

A NEW ALABAMA CONSTRUCTION INDEMNITY REGIME

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A NEW ALABAMA CONSTRUCTION INDEMNITY REGIME

Note

Alabama's construction industry has a problem. The indemnity clause, the single most important risk-shifting provision in construction contracts, is unregulated by statute and subject to judicial uncertainty. Given the dangerous, costly, and complex nature of construction, owners, general contractors, and subcontractors use contractual indemnity to shift the risk of tort liability. The current regime, however, leaves parties to a construction contract wondering whether an unambiguous indemnity clause will be enforceable.

This Note provides a solution. It argues that Alabama needs a compromise indemnity statute that provides a clear, fair approach to the enforcement of indemnity clauses in construction contracts. Even if the legislature creates such a law, however, the efficacy of that new regime hinges on whether the Alabama Supreme Court will abrogate its current enforcement tests in deference to legislative compromise. If so, Alabama will become a model of contractual efficiency for shifting tort risk in the construction industry.

INTRODUCTION

The indemnity clause is the most powerful way to shift risk in the construction industry. It allows owners, general contractors, and subcontractors to allocate the risk of liability for accidents before they ever happen. Put simply, contractual indemnity is the right of one party (the indemnitee) to claim reimbursement for its losses, claims, or damages from another (the indemnitor).¹ But that definition requires state law to answer a critical question: Should a party to a construction contract be forced to bear responsibility for another party's negligence?

Alabama law does not give a clear answer. Unlike nearly every other state, Alabama does not statutorily restrict when indemnity clauses between project owners, general contractors, and subcontractors are enforceable.² Instead, the

1. *Indemnity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. At the time this Note was written, twenty-six states ban both broad- and intermediate-form indemnity in private construction contracts between owners and contractors. *See* CAL. CIV. CODE § 2782 (West 2011) (California); COLO. REV. STAT. ANN. § 13-21-111.5(1) (West 2021) (Colorado); CONN. GEN. STAT. § 52-572k(a) (2001) (Connecticut); DEL. CODE ANN. tit. 6, § 2704(a) (West 2003) (Delaware); 740 ILL. COMP. STAT. 35/1 (1971) (Illinois); IOWA CODE § 537A.5 (2011) (Iowa); KAN. STAT. ANN. § 16-121 (West 2017) (Kansas); KY. REV. STAT. ANN. § 371.180(2) (West 2005) (Kentucky); MINN. STAT. § 337.02 (1999) (Minnesota); MISS. CODE ANN. § 31-5-41 (West 1972) (Mississippi); MO. REV. STAT. § 434.100 (West 1999) (Missouri); MONT. CODE ANN. § 28-2-2111 (West 2003) (Montana); N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2009) (New York); N.C. GEN. STAT. ANN. § 22B-1 (West 2019) (North Carolina); OHIO REV. CODE ANN. § 2305.31 (West 1975) (Ohio); OKLA. STAT. ANN. tit. 15, § 221 (West 2006) (Oklahoma); OR. REV. STAT. ANN. § 30.140 (West 2007) (Oregon); 6 R.I. GEN. LAWS ANN. § 6-34-1 (West 1956) (Rhode Island); UTAH CODE ANN. § 13-8-1 (West 1997) (Utah); WASH. REV. CODE ANN. § 4.24.115 (West 2012) (Washington); WIS. STAT. ANN. § 895.447 (West 2022) (Wisconsin). Eighteen states ban only broad-form indemnity in private construction contracts. *See* ALASKA STAT. ANN. § 45.45.900 (West 1986) (Alaska); ARIZ. REV. STAT. ANN. § 32-1159 (1996) (Arizona); ARK. CODE ANN. § 4-56-104 (West 2015) (Arkansas); GA. CODE ANN. § 13-8-29 (West 2016) (Georgia); HAW. REV. STAT. § 431:10-222 (1987) (Hawaii); IDAHO CODE ANN. § 29-114 (West 1971) (Idaho); IND. CODE § 26-2-5-1 (2019) (Indiana); MD. CODE ANN., CTS. & JUD. PROC. § 5-401 (West 2016) (Maryland); MASS. GEN. LAWS, ch. 149, § 29C (1986) (Massachusetts) (applying only to subcontractors); MICH. COMP. LAWS § 691.991 (2013) (Michigan); NEV. REV. STAT. § 40.693 (2015)

Alabama Supreme Court uses ever-evolving balancing tests to decide when an indemnity clause is enforceable from case to case.

As applied to the construction industry, this regime is problematic. It permits general contractors to shift the risk of accidents caused by their sole negligence which ultimately undermines their safety incentives.³ Subcontractors also claim that, under regimes like Alabama's, general contractors unfairly require them to "accept potentially ruinous indemnity provisions or forgo work."⁴ Meanwhile, project owners and general contractors need clarity over when their indemnity clauses are enforceable so they can ensure their contract price reflects the amount of risk that such clauses shift. Sophisticated construction professionals do not want to play an uncertain game of equity with judges. But right now, they are.

Alabama has a clear and fair solution to this problem, but it requires legislative and judicial action. First, Alabama needs a construction-specific indemnity statute. Alabama's legislators are familiar with this task. Just last year, Senator Greg Albritton introduced a bipartisan bill (SB24) that permitted indemnification for one's own negligence (but not sole negligence, wantonness, recklessness, or intentional misconduct), so long as the indemnity contract imposed a monetary limit and required the indemnitor to maintain insurance up to that amount.⁵ SB24 was unsuccessful because owner, general contractor, and subcontractor interest groups have been unable to resolve their competing interests.⁶ However, the current balancing tests do not further those interests; in pursuit of fairness, courts' applications of those tests tend to upset parties' bargained-for expectations. In contrast, a construction-specific indemnity statute could create a regime that is not only fair but also produces clear results.

(Nevada) (applying only to residential contracts); N.H. REV. STAT. ANN. § 338-A:2 (2004) (New Hampshire); N.J. STAT. ANN. § 2A:40A-1 (West 1983) (New Jersey); S.C. CODE ANN. § 32-2-10 (1976) (South Carolina); S.D. CODIFIED LAWS § 56-3-18 (1973) (South Dakota); TENN. CODE ANN. § 62-6-123 (West 1976) (Tennessee); VA. CODE ANN. § 11-4.1 (West 1991) (Virginia); W. VA. CODE § 55-8-14 (1975) (West Virginia). Florida has a unique anti-indemnity statute that prohibits broad- and intermediate-form indemnity unless the contract has a monetary limit on the extent of indemnification. FLA. STAT. § 725.06 (2001). Some states (Georgia, Kansas, Montana, Nebraska, New Mexico, and Oklahoma) also foreclose the additional insured route of tort liability protection for private construction contracts. *See* GA. CODE ANN. § 13-8-2.9 (West 2016); KAN. STAT. ANN. § 16-121 (WEST 2017); MONT. CODE ANN § 28-2-2111 (West 2003); NEB. REV. STAT. § 25-21, 187 (1979); N.M. STAT. ANN. § 56-7-1 (West 2005); OKLA. STAT. ANN. tit. 15, § 221 (West 2006). Practitioners and construction professionals should note that indemnity laws change from time to time and from state to state. When drafting an indemnity provision, one should check the requirements of his or her client's state-specific requirements and determine to whom and to what projects the statute applies.

