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Constructing Clearer Policy: Reconsidering Louisiana's Anti-Indemnity Regime for Additional Insured Agreements in Public Construction Contracts

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INTRODUCTION

In the bitter cold of a Louisiana winter, a man arrived at a construction site to repair the Jefferson Parish sewerage system, just as he had done for the past month.[1] Nothing felt out of the ordinary about the day as the man began completing the routine tasks required of him as a Foreman of the jobsite.[2] However, this day brought a new challenge. This day required the man to descend into a wet well and change out piping and railing at the bottom of the well.[3] The Foreman descended, as he was assigned, and completed his task briskly.[4] As he ascended up the ladder to the top of the well, the Foreman gripped the open door to steady himself before exiting the well.[5] Unfortunately, such a simple decision turned into a horrifying nightmare. By placing weight on the door, the hatch on the door failed, causing the door to slam shut and the Foreman to lose his weight-bearing object.[6] As a result, the Foreman fell about 30 feet to the bottom of the well, subsequently suffering a traumatic brain injury and paraplegia.[7] This is the story of Shane Salathe, the plaintiff in *Salathe v. Parish of Jefferson through Department of Sewerage*.[8]

Despite Mr. Salathe's gut-wrenching and horrific story, his story ends here because he will ultimately be compensated for his damages. The issue becomes *who* will compensate the injured party for the damages—the Parish who owned the sewerage system being repaired? the contractor who employed him? or an insurance company associated with one of these parties? In a situation like Mr. Salathe's case, the Parish would be solely liable for the sustained injuries under a theory of premises liability because of their negligent upkeep of the facility.[9] In contrast, the employer would have had no impact on the injuries sustained and, thus, would not be liable.

After an injured plaintiff files suit against the Parish for failing to maintain its facility, the Parish will immediately file a third-party demand

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1. *See generally* Salathe v. Par. of Jefferson through Dep't of Sewerage, 300 So. 3d 460, 463 (La. Ct. App. 5th Cir. 2020).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See generally* LA. REV. STAT. § 9:2800 (2023).

against an insurance company but not the Parish's insurance company. Rather, the Parish will demand that the employer's insurer provide the Parish's defense and compensate the injured party even though the employer—a general contractor—was entirely innocent. The Parish did not pay any premiums for the contractor's insurance and only maintains a relationship with the contractor's insurance through an additional insured provision contained within the contract between the contractor and the Parish. This is an example of a public entity successfully transferring its compensation responsibility to an innocent party even though the public entity solely caused the crippling damages. Though this action resembles indemnification, the public entity used insurance, rather than an indemnity agreement, to obtain protection from its responsibility.

Indemnification occurs through a contractual provision that requires one party, known as the indemnitor, to protect another party, known as the indemnitee, against various losses and expenses that the indemnitee may suffer through litigation.[10] These indemnity agreements do not impact who is at fault nor do they affect a plaintiff's compensation.[11] Rather, these agreements only decide who must pay for the damages caused, which may not necessarily come from the party that caused them.[12] *Additional insured agreements* are contractual agreements that require one party, known as the named insured, to procure liability insurance and name the other party as an additional insured on the policy.[13] Thus, the additional insured party may avail itself of the insurance coverage's benefits while not burdening itself with any insurance premiums.[14]

As of December 2021, most states prohibit indemnity agreements that indemnify a party from its own negligence through anti-indemnity statutes;[15] however, many states do not address the validity of additional

10. RONALD J. SCALISE JR., INDEMNITY OR HOLD HARMLESS AGREEMENTS § 11.27, *in* 6 LOUISIANA CIVIL LAW TREATISE (2d ed. 2021) [hereinafter SCALISE, INDEMNITY OR HOLD HARMLESS AGREEMENTS]; 3 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR CONSTRUCTION LAW § 10:1 (2021) [hereinafter BRUNER & O'CONNOR, JR., INTRODUCTION].

11. SCALISE, INDEMNITY OR HOLD HARMLESS AGREEMENTS, *supra* note 10.

12. *Id.*

13. *See* 4PT2 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR CONSTRUCTION LAW § 11:322 (2021).

14. BRUNER & O'CONNOR, JR., *supra* note 10, § 10:82. Investopedia defines an *insurance premium* as "the amount of money an individual or business pays for an insurance policy." Julia Kagan, *Insurance Premium Defined, How It's Calculated, and Types*, INVESTOPEDIA (Mar. 3, 2022), https://www.investopedia.com/terms/i/insurance-premium.asp [https://perma.cc/MJ7F-WQX2].

15. *See ANTI-INDEMITY STATUTES IN ALL 50 STATES*, MATTHIESEN, WICKERT & LEHRER, S.C. ATT'YS AT L. (Dec. 22, 2021), https://www.mwl-

insured agreements.[16] Thus, in many states, parties may transfer the risk of financial loss through additional insured agreements but not indemnity agreements, although the end result appears the same. Nevertheless, every state, including Louisiana, faces the issue of whether additional insured agreements should be prohibited as a matter of law or accepted as a permitted alternative risk transfer mechanism.[17] While Louisiana law clearly prohibits additional insured agreements in private construction contracts,[18] it was unclear whether such agreements were enforceable in public construction contracts prior to 2023,[19] which resulted in unclear public policy. This unclear policy derived from two anti-indemnity statutes—enacted 30 years apart—that differ as to the validity of additional insured agreements in public construction contracts.[20] The Louisiana Circuit Courts of Appeal exacerbated this tension in the years following by disagreeing as to which statute controlled.[21] This disagreement amongst the circuits allowed certain parishes to contract away their responsibility of compensating an injured party for their liability through additional insured agreements, while other parishes were held liable and responsible for their own acts of negligence.[22]

Then, the Louisiana legislature in 2023 attempted to clarify the statutory tension by amending Louisiana Revised Statutes § 38:2195

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law.com/wp-content/uploads/2013/03/Anti-Indemnity-Statutes-In-All-50-States-00131938.pdf [https://perma.cc/TFZ6-NWS5]; *see generally* Dean B. Thomson & Colin Bruns, *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States*, 8 AM. COLL. CONSTR. LAWS. J. 1 (2014); *see also* Allen Holt Gwyn & Paul E. Davis, *Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law*, 23 CONSTR. LAW. 26, 28 (2003).

16. *See ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15, at 3–10 (listing only eight states as prohibiting additional insured agreements as of December 2021); *See also* Gwyn & Davis, *supra* note 15, at 27 ("Many state statutes are silent on this issue, and most states have no decision directly addressing [the validity of additional insured agreements].").

17. *See* Thomson & Bruns, *supra* note 15 (listing Louisiana as 1 of the 28 states that prohibits both broad form and intermediate form indemnity agreements).

18. *See* LA. REV. STAT. § 9:2780.1(C) (2023).

19. *Compare id.*, *with id.* § 38:2216(G), *and id.* § 38:2195(B).

20. *Compare id.* § 9:2780.1(C), *with id.* § 38:2216(G), *and id.* § 38:2195(A).

21. *Compare* Salathe v. Par. of Jefferson through Dep't of Sewerage, 300 So. 3d 460, 470 (La. Ct. App. 5th Cir. 2020), *with* Jeff Mercer, L.L.C. v. Dep't of Transp. & Dev., 174 So. 3d 1180, 1182 (La. Ct. App. 1st Cir. 2015).

22. *Compare Salathe*, 300 So. 3d at 472 (holding that additional insured provisions in public contracts are null), *with Jeff Mercer*, 174 So. 3d at 1182 (holding that additional insured provisions in public contracts are not null).

through Act 379.[23] While Act 379 was good in theory, the Louisiana legislature actually amended the statute in such a way that the amendment contradicted the legislature's perceived intentions.[24] The Louisiana legislature intended to unify the Louisiana Public Works Act with the rest of Louisiana's anti-indemnity regime[25] but, instead, deepened the differences between the two. In lieu of this historical development, Louisiana's anti-indemnity regime for public construction contracts remains an irreconcilable mess. The current state of the law places Louisiana citizens' tax dollars in peril and requires immediate attention from the Louisiana legislature. Even with the possibility that the new legislation is not constitutionally sound, the Louisiana legislature should establish a modern, clear policy on additional insured agreements in public construction contracts and then enact new legislation that aligns with that new policy.

Part I of this Comment provides an overview of the different types of risk transfer mechanisms in construction contracts and the public policy considerations that arise from these agreements. Part II outlines Louisiana's statutory makeup governing additional insured agreements in public construction contracts prior to Act 379 and the cases that built the backdrop of these statutes. Part III illustrates the tension that existed between the statutes by examining the two appellate court cases that established a circuit split in the Louisiana courts. Part IV provides a glimpse as to how a Louisiana court, using methods of statutory interpretation, would have resolved the statutory tension prior to Act 379. Part V analyzes Act 379 by examining the 2023 amendment to Louisiana Revised Statutes § 38:2195 and how a Louisiana court would now address additional insured agreements in public construction contracts. Part V also serves to detail the discrepancies that are found in Act 379 as it relates to the legislative history surrounding it while exploring the constitutionality of Act 379. Last, with these discrepancies in mind, Part VI proposes new legislation for the regulation of additional insured agreements in public construction contracts that is based upon a modern understanding of the relationships between additional insured agreements and indemnity agreements, and private and public construction.

23. LA. REV. STAT. § 38:2195(B).
24. *See infra* Part V.B.
25. *See infra* Part V.B.

I. A COMPARISON OF DIFFERENT RISK TRANSFER MECHANISMS AND THEIR IMPLICATIONS

Frequent injuries and constant property damage cause indemnity agreements to be most common in inherently high-risk industries, such as the oil field, construction, and transportation industries.[26] Looking in particular to the construction industry, before a construction project begins, the party responsible for the overall project's oversight—referred to as the owner—initiates the project's contract formation by seeking bids from the parties who will perform the construction if their bid is selected—referred to as the general contractor.[27] Depending on the type of construction project, the owner of the project's ability to select a contractor's bid may be limited. In private construction projects, Louisiana preserves the owner's freedom to accept or reject any bid,[28] while Louisiana's public construction laws restrict a public entity contracting as an owner to only awarding the project to the lowest responsible and responsive bidder.[29] Nevertheless, upon approval of the bid, the owner furnishes the successful bidder with a proposed construction contract containing additional requirements for the bidder to agree to before construction may commence.[30] Layered amongst those pages are provisions containing risk transfer mechanisms commonly referred to as indemnity agreements and additional insured agreements.[31]

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26. Gregory D. Podolak & Tiffany Casanova, *CONTRACTUAL IDEMNITY: Anti-Indemnity Statutes and Additional Insured Coverage*, 47 BRIEF 30, 31 (2018).

27. *See* JAMES S. HOLLIDAY, JR. & DALE R. BARINGER, GENERALLY § 3:1, *in* LOUISIANA PRACTICE CONSTRUCTION LAW (2021).

28. *See generally id.* § 3:2.

29. *See* LA. REV. STAT. § 38:2212(A)(1)(a) (2023); *see also id.* § 38:2214(B)(1)–(5) (awarding the project to the lowest responsible bidder is subject to exceptions for just cause). For definition of a lowest responsible bidder, see HOLLIDAY, JR. & BARINGER, *supra* note 27, § 3:6 ("Whether or not a bidder is a responsible bidder, turns on his ability to do the work required for the project.").

30. *See* Hannah Donato, *Bidding & Tendering Process*, PROJECTMANAGEMENT.COM (Dec. 1, 2022) https://project-management.com/bidding-tendering-process/ [https://perma.cc/UQR9-9RUG] (referencing "Step 4: Contract Negotiation and Awarding," which states: "Legal terms, payment terms, deliverable schedules, and other important details are documented and signed by the involved parties to solidify the agreement.").

31. *See* HOLLIDAY, JR. & BARINGER, *supra* note 27, § 4:8.

A. Indemnification Agreements and Additional Insured Agreements in General

If legal disputes between the parties arise, indemnity agreements require an indemnitor[32] to compensate an indemnitee[33] for harm or loss suffered, subject to the terms of the agreement.[34] The language of indemnity varies from contract to contract with parties often drafting indemnity agreements that protect the indemnitee against bodily injuries and property damage.[35] Though the tort action is what triggers the indemnity agreements, indemnification is a contractually based obligation that is independent of the underlying tort.[36]

Parties often include indemnity agreements in their contracts that transfer the risk of financial responsibility to one party to protect the other party from being responsible for liability, hence the name *risk transfer mechanisms*.[37] Indemnity agreements appear in one of three forms: limited form indemnity agreements, intermediate form indemnity agreements, or broad form indemnity agreements.[38] To add another layer of protection, contracting parties may also include additional insured agreements as an alternative, or ancillary, risk transfer mechanism.[39] Each risk transfer mechanism creates unique consequences for the parties—particularly broad form indemnity agreements and additional insured agreements.

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32. "'Indemnitor' means any party to the contract who obligates himself to provide indemnification pursuant to the terms of the contract." LA. REV. STAT. § 9:2780.1(A)(4).

33. "'Indemnitee' means any named party in the contract to whom indemnification is owed pursuant to the terms of the contract." *Id.* § 9:2780.1(A)(3).

34. BRUNER & O'CONNOR, JR., INTRODUCTION, *supra* note 10.

35. Podolak & Casanova, *supra* note 26, at 31.

36. BRUNER & O'CONNOR, JR., *supra* note 10, § 10:5.

37. Podolak & Casanova, *supra* note 26, at 31.

38. *Id.* at 31–32; Trisha Strode, *From the Bottom of the Food Chain Looking Up: Subcontractors Are Finding That Additional Insured Endorsements Are Giving Them Much More than They Bargained For*, 23 ST. LOUIS U. PUB. L. REV. 697, 700 (2004); Thomson & Bruns, *supra* note 15, at 2 (listing Louisiana as 1 of the 28 states that prohibits both broad form and intermediate form indemnity agreements). *But see* BRUNER & O'CONNOR, JR., *supra* note 10, § 10:2 [hereinafter BRUNER & O'CONNOR, JR., GENERAL TYPES OF EXPRESS INDEMNITY] (placing indemnity provisions into three categories but expanding upon these categories because they are too confined. However, for ease of explanation, the traditionally recognized three categories will be utilized).

39. *See* Podolak & Casanova, *supra* note 26, at 31–32; Strode, *supra* note 38, at 703–04; *see generally* Thomson & Bruns, *supra* note 15.

1. Limited Form Indemnity Agreements: The Contractor Indemnifying the Owner for the Contractor's Negligence

One type of indemnity agreement known as a limited form indemnity agreement may require the contractor, as indemnitor, to indemnify the owner, as indemnitee, when the owner is sued for damages caused by the contractor's negligence.[40] Depending on the precise language of the provisions, limited form indemnity agreements are enforceable by law because these indemnity agreements enforce what a party to the contract reasonably presumes—the contractor being liable for his own negligence.[41] These types of indemnity agreements allow the owner to contractually bind the contractor to responsibility for the damages caused by the contractor's negligence, thus binding the party ultimately responsible for causing the damage.[42] In addition, limited form indemnity agreements minimize the owner's exposed risk, which lowers the costs for the construction project at large since the owner does not need to account for unnecessary risk exposure.[43]

A simple hypothetical that triggers a limited form indemnity agreement arises when a couple contracts with a contractor to repair their home's roof. The contract includes a provision that requires the contractor to indemnify the couple for a third party's bodily damages caused by the contractor's negligence on the couple's property. While repairing the roof, the contractor negligently leaves nails all over a sidewalk and a passing child steps on one of these nails, causing nerve damage in the child's foot. Putting aside any comparative fault[44] on the part of the child, the facts indicate that the contractor would be liable for negligently leaving nails on the sidewalk. However, the child's parents file a lawsuit against the couple, not the contractor. With a limited form indemnity agreement in place, the couple may file a third-party demand against the negligent contractor. This indemnity agreement between the parties obliges the contractor to indemnify the couple for damages caused by the contractor's

40. BRUNER & O'CONNOR, JR., GENERAL TYPES OF EXPRESS INDEMNITY, *supra* note 38 (identifying category three as "those provisions indemnifying the indemnitee only against the consequences of the indemnitor's negligence").

