Top Negotiated and Litigated Clauses in Construction Contracts

10/13 (8:30-10AM) - Earn up to 1.8 CLE Credits. Full Credits: NJG (1.8); NYPN (1.5); PAS (1.5).

Track: Civil Procedure

Speakers:

Moderator/Speaker:
Lisa Lombardo, Esq., Gibbons PC

Speakers:
Daniella Gordon, Esq., McCarter & English, LLP
William H. Mergner, Jr., Esq., Past President, New Jersey State Bar Association, Leary Bride Mergner & Bongiovanni P.A.

Description:

The seminar will provide an overview of the most commonly litigated and negotiated terms in construction contracts with a focus on the following terms from the perspective of the Owner, Contractor, Construction Manager and Subcontractor:

- No Damage for Delay
- Risk transfer through Contractual Indemnity and Additional Insureds
- Liquidated Damages
- Limitation of Damage
- Waiver of Consequential Damages
- Pay if Paid/Pay when Paid
- Unforeseen Conditions
- Material Price Increases/Volatility

Top Negotiated and Litigated Clauses in Construction Contracts

October 13, 2025 8:30-10:00

Moderator: Lisa Lombardo (Gibbons P.C.)

Presenters: Daniella Gordon (McCarter & English, LLP)

William H. Mergner, Jr. (Leary, Bride, Mergner & Bongiovanni, P.A.)

No Damage for Delay

Example 1: "The Contractor shall be entitled to an extension of time for delays beyond its control but shall not be entitled to any payment or compensation of any kind for damages resulting from such delays.

Example 2: "To the extent permitted under Paragraph 8.3.1, and provided Contractor has provided Initial Written Notice and the documentation required in Section 8.3, an extension in the Contract Time shall be the sole remedy of the Contractor for any (1) delay in the commencement, prosecution or completion of the Work, (2) hindrance or obstruction in the performance of the Work, (3) loss of productivity, or (4) acceleration, stacking of trades, home office overhead, expectant underrun, season change, extended overhead, impact damages, profit upon damages for delay (5) other similar claims (collectively referred to as "Delays") whether or not such Delays are foreseeable, unless a Delay is caused by (a) changes in the Work under Article 7 hereof, or (b) acts of the Owner constituting material interference with the Contractor's performance of the Work ("Owner-Caused Delays"). In no event shall the Contractor be entitled to any compensation or recovery of any damages in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, lost productivity/efficiency costs, impact damages or other similar remuneration; however, for Owner-Caused Delays Contractor may request direct costs for labor, materials, equipment, and jobsite overhead caused by Owner-Caused Delays. The Owner's exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling or correction of the Work), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as material interference with the Contractor's performance of the Work."

Effect of such clauses

- Forces contractor to waive monetary compensation for delays caused by other parties, and to absorb potentially devastating costs.
- Common examples of unrecoverable damages:
  - Increased labor, material, or equipment costs;
  - Additional project management or administrative costs;
  - Loss of productivity and acceleration costs; and
  - Extended general conditions.

No Damage for Delay Clauses Not Enforceable in Public Contracts

2A:58B-3.

"Public entity" means this State or any department, public authority, public agency, public commission or any instrumentality of this State authorized by law to make contracts for the making of any public work, but shall not include any county, municipality or instrumentality thereof.

"Contractor" means a person, his assignees or legal representatives, with whom a contract with a public entity is made.

b. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, to which a public entity is a party, relative to the construction, alteration, repair, maintenance, servicing or security of a building, structure, highway, roadway, railroad, appurtenance and appliance, including moving, demolition, excavating, grading, clearing, site preparation or development of real property connected therewith, purporting to limit a contractor's remedy for delayed performance caused by the public entity's negligence, bad faith, active interference, or other tortious conduct to an extension of time for performance under the contract, is against public policy and is void and unenforceable.

c. Nothing in this section shall be deemed to void any provisions in a contract, agreement or purchase order which limits a contractor's remedy for delayed performance caused by reasons contemplated by the parties nor shall the negligence of others be imputed to the State.

d. Nothing in this section shall be deemed to void any provision in a contract, agreement or purchase order which requires notice of delays, provides for arbitration or other procedures for settlement or provides for liquidated damages.

Note: If delay on public project is caused by party *other than* the public entity, such clauses may be enforced.

No Damages for Delay Clauses *Are* Enforceable in Private Commercial Contracts, but Note Exceptions.

- A simple mistake, error in judgment, lack of effort, or failure to exercise complete diligence by the owner generally will not be enough to invalidate the clause.
- Even where a no damage for delay clause is included in a contract, it will not be enforced if the delays are the benefiting party's bad faith, active interference, fraud or misrepresentation.

Risk transfer through Contractual Indemnity and Additional Insureds

- See attached handout “Analyzing Claims for Contractual Indemnification Insurance Law Institute”

Liquidated Damages

Liquidated damages clause is an agreed upon predetermined amount of money that must be paid in the event of a breach and serves as a reasonable estimate of the likely damages.

- A liquidated damages clause must meet two main criteria, which are assessed at the time the contract was made:
  1. Damages are difficult to estimate. The actual damages resulting from a breach must be difficult or impossible to calculate accurately.
  2. The amount is a reasonable forecast. The stipulated amount must be a reasonable forecast of the just compensation for the harm caused by the breach

Reasonableness:

- A reasonable estimate is based on a good faith effort to estimate in advance what the actual damage will be from a breach.
- An unreasonable penalty is a fixed amount designed as a punishment to prevent a breach and is not permitted and a court may refuse to enforce it.

Additional Considerations:

- **UCC contracts**: New Jersey's Uniform Commercial Code (UCC) for contracts involving the sale of goods also recognizes the validity of liquidated damages provisions, as long as they are reasonable in light of the anticipated harm.
- **Construction contracts**: In construction projects, liquidated damages are often assessed for project delays. These clauses are generally enforceable as long as they represent a reasonable approximation of damages.
- **Drafting guidance**: To increase the likelihood of enforceability, parties drafting a contract should document and reflect their intent that the clause serves as a reasonable pre-estimate of damages, not a penalty.

New Jersey Decisions

- **Westmount Country Club v. Kameny, 82 N.J. Super. 200 (App. Div. 1964)** LD clause upheld when amount bore a reasonable relation to anticipated loss.
- **Wasserman's Inc. v. Township of Middletown, 137 N.J. 238 (1994)** The New Jersey Supreme Court invalidated a lease provision that required a tenant to pay substantial sums upon early termination, finding the clause punitive rather than compensatory. The Court underscored that liquidated damages must bear a reasonable relationship to the anticipated actual loss and cannot provide the non-breaching party with a windfall.
- **MetLife Capital Financial Corp. v. Washington Ave. Associates, L.P., 159 N.J. 484 (1999)** This case remains the controlling authority. The Court upheld a commercial lease clause requiring additional rent upon tenant default. It clarified that enforceability turns on whether the stipulated damages were reasonable at the time of contract formation, especially in transactions involving sophisticated commercial parties. The Court distinguished Wasserman's as involving public policy concerns in a municipal lease context.

Waiver of Consequential Damages

- What Are Consequential Damages? Unique or special damages; unforeseeable at the time the contract was entered into; indirect damages that do not flow directly or immediately from the act of the party, but only from some of the consequences or results of such act.
- Origin of Waiver Clauses: New Jersey Supreme Court's decision in Perini Corp. v. Greate Bay Hotel & Casino, 129 N.J. 479 (1992). In that case, the owner of a casino was awarded over $14.5M in lost profits against the general contractor hired to manage its casino renovation project. The general contractor's fee for the project, by comparison, was $600,000.
- Contract forms:
  - AIA: Mutual waiver of consequential damages, with examples of cd's - loss of management or employee productivity or of the services of such persons; damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit other than anticipated profits.
  - Consensus Doc: Limited waiver of consequential damages where the Parties agree to waive consequential damages except for liquidated damages, damages covered by contractually required insurance, and other mutually agreed item(s) that are filled in the form.
- Advantages/ Disadvantages From Owner, Contractor and Designer's Individual Perspectives? Typically the types of damages waived by the owner, and which the owner may incur, are broader than what the general contractor and designers waive against the owner. As such, arguably the owner is giving up more with this waiver than the contractor or design professional.
- Common Carveouts: Exceptions for gross negligence, willful misconduct or fraud, claims covered by insurance and third party indemnity claims.

Pay-if-Paid/Pay-when-Paid

Pay-if-paid clauses are enforceable in construction contracts but require clear and unequivocal language stating that payment to the subcontractor is contingent on the general contractor receiving payment from the owner. A pay-when-paid clause, in contrast, simply dictates the timing of payment but does not make it conditional.

Pay-if-Paid vs. Pay-When-Paid

- **Pay if paid:** This clause makes the subcontractor's payment *conditional* upon the general contractor receiving payment from the owner. The risk of the owner's non-payment is shifted to the subcontractor.
- **Pay-when-paid:** This clause deals only with the *timing* of payment; payment is due within a reasonable time, even if the general contractor hasn't been paid by the owner. It does not make payment conditional.