3. *See infra* text accompanying note 29.

4. John D. Wilburn & Jennifer A. Guy, *Construction Indemnity in Virginia: Less Just Might Be More*, 44 VA. BAR ASS'N J. 28, 29 (2017); *see also* PHILIP L. BRUNER & PATRICK J. O'CONNOR JR., 3 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 10:13 (2022) ("[M]any state legislatures have expressed concern over the undue use of leverage in contract negotiations by owners and general contractors to extract broad exculpatory indemnity commitments from lower-tier contractors.").

5. *See* S.B. 24, 2023 Reg. Leg. Sess. (Ala. 2023).

6. *See, e.g., AL SB24*, LEGISCAN, <https://legiscan.com/AL/bill/SB24/2023> [<https://perma.cc/9NWE-9UDS>].

Second, Alabama's courts should respond to such a statute by enforcing a construction indemnity contract if it falls within the statute's guardrails.

Accordingly, Part I explains why parties use contractual indemnity. Part II outlines the types of contractual indemnity, their practical effects, and relevant policy considerations for them. Part III surveys Alabama's indemnity jurisprudence and its problematic uncertainty. And finally, Part IV provides a solution to that uncertainty. Part IV.A discusses how a construction-specific indemnity statute could strike an appropriate compromise between owners' and general contractors' desire for contractual freedom and subcontractors' fairness and safety concerns. Part IV.B argues that, if the legislature passes such a statute, the Alabama Supreme Court should consider abrogating its balancing tests when a construction indemnity contract is at issue. That response will permit Alabama's owners, general contractors, and builders to efficiently shift tort risk on construction projects.

I. THE CASE FOR CONTRACTUAL INDEMNITY

On a construction jobsite, you might see tradesmen carefully pouring concrete, trucks removing dirt for a foundation, or an electrician working on a power line. Unsurprisingly, human error, powerful machinery, and heights create risk. Despite safety programs and Occupational Safety and Health Administration (OSHA) guidelines,⁷ accidents still cause personal injury and property damage. And they frequently have multiple causes attributable to multiple parties.

Suppose that the employee of a project owner watches a construction team renovate a manufacturing plant.⁸ A general contractor's superintendent guides a subcontractor's crane operator as she moves materials in a storage yard. Suddenly, the crane's arm accidentally connects with an exposed high-voltage transmission line overhead. Though the general contractor's superintendent told the operator that he disconnected the wire, the live contact electrocutes the owner's employee. That employee will likely sue the general contractor and the crane operator subcontractor so that he has multiple avenues of recovery.⁹ When, like in our example, the defendants' negligent conduct causes a single, indivisible harm (the electrocution injury), each defendant is subject to liability for the entire harm.¹⁰ This joint and several liability (JSL) means that the

7. See generally *Law and Regulations*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/laws-regs> [<https://perma.cc/9Y67-GRJ4>] (providing a search engine for OSHA rules).

8. These facts are loosely based upon *Industrial Tile, Inc. v. Stewart*, a seminal case in Alabama's contractual indemnity jurisprudence. See 388 So. 2d 171, 172 (Ala. 1980).

9. James S. Schenck, IV & Kelli E. Goss, *Liability for Construction Defects That Result from Multiple Causes*, J. OF THE AM. COLL. OF CONSTR. LAWS., Jan. 2015, at 45, 46.

10. MARC M. SCHNEIER, CONSTRUCTION ACCIDENT LAW: A COMPREHENSIVE GUIDE TO LEGAL LIABILITY AND INSURANCE CLAIMS 446 (1999); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S.

plaintiff can recover his full amount of damages from any liable defendant, whether they are one or ninety-nine percent at fault.¹¹ A plaintiff might elect to recover from whoever has the deepest pocket or whom they dislike the most.¹² In Alabama, defendants who are JSL cannot seek contribution from one another.¹³ After a plaintiff's election, the paying defendant cannot ask the other defendants for reimbursement based on comparative fault.¹⁴

Recognizing construction's inherent risks (and potential JSL liability with no contribution), parties to a construction contract rely on contractual indemnity to shift the burden of tort risk.¹⁵ Indemnity contracts make one party (the indemnitor) reimburse another party (the indemnitee) for liability to a third party.¹⁶ When an indemnitee faces liability from a covered claim, it usually triggers the indemnitor's duty to reimburse the indemnitee for all losses or damages arising from said claims.¹⁷ In practice, indemnity provisions often transfer risk from owners to general contractors, and then from general contractors to subcontractors, because the subcontractors who perform work are often in the best position to prevent accidents arising from it and have less bargaining power.¹⁸

Indemnity also covers the risk of liability where insurance cannot. For Judge Posner, insurance and indemnity are tools that shift liability to "someone better able to bear the burden."¹⁹ That may be an insurance company that can "spread the risk better than the tortfeasor" or an indemnitor "who could have

599, 614 (2009) (citing RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (AM. L. INST. 1965)); *see also* Holcim (US), Inc. v. Ohio Cas. Ins. Co. 38 So. 3d 722, 729 (Ala. 2009) ("Under Alabama law governing joint and several liability, '[a] tort-feasor whose negligent act or acts proximately contribute in causing an injury may be held liable for the *entire resulting loss.*'") (citing Nelson Bros., Inc. v. Busby, 513 So. 2d 1015, 1017 (Ala. 1987)).

11. J. Shahar Dillbary, *Apportioning Liability Behind a Veil of Uncertainty*, 62 HASTINGS L.J. 1729, 1731 (2010).

12. *Id.* at 1748 ("JSL with no contribution allows the victim to target large, deep-pocket defendants . . . [or] small defendants . . . [T]he [victim has the ability] to arbitrarily or strategically choose from whom to recover.") (footnote omitted).

13. Susan Randall, *Only in Alabama: A Modest Tort Agenda*, 60 ALA. L. REV. 977, 980 (2009); *see, e.g.*, Holcim (US), Inc., 38 So. 3d at 727; Humana Med. Corp. v. Bagby Elevator Co., 653 So. 2d 972, 974 (Ala. 1995); Apel Mach. & Supply Co. v. J.E. O'Toole Eng'g Co., 548 So. 2d 445, 448 (Ala. 1989).