41. *See* BRUNER & O'CONNOR, JR., *supra* note 10, § 10:66 [hereinafter BRUNER & O'CONNOR, JR., INDEMNITY TRIGGERED].

42. *Id.*

43. BRUNER & O'CONNOR, JR., *supra* note 10, § 10:8 [hereinafter BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS].

44. Comparative fault is the recognition that each party is responsible for its own virile share. LA. CIV. CODE art. 2323 (2023). For further discussion, *see infra* Part IV.A.1.

negligence, eliminating any litigious expenditures the couple accrues for damages they did not cause.

This simple hypothetical illustrates the underlying policy rationale for why society favors limited form indemnity agreements. This type of indemnity agreement contractually obliges the negligent party to reimburse the innocent party for legal fees incurred and to defend the innocent party against suffering further expenses that may be incurred.[45] Fundamentally, a limited form indemnity agreement is sensible and straightforward because this agreement requires a negligent party to be held liable for their actions, not an innocent party.[46] Every state permits limited form indemnity agreements because this agreement promotes the favorable policy of parties being held responsible for its portion of fault,[47] which Louisiana refers to as the party's *virile share*.[48] A more controversial type of indemnity agreement is an agreement requiring indemnity for a party's partial fault. This type of agreement blurs the lines between indemnifying for the contractor's negligence and indemnifying for the owner's negligence, which creates problematic policy.[49]

2. Intermediate Form Indemnity Agreements: The Contractor Indemnifying for the Contractor's Partial Negligence

Intermediate form indemnity agreements require the contractor, as indemnitor, to indemnify the owner, as indemnitee, for the plaintiff's damages when the contractor and owner are both at fault for the injuries sustained.[50] This type of indemnity agreement includes two categories: full indemnification and partial indemnification.[51] Full indemnification encompasses numerous situations but maintains the same result because the contractor will be responsible for the entire amount of damages so long as the owner is allocated some fault, even if it is only one percent of the fault.[52] Partial indemnification only contractually obliges the indemnitor

45. *See* BRUNER & O'CONNOR, JR., INDEMNITY TRIGGERED, *supra* note 41.

46. BRUNER & O'CONNOR, JR., GENERAL TYPES OF EXPRESS INDEMNITY, *supra* note 38.

47. Podolak & Casanova, *supra* note 26, at 32.

48. LA. CIV. CODE art. 2323 (providing the theory of comparative fault, which establishes that all parties involved, including the plaintiff, are allocated fault and each party is responsible for their virile share).

49. *See* Podolak & Casanova, *supra* note 26, at 32.

50. *Id.*

51. *Id.*

52. *Id.*

to indemnify the indemnitee for the indemnitor's attributable fault.[53] Partial indemnification, functioning like a limited form indemnity agreement, leaves each party as being responsible for their fault.[54] As a result, intermediate form indemnity agreements requiring partial indemnification are typically allowed, just like limited form indemnity agreements.[55]

By their very nature, intermediate form indemnity agreements are more complex and controversial than limited form indemnity agreements because of an intermediate form indemnity agreement's fluctuating and flexible nature. For instance, assume the same facts from the hypothetical above—the contractor negligently leaves nails on the sidewalk. However, this time, the gardening-loving couple negligently leaves a hose stretched out across their yard. The child again comes into the yard, but this time the child trips over the hose and lands on the nails. In this scenario, assume that a jury finds both the couple and the contractor negligent and allocates the couple 75% fault and the contractor 25% fault.[56] Since Louisiana implements comparative fault,[57] the couple would traditionally pay the child and the child's parents 75% of the damages incurred while the contractor would pay the other 25%. However, suppose the parties agreed to an intermediate form indemnity agreement prior to beginning construction that obliges the contractor to responsibility for both its own and the couple's allocation of fault. This agreement consequently leads to the contractor paying 100% of the damages to the child even though the jury allocated more fault to the couple.

The full indemnification requirement from the intermediate form indemnity agreement in the hypothetical causes the same result when a jury allocates the couple 99% of the damages and the contractor 1% or vice versa. Ultimately, a jury may allocate fault a million different ways, but the result stays the same: the contractor is liable for 100% of the damages if the parties agreed to an intermediate form indemnity agreement requiring full indemnification at the outset.[58] These agreements can be problematic because, like the broad form indemnity agreement, it causes

53. *Id.*

54. *See supra* Part I.A.1.

55. Podolak & Casanova, *supra* note 26, at 32; Strode, *supra* note 38, at 700; Thomson & Bruns, *supra* note 15.

56. The child is likely at fault as well, but for purposes of this hypothetical, assume the child is not at fault and, thus, is not allocated any fault.

57. LA. CIV. CODE art. 2323 (2023).

58. Podolak & Casanova, *supra* note 26, at 32.

a party to carry the financial burden of another party's fault.[59] Since intermediate form indemnity agreements requiring full indemnification trigger similar policy concerns as broad form indemnity agreements by requiring the contractor to indemnify the owner for the owner's negligence,[60] most states prohibit both intermediate form indemnity agreements requiring full indemnification and broad form indemnity agreements,[61] including Louisiana.[62]

3. Broad Form Indemnity Agreements: The Contractor Indemnifying the Owner for the Owner's Negligence

The most divisive type of indemnity agreements are broad form indemnity agreements, which requires the contractor, as indemnitor, to indemnify the owner, as indemnitee, for damages caused by the owner's negligence.[63] These agreements allow a negligent party to insulate itself from the responsibility for liability by transferring to an innocent party the legal responsibility of compensating an injured plaintiff.[64] In complete contrast to a limited form indemnity agreement, a broad form indemnity agreement is typically unenforceable because a party dissociated from the negligence must unnecessarily compensate for a plaintiff's damages while the tortfeasor walks away unscathed and unpunished.[65]

To illustrate the issue with this type of indemnity agreement, imagine once more the same general set of facts as above—a couple repairing their roof. In this instance, the gardening-loving couple negligently leaves their

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59. BRUNER & O'CONNOR, JR., *supra* note 10, § 10:9 [hereinafter BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS IN FAVOR OF RESTRICTING USE OF INDEMNITY AGREEMENTS].

60. *Id.* Strode, *supra* note 38, at 700.

61. *ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15, at 1, 3–10 (recognizing that 45 states prohibit intermediate form and broad form indemnity agreements as of December 2021).

62. *See, e.g.*, LA. REV. STAT. § 9:2780.1(B) (2023).

63. Podolak & Casanova, *supra* note 26, at 32; Strode, *supra* note 38, at 700; BRUNER & O'CONNOR, JR., GENERAL TYPES OF EXPRESS INDEMNITY, *supra* note 38. (identifying category one, which includes "'fault-free' provisions, such as (a) where indemnification arises out of the indemnitor's work or presence, or (b) where an indemnitee is indemnified against its sole fault").

64. BRUNER & O'CONNOR, JR., INTRODUCTION, *supra* note 10.

65. Strode, *supra* note 38, at 700–01 (citing United States v. Seckinger, 397 U.S. 203, 211–12 (1970)) ("Justice Brennan noted that the courts have had a 'traditional reluctance' to 'cast the burden of negligent actions upon those that were not actually at fault . . . particularly [where] there is a vast disparity in bargaining power . . . between the parties.'").

hose stretched across their yard while the contractor has done nothing negligent. A young child playing in the couple's yard with their permission trips over the hose and suffers two broken arms. The child's parents sue the couple for the child's medical bills, and the couple files a third-party demand against the contractor for indemnity. Assume that when executed, the construction contract contained a broad form indemnity agreement,[66] and assume further that the jury found the couple solely responsible for the child's damages because of the couple's negligently misplaced hose. Even with these findings of fault, the contractor is solely responsible for compensating the child and the child's parents because the indemnity agreement contemplates an identical situation to the one at hand. With this agreement, the contractor is contractually bound to indemnify the couple for the couple's negligence even though the contractor had no connection to the injury besides repairing a roof on the couple's premises at the same time as the accident.[67]

As this hypothetical reveals, a broad form indemnity agreement places the burden to compensate on an innocent contractor who is typically less financially robust than the owner,[68] which makes the significant increase in the contractor's risk exposure from this agreement a major issue for the contractor. As a result, the contractor may respond to the increased risk exposure in two ways. First, when bidding the job, the contractor may increase the bid price to incorporate the increased risk exposure caused by the broad form indemnity agreement.[69] If this occurs, the general contractor may include broad form indemnity agreements in the subcontractors'[70] agreements, simultaneously passing the buck of

66. An example of a broad form indemnity agreement is as follows: "The CONTRACTOR agrees to indemnify, defend, and hold harmless the OWNER from any and all claims for damages, losses, and/or expenses that occur on the OWNER's premise while the CONTRACTOR undertakes the construction, regardless of whether the OWNER may be partially or solely negligent."

67. This hypothetical raises the issue of when the owner's negligence does not arise from the nature of the contract, but rather, the contractor's presence. However, parties will stipulate that the contractor will only indemnify when the owner's negligence "aris[es] out of" the nature of the contract to limit the scope of responsibility for liability. *See* BRUNER & O'CONNOR, JR., *supra* note 10, § 10:58.

68. This is more so the case in commercial and industrial construction contracts, such as buildings, and not necessarily residential construction contracts, as is the case in the hypothetical.

69. BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS, *supra* note 43.

70. Black's Law Dictionary defines "subcontractor" as "[s]omeone who is awarded a portion of an existing contract by a contractor, esp. a general contractor." *Subcontractor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

responsibility down the contracting chain and exposing an even less financially robust and innocent company to adverse financial exposure.[71] Assuming this situation occurs, a small glass installation company who does subcontracting work must decide whether to take the needed construction work to keep their business open or avoid exposing itself to undue and unlimited financial risk. The alternative option is that the general contractor can try to use its contractual freedom to bargain for the removal of the indemnity agreement from the contract or simply not agree to the construction contract if it includes a broad form indemnity agreement.[72] However, electing to not undertake the construction contract containing an indemnity agreement leaves the contractor with no construction project, which results in lower profits for the construction company.[73]

For the indemnified owner, the insulation from responsibility for liability reduces the owner's financial risk exposure to practically nothing, which allows the owner to reduce its operating expenses by no longer retaining counsel to litigate these matters.[74] Further, by outsourcing all responsibility for its liability, the owner has no incentive to act with reasonable care, making the odds of triggering the indemnity agreement all the more likely.[75] This disincentivizing of the owner's reasonable care intensifies the contractor's already difficult decision to accept or decline construction contracts that contain broad form indemnity agreements. Most states take this decision out of the contractors' hands by prohibiting broad form indemnity agreements due to the glaring policy concerns that heavily disfavor the contractors.[76] Even the courts in the few states without anti-indemnity statutes that uphold the broadest form of contractual freedom have narrowly construed these agreements to limit their negative implications.[77] Though additional insured agreements appear to raise

71. BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS, *supra* note 43.

72. *Id.*

73. *See* Podolak & Casanova, *supra* note 26, at 32 (referencing the possibility of unequal bargaining power in construction agreements). For further discussion, *see supra* Part I.A.3.

74. BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS, *supra* note 43.

75. BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS IN FAVOR OF RESTRICTING USE OF INDEMNITY AGREEMENTS, *supra* note 59.

76. *See, e.g.*, LA. REV. STAT. § 9:2780.1 (2023); Podolak & Casanova, *supra* note 26, at 32; Thomson & Bruns, *supra* note 15.

77. Podolak & Casanova, *supra* note 26, at 32; Thomson & Bruns, *supra* note 15.

similar policy concerns, far fewer states treat additional insured agreements and indemnity agreements identically.[78]

4. Additional Insured Agreements[79]

During the negotiating process, the owner typically includes both an indemnity agreement and an additional insured agreement in the construction contract because an additional insured agreement further insulates the owner from financial risk.[80] Additional insured agreements require the contractor to purchase insurance[81] that covers the insured's negligence and then name the owner as an additional insured to that insurance policy.[82] The contractor who purchased the insurance holds the policy, which makes the contractor the named insured and the responsible party for paying the insurance premiums.[83] By function of the additional

78. *See* Gwyn & Davis, *supra* note 15, at 27; *ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15; *see generally* Thomson & Bruns, *supra* note 15.

79. Additional insured agreements can function in two ways. First, additional insured agreements may require an underlying insurance agreement to be enforceable. Second, the additional insured agreement may not elicit any indemnity agreement, but rather, may be a stand-alone insurance contract. This Comment only views additional insured agreements that create stand-alone contracts. Additional insured agreements may also require the additional insured to be explicitly named or be considered a co-insured by function of the primary insured's contractual obligations. The latter tends to raise questions as to scope of who is a co-insured. All discussion in this Comment will supersede this issue and presume there is no issue as to the owner being a co-insured to the contractor's insurance. For a full discussion of these differences, *see* Terry J. Galganski et al., *A Construction Lawyer's Top 10 Additional-Insured Considerations*, 30 CONSTR. LAW. 5 (2010).

80. WILLIAM SHELBY MCKENZIE & H. ALSTON JOHNSON III, INSURED § 6:3, *in* 15 LOUISIANA CIVIL LAW TREATISE (4th ed. 2021) [hereinafter MCKENZIE & JOHNSON III, INSURED].

81. Contractors may procure an array of insurance policies that allow for an additional insured, most typically being Commercial General Liability, which is procured by the contractor regardless, and Owners and Contractors Protective Liability, which is only procured as a result of additional insured agreements. For a full discussion of the different types of insurance, *see* Galganski et al., *supra* note 79, at 11. *See also* Samir B. Mehta, *Additional Insured Status in Construction Contracts and Moral Hazard*, 3 CONN. INS. L.J. 169, 171–73 (1997). Hereinafter, references to insurance agreements in this Comment will be to insurance agreements for an insured's negligence.

82. MCKENZIE & JOHNSON III, INSURED, *supra* note 80.

83. Strode, *supra* note 38, at 702.

insured provision in the construction contract, the owner is named an additional insured to the contractor's policy.[84] The additional insured will not pay any premiums to the insurer or reimburse the named insured for paying premiums on the policy but may avail itself to the named insured's policy limits and any insurance defense that the named insured's policy provides.[85]

Using the same set of facts as above—the contractor indemnifying the couple for the negligently misplaced hose—an additional insured agreement circumvents any need for the contractor to appear in court because the couple's liability defense will be provided by the contractor's insurer, not the contractor. Further, the contractor's insurer will be responsible for the damages allocated to the couple rather than the contractor indemnifying the couple for allocated damages. The contractor's only costs are procuring and maintaining the insurance policy.