Enforceability in New Jersey

- Clear and Unambiguous Language: The key factor for enforcing a pay-if-paid clause in New Jersey is that the contract language must clearly and unequivocally state that payment from the owner is a condition precedent to the general contractor's duty to pay the subcontractor.
- No Unfairness or Unconscionability: The New Jersey Appellate Division in JPC Merger found that a clear pay-if-paid clause is neither unfair, unconscionable, nor against public policy.
- Contractor's Actions Matter: Even with a clear pay-if-paid clause, a general contractor cannot rely on it to avoid payment if their own conduct (actions or inactions) caused the owner to withhold payment.

New Jersey Decision

JPC Merger Sub LLC v. Tricon Enterprises, Inc., 474 N.J. Super. 145 (App. Div. 2022) New Jersey Appellate Division ruled that "pay-if-paid" clauses in construction contracts are enforceable in New Jersey. The court held that these clauses are valid as long as they contain clear and unambiguous language showing the parties' intent to make payment from the project owner a condition precedent to the general contractor's obligation to pay the subcontractor.

Unforeseen Conditions

Examples:

- Subsurface: Encountering rock where soft soil was indicated, or a higher-than-expected water table.
- Hidden Debris: Unearthing buried debris or unsuitable fill that was not identified in available data.
- Contamination: The presence of unexpected hazardous materials.
- Structures: Finding previously unknown structures or obstructions below the surface.

Local Public Contracts

40A:11-16.7 - Changed conditions clauses for certain local public contracts.

- “As used in this subsection, "differing site conditions" mean physical conditions at the contract work site that are subsurface or otherwise concealed and which differ materially from those indicated in the contract documents or are of such an unusual nature that the conditions differ materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract.”
- Note various notice and inspection provisions of the Statute.
- Entitlement under Statute to equitable price adjustment. If denied, perform and pursue claim.

Private Projects

AIA Document A201-2017 (General Conditions), 3.7.4 Concealed or Unknown Conditions:

- If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents, or (2) unknown physical conditions or an unusual nature that differ materials from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially, and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment on the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

"Type I" conditions pertain to "subsurface or otherwise concealed physical conditions, which differ materially from those indicated in the contract documents." I.e., inaccuracies in the plans, specifications, test borings, soil reports or other contract documents.

"Type II" conditions pertain to "unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the contract documents." This does not require an inaccuracy in the contract documents. Less common than Type I.



Material Price Increases/Volatility

Impact:

- Delays in supply chain.
  - Steel, aluminum, lumber, copper, concrete, dry wall.
  - Other electric components.
- In a GMP contract, the contractor must usually absorb these fluctuations and increases.
- Owners, on the other hand, may face more exposure in cost plus agreements.

Contract provisions:

- Force majeure clauses – do not assume that they will cover market fluctuation due to tariffs. Commercial impracticability is not commercial impossibility.
- Price adjustment clauses – e.g., if price fluctuates between a certain range, responsibility remains with the contractor; if it increases or decreases beyond a certain threshold, cost is shared.
- Allow for time adjustments.

LEARY BRIDE MERGNER & BONGIOVANNI, P.A.

ANALYZING CLAIMS FOR CONTRACTUAL INDEMNIFICATION
INSURANCE LAW INSTITUTE

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I. Indemnification Generally

In sophisticated construction relationships the written contracts among owners, general contractors and subcontractors almost universally incorporate some form of an indemnity agreement which seeks to transfer the risks of property damage and bodily injury claims from the legally culpable party to others, such as lower tier subcontractors. Similar indemnity obligations are found in contracts between property owners and contractors performing services (e.g., snow removal, security, maintenance work, etc.) and in numerous other types of relationships (e.g. product suppliers and manufacturers, principals and agents, sporting organizations and participants, etc.) These indemnification agreements are frequently coupled with insurance requirements that include (1) an obligation to obtain contractual liability insurance coverage, and (2) obligations to name the owner and/or general contractor as an additional insured.

Contractual indemnification is an extension of the historical concept of common-law indemnity pursuant to which a vicariously liable tortfeasor, without any active fault, was entitled to seek indemnification from the party who actually caused the damages. The most typical circumstance giving rise to common-law indemnity claims exists in product liability actions in which the supplier of a product in the distribution chain can be held vicariously liable to the plaintiff for any design defects, but is entitled to obtain common-law indemnification from the product manufacturer who actually designed and manufactured the product. See Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 80 (1960); Harley Davidson Motor Co. v. Advance Die Casting, Inc., 150 N.J. 489 (1997) Contractual indemnification is the attempt to expand the common-law indemnification doctrine beyond these relatively narrow circumstances.

New Jersey courts have consistently enforced indemnification clauses with the recognition that there is no public policy impediment to contractually transferring such risks, including indemnifying an indemnitee for its own fault. See Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 192 (App. Div.), certif. denied, 151 N.J. 466 (1997); Mautz v. J.P. Patti Co., 298 N.J. Super. 13 (App. Div.) certif. denied, 151 N.J. 472 (1997). The one exception to this comes from the Legislature, which has declared that any agreement in a construction contract to indemnify a party for its own *sole negligence* (i.e. 100%) is void as a matter of law. N.J.S.A. 2A:40A-1 & -2. There is no similar prohibition in non-construction contracts and the statutory prohibition does *not* apply to governmental entities or railroads, which can be indemnified for their own sole fault. N.J.S.A. 2A:40A-3.

In many states, parties are permitted to pursue 'first-party' contractual indemnification claims against an indemnitor for their own damages, rather than being limited to indemnification for claims brought against the them by another, i.e. a 'third-party' claim only. Such first party claims arise, for example, when a property owner asserts its own claims of property damage against an indemnitor, rather than identifying a claim it is defending against that has been brought against them by another party. New Jersey does not recognize such first party "contractual indemnification" claims. Investors Sav. Bank v. Waldo Jersey City, LLC, 418 N.J. Super. 149, 159 (App. Div. 2011); Travelers Indemnity Co. v. Dammann & Co., Inc., 592 F.

Supp. 2d 752, 766-67 (D. N.J. 2008), aff'd, 594 F.3d 238 (3d Cir. 2010) New Jersey limits a party's contractual indemnity obligation to another to those circumstances when the putative indemnitee is being sued by another party, e.g. indemnifying an owner against a claim made by an injured worker, defending a general contractor against a claim of property damage asserted by an owner, etc. (but not "indemnifying" an owner for its own property damage claim). Such claims are governed by standard tort principles and the allocation of fault based upon each party's relative culpability. See N.J.S.A. 2A:15-5.3 *et seq.* (Comparative Negligence Act) and N.J.S.A. 2A:53A-1 *et seq.* (Joint Tortfeasors and Contribution Law)

If a facially valid indemnity obligation appears to exist, the first substantive step is to assess whether or not the clause has been triggered and applies to a given circumstance. That depends upon the actual language used in the clause, but typically such clauses are triggered in one of two ways: (1) when the conduct or negligence of the indemnitor 'causes' or contributes to the accident (often referred to in the case law as a 'narrow form' clause), or (2) when the accident simply 'arises out of' or 'relates to' the work of the indemnitor (often referred to as a 'broad form' clause). In the first type of clause, the indemnity obligation is only triggered when there is actual negligence attributable to the conduct of the indemnitor, including most often through the conduct of the employee-plaintiff. (e.g. the indemnity obligation would *not* likely be triggered by material falling from a structure and striking the plaintiff) In the second type of clause, the indemnity obligation is simply triggered by the employer's presence on the work site (e.g. the indemnity obligation *would* likely be triggered in the preceding example). See Leitao, *supra*, at 193; Vitty, *infra*.

If an indemnity clause has been triggered, the next step in the analysis is to determine the scope of the indemnity obligation, including whether the clause indemnifies for an indemnitee's own fault (as opposed to just the indemnitor's fault) and whether defense costs and counsel's fees may be owed to the putative indemnitee.

II. Indemnification for an Indemnitor's/Employer's Fault ('*Partial Indemnity*')

In the construction setting, the general contractor will typically agree to indemnify the owner and then the general contractor will then incorporate indemnification agreements into its written contracts with various subcontractors requiring indemnification of the general contractor and the owner. In perhaps the most common type of accident in which indemnification claims arise, the plaintiff is an employee of one of the subcontractors who sues the project owner, general contractor and others, however the plaintiff's employer is immune from suit by virtue of the exclusivity of the Workers' Compensation Act (including cross-claims for contribution by defendants). N.J.S.A. 34:15-8.

