage will not be triggered if the indemnity provision is void because of an anti-indemnity statute.[160] The idea being, if the indemnity provision is unenforceable, then there is no way to trigger the contractual liability coverage.[161]

Thus, contractors should require a promise to procure general contractual liability insurance.[162] Moreover, they should include a clause in their indemnity agreement that requires the indemnitor to procure insurance to insure the indemnity obligation.[163] Lastly, contractors should include a separate insuring obligation without reference to the indemnity obligation.[164] This separate obligation would constitute an independent obligation that requires the subcontractor to purchase an insurance product that covers the contractor for its own negligence.[165] An example of this provision might read: "The Subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage as will insure the provisions of this paragraph including 'completed operations' coverage, and other contractual indemnities assumed by the Subcontractor in this Subcontract."[166] This language requires the subcontractor to procure insurance and insure the indemnity portions of the provision. Thus, the provision provides a contractor with a potential work-around of Nebraska's anti-indemnity statute.

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158 O'Connor, *supra* note 74.
159 *Id*.
160 *Id*. *See also e.g.*, Gotro v. Town of Melville, 527 So. 2d 568 (La. Ct. App. 3d Cir. 1988); DiPietro v. City of Philadelphia, 344 Pa. Super. 191, 496 A.2d 407 (1985).
161 O'Connor, *supra* note 74.
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.*

### D. Additional Considerations

Three additional considerations for contractors include (1) limitations on the amount of transferability liability, (2) the preservation of the duty to defend, and (3) choice of law provisions.

**Limitations:** Contractors should be aware that they likely cannot get around Nebraska's anti-indemnity statute by limiting the amount of transferable liability. Although caselaw is sparse, a question remains as to whether an indemnity agreement can limit the amount of liability transferred to a party and still be valid. For example, if an indemnity agreement places a cap on damages for negligent behavior—has it complied with the scope and intent of Nebraska's anti-indemnity statute? At least one court has said no.[167] In an unreported case, *Omaha Cold Storage Terminals, Inc. v. The Hartford Ins. Co.*, the U.S. District Court for the District of Nebraska held that a party could not limit the liability of its negligence by transferring it to another and complying with Nebraska's anti-indemnity statute.[168] The court concluded that any and all acts that purport to limit a party's liability for its own negligent acts have violated Nebraska's public policy and anti-indemnity statute.[169] Thus, it appears that clever contractors cannot simply cap the liabilities they shift and still comply with Nebraska's anti-indemnity statute.[170]

**Duty to Defend:** Contractors may consider drafting a separate provision to expressly preserve the duty to defend and distinguish it from its indemnity provision. Some states (e.g. Iowa) specifically provide that an agreement to indemnify *or defend* another for its own negligence is

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[167] Omaha Cold Storage Terminals, Inc. v. The Hartford Ins. Co., No. 8:03CV445, 2006 WL 695456 (D. Neb. Mar. 17, 2006).

[168] *Id.*; Richard F. Paciaroni and Janet M. Serafin, *Anti-Indemnity Statutes: A Threat to Limitation of Liability Clauses?*, K&L GATES CONSTRUCTION LAW (Dec. 1, 2007), https://www.klconstructionlawblog.com/2007/12/anti-indemnity-statutes-a-threat-to-limitation-of-liability-clauses/.

[169] *Id.*

[170] *See also* GGA-PC v. Performance Eng'g, Inc., No. 8:16CV567, 2017 WL 2773532, at *3 (D. Neb. June 26, 2017); ("The Nebraska Supreme Court has held that public policy prevents a party from limiting its damages for gross negligence or willful and wanton misconduct."); New Light Co. v. Wells Fargo Alarm Servs., 525 N.W.2d 25, 30–31 (Neb. 1994) (balancing the parties' right to contract against the protection of the public); Ploen v. Union Ins. Co., 573 N.W.2d 436, 443 (Neb. 1998) (determining whether a contract violates public policy is a question of law).

unenforceable as against public policy.[171] However, many anti-indemnity statutes do not mention the duty to defend.[172] Nebraska is one of those states.[173]

> The duty to defend is broader than the duty to indemnify in three ways: (1) the duty to defend extends to every claim that "arguably" falls within the scope of coverage; (2) the duty to defend a claim may effectively create a duty to defend all claims; and (3) the duty to defend can exist regardless of the merits of the underlying claims.[174]