The similarities between an indemnity agreement and an additional insured agreement are striking since the owner acquires additional and unpaid-for financial protection by simply placing these agreements in the construction contract. However, additional insured agreements warrant a necessary distinction from indemnity agreements for a couple reasons. First, both parties in the construction contract benefit from additional insured agreements. Unlike a broad form indemnity agreement, the contractor who procured the insurance benefits from the additional insured agreement because the agreement requires the contractor's insurer, rather than the contractor, to provide indemnity and defense to the owner for the owner's negligence.[86] Thus, the contractor is never hauled into court, only the contractor's insurer. The owner benefits by receiving additional protection from having to compensate an injured party for its own negligence through insurance coverage provided by the contractor's insurer without having to compensate the contractor for the premiums paid.[87] Moreover, if the owner's own insurance and the contractor's insurance are both primary insurance[88] policies, the owner may preference and exhaust the contractor's insurance coverage while never effectuating

84. *Id.*

85. Mehta, *supra* note 81, at 187.

86. Galganski et al., *supra* note 79, at 17.

87. *Id.* at 11; Mehta, *supra* note 81, at 187.

88. *Primary insurance* is defined as "a policy that pays for coverage first, even when the policyholder has other policies that cover the same risk. Those other policies will only be tapped when the primary policy has reached its financial limit." *Primary Insurance*, INSURANCEOPEDIA (Dec. 28, 2017), https://www.insuranceopedia.com/definition/3616/primary-insurance [https://perma.cc/8VGG-2GVD].

the owner's own procured insurance because the two policies are horizontally equivalent.[89]

Another distinction is that additional insured agreements and indemnity agreements contemplate different obligations for different parties. While an indemnity agreement only contemplates a relationship between the indemnitor and indemnitee, an additional insured agreement creates new and separate obligations from the construction contract, one that binds the owner and the contractor's insurer.[90] This separate insurance agreement quantifies the undertaken risks for the contractor by stating the policy limits and the cost of the contractor's regularly paid premiums to the insurer from the outset.[91] To the contrary, an indemnity agreement makes quantifying the contractor's exposed risk nothing short of difficult.[92] Also, unlike indemnity agreements, additional insured agreements assure that there will be adequate compensation for the injured plaintiff.[93] Since indemnity agreements do not contemplate an insurance relationship, the funds for the plaintiff are not guaranteed because the less-financially affluent contractor, as indemnitor, must entirely compensate the injured party with no guarantee that its insurer will help.[94]

Additional insured agreements and broad form indemnity agreements share similar unfavorable policy concerns, but additional insured agreements yield fewer negative effects on the contractor. As a result, most state statutes remain ambiguous as to whether additional insured agreements and indemnity agreements should be treated identically or if additional insured agreements are viable alternatives.[95] Louisiana is a

89. Galganski et al., *supra* note 79, at 17. Additional insured agreements may contemplate the insurance being a primary insurance coverage or an umbrella coverage. Umbrella coverage is additional insurance to the primary coverage and can only be utilized when all the primary insurance coverages are exhausted. This rule is referred to as the horizontal exhaustion rule. If there is more than one primary coverage, the insured may preference which will be exhausted first. *Id.* at 16–17.

90. *See* BRUNER & O'CONNOR, JR., *supra* note 10, § 11:350 [hereinafter BRUNER & O'CONNOR, JR., ADDITIONAL INSURED COVERAGE CONTRASTED WITH COVERAGE FOR INDEMNITY OBLIGATIONS].

91. Galganski et al., *supra* note 79, at 11; Mehta, *supra* note 81, at 186–87.

92. *See* discussion *supra* Part I.A.3.

93. James Duffy O'Connor, *Wrestling with Reform: Indemnification Agreements, the Statutory Bars, Promises to Procure, and Insurance Products for the Construction Industry*, 1 No. 1 J. AM. COLL. CONSTR. LAWS. 4 (2007).

94. *See* Jeffrey M. Hummel & Z. Taylor Shultz, *Indemnification Principles and Restrictions on Construction Projects*, CONSTR. BRIEFINGS NO. 2005-8 (2005).

95. Podolak & Casanova, *supra* note 26, at 33–34.

prime example of this uncertainty. Even after the 2023 amendment, Louisiana's anti-indemnity statutes contradict on two major policy determinations,[96] which displays the difficulty states have with managing an additional insured agreement's underlying policy concerns.[97]

B. Major Policy Concerns with Additional Insured Agreements in Public Construction Contracts that the Louisiana Legislature has not Clearly Articulated

Louisiana's anti-indemnity regime encases two major policy concerns. The first is whether public and private construction contracts merit distinct or identical treatment within anti-indemnity statutes. The second policy concern is whether broad form indemnity agreements and additional insured agreements merit distinct or identical treatment within anti-indemnity statutes. Both before the 2023 amendment and after, Louisiana's anti-indemnity regime relied upon contradictory answers to both policy concerns. Even after the Louisiana legislature sought to rectify this discrepancy, the current anti-indemnity regime lacks clear and coherent principles for Louisiana courts to apply.

1. Policy Considerations for Private and Public Construction Contracts

As of December 2021, only three states, including Louisiana, make a categorical distinction between the validity of risk transfer mechanisms in public and private construction contracts.[98] Categorizing the construction contract as either *private* or *public* subjects the contracting parties to different governing rules.[99] The differing rules based upon the characterization of the contract alter the trajectory of the contractual negotiations by impacting the contracting parties' bargaining power.

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96. *See* LA. REV. STAT. § 38:2216(G) (2023); *id.* § 38:2195(B); *id.* § 9:2780; *id.* § 9:2780.1.

97. Podolak & Casanova, *supra* note 26, at 33–34.

98. *Id.* at 34 (recognizing that Louisiana, Arizona, and Colorado have category specific anti-indemnity statutes). *But see ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15, at 4 (recognizing that Florida prohibits intermediate indemnity agreements in public construction contracts, but for simplicity, this Comment only counts the other three).

99. BRUNER & O'CONNOR, JR., *supra* note 10, § 2:20 [hereinafter BRUNER & O'CONNOR, JR., PROJECT DELIVERY METHODS—LEGAL IMPLICATIONS OF "PUBLIC" VERSUS "PRIVATE" PROJECTS].

Private construction contracts are contracts between two private parties.[100] As a result, traditional common-law principles of contract law govern these contracts, which means that the parties are free to negotiate provisions into or out of the contract.[101] This theory of contractual freedom presupposes that the parties are on equal footing when the contract negotiations begin. However, this presumption is rarely the case, as owners often utilize indemnity agreements or additional insured agreements as mechanisms because of their leverage over the contractor.[102] While the owner desires to have their construction project completed timely, the owner can take time to seek a contractor who is willing to pay a lower price and also undertake a risk transfer mechanism. Conversely, contractors must frequently compare the likelihood that the owner will pursue lower priced contractors to the company's need for income-producing work. This constant balancing of risk versus reward places the contractor at a position with lower bargaining power when negotiating with the owner.[103] The contractor can slightly mitigate this uneven bargaining power by quantifying its assumed risk and including that quantified risk in the bid price to the owner.[104] By quantifying the risk, the contractor essentially acts as an insurance broker by assessing the risk being undertaken—in this instance, the compensation for the owner's negligence—and placing a price tag to that amount.

In contrast, contractors in public construction contracts do not have any of the contractual freedoms seen in private construction contracts. Public construction contracts, which exist between a private contractor and a public entity acting as owner,[105] must abide by state-specific statutory regimes that regulate the bidding process, the contracting process, and the substance of the contract.[106] Louisiana requires public entities to accept the lowest responsible and responsive bidder while the contractor must accept the contractual terms as presented.[107] Since contractors are vigorously

100. *Id.*

101. *Id.*

102. *See* Podolak & Casanova, *supra* note 26, at 32.

103. *See, e.g.*, Strode, *supra* note 38, at 724–25. For further discussion, *see supra* Part I.A.3.

104. BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS, *supra* note 43.

105. Scott Wolfe Jr., *The Difference Between Public and Private Projects*, LEVELSET, https://www.levelset.com/blog/the-difference-between-public-and-private-projects/ [https://perma.cc/QMY4-MYF8] (last updated June 3, 2020).

106. BRUNER & O'CONNOR, JR., PROJECT DELIVERY METHODS—LEGAL IMPLICATIONS OF "PUBLIC" VERSUS "PRIVATE" PROJECTS, *supra* note 99.

107. *See* LA. REV. STAT. § 38:2212(A)(1)(a) (2023). *Lowest responsible and responsive bidder* is "one whose bid meets the requirements set out in the

vying for the lowest bid, a contractor bidding for a public construction contract may economize its bid price by not accounting for the assumed risk created by risk transfer mechanisms in the construction contract. Additionally, public entities can lock contractors into accepting the public entities' responsibility of fault at the outset, which eliminates the public entities' incentive to take precautionary measures in maintaining and upkeeping project sites to prevent injuries and liability.[108] In essence, public entities in Louisiana have the lowest responsible and responsive bidder hand-cuffed to agree to risk transfer mechanisms as contractors compete in a cost-cutting competition.

Moreover, Louisiana has waived sovereign and government immunity[109] from suit for the state and public entities in its constitution but does maintain a limitation of $500,000 in general damages against personal injury and wrongful death claims.[110] Louisiana has also expressed policy disfavoring sovereign immunity, stating in Louisiana Revised Statutes § 39:1538(B): "The state and its agencies shall be liable for claims in the same manner and to the same extent as a private individual under like circumstances."[111] This express policy applies with equal force to government immunity for political subdivisions in Louisiana, like parishes.[112] Indeed, it is manifest in the waiver of sovereign immunity and government immunity in the Louisiana Constitution, which states "Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property."[113] Nevertheless, though Louisiana public entities can procure their own

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advertised bidding documents and who provides the required documentation within ten days of the bid opening." *Public Bid Law*, LA. LEGIS. AUDITOR (Feb. 7, 2023), https://app.lla.state.la.us/llala.nsf/87BD5C74CB17E03686257AB8006F37DE/$FILE/Public%20Bid%20Law%20FAQ.pdf [https://perma.cc/3HDU-Y256].

108. *See* BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS IN FAVOR OF RESTRICTING USE OF INDEMNITY AGREEMENTS, *supra* note 59.

109. The difference between sovereign immunity and government immunity is: "Sovereign immunity protects sovereign states and their state officers and agencies. On the other hand, governmental immunity provides immunity for subdivisions within the state, such as city municipalities." *Government Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/governmental_immunity [https://perma.cc/PPM3-3B4M] (last updated June 2020).

110. LA. CONST. art. XII, § 10(A); LA. REV. STAT. § 13:5106(B)(1)–(2) (2023). For the history of government immunity in Louisiana, *see Fecke v. Bd. of Supervisors of La. State Univ.*, 217 So. 3d 237 (La. 2016).

111. LA REV. STAT. § 39:1538(2).

112. See LA. CONST. art. XII, § 10(A).

113. *Id.*

insurance policies,[114] finding a public entity at fault harms the taxpayers because their tax money now transfers to paying litigation fees rather than funding services that benefit the community at large, such as resurfacing roads or funding local public school systems. Not to mention, once a judgment is rendered against a public entity, the funds to pay the plaintiff must be appropriated by the Louisiana legislature, which creates a great deal of uncertainty for the plaintiff as to when, if ever, they will be compensated.[115] Since Louisiana ranks 50th in economic performance in the United States as of 2022,[116] it is in Louisiana and its municipalities' best interest to allow risk transfer mechanisms since these mechanisms reduce negative fiscal impacts.

In both private and public construction contracts, owners exploit their disproportionately greater bargaining power over the contractor by using indemnity agreements to insulate themselves from being responsible for their own liability. As a result, most states, including Louisiana, prohibit broad form indemnity agreements and intermediate form indemnity agreements requiring full indemnification in all construction contracts.[117] However, as of December 2021, Louisiana is only one of three states that regulates risk transfer mechanisms in public construction contracts differently from risk transfer mechanisms in private construction contracts.[118] Louisiana, both before the 2023 amendments and after, has

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114. *See generally* RUSS M. HERMAN & JOSEPH E. CAIN, GOVERNMENTAL DEFENDANTS—EFFECT OF INSURANCE COVERAGE § 5:23, *in* 1 LOUISIANA PRACTICE PERSONAL INJURY (2022); s*ee, e.g.*, Socorro v. City of New Orleans, 579 So. 2d 931 (La. 1991) (an example of a city procuring and holding an insurance policy as its primary insurance coverage).

115. LA. CONST. art. XII, § 10(C); LA. REV. STAT. § 13:5109(B)(2); *see also* 1 CIV. ACTIONS AGAINST STATE & LOC. GOV'T § 6:17 (2023); P. RAYMOND LAMONICA & JERRY G. JONES, INTRODUCTION § 11:1, *in* 20 LOUISIANA CIVIL LAW TREATISE, LEGISLATIVE LAW & PROCEDURE (2022 ed.). There are potential issues that can occur when Louisiana or one of its agencies are sued because the Office of Risk Management is then involved, which will include a self-insured fund and a future medical care fund. *See* LA. REV. STAT. § 39:1533 (establishing the self-insured fund); *id.* § 39:1533.2 (establishing the future medical care fund). For political subdivisions like parishes, a reversionary trust must be established to pay all medical benefits and related benefits. HERMAN & CAIN, *supra* note 114, § 5:24 (discussing LA. REV. STAT. § 13:5106(B)(3)(a) (2023)).

116. ARTHUR B. LAFFER ET AL., RICH STATES, POOR STATES: ECONOMIC PERFORMANCE RANK OVERVIEW 4 (15th ed. 2021).

117. *See, e.g.*, LA. REV. STAT. §§ 9:2780.1, 38:2216(G); *see also ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15, at 1, 3–10.

118. *See ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15, at 3–10.

statutes in its anti-indemnity regime that provides an exception to the prohibition on indemnity agreements by allowing public entities as owners to include additional insured agreements in public construction contracts.[119]

2. Policy Considerations for Additional Insured Agreements

The second policy consideration invoked by Louisiana's current anti-indemnity statutes is the more difficult question, which is the relationship between additional insured agreements and indemnity agreements. Both broad form indemnity agreements and additional insured agreements appear to use different means to accomplish the same ends, which is to insulate the owner from being personally responsible for its own negligence.[120] By receiving additional protection from these risk transfer mechanisms, the owner lacks the same incentive to maintain a reasonable standard of care as in the situation when the owner is financially responsible for its own negligence.[121] With the owner acting with a lower standard of care, the likelihood of injuries to third parties increases, which increases the likelihood that an innocent party—the contractor in an indemnity agreement and the contractor's insurer in an additional insured agreement—is financially responsible for the negligent owner.[122]

This lower incentive is not as clearly displayed in additional insured agreements, but it is still present because the owner as the additional insured is not responsible for paying premiums to the insurer or the named insured.[123] Thus, the owner as an additional insured lacks the incentive to lower premium costs through engaging in risk-aversion activities, like safety training.[124] This theoretical lowered standard of care from the owner known as the "moral hazard"[125] raises the more practical question of whether the owner will actually behave more erratically when recognizing the lower incentive to maintain a certain standard or will the owner carry on as though the incentive never changed.[126] Nevertheless, the moral-

119. LA. REV. STAT. §§ 38:2216(G), 38:2195.
120. Mehta, *supra* note 81, at 186.
121. *Id.*
122. *Id.*
123. *Id.* at 186–87.
124. *Id.*
125. *Id.* at 182–86.
126. *See* BRUNER & O'CONNOR, JR., POLICY CONSIDERATIONS IN FAVOR OF RESTRICTING USE OF INDEMNITY AGREEMENTS, *supra* note 59 ("It is questionable whether parties act with less care merely because someone else has agreed to be responsible for their errors. Do professionals such as lawyers, doctors, and

hazard theory creates a policy concern that is similarly present in both additional insured and indemnity agreements.