Most standard indemnity provisions, including those in AIA form contracts, successfully obligate the plaintiff's employer to indemnify the general contractor and owner for the *subcontractor/employer's negligence* and overcome the prohibition of the Workers' Compensation bar (i.e. partial indemnity). That is because indemnity provisions are generally interpreted like all other contractual terms in which a court seeks to discern the intent of the parties from reasonable construction of the language of the contract itself. See Vitty v. D.C.P. Corp., 268 N.J. Super. 447 (App. Div. 1993); Ramos v. Browning Ferris Indus., 103 N.J. 177, 191 (1986)

When an indemnification clause only indemnifies for the indemnitor's fault (e.g. such as the liability of the plaintiff's employer, who would otherwise be protected by the workers' compensation bar), the issue becomes how that liability gets allocated. In New Jersey, the employer's contractual indemnification obligation for the employer's share of fault *cannot* be allocated in the same proceeding by the same fact-finder as the other alleged tortfeasors because of how the Workers' Compensation bar has been construed. The liability allocation can only take place in a separate proceeding, though New Jersey appellate courts have deferred to the trial courts to formulate a case-by-case approach for the most appropriate way of doing so. (e.g. a contemporaneous proceeding with a separate fact-finder, a subsequent proceeding with the same or a different fact finder, etc.) See Kane v. Hartz Mountain Indus., Inc., 278 N.J. Super. 129, 145 (App. Div. 1994) aff'd o.b., 143 N.J. 141 (1996); See also D'Avila v. Hugo Neu, 442 N.J. Super. 80 (App. Div. 2015)

As a result of this sequencing of the litigation involving an indemnity claim against an employer, several strategy issues come into play that can be exploited both from the perspective of the indemnitee/general contractor and the indemnitor/employer. Perhaps most significantly, a direct-defendant general contractor that is entitled to indemnification from the plaintiff's employer will have to be prepared to pay a settlement with the plaintiff up front, or be willing to take the case to verdict, before it is then able to go after the employer to collect on the indemnity obligation (i.e. pay and chase). This will be true even when the general contractor bears minimal liability for the incident and the reserve set for the general contractor reflects that modest exposure. It also means, if discovery progresses significantly, that the plaintiffs will spend the entire litigation (including through depositions and expert reports) focusing almost exclusively on the negligence of the general contractor – which largely does the proverbial bidding of the indemnitor/employer in the subsequent action and can help to reduce their ultimate exposure.

A. Recovery of Attorneys' Fees and Costs Against an Indemnitor

As an initial matter, it is significant to note that while litigation costs (transcript expenses, filing fees, etc.) may be recoverable as a component of an indemnity clause's defense obligation, any obligation to actually reimburse a party for "attorneys' fees" (which make up the vast majority of any 'expense' claim) must be explicitly provided for, or such fees are not indemnifiable. Mantilla v. N.C. Mall Assoc., 167 N.J. 262 (2001); Bradford v. Kupper

Associates, 283 N.J. Super. 556, 585 (1995); North Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 569-570 (1999) It is therefore always important to review the clause and ensure that 'attorneys' fees" are specifically set forth, or it is likely that they will not be recoverable. (If 'attorneys fees' are not provided for, it is also likely that expert billing will also not be recoverable as an 'expense'.)

Even if attorneys' fees are provided for (as is often the case), if an indemnity agreement is not sufficiently specific to provide indemnification for a party's own negligence or fault, it will also be found insufficient to require a defense to be provided to that putative indemnitee. In other words, if a party is not entitled to be indemnified for its own fault, it is also not entitled to counsel fees in defending against plaintiff's claims. (Note: partial or proportional counsel fees are not awarded in New Jersey.)

In a significant wrinkle in the case law, however, it is important to keep in mind that a putative indemnitee who *is found to be completely free of fault* (i.e. 0% liable) has a very good argument to obtain reimbursement of all defense costs and attorneys fees incurred in defending against plaintiff's claims. See Mantilla, *supra*; Kieffer v. Best Buy, 205 N.J. 213 (2011). In Mantilla and Kieffer, the Supreme Court adopted an 'after-the-fact' approach and held that a party is entitled to reimbursement of all defense costs and counsel fees if it is later found to be *free of fault*, even when the clause does *not* indemnify for the indemnitee's own fault. This conclusion was reached on the theory that upon such a finding of no liability, it is reasonable to conclude that the indemnitee was never truly defending against claims of its own independent fault and, hence, its recovery of defense costs is consistent with the partial indemnity obligation.

The potential to owe defense costs (and significant attorneys' fees) to an indemnitee who is later found to be free of fault raises some complex discovery strategy issues for a potential indemnitor. Such issues may not arise routinely in the context of a general contractor (who is often a litigation target whom bears some degree of fault), but they are not uncommon in the context of a property owner, construction manager, architect, or other defendant who may have had limited involvement in site safety responsibilities and, hence, has minimal liability exposure. If a plaintiff does not seek to establish liability on such a potential indemnitee during discovery (through depositions or served expert reports) and yet they remain in the case, or if plaintiffs settle with the general contractor on the eve of trial, the indemnitor/subcontractor needs to be in a position to attribute fault to that party in order to avoid the potential attorney's fee obligation – even though such parties may ordinarily wish to work together to avoid attributing any fault among such defendants during discovery. These circumstances necessitate early development of a discovery and settlement strategy that includes, potentially, working out an agreement with the potential indemnitee which waives defense cost claims in exchange for promise not to serve a liability expert report attributing fault to such party.

There is a final potential caveat to this analysis. An unpublished Appellate Division case appears to make it much more difficult in the typical case to recover counsel fees when the indemnitee is found to be free of fault. In Franchini v Beverly Hills Terrace Condo Assoc., A-

6221-10T2 (App. Div. August 27, 2012; unpublished) the Court held that when the plaintiff specifically pleads claims that would factually establish the independent fault of the indemnitee, then attorneys' fees are not recoverable because the indemnitee is defending against claims of its own independent fault (even if it does so well, and obtains a 'no cause'). This is a nuanced and developing area of the law and the recent court opinions addressing this issue turn on the very specific indemnification language used and specific manner in which the claims have been plead.

III. Indemnification for an Indemnitee's Own Fault ('*Complete Indemnity*')

In the last 30 years, general contractors and owners have sought to shift liability for property damage and bodily injury claims to lower tier subcontractors not just for the subcontractor's share of its own fault, but to obligate the subcontractor to indemnify for the *general contractor's and owner's* share of fault (i.e. complete indemnity).[1] However, unlike an indemnity obligation for the indemnitor's fault, an indemnity agreement attempting to indemnify another party *for its own negligence* must express that intention in 'clear and unequivocal' terms. See Ramos v. Browning Ferris Industries, Inc., 103 N.J. 177 (1986); Azurak v. Corporate Property Investors, 347 N.J. Super. 516 (App. Div. 2002). That is because there is a deeply rooted common-law principle in New Jersey that parties are responsible for their own fault. Blazovic v. Andrich, 124 N.J. 90 (1991); See also N.J.S.A. 2A:53A-1 *et seq, supra.*

The language typically relied upon in indemnity contracts in New Jersey to indemnify a party for its own fault has almost always been a variation of the language interpreted by the appellate court in Leitao, *supra*. The clause in that case provided for indemnification of the indemnitee "regardless of whether it (the injury) is caused in part by a party indemnified hereunder".[2] Most attorneys and courts still look to this specific language and the Leitao opinion
to discern if the indemnity language is broad enough to indemnify for one's own fault. (Note

[1] As noted previously, N.J.S.A. 2A:40A-1 & -2 precludes indemnity in favor of a party that is solely at fault.

[2] The clause in Leitao provided that:

> The subcontractor/vendor shall indemnify and hold harmless [the general contractor] and all of its agents and employees from and against all claims, damages, losses, and expenses, including attorney's fees arising out of or resulting from the performance of the subcontractor/ vendor's work under this purchase order, **provided that any such claim**, damage, loss or expense a) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than work itself), including the loss of use resulting therefrom, and b) **is caused in whole or in part by any negligent act or omission of the subcontractor/ vendor** or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless of whether it is caused in part by a party indemnified hereunder.**

that general prefacing language which requires the contractor to 'assume all risks' or to indemnify 'to

the fullest extent of the law' are *insufficient* to 'clearly and unambiguously' express an intention to indemnify for one's own fault. See Meder v. Resorts Int'l Hotel, 240 N.J. Super. 470, certif. den. 121 N.J. 608 (1990); Mantilla v. NC Mall Associates, 167 N.J. 262 (2001))

New Jersey has more recently undergone a significant and potentially seismic shift which arises out of a little-appreciated Appellate Division case from several years ago: Englert v. The Home Depot, 389 N.J. Super. 44 (App. Div.) certif. den. 192 N.J. 71 (2007). The case ostensibly dealt with insurance coverage provisions in the contracts among the parties and is also cited for the proposition – now well established – that contracts with multiple indemnity clauses that have *in*consistent obligations do not entitle a party to indemnification for its own fault (even if one of the clauses purports to do so). See also Meder v.Resorts Int'l Hotel, Inc., 240 N.J. Super. 470, 479-80 (App. Div. 1989)

Importantly, the appellate court in Englert held that the '*regardless of*' phrase – which had previously been found to be sufficiently clear and unambiguous to indemnify a party for its own fault (e.g. Leitao) – does *not create* an indemnity obligation in favor of the indemnitee. Rather, it simply *eliminates* the common-law proscription (discussed in section I., *supra*) that a party could not be indemnified if it was at all at fault (even 1%). This analysis would apply to any phrasing (not just the specific 'regardless of' phrase) that can reasonably be construed to have the same meaning. Although the holdings of Englert and Leitao are essentially in conflict, the inherent logic of the Englert court's analysis is difficult to overcome – particularly considering the strictness with which indemnity provisions are interpreted. We have used this exact argument to prevail in summary judgment motions on three separate occasions at the trial court level, including before one judge who was recently elevated to the appellate court.

