DECONSTRUCTING MCL 691.991, MICHIGAN'S CONSTRUCTION ANTI-INDEMNITY STATUTE

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I. INTRODUCTION

Construction projects involve a variety of risks.[1] Among other things, construction project owners and contractors face the prospect of construction and design defects, permitting issues, property damage, natural disasters, theft of building materials and equipment, project delays, and injury to employees and third parties.[2] It is common practice for participants in construction projects to use indemnity agreements to shift these risks to other businesses and individuals they hire.[3] An indemnity agreement is "an agreement by one person to safeguard or hold another harmless from loss or damage as may be specified in the agreement, or in which the indemnitor promises to reimburse his or her indemnitee for loss suffered."[4] In a typical construction project, the owner requires the general contractor to sign an indemnity agreement, the general contractor in turn requires the same of subcontractors it hires, and those subcontractors require the same of sub-subcontractors they hire.[5] In addition to indemnity, these agreements also typically require the indemnitor to defend the indemnitee against third-party claims that fall within the scope of the agreement.[6]

Because many construction firms are small businesses,[7] issues of unequal bargaining power are prevalent in the construction industry. In 2021, the ten largest general contractors in Michigan each generated over $200 million in revenue, with the largest three generating over $1 billion

1. Except where otherwise indicated, this Note uses the term "construction projects" to broadly refer to projects focused on shaping the built environment. This includes not only the initial construction of buildings, but also the design, renovation, remodeling, and demolition of those buildings as well as bridges, highways, utilities, and other infrastructure. This Note also uses the term "contractors" to broadly refer to businesses and individuals who work on those projects under contract with property owners or other contractors. While architects and engineers are technically "contractors," this Note refers to them as "design professionals" where it is important to distinguish them from other contractors. This nuance is particularly important in the context of negligence, indemnity agreements, and insurance. *See* discussion *infra* Part III.

2. *See infra* note 19 and accompanying text.

3. 3 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 10:1 (2024).

4. 42 C.J.S. *Indemnity* § 1 (1991).

5. *Id.*

6. *Id.*

7. *See* Jordan Howard, *Small Business Contracting*, ASSOCIATED GEN. CONTRACTORS AM., https://www.agc.org/small-business-contracting [https://perma.cc/SV99-MX7D] (last visited Jan. 19, 2024).

each.[8] When one considers that larger private businesses and public entities often commission construction projects, the potential for disparities in bargaining power becomes even more evident. In this highly competitive industry, contractors may have no choice but to agree to terms that are undesirable or even patently unfair.[9] To compensate for disparities in bargaining power and prevent excessive risk shifting, the Michigan Legislature and its counterparts in other states[10] have limited the permissible scope of indemnity provisions in construction contracts.[11]

Michigan's construction anti-indemnity statute, MCL 691.991, comprises two operative subparagraphs. The first was adopted in 1966, amended in 2012, and covers construction and design contracts with private entities:

> In [a wide range of defined construction and design contracts], a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.[12]

The second was adopted in 2012 and covers construction and design contracts with public entities *other than a defined group of public colleges and universities*:

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8. Sonya D. Hill, *Crain's List: General Contractors Ranked by 2021 Revenue*, CRAIN'S DET. BUS. (Apr. 18, 2022), https://www.crainsdetroit.com/Reprint-CD22044BartonMalow [https://perma.cc/5QPH-8D2D].

9. *See* Haskell Shelton, *Michigan's Murky Law of Contractual Indemnity*, 75 MICH. B.J. 1182, 1182 (1996) ("Indemnity contracts typically arise when general contractors insert an indemnity provision and demand that subcontractors accept the proffered language. Most often, indemnity clauses are presented on a 'take it or leave it' basis, with no room for negotiation.").

10. *See generally* 3 BRUNER & O'CONNOR, *supra* note 3, § 10:100.

11. MICH. COMP. LAWS § 691.991 (1966); *see also* Asha A. Echeverria & Brian R. Zimmerman, *Construction Bills: Recent Changes to Construction Laws*, 34 CONSTR. LAW. 1, 1 (2014) ("Spurred by Lobbying from industry trade groups over the past several years, many states have enacted new laws or revised existing laws limiting the extent to which construction participants may contract to indemnify other participants . . . . With inequalities in bargaining power among owners, architects, contractors, subcontractors, and other project participants, it is not surprising that trade groups have lobbied aggressively to convince state legislatures to void various indemnification arrangements as against public policy. Forty-four states and the District of Columbia have enacted some form of legislation governing indemnity clauses relating to construction contracts.").

12. § 691.991(1).

> When entering into [a wide range of defined construction and design contracts], a public entity shall not require the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor or the contractor to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the [indemnitor]. A contract provision executed in violation of this section is against public policy and is void and unenforceable.[13]

This Note explores whether MCL 691.991, as currently written, adequately protects contractors and design professionals. Part II discusses the history of MCL 691.991 and construction anti-indemnity statutes in other states.[14] It also addresses a 2012 amendment to the Michigan statute that, interestingly enough, further restricted the scope of permissible indemnity with respect to *most* public construction contracts but did not do the same with respect to private construction contracts or contracts with a defined group of public colleges and universities.[15] Part III weighs the pros and cons of allowing intermediate form indemnity provisions in construction contracts.[16] It considers problems of unequal bargaining power and transferring away accountability for job site safety, how those problems persist in both private and public construction contracts, and the extent to which the availability of liability insurance mitigates those problems.[17] Part IV concludes that the Michigan Legislature should amend MCL 691.991 to make provisions in all construction contracts purporting to indemnify the promisee for any amount greater than the degree of fault of the promisor unenforceable and contrary to public policy.[18] In so doing, the Legislature would promote worker safety and protect small businesses from exposure to excessive risk.

II. BACKGROUND

Although construction indemnity agreements and anti-indemnity statutes typically apply to a variety of risks,[19] their evolution has largely

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13. *Id.* § 691.991(2).
14. *See* discussion *infra* Part II.
15. *See* discussion *infra* Part II.
16. *See* discussion *infra* Part III.
17. *See* discussion *infra* Part III
18. *See* discussion *infra* Part IV.
19. *See* 3 BRUNER & O'CONNOR, *supra* note 3, § 10:2 ("There is nothing written in stone mandating that indemnity provisions be limited to losses relating to property damage or bodily injury. Many construction contracts contain several indemnity provisions. For

focused on worker injuries.[20] These concepts are part of a long, much broader historical debate about what remedies should be available to injured workers.[21] A workers' compensation system has existed in Michigan for over a century,[22] but understanding MCL 691.991 requires awareness of the historical circumstances that prompted the implementation of workers' compensation programs in the United States to begin with.

A. Workplace Injuries

Prior to the Industrial Revolution, in the United States, tort suits provided the exclusive legal remedy for injured workers against their employers.[23] But the tort system proved ineffective at that job.[24] Several common law doctrines impeded the prospects for recovery,[25] litigation was expensive,[26] and even if an action ultimately succeeded, protracted litigation left workers uncompensated for months or years following

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example, the AIA General Conditions obligate the owner to indemnify the contractor for all costs and expenses associated with remediation of hazardous material resulting from performance of the work . . . . The AIA contracting scheme also requires indemnity in connection with copyright or patent infringement claims."). The AIA General Conditions refers to standardized construction forms published by the American Institute of Architects, a professional organization representing architects and other professionals. *See* AIA, https://www.aia.org [https://perma.cc/2A4F-2CP6] (last visited Apr. 3, 2025); *see also What We Do*, AIA CONT. DOCUMENTS, https://learn.aiacontracts.com/contract-doc-pages/21536-what-we-do/ [https://perma.cc/8SSA-EWZZ] (last visited Apr. 3, 2025).