14. Dillbary, *supra* note 11.

15. *See, e.g., id.* at 1744 ("Indemnity simply shifts the burden from one joint tortfeasor to another who is better situated to avoid the accident, rather than dividing it between the tortfeasors."); CHARLES A. BURKHART ET AL., ALABAMA CONSTRUCTION LAW MANUAL 49 (Charles A. Burkhardt & L. Conrad Anderson IV, eds., 2018); Cheryl Hood Langel, *Risk-Shifting Indemnity Agreements in Construction: Are They Finally Demolished*, 70 BENCH & B. MINN. 22, 23 (2013).

16. Robert L. Meyers, III. & Debra A. Perelman, *Risk Allocation Through Indemnity Obligations in Construction Contracts*, 40 S.C. L. REV. 989, 991 (1989). While indemnity clauses usually cover bodily injury, death, or property damage, they can cover "breach of warranty, breach of contract, antitrust violations, patent, trademark or copyright infringements, willful misconduct, and criminal behavior." *Id.* at 992–93.

17. *See supra* text accompanying note 1.

18. *See generally* BURKHART ET AL., *supra* note 15; McMunn v. Hertz Equip. Rental Corp., 791 F.2d 88, 91 (7th Cir. 1986).

19. *See McMunn*, 791 F.2d at 91.

prevented the accident at [a] lower cost than the indemnitee.”²⁰ The same party that is an indemnitee (the owner or general contractor) will often require the same party that is the indemnitor (the general contractor or subcontractor) to name it as an additional insured on its commercial general liability (CGL) policy so that the indemnitee can submit its claims directly to the insurance carrier.²¹ Even with the availability of insurance, owners and general contractors still want indemnification from parties down the contractual chain because a claim could either exceed that party’s insurance limits or not be covered by the policy at all. Thus, contractual indemnity is an essential tool to mitigate risk on the jobsite.

II. THE TYPES OF CONTRACTUAL INDEMNITY: PRACTICAL EFFECTS AND POLICY

The degree of risk that an indemnity contract shifts depends on each project’s needs and the relative bargaining positions of the contracting parties. At contract formation, project owners, general contractors, and subcontractors negotiate how much risk they are willing to assume.²² The more risk that a general contractor or subcontractor assumes *ex ante*, the higher their price of work will likely be.²³ For example, a subcontractor with an excellent safety program might appeal to a risk-averse general contractor by offering an expensive contract with a broad scope of indemnity. A general contractor might also insist on an expansive scope of indemnity from its subcontractors because it has agreed to broadly indemnify the project’s owner. Today, the construction industry in Alabama uses three indemnity forms (listed from the most to least expansive): broad-form, intermediate-form, and limited-form indemnity.²⁴

A. Broad-Form Indemnity

Broad-form indemnity requires an indemnitor to pay for its indemnitee’s covered tort liability, even if the indemnitee is solely at fault.²⁵ Returning to our crane accident example, assume that a trial court finds that the overseeing general contractor was solely at fault for the accident. Under broad-form indemnity, the subcontractor (indemnitor) crane operator must reimburse the general contractor (indemnitee) for any amounts the general contractor pays to

20. *Id.*

21. Langel, *supra* note 15; Dean B. Thomson & Colin Bruns, *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States*, J. AM. COLL. OF CONSTR. LAWS., Aug. 2014, at 1, 7.

22. See BURKHART ET AL., *supra* note 15, at 50.

23. See BRUNER & O’CONNOR, *supra* note 4, § 10:12 (2022) (“[T]he pricing of construction services should include these assumed risks.”).

24. Wilburn & Guy, *supra* note 4, at 28; Thomson & Bruns, *supra* note 21, at 3.

25. Wilburn & Guy, *supra* note 4, at 28.

the victim, even though a jury found that the subcontractor was fault-free. A broad-form indemnity clause might provide:

Indemnitor shall indemnify Indemnitee for all third-party claims or damages for bodily injury or property damage that arise out of Indemnitor's work, regardless of whether such claims or damages result from Indemnitee's partial or sole negligence.²⁶

As the Alabama Supreme Court noted in *Housing Authority of Birmingham District v. Morris*, broad-form indemnity is inherently unfair:

[I]t is a well recognized general principle, founded on human experience, that "Agreements exempting persons from liability for negligence induces a want of care, for the highest incentives to the exercise of due care rest in consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. It has therefore been declared to be a good doctrine that no person may contract against his own negligence."²⁷

Thus, most states have anti-indemnity statutes that disallow broad-form indemnity.²⁸ Those legislatures have concluded that broad-form indemnity undermines the safety incentives of indemnitee general contractors because it allows general contractors to shift the liability of an accident caused by their sole negligence to a subcontractor.²⁹

General contractors do have independent safety incentives from Occupational Safety and Health Administration (OSHA) regulations (to avoid fines),³⁰ insurance ratings (to pay lower premiums),³¹ and for the maintenance

26. *See id.* (emphasis added).

27. 14 So. 2d 527, 531 (Ala. 1943) (quoting 12 AM. JUR. § 183).

28. *See supra* note 2 (listing the scope of each state's anti-indemnity statute).

29. *See* BRUNER & O'CONNOR, *supra* note 4 ("Where an indemnity agreement requires the indemnitor to be responsible for the fault or wrongdoing of the indemnitee, there often arises a question as to whether a disincentive to careful behavior is created."):

30. Congress enacted the Occupational Health and Safety Act of 1970 to establish OSHA as a national guardian of safe working conditions. *See* 29 U.S.C. § 651. OSHA officials frequently conduct unannounced jobsite inspections to ensure that they are "free from recognized hazards that are causing or are likely to cause death or serious physical harm" and that contractors comply with safety standards. *Id.* § 654. If an inspector finds a violation, OSHA issues a citation and a notice to abate the violation. *Id.* § 658. Those citations have penalties of up to \$14,502 for serious violations and up to \$145,027 for willful or repeated violations. Kimberly A. Stille & Scott C. Ketcham, *2022 Annual Adjustments to OSHA Civil Penalties*, OCCUPATIONAL SAFETY AND HEALTH ADMIN. (Jan. 13, 2022), <https://www.osha.gov/memos/2022-01-13/2022-annual-adjustments-osha-civil-penalties> [https://perma.cc/3PDT-G7NL]. During inspections, OSHA frequently deems general contractors a jobsite's "controlling employer," which means that OSHA may cite a general contractor for a subcontractor's violation because the general contractor failed to correct the violation. Megan E. Baroni, *OSHA's Multi-Employer Policy Continues to Ensnare the Construction Industry*, CONSTR. EXEC. (Jun. 27, 2022), <https://www.constructionexec.com/article/oshas-multi-employer-policy-continues-to-ensnare-the-construction-industry> [https://perma.cc/6F6K-9G9Q]; *see also* OCCUPATIONAL SAFETY AND HEALTH ADMIN., CPL 02-00-124, MULTI-EMPLOYER CITATION POLICY (1999).