Additional insured agreements, however, appear less offensive to the general public as indemnity agreements. While indemnity agreements financially burden and lower the contractor's bargaining power, most owners already commonly require the contractor to procure liability insurance during the contracting stage.[127] By requiring the contractor to also procure insurance that protects an additional insured, the contractor benefits from the additional insured agreement by circumventing the need for the innocent contractor to be brought into litigation and avoids holding the contractor personally responsible for another's actions.[128] Rather than an innocent contractor whose primary organizational function is to develop property bearing the financial risk, an insurance company designed to gamble the risk of possible negligence bears the risk of the owner's negligence up to a specific amount for compensation through premiums.[129] As a matter of policy, society favors transferring limited risk to insurance companies rather than limitless risk to innocent parties, particularly in lucrative and high-risk industries like construction.[130]

Additionally, the obligation of responsibility arises at a more advantageous time in additional insured agreements based on the contractual relationships.[131] The additional insured agreement establishes a direct relationship with the contractor's insurer and the owner as an additional insured.[132] Thus, the additional insured agreement becomes effective immediately following the tortious action, triggering immediate investment in the lawsuit on the part of the insurer.[133] In contrast, an indemnity agreement is dependent upon a future event—the conclusion of

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engineers act with less care merely because they carry 'errors and omissions' coverage?").

127. Galganski et al., *supra* note 79, at 11.

128. SCOTT C. TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 10:16 (2d ed. 2021).

129. Galganski et al., *supra* note 79, at 11.

130. *Id.*

131. Suire v. Lafayette City-Par. Consol. Gov't, 907 So. 2d 37, 51–52 (La. 2005); *See also* BRUNER & O'CONNOR, JR., ADDITIONAL INSURED COVERAGE CONTRASTED WITH COVERAGE FOR INDEMNITY OBLIGATIONS, *supra* note 90.

132. *See* BRUNER & O'CONNOR, JR., ADDITIONAL INSURED COVERAGE CONTRASTED WITH COVERAGE FOR INDEMNITY OBLIGATIONS, *supra* note 90.

133. *Suire*, 907 So. 2d at 52; *See also* BRUNER & O'CONNOR, JR., ADDITIONAL INSURED COVERAGE CONTRASTED WITH COVERAGE FOR INDEMNITY OBLIGATIONS, *supra* note 90.

the case and an allocation of fault upon the parties.[134] Parties can add language, such as the duty to "defend," that triggers indemnification before a finding of liability,[135] but traditionally, indemnification agreements are conditional upon a finding of liability at trial.[136] Even with this finding, the indemnity agreement does not guarantee that the plaintiff will be paid because an indemnity agreement only binds the two contracting parties while not directly contemplating the indemnitor's insurer as a liable party.[137]

Since an additional insured agreement binds the owner and the contractor's insurer, an additional insured agreement essentially guarantees an insurance pool to compensate an injured party.[138] To the contrary, recovering against the indemnitor's insurer through an indemnity agreement requires the indemnity agreement to function as a de facto third party beneficiary contract, meaning that the insurer owes a duty to defend the insured—the contractor—who is contractually obligated to indemnify the owner of the contract.[139] With the indemnitee not having a direct relationship with the indemnitor's insurer, the plaintiff is not guaranteed compensation.[140] For instance, since certain insurance policies exclude coverage for indemnification,[141] the indemnitor's insurer could refuse the contractor as indemnitor's claim for coverage. Refusing coverage leaves the less financially robust contractor to solely cover the entire amount of damages with no insurance protection, which could consequently lead to the contractor filing for bankruptcy.[142] Ultimately, by nature of the agreement, an additional insured agreement virtually guarantees that a

134. *Suire*, 907 So. 2d at 51; BRUNER & O'CONNOR, JR., *supra* note 10, § 10:6.10 [hereinafter BRUNER & O'CONNOR, JR., WHEN IS AN INDEMNITY CLAIM RIPE FOR ADJUDICATION?].

135. Galganski et al., *supra* note 79, at 12.

136. *Suire*, 907 So. 2d at 51; BRUNER & O'CONNOR, JR., WHEN IS AN INDEMNITY CLAIM RIPE FOR ADJUDICATION?, *supra* note 134.

137. BRUNER & O'CONNOR, JR., ADDITIONAL INSURED COVERAGE CONTRASTED WITH COVERAGE FOR INDEMNITY OBLIGATIONS, *supra* note 90; *see* Hummel & Shultz, *supra* note 94.

138. Galganski et al., *supra* note 79, at 11–12; O'Connor, *supra* note 96. *But see* Galganski et al., *supra* note 79, at 21 (referencing an issue where multiple additional insureds are named on the same policy, further diluting the policy's limits).

139. BRUNER & O'CONNOR, JR., ADDITIONAL INSURED COVERAGE CONTRASTED WITH COVERAGE FOR INDEMNITY OBLIGATIONS, *supra* note 90; Galganski et al., *supra* note 79, at 11.

140. *See* Hummel & Shultz, *supra* note 94.

141. MCKENZIE & JOHNSON III, *supra* note 80, § 6:12.

142. *See* Hummel & Shultz, *supra* note 94.

plaintiff will be compensated for covered events while an indemnity agreement does not.

Though additional insured agreements avoid some policy concerns that are imbedded in indemnity agreements, the former raises new policy considerations that are not present in the latter.[143] The issue of two parties exercising one insurance coverage appears to take advantage of the contractor who procured and continuously pays for the insurance. For instance, additional insured agreements bind the obligation to pay premiums on one party—the contractor.[144] Thus, the owner, as additional insured, receives the fruits of the insurance coverage while never incurring the costs of procuring the policy.[145] Alternatively, the contractor who purchased the policy and pays the premiums is adversely impacted by an owner freely utilizing the policy's limits since the utilization by the owner reduces the contractor's available coverage.[146] In addition, if a scenario arises where a plaintiff sues both the contractor and the owner together, the insurer must obtain separate legal representation for both the named insured and the additional insured to avoid any conflict of interest issues,[147] which again adversely effects the insurance policy's limit.[148] However, courts in other jurisdictions have found no issue with adverse impacts on the named insured and have gone as far as to state that the insurer should not care as to whether the party who paid for the insurance is the party who enjoys insurance's protection since the insurer is receiving premium payments regardless.[149]

Additional insured agreements also create an increased unforeseeable risk undertaken by the insurer, which is reflected in considerably more expensive premium prices.[150] Since the owner is only an additional insured and does not pay the premiums, the insurer is unable to monitor and incentivize the owner as an additional insured to act with an adequate standard of reasonable care, which increases the likelihood that the insurer

143. Galganski et al., *supra* note 79, at 20.
144. *Id.* at 21.
145. *Id.*
146. *Id.*
147. The conflict-of-interest issue alluded to is that both the parties cannot have the same attorney, and, thus, the insurer must obtain separate legal representation for both the owner and the contractor, with both of their legal fees paid from the insurance policy's limits.
148. Galganski et al., *supra* note 79, at 21.
149. Gwyn & Davis, *supra* note 15, at 28 (citing Sentry Ins. Co. v. Nat'l Steel Corp., 382 N.W.2d 753 (Mich. Ct. App. 1985)).
150. Mehta, *supra* note 81, at 185–86.

may have to compensate for an insured's liability.[151] With a lack of control over the additional insured, the insurer undertakes the unforeseeable risk of an unrestricted party.[152] As a result, the insurer increases the premium prices so as to quantify the undertaken unforeseeable risk.[153] Unfortunately, the increased premium prices only affect one party—the contractor—who is the only named insured on the policy required to pay the premiums.[154] Since the insurer maintains an experience rating[155] for the named insured that helps quantify the riskiness of the named insured, the contractor as named insured will have an adverse impact upon its experience rating if the insurer of the additional insured policy compensates a party for the owner's negligence.[156] An adverse impact on the contractor's experience rating makes insurance from the insurer more difficult and more expensive to procure the next time the contractor seeks a policy.[157]

Moreover, additional insured agreements may provide broader coverage than an indemnity agreement for the contractor since the insurance policy, rather than the contract, establishes the extent of coverage.[158] This situation may occur when an indemnity agreement requires the contractor to indemnify the owner for bodily injury while the additional insured agreement covers bodily injury and property damage.[159] In a scenario where the owner is liable for property damage but not bodily injury, only the additional insured agreement would protect the owner because of the additional insured agreement's extended coverage.[160]

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151. *Id.* at 186.
152. *Id.*
153. *Id.*
154. *Id.* at 186–87.
155. *Experience Rating* is

> the amount of loss that an insured party experiences compared to the amount of loss that similar insured parties have. . . . The experience rating helps an insurance company determine the likelihood that a particular policyholder will file a claim. In this sense, the past loss experience of a policyholder is used to determine future changes to the premium charged for the policy.

Julia Kagan, *What Are Experience Ratings in Insurance*, INVESTOPEDIA (Sept. 17, 2023), https://www.investopedia.com/terms/e/experience-rating-insurance.asp [https://perma.cc/SUW6-8STP].
156. Strode, *supra* note 38, at 718.
157. *Id.*
158. Galganski et al., *supra* note 79, at 21.
159. *See id.*
160. *Id.*

Last, ambiguities in contracts that include risk transfer mechanisms are construed in different ways with the interpretation of these agreements favoring different parties.[161] The jurisprudential rules of contract interpretation provide that ambiguity in contracts should be construed against the drafter because the drafter is the master of the contract.[162] Likewise, the interpretive rules of insurance contracts provide that ambiguity should be construed against the insurer so as to err on the side of insurance coverage.[163] Thus, ambiguous indemnity agreements are construed against the owner because the owner provides the prospective construction contract to the contractor. However, courts will construe ambiguous additional insured agreements in favor of the owner as an insured, which provides the owner additional protection.[164]

States tend to respond to the conflicting policies underlying indemnity agreements and additional insured agreements in construction contracts in one of three ways: (1) allow all types of indemnity agreements as well as additional insured agreements; (2) prohibit broad form indemnity agreements and intermediate form indemnity agreements requiring full indemnification with an exception for additional insured agreements; or (3) prohibit both these types of indemnity agreements and additional insured agreements in a broad stroke.[165] As of December 2021, 45 of the 50 states have enacted statutory schemes to combat broad form and intermediate form indemnity agreements in construction contracts.[166] These statutes serve to prevent parties with superior bargaining power due to contractual positioning and financial leverage—in this instance, the owners—from taking advantage of parties with inferior bargaining power—in this instance, the contractors.[167] However, most states have not addressed the validity of additional insured agreements.[168] While

161. Strode, *supra* note 38, at 720–21.
162. *Id.* at 721.
163. *Id.* at 720.
164. *Id.* at 720–21.
165. Galganski et al., *supra* note 79, at 13.
166. *ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15, at 1. Notably, while this source does distinguish between intermediate form indemnity agreements requiring full indemnification and partial indemnification, it does not distinguish between these forms when addressing whether a specific state prohibits intermediate form indemnity agreements. *See id.* at 3–10. Presumably, these states are prohibiting intermediate form indemnity agreements requiring full indemnification. *See* Thomson & Bruns, *supra* note 15.
167. TURNER, *supra* note 128, § 10:16.
168. Gwyn & Davis, *supra* note 15, at 27; *ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15, at 3–10.

Louisiana's anti-indemnity regime addresses the validity of additional insured agreements, Louisiana's current regime causes confusion and chaos due to conflicting treatment of additional insured agreements in public and private construction contracts.

II. LOUISIANA'S STATUTORY REGIME AGAINST INDEMNITY AGREEMENTS PRIOR TO THE 2023 AMENDMENT

Prior to the 2023 amendment, Louisiana had two anti-indemnity statutes that both prohibited broad form and intermediate form indemnification agreements in construction contracts.[169] These statutes conflicted, however, over the validity of additional insured agreements in public construction contracts, specifically provisions that required the contractor to procure liability insurance and name the public entity as an additional insured to that liability insurance policy.[170] Before the legislature enacted any anti-indemnity statutes, the Louisiana Supreme Court in 1977 first addressed the validity of indemnity agreements in *Polozola v. Garlock, Inc*.[171] Faced with the issue of interpreting a private construction contract's indemnity agreement that indemnified the owner for the owner's negligence,[172] the Court recognized the legality of such agreements to the extent that the agreements were strictly construed and the intentions of the parties "[were] expressed in unequivocal terms."[173] The case was remanded, and in 1979, the Louisiana First Circuit Court of Appeal addressed whether the indemnity agreement applied to the issue before the court, to which it held that it did.[174] Within only a few short months, the Louisiana legislature enacted the state's first anti-indemnity statute.[175]

A. The Louisiana Public Works Act & Subsequent Jurisprudence

The first piece of Louisiana's anti-indemnity regime for construction contracts is Louisiana Revised Statutes § 38:2216, located within the

169. *See* LA. REV. STAT. § 38:2216(G) (2023); *id.* § 9:2780.1(B)–(C).
170. *Compare id.* § 38:2216(G), *with id.* § 9:2780.1(B)–(C).
171. Polozola v. Garlock, Inc., 343 So. 2d 1000 (La. 1977).
172. *Id.* at 1002.
173. *Id.* at 1003.
174. Polozola v. Garlock, Inc., 376 So. 2d 1009, 1013, 1016 (La. Ct. App. 1st Cir. 1979).
175. Act No. 62, 1980 La. Acts 683.

Louisiana Public Works Act.[176] Enacted in 1980, subpart (G) of this statute prohibits a public entity from requiring a general contractor to indemnify the public entity for its own negligence.[177] Within Section 2216, the Louisiana legislature established one exception to this bright-line prohibition of indemnity agreements: insurance contracts.[178] In pertinent part, Section 2216 states:

> It is hereby declared that any provision contained in a public contract, *other than a contract of insurance*, providing for a hold harmless or indemnity agreement, or both, [f]rom the contractor to the public body for damages arising out of injuries . . . to third parties caused by the negligence of the public body, its employees, or agents . . . is contrary to the public policy of the state, and any and all such provisions . . . are null and void.[179]

By exempting "contract[s] of insurance" from the prohibition on indemnity agreements, the Louisiana legislature preserved the enforceability of additional insured agreements in public construction contracts.[180]

In 1988, the legislature enacted a second statute within the Louisiana Public Works Act addressing indemnity agreements, Louisiana Revised Statutes § 38:2195.[181] Unlike Section 2216, which prohibits contracts by which the *contractor* indemnifies a *public entity*, subpart (A) of Section 2195 prohibits contracts by which the *public entity* indemnifies a *contractor or third party*.[182] However, like Section 2216, subpart (A) of Section 2195 exempts additional insured agreements from the general

176. LA. REV. STAT. § 38:2216 (2023). Though there is no consensus as to what exactly constitutes the Louisiana Public Works Act, the Louisiana Public Works Act generally encompasses Louisiana Revised Statutes § 38:2211 *et seq.* Hereinafter, the Louisiana Public Works Act sections will refer to Louisiana Revised Statutes § 38:2216 and § 38:2195. Hereinafter, Louisiana Revised Statutes § 38:2216(G) will be referred to as Section 2216.