20. *See* DWIGHT G. CONGER ET AL., CONSTRUCTION ACCIDENT LITIGATION § 6:1 (2d ed. 2023) ("While the goal of tort liability expansion was to open new sources of recovery for injured construction workers (which many of their counterparts in industrial and commercial settings do not enjoy) and enhance job site safety, the result has been the proliferation of indemnity and insurance agreements in the construction industry.").

21. *See generally* Paul Raymond Gurtler, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 HAMLINE J. PUB. L. & POL'Y 286 (1989) (discussing the history of workers' compensation laws).

22. Charles W. Palmer, *Passage of the 1912 Michigan Workmen's Compensation Act: A Grand Bargain for Whom?*, 100 MICH. B.J. 20, 23 (2021).

23. Gurtler, *supra* note 21, at 286 ("At common law, an injured employee faced virtually insurmountable odds in trying to obtain damages from his or her employer. The employee's sole cause of action was one based on employer negligence.").

24. *Id.*

25. John Fabian Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998) ("The common law rules of fellow servant, assumption of risk, and contributory negligence posed a series of daunting obstacles for nineteenth-century workers seeking to recover for injuries suffered on the job.").

26. Gurtler, *supra* note 21, at 287–88 ("These weaknesses included . . . the substantial costs of litigation borne by the injured employee . . . .").

injury.[27] A surge in worker injuries brought on by the Industrial Revolution led Prussia, Great Britain, and later, U.S. states to implement workers' compensation systems.[28] Workers' compensation came to be known as a "Grand Bargain" because it required prompt payment of predictable benefits to injured workers in exchange for their giving up the right to bring tort actions against their employers.[29] In the 1960s and 1970s, to circumvent workers' compensation's limitations on recovery, courts found ways to continue to impose tort liability for worker injuries.[30] During those decades, tort suits brought by injured workers against property owners led to widespread use of indemnity agreements in the construction industry.[31]

B. Indemnity

Understanding MCL 691.991 requires familiarity with some basic principles of indemnity. Indemnity is "an obligation by one party to make another whole for a loss that the other party has incurred."[32] Indemnity provisions in construction contracts typically take one of three forms: limited form, intermediate form, or broad form.[33] Under all forms, the indemnitor must reimburse the indemnitee for losses that are solely the indemnitor's fault.[34] Where the three forms of indemnity provisions differ is the extent to which the indemnitor must also reimburse the indemnitee

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27. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 66 (1967) ("At best [an injured worker] has a right to retain a lawyer, spend two months on the pleadings, watch his case from six months to two years on a calendar and then undergo the lottery of a jury trial . . . . If he wins, he wins months after his most urgent need is over.") (quoting an assessment of industrial accident remedies in 1910 by the New York Employers' Liability Commission).

28. *See* Gurtler, *supra* note 21, at 288–93.

29. *See* Palmer, *supra* note 22, at 21.

30. CONGER ET AL., *supra* note 20, § 6:1.

31. *Id.* (citing Willey v. Minnesota Mining & Mfg. Co., 755 F.2d 315 (3d Cir. 1985) for the proposition that numerous suits against premises owners prompted the owners to shift risk onto contractors and subcontractors).

32. 41 AM. JUR. 2D *Indemnity* § 1 (1968) (citing Crone v. Crone, 77 P.3d 167 (Mont. 2003)); *See also* 3 BRUNER & O'CONNOR, *supra* note 3, § 10:54 ("While the majority of indemnity disputes involve a party seeking recovery for losses incurred as a result of claims asserted against it by a third party, this is not always the case. Moreover, while indemnity agreements are commonly construed to apply only in cases of third-party liability, they often are not drafted so as to expressly state this limitation. As a consequence, courts on occasion will interpret indemnity language to apply to claims or losses other than those arising from injury to a third party . . . .").

33. Edward (Teddie) Arnold et al., *What Does the Indemnity Clause Cover and When Does the Claim Accrue*, SEYFARTH SHAW LLP (Jan. 2, 2019), https://www.constructionseyt.com/2019/01/indemnity-clause-cover-claim-accrue/ [https://perma.cc/UL4Q-ND5F].

34. *See id.*

for losses for which the indemnitee is partially at fault.[35] Limited form indemnity requires the indemnitor to reimburse the indemnitee for losses only to the extent they are the indemnitor's fault.[36] For instance, if the indemnitor is determined to be 20% at fault for a loss, it must reimburse the indemnitee for 20% of the loss; if the indemnitor is determined to be 50% at fault for the loss, it must reimburse the indemnitee for 50% of the loss, and so on.[37] Intermediate form indemnity requires the indemnitor to reimburse the indemnitee for 100% of any loss other than one that is solely the indemnitee's fault.[38] In other words, if the indemnitee is determined to be up to 99% at fault for a loss, the indemnitor must reimburse it for the entire loss.[39] Broad form indemnity requires the indemnitor to reimburse the indemnitee for all losses within the scope of the agreement, including those that are solely the indemnitee's fault.[40]

C. Construction Anti-Indemnity Statutes

In the wake of courts' increased recognition of tort remedies for injured workers in the 1960s and 1970s and the subsequent widespread use of indemnity agreements,[41] most states have passed construction anti-indemnity statutes.[42] These statutes limit the permissible scope of indemnity for an indemnitee's negligence in construction contracts.[43] States have two primary motives for doing so with respect to construction contracts specifically.[44] First, a party being indemnified for its own negligence may have less of an incentive to prioritize job site safety.[45] Second, unequal bargaining power may enable owners and general contractors to compel subcontractors to accept unfair indemnity provisions.[46]

While anti-indemnity statutes are nuanced as to which contracts are covered and what scope of indemnity is permissible, they generally prohibit broad form indemnity.[47] Given the two aforementioned motives

35. *See id.*
36. James v. Burlington N. Santa Fe Ry. Co., 636 F. Supp. 2d 961, 967–68 (D. Ariz. 2007).
37. *Id.* at 968.
38. *Id.*
39. *Id.*
40. *Id.*
41. *See supra* notes 30–31 and accompanying text.
42. 3 BRUNER & O'CONNOR, *supra* note 3, § 10:108.
43. *Id.* § 10:100.
44. 2 RANDY MANILOFF ET AL., GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 85 (5th ed. 2021).
45. *Id.* (citing Jankele v. Texas Co., 45 P.2d 425, 427 (Utah 1936)).
46. *Id.* (citing Brooks v. Judlau Contracting, Inc., 898 N.E.2d 549, 551 (N.Y. 2008)).
47. 3 BRUNER & O'CONNOR, *supra* note 3, §10:100.

for passing these statutes, this should not be surprising. Both of those concerns are heightened when an indemnitee contracts away responsibility for losses that are attributable to its sole negligence.[48] Some anti-indemnity statutes go further, prohibiting indemnity for any amount beyond the degree of fault of the indemnitor.[49] Even where states allow broad form indemnity or have no anti-indemnity statute, courts have construed broad form indemnity agreements strictly.[50]

D. Michigan Construction Indemnity Cases Prior to 1967

Two cases demonstrate Michigan's lack of statutory protections for construction contractors against onerous indemnity agreements in the 1950s and early 1960s. The 1955 case *Buffa v. General Motors Corp.*[51] exemplifies the expansive nature of some indemnity agreements in

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48. This should not be taken to suggest that owners prioritize job site safety only when they bear the direct costs of workers' personal injury lawsuits. Even cynics would acknowledge that the potential for reputational harm, loss of productivity, and decreased worker morale can serve as an incentive for owners to prioritize worker safety. An optimist might argue that some owners value job site safety out of consideration for the workers even when the owners do not bear any risks related to the workers' injuries. This does, however, raise interesting public policy questions: What duties should owners owe to workers employed on their projects? Should an owner be able to commission a project and then leave full responsibility for job site safety with the general contractor and its subcontractors? Or would imposing greater liability on owners for worker injuries benefit workers? Would doing so dissuade owners from commissioning construction projects in Michigan?