For the last 25+ years there has essentially been no appellate court decision in New Jersey in which any indemnification clause has been found to be sufficiently clear and unambiguous to entitle a party to be indemnified for its own fault, extending from before Ramos (1998) through after Englert (2007). More recently, however, the Appellate Division came out with a decision in January, 2013 in Sayles v G&G Hotels, Inc., 429 N.J. Super. 266 (App. Div. 2013) in which it did find an indemnity clause sufficiently clear to indemnify a party for its own fault. It remains to be seen how broadly this opinion gets read, or how limited to its particular clause it is ultimately construed, but what seems certain is that Sayles is the first case in a very long time that now provides putative indemnitees a reasonable opportunity to argue that they should be indemnified for their own fault.

In Sayles, the Appellate Division addressed a clause that was substantively similar to the one addressed in Englert - but also different in a potentially meaningful way. Rather than providing that the indemnity obligation applied "regardless of whether" or not the negligence was caused by the indemnitee, the clause provided that the indemnity obligation was effective "*including when*" the negligence of the indemnitee is alleged or proven.[3] The Court was very clear in reaching its decision that it was not at all critical of Englert or any of its earlier law (and in fact cited it approvingly), but rather that it viewed the 'including' language as meaningfully different and broader than the 'regardless of' phrase. It must be said, however, that a good argument could have been made that the two clauses are substantively identical, but the court noted that it found the narrow arguments actually advanced by G&G in its briefing 'crabbed' and 'faulty'. As it stands now, the 'including' language actually employed in Sayles is sufficient in New Jersey to indemnify a party for its own fault - though the phrasing is not particularly common and has never been used in any of the recent iterations of the AIA form contracts (unlike the more common Englert clause).

It must also be added, however, to emphasize the inherent hazards and continuing changes to this area of the law, that less than one year ago the Appellate Division decided the case D'Avila v. Hugo Neu, 442 N.J. Super. 80 (App. Div. 2015). It is an opinion that is directed almost entirely to analyzing the right of an employer to participate in the underlying tort trial in certain 'complex' matters (in the discretion of the trial judge), creating an 'exception' to the bright-line rule of Kane v Hartz Mountain, *supra*, which forbade such practice. Tangentially, the opinion also very briefly and superficially touched upon the indemnity clause at issue in the case and concluded that a 'regardless of' language (like that addressed in Leitao, *supra*) was sufficient to indemnify a party for its own fault. Oddly, while the case essentially directly contradicts its sister panel in Englert - which held that the 'regardless of' clause was legally insufficient to indemnify a party for its own fault - the D'Avila court did so without even discussing or citing to Englert. (We know from the submitted legal briefs that we obtained that Englert was in fact argued to the Court, which makes its avoidance of the directly contradictory opinion all the more perplexing). The result is that there are, technically, contradictory appellate opinions out there that can be used to push a result in a certain direction, depending upon the sophistication of the adversary, the Court, and the particular language employed in the clause.

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[3] [G&G shall] indemnify, defend and hold [HJI] harmless, to the fullest extent permitted by law, from and against all Losses and Expenses, incurred by [HJI] in connection with any... claim... related to or arising out of any transaction, occurrence or service at or in conjunction with the operation of the Facility, any breach of violation of any contractor or any law... or any act, error or omission (active or passive) of, [G&G]... ***including when the active or passive negligence of [HJI] is alleged or proven***. (emphasis added)

IV. Interaction of Contractual Indemnification and 'Additional Insured' Coverage

While the focus on the indemnity clauses of a contract is important to analyze the insured's ultimate exposure, it should be remembered that these principles of law *do not* apply to the interpretation of an insurer's duty to provide indemnity and a defense pursuant to a policy of insurance on which the owner/general contractor has been named as an "additional insured". Occasionally, from the insurer's standpoint, policy language may serve to moot the question of an indemnity obligation, if the terms of the policy make that "additional insured" coverage primary on a given loss. Nevertheless, indemnity clauses can practically function very differently from a risk transfer through additional insured status.

In a fairly typical example involving a large-loss exposure, a subcontractor may be obligated to obtain primary additional insured general liability coverage in favor of a general contractor (which it then does, e.g. for $1 million). The general contractor will also likely have its own primary general liability and excess policies (e.g. for $1 million/ $10 million). If the injury value exceeds the limits of the additional insured coverage available to the general contractor, and the subcontractor is significantly or primarily liable for the incident, the indemnification clause represents the only means available to have the loss in excess of those additional insured limits paid out of the subcontractor's excess insurance policy – rather than the general contractor's primary and excess insurance policies.

V. Conclusion

In the context of construction industry bodily injury claims, an unenforceable indemnity clause leaves a general contractor in a particularly difficult position. It is exposed to liability vis-à-vis the plaintiff based upon a general contractor's non-delegable duty to provide a safe work environment. At the same time the employer, who may be primarily liable for the incident, cannot be sued due to the worker's compensation bar. As a result, enforceable insurance coverage obligations and a clear indemnity agreement are the only means of shifting responsibility to the primarily culpable entity.

If drafted correctly, a contractual indemnity clause can also be used to compel lower tier subcontractors to pay any judgment obtained against a general contractor, owner or other party based upon the indemnitee's percentage of allocated fault, as well as all costs and fees incurred in defending the action. In order to trigger the date for the reimbursement of such defense costs, a tender seeking acceptance of the defense and indemnification of the insured – on both an insurance coverage and contractual indemnity basis – should go out to the potential indemnitors and their insurance carrier as soon as possible once a claim has been asserted or filed.

LEARY BRIDE MERGNER & BONGIOVANNI, P.A.

APPENDIX

I. Case Law Bullet Points

- Landowner or contractor has non-delegable duty to exercise reasonable care to render work site reasonably safe for employee of independent contractor. Rodriguez v. Elizabethtown Gas Co., 104 N.J. Super. 436 (App. Div. 1969); Kane v. Hartz Mountain Industries, 278 N.J. Super. 129 (App. Div.), affirmed, 143 N.J. 141 (1996)

- No public policy impediment exists to indemnify for indemnitee's own negligence up to, but not including, the indemnitee's sole fault. Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 192 (App. Div.), certif. denied, 151 N.J. 466 (1997); Mautz v. J.P. Patti Co., 298 N.J. Super. 13 (App. Div.) certif. denied, 151 N.J. 472 (1997); N.J.S.A. 2A:40A-1 & -2.

- Indemnification of third party by an employer pursuant to an express contract is permissible. Intention to indemnify for indemnitee's own negligence must be expressed in clear and unequivocal terms. Ramos v. Browning Ferris Industries, 103 N.J. 177 (1986); Azurak v. Corporate Prop. Investors, 347 N.J. Super. 516 (App. Div. 2002) affirmed 175 N.J. 110 (2003)

- Third party actions against employers for contribution and common-law indemnification are prohibited. N.J.S.A. 34:15-8. Arcell v. Ashland Chem. Co., Inc., 152 N.J. Super. 471 (Law Div. 1977) The only exception is when plaintiffs are seeking to overcome the workers' compensation bar by asserting a claim for an 'intentional wrong'. Laidlow v. Hariton Machinery, 170 N.J. 602, 613 (2002)

- New Jersey does not recognize 'first party' claims for contractual indemnification seeking recovery for an indemnitee's own damage claim. Only claims that are based on potential third-party liability owed to another are considered claims for 'indemnification'. Investors Sav. Bank v. Waldo Jersey City, LLC, 418 N.J. Super. 149, 159 (App. Div. 2011); Travelers Indemnity Co. v. Dammann & Co., Inc., 592 F. Supp. 2d 752, 766-67 (D. N.J. 2008), aff'd, 594 F.3d 238 (3d Cir. 2010)

- Even though a promise to indemnify for sole negligence is unenforceable in the construction context, the remainder of the indemnity agreement is valid. A promise to indemnify for 99% negligence may be enforced. Secallus v. Muscarelle, 245 N.J. Super. 535 (App. Div. 1991)

- The statutory limitation that a party cannot be indemnified for its own sole fault is assessed in the context of all potentially culpable parties (including the plaintiff). It is not based upon whether or not their is 'sole' fault on the part of the indemnitee in relation to the contractual indemnitor. Vitty v. D.C.P. Corporation, 268 N.J. Super 447, 457 (App. Div. 1993)

