

10 INDEMNITY

Indemnity is generally defined as the obligation of one party to make good a loss suffered by another. The obligation may arise from an express contractual indemnity provision, it may be implied from a contract, which does not otherwise require indemnity, or it may arise from the equities surrounding a particular claim.¹ Furthermore, the unambiguous language of an indemnity provision as reasonably construed will be given full effect, even if it does not contain words specifying indemnity for the indemnitee's own negligence.²

Alaska has rejected indemnity based on an analysis of "active" and "passive" negligence. If a tortfeasor is independently negligent – is guilty of any degree of negligence – that tortfeasor will not be entitled to receive implied or equitable indemnity from another tortfeasor.³ To obtain implied contractual indemnity for amounts paid to an injured party, the settling party cannot have any independent liability to that injured party except vicariously, and the settling party must obtain a release that extinguishes the potential liability of the indemnitor to the injured party.⁴

Alaska law recognizes an action by a third-party for indemnity from the employer of an employee injured in part by the actions of the third-party based upon an express contract to indemnify, despite the exclusive remedy provision of Alaska's Workers' Compensation Act. Alaska law does not, however, recognize a third-party's right to implied contractual indemnity against the employer of an injured employee.⁵

With regard to indemnity in the context of construction contract litigation, please refer to Tab No. 22 below. As indicated there, indemnity clauses are generally valid in the context of construction contracts, except where indemnification would tend to promote a breach of public policy or where the promisee seeks indemnity protection, or

¹ See *Fairbanks North Star Borough v. Kandik Constr.*, 795 P.2d 793, 803 (Alaska 1990), *vacated in part on reh'g*, 823 P.2d 632 (Alaska 1991); see also *AVCP Regional Housing v. Vranckaert & Co.*, 47 P.3d 650 (Alaska 2002).

² See *City and Borough of Juneau v. Alaska Elec. Light & Power Co.*, 622 P.2d 954 (Alaska 1981); see also *Alyeska Pipeline Serv. Co. v. Shook*, 978 P.2d 90 n.11 (Alaska 1999).

³ See *Fairbanks North Star Borough*, 823 P.2D at 638; *Palmer G. Lewis Co. v. ARCO Chem. Co.*, 904 P.2d 1221, 1224-25 (Alaska 1995).

⁴ *AVCP Regional Housing Authority v. R.A. Vranckaert Co.*, 47 P.3d 650 (Alaska 2002).

⁵ See *Bell Helicopter Textron v. United States*, 755 F. Supp 269 (D. Alaska 1990).

a limitation of liability, against claims arising out of the promisee's sole negligence or wrongful conduct.⁶

Where a party is entitled to indemnity, that party is also entitled to recover all actual, reasonable costs and attorney's fees incurred in defending the underlying action and prosecuting its indemnity rights.⁷

⁶ See *Aetna Cas. & Sur. Co. v. Marion Equip. Co.*, 894 P.2d 664 (Alaska 1995); see also *City of Dillingham v. CH2M Hill Northwest*, 873 P.2d 1271 (Alaska 1994); and AS 45.45.900.

⁷ See *Heritage v. Pioneer Brokerage & Sales* 604 P.2d 1059 (Alaska 1979).