49. *See* 3 BRUNER & O'CONNOR, *supra* note 3, §10:110 ("A number of states have enacted legislative schemes that prohibit indemnity outright, but allow the parties to contract to contribute to losses suffered on the job to the extent caused by each. These statutes void indemnity agreements that purport to indemnify the indemnitee for its own negligence—sole or otherwise. The statutes do not prohibit the parties from agreeing to be responsible for those losses caused by their own negligence irrespective of any defenses that might otherwise be available to the promisor.").

50. Echeverria & Zimmerman, *supra* note 11, at 1 ("A minority of states permit such broad form indemnification, but even in these six states–Alabama, Maine, Nevada, Vermont, Wisconsin, and Wyoming–such clauses are strictly construed."); Algrem v. Nolan, 154 N.W.2d 217, 220 (Wis. 1967) ("In cases where the damage results solely from the negligence of the indemnitee, and the indemnitee seeks recovery from the indemnitor, this court and the overwhelming majority of other state courts apply the rule that the indemnity contracts will be strictly construed.").

51. 131 F. Supp. 478 (E.D. Mich. 1955). This case and many other Michigan construction indemnity cases have involved incidents that occurred at auto manufacturing facilities. *See generally* WESTLAW, + "691.991", 60 results (Nov. 15, 2025) (on file with author) (filtered by "Cases", "Michigan") (yielding many cases involving worker injuries at auto manufacturing facilities). This seems to merely reflect the large concentration of automakers in Michigan and their demand for new facilities and improvements to existing facilities. *But see infra* note 86 (citing several construction indemnity cases not related to the automotive industry).

Michigan prior to 1967.[52] In that case, GM had hired a general contractor to erect a building at its Buick division site.[53] The plaintiff, a cement worker employed by the general contractor, alleged he was injured when a GM employee negligently crashed an industrial truck, causing a wheelbarrow to fall on him.[54] The plaintiff sued GM, and GM added the general contractor as a third-party defendant.[55] GM sought indemnity from the general contractor based on the broad form indemnity provision in the parties' contract.[56] The general contractor moved for summary judgment, arguing that GM could not recover for injuries resulting from its sole negligence and that the contract was not broad enough to be construed as indemnifying GM for its own negligence.[57] The Court denied the motion.[58] It held that the agreement "clearly indicate[d] that the undertaking of [the general contractor] was, in part at least, to indemnify [GM] against responsibility for injuries to [the general contractor]'s employees used on the job in question, regardless of [who was] at fault."[59]

In 1960, the United States Court of Appeals for the Sixth Circuit decided *Allied Steel & Conveyors, Inc. v. Ford Motor Co.*[60] In that case, Ford had contracted with Allied Steel for the sale and installation of machinery at one of Ford's facilities.[61] "[I]n the course of the installation, [one of Allied Steel's employees] sustained personal injuries as a result of the negligence of Ford's employees."[62] The injured employee sued Ford, who then added Allied Steel as a third party defendant.[63] Ford sought indemnity from Allied Steel pursuant to a broad form indemnity

52. *See infra* note 79 and accompanying text.
53. *Buffa*, 131 F. Supp. at 479.
54. *Id.*
55. *Id.*
56. *Id.* at 481 ("The pertinent provisions of the contract are: . . . . 'The Contractor shall be responsible for his work and every part thereof, and for all materials, tools, appliances, and property of every description used in connection therewith. He shall specifically and distinctly assume and does so assume all risks of damage or injury to property or persons used or employed on or in connection with the work, and of all damage or injury to any persons or property wherever located, resulting from any action or operation under the contract or in connection with the work, and undertakes and promises to protect and defend the Owner against all claims on account of any such damage or injury . . . . The Contractor shall secure and protect the Owner from any liability or damage whatsoever, for injury (including death) to any person or property . . . .'").
57. *Id.* at 479.
58. *Buffa*, 131 F. Supp. at 485.
59. *Id.* at 484.
60. 277 F.2d 907 (6th Cir. 1960).
61. *Id.* at 909.
62. *Id.* at 910.
63. *Id.*

agreement[64] in the purchase order for the equipment and installation work.[65] The Sixth Circuit affirmed the trial court's judgment in favor of Ford.[66]

But a third case, *Ray D. Baker Contractor, Inc. v. Chris Nelsen & Son, Inc.*, represents one limitation on Michigan courts' enforcement of broad form indemnity agreements prior to the enactment of an anti-indemnity statute.[67] In *Baker*, the city of Dearborn hired a general contractor to build a storm sewer.[68] The general contractor planned to dig the necessary trench for the sewer and hired a subcontractor to pour the concrete.[69] The general contractor and the subcontractor entered into an agreement that contained a broad form indemnity provision.[70] During the project, "spoil"[71] fell into the partially-completed sewer several times, damaging it and requiring the

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64. *Id.* at 909 ("Attached to the Purchase Order and made a part thereof was a printed form designated Form 3618, which included an indemnity provision . . . requiring the Seller to assume full responsibility not only for the fault or negligence of its own employees but also for the fault or negligence of Ford's employees, arising out of or in connection with Allied's work.").

65. *Id.* at 910.

66. *Allied*, 277 F.2d at 914. This case involved a complex set of facts surrounding the formation of the contract in question. Ford purchased the machinery and the installation service from Allied through an amendment ("Amendment No. 2") to an existing purchase order. *Id.* at 909. The original purchase order contained an indemnity provision under which Allied would only be responsible for "all damages or injuries occurring as a result of the fault or negligence of its own employees." *Id.* Ford had attached a form to the original purchase order, including a broader indemnity provision that required Allied to "assume full responsibility not only for the fault or negligence of its own employees but also for the fault or negligence of Ford's employees, arising out of or in connection with Allied's work", but that provision was marked "VOID." *Id.* Ford attached another copy of the same form to Amendment No. 2, but it did not mark the provision "VOID." *Id.* at 910. The record "ma[de] it clear that the reason for not voiding the broad indemnity provision of [the form] attached to Amendment No. 2 was that the installation work on Ford's premises was to be performed by Allied's employees, whereas under the original purchase order . . . the installation work was to be done by Ford's own employees." *Id.* Allied argued that it was not bound by the provisions of Amendment No. 2 because it did not sign and return a copy of the amendment to Ford until after the employee's injury. *Allied*, 277 F.2d at 910. The Sixth Circuit rejected that argument, holding that Allied created a binding contract through part performance. *Id.* at 912.