Because the duty to defend is distinct from the duty to indemnify, it is possible that the duty to defend can survive an anti-indemnity statute even when the indemnity provision of the contract is rendered unenforceable.[175] However, some courts have ruled that if a provision indemnifying a party from its own negligence is unenforceable as against public policy, then so too is the duty to defend against that party's own negligence.[176] At the moment, this has not been a problem for

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[171] *See* ARIZ. REV. STAT. §§ 32-115934-22641-2586; ARK. CODE §§ 4-56-10422-9-214; CAL. CIV. CODE § 2782.05; GA. CODE ANN. § 13-8-2; IOWA CODE ANN. § 537A.5; MONT. REV. CODE ANN. § 28-2-2111; N.M. STAT. ANN. § 56-7-1; OKLA. STAT. tit. 15, § 221; UTAH CODE ANN. § 13-8-1.

[172] *See e.g.*, Wooddale Builders, Inc. v. Maryland Cas. Co., 722 N.W.2d 283, 302 (Minn. 2006) ("It is axiomatic that the duty to defend is broader than the duty to indemnify.") (internal citations omitted); Durant v. North Country Adirondack Co-op. Ins. Co., 24 A.D.3d 1165, 1166, 807 N.Y.S.2d 427, 429 (3d Dep't 2005) ("It is well established that an insurer's duty to defend is much broader than the duty to indemnify and will arise whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy or where the insurer has actual knowledge of facts establishing . . . a reasonable possibility of coverage.") (internal citations and quotations omitted); Ferreira v. Beacon Skanska Const. Co., Inc., 296 F. Supp. 2d 28, 33 (D. Mass. 2003); Westlake Vinyls, Inc. v. Goodrich Corp., 518 F. Supp. 2d 918, 936 (W.D. Ky. 2007); Crawford v. Weather Shield Mfg. Inc., 44 Cal. 4th 541, 79 Cal. Rptr. 3d 721, 187 P.3d 424, 430–32 (2008); Tateosian v. State, 183 Vt. 57, 2007 VT 136, 945 A.2d 833, 838 (2007); St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc., 256 Or. 576, 475 P.2d 69, 71 (1970); City of Albuquerque v. BPLW Architects & Engineers, Inc., 146 N.M. 717, 2009-NMCA-081, 213 P.3d 1146, 1150 (Ct. App. 2009); English v. BGP Intern., Inc., 174 S.W.3d 366, 372 n.6, 162 O.G.R. 954 (Tex. App. Houston 14th Dist. 2005); Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Haw. 286, 944 P.2d 83, 88–89 (Ct. App. 1997).

[173] *See* NEB. REV. STAT. § 25-21,187(1) (Nebraska's statute does not mention the duty to defend).

[174] O'Connor, *supra* note 74.

[175] Riordan v. John T. Callahan & Sons, Inc., 10 Mass. L. Rptr. 642, 1999 WL 1203922 (Mass. Super. Ct. 1999); Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 786–87, 667 N.E.2d 907, 914 (1996).

[176] Thomson et al., *supra* note 11. *See* Frazier v. Columbia Gas Development Corp., 605 F. Supp. 200, 201 (W.D. La. 1985) ("Columbia cannot be indemnified for their own negligence. This is clearly against public policy. Likewise, requiring Consolidated to defend Columbia for its own negligence is equally against public policy."); Keech v. Chrysler Corp., 2000 WL 33113957 (Del. Super. Ct. 2000), *decision aff'd in part, rev'd in part on other grounds*, 796 A.2d 648 (Del. 2002) ("But, an insurer has no duty to defend if the claims made are clearly outside the coverage. A corollary to this last principle is that the duty to defend is discharged, if the duty to indemnify is void because it violates public policy."); Best v. Energized Substation Service, 1994 WL 440471 (Ohio Ct. App. 9th Dist. Lorain County 1994) ("[A] duty to defend is distinct from a duty to indemnify. However, even though these two duties are distinct, they are not mutually exclusive . . . [I]f there is no possibility of coverage under the policy for the actions

contractors in the state of Nebraska. Therefore, a contractor may want to preserve the duty to defend by making clear that it exists not only as a part of the duty to indemnify, but as a separate contractual obligation.[177]

**Choice of Law:** Contractors may also consider drafting a choice of law provision to invoke a more favorable and predictable statutory rule. Many construction contracts include choice of law provisions. However, they are rarely drafted to pinpoint a jurisdiction's interpretation of indemnity.[178] According to Dean B. Thomason and Colin Bruins;