31. Workers' compensation insurance (applying to employee personal injuries) providers use an insured contractor's Experience Modification Rate (EMR) to measure how likely it is to have a jobsite accident, and thus, to calculate premiums. Danica Miller, *EMR — Experience Modification Rate*, EHS

of their general reputation for safety (to win project bids). Also, most jobsite safety decisions are “spontaneous and dictated largely by the circumstances at hand,” rather than by contract terms.³² Even so, a general contractor’s consistent use of broad-form indemnity over a substantial number of subcontracts may create a culture of complacency in jobsite safety.

B. *Intermediate-Form Indemnity*

Intermediate-form indemnity requires an indemnitor to pay for its indemnitee’s covered tort liability, so long as the indemnitor is at least partially at fault.³³ For instance, assume that a jury finds that the general contractor (indemnitee) and subcontractor (indemnitor) are joint and severally liable for the victim’s harm (with no contribution). The general contractor and subcontractor are both fifty percent at fault for the accident. If the victim elects to recover his entire judgment from the general contractor, the intermediate-form indemnity clause would require the subcontractor to reimburse the general contractor for its entire amount of liability. An intermediate-form indemnity clause might provide:

Indemnitor shall indemnify Indemnitee against all third-party claims or damages for bodily injury and property damage arising out of Indemnitor’s work, *except for claims or damages that arise out of Indemnitee’s sole negligence*.³⁴

In contrast to broad-form indemnity, the safety disincentive argument is less compelling for intermediate-form indemnity because enforceability implicitly requires that the indemnitor subcontractor’s conduct (or its subcontractor’s conduct) was still a “but-for” cause of the accident.³⁵ Thus, if

SOFTWARE (Aug. 4, 2020, 1:00PM), <https://blog.ehssoftware.io/safetyinsiderblog/the-experience-modification-rate-explained> [<https://perma.cc/84GM-UECT>]. It represents the actual payroll dollars a company expends on workers’ compensation claims versus the industry’s predicted risk for similar companies. *See id.* An EMR of 1.0 indicates that a contractor’s actual amount of work compensation paid was equivalent to the industry standard. *Id.* An EMR of greater than 1.0 shows that a contractor’s actual amount of work compensation paid was greater than the industry standard. *Id.* An EMR of less than 1.0 indicates that the actual amount of work compensation paid was less than the industry standard (and that a general contractor has an excellent reputation for safety). *Id.* Similarly, CGL insurance (applying to third-party personal injury and property damage) providers assess the degree and frequency of a general contractor’s previous accidents as a critical factor in underwriting their policies. Brandon Medina, *The Complete Guide to Construction Insurance*, CONSTR. COVERAGE (Oct. 26, 2023), <https://constructioncoverage.com/construction-insurance> [<https://perma.cc/F896-TBNZ>].

32. *See* William C. Roedder, Jr., *Contractual Indemnity in Alabama*, 33 ALA. L. REV. 31, 49 (1981).

33. Brett E. Bitzer, *Chapter 32: Bringing Down the Hammer on Type 1 Indemnity Agreements in Construction Contracts*, 39 MCGEORGE L. REV. 407, 409 (2008); *see* Meyers & Perelman, *supra* note 16, at 992.

34. Wilburn & Guy, *supra* note 4, at 28 (emphasis added); *see also* Meyers & Perelman, *supra* note 16, at 991–92.

35. J. Shahar Dillbary, *Causation Actually*, 51 GA. L. REV. 1, 30 (2016) (“The main test [in negligence law] for determining whether the defendant’s conduct was the actual cause of the victim’s harm is the but-for (or *sine qua non*) test. It asks whether the harm would not have occurred but for the defendant’s misconduct. The test implies that the defendant’s tortious conduct is a *necessary* condition for the harm.”) (footnote omitted).

an accident triggers a subcontractor's duty of indemnification under an intermediate-form clause, then the subcontractor's or its sub-subcontractor's conduct was necessary for the accident to happen (even if it was only minimally at fault). Even so, some states still ban intermediate-form indemnity because holding a subcontractor one percent at fault for an entire judgment against a general contractor can impose an unjust financial burden.³⁶ For that reason, states like Florida only allow intermediate-form indemnity if the clause contains a specific monetary limitation.³⁷ Where it is legal, owners and general contractors often opt for intermediate-form indemnity because it allows them to shift liability downstream to the party that caused the accident and avoids the time and expense of allocating fault and corresponding damages for the parties involved.

C. Limited-Form Indemnity

Limited-form indemnity requires an indemnitor to pay for an indemnitee's covered tort liability but solely to the extent that the indemnitor was at fault.³⁸ Put simply, it only covers an indemnitor's own fault. Assume that the general contractor settles the electrocution victim's negligence claim on behalf of the crane operator subcontractor. After paying the settlement, the general contractor (indemnitee) will ask the subcontractor (indemnitor) to reimburse it to the extent that it was at fault for the accident.³⁹ The parties must negotiate who was at fault and to what extent. If they cannot agree, the general contractor might file a separate breach of contract action against the subcontractor so that a court or arbitrator can allocate fault for them.⁴⁰ A limited-form indemnity clause might provide:

Indemnitor shall indemnify Indemnitee against all third-party claims or damages for bodily injury and property damage arising out of Indemnitor's work *to the extent that such claims or damages arise out of Indemnitor's proportional negligence, as determined by a court.*⁴¹

Limited-form indemnity creates a contractual right of contribution between JSL defendants that is limited to the indemnitor's comparative fault.⁴² Many

36. See *supra* note 2 (listing the scope of each state's anti-indemnity statute).

37. Florida's indemnification statute prohibits broad- and intermediate-form indemnity unless the contract has a monetary limit on the extent of indemnification. FLA. STAT. § 725.06 (2001).

38. Wilburn & Guy, *supra* note 4, at 28; Bitzer, *supra* note 33.

39. Meyers & Perelman, *supra* note 16, at 993 ("The indemnitor may be subject to damages determined by judgment, by terms of the contract, or by settlement of the parties.").