177. *Id.* § 38:2216(G). The 1980 act from the Louisiana legislature was actually an amendment to the statute to add the subpart of the statute that is now Louisiana Revised Statutes § 38:2216(G).

178. *Id.*

179. *Id.* (emphasis added).

180. *Id.*

181. *Id.* § 38:2195. Hereinafter, Louisiana Revised Statutes § 38:2195 will be referred to as Section 2195.

182. *Id.* § 38:2195(A); *see also id.* § 38:2216(G).

prohibition of indemnity agreements.[183] In pertinent part, subpart (A) of Section 2195 states:

> It is hereby declared that any provision contained in a public contract, *other than a provision naming another as a co-insured or additional beneficiary in a contract of insurance*, which requires a public entity to assume liability for damages arising out of injuries or property damage to the contracting parties or to third parties caused by the negligence of anyone other than the public body, its employees, or agents, is contrary to the public policy of the state of Louisiana.[184]

Thus, subpart (A) of Section 2195 broadly prohibits a public entity from indemnifying a contractor or third party but allows a contractor to require the public entity to name the contractor as an additional insured under the public entity's insurance policy.[185] It should be noted that there is little likelihood of subpart (A) of Section 2195 being invoked because the current structure of the Louisiana bid laws places the public entity in charge of preparing the bidding documents that would include any additional insured provision.[186] The public entity's inclusion of an additional insured agreement in the bidding documents would serve no benefit to the public entity and would actually cause a financial detriment to the public entity.[187] Because of this adverse financial impact and because the public entity solely drafts the public construction contract, the public entity has no incentive to include a provision that requires itself to procure insurance and name a contractor as an additional insured on that policy. Consequently, subpart (A) of Section 2195 does not have much practical use.

Following the enactment of these two provisions, two Louisiana courts rendered decisions that confronted the validity of additional insured agreements in public construction contracts. In both cases, the courts were called upon to interpret and apply Section 2216 alone. Subpart (A) of Section 2195 was not implicated in either case.

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183. *Id.* § 38:2195(A); *see also id.* § 38:2216(G).

184. *Id.* § 38:2195(A) (emphasis added).

185. *Id.*

186. *Id.* § 38:2211(A)(2) ("'Bidding documents' means the bid notice, plans and specifications, bid form, bidding instructions, addenda, special provisions, and all other written instruments prepared by or on behalf of a public entity for use by prospective bidders on a public contract.").

187. For a more thorough discussion of the adverse effects of additional insured agreements on the indemnitor, *see* discussion *supra* Part I.B.2.

In 1989, the Louisiana Third Circuit Court of Appeal in *Domingue v. H & S Construction* became the first Louisiana court to address Section 2216.[188] In *Domingue*, a street-crossing pedestrian tripped and fell over a stringline used during a street resurfacing project.[189] The pedestrian sued the general contractor, the contractor's insurer, the city of Rayne (the City), and the City's insurer.[190] The City and the City's insurer subsequently filed a cross-claim against the contractor and its insurer for indemnity pursuant to the party's contract and defense as an insured to the contractor's insurance.[191] After being tried on the merits, a jury trial allocated fault to only the plaintiff and the contractor.[192] The trial judge then dismissed the plaintiff's claims against the City and the City's insurer and granted the City's and its insurer's cross-claim against the contractor's insurer for indemnity and defense costs.[193] The Contractor and its insurer subsequently appealed the granting of the cross-claim.[194]

On appeal regarding the indemnity agreement's scope, the Third Circuit interpreted the indemnity provision to only indemnify the owner for the *contractor*'s negligence, which is a limited form indemnity agreement not prohibited by Section 2216.[195] Looking next to the insurance provision, the provision purported to require the Contractor to purchase insurance in the name of the City as Owner, referred to as "Owners' and Contractors' Protective Liability Insurance Coverage for Operations and Designated Contractor."[196] The court interpreted the insurance policy as only covering the contractor's negligence and the City's negligence in its role of supervising the project, not the City's negligence for its independent acts.[197] This insurance policy "[did] not circumvent the prohibition against indemnification contained in the statute or violate public policy."[198] Accordingly, the Third Circuit affirmed the

188. *See* Domingue v. H & S Constr., 546 So. 2d 913 (La. Ct. App. 3d Cir. 1989).
189. *Id.* at 914.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 918.
196. *Id.* For a more thorough discussion on Owners' and Contractors' Protective Liability Insurance, *see* Galganski et al., *supra* note 79, at 10.
197. *Domingue*, 546 So. 2d at 918.
198. *Id.* at 919.

trial court's decision, upholding the indemnity agreement and insurance agreement.[199]

Although the court upheld the insurance agreement, the court noted that even though Section 2216 does not expressly prohibit contractors from procuring insurance for public entities, allowing public entities to *require* contractors to procure insurance circumvents the policy behind Section 2216.[200] The court construed the policy of Section 2216 by looking to another Louisiana anti-indemnity statute, the Louisiana Oil-Field Anti-Indemnity Act,[201] which expressly prohibits additional insured agreements.[202] Thus, the Third Circuit expressed Louisiana's position on additional insured agreements in public construction contracts as being against public policy if the public entity required the contractor to procure insurance for the public entity's protection.[203]

In 2005, the Louisiana Supreme Court also confronted the validity of additional insured agreements in public construction contracts.[204] In *Suire v. Lafayette City-Parish Government*, the plaintiff sued the city of Lafayette (the City) and the general contractor for property damage on his home that resulted from dredging and filling a coulee[205] with concrete adjacent to the home.[206] Consequently, the City filed a cross-claim against the contractor and its insurer seeking indemnification and defense as an indemnitee and an additional insured pursuant to the parties' contract and the insurance policy, respectively.[207] Following the appellate court's proceedings, which limited the City's demand for indemnity and defense to only the absolute liability context,[208] the Louisiana Supreme Court granted a writ to address the enforceability of the contractual provisions.[209]

The Louisiana Supreme Court looked first to the indemnity provision in the contract and observed that indemnity agreements are "distinguishable" from insurance agreements due to differences in when

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199. *Id.*
200. *Id.* at 918.
201. *Id.*
202. LA. REV. STAT. § 9:2780(G) (2023).
203. *Domingue*, 546 So. 2d at 919.
204. *See* Suire v. Lafayette City-Par. Gov't, 907 So. 2d 37 (La. 2005).
205. Merriam-Webster Dictionary defines "coulee" as a "a small stream." *Coulee*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/coulee [https://perma.cc/B3JS-NXB8] (last visited Mar. 2, 2023).
206. *Suire*, 907 So. 2d at 42–43.
207. *Id.* at 43.
208. *Id.* at 47.
209. *Id.*

the cause of actions arise.[210] Since indemnity agreements arise at the conclusion of the case, the Court found that the indemnity agreement was not yet enforceable since there was no allocation of fault.[211] Thus, the Supreme Court reversed the appellate court as to the enforceability of the indemnity agreement.[212]

The Supreme Court then turned to the additional insured provision and observed that, in contrast to the indemnity agreement, coverage for defense from an insurance agreement is immediately triggered unless unambiguously excluded.[213] Moreover, the Court noted that the contract limited the enforceability of the additional insured provision by making the provision contingent upon the indemnity provision in the contract being legally enforceable.[214] As a result, the Supreme Court examined the underlying indemnity provision first and interpreted the provision as requiring the contractor to indemnify the City if the City and the contractor are both at fault.[215] Nevertheless, the Court concluded that language in the indemnity provision that "might require defense and indemnity for the City's negligence of a joint or concurrent sort . . . violates La. Rev. Stat. 38:2216(G)" because the legislature limited Section 2216 to the negligence context.[216] Thus, the contractor's insurer did not owe the City as an additional insured a duty to defend as to claims of negligence against the City.[217]

The Supreme Court's decision in *Suire* did not impact additional insured agreements with standalone power because the Court only addressed additional insured agreements contingent upon enforceable indemnity agreements.[218] *Suire* also neither affirmed nor denied the policy on additional insured agreements in public construction contracts expressed in *Domingue*.[219] Nevertheless, the issue of whether a public entity could require a contractor to procure liability insurance and name the public entity as an additional insured remained dormant until the

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210. *Id.* at 51.
211. *Id.*
212. *Id.*
213. *Id.* at 52.
214. *Id.*
215. *Id.* at 53.
216. *Id.* (Since the statute does not bar indemnification for strict or absolute liability, the Court also held that the indemnity provision could be legally enforced to the extent of indemnifying the City's strict or absolute liability.).
217. *Id.* at 45.
218. *Id.*
219. *See id.* Domingue v. H & S Constr., 546 So. 2d 913, 918 (La. Ct. App. 3d Cir. 1989).

Louisiana legislature enacted a new, more comprehensive anti-indemnity statute five years after *Suire*.

B. The Louisiana Construction Anti-Indemnity Act

In 2010, the Louisiana legislature enacted the most recent anti-indemnity statute, Louisiana Revised Statutes § 9:2780.1.[220] Applicable to "motor transportation contracts"[221] and "constructions contracts,"[222] Louisiana Revised Statutes § 9:2780.1, referred to as the Louisiana Construction Anti-Indemnity Act, purports to invalidate indemnification provisions *and* provisions requiring an indemnitor to procure insurance for an indemnitee's actions over which an indemnitor has no control.[223] Subparts (B) and (C) are the cornerstones of the Act, with subpart (B) prohibiting provisions in construction contracts that "purports to indemnify . . . or has the effect of indemnifying . . . the indemnitee" from financial loss for the liability for the indemnitee's actions or negligence.[224] Subpart (C) goes on to address additional insured agreements, specifically by stating:

> Notwithstanding any provision of law to the contrary and except as otherwise provided in this Section, any provision . . . contained in . . . a . . . construction contract which purports to require an

220. *See ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15 (Louisiana's two anti-indemnity acts are Louisiana Revised Statutes § 9:2780 and § 38:2216); *see generally* Act No. 492, 2010 La. Acts 1919 (enactment of Louisiana Revised Statutes § 9:2780.1, the Louisiana Construction Anti-Indemnity Act).

221. LA. REV. STAT. § 9:2780.1(A)(1) (2023) ("'Motor carrier transportation contract' shall mean any contract, agreement, or understanding covering the transportation of property . . . for compensation or hire by a motor carrier, entrance upon property by the motor carrier for the purpose of loading, unloading, or transporting property . . . for compensation or hire, or a service incidental to any such activity . . . .").

222. *Id.* § 9:2780.1(A)(2)(a) ("'Construction contract' shall mean any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property . . . .").

223. MCKENZIE & JOHNSON III, INSURED, *supra* note 80. "'Indemnitee' means any named party in the contract to whom indemnification is owed pursuant to the terms of the contract." LA. REV. STAT. § 9:2780.1(A)(3). "'Indemnitor' means any party to the contract who obligates himself to provide indemnification pursuant to the terms of the contract." *Id.* § 9:2780.1(A)(4).

224. LA. REV. STAT. § 9:2780.1(B)–(C).

> indemnitor to procure liability insurance covering the acts or omissions or both of the indemnitee . . . or the acts or omissions of a third party over whom the indemnitor has no control is null, void, and unenforceable.[225]

As such, the Louisiana Construction Anti-Indemnity Act prohibits broad form indemnity agreements and intermediate form indemnity requiring full indemnification agreements, just like Section 2216 and subpart (A) of Section 2195. Unlike Section 2216 and subpart (A) of Section 2195, however, the Louisiana Construction Anti-Indemnity Act prohibits, rather than preserves, additional insured agreements.

The Louisiana Construction Anti-Indemnity Act's definition of construction contracts encompasses "any agreement" of construction followed by a list of certain objects that may require construction or restoration, such as a road, a bridge, or a sewer line.[226] This "construction contract" definition in the Louisiana Construction Anti-Indemnity Act does not designate applicability to specific contract types, such as public or private construction contracts.[227] Rather, the definition uses the language "any agreement" with limits stemming from the object of the construction project.[228] Moreover, subpart (D) of the Louisiana Construction Anti-Indemnity Act emphatically makes clear that the Louisiana Construction Anti-Indemnity Act applies to and governs "any construction contract to be performed in this state."[229] In an attempt to reconcile the conflict between the Louisiana Construction Anti-Indemnity Act and the pre-existing law, subpart (E) provides that the Louisiana Construction Anti-Indemnity Act does not "alter, add to, subtract from, amend, overlap, or affect the provisions of [Louisiana Oil-field Anti-

225. *Id.* § 9:2780.1.

226. *Id.* § 9:2780.1(A)(2)(a) ("'Construction contract' shall mean any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property . . . ."). Louisiana Revised Statutes § 9:2780.1(A)(2)(b) outlines what does not constitute a construction contract. However, those exceptions are directed towards oil and gas constructions. *See id.* § 9:2780.1(A)(2)(b).

227. *Id.* § 9:2780.1(A)(2)(a).

228. *Id.*

229. *Id.* § 9:2780.1(D) ("Notwithstanding any contractual provision to the contrary, this Section shall apply to and govern any construction contract to be performed in this state . . . . Any provision, covenant, or clause in such contracts which conflicts with the provisions of this Section shall be null, void, and unenforceable.").

Indemnity Act] or [Section 2195]."[230] Inexplicably, neither subpart (E) nor any other subpart of the Louisiana Construction Anti-Indemnity Act addresses Section 2216.[231]

In a subsequent amendment two years after the enactment, the Louisiana legislature added subpart (I) to the Louisiana Construction Anti-Indemnity Act.[232] Subpart (I)(2), in particular, allows for additional insured agreements in construction contracts if: (1) the indemnitee—the additional insured—compensates the indemnitor for the insurance costs pursuant to subpart (I)(1); and (2) the indemnitor—the party procuring the insurance—is partially at fault.[233] Subpart (I) creates a unique exception to the Louisiana Construction Anti-Indemnity Act that allows additional insurance coverage when the insurance is paid for by both the named and additional insured and both parties are allocated some fault—an exception that is not common in other state's anti-indemnity statutes.[234] This exception mirrors a similar jurisprudential exception to Louisiana Revised Statutes § 9:2780, the Louisiana Oilfield Indemnity Act.[235]

When read in isolation, both the sections of the Louisiana Public Works Act, Section 2216 and the subpart (A) of Section 2195, and the Louisiana Construction Anti-Indemnity Act appeared to be crystal clear.[236] Yet, when read together, the crystal became hazy as to the validity of additional insured agreements in Louisiana public construction contracts.[237] Consequently, Louisiana's anti-indemnity regime prior to the 2023 amendment was in complete disrepair, and the Louisiana circuit courts of appeal amplified the irreconcilable tension between the Louisiana Public Works Act sections and the Louisiana Construction Anti-Indemnity Act.

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230. *Id.* § 9:2780.1(E).

231. *See generally id.* § 9:2780.1.

232. *See id.* § 9:2780.1(I); Act No. 684, 2012 La. Acts 2871.