67. 136 N.W.2d 771 (Mich. Ct. App. 1965).

68. *Id.* at 771.

69. *Id.*

70. *Id.* at 772. ("The written contract between [the general contractor] and [the subcontractor] contained an express provision as follows: 'The Sub-contractor agrees to indemnify and hold harmless [the general contractor] from all liabilities, claims or demands for injury or damage to any person or property arising out of the performance of this contract.'").

71. "Spoil" refers to excess soil and other excavated materials that are eventually hauled off to a disposal site.

subcontractor to redo some of the work and incur additional expenses.[72] However, the general contractor refused to pay the subcontractor any more than the original contract price.[73] The subcontractor sued the general contractor, and the Oakland County Circuit Court awarded the subcontractor damages for its extra expenses.[74] The Court reasoned that the damage to the sewer resulted from the general contractor's negligent placement of spoil piles too close to the trench, which amounted to a breach of an implied contractual term.[75]

The general contractor appealed, arguing that the indemnity provision in the parties' agreement served as a defense to the breach of contract claim.[76] The Michigan Court of Appeals rejected that argument.[77] It held that similar indemnity provisions were traditionally used to indemnify the promisee against liability to third parties, and it refused to construe the provision as indemnifying the general contractor for its contractual obligations to the subcontractor.[78]

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72. *Baker*, 136 N.W.2d at 771–72.
73. *Id.* at 772.
74. *Id.*
75. *Id.* at 771–72.
76. *Id.* at 772. The general contractor also attempted to raise a second issue ("Must one who contracts absolutely and unqualifiedly to erect a structure for a stipulated price, bear the loss occasioned by the accidental destruction of that structure before completion?"), but the Court of Appeals refused to consider it because it was not raised to the trial court. *Id.*
77. *Baker*, 136 N.W.2d at 772–73.
78. *Id.* at 773. ("We [cannot] subscribe to the contention of defendant that the indemnity clause was meant to cover the situation which the defendant here claims it covers. We do not think that such a clause, which is one frequently used in construction contracts, was conceived to be used to indemnify a [tortfeasor] against the breach of his duty in the situation found here by the jury in the lower court. Nor has the search of the record and of Michigan cases shown that such an indemnification was contemplated. This type of clause has traditionally been used to indemnity [sic] one of the contracting parties against tort liability to third parties. In no case has such a clause been successfully used to protect one contracting party from liability to the other when dealing *inter se*, with no third party plaintiff concerned. In the cases in which this clause has been cited and discussed, the liability is concerned with third parties. In the instant case, the two contracting parties, both construction companies, are dealing face to face, and the liability goes to their basic contractual relationship, one with the other. The case primarily relied on by defendant is clearly distinguishable from the instant case, being involved with a third party plaintiff. The defendant's attempt to use what is a commonly encountered indemnity clause as a defense to its own breach of contract is an ingenious argument, but one which we [cannot] accept. It is clear from the way such clauses have been used that they may protect the indemnitee with regard to harm done to third parties. It is also clear, however, that such clauses are construed most strictly against the party who drafts them and the party who is the indemnitee. In this case, [the general contractor] is both drafter and indemnitee.") (citations omitted).

E. Michigan Enacts a Construction Anti-Indemnity Statute, MCL 691.991

In 1966, the Michigan Legislature enacted MCL 691.991, Michigan's construction anti-indemnity statute, titled, "void construction contracts."[79] The law took effect on March 10, 1967, and it remained unchanged for the next forty-five years.[80] As originally enacted, the statute applied only to contracts "relative to the construction, alteration, repair, or maintenance of a building, structure, appurtenance and [sic] appliance, including moving, demolition and excavating connected therewith."[81] It would later be amended to apply to design contracts and contracts for a wider range of infrastructure projects as well.[82] MCL 691.991 was initially permissive and favorable to indemnitees.[83] The statute prohibited broad form indemnity agreements, but it still allowed indemnitees to require reimbursement for losses for which they were up to 99% at fault.[84]

F. Scenarios Invoking MCL 691.991

Although indemnity agreements can apply to a variety of construction risks,[85] many of the cases invoking MCL 691.991 have involved serious job site injuries or fatalities.[86] This squares with the central importance of worker injuries to the development of indemnity agreements and anti-indemnity statutes.[87] While workers' compensation benefits are generally an injured worker's exclusive remedy *against a direct employer*,[88] the

79. MICH. COMP. LAWS § 691.991 (1966).
80. MICH. COMP. LAWS § 691.991 (2024).
81. *See* H.B. 5466, 96th Leg., Reg. Sess. (Mich. 2012).
82. *See id.*
83. Fischbach-Natkin Co. v. Power Process Piping, Inc., 403 N.W.2d 569, 575 (Mich. Ct. App. 1987) ("The express language of M.C.L. § 691.991 . . . requires that the 'bodily injury,' as a whole, results from the sole negligence of the indemnity in order to find the indemnification provision unenforceable.").
84. *Id.*
85. *See supra* note 19 and accompanying text.
86. *See, e.g.*, *Fischbach-Natkin*, 403 N.W.2d at 570–71 (subcontractor's employee was seriously injured when a hydraulic machine tipped over on him during installation at an auto manufacturer's plant); Redfern v. R.E. Dailey & Co., 379 N.W.2d 451 (Mich. Ct. App. 1985) (contractor's employee sustained fatal injuries while attempting to retrieve a broken component from an agitator at a wastewater treatment facility); Giguere v. Detroit Edison Co., 319 N.W.2d 334 (Mich. Ct. App. 1982) (contractor's employee was killed in a fall when a utility pole he was working on broke); Peeples v. City of Detroit, 297 N.W.2d 839 (Mich, App. 1980) (subcontractor's employee sustained injuries in fall from scaffold).
87. *See supra* note 20 and accompanying text.
88. MICH. COMP. LAWS § 418.131(1) (1969) ("The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy *against the employer* for a

worker remains free to bring tort suits against third parties whose alleged negligence has contributed to the injury.[89] Such suits frequently target contractors or owners upstream of the injured worker's direct employer, triggering indemnity agreements between the parties.[90]

The 1987 case *Burdo v. Ford Motor Co.*[91] illustrates a typical job site injury situation implicating an indemnity agreement governed by MCL 691.991. In that case, Ford hired a contractor to build a paint processing structure and other improvements at one of its plants.[92] One of the contractor's employees slipped and fell while pulling a machine through the plant, receiving major injuries to his back and neck.[93] A jury determined that the employee was 70% at fault for the injury and Ford was 30% at fault.[94] The United States District Court for the Eastern District of Michigan upheld the intermediate form indemnity agreement between the contractor and Ford, ruling that the contractor was required to completely indemnify Ford for its damages.[95] The United States Court of Appeals for the Sixth Circuit affirmed.[96]

G. 2012 Amendments to MCL 691.991

In December 2012, the Michigan Legislature passed HB 5466 to amend MCL 691.991.[97] Introduced by a predominantly Republican group of state representatives,[98] in relevant part, the bill added a subsection voiding intermediate form indemnity provisions in construction and design contracts with public entities *other than a defined group of public colleges and universities*.[99] With respect to contracts with those colleges

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personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort." (emphasis added)).

89. MICH. COMP. LAWS § 418.827(1) (1969) ("Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section . . . .").

90. *See supra* notes 51–66 and accompanying text.