40. See generally BRUNER & O'CONNOR, *supra* note 4.

41. Wilburn & Guy, *supra* note 4, at 28 (emphasis added).

42. Given that Alabama does not permit contribution between JSL defendants, limited-form indemnity is a means to contract around that default rule. Cf. COMPARATIVE NEGLIGENCE MANUAL § 9:13 (3d ed. 2023) ("While contribution contemplates the equitable distribution of loss among joint tortfeasors,

subcontractors prefer limited-form indemnity because their liability only runs as far as their own fault (or their sub-subcontractors' fault). While subcontractors might charge a general contractor less for limited-form indemnity, this form still imposes expensive *ex post* transaction costs. As in our example, disagreement about fault allocation drives up the costs of construction for owners because general contractors will ensure that their contract price includes contingency funds for protracted disputes. While that may stir up more business for construction lawyers, it could present a net loss for parties to a construction contract.

In sum, the appropriate type of indemnity varies on a project-to-project basis. Owners, general contractors, and subcontractors must negotiate between the forms of indemnity based on each party's risk tolerance, capitalization, safety reputation, and need to win a project's bid. Of course, that analysis first assumes that a court will enforce an indemnity contract. In an earnest attempt to make the enforcement of indemnity provisions fair, Alabama courts' indemnity balancing tests have devolved into an uncertain game of equity. Accordingly, Part III will evaluate Alabama's indemnity jurisprudence and how it has undermined the *ex ante* expectations of parties from case to case.

III. THE PROBLEM: THE UNCERTAINTY OF ALABAMA'S INDEMNITY JURISPRUDENCE

As of December 2023, Alabama statutory law does not restrict indemnity contracts between project owners, general contractors, and subcontractors.⁴³ Instead, the Alabama Supreme Court's contractual indemnity tests have moved the goalposts for what defines an enforceable indemnity contract from case to case. The history of Alabama's indemnity jurisprudence reveals why its indemnity regime is desperate for clarity and stability.

Traditionally, an indemnity contract was enforceable if the parties' intention was clear from the face of their agreement and their circumstances (even if a contract never mentioned what would happen if an indemnitee was solely or partially negligent).⁴⁴ In the 1978 decision *Alabama Great Southern*

generally based on relative fault, indemnity traditionally shifts the entire loss to the tortfeasor who was actually at fault.”).

43. In 2021, Alabama enacted two narrow anti-indemnity laws: one for design professionals and another for roadbuilders. The design professional anti-indemnity statute prohibits broad- and intermediate-form indemnification claims against design professionals. ALA. CODE § 41-9A-3(a) (1975). The term “design professional” means a person or entity who is licensed or authorized in this state to practice architecture, landscape architecture, surveying, engineering, interior design, or geology. *Id.* The roadbuilder anti-indemnity statute prohibits broad- and intermediate-form indemnification for public works projects concerning roads or bridges. *See* ALA. CODE §§ 39-9-1 to -9 (1975).

44. *E.g.*, Ga., Fla., Ala. Transp. Co. v. Deaton, Inc., 304 So. 2d 168, 170 (Ala. 1974); Eley v. Brunner-Lay S. Corp., 266 So. 2d 276, 280 (Ala. 1972), *overruled by* Holcim (US), Inc. v. Ohio Cas. Ins. Co., 38 So. 3d 722 (Ala. 2009); Walter L. Couse & Co. v. Hardy Corp., 274 So. 2d 316, 319 (Ala. Civ. App. 1972); Republic Steel Corp. v. Payne, 132 So. 2d 581, 585 (Ala. 1961).

Railroad Co. v. Sumter Plywood Corp., the Alabama Supreme Court voided broad and intermediate-form indemnity with little explanation other than that expansive indemnity undermined indemnitees' safety incentives.⁴⁵ Two years later in *Industrial Tile, Inc. v. Stewart*, the court resumed its previous thinking by holding that "indemnity contracts are enforceable if the contract clearly indicates an intention to indemnify against the consequences of the indemnitee's negligence, and such provision was clearly understood by the indemnitor, and there is not shown to be evidence of a disproportionate bargaining position in favor of the indemnitee."⁴⁶

The court modified that test in *Brown Mechanical Contractors, Inc. v. Centennial Insurance Co.*⁴⁷ Under the *Brown* test, an indemnity clause's enforceability turns on: "(1) [the] 'contractual language,' (2) [the] 'identity of the draft[er] of the language,' and (3) 'the indemnitee's retention of control.'"⁴⁸ For the "language" factor, drafters are not required to use magic words, but the parties' intent must be clear from the contract's face.⁴⁹ For the "identity" factor, the more sophisticated a would-be indemnitor is, the more likely a court is to uphold its duty of indemnification.⁵⁰ Finally, for the "control" factor, "the smaller the degree of control [over the risk area] retained by the indemnitee, the more reasonable it is for the indemnitor, who has control, to bear the full burden of responsibility for injuries that occur in that area."⁵¹

In *Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, the court created another test for limited-form indemnity clauses that provide "for the allocation of a proportionate part of the obligation or damages based on the parties' respective fault."⁵² That test requires that (1) the parties "knowingly, clearly, and unequivocally" agree on the clause and (2) that "some type of agreed-upon formula" determines the parties' respective liability.⁵³ Though it has not expressly said so, the court now applies the *Brown* three-part test to broad- and intermediate-form indemnity clauses⁵⁴ and the *Holcim* two-part test to limited-

45. 359 So. 2d 1140, 1145 (Ala. 1978), *overruled by* *Indus. Tile, Inc. v. Stewart*, 388 So. 2d 171, 176 (Ala. 1980).

46. 388 So. 2d at 175; *see also* *Humana Med. Corp. v. Bagby Elevator Co.*, 653 So. 2d 972, 975 (Ala. 1995) ("While 'talismanic language' is not a necessity, the intention to indemnify [the indemnitee] for the indemnitee's own negligence must be clear from the instrument."); *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 555 (Ala. 1994); *Apel Mach. & Supply Co. v. J.E. O'Toole Eng'g Co.*, 548 So. 2d 445, 448 (Ala. 1989); *Crigler v. Salac*, 438 So. 2d 1375, 1386 (Ala. 1983).

47. *See* 431 So. 2d 932, 945–47 (Ala. 1983).

48. *Nucor Steel Tuscaloosa, Inc. v. Zurich Am. Ins. Co.*, 343 So. 3d 458, 469 (Ala. 2021) (quoting *Royal Ins. Co. of Am. v. Whitaker Contracting Corp.*, 824 So. 2d 747, 750–51 (Ala. 2002)).

49. *Id.*

50. *See id.*

51. *See* *City of Montgomery v. JYD Int'l, Inc.*, 534 So. 2d 592, 594 (Ala. 1988).

52. 38 So. 2d 722, 728 (Ala. 2009).

53. *Id.* at 729.

