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Virginia Supreme Court Invalidates Provision Commonly Used by Owners and Contractors for Transferring Risk on Construction Projects

A recent decision by the Virginia Supreme Court significantly alters the landscape in Virginia regarding a provision in construction contracts commonly used by owners and contractors for shifting risk for claims of bodily injury or property damage. Interpreting Virginia's "Anti-Indemnity" statute, the Supreme Court ruled that a contract provision requiring one party (the "indemnitor") to indemnify the other party (the "indemnitee") against claims arising out of the indemnitee's own negligence is invalid even where the indemnitor is also partially at fault for the loss. Based upon similarly worded statutes in other states, practitioners had interpreted Virginia's statute to prohibit only provisions that purported to shift liability from an indemnitee to an indemnitor where the loss was caused by the indemnitee's sole fault. Because the terms of the Virginia statute are similar to the "anti-indemnity" statutes of other ostensibly "sole negligence" states, the decision could have repercussions in other states that have not yet interpreted their "Anti-indemnity" statute if the Virginia court's reasoning is followed.

At the same time, the Virginia Supreme Court found enforceable a provision that required indemnification only "to the extent" a damage or loss resulted from the indemnitor's negligence. In other words, if a contractor and subcontractor both contribute to a loss, the contractor can receive indemnity "to the extent" that the subcontractor was the cause. But, under the new ruling, the contractor cannot be indemnified by the subcontractor for that portion of the harm that the contractor itself caused.

The decision warrants a review of existing construction agreements because the decision invalidates, in its entirety, a contractual indemnity provision that purports to render an indemnitor liable for losses allegedly arising in part from an indemnitee's own negligence. A party expecting indemnification where concurrent fault is alleged will be disappointed and, potentially, could be left solely with claims against the erstwhile indemnitor in common law contribution and indemnification.

Please contact Leonard Goodman at lsgoodman@Venable.com if you need assistance responding to the implications of this decision.

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