- If the indemnity clause is insufficiently specific to require indemnity for the indemnitee's own negligence, it also is insufficiently specific to require a defense be provided to the indemnitee for defending against claims of their own negligence. Mantilla v. N.C. Mall Assoc., 167 N.J. 262 (2001)

- Even if an indemnification clause is insufficient to indemnify a party for its own fault, if that party is not found to be at fault then it may still be entitled to recover all of its incurred defense costs. Mantilla v. N.C. Mall Assoc., 167 N.J. 262 (2001); Kieffer v. Best Buy, 205 N.J. 213 (2011); but see Franchini v Beverly Hills Terrace Condo Assoc., A-6221-10T2 (App. Div. August 27, 2012; unpublished)

- General prefacing language which requires the contractor to 'assume all risks' or to indemnify 'to the fullest extent of the law' are *insufficient* to 'clearly and unambiguously' express an intention to indemnify for one's own fault. See Meder v. Resorts Int'l Hotel, 240 N.J. Super. 470, certif. den. 121 N.J. 608 (1990); Mantilla v. NC Mall Associates, 167 N.J. 262 (2001))

- Multiple indemnity clauses that indemnify inconsistently create a *per se* ambiguity and preclude indemnification for one's own negligence. Meder v.Resorts Int'l Hotel, Inc., 240 N.J. Super. 470, 479-80 (App. Div. 1989); Englert v. The Home Depot, 389 N.J. Super. 44 (App. Div.) certif. den. 192 N.J. 71 (2007)

- Contrary to the early holding of Doloughty, the law does not recognize "broad form" indemnity agreements which purport to indemnify for any claim "arising out of the work" as sufficient to provide indemnity to the indemnitee for their own negligence. The language must specifically provide such indemnity, or it will not be found. Azurak v. Corporate Prop. Investors, 347 N.J. Super. 516 (App. Div. 2002) affirmed 175 N.J. 110 (2003)

II. Analysis of Major Cases and Trends Over The Last 15 Years

MAUTZ v. J.P. PATTI CO.

In Mautz v. J.P. Patti Co., 298 N.J. Super. 13 (App. Div. 1997) an injured employee of a sub-contractor brought an action against the general contractor, an equipment manufacturer and the seller of the equipment. The general contractor brought a third party claim against its sub-contractor (plaintiff's employer) for contractual indemnification. The Appellate Division interpreted Section 11.11.1 of the "Standard Form of Agreement Between Contractor and Sub-Contractor", American Institute of Architects (AIA) document A401. [4]

This clause has been relied upon as a basis for indemnification and has been a constant in the construction industry for a number of years. In interpreting the agreement, the Appellate Division determined that the clear and unambiguous language of the agreement obligated the sub-contractor to indemnify only to the extent that the claim is caused by sub-contractor's own negligence. The indemnity agreement contained in the AIA contract was interpreted as not providing indemnity for the general contractor's own negligence. The clause interpreted in this case is substantively very similar to the newer AIA A201-2007 form contract.

LEITAO v. DAMON G. DOUGLAS CO.

In Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div. 1997), the Appellate Division dealt with a case where an electrical sub-contractor's employee sued the general contractor and masonry sub-contractor for injuries sustained in a trip and fall on wire mesh that had been installed by the masonry sub-contractor. The jury found the general contractor 51% at fault and the plaintiff 49% comparatively negligent.

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[4] The indemnity clause in Mautz provided as follows:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses including but not limited to attorney's fees, **arising out of or resulting from the performance of the Subcontractor's Work** under this Subcontract, **provided that any such claim**, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, **to the extent caused in whole or in part by any negligent act or omission of the Subcontractor** or anyone for whose acts he may be liable, **regardless of whether it is caused in part by a party indemnified hereunder**. Such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 11.11.

The Court interpreted an indemnity provision that includes language requiring indemnity for claims "arising out of or resulting from the performance of the sub-contractor's work... caused in whole or in part by any negligent act or omission of the sub-contractor... or anyone directly or indirectly employed by it, *regardless of whether* it is caused in part by a party indemnified hereunder..." [5] The Court took a broad view of the indemnity obligation and found that it was triggered by merely showing a substantial nexus between the work under the subcontract and the claim presented. The Court went on to determine that plaintiff's negligence in his status as an employee of the sub-contractor triggered his employer's indemnity obligation.

Previous case law had suggested that the plaintiff, as an employee of the subcontractor, may be negligent without that negligence triggering the indemnity obligation. Under the particular clause described in this case, which is typical of clauses currently included in many contracts, the indemnity obligation may be triggered in the event that the employee, as a plaintiff, is determined to be negligent even if there is no independent negligence of the subcontractor (employer). It should be noted that the clause interpreted in this case is substantively very similar to the older AIA A201-1997 form contract.

AZURAK v. CORPORATE PROPERTY INVESTORS

Azurak v. Corporate Property Investors, 347 N.J. Super. 516 (App. Div. 2002), affirmed 175 N.J. 110 (2003) coincidentally also involved PBS, this time related to its contract for services at the Ocean County Mall. This time the allegation was that plaintiff slipped and fell on a cheese-like substance on the floor, and brought suit naming the mall and PBS as defendants. The mall sought indemnity and a defense from PBS pursuant to their contract.

The importance of Azurak is not in the direct holding, which did not really break any new ground, and held, as did Mantilla, that the contract language was insufficiently explicit to provide
the mall with indemnity and a defense for their own negligence. What was important about this

[5] The indemnity clause in Leitao provided that:

> The subcontractor/vendor shall indemnify and hold harmless Damon G. Douglas Company and all of its agents and employees from and against all claims, damages, losses, and expenses, including attorney's fees **arising out of or resulting from the performance of the subcontractor/ vendor's work** under this purchase order, **provided that any such claim**, damage, loss or expense a) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than work itself), including the loss of use resulting therefrom, and b) **is caused in whole or in part by any negligent act or omission of the subcontractor/ vendor** or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless of whether it is caused in part by a party indemnified hereunder.**

case was that it once and for all put to bed an argument which had been a thorn or a boon to parties litigating the question of entitlement to contractual indemnity, depending on which party they represented. In 1976, Appellate Presiding Judge Sylvia Pressler, while sitting in the Law Division, had decided a case called Doloughty v. Blanchard Construction, 139 N.J. Super. 110 (L. Div. 1976), in which she explained that there were two types of valid indemnity clauses; "Broad Form" and "Limited Form". "Broad Form" clauses were defined as those which broadly shifted all risk of loss to the indemnitor, requiring indemnity for any and all injuries occurring in connection with the indemnitor's work. "Limited Form" clauses were those which only shifted the loss for those specific incidents resulting from the negligence of the indemnitor.

Doloughty was decided ten years before Ramos v. Browning Ferris Industries, 103 N.J. 177 (1986). It appears obvious that the holding of Ramos, requiring the language to specifically declare an intent to indemnify for the indemnitee's own negligence, would hold invalid the "Broad Form" clauses described by Judge Pressler in Doloughty. The difficulty was, however, that no published decision ever said that "Broad Form" clauses were insufficiently specific to provide indemnity for the negligence of the indemnitee under Ramos. For this reason, it was quite routine for counsel for general contractors/owners to argue that even if an indemnity clause was not specific enough to qualify under the Ramos standard, it should still be enforced as a "Broad Form" clause under Doloughty. This argument had been used with surprising success to persuade judges to grant indemnity on clauses that clearly did not meet the Ramos standard.

Azurak appears to have shut the door on this argument after 16 years, explicitly holding that a Doloughty "Broad Form" agreement cannot be enforced to provide indemnity for the indemnitee's own negligence, as doing this would be contrary to the holdings of Ramos and its progeny. Azurak was affirmed by the New Jersey Supreme Court for largely for the reasons expressed in the Appellate Division opinion.