233. LA. REV. STAT. § 9:2780.1(I)(2).

234. *See* Podolak & Casanova, *supra* note 26, at 32.

235. *See* Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins. Co., 745 So. 2d 676, 680 (La. Ct. App. 1st Cir. 1999) (discussing the *Marcel* exception to the Louisiana Oil Anti-Indemnity Act, which arose after the United States Court of Appeals for the Fifth Circuit's jurisprudential exception in *Marcel v. Placid Oil Company*). *See* Podolak & Casanova, *supra* note 26, at 32 ("In Louisiana, there is a[n] . . . exception for broad indemnification if the indemnification is supported by additional insured coverage and the indemnitee pays the associated costs of that coverage.").

236. LA. REV. STAT. §§ 38:2216, 9:2780.1.

237. *See generally id.* §§ 38:2216, 9:2780.1.

III. THE ILLUSTRATED TENSION BETWEEN LOUISIANA'S ANTI-INDEMNITY STATUTES

Following the enactment of the Louisiana Construction Anti-Indemnity Act, the tension between the Louisiana Public Works Act sections and the Louisiana Construction Anti-Indemnity Act became apparent through a series of Louisiana circuit court decisions.[238] Two Louisiana circuit courts of appeal addressed the validity of additional insured agreements in public construction contracts in light of the new Louisiana Construction Anti-Indemnity Act.[239] Unfortunately, the courts reached conflicting conclusions, each relying upon different statutes.[240]

A. Section 2216 of the Louisiana Public Works Act Prevails in the First Circuit

Being the first to address the issue, the Louisiana First Circuit Court of Appeal in 2015 upheld additional insured agreements in public construction contracts.[241] In *Mercer, L.L.C., et al v. State of Louisiana, Department of Transportation and Development*, four general contractors collectively sued the Department of Transportation and Development (DOTD) for claims arising out of the DOTD's required additional insured agreement.[242] The DOTD filed peremptory exceptions for no right and no cause of action, but the district court denied the DOTD's exceptions.[243] The First Circuit reversed the trial court's denial with the only written reason for judgment being: "La. R.S. 9:2780.1 does not apply to public works contracts with DOTD. La. R.S. 48:250 et seq. and La. R.S. 38:2216(G) govern this matter."[244] While the writ application to the First Circuit was pending, the trial court consolidated two other lawsuits by contractors seeking the same relief against the DOTD with *Mercer*.[245]

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238. *Compare* Salathe v. Par. of Jefferson through Dep't of Sewerage, 300 So. 3d 460 (La. Ct. App. 5th Cir. 2020) (holding that additional insured agreements in public construction contracts are unenforceable), *with* Jeff Mercer, L.L.C. v. Dep't of Transp. & Dev., 174 So. 3d 1180 (La. Ct. App. 1st Cir. 2015) (holding that additional insured agreements in public construction contracts are enforceable).

239. *Compare Salathe*, 300 So. 3d 460, *with Mercer*, 174 So. 3d 1180.

240. *Compare Salathe*, 300 So. 3d 460, *with Mercer*, 174 So. 3d 1180.

241. *Mercer*, 174 So. 3d 1180.

242. *Id.* at 1182.

243. *Id.* at 1183.

244. Jeff Mercer, L.L.C. v. Dep't of Transp. & Dev., No. 2013 CW 1108, 2013 WL 12123235, at *1 (La. Ct. App. 1st Cir. Nov. 19, 2013).

245. *Mercer*, 174 So. 3d at 1183.

Following the Supreme Court's writ denial, the DOTD filed the same peremptory exceptions against the two additional contractors, which the district court sustained and dismissed the contractor's claims with prejudice.[246]

On appeal, the First Circuit applied the "law of the case" doctrine to decline considering the merits of the subsequently consolidated lawsuits.[247] However, the court placed a footnote within the opinion, providing additional reasoning for its originally rendered decision.[248] In the footnote, the court observed that a more specific statute supersedes a general statute pursuant to the general jurisprudential rules of statutory construction.[249] Relying on this rule, the First Circuit reiterated that the more specific sections of the Louisiana Public Works Act supersede the more general Louisiana Construction Anti-Indemnity Act.[250] As a result, the First Circuit's decision permitted public entities in the Greater Baton Rouge area to transfer the financial risk of its own negligence to a contractor through an additional insured agreement but not an indemnity agreement.[251] The First Circuit's decision essentially protected the innocent contractor only to the extent that the risk transfer mechanism is in one of a certain form—that being an indemnity agreement.

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246. *Id.*

247. *Id.* at 1185. "Law of the case" doctrine bars a court from redetermining an issue previously heard within the same case. The doctrine also applies to appellate courts by barring the appellate court from redeciding an issue heard on a previous appeal within the same case. FRANK L. MARAIST, LAW OF THE CASE § 4.7, *in* 1A LOUISIANA CIVIL LAW TREATISE, CIVIL PROCEDURE—SPECIAL PROCEEDINGS (2021).

248. *Mercer*, 174 So. 3d at 1186 n.5.

249. *Id.* (citing Filson v. Windsor Ct. Hotel, 907 So. 2d 723, 726 (La. 2005) ("where two statutes deal with the same subject matter, they should be harmonized if possible; however, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character"); Johnson v. Shafor, 22 So. 3d 935, 940 (La. Ct. App. 1st Cir. 2009). ("where there is a conflict between two statutory provisions, the statute that is more specifically directed to the matter at issue must prevail over the statute that is more general in character")).

250. *Id.* (The court also stated that the DOTD Public Works Act also preempts the Louisiana Construction Anti-Indemnity Act.).

251. *See* Jeff Mercer, L.L.C. v. Dep't of Transp. & Dev., No. 2013 CW 1108, 2013 WL 12123235 (La. Ct. App. 1st Cir. Nov. 19, 2013).

B. The Louisiana Construction Anti-Indemnity Act Governs in the Fifth Circuit

Mercer remained the only decision addressing the validity of additional insured agreements in public construction contracts following the enactment of the Louisiana Construction Anti-Indemnity Act until the Louisiana Fifth Circuit Court of Appeal rendered an opinion on the matter in the summer of 2020.[252] In *Salathe v. Parish of Jefferson through Department of Sewerage*, the Fifth Circuit affirmed the trial court's decision and held that additional insured agreements in public construction contracts are unenforceable.[253] The case arose after the contractor's employee sustained injuries after falling 30 feet to the bottom of a well due to the door of the well malfunctioning.[254] The employee filed suit naming Jefferson Parish (the Parish) as a defendant and then filed an amending petition adding the Parish's insurer and the general contractor's insurers as defendants pursuant to the additional insured agreement.[255] The contractor's insurers subsequently filed, and the trial court granted, a motion for summary judgment recognizing the indemnity and additional insured provisions in the contract as unenforceable.[256]

On appeal, the Fifth Circuit began its analysis by looking to Section 2216 of the Louisiana Public Works Act and the *Domingue* and *Suire* decisions but avoided an extended analysis of these authorities because the court concluded that the subsequent Louisiana Construction Anti-Indemnity Act superseded these authorities.[257] Turning to the Louisiana Construction Anti-Indemnity Act, the court acknowledged two rules of statutory construction that determine which statute governs when two statutes are so irreconcilable, with those rules being: (1) the later enacted statute governs; and (2) the more specific statute governs unless the statute includes language signaling the legislature's intent to the contrary.[258] With these rules in mind, the court noticed that subpart (C) and (D) of the Louisiana Construction Anti-Indemnity Act began with "[n]otwithstanding any provision of law to the contrary," which

252. *See* Salathe v. Par. of Jefferson through Dep't of Sewerage, 300 So. 3d 460 (La. Ct. App. 5th Cir. 2020).
253. *Id.* at 473.
254. *Id.* at 463.
255. *Id.*
256. *Id.* at 465.
257. *Id.* at 466–67.
258. *Id.* at 468.

represented to the court an intent for the Louisiana Construction Anti-Indemnity Act to govern unless there was an applicable exception.[259]

Focusing on the exceptions in subparts (E) and (I), the court found subpart (I) did not apply because the Parish had not reimbursed the contractor for the cost of the insurance.[260] More importantly, the court found it persuasive that the legislature excluded two specific statutes in subpart (E) but did not include Section 2216 of the Louisiana Public Works Act.[261] The court acknowledged that the Louisiana legislature went as far as to exclude Section 2195 and could have also excluded Section 2216 but chose not to do so.[262] As a result, the court concluded that the Louisiana legislature acted "with consideration and knowledge of all existing laws affecting indemnity and insurance procurement provisions, including [Section 2216 of the Louisiana Public Works Act]."[263]

As a result, the Fifth Circuit concluded that additional insured agreements in public construction contracts are prohibited, thus creating a circuit split.[264] The Louisiana Supreme Court subsequently denied the

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259. *Id.* at 470 (alteration in original) (citing LA. REV. STAT. § 9:2780.1(C) (2020)).

260. *Id.* at 471. *See* LA. REV. STAT. § 9:2780.1(I) (2023), which provides:

> Nothing in this Section shall invalidate or prohibit the enforcement of the following:
>
> (1) Any clause in a construction contract containing the indemnitor's promise to indemnify, defend, or hold harmless the indemnitee or an agent or employee of the indemnitee if the contract also requires the indemnitor to obtain insurance to insure the obligation to indemnify, defend, or hold harmless and there is evidence that the indemnitor recovered the cost of the required insurance in the contract price. However, the indemnitor's liability under such clause shall be limited to the amount of the proceeds that were payable under the insurance policy or policies that the indemnitor was required to obtain.
>
> (2) Any clause in a construction contract that requires the indemnitor to procure insurance or name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insurance coverage provides coverage for liability due to an obligation to indemnify, defend, or hold harmless authorized pursuant to Paragraph (1) of this Subsection, provided that such insurance coverage is provided only when the indemnitor is at least partially at fault or otherwise liable for damages ex delicto or quasi ex delicto.

261. *Salathe*, 300 So. 3d at 471.

262. *Id.* at 471–72.

263. *Id.* at 472.

264. *Id.* at 473.

Parish's writ applicant, solidifying the split.[265] *Mercer* and *Salathe* represented the troubled relationship between the sections of the Louisiana Public Works and the Louisiana Construction Anti-Indemnity Act.[266] Yet, the issue had and still has far greater implications that affect whether a public entity may insulate itself from financial loss and responsibility for liability using a private contractor's insurance or whether the public entity must use the tax payers' money to rectify damage caused by the public entity's negligence. For example, the state of the law prior to the 2023 amendment allowed East Baton Rouge Parish to avail itself of additional insured agreements procured by contractors performing the parish's construction projects, which gave East Baton Rouge Parish's tax dollars additional protection.[267] By contrast, Jefferson Parish did not have the same luxury.[268] Jefferson Parish and any other parish within the jurisdiction of the Louisiana Fifth Circuit Court of Appeal could only claim protection from insurance policies that the Parish had personally procured.[269]

The First and Fifth Circuit's decisions undoubtedly left the legality of additional insured agreements within public construction contracts in limbo. The conflicting language in the sections of the Louisiana Public Works Act and the Louisiana Construction Anti-Indemnity Act could not simultaneously co-exist and govern the same area of law since the two statutes caused irreconcilable results. Having two areas of the state subjected to separate rules, especially ones with fiscal impacts on entities using citizen's tax dollars, was unacceptable. Thus, the legislature decided to act in 2023. Before discussing the amendment, however, it is imperative to determine how a court prior to 2023 would have resolved the statutory-turned-circuit conflict.

IV. FIXING LOUISIANA'S BROKEN AND IRRECONCILABLE ANTI-INDEMNITY STATUTES

The Louisiana legislature's pre-2023 approach to anti-indemnity statutes could be classified, at best, as patchwork and left up to interpretation whether a public entity could utilize additional insured

265. Salathe v. Par. of Jefferson through Dep't of Sewerage, 303 So. 3d 642 (La. 2020).

266. *See* Jeff Mercer L.L.C. v. Dep't of Transp. & Dev., 174 So. 3d 1180, 1186 n.5 (La. Ct. App. 1st Cir. 2015). *See also Salathe*, 300 So. 3d 460.

267. *See generally* Jeff Mercer, L.L.C. v. Dep't of Transp. & Dev., No. 2013 CW 1108, 2013 WL 12123235 (La. Ct. App. 1st Cir. Nov. 19, 2013).

268. *See generally Salathe*, 300 So. 3d 460.

269. *Id.*

agreements as a sufficient risk transfer mechanism. This left the Louisiana citizens' tax money subject to varying levels of risk. While the 2023 amendment sought to resolve the circuit split, it is important to determine the proper resolution to the statutory tension to have a full understanding of the state of the law prior to 2023.[270] With conflicting statutes, the Louisiana Supreme Court or a Louisiana Court of Appeal would likely attempt to utilize the jurisprudential rules that identify implicit statutory repeal. However, the Court's own interpretive rules would not clearly resolve the statutory tension. An additional application of traditional civilian methods of statutory interpretation would provide a slightly less hazy answer, but as the Louisiana legislature properly recognized, the only path to a direct and concrete resolution was through legislative intervention.

A. Applying the Louisiana Supreme Court's Own Jurisprudential Rules to the Issue Would Not Have Resolved the Statutory Tension

The Louisiana Civil Code recognizes that a statute may be explicitly or implicitly repealed through later-enacted legislation.[271] *Explicit repeals* occur when a statute states in plain language that another statute no longer governs that area of the law while *implicit repeals* are presumed from the conflicting statutes.[272] Louisiana, as a civilian state, disfavors a court recognizing an implicit repeal and, instead, values a court that ascertains and enforces the legislature's intent when enacting both statutes.[273] Still,

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270. Notably, it is imperative to resolve the pre-2023 statutory conflict because the 2023 amendment does not address the amendment's retroactivity. Thus, while retroactivity is beyond the scope of this Comment, it is possible that a court may still need to resolve the issue of additional insured agreements in public construction contracts using Louisiana's pre-2023 anti-indemnity statutes.

271. LA. CIV. CODE art. 8 (2023) ("Laws are repealed . . . by other laws. A repeal may be express or implied. . . . It is implied when the new law contains provisions that are contrary to, or irreconcilable with, those of the former law. The repeal of a repealing law does not revive the first law.").

272. *See* P. RAYMOND LAMONICA & JERRY G. JONES, REPEAL AND TERMINATION OF LAW § 6:3, *in* 20 LOUISIANA CIVIL LAW TREATISE, LEGISLATIVE LAW & PROCEDURE (2021 ed.) [hereinafter LAMONICA & JONES, REPEAL AND TERMINATION OF LAW].