91. 828 F.2d 380 (6th Cir. 1987).

92. *Id.* at 381.

93. *Id.*

94. *Id.* at 382.

95. *Id.*

96. *Id.* at 384.

97. H.B. 5466, 96th Leg., Reg. Sess. (Mich. 2012).

98. *Id.* ("Introduced by Reps. Heise, Haugh, Potvin, Wayne Schmidt, Horn, Knollenberg, Pettalia, Huuki and Haveman.").

99. *See supra* note 15 and accompanying text.

and universities and all private entities, MCL 691.991 still only prohibits broad form indemnity provisions and therefore permits intermediate form indemnity provisions.[100]

III. ANALYSIS

In considering whether MCL 691.991 would benefit from further amendment, it is important to investigate what motivated the 2012 amendments. Also, because MCL 691.991 now prohibits intermediate form indemnity agreements in some contexts while allowing them in others, it is important to weigh the pros and cons of each approach, as well as the merits of regulating construction indemnity differently depending on the identity of the indemnitee. Documentation of the legislative intent behind House Bill 5466 is sparse. What is clear is that legislators felt that the existing statute permitted public entities to shift too much risk onto indemnitors. However, public records do not clearly explain what prompted the Legislature to pass House Bill 5466 or why the bill increased restrictions on risk shifting in public projects but not in private projects.[101]

In a 2014 article covering then-recent amendments to several states' anti-indemnity laws, construction attorneys Asha Echeverria and Brian Zimmerman noted the bill's public versus private distinction and provided one possible explanation: "[r]eflecting the fact that most public projects are subject to competitive bidding, with little opportunity for contract negotiation, [MCL 691.991] prevents overreach by public entities by restricting both the assignment of liability and indemnification beyond a party's own fault."[102]

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100. *See supra* note 15 and accompanying text.

101. *See generally* SUSAN STUTZKY & ERIK JONASSON, HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: EXPAND ANTI-INDEMNIFICATION STATUTE: CONSTRUCTION CONTRACTS WITH PUBLIC ENTITIES (2012), https://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-5466-1.pdf [https://perma.cc/9V5K-H5UC]; *see also* PATRICK AFFHOLTER & DAN O'CONNOR, SENATE FISCAL AGENCY, ANTI-INDEMNIFICATION STATUTE: H.B. 5466 (H-1): COMMITTEE SUMMARY (2012), https://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-5466-S.pdf [https://perma.cc/4K5R-GLA5]; *see also* PATRICK AFFHOLTER & DAN O'CONNOR, SENATE FISCAL AGENCY, ANTI-INDEMNIFICATION STATUTE: H.B. 5466 (S-5): FLOOR SUMMARY (2012), https://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-5466-F.pdf [https://perma.cc/GS8L-5SAT]. These analysis documents on the Legislature's website provide short overviews of the bill, but they do not explain what prompted the bill's introduction, the arguments for and against the bill, or why it exempted certain public institutions of higher education and private entities.

102. Echeverria & Zimmerman, *supra* note 11, at 3.

A. Unequal Bargaining Power

Echeverria and Zimmerman's explanation certainly supports prohibiting intermediate indemnity provisions in contracts with public entities, but it does not support treating the same provisions in contracts with private entities or public colleges and universities differently. While competitive bidding is the norm in public construction projects, it is also frequently used in private projects.[103] Even in private projects where owners or general contractors do not employ competitive bidding processes, the potential for disparities in bargaining power still exists. An increased opportunity for negotiation of contract terms does not necessarily prevent an indemnitor from being taken advantage of. Stated differently, having greater bargaining *opportunity* does not necessarily equate to having greater bargaining *power*.

B. Worker Safety

Whatever the Michigan Legislature's reasoning for treating public and private construction indemnity agreements differently, worker safety should be no less of a concern in private projects than it is in public projects. Whether the indemnitee is a large private business or a state government agency, the more risk it is permitted to shift onto an indemnitor, the less incentive it has to take steps to ensure job site safety.[104] As a corollary, the less risk an indemnitee can shift onto an indemnitor, the greater the indemnitee's incentive to prioritize job site safety.

C. Insurance

The availability of liability insurance can complicate the analysis of anti-indemnity statutes. Subcontractors can often transfer contractually

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103. 1 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 2:20 (2002) ("As a practical matter, competitive bidding and negotiation procedures each are widely used in both public and private formation and modification."); *see also id.* § 2:32 ("The mechanics of competitive sealed bidding, developed to promote the integrity of competitive bidding under the bright lights of open scrutiny, are time-consuming, costly, complex and rigid. Contractors are expected to turn 'square corners' when they deal with the government, and the sealed bidding process has numerous 'square corners.' Myriad rigid requirements, which address bid preparation, submission, opening, evaluation and acceptance, are imposed by the invitation to bid, and, for public work, the governing statutes, ordinances, and regulations, which collectively dictate specific procedures under which a contract will be awarded. Although these rigid requirements convey a sense of fairness, *the lack of negotiation presents adhesionary 'take it or leave it' risks*." (emphasis added)).

104. *See supra* note 45 and accompanying text.

assumed liabilities to their insurers.[105] Assuming the subcontractor's policy covers the indemnity agreement and the loss in question, the insurer, not the subcontractor, defends and indemnifies the indemnitee against third-party claims.[106] At first glance, insurance may appear to solve the problem of excessive risk shifting. After all, an indemnitor who can transfer risk to an insurer no longer bears the direct burden of indemnifying the indemnitee. However, insurance does not fully address the two primary problems anti-indemnity statutes are generally enacted to prevent.

First, although insurance allows the indemnitor to transfer its contractual indemnity obligations to its insurer,[107] it is still true that where the indemnitee is to be indemnified for its own negligence, financial responsibility for that negligence rests with some entity other than the indemnitee. On the other hand, even in the absence of an indemnity agreement, an owner or general contractor is free to maintain its own liability insurance policy. Some would argue that liability insurance inherently lessens a policyholder's incentive to act carefully and safely.[108] While that may be true, it is unlikely that having liability insurance *completely* shields an owner or general contractor from the financial consequences of losses. At a minimum, the insurer might increase the premium at renewal, provide less favorable policy terms and conditions at renewal, or even elect to non-renew the policy. Avoiding those consequences through risk shifting would still represent a significant decrease in the owner or general contractor's incentives to ensure worker safety.

Second, liability insurance does not fully shield an indemnitor from the potential consequences of assuming excessive risk. Absent a provision to the contrary, an indemnitor would still have to defend and indemnify the indemnitee against any *uninsured* losses within the scope of the indemnity agreement. Additionally, an indemnitor will not necessarily be able to pass 100% of its insurance costs to the indemnitee, especially

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105. *See* 4 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 11:489 (2014) (discussing how an indemnitor can secure its indemnity obligations by purchasing contractual liability insurance coverage or having the indemnitee included on an insurance policy as an additional insured).

106. *Id.*

107. *See infra* notes 112–18 and accompanying text.

108. Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 313 (1990) ("In addition, tort law is commonly commended as a deterrence measure. Yet insurance, by removing from the defendant the threat of actual liability, obviously calls into question tort law's ability to achieve deterrence. Indeed, many scholars share in the view that tort law's deterrence objective is 'severely, perhaps fatally undermined' by the prevalence of insurance.").

where the two parties are already in positions of unequal bargaining power.