> The various anti-indemnity statutes that could apply to a party, contract, or dispute introduce a great deal of uncertainty to any risk management plan. One way to obtain greater certainty, and avoid or take advantage of certain anti-indemnity statutes, would be to contractually specify a choice of law that invokes a predictable and favorable statutory rule. A most favorable jurisdiction clause is often used for this purpose. But for some well-known caveats, choice of law provisions tends to be generally enforceable. The issue becomes more complicated, however, because several anti-indemnity statutes contain provisions that require, somewhat circularly, that the anti-indemnity statute be applied to claims to which the statute applies. Whether such statutes will control the disposition of a claim filed in another state could be subject to constitutional challenge and will probably be subject to normal choice of law analysis.[179]

Contractors may want to include a choice of law provision that considers indemnity. For example, a contractor based in Omaha, Nebraska, is more likely familiar with Nebraska's laws and procedures. Although Nebraska's anti-indemnity statute is not the most favorable to indemnity provisions, it does allow for a contractor to be named as an additional insured.[180] By allowing a contractor to be named as an additional insured on a subcontractor's insurance, the contractor can almost certainly circumnavigate Nebraska's anti-indemnity statute.[181] Indeed, in *Anderson v.*

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filed against [the insured], it follows that [the insurer] has no duty to defend those actions.") (internal quotations omitted).

[177] *Id*.

[178] Choice of law provisions, 3 Bruner & O'Connor Construction Law § 10:19.

[179] Thomason et al., *supra* note 11 (internal citations omitted).

[180] NEB. REV. STAT. § 25-21,187.

[181] Anderson v. Nashua Corp., 251 Neb. 833, 560 N.W.2d 446 (1997).

*Nashua Corp*., the Nebraska Supreme Court held that even though an indemnity provision is invalid, it does not affect the coverage extended to another party as an additional insured.[182] Consequently, the contractor may want to consider including a choice of law provision to invoke a more favorable and predictable statutory environment, like Nebraska.

### E. Severance

Contractors should compartmentalize their indemnity agreements in case a particular portion runs afoul with Nebraska's anti-indemnity statute. If an indemnity agreement is found to have violated Nebraska's anti-indemnity statute, the provision will be void as against public policy.[183] However, provisions of the agreement that do not violate the statute will remain valid.[184] "Under Nebraska law, only the portion prohibited by section 25–21,187 is stricken from the indemnification clause and the language remaining may be interpreted to impose liability on the indemnitor."[185] Accordingly, the determination of validating or striking various provisions within a construction agreement requires a case-by-case analysis.[186] If the indemnity agreement is compartmentalized, the invalid portion of the agreement can be easily severed. If the agreement is not compartmentalized, it may be harder for the courts to sever the provision, and therefore, may strike down the entire agreement. Thus, it is important for contractors to draft indemnity agreements that compartmentalize provisions that could potentially run afoul with Nebraska's anti-indemnity statute.

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[182] *Id*. at 840. *See* 36 Construction Contracts Law Report 19.
[183] *See* NEB. REV. STAT. § 25-21,187(1).
[184] *See* Hiway 20 Terminal, Inc. v. Tri–County Agri–Supply, Inc., 232 Neb. 763, 443 N.W.2d 872, 875–76 (1989).
[185] Day v. Toman, 266 F.3d 831, 835 (8th Cir. 2001).
[186] Osborne v. City of Atkinson, No. CI00-93, 2001 WL 34034968, at *6 (Neb. Dist. Ct. July 12, 2001) ("Because the facts here fall within the scope of the statute, the indemnity clause cannot be enforced. This rule applies even though the indemnity clause, in another factual situation, might encompass liability for conduct outside the statute and be enforceable in that context.").

## IV. CONCLUSION

Contractors must carefully comply with Nebraska's anti-indemnity statute in order to shift risk and liabilities. In doing so, contractors must have an understanding of general construction industry trends and how they impact and apply to Nebraska's anti-indemnity statute. First, contractors must have a general understanding of pertinent construction issues including indemnity, anti-indemnity statutes, insurance, and the rising cost of litigation. These issues are paramount to understanding the purpose behind Nebraska's anti-indemnity statute. These issues are also important when understanding its caselaw and judicial interpretation. Second, contractors can protect themselves from Nebraska's anti-indemnity statute by drafting indemnity provisions that comply with the statute's (1) purpose & prohibition, (2) scope & coverage, (3) insurance requirements, and (4) additional considerations. Thus, this Note shows that contractors can balance their interests in shifting risk and liability while still complying with Nebraska's anti-indemnity statute.