54. *See* *Nucor Steel Tuscaloosa, Inc.*, 343 So. 3d at 469.

form indemnity clauses.⁵⁵ Two recent Alabama Supreme Court decisions illustrate why this regime is problematic.

In the 2021 decision *Nucor Steel Tuscaloosa, Inc. v. Zurich American Insurance Co.*, the court used *Brown's* control factor to void an unambiguous intermediate-form clause.⁵⁶ In *Nucor*, a steel manufacturer (Nucor) recruited student interns from a local community college through a staffing agency (Onin).⁵⁷ Nucor's temporary services agreement with Onin required Onin to indemnify Nucor for third-party negligence claims under a clear intermediate-form clause.⁵⁸ Moreover, it had to "use its best efforts to insure the safety of all [interns]."⁵⁹ Tragically, a warehouse crane killed one of the interns while he was operating a plasma cutter at the Nucor plant.⁶⁰ Afterward, the intern's mother settled a wrongful death action with Nucor.⁶¹ Nucor tried to enforce its indemnity clause against Onin's insurer, but the court ruled that it was void under *Brown's* test.⁶² It reasoned that the parties' course of dealing overrode their contract terms because Onin had no practical control over the interns' safety.⁶³ Thus, it held that the indemnity clause was void because Nucor was "the only party actually exercising control over [the intern's] work safety and training."⁶⁴

The court did not apply *Brown's* "language" or "identity" factors at all in *Nucor*. In his dissenting opinion, Chief Justice Parker reasoned that *Brown's*

55. See *Mobile Infirmary Ass'n v. Quest Diagnostics Clinical Lab's, Inc.*, No. SC-2022-0641, 2023 WL 2196590, at *6–7 (Ala. Feb. 24, 2023).

56. 343 So.3d at 472.

57. *Id.* at 461.

58. The intermediate-form indemnity clause between Nucor (the indemnitee) and Onin (the indemnitor) provided:

10. **Indemnification.** To the fullest extent allowed by law, [Onin] shall defend (but only if so elected by Nucor in its sole discretion), indemnify and hold harmless Nucor . . . from and against all proceedings, claims, damages, liabilities, losses, costs and expenses (including, but not limited to, attorneys' fees and expenses, including any attorneys' fees and expenses incurred by a Nucor indemnified party in enforcing [Onin's] indemnification obligations hereunder) (collectively, 'damages'), in any manner arising out of, related to, or resulting from the performance of the work hereunder, *provided that any such damages are caused in whole or in part by any act or omission of [the staffing agency], any [of Onin's] Personnel, any subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, including, but not limited to any negligent, grossly negligent or willful acts or omissions, and regardless of whether or not (A) any such damages are caused in part by the concurrent negligence of a Nucor Indemnified Party or any other acts or omissions (including, without limitation, any negligent acts or omissions) of a Nucor indemnified party or (B) a Nucor Indemnified Party would otherwise be liable for such damages under a statutory or common law strict liability standard.*

Id. (emphasis added).

59. *Id.*

60. *Id.* at 463.

61. *Id.* at 467.

62. *Id.* at 473.

63. See *id.* at 472.

64. *Id.* at 471.

control factor should not violate the freedom of contract.⁶⁵ For him, *Nucor* was a paternalistic decision: “We judges like the way tort law allocates incentives, and we’re not going to let parties, even in arm’s-length and nonadhesion contracts, opt out by reallocating those incentives among themselves.”⁶⁶ Therefore, under his view, Onin was “free to contractually assume” safety responsibilities over the interns that it did not “adequately perform” because Nucor (the indemnitee) shifted that risk to Onin (the indemnitor) in their agreement.⁶⁷ Put simply, he reasoned that the court should not “rescue [indemnitors] from bad bargains.”⁶⁸ He concluded that the court should “rethink [the control factor], given an appropriate case and appropriate argument.”⁶⁹ Chief Justice Parker’s contract analysis is more sound than the court’s because Nucor and Onin agreed to “shift tort-based risk by mutual consent.”⁷⁰ While the court treated the control factor as dispositive, the Chief Justice appropriately characterized it as relevant but not sufficient to overcome the enforceability of a clearly worded indemnity contract between sophisticated parties. *Nucor* shows that the enforceability of the indemnity contract may depend on judges’ subjective view of facts after contract formation rather than the contract’s language.

This regime also upset expectations for a limited-form indemnity clause in the Alabama Supreme Court’s 2023 decision *Mobile Infirmary Association v. Quest Diagnostics Clinical Laboratories, Inc.*⁷¹ In *Mobile Infirmary*, a hospital (Mobile Infirmary) settled a wrongful death action brought by a former patient’s estate.⁷² Believing that its laboratory management contractor (Quest) was partially responsible for the patient’s death, Mobile Infirmary sought indemnification from Quest under reciprocal limited-form indemnity clauses.⁷³ Those clauses required each party to indemnify the other party “to the extent” that the underlying claim did not “arise from a[] [claim] for which” the party seeking indemnification “is required to provide indemnity” under a reciprocal indemnity clause.⁷⁴ On appeal, the Alabama Supreme Court affirmed the trial court’s decision that the clause was unenforceable under *Holcim* because it did not provide an “agreed-upon formula” for proportional liability.⁷⁵ It reasoned

65. *Id.* at 478–79 (Parker, C.J., concurring in part, concurring in the result in part, and dissenting in part).

66. *Id.* at 478 (internal quotations omitted) (citing *City of Montgomery v. JYD Int’l, Inc.*, 534 So. 2d 592 (Ala. 1988)).

67. *Id.* at 479.

68. *Id.*

69. *Id.* (citing *City of Montgomery*, 534 So. 2d at 592).

70. *Id.*

71. No. SC-2022-0641, 2023 WL 2196590, at *13–18 (Ala. Feb. 24, 2023).

72. *Id.* at *5.

73. *Id.*

74. *Id.* at *2.

75. *Id.* at *22.

that the clause was ambiguous because when both parties were partially at fault, one could reasonably understand the reciprocal clauses to (1) permit “indemnification back and forth *ad infinitum*,” (2) “cancel each other out,” or (3) “require apportionment of fault.”⁷⁶ Even so, Chief Justice Parker dissented that the *Holcim* test was dicta and that the court should have chosen option (3) because it would “uphold, rather than destroy” the indemnity contract.⁷⁷ He noted that *Holcim*’s “clear and unequivocal” element was inapplicable to limited-form indemnity clauses because they “merely extend[] the common law’s fault-based scheme of indemnity/contribution to the joint-tortfeasor scenario.”⁷⁸ In other words, limited-form indemnity does not implicate the same equitable concerns as broad- and intermediate-form indemnity because it merely allows parties to contract around Alabama’s rule of no contribution between JSL tortfeasors.⁷⁹

Nucor and *Mobile Infirmary* should concern construction professionals. Right now, parties to a construction contract cannot be sure whether a court interpreting Alabama law will use *Brown*’s control factor to void an unambiguous indemnity clause or create a new requirement for what constitutes an agreed-upon formula under *Holcim*. Given the high stakes involved in multi-million-dollar construction disputes, Alabama’s construction industry should not be beholden to these subjective, fact-dependent standards. Instead, it needs a new indemnity regime.