ENGLERT V. HOME DEPOT

In Englert v. The Home Depot, 389 N.J. Super. 44 (App. Div.) certif. den. 192 N.J. 71 (2007) the Appellate Division interpreted an indemnification clause that was substantially identical to the clause interpreted in Mautz v. J.P. Patti, *supra*, and concluded – like the Mautz court – that the clause was insufficient to indemnify for one's own negligence. The court went further, however, and explained that independently the 'regardless of' phrase in the indemnity clause – which the appellate panel in Leitao v Damon Douglas, *supra*, had previously found satisfied the standard to be indemnified for one's own negligence – did *not* do so.[6]

[6] The specific clause interpreted by the Court in Englert provided:

> [T]o the fullest extent permitted by law, [Weir] shall indemnify and hold harmless [Home Depot] . . . from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, **arising out of or resulting from the performance of**

The Court based its reasoning on the interplay of contractual indemnification and common-law indemnification, the later of which was historically only available to parties who are not at fault at all (i.e. are only vicariously liable). In the common-law indemnity circumstance, a general contractor could not be indemnified by a subcontractor even for the subcontractor's negligence if the general contractor was in any way at fault (i.e. even 1%). The Appellate Division found that the "regardless of" phrase can be read in the contract *not* as somehow requiring indemnity for one's own negligence – which could certainly have been expressed much more clearly if that was the intent. Rather it should be read as eliminating, in the contractual setting, the historical common-law requirement that a party be fault-free before it can be indemnified by another party, even if just for the indemnifying party's own negligence. (e.g. an employer, protected by the Worker's Compensation bar, indemnifying a general contractor for the damages attributable to the employer's negligence)

Without expressly disavowing Leitao, the Englert court reached a different conclusion from its sister panel and essentially undercut the main argument that most parties had relied upon for the previous 10 years seeking to be indemnified for one's own negligence. The fact that the Englert court provided an alternative and reasoned explanation of how to interpret the 'regardless of' phrase – which did not include indemnifying for one's own negligence – means that it is very difficult to see how future trial courts could rely on Leitao and conclude that the 'regardless of' phrase 'clearly and convincingly' obligates a party to indemnify for another party's fault.

As a result of the Englert decision, and as it currently stands in New Jersey, there is essentially no appellate court decision in which any indemnification clause has been found to be sufficiently clear and unambiguous to entitle a party to be indemnified for its own fault.

SAYLES v. G&G HOTELS

The Appellate Division decision in Sayles v G&G Hotels Inc., 429 N.J. Super. 266 (App. Div. 2013) is the only case decided in the last 25+ years, that has not been overruled or undermined, finding that an indemnity provision is good enough to indemnify a party *for its own fault.* (Cf. Englert analyzing Leitao, *supra*.) The Court in Sayles was called upon to interpret a contractual provision which provided that the indemnity obligation was effective "*including when*" the

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> **[Weir's] Work** under this Sub-contract, **provided that any such claim**, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, ***to the extent caused in whole or in part by any negligent act or omission of [Weir] or anyone directly or indirectly employed by [Weir]*** or anyone for whose acts [Weir] may be liable, ***regardless of whether it is caused in part by a party indemnified hereunder***. Such obligation shall not be construed to negate, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph. (emphasis added)

negligence of the indemnitee is alleged or proven (unlike, e.g., the clause in Englert which provided that the indemnity obligation applied "regardless of whether" or not the negligence was caused by the indemnitee).[7] The Court then explained its rationale in context:

> Unlike these earlier cases (Ramos, Mantilla, Azurak and Englert), the indemnification provision in question here expressly "includ[es]" within the losses and expenses whose occurrence give rise to G&G's obligation to indemnify HJI those where it is "alleged or proven" as having been caused by "the active or passive negligence of [HJI]." G&G's argument that the provision is ambiguous in this regard is, unlike the cases cited, not based on the absence of a reference to the indemnitee's own negligence, but on the contention that the phase's placement in the clause suggested a limited application. Indeed, G&G's crabbed reading of the provision is faulty. Id. at 273.

The Court reached its decision by concluding that the 'including when' language in Sayles was meaningfully different and broader than the more narrowly construed 'regardless of' phrase from Englert. Although this particular indemnity clause phrasing is not very common (and certainly much more rare than 'regardless of' phrases that exist in many AIA form contracts), clauses that provide for indemnification *'including when* the fault of the indemnitee is alleged' will now be interpreted to indemnify the indemnitee for its own fault.

D'AVILA v HUGO NEU

The recent Appellate Division decision in D'Avila v. Hugo Neu, 442 N.J. Super. 80 (App. Div. 2015) only tangentially touches upon whether or not a particular indemnity clause is legally sufficient to indemnify a party for its own fault, but the Court - somewhat oddly and quite unexpectedly - reached a result that contradicts a sister panel's ruling (Englert) without even ever discussing that other opinion. The Court ruled that the 'regardless of whether or not' phrasing, which the Englert Court had previously held was insufficient to indemnify a party for its own fault, was in fact good enough to indemnify the indemnitee for its own fault. See discussions of Englert and Leitao opinions, *supra*. The result is that there are now at least two opinions that give inconsistent direction as to whether or not certain commonly employed phrasing (as used in AIA form and other contracts) passes legal muster to indemnity a party for its own fault. This has recently resulted in litigants being able to pick-and-choose the case law that they are relying upon and has become a bit of a trap for the unwary attorney who is not fully versed in the nuances of this area of the law.

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[7] [G&G shall] indemnify, defend and hold [HJI] harmless, to the fullest extent permitted by law, from and against all Losses and Expenses, incurred by [HJI] in connection with any... claim... related to or arising out of any transaction, occurrence or service at or in conjunction with the operation of the Facility, any breach of violation of any contractor or any law... or any act, error or omission (active or passive) of, [G&G]... ***including when the active or passive negligence of [HJI] is alleged or proven.*** (emphasis added)

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MANTILLA v. N.C. MALL ASSOCIATES
KIEFFER v. BEST BUY
(attorneys' fees)

Mantilla v. N.C. Mall Associates, 167 N. J. 262 (2001), is a case which focuses not on the duty to indemnify, but rather on the duty to defend usually included in those agreements. In Mantilla, the court focused on the indemnity agreement between the N.C. Mall Associates, owners of Newport Mall, and a maintenance contractor for the mall, Planned Building Services (PBS). A mall customer, Mantilla, had slipped and fallen on water that had accumulated on the floor of the Newport Mall due to a leaky roof. PBS had contracted with the mall to perform janitorial services in the common areas of the mall. There was a dispute between PBS and the mall as to whether the janitorial contract required PBS to clean up water caused by a leaky roof. The matter was tried before a jury, which assessed liability at 40% against the mall, 50% against PBS and 10% to the plaintiff.

The mall then moved for a declaration that PBS owed it indemnity and a defense under the indemnity agreement contained in their contract. The trial court granted full indemnity and full reimbursement of a defense to the mall. PBS appealed, and the Appellate Division held that the indemnity clause was not sufficiently specific to require PBS to indemnify the mall for their (the mall's) own negligence. Despite this, they held that PBS was required to fully reimburse the mall for their defense costs, reasoning that the duty to defend was broader than the duty to indemnify, and was triggered by any claim "arising out of the work" of PBS.

The Supreme Court granted certification as to the defense cost issue only. They noted that under common law principles, an indemnitee who has defended against claims of its own independent negligence is not entitled to reimbursement of defense costs. Parties are free to contract around this common law principle, but as with indemnity, any agreement to do so must explicitly indicate that the indemnitee is entitled to the costs associated with defending against their own negligence. In the absence of such express provisions in the contract, a claim of reimbursement will only lie where the indemnitee is absolutely free of active fault.

This decision was recently applied by the Supreme Court in Kieffer v. Best Buy, 205 N.J. 213 (2011) which reaffirmed that courts must utilize an 'after-the-fact' approach to award attorneys fees to indemnitees (e.g. property owners, general contractors, landlords, etc.) who are found to be *free of fault* in a case, even when the applicable indemnity clause is insufficient to indemnify for a party's own fault. In other words, if it is determined that *after* the claims against the indemnitee have been resolved (by way of summary judgment or trial verdict) that the indemnitee was not at fault, then the indemnitee will be entitled to be indemnified for all of its counsel fees and defense costs as long as the clause itself is found to be applicable (e.g. a fault-based clause is triggered or there is a 'substantial nexus' between the work and incident for an 'arising out of' clause).

Note that in Franchini v Beverly Hills Terrace Condo Assoc., A-6221-10T2 (App. Div. August 27, 2012; unpublished), a very recent Appellate Division case, the Court held that when the plaintiff specifically pleads claims that would factually establish the independent fault of the indemnitee, then attorneys' fees are not recoverable because the indemnitee is defending against claims of its own independent fault (even if it does so well, and obtains a 'no cause'). This is an evolving area with additional adjustments in the law quite likely in the future.



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This attorney has been selected for the recognitions mentioned herein, which have been conferred by the corresponding publications and/or organizations noted. An overview of the award selection methodologies for these recognitions can be found at https://www.gibbonslaw.com/awards. Links to certain specific methodologies are embedded in individual entries. Results may vary depending on your particular facts and legal circumstances. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

Ms. Lombardo has successfully litigated matters before the state and federal courts of New Jersey and New York, as well as the American Arbitration Association, with a focus on construction matters. Her experience in commercial litigation and construction litigation is unique in that she represents both plaintiffs and defendants. She was co-lead counsel in a

three-year long arbitration representing a major university in a claim involving extensive and complex design and construction defects, which resulted in a multimillion-dollar award in our client's favor and the arbitrator striking down a limitation of liability clause. Unlike most litigators in the construction arena, Ms. Lombardo also has experience drafting and negotiating contracts. She has worked with owners, contractors, subcontractors, and designers on contracts for projects involving academic centers, public schools, laboratory facilities, office buildings, energy facilities, public-private projects, and building additions of varying sizes. Namely, Ms. Lombardo is lead construction counsel for a prominent healthcare system in the tri-state area.