D. Design Professionals' Role in the Enactment of House Bill 5466

As it turns out, design professionals were central to the enactment of House Bill 5466.[109] They have an important interest in avoiding intermediate form indemnity agreements because of the unique liability associated with design work and some of the limitations of the insurance available to cover that liability. A key distinction between design professionals and other contractors is that design professionals primarily face liability for errors and omissions in creating the plans and specifications other contractors bring to fruition, while other contractors primarily face liability for losses occurring in the execution of those plans and specifications.[110] Much like doctors, accountants, and lawyers, under common law, design professionals are held to a high standard of care with respect to the professional services they provide.[111] Likewise, where a contractor primarily seeks to transfer liability to a general liability insurance policy, a design professional primarily seeks to transfer liability to a professional liability insurance policy.[112]

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109. Telephone interview with Gary D. Quesada, Principal Attorney, Cavanaugh & Quesada, PLC (Jan. 27, 2025).

110. *Id.*

111. *See generally* Patrick J. O'Connor Jr., *Duties Owed by Design Professionals: Standard of Care and Other Mysteries*, 9 No. 1 J. AM. COLL. CONSTR. LAWS. 1 (2015).

112. Insurance is not a commodity; each insurance policy is a unique contract between the insurer and the policyholder. *See generally* Bill Wilson, *Seriously, Insurance is NOT a Commodity*, INS. J. (June 19, 2023), https://www.insurancejournal.com/magazines/mag-features/2023/06/19/725391.htm [https://perma.cc/8VPS-BEJL]. This Note uses the term "general liability insurance" to refer to a category of insurance policies that cover liability arising from operations and exposures other than professional services. This Note uses the term "professional liability insurance" to refer to a type of insurance policy that covers liability arising from professional services. Depending on how a particular insurance policy is worded, a "general liability" policy may cover certain losses that a "professional liability" policy would traditionally cover and vice versa. It should also be noted that maintaining one of these two types of policies does not necessarily obviate the need to maintain the other type. For example, a design firm that purchases professional liability insurance would also most likely need to purchase general liability insurance to cover liability the firm incurs outside the scope of the professional services it provides. *See* O'Connor, *supra* note 111 at 1 n.5 ("*See* Gregoire v. AFB Const., Inc., 478 So. 2d 538 (La. Ct. App. 1st Cir. 1985) (engineer's duty to warn about safety issues presented by high-voltage electric wire at construction site could be found outside of the professional services the engineer had agreed to perform, and thus engineer was entitled to defense under its general liability policy against claim for breach of such duty)."). Likewise, a contractor who does not engage in architecture or engineering work may nonetheless purchase professional liability insurance to cover the risk of faulty work and other errors and

One of the critical differences between general liability insurance and professional liability insurance is that general liability insurance policy forms are relatively standardized, while professional liability insurance policy forms are not.[113] General liability policies often provide some coverage for claims for which the policyholder is liable solely by having assumed liability in a contract.[114] In contrast, many professional liability policies covering architects and engineers explicitly exclude claims for which the policyholder has assumed liability in a contract, other than to the extent that the policyholder would have been liable in the absence of

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omissions beyond the scope of general liability insurance. *See generally Why Do Contractors Need E&O Insurance?*, CFC (Feb. 12, 2021), https://www.cfc.com/en-us/knowledge/resources/articles/2021/02/why-do-contractors-need-eo-insurance/ [https://perma.cc/5AE2-QHXK].

113. Telephone interview with Gary D. Quesada, *supra* note 109; *see also* Randy J. Maniloff, *Is a Standard ISO Professional Liability Form Finally Here?*, ALM PROPERTYCASUALTY360 (Sept. 18, 2017, at 02:00 ET), https://www.propertycasualty360.com/2017/09/18/is-a-standard-iso-professional-liability-form-fina/ [https://perma.cc/WTE4-W2XU] ("One of the hallmarks of commercial general liability insurance is that it's provided by insurers with relatively consistent terms . . . . Although CGL policies have enjoyed this similarity in terms, the same can't be said about professional liability policies."); *see also* Chris Boggs, *Insurance History—and Maybe Some Myths and Legend*, BIG "I" VIRTUAL UNIV. (Feb. 17, 2017), https://www.independentagent.com/vu/Insurance/Commercial-Lines/Miscellaneous/BoggsInsuranceHistory.aspx [https://perma.cc/3UN4-LR3V] (describing the Insurance Services Office (ISO) and the American Association of Insurance Services (AAIS), two organizations that promulgate standardized insurance policy language).

114. *See* Bill Wilson, *How Do You Know if It's an ISO Policy Form?*, INS. J. (Mar. 18, 2024), https://www.insurancejournal.com/magazines/mag-features/2024/03/18/764934.htm [https://perma.cc/AZ5P-U65R] ("Since its official inception in 1971, Insurance Services Office Inc. (ISO) has been the national insurance industry standard setter for policy form language. Many insurers use pure ISO forms, usually along with proprietary endorsements of their own. Even insurers who don't subscribe to ISO forms often use language very close, even identical, to that in ISO forms . . . . Most industry education and reference materials focus on ISO forms and many businesses that establish minimum coverage requirements for their business partners do so by requesting that coverage be provided by specific ISO forms 'or their equivalent.'"). The CG 00 01 04 13, the current version of ISO's standard, occurrence-based general liability form, provides contractual liability coverage via an exception to an exclusion. While the form broadly excludes contractual liability, the exclusion contains an exception for certain liability assumed in an "insured contract" and includes a wide range of business contracts in its definition of that term. *See* INS. SERVS. OFF., INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM 2, 14 (2012) ("This insurance does not apply to: . . . 'Bodily injury' or 'property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. *This exclusion does not apply to liability for damages . . . . Assumed in a contract or agreement that is an 'insured contract'* . . . 'insured contract' means: . . . . That part of any other contract or agreement pertaining to your business … under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization." (emphasis added)).

the contract.[115] In other words, professional liability policies may cover claims based on common law indemnity[116] or limited form indemnity, but they are unlikely to cover claims based on intermediate form indemnity. Accordingly, a design firm's contractual assumption of liability beyond its own degree of fault is most likely an uninsured obligation. Additionally, general liability policies often provide that the insurer's payment of defense costs does not erode the policy limits,[117] while under most professional liability policies, the insurer's payment of defense costs *does* erode the policy limits.[118]

Michigan owners, particularly public entities, have frequently required intermediate form indemnity provisions in construction contracts and design contracts.[119] Considering that professional liability insurance typically does not cover intermediate form indemnity obligations,[120] the prevalence of such provisions in Michigan has had a greater impact on design professionals than other types of contractors whose general liability insurance is more likely to cover these obligations. At the same time, design firms typically do not carry significant assets, instead relying

115. Telephone interview with Gary D. Quesada, *supra* note 109.

116. *Id.*; *see also* 3 BRUNER & O'CONNOR, *supra* note 3, § 10:3 (discussing common-law indemnity at length).

117. *Defense Within Limits*, INT'L RISK MGMT. INST., https://www.irmi.com/term/insurance-definitions/defense-within-limits [https://perma.cc/QXG8-9RJN] (last visited Mar. 26, 2025) ("Defense within limits is a liability policy provision stating that amounts paid by the insurer to defend the insured against a claim or suit reduce the policy's applicable limit of insurance . . . . General liability policies are ordinarily not subject to such a provision, although the standard commercial general liability (CGL) policy provides for defense of the named insured's indemnitee 'within limits' when the named insured has a contractual obligation to provide such a defense.").