IV. THE SOLUTION: A CLEAR BUT FAIR CONSTRUCTION INDEMNITY REGIME

Alabama needs a new indemnity regime for construction contracts. Implementing it will require legislative and judicial action. First, the legislature must enact a construction-specific indemnity statute that will make the enforcement of indemnity provisions clear and fair for construction professionals.⁸⁰ Second, the Alabama Supreme Court must abrogate its enforcement tests in deference to the legislature by enforcing unambiguous indemnity contracts within the bounds of the new statute.⁸¹

A. Legislative Action: Alabama’s Future Construction Indemnity Statute

Alabama’s legislature must pass a construction-specific indemnity statute (Statute) to address the issues with Alabama’s current indemnity regime. The

76. *Id.* at *35 (Parker, C.J., dissenting).

77. *Id.* at *36.

78. *Id.* at *33–34.

79. *Id.*

80. *See infra* text accompanying notes 82–92.

81. *See infra* text accompanying notes 93–105.

Statute's preamble should state that its purpose is to replace Alabama courts' indemnity balancing tests with clear rules for enforcement when an indemnity clause appears in a construction contract. Such a preamble will signal the Alabama Supreme Court to abrogate those tests.

The Statute should balance the competing interests of owners, general contractors, and subcontractors by eliminating broad-form indemnity and imposing clear conditions for the enforceability of intermediate-form and limited-form indemnity clauses. Voiding broad-form indemnity will ease concerns that indemnitee general contractors are incentivized to reduce their level of care on a jobsite under broad-form indemnity.⁸² It also addresses subcontractors' fairness concerns—many argue that general contractors “leverage their buying power to impose onerous indemnity obligations.”⁸³ By taking broad-form indemnity off the table, the Statute will protect indemnitors from paying for accidents that they did not cause. Owner interest groups might insist on the availability of broad-form indemnity because they have little control over contractors' means and methods of construction (and are thus in a poor position to prevent jobsite accidents).⁸⁴ However, if every indemnity form remains available in the Statute, then the need for balancing tests arguably remains, and the Alabama Supreme Court might not see the need to abandon them.

Still, the Statute should permit intermediate-form indemnity. Allowing intermediate-form indemnity preserves subcontractors' ability to differentiate themselves in project bidding (unlike the one-size-fits-all indemnity policies of other states).⁸⁵ In most project delivery forms, an owner solicits bids from general contractors to build the project, and general contractors from subcontractors, for discrete scopes of work.⁸⁶ In addition to the lowest price, owners and general contractors consider bidders' performance history and willingness to assume favorable contract terms when deciding whether to award a contract.⁸⁷ A subcontractor with exemplary safety standards might agree to an intermediate-form clause because it can confidently bear heightened tort risk. That could allow such a subcontractor to be competitive, even if it did not have the lowest price. Thus, the Statute could address subcontractors' relative lack of bargaining power by eliminating potentially ruinous tort liability under broad-form indemnity while preserving opportunities for marketplace differentiation under intermediate-form indemnity with appropriate guardrails. Leaving

82. See *supra* text accompanying notes 25–32.

83. Wilburn & Guy, *supra* note 4.

84. See *supra* text accompanying note 18.

85. See *supra* note 2 (listing statutes that restrict construction owners and contractors to limited-form indemnity).

86. BURKHART ET AL., *supra* note 15, at 23–24, 89 (discussing project bidding by general contractors and subcontractors).

87. See ROBERT S. PECKAR, *Receipt and Consideration of Bids—Factors in Consideration of Bids*, in 41 N.J. PRAC. SERIES, CONSTRUCTION LAW § 5:21 (2022).

intermediate-form indemnity on the table also appeals to owners and general contractors because it preserves their ability to shift tort risk downstream to those who are in a better position to prevent accidents. Given the uncertainty of a factfinder's fault allocation under limited-form indemnity, the bill fosters *ex ante* risk shifting by preserving intermediate-form indemnity. Enforcing intermediate-form indemnity has lower transaction costs because it only requires proof that the indemnitor's conduct was necessary for the accident to happen (rather than the application of an "agreed-upon formula" to determine joint tortfeasors' respective liability).

As seen in SB24, a monetary limitation and insurance requirement for intermediate-form clauses could also be attractive.⁸⁸ A monetary limitation would cap the maximum amount that an indemnitee can seek reimbursement for under an intermediate-form clause. An insurance requirement might require the indemnitor to obtain a policy with coverage up to the monetary cap. Both features appeal to subcontractors because they prevent an indemnity clause from sending them toward a bankruptcy filing. If a subcontractor accepts intermediate-form indemnity, it knows its scope of potential liability and has insurance as a backstop to cover its obligations.⁸⁹ That is fairer to subcontractors because "both the insurer and the insureds have agreed to this risk transfer mechanism in return for a premium payment."⁹⁰ An insurance requirement also aids indemnitees' recovery efforts from indemnitors. Even if an indemnity clause is *legally* enforceable, it may not be *practically* enforceable if an indemnitor is insolvent. If an indemnitor "goes through economic troubles or, worse, becomes insolvent, the money for indemnification simply may not be there, regardless of what" an indemnity contract says.⁹¹ By providing that an intermediate-form indemnity clause is only enforceable if the subcontractor has commensurate insurance limits, an indemnitee can worry less about whether its indemnitor is judgment proof because the indemnitor's carrier will provide an additional financial backstop to its insolvency.⁹² In sum, the Statute should strike a measured compromise for the enforcement of indemnity contracts that will benefit project owners, general contractors, and subcontractors alike.

88. See *supra* text accompanying note 5.

89. Meyers & Perelman, *supra* note 16, at 997 ("Through the purchase of insurance, the indemnitor can insure the risk of loss from his indemnity obligation.").

90. Thomson & Bruns, *supra* note 21, at 10.

91. JOHN F. OLSON ET AL., DIRECTOR AND OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE § 12:3 (2023–2024 ed. 2023) (discussing a corporation duty of indemnification under its charter and bylaws).