Ms. Lombardo works with the firm's longstanding corporate clients in addition to the Northeast region's top universities, retailers, and professionals in the design and construction field in the following types of matters:

- Restrictive covenants
- Contract disputes
- Insurance coverage
- Multi-party construction matters involving design and construction defects
- Construction lien and collection claims
- Surety claims
- Condominium liability

Ms. Lombardo is currently on the American Arbitration Association Panel of Construction Arbitrators and a Member of the Roster of Mediators. She has also been included on the New Jersey Superior Court Roster of Mediators, where she has mediated a variety of civil matters.

AREAS OF FOCUS

Breach of Contract

Defense and prosecution of matters involving failure to abide by contract terms.

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Defense and prosecution of claims involving a breach of a covenant not to compete.

Construction Design and Defect Claims

Defense and prosecution of claims involving defective design and/or construction of commercial properties ranging from warehouses to condominiums.

Construction Liens

Filing of and defending against construction liens and municipal mechanic's liens.

Surety Claims

Prosecution of claims on performance and payment bonds procured on construction projects.

Construction and Design Contract Drafting

Drafting and negotiation of contracts for owners, contractors, designers and subcontractors for a variety of commercial construction projects.

CREDENTIALS

Education

Rutgers School of Law - Newark (J.D., *summa cum laude*)

- *Order of the Coif*
- Legal Research and Writing – Teaching Associate

Montclair State University (B.A., *magna cum laude*)

- University Honor's Program

Professional Admissions

State of New Jersey

State of New York

Commonwealth of Pennsylvania

United States District Court for the District of New Jersey

United States District Court for the Eastern District of New York

United States District Court for the Southern District of New York

United States District Court for the District of Colorado

Professional Activities

New Jersey Supreme Court Committee on Character for Part II
Member

Essex County Bar Association

New Jersey State Bar Association
Construction Section

AAA Panel of Construction Arbitrators
Member
Roster of Mediators

Association of Trial Lawyers of America

New Jersey District V-A Fee Arbitration Committee (Essex County)
Member, 2015-2019
Panel Chair, 2018-2019

New Jersey Superior Court
Roster of Mediators

Montclair State University
Adjunct Professor

Judicial Clerkship(s)

Judicial intern to the Honorable Philip B. Cummis, Superior Court-Family Division in Newark

Languages

Italian

Litigation:

Ms. Lombardo has been involved in several high-profile matters that have been arbitrated and litigated to judgment, including the following:

Seton Hall University Arbitration before the American Arbitration Association
Gibbons represented Seton Hall University, the claimant in an AAA arbitration involving the design and construction of the expansion and renovation of McNulty Hall, the University's Science and Technology Building. McNulty Hall is one of the more visible buildings on campus, given the prominence of the University's science and research programs. The McNulty Hall project was an integral part of the University's Master Plan, which was aimed at transforming and modernizing the University campus to meet the University's future needs and goals. The claims in the arbitration were asserted against the project architect and general contractor and involved varied and widespread errors in design and construction, ranging from the failure of the design to account for future chemical storage and usage to the building's defective exterior limestone façade, which required complete removal and replacement. After a year-long arbitration, the arbitrator issued a multimillion-dollar judgment in Seton Hall's favor.

Restrictive Covenant Arbitration for a Leading Manufacturer of Orthopedic Implants before the American Arbitration Association
Ms. Lombardo was second chair in an arbitration brought on behalf of a leading manufacturer of orthopedic implants and instruments in a restrictive covenant litigation. Our client instituted an arbitration with the AAA against its former local distributor, based on a violation of a restrictive covenant in its contract with the manufacturer that prohibited it from selling competing products during the term of the contract and then one year after the contract's termination. The respondents at first challenged the contention that they had violated the restrictive covenant by selling competing products in the territory during the term of the non-compete. After extensive discovery, including third party discovery, respondents admitted violating the terms of the restrictive covenant. A hearing was held before a three arbitrator panel, which awarded our client full recovery on its claims.

Independence Harbor Condominium Association v. Hartz Mountain Industries, et al. **Superior Court of New Jersey, Law Division, Bergen County**
The firm represented Independence Harbor Condominium Association in a construction defects lawsuit against the condominium's developer, the contractors responsible for its construction, and the designers. The claims included breach of warranty, violations of New Jersey's Planned Real Estate Development Full Disclosure Act, violations of New Jersey's Consumer Fraud Act, and design error and omission claims. Ms. Lombardo was an integral member of the litigation team, having been part of the case since the inception of the firm's involvement and responsible for overseeing and conducting key fact and expert discovery. This matter was successfully tried before a jury, resulting in a multimillion-dollar verdict. Thereafter, the firm negotiated and documented a series of settlements between the various parties.

In addition to the above matters, Ms. Lombardo has worked on several matters that have resulted in opinions, including the following:

Fabcon East, L.L.C. vs. The Stegla Group, Inc., 2:2010cv04601 (D.N.J. June 8, 2011)

All Metro Health Care Servs. v. Edwards, 2010 N.J. Super. Unpub. LEXIS 1821 (App.Div. July 30, 2010)

Lane v. Schmied, 2008 N.J. Super. Unpub. LEXIS 1014 (App.Div. Feb. 11, 2008)

21st Capital Corp. v. Tiffany & Co., 2008 N.J. Super. Unpub. LEXIS 2281 (App.Div. Feb. 6, 2008)

Thermal Design Inc. v. U.S. Home Corporation, 2006 WL 3228596 (N.J. App. Div. Nov. 9, 2006)

Construction Counseling:

Notable contracts Ms. Lombardo has drafted and negotiated include the following:

- A construction manager agreement for a major addition to a healthcare facility involving a multi-phase expansion estimated at $715 million.
- The design and construction agreements for a $225 million addition to a major tri-state area medical center.
- The architect and engineer agreements for a new medical school.
- Design build contracts for new state-of-the-art medical facilities.
- The construction manager agreement for the construction of LG's new North American headquarters in Englewood Cliffs, New Jersey.

- Template AIA architect and construction contracts under various contract procurement methods for a leading American multinational conglomerate that produces a variety of commercial and consumer products. The templates were put out to bid across the United States.
- Design and construction agreements for a leading real estate investment and management firm of upwards of $20 million on high-profile projects in New Jersey and New York.



Blog Post

Recent Construction Law Decision Holds That Contract Payment Terms Control Over New Jersey's Prompt Payment Act

Gibbons Law Alert

By: Lisa Lombardo and Julia E. Browning, CIPP-US
August 21, 2024



Quote

Construction and development experts: Keep a finger on the pulse

NJBIZ

By: Lisa Lombardo
May 6, 2024



Article

Vacating or Modifying an Arbitration Award in New Jersey State Court

Thomson Reuters

By: Lisa Lombardo and Susan M. Kritzmacher
May 2, 2024



Daniella Gordon

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Business Litigation | Government Investigations & White Collar Defense | Construction & Real Estate Litigation | Construction Defect Litigation | Construction Contracting | Crisis Management | Securities Litigation | False Claims Act | Labor & Employment | Diversity, Equity, and Inclusion

Daniella Gordon is a strategic and zealous advocate for clients facing a wide range of matters. Her clients span various industries, including healthcare, construction, finance, government, media, and technology. She has served as lead counsel in civil and criminal jury trials in federal and state court and on appeal.

Ranked by *Chambers USA* in the area of white collar defense, Daniella represents businesses and individuals in internal and government investigations and through trial. In her white collar practice, Daniella leads investigations and represents clients in matters involving alleged false claims, investor misrepresentation, public corruption, fraud, tax-related matters, and anti-kickback violations, among other matters. She has also represented individuals in matters involving wrongful conviction.

In her civil practice, Daniella represents businesses in a range of commercial disputes, with a special focus on the construction industry. For twenty years, she has represented owners, developers, and all tiers of contractors in construction defect claims, scope of work disputes, differing site conditions claims, and bid protests, among many other construction-related issues. She has prevailed at trial in matters involving prompt payment statutes and efforts to pierce the corporate veil. Daniella has extensive experience drafting commercial construction contracts, including specifically modifications to AIA forms of agreement.

Daniella's civil practice also includes employment-related investigations and defense in matters involving alleged harassment, discrimination, and whistleblower retaliation under state and federal statutes. She has successfully represented high profile public figures facing such accusations. Daniella has also represented businesses in labor matters involving alleged misclassification, wage and hour violations, and in suspension/debarment actions.

Daniella regularly speaks on criminal justice, civil litigation, and construction-related topics. She serves on the Board of Trustees for the Association of the Federal Bar of New Jersey, where she is Chair of the Pro Bono Committee. Daniella also serves on the Board of Trustees for the Association of Criminal Defense Lawyers – NJ. She previously served two terms on the Board of Directors for the National Association of Criminal Defense Lawyers. Daniella is also a past Co-Chair of the Construction Section of the New Jersey State Bar Association.