118. *See id.* ("Defense within limits is more common in professional liability policies."); *Professional Liability PL*, INT'L RISK MGMT. INST., https://www.irmi.com/term/insurance-definitions/professional-liability [https://perma.cc/6VZB-NGNU] (last visited Mar. 26, 2025) ("The vast majority of professional liability policies are written with claims-made coverage triggers, and the insurer's payment of defense costs reduces available policy limits."). Consider how a hypothetical claim scenario would play out differently depending on whether a policy provides defense within the limits or outside the limits. Suppose an engineering firm carries professional liability insurance with a $1 million per claim limit. The firm is sued for its defective design work that allegedly caused the plaintiff to incur $2 million in losses, and the firm incurs $400,000 in legal fees defending the claim before ultimately settling for $900,000. Notwithstanding any deductibles or self-insured retentions, if the firm's policy provides for defense outside the limit, the full amount of the settlement can be covered within the limit. If the firm's policy provides for defense within the limit, only $600,000 of the limit remains after the payment of defense costs, and the firm is left with $300,000 in uninsured losses.

119. Telephone Interview with Gary D. Quesada, *supra* note 109.

120. *Id.*

heavily on cash flow.[121] Because of the limited assets and the unavailability of insurance coverage, compelling a design firm to enter into an intermediate form indemnity agreement accomplishes little.[122] It is unlikely to result in greater protection for the owner, and it increases the likelihood that the design firm will become insolvent in the event of significant losses resulting from concurrent negligence.[123] Additionally, an indemnitor's contractual duty to defend an indemnitee against claims is separate from and broader than its duty to indemnify the indemnitee.[124] In other words, even where an indemnitor is not required to indemnify the indemnitee, the indemnitor may still owe the indemnitee a legal defense.[125]

Trade associations representing Michigan design professionals have urged the legislature to increase statutory protections against onerous indemnity provisions.[126] In 2004, in response to the trade associations' concerns, the Michigan Legislature enacted House Bill 5656, which prohibited the Michigan Department of Management and Budget from requiring an architect, engineer, or contractor to assume any liability or indemnify the state beyond the degree of the indemnitor's own fault.[127] Although the bill provided some protection to design professionals and contractors, it was limited to one department within the state government.

The Michigan House Fiscal Agency's Legislative Analysis[128] set out the arguments on both sides of House Bill 5656.[129] The parties who

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121. Emily Gunther, *Determining Fair Value of an Architecture and Engineering Firm*, CLIFTONLARSONALLEN (Aug. 17, 2017), https://www.claconnect.com/en/resources/articles/2017/determining-fair-value-of-an-architecture-and-engineering-firm [https://perma.cc/7SNN-U6VY] ("Several approaches can be used to determine fair value [of an architecture and engineering firm] . . . . The third approach, which is almost never used in the [architecture and engineering] environment, is an asset-based approach, which values the significant assets held by an entity . . . . In an [architecture and engineering] firm, the real value is generally not the assets owned by the entity but the ability of the owners to generate future cash flow.").

122. Telephone Interview with Gary D. Quesada, *supra* note 109.

123. *Id.* Note that a design firm or other contractor might protect itself by negotiating a limitation of liability provision with the indemnitee. For example, the parties might agree that the indemnitor's liability is limited to what it can recover from insurance proceeds. *See generally* 3 BRUNER & O'CONNOR, *supra* note 3, § 10:117.

124. *See generally* 3 BRUNER & O'CONNOR, *supra* note 3, § 10:62

125. *Id.*

126. Telephone Interview with Gary D. Quesada, *supra* note 109.

127. H.B. 5656, 92nd Leg., Reg. Sess. (Mich. 2004).

128. J. HUNAULT & AL VALENZIO, HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: LIABILITY OF ARCHITECTS, CONTRACTORS, AND ENGINEERS ON CAPITAL OUTLAY PROJECTS, (2004), https://legislature.mi.gov/documents/2003-2004/billanalysis/House/pdf/2003-HLA-5656-3.pdf. [https://perma.cc/UNL5-NHYF].

129. *Id.* Note that House Bill 5656 (2004) and later House Bill 5466 (2012) dealt with effectively the same issue on different scales and were supported by some of the same trade

supported the bill argued that professional liability insurers were shying away from covering intermediate form indemnity obligations,[130] the unavailability of insurance would deter design professionals and contractors from bidding on state projects,[131] and decreased competition might raise project costs.[132] The Department of Management and Budget argued that its intermediate form indemnity provision protected taxpayers from excessive third-party claims for damages.[133] However, that argument assumes that indemnitors have sufficient insurance or assets to back the obligations the provision creates.[134] To the extent they do not, taxpayers will bear the costs of those claims anyway. The argument also fails to acknowledge that there are other ways to protect taxpayers from excessive third-party claims (e.g., statutory damage caps).[135]

The Department further argued that its intermediate form indemnity provision was not unfair because its contracts also provided for a dispute resolution process for determination of fault between the parties,[136] and Michigan follows modified comparative negligence.[137] However, these arguments do not address the fact that in some situations, an intermediate form indemnity provision would still obligate the indemnitor to indemnify the Department for losses caused in part by the Department's own negligence.[138] Finally, the Department maintained that there was "no

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associations. Accordingly, the arguments for and against House Bill 5656 likely shed some light on the arguments for and against House Bill 5466.

130. HUNAULT & VALENZIO, *supra* note 128.

131. *Id.*

132. *Id.* Parties supporting the bill included: Professional Concepts Insurance Agency; The Association of Underground Contractors; The Michigan Road Builders Association; The American Institute of Architects, Michigan; The American Council of Engineering Companies/Michigan; and TetraTech MPS, Inc. *Id.*

133. *Id.*

134. *See supra* notes 119–23 and accompanying text.

135. For example, some state legislatures have enacted statutory damage caps in the medical malpractice context. *See* 2 AM. LAW MED. MALP. § 9:3.

136. HUNAULT & VALENZIO, *supra* note 128.

137. *Id.*; *see also* McMaster v. DTE Energy Company, 984 N.W.2d 91, 101 n.3 (Mich. 2022) ("[The Michigan Supreme Court] adopted the doctrine of comparative negligence in *Placek*, 405 Mich. 638, 275 N.W.2d 511, and the Legislature later codified the state's modified comparative-negligence scheme, MCL 600.2957. After the jury has determined that a party is liable for damages in a tort action, the comparative-fault assessment kicks in for the jury to apportion liability on the basis of the relative fault of the parties. MCL 600.2957; see also M Civ JI 11.01. In contrast to our former contributory-negligence scheme, which we cast aside in *Placek*, an at-fault party generally may not escape liability by pointing to the plaintiff's own negligence unless the jury determines that the plaintiff's percentage of fault surpasses that of the at-fault party. MCL 600.2959; M Civ JI 11.01.").