92. John G. Cameron, Jr., *Construction Site Safety: Protecting the Worker/Protecting the Owner*, J. AM. COLL. OF CONSTR. LAWS., Jan. 2013, at 173 (2013) ("Even if the contractor is insolvent, insurance is ordinarily available to pay the injured worker's claim, and the owner has in a way assumed financial responsibility for the injuries because the cost of the worker's compensation, or insurance coverage therefor, is passed on to the owner via the terms of or price contained in the construction contract.").

B. *Judicial Response: Deference to Legislative Compromise*

Even if Alabama's legislature enacts the Statute, its effectiveness ultimately requires the Alabama Supreme Court to enforce indemnity clauses within the bounds of the Statute. More specifically, upon a proper case and argument, the court should modify the *Brown* test for intermediate-form indemnity by dropping the "identity" and "control" factors and eliminating the *Holcim* test for limited-form indemnity. Such action is warranted for two critical reasons.

First, the new regime will employ the same fairness and safety rationale underpinning the *Brown* and *Holcim* tests but will accomplish them with clarity. As noted in Part II, broad-form indemnity is concerning because it might undermine the safety incentives of general contractors and unfairly saddle subcontractors with liability for accidents they did not cause.⁹³ A new construction indemnity statute should invalidate these types of clauses,⁹⁴ however, so there will no longer be any need for a judicial test to protect an indemnitor from bearing responsibility for an indemnitee's sole negligence. As to intermediate-form indemnity, the indemnitor's contractual partial negligence requirement undermines the need for *Brown's* "identity" and "control" factors.⁹⁵ Intermediate-form indemnity ensures that the indemnitor had control over the activity giving rise to the liability because its conduct (or its sub-subcontractor's conduct) was necessary to cause the harm.⁹⁶ Whether such conduct was necessary for an accident to happen requires that the indemnitor had sufficient control—but for its conduct or its sub-subcontractor's conduct, the accident would not have happened.⁹⁷ Alabama's tort regime does not permit a JSL defendant to avoid liability for its negligence just because it is less sophisticated than its codefendants.⁹⁸ It is absurd for courts to consider a party's sophistication when that party contractually agrees to assume liability for an accident under an intermediate-form clause (requiring the indemnitee's conduct is but-for cause of it) but not when a plaintiff chooses to recover his or her full amount of damages from a party that is 1% at fault.⁹⁹ While the court might reasonably choose to retain the "language" factor for intermediate-form clauses only, it should drop the "identity" and "control" factors.

As to limited-form indemnity, however, *Holcim's* requirements that the parties "knowingly, clearly, and unequivocally" agree on the clause and that "some type of agreed-upon formula" determines the parties' respective liability

93. See *supra* text accompanying notes 25–32.

94. See *supra* text accompanying notes 82–84.

95. See generally *Brown Mech. Contractors, Inc. v. Centennial Ins. Co.*, 431 So. 2d 932 (Ala. 1983).

96. See *supra* text accompanying note 34.

97. See *supra* text accompanying note 35.

98. See *supra* text accompanying note 13.

99. See *supra* text accompanying note 12.

are due for elimination.¹⁰⁰ As Chief Justice Parker dissented in *Mobile Infirmary*, there is no need for the “clear and unequivocal” element because limited-form indemnity does not implicate the same equity concerns as indemnification for one’s own negligence.¹⁰¹ Instead, a limited-form indemnity clause should receive the same treatment as any other contract because it merely allows parties to contract around Alabama’s rule of no contribution between JSL tortfeasors. There is no need for an “agreed-upon formula” either.¹⁰² Every matter with disputed facts requires a judge, jury, or arbitrator to serve as a fact finder; a judge or arbitrator can simply apportion liability according to the parties’ proportional fault. Thus, the court should (1) eliminate the identity and control factors for intermediate-form indemnity and (2) eliminate the language and formula requirements for limited-form indemnity.

Second, Alabama’s express constitutional commitment to the separation of powers and the freedom of contract supports that after the new statutory regime, indemnity contracts ought to be enforceable within its guardrails.¹⁰³ Such a reaction will ensure that parties to a construction contract can shift risk within the bounds of Alabama’s democratically deliberated public policy. There is no need for a court to void an otherwise valid indemnity clause when the legislature has defined which indemnity contracts are acceptable and which are not. After all, “it is not the role of courts to rescue parties from bad bargains [J]udges in contract cases are not free to act as [a] roving fairness police.”¹⁰⁴

Therefore, the Alabama Supreme Court should respond to a new construction indemnity law by deferring to the legislature. If not, Alabama’s owners and builders will be justified in worrying that courts will void their indemnity contracts under *Brown* or *Holcim*. That result only inhibits the future of the industry. Such is the “appropriate argument” that future construction litigants can bring before the Alabama Supreme Court for a new indemnity enforcement test in an “appropriate case.”¹⁰⁵

100. *Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, 38 So. 3d 722, 729 (Ala. 2009).

101. *See Mobile Infirmary Ass’n v. Quest Diagnostics Clinical Lab’s, Inc.*, No. SC-2022-0641, 2023 WL 2196590, at *32 (Ala. Feb. 24, 2023) (Parker, C.J., dissenting).

102. *See generally Holcim*, 38 So. 3d at 729.

103. *See* ALA. CONST. art. I, § 22 (“[N]o . . . law . . . impairing the obligations of contracts . . . shall be passed by the legislature”); *Id.* art. III, § 43 (“To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.”).

104. *Nucor Steel Tuscaloosa, Inc. v. Zurich Am. Ins. Co.*, 343 So. 3d 458, 479 (Parker, C.J., concurring in part, concurring in the result in part, and dissenting in part).

105. *Id.*

CONCLUSION

Alabama's construction industry needs a new indemnity regime. The efficacy of that regime, however, requires action from both the legislature and the judiciary. First, the legislature must make a compromise, construction-specific indemnity statute. That statute should strike a measured balance between the interests of owners and general contractors (by allowing intermediate-form indemnity), subcontractors (by eliminating broad-form indemnity and potentially requiring monetary limitations and insurance coverage for intermediate-form indemnity), and the construction industry as a whole (by removing the safety disincentives of broad-form indemnity).¹⁰⁶ However, that statute's effectiveness requires the Alabama Supreme Court to modify its current indemnity balancing tests for construction contracts.¹⁰⁷ If Alabama changes its regime, then it may influence the twenty-six states that have imposed a one-size-fits-all risk management approach by limiting parties to limited-form indemnity or no indemnity at all.¹⁰⁸ More importantly, however, it will permit owners, general contractors, and subcontractors to shift the risk of tort liability in construction with clarity and fairness.

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106. *See supra* text accompanying notes 82–92.

107. *See supra* text accompanying notes 93–105.

108. *See generally supra* text accompanying note 2.

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