Representative Matters

Private equity investor—ATM fraud defense.

Defending a private equity investor and former ATM promoter against securities fraud and wire fraud charges brought by DOJ and the SEC in connection with an alleged ponzi-like scheme.

Education

Rutgers Law School, JD, 2005

Connecticut College, BA, 2001

Bar Admissions

Pennsylvania

New Jersey

Court Admissions

U.S. Court of Appeals, Third Circuit

U.S. Court of Federal Claims,

U.S. District Court, District of New Jersey

U.S. District Court, Eastern District of Pennsylvania

U.S. Supreme Court,

Memberships and Certifications

Association of the Federal Bar of New Jersey
Board of Trustees; Chair, Pro Bono Committee; Vice-Chair of Programming, Bench-Bar Brown Bag Lunch CLE

Association of Criminal Defense Lawyers – New Jersey
Board of Trustees

National Association of Criminal Defense Lawyers
Board of Directors, 2015-2021
Co-Vice Chair, Third Circuit Amicus Committee
White Collar Committee; Women in Criminal Defense Committee; Fourth Amendment Committee; Trial Penalty Task Force

Life Member

New Jersey State Bar Association
Past Co-Chair, Construction Section

NAACP, Southern Burlington County Branch
Chair, Legal Redress and Criminal Justice Committees

Women in White Collar Defense Association, Philadelphia and New Jersey Chapters
Member

Pennsylvania Association of Criminal Defense Lawyers
Member

Philadelphia-Israel Chamber of Commerce
Member

Russian Speaking Professionals Network of Philadelphia
Member

Judicial Clerkships

Judicial Law Clerk
The Hon. Robert G. Millenky, former Presiding Judge, Superior Court of New Jersey, 2005–2006

Judicial Intern
The Hon. Joseph H. Rodriguez, U.S. District Court, District of New Jersey, 2004–2005

Languages

Russian

Recognitions*

The Best Lawyers in America, Criminal Defense: White Collar, 2021–2026; Appellate Practice, Construction Law, Criminal Defense: General Practice, Pennsylvania, 2023–2026

Chambers USA, Litigation: White-Collar Crime & Government Investigations, New Jersey, 2022–2025

New Jersey Super Lawyer, 2019–2022, 2025; New Jersey Rising Star*, Super Lawyers, 2017–2018*

ROI Influencers: Women in Business, *ROI-NJ*, 2022

Nelson B. Rivers, III, Excellence Award, Southern Burlington County NAACP, 2015

* No aspect of this or any advertisement has been approved by the Supreme Court of New Jersey. For ranking methodologies, please see here.

Alerts

DOJ Signals Potential Criminal Enforcement Against Private Sector for Diversity Equity and Inclusion (DEI) and Diversity Equity Inclusion and Accessibility (DEIA) Programs, Government Investigations & White Collar Defense Alert, 2.10.2025

Speaking Engagements

Top Negotiated and Litigated Clauses in Construction Contracts, New Jersey State Bar Association, 10.13.2025

Hot Topics: Defending a Politically Connected Client or Case, NACDL's 2025 White Collar Seminar & Fall Board Meeting, 9.19.2025

Public Project Compliance: Understanding New Bidding, Procurement & Prevailing Wage Regulations, New Jersey State Bar Association (NJSBA), 5.25.2025

Getting and Maintaining a Seat at the Table, Association of the Federal Bar of New Jersey, 3.12.2025

Ethical Considerations in Corporate Investigations, McCarter & English CLE Symposium, 12.3.2024

Views from the Bench, Association of Criminal Defense Lawyers of New Jersey, 11.16.2024

White Collar Issues in the Construction World: Compliance and Prevention, Construction Super Conference, 11.29.2023

Social Media Evidence: From Discovery Through Trial, Association of the Federal Bar of New Jersey, 4.4.2023

A Bridge Over Troubled Water: How Public Corruption Cases Will Be Prosecuted and Defended After Kelly Demonstrated Once Again That Everything's Legal in Jersey, PACDL White Collar Conference, 11.27.2020

The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, Association of the Federal Bar of New Jersey, 1.20.2020

Federal Civil Rights Litigation in Uncivil Times, Burlington County Bar Association, 12.3.2019

Public Bidding and Bond Concerns, New Jersey State Bar Association, New Brunswick, NJ, 9.17.2019

Defending Against the Residential Lien Claim, Atlantic Builders Convention, 4.27.2019

Lien on Me: Mastering New Jersey's Construction Lien Law, HB Litigation Conference, 8.15.2018

Crime and Punishment: A Defense Perspective, Burlington County Prosecuter's Office, 12.5.2017

Construction Law 2017-Not Going Down With the Ship: Managing Risk and Surviving the Struggling Construction Project, New Jersey State Bar Association, 5.7.2017

Construction Arbitration Seminar, HB Litigation Conferences,, 9.14.2016

Wage Equality-Laws, Realities, and Suggestions, W.I.N. Empowerment Conference, 4.27.2016

Gender and Wage Negotiation Seminar, the American Association of University Women (AAUW), 3.9.2016

Tackling Contract Provisions and Insurance Issues, New Jersey State Bar Association, 11.4.2015

Annual Freedom Fund Gala, Southern Burlington County NAACP, 10.7.2015

Construction Primer CLE, Burlington County Bar Association, 3.11.2015

Making a Seat at the Table, Southern Burlington County NAACP, 3.4.2015

Construction Defect Litigation, HB Litigation Conferences, 9.18.2014

Tipping the Balance: Fee Shifting in Commercial Litigation, Burlington County Bar Association, 5.15.2013

Webinars

National Security and the First Amendment, Monmouth University, 8.7.2023

Subpoenas, Search Warrants, and Government Interviews: Now What?, Camden County Bar Association, 4.3.2023

Implications for Employers from the Overturning of Roe v. Wade, 7.19.2022



William H. Mergner, Jr.

Co-Managing Partner

WILLIAM H. MERGNER, JR., graduated from the Catholic University of America Magna Cum Laude in 1982. He received his Juris Doctor from the Marshall Wythe School of Law at the College of William and Mary in 1985. He became associated with the firm following graduation and subsequently has become a partner in the firm, currently serving as co-managing partner.

Since joining the firm, he has been involved in daily trial work, having tried more than two hundred twenty jury trials to verdict in state and federal courts in New Jersey. He currently handles catastrophic loss cases as well as coverage matters with an emphasis on risk transfer issues. He has successfully handled the defense through trial of construction site accidents, multi-party construction defect cases, environmental/toxic tort claims, products liability claims, class action litigation, professional liability claims including medical, engineering, agents/brokers claims, as well as a wide variety complex general liability claims involving serious injury or death. He has handled a significant number of appeals before the New Jersey Appellate Division, the New Jersey Supreme Court, and the Third Circuit Court of Appeals and has numerous favorable published and unpublished decisions.

He counsels private clients on issues related to effective contractual risk transfer. He regularly provides seminars to clients of the firm and attorneys in New Jersey regarding a

wide range of issues ranging from contractual risk transfer, products liability law, as well as developments in insurance coverage law, trial techniques and handling of cases subject to the Complex Business Litigation Program, teaching an average of eight seminars per year over the last twenty years.

He is the President Elect of the New Jersey State Bar Association (NJSBA) and is anticipated to become President of the NJSBA in May 2024. He serves on the NJSBA Judicial and Prosecutorial Appointments Committee. He is a member of the NJSBA Amicus Committee, having previously served as Chair of the committee. He is a member of the Executive Committee of the Civil Trial Practice Section of the NJSBA having previously served two terms as Chair. He currently serves as a member of the NJSBA Meeting Arrangements and Programs Committee. He is a member of the NJSBA's Insurance Defense Committee, where he has been a member since its formation. He is also a Trustee of the New Jersey State Bar Foundation

He previously served three terms as a Trustee of the NJSBA. He also served as a member of the NJSBA Pandemic Task Force and served as Chair of the subcommittee on Restarting Jury Trials. He served as a member of the Judiciary Working Group on COVID-19 Jury Operations. He served as the Chair of the NJSBA Special Task Force on the Practice of Law.

He is Serving his second term as a member of the Supreme Court Civil Trial Practice Rules Committee and serves on the Discovery Subcommittee. He previously served two terms as a member of the Supreme Court Committee on the Rules of Evidence, the Joint Supreme Court/NJSBA E-Courts Committee, as well as serving on the Supreme Court Committee on Expediting Civil Actions.

He has been selected as a "Super Lawyer" by New Jersey Monthly Magazine every year since the award was initiated and is "AV Preeminent" rated by Martindale-Hubbell. He is a member of the American Board of Trial Attorneys and is a Fellow of the American Bar Association. In 2019, he was honored by the Civil Trial Bar Section of the New Jersey State Bar Association with the James J. McLaughlin Award, which recognizes civility, professionalism, and competence in the practice of law.