273. *See id.* LA. CIV. CODE art. 1 ("The sources of law are legislation and custom."); *id.* art. 2 ("Legislation is a solemn expression of legislative will."). *But see* LAMONICA & JONES, REPEAL AND TERMINATION OF LAW, *supra* note 272. Though the Louisiana Supreme Court's majority has recognized the avoidance of the general rule when possible, some Supreme Court Justices are not quite in

implicit repeal is a legitimate possibility because the legislature's approach to public policy may change over time and the legislature is presumed to have knowledge of all existing statutes when new statutes are enacted.[274]

When two statutes are so irreconcilable that the two statutes cannot coincide, an implicit repeal of one of the statutes must occur, and the Louisiana Supreme Court has established two methods to resolving the generated tension. Generally, the Court recognizes the passage of time as a controlling factor to resolving statutory tension, suggesting that a more recently enacted statute repeals a less recent statute.[275] As a result of the complications of implicit repeal, the Louisiana Supreme Court also recognizes that the more specific statute, compared to the more general statute, ought to govern a directed matter unless the legislature expressed contrary intent.[276]

Taking these statutory rules and applying them to Section 2216 of the Louisiana Public Works Act and the Louisiana Construction Anti-Indemnity Act, the Louisiana Construction Anti-Indemnity Act would be

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agreeance. For instance, as footnote 5 of the Louisiana Treatise on Repeal and Termination of Law states:

> But see Killeen v. Jenkins, 752 So. 2d 146 (La. 1999), in which Justice Traylor dissents from the majority opinion that, of two irreconcilable acts, the latest enactment must control under the facts of the case. His dissent argues that the majority opinion ignores the rule of statutory construction that the more specific statute must prevail over the statute more general in character.
>
> See also, Richard v. Hall, 874 So. 2d 131 (La. 2004). As noted in the Killeen case above, simple application of certain "axioms" of statutory construction without thoughtful consideration may lead to contradictory results in the situation where a later general statute is enacted that is irreconcilable with an earlier specific statute. There exists multiple "axioms" that may be potentially applicable and not all lead to the same result. For example, it is well-settled that when there is a conflict between two statutes dealing with the same subject matter, the statute specifically directed to the matter at issue controls as an exception to the more general statute.

Id.

274. Theriot v. Midland Risk Ins. Co., 694 So. 2d 184, 186 (La. 1997); LAMONICA & JONES, REPEAL AND TERMINATION OF LAW, *supra* note 272.

275. State v. Piazza, 596 So. 2d 817, 819 (La. 1992); LAMONICA & JONES, REPEAL AND TERMINATION OF LAW, *supra* note 272.

276. LaBreton v. Rabito, 714 So. 2d 1226, 1229 (La. 1998); Filson v. Windsor Ct. Hotel, 907 So. 2d 723, 726 (La. 2005); LAMONICA & JONES, REPEAL AND TERMINATION OF LAW, *supra* note 272.

the more recent statute but also the more general statute. Though older, Louisiana Revised Statutes § 38:2216(G) of the Louisiana Public Works Act would be more specific to the question of law at issue because Section 2216 falls within Title 38 governing "Public Contracts, Works and Improvements" and Chapter 10 governing "Public Contracts."[277] Further, the Louisiana Supreme Court previously recognized that the Louisiana Public Works Act, in its entirety, "is *sui generis*[278] and provides the exclusive remedies to parties in public construction work."[279] Consequently, applying the two rules outlined by the Louisiana Supreme Court—those being the "more recent" rule and the "more specific" rule—would appear to produce differing results, which makes the Louisiana circuit split less surprising. With the two jurisprudential rules for implicit repeal causing an impasse, the Louisiana Supreme Court would need to apply traditional civilian methods of statutory interpretation to the conflicting statutes in search for expressed legislative intent. Thus, looking further into the language of the Louisiana Construction Anti-Indemnity Act and applying additional methods of statutory interpretation suggest that the Louisiana legislature expressed its intent for the Louisiana Construction Anti-Indemnity Act to implicitly repeal Section 2216 of the Louisiana Public Works Act.

B. Applying Civilian Methods of Statutory Interpretation Suggests that the Louisiana Construction Anti-Indemnity Act Implicitly Repealed Section 2216 of the Louisiana Public Works Act

With no clear answer from the jurisprudential rules for repeal, the next place the Louisiana Supreme Court would turn is Louisiana's axioms of statutory construction and seek the legislature's intent when enacting the statute. Despite the sections of the Louisiana Public Works Act's more specific aim, the Louisiana Construction Anti-Indemnity Act would prevail as the governing statute and, thus, would have prohibited public entities from indemnifying themselves through an additional insured agreement. The language of the Louisiana Construction Anti-Indemnity

277. *See* LA. REV. STAT. § 38:2216 (2023).

278. *Sui generis* means "[o]f its own kind." *Sui Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

279. State Through Div. of Admin. v. McInnis Bros. Constr., 701 So. 2d 937, 944 (La. 1997).

Act suggests that "the purpose of the law"[280] behind the statute was to implicitly repeal Section 2216 of the Louisiana Public Works Act.

The starting point for statutory construction is the language of the statute.[281] Subparts (B) and (C) of the Louisiana Construction Anti-Indemnity Act both begin with the language "[n]otwithstanding any provision of law to the contrary and except as otherwise provided in this Section . . . ."[282] Using Louisiana Civil Code article 11 to give to the clause its "generally prevailing meaning,"[283] "[n]otwithstanding anything to the contrary" colloquially translates to "despite what was previously indicated."[284] This language is the quintessential example of an implicit repeal.[285] The usage of this language within the statute is an acknowledgement by the legislature that conflicting statutes may exist, but those statutes no longer express the current state of the law. The use of the "notwithstanding" language suggests that the legislature's intent was to make the Louisiana Construction Anti-Indemnity Act the exclusive anti-indemnity statute for construction contracts.

Additionally, using the language "and except as otherwise provided in this Section" in conjunction with the "notwithstanding" language in subparts (B) and (C) furthers the legislature's intent to make the Louisiana Construction Anti-Indemnity Act a comprehensive statute.[286] The "except as otherwise provided" language indicates that the legislature provided the only excluded statutes to the Louisiana Construction Anti-Indemnity Act

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280. LA. CIV. CODE art. 10 (2023) ("When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.").

281. *Id.* art. 1.

282. *See* LA. REV. STAT. § 9:2780.1(B)–(C).

283. LA. CIV. CODE art. 11 ("The words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter.").

284. Editorial Staff, *Notwithstanding Anything To The Contrary (Meaning In Contracts)*, INCOPORPORATED.ZONE (Aug. 26, 2020), https://incorporated.zone/notwithstanding-anything-to-the-contrary/ [https://perma.cc/44H6-8UVY].

285. LAMONICA & JONES, REPEAL AND TERMINATION OF LAW, *supra* note 272 ("Examples of an express legislative intent for control includes phrases in laws such as 'Notwithstanding any other provision of law to the contrary' and 'The provisions of this Subsection shall supersede and control to the extent of any conflict with any other provision of law.'").

286. LA. REV. STAT. § 9:2780.1(B)–(C) (both stating "Notwithstanding any provision of law to the contrary and except as otherwise provided in this Section . . .").

within the statute, which did not include being Section 2216.[287] Thus, the Louisiana Construction Anti-Indemnity Act's preemptive language and its established exceptions represent the Louisiana legislature's intention to implicitly repeal Section 2216 of the Louisiana Public Works Act.[288]

Moreover, the Louisiana Construction Anti-Indemnity Act explicitly states that the Louisiana Construction Anti-Indemnity Act "appl[ies] to and govern[s] any construction contract to be performed in this state."[289] The plain meaning[290] of "[a]ny construction contract"[291] insinuates no distinction between public and private construction contracts, and, consequently, the Louisiana Construction Anti-Indemnity Act regulates both. The legislature furthers this dual governance by defining construction contracts as "any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property."[292] While the definition does not use the words "public" or "private," it does include objects that are both public and private in nature as defined by other applicable articles or statutes.

For example, under the Louisiana Construction Anti-Indemnity Act, construction contracts encompass contracts for the construction of highways.[293] Title 48 of the Louisiana Revised Statutes regulates "Roads, Bridges and Ferries" and defines "highway" as "a *public* way for vehicular . . . traffic, including . . . the bridges . . . [and] structures."[294] The provided definition for "highway" in Title 48 contemplates both bridges and structures as being publicly owned,[295] which are two additional terms listed in the "construction contract" definition in the Louisiana Construction Anti-Indemnity Act.[296] Additionally, a statute within the same title recognizes that public entities own bridges and elect when those

287. *Id.* § 9:2780.1(E) (those statutes not affected are the Louisiana Oilfield Indemnity Act and Louisiana Revised Statutes § 38:2195).

288. This is an example of the interpretive method *a contrario sensu*. Black's Law Dictionary defines *a contrario sensu* as "[o]n the other hand; in the opposite sense." *A Contrario Sensu*, BLACK'S LAW DICTIONARY (11th ed. 2019).

289. LA. REV. STAT. § 9:2780.1(D).

290. LA. CIV. CODE art. 11 (2023).

291. LA. REV. STAT. § 9:2780.1(D).

292. *Id.* § 9:2780.1(A)(2)(a).

293. *Id.*

294. *Id.* § 48:1(10) (emphasis added).

295. *Id.*

296. *Id. See also id.* § 9:2780.1(A)(2)(a).

bridges may be renovated.[297] Likewise, Louisiana Civil Code article 457 states that "[a] road may be either public or private,"[298] and "road" is another item listed in the "construction contract" definition of the Louisiana Construction Anti-Indemnity Act. Applying the statutory interpretation method of *in pari materia*,[299] the Louisiana legislature intended for the term "construction contract" in the Louisiana Construction Anti-Indemnity Act to encompass public construction contracts because the listed items in the definition are inherently publicly owned items.

Further, the legislative history of the Louisiana Construction Anti-Indemnity Act solidifies the legislature's intended scope of the act. During the 2010 legislative session, Senator Danny Martiny and Representative Anthony Ligi jointly introduced the Louisiana Construction Anti-Indemnity Act as Senate Bill 625.[300] When Senator Martiny introduced the bill, he continually stressed the unfairness of broad form indemnity agreements and intermediate form indemnity agreements requiring full indemnification.[301] When questioned about how other states have addressed this issue Senator Martiny listed 20 states that have already passed identical anti-indemnity statutes.[302] After passing successfully through the Senate, Representative Ligi experienced immense pushback in the House of Representatives, particularly about the effects the Act

297. *Id.* § 48:859 ("Any parish may construct, subject to the approval hereinafter required, any bridge, or construct improvements to any bridge theretofore constructed or acquired, whenever such construction is deemed expedient."); *id.* § 48:831 ("In addition to the powers now possessed by it, any parish or municipality may construct, acquire, improve, operate, and maintain tunnels, causeways, [or] bridges . . . ."); *id.* § 48:1152 ("The department of highways is hereby authorized to enter into contracts with bridge and ferry authorities, organized under the laws of the state of Louisiana, for the construction, maintenance and operation of bridges and ferries . . . .").

298. LA. CIV. CODE art. 457 (2023).

299. *Id.* art. 13 ("Laws on the same subject matter must be interpreted in reference to each other."). *In pari materia* means "on the same subject matter; relating to the same matter." *In Pari Materia*, BLACK'S LAW DICTIONARY (11th ed. 2019).

300. S.B. 625, 2010 Leg., Reg. Sess. (La. 2010).

301. Louisiana Senate Floor Debate, S.B. 625, at 2:25:11–2:51:07 (June 2, 2010) (on file with the Louisiana Law Review).

302. *Id.* (the 20 states are: Georgia, Illinois, Indiana, Kansas, Maryland, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, Tennessee, Virginia, West Virginia, & Wyoming).

would have on public entities.[303] Representative Neil Abramson explicitly asked if the proposed bill would apply to public construction contracts, which Representative Ligi answered affirmatively.[304] Representative Abramson then expressed his concerns with how an anti-indemnity statute would place a financial strain on the state and the tax payers because the state would lose its protective safeguards.[305] Following these remarks, then-Representative and now Governor John Bel Edwards expressed his support to prohibit these agreements based on Louisiana's comparative fault scheme and the unequal bargaining powers of the parties.[306] Representative Ernest Wooten, also sharing his support, stated that "You should not have to buy insurance to protect yourself from another man's mistakes."[307] After a heated discussion, Senate Bill 625 went to a vote and passed the Louisiana House of Representatives by a vote of 54–46.[308]

The affirmative legislative intent for the Louisiana Construction Anti-Indemnity Act to govern public construction contracts simply affirms what statutory interpretation conveys—the Louisiana Construction Anti-Indemnity Act prohibits additional insured agreements in public construction contracts. Albeit somewhat ambiguous, the Louisiana legislature did in fact intend to repeal Section 2216 of the Louisiana Public Works Act's exception when it enacted the Louisiana Construction Anti-Indemnity Act, prohibiting additional insured agreements that seek to insulate the public entity from financial responsibility for liability caused by its own negligence. The recognition of the legislature's intent to repeal Section 2216 of the Louisiana Public Works Act aligns with Louisiana's intention to not allow parties to insulate themselves from financial responsibility for liability for their own negligence, which is encapsulated in Louisiana's virile share theory of comparative fault and Louisiana's general obligation to have the tortfeasor personally remedy the damages caused to an injured party.[309]

While the resolution was not perfect, a court could certainly resolve the issue by determining that the Louisiana Construction Anti-Indemnity Act implicitly repealed Section 2216 of the Louisiana Public Works Act because of the beginning clauses contained in subparts (B) and (C) of the Louisiana Construction Anti-Indemnity Act, the definition of

303. Louisiana House of Representatives Floor Debate, S.B. 625, at 3:12:05–4:20:56 (June 17, 2010) (on file with the Louisiana Law Review).
304. *Id.* at 3:19:20–3:22:57.
305. *Id.*
306. *Id.* at 3:37:27.
307. *Id.* at 4:08:11.
308. *Id.* at 4:22:27.
309. *See infra* Part VI.A for further discussion.

"construction contract" in light of other Louisiana statutes and code articles, and the legislative intent during the enactment of Louisiana Construction Anti-Indemnity Act. The only mechanism that could provide complete clarity to such a splintered issue, as the Louisiana legislature noticed, was new legislation. Thus, the legislature in 2023 proposed legislation with plans to clarify the issue of whether additional insured agreements are permissible or prohibited in public construction contracts.

V. THE ADDITION OF ACT 379 TO LOUISIANA'S ANTI-INDEMNITY REGIME AND ITS IMPLICATIONS ON ADDITIONAL INSURED AGREEMENTS IN PUBLIC CONSTRUCTION CONTRACTS

The proposal and passage of Act 379 in 2023 added a new wrinkle to the development of Louisiana's anti-indemnity regime. Act 379, which was proposed as House Bill 573, amended Louisiana Revised Statutes § 39:2195.[310] Prior to Act 379, Section 2195 had little practicality since subpart (A) prohibited public entities from indemnifying private contractors.[311] Subpart (A) of Section 2195's only real relevance was being included as an exception in subpart (E) of the Louisiana Construction Anti-Indemnity Act.[312]

Following the passing of Act 379, Section 2195 is more relevant than ever as it relates to Louisiana's anti-indemnity regime. The result of the act is that Louisiana's anti-indemnity regime now definitively treats public entities different from private contractors. Surprisingly, however, a glimpse into the legislative history of Act 379 suggests that this result is contrary to the legislature's intent. If such is true, the Louisiana legislature must act quickly to correct this legislatively created discrepancy.

A. The Legislative History of Act 379, i.e., The Amendment to Louisiana Revised Statutes § 38:2195

Before Act 379, subpart (A) of Louisiana Revised Statutes § 38:2195 prohibited a public entity from indemnifying a private contractor for a contractor's negligence with an exception for additional insured agreements.[313] Subpart (A) of Section 2195 served as the inverse to Section 2216, which prohibits a contractor from indemnifying a public entity acting as owner for the public entity's negligence with an exception

310. Act No. 379, 2023 La. Acts 1.

311. LA. REV. STAT. § 38:2195 (2023). For why subpart (A) of Section 2195 has little practicality, *see supra* Part II.A.