138. Before the Legislature enacted House Bill 5656, M.C.L. 691.991 only prohibited indemnity provisions purporting to indemnify the promisee for its sole negligence. *See supra* notes 79–84 and accompanying text.

shortage of bids from" design professionals or contractors on state contracts.[139] But the parties supporting the bill merely argued that a lack of insurability would *eventually* reduce the number of design professionals and contractors submitting bids for state contracts, not that it had already done so.[140]

After the enactment of House Bill 5656,[141] intermediate form indemnity agreements persisted in design and construction contracts with many other public and private entities.[142] In response, trade associations urged the Legislature to pass what they referred to as the "FAIR Indemnification Bill."[143] Although the unique challenges design professionals face provided the impetus for the bill, it would also benefit other contractors, so it attracted their support as well.[144] As originally proposed, the bill would have prohibited intermediate form indemnity provisions in construction and design contracts with all public and private entities.[145] However, public higher learning institutions and private businesses urged the Legislature to grant them exemptions, which it ultimately did when enacting the final version of the bill.[146]

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139. *See* HUNAULT & VALENZIO, *supra* note 128.
140. *Id.*
141. H.B. 5656, 92nd Leg., Reg. Sess. (Mich. 2004).
142. Telephone Interview with Gary D. Quesada, *supra* note 109.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*; *see also* MICH. COMP. LAWS § 691.991 (1966). Subsection (1) voids broad form indemnity provisions in all contracts that the statute applies to. *Id.* Subsection (2) voids intermediate form indemnity provisions in contracts where the party requiring indemnity is a public entity. *Id.* Subsection (4) defines "public entity" as the following:

> [T]his state and all agencies thereof, any public body corporate within this state and all agencies thereof, and any nonincorporated public body within this state of whatever nature and all agencies thereof; including, but not limited to, cities, villages, townships, counties, school districts, intermediate school districts, authorities, and community and junior colleges as provided for in section 7 of article VIII of the state constitution of 1963, and their employees and agents, including, but not limited to, construction managers or other business arrangements retained by or contracting with the public entity to manage or administer the contract for the public entity. *However, public entity does not include institutions of higher education as described or provided for in section 4 or 6 of article VIII of the state constitution of 1963, or their employees or agents.*

Id. (emphasis added); *see also* MICH. CONST. art. VIII, § 7 (including all public community and junior colleges within the state). Sections Four and Six include the University of Michigan, Michigan State University, Wayne State University, Eastern Michigan University, [Michigan Technological University], Central Michigan University, Northern Michigan University, Western Michigan University, [Ferris State University], Grand Valley State College, and "[o]ther institutions of higher education established by law having authority to grant baccalaureate degrees." *Id.* §§ 4, 6, 7.

E. Construction Anti-Indemnity Statutes in Other States

In weighing a potential amendment to MCL 691.991, it is helpful to consider similar statutes enacted in other states, including those neighboring Michigan. Though Wisconsin has a statute that prohibits limitations on tort liability in construction contracts,[147] it does not have a construction anti-indemnity statute. Accordingly, Wisconsin courts have upheld intermediate form and even broad form indemnity provisions, so long as they are clear and unambiguous.[148] Similarly to Michigan's statute prior to the 2012 amendment, Indiana's anti-indemnity statute prohibits only broad form indemnity agreements in public and private contracts alike.[149] On the other hand, Ohio and Illinois have taken more dramatic steps to protect indemnitors, prohibiting intermediate form indemnity agreements in both public and private contracts.[150] Since the 2012 amendment, MCL 691.991 has created an awkward middle ground: an indemnity clause that would run contrary to public policy when entered into with most public entities is acceptable when the indemnitee is instead a private entity or a qualifying public college or university.[151]

F. How the Michigan Legislature Should Amend MCL 691.991

Increasing restrictions on indemnity provisions in construction contracts might raise overbreadth concerns. A blanket ban on intermediate form indemnity agreements in Michigan would interfere with at least some, if not many, business relationships where the parties have roughly equal bargaining power. There are surely at least some indemnitees, if not many, who have robust job site safety programs and will prioritize worker safety regardless of their ability to shift the risk of worker injuries to indemnitors.

However, the status quo under MCL 691.991 is unsustainable. The continued prevalence of intermediate form construction indemnity agreements in Michigan reduces incentives for job site safety and saddles contractors—especially design professionals—with excessive risk. The permissibility of intermediate form indemnity agreements also seems to run contrary to Michigan's status as a modified comparative fault state.[152]

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147. WIS. STAT. § 895.447 (2025).
148. *See, e.g.*, Gunka v. Consolidated Papers, Inc., 508 N.W.2d 426 (Wis. Ct. App. 1993); Gerdmann by Habush v. U.S. Fire Ins. Co., 350 N.W.2d 730 (Wis. Ct. App. 1984).
149. IND. CODE § 26-2-5-1 (2019).
150. OHIO REV. CODE ANN. § 2305.31 (West 2025); 740 ILL. COMP. STAT. 35/1 (West 2025).
151. *See* MICH. COMP. LAWS § 691.991 (1966).
152. *See* MICH. COMP. LAWS § 600.2959 (1961).

In amending the statute to apply to all construction and design contracts, the Legislature would simply have to accept the consequence that some risk shifting which does not implicate unequal bargaining power or worker safety concerns would nonetheless be banned.

IV. CONCLUSION

MCL 691.991 is the product of a long series of developments in personal injury litigation and construction contracts. Following the Industrial Revolution, Michigan implemented a workers' compensation system to address the shortcomings of tort law as a "means of recovery for injured workers."[153] Although workers' compensation made the payment of benefits more predictable and efficient, it severely limited the amounts injured workers could recover.[154] In response, courts found new ways to award injured workers damages from negligent property owners, leading owners and general contractors to include indemnity provisions in their contracts.[155]

Until the late 1960s, Michigan courts upheld broad construction indemnity agreements purporting to indemnify promisees for claims arising from their sole negligence.[156] In 1966, the Michigan Legislature enacted MCL 691.991, prohibiting broad form indemnity provisions in many construction contracts, both public and private.[157] Saddled with excessive risk from onerous indemnity provisions they were compelled to accept, design professionals and other contractors sought additional legislative protection.[158] The Legislature began to provide some protection in 2004 by enacting House Bill 5656, which prohibited the Department of Management and Budget from requiring contractual indemnity for losses beyond a design professional or other contractor's degree of fault.[159]

As other public and private entities continued to require intermediate form indemnity provisions, design professionals continued to urge the Legislature to put additional statutory protections in place.[160] In response, the Legislature enacted House Bill 5466 in 2012.[161] While House Bill 5466 expanded protections in many public construction contracts, its exemptions for private owners and public higher education institutions

153. *See supra* notes 22–31 and accompanying text.
154. *See supra* note 29 and accompanying text.
155. *See supra* notes 30–31 and accompanying text.
156. *See supra* notes 51–78 and accompanying text.
157. *See supra* notes 79–84 and accompanying text.
158. *See supra* note 126 and accompanying text.
159. *See supra* note 127 and accompanying text.
160. *See supra* notes 142–43 and accompanying text.
161. *See supra* notes 97–100 and accompanying text.

have left indemnitors, especially design professionals, exposed to excessive risk via intermediate form indemnity provisions.[162]

The current iteration of MCL 691.991 represents a compromise. While the 2012 amendment represented a step in the right direction, the statute still does not go far enough to protect small construction and design firms. The Legislature should amend MCL 691.991 again to prohibit intermediate form indemnity provisions in all construction and design contracts. Doing so would promote worker safety, protect small construction and design firms, and allocate the financial consequences of losses to the parties who caused them, aligning the statute with the state's modified comparative fault scheme.[163]

162. *See supra* notes 145–146 and accompanying text.
163. *See supra* note 152 and accompanying text.