312. LA. REV. STAT. § 9:2780.1(E).

313. *Id.* § 38:2195(A).

for additional insured agreements.[314] In the spring of 2023, Representative Jack McFarland proposed House Bill 573. The original proposal of House Bill 573 would have added a new subpart to Section 2195 as subpart (B), which would have stated, "Notwithstanding any provision of law to the contrary, any provision contained in a public contract that is in violation of R.S. 9:2780.1 shall be null and void."[315] If this version of the amendment had been enacted, then the Louisiana Construction Anti-Indemnity Act would have governed both public and private contracts, which would have meant that additional insured agreements would have been prohibited in both types of contracts.[316]

In between passing unanimously through the House Committee on Transportation, Highways, & Public Works and appearing on the House of Representative's floor, House Bill 573 changed drastically with no real explanation provided in the legislative record. The reengrossed version of the house bill reimagined the new subpart to Section 2195 by proposing more technical terminology while introducing an exception for additional insured agreements.[317] This version of the bill, subject to grammatical amendments, passed unanimously through the House of Representatives and the Senate and was enacted as Act 379 on August 1, 2023.[318] Act 379 adds subpart (B) to Section 2195, which states,

> It is hereby declared that any provision contained in a public contract, **other than a provision naming another as a co-insured or additional beneficiary in a contract of insurance**, which requires a contracting private party to assume liability for damages arising out of injuries or property damage to a public entity caused by the negligence of anyone other than the contracting private party, its employees, or agents, is contrary to the public policy of the state of Louisiana. Any and all such provisions in any and all public contracts shall be null and void.[319]

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314. *Id.* § 38:2216(G).

315. H.B. 573, 2023 Leg., Reg. Sess. (La. 2023) (original).

316. *See* LA. REV. STAT. § 9:2780.1(C). *But see id.* § 9:2780.1(I)(2) (creating an exception for additional insured agreements where the indemnitor is partially at fault and the indemnitee compensates the indemnitor for the insurance).

317. H.B. 573, 2023 Leg., Reg. Sess. (La. 2023) (reengrossed).

318. LA. REV. STAT. § 38:2195(B) (subpart (B), enacted as Act 379, passed unanimously through the Louisiana House of Representatives and the Senate).

319. Act No. 379, 2023 La. Acts 1 (emphasis added). Of note, Act 379 also amended Louisiana Revised Statutes § 48:251.7(C). This subpart is the exact same as Subpart (B) in Louisiana Revised Statutes § 38:2195. The only difference is that Title 48 is for construction contracts with the Department of Transportation

Subpart (B) of Section 2195 reads conspicuously like Section 2216.[320] Both subpart (B) of Section 2195 and Section 2216 invalidate broad and intermediate form indemnity agreements in public construction contracts that would hold a contractor responsible for a public entity's negligence.[321] However, unlike the Louisiana Construction Anti-Indemnity Act, both subpart (B) of Section 2195 and Section 2216 allow additional insured agreements in public construction contracts such that the public entity may serve as a co-insured on the contractor's insurance without contributing to the premiums.[322] While subpart (A) of Section 2195 does not have much practical use,[323] subpart (B) of Section 2195 restates the already-existing Section 2216, which was likely implicitly repealed by the Louisiana Construction Anti-Indemnity Act.[324] Reenacting a statute following a court decision is normally enough to provide the legislature's intentions, but the legislative history of Act 379 is far more complex than just reenacting a statute.

B. Section 2195 now governs public construction contracts, but this is likely not the result the legislature intended.

If a Louisiana court were to now address the validity of additional insured agreements in public construction contracts where the public entity serves as a co-insured on a contractor's insurance, the court would certainly determine that subpart (B) of Section 2195 governs, which would permit such additional insured agreements. Applying the "more recent" and the "more specific" rules from the Louisiana Supreme Court,[325] subpart (B) of Section 2195 prevails since it is the more recent statute as it was enacted in 2023, and it is the more specific statute as it is found in the Louisiana Public Works Act, which is sui generis.[326] Moreover, using statutory interpretation, subpart (B) of Section 2195 governs public

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and Development. *See* LA. REV. STAT. § 48:11. While this Comment focuses on Section 2195, everything stated applies with equal force to Louisiana Revised Statutes § 48:251.7.

320. *Compare* LA. REV. STAT. § 38:2195(B), *with id.* § 38:2216.

321. *Compare id.* § 38:2195(B), *with id.* § 38:2216.

322. *Compare id.* § 9:2780.1, *with id.* §§ 38:2195, 38:2216.

323. *See supra* Part II.A.

324. *See supra* Part IV.B.

325. *See* State v. Piazza, 596 So. 2d 817, 819 (La. 1992) (recognizing the "more recent" rule); LaBreton v. Rabito, 714 So. 2d 1226, 1229 (La. 1998) (recognizing the "more specific" rule).

326. *See* State Through Div. of Admin. v. McInnis Bros. Constr., 701 So. 2d 937, 944 (La. 1997) (recognizing the Louisiana Public Works Act as sui generis).

construction contracts and not the Louisiana Construction Anti-Indemnity Act since the Louisiana Construction Anti-Indemnity Act has a specific exception for Section 2195, meaning that Section 2195 will prevail when there is a conflict.[327] Thus, a Louisiana court would now apply subpart (B) of Section 2195 to a public construction contract to hold that an additional insured agreement is enforceable in a Louisiana public construction contract. This result allows a public entity as owner to avail itself of a private contractor's insurance without paying any premiums while a private owner cannot do the same.

While this discrepancy in treatment between a private owner and a public entity as owner could arguably be justified by focusing on the fiscal impacts to Louisiana and its municipalities,[328] the Louisiana legislature interestingly did not do so. Instead, Representative Jack McFarland who introduced the bill emphasized that the goal of House Bill 573 was to "restore the intent of the law"[329] by "harmonizing" the Louisiana Construction Anti-Indemnity Act with the Louisiana Public Works Act.[330] Throughout the committee hearings and floor debates, Representative McFarland focused on how House Bill 573 would protect a private contractor from a public entity's negligence and would ensure that a private contractor and a public entity are responsible for their own negligence, respectively.[331] Representative McFarland also mentioned the impetus of the legislation being "a court decision" that allowed a public entity to "hold[] itself harmless from its own negligence."[332] While Representative McFarland never states which case he is referring to, a later hearing with the Senate Transportation, Highways & Public Works

327. *See* LA. REV. STAT. § 9:2780.1(E).

328. *See infra* Part VI.A.

329. Louisiana House Committee on Transportation, Highways and Public Work Meeting, H.B. 573, at 2:03:04 (April 13, 2023), *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2023/apr/0413_23_TR [https://perma.cc/3NSN-CVHT].

330. *See* Louisiana Senate Committee on Transportation, Highways and Public Work Meeting, H.B. 573, at 15:28–26:04 (April 19, 2023), *available at* https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2023/04/041923THPW [https://perma.cc/L8TX-SY4S].

331. *See generally* Louisiana House Floor Debate on H.B. 573 (June 1, 2023); *see* Louisiana Senate Committee on Transportation, Highways and Public Work Meeting, H.B. 573, at 45:12–52:47 (June 1, 2023), *available at* https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2023/06/060123THPW [https://perma.cc/6ACF-H9Y3].

332. Louisiana House Floor Debate on H.B. 573, *supra* note 331.

Committee confirms that House Bill 573 was motivated by the circuit split between the First Circuit in *Mercer* and the Fifth Circuit in *Salathe*.[333]

Reviewing the legislative history reveals the tension that exists between the intent of the legislature to protect private contractors from responsibility for public entities' negligence and the motivation to resolve the circuit split between *Mercer* and *Salathe*. This tension appears to derive from a misunderstanding by the legislature of the issues in *Mercer* and *Salathe*. In these cases, the issue is whether additional insured agreements—not indemnity agreements—are prohibited in public construction contracts.[334] This misunderstanding is illustrated in the fact that the legislature's main objective with House Bill 573 was to prohibit broad and intermediate form indemnity agreements in public construction contracts, as suggested by Representative McFarland using quintessential indemnity language such as "hold harmless" in floor debates.[335] While this objective is nonetheless important, Louisiana's anti-indemnity regime already prohibited these types of indemnity agreements in public construction contracts.[336] Thus, this review of the legislative history reveals that the Louisiana legislature misidentified the issue in *Mercer* and *Salathe*, which inevitably led to the legislature enacting an ineffective amendment to Louisiana's anti-indemnity regime.

Part of this misidentification likely derives from the blatant overlooking of Section 2216, which already provided the anti-indemnity protection for private contractors from public entities' negligence that the legislature sought. Throughout the hearings and floor debates, the Louisiana legislature never mentioned Section 2216 despite maintaining the same language as the new amendment. Had the legislature known of Section 2216, which was discussed at length in *Salathe* and *Mercer*, then there is a better chance that the legislature would have properly identified the issue that existed in the circuits. Now, Louisiana's anti-indemnity regime maintains repetitive statutes that invoke different implications based on the timing of the enactments and the cross-referencing of Section 2195 in the Louisiana Construction Anti-Indemnity Act.

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333. Louisiana Senate Committee on Transportation, Highways and Public Work Meeting, H.B. 573, *supra* note 330, at 15:28–26:04.

334. *Compare* Salathe v. Par. of Jefferson through Dep't of Sewerage, 300 So. 3d 460, 470 (La. Ct. App. 5th Cir. 2020), *with* Jeff Mercer, L.L.C. v. Dep't of Transp. & Dev., 174 So. 3d 1180, 1182 (La. Ct. App. 1st Cir. 2015).

335. Louisiana House Floor Debate on H.B. 573, *supra* note 331.

336. *See* LA. REV. STAT. §§ 9:2780.1, 38:2216 (2023). Irrespective as to which statute governed public construction contracts prior to House Bill 573, an indemnity agreement that would require a private contractor to indemnify a public entity for the public entity's negligence would have been prohibited.

Moreover, Act 379 may very well not be constitutional for the same reasons that Section 2216 may not be constitutional.[337]

Though never addressed by a Louisiana court, Section 2216, and now subpart (B) of Section 2195, may be subject to constitutional challenge under Article XII, Section 10, Subpart (C). This subpart in the Louisiana Constitution, in part, states: "[T]he legislature by law may *limit or provide for the extent of liability* of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages."[338] The constitutionality of Section 2216 and subpart (B) of Section 2195 hinges upon the fact that the language in this specific subpart of the Louisiana Constitution only references the legislature's ability to "limit" liability, not the ability to transfer the risk and responsibility of compensating for the state or its political subdivision's liability. This language in the Louisiana Constitution is modified by the provision stating that this limitation can be for "circumstances giving rise to liability and the kinds and amounts of recoverable damages," which is not the same as transferring the responsibility of liability.[339] Though risk transfer mechanisms do not insulate the state from liability, risk transfer mechanisms—including additional insured agreements—do insulate the state and its subdivisions from the *responsibility* of compensating that derives from being held liable, which circumvents the spirit of the constitutional waiver of sovereign and government immunity. While Section 2216 may have been enacted 15 years before the constitution was amended to include Article XII, Section 10, Subpart (C),[340] subpart (B) of Section 2195 certainly came after the constitutional amendment. Nevertheless, Article XII, Section 10, Subpart (C) may very well make Section 2216 and subpart (B) of Section 2195 unconstitutional due to their circumventive nature of insulating public entities from the responsibility of their liability. Thus, if a Louisiana court determined that additional insured agreements were risk transfer mechanisms that "limit . . . the extent of liability," then a Louisiana court will hold the newly enacted subpart (B) of Section 2195 as being unconstitutional pursuant to Article XII, Section 10, Subpart (C).

Though the state of the law was not entirely clear before this new legislation, the result of statutory interpretation would have been to treat public and private owners equally by not allowing either type of owner to

337. *See supra* Part IV.B.

338. *See* LA. CONST. art. XII, § 10(C) (emphasis added).

339. *See id.* art. XII, § 10(C).

340. *See* Act No. 1328, 1995 La. Acts 1; LA. CONST. ANN. art. XII, § 10(C). *See also* Act No. 62, 1980 La. Acts 683.

use additional insured agreements without paying any premiums.[341] Now, following the amendment, the resolution to whether an additional insured agreements are prohibited in public construction contracts places public entities on a pedestal. Because of Act 379, public entities can insulate themselves from responsibility for their own negligence as long as the entities include an additional insured agreement in their public construction contracts, which is a contradictory result from what the legislature intended. The nature of Louisiana public bid law eliminates the private contractors' ability to bargain their way out of an additional insured agreement in a public construction contract.[342] This new wrinkle in Louisiana's anti-indemnity regime causes an inevitable shift of responsibility for the public entity's negligence to the private contractor who is a tax-paying citizen of Louisiana. This shift of responsibility is expressly contradictory to Louisiana's comparative-fault scheme that seeks to hold each party responsible for their own fault.[343]

The consequences of Act 379 are troublesome in light of the Louisiana legislature's perceived intent to treat private owners and public entities as owners equally. If such result was the intent of the legislature, which the legislative history demonstrates that it was, then Act 379 results in the exact opposite outcome. This conflict deriving from Act 379 only amplifies a messy area of the law to a point where it is now an irreconcilable mess. Irrespective of the constitutionality of subpart (B) of Section 2195, the Louisiana legislature must immediately revisit its newest amendment to its anti-indemnity regime to correct the irreconcilable mess it created.

VI. THE LEGISLATIVE BRANCH MUST REASSESS AND RECONFIGURE SECTION 2195 AND THE REST OF LOUISIANA'S ANTI-INDEMNITY REGIME

As shown above, the intentions and the actions of the Louisiana legislature in 2023 do not align as it relates to additional insured agreements in public construction contracts. While the legislative history suggests that the legislature intended to codify the Fifth Circuit's decision in *Salathe*, the legislature's actions instead indoctrinate the First Circuit's decision in *Mercer*. Thus, while the legislature intended to hold every party responsible for their own negligence, the legislature instead provided public entities an opportunity to include a risk transfer mechanism in their construction contracts. This flawed amendment only adds to the

341. *See supra* Part IV.B.
342. *See supra* Part IV.B.
343. *See* LA. CIV. CODE art. 2323 (2023).

irreconcilable patchwork of statutes that make up Louisiana's anti-indemnity regime governing construction contracts.

To resolve the newly created discrepancy and the patchworked anti-indemnity regime, the Louisiana legislature must act methodically to enact legislation that will bring clarity to this area of the law, but it must not rush to enact new legislation without fully considering the implications as it has done in the past. Instead, the legislature must first solidify its public policy on additional insured agreements in public construction contracts. Once solidified, the legislature should then enact legislation that provides a cohesive statutory regime that aligns with its new public policy.

Before reconfiguring Louisiana's statutes on indemnity and additional insured agreements, the Louisiana legislature must first reassess two major policy concerns that conflict with the current anti-indemnity statutes in place. Those two major policy concerns are: (1) whether public and private construction contracts deserve identical treatment; and (2) whether additional insured agreements and indemnity agreements deserve identical treatment.[344] Once the legislature determines the state's public policy for additional insured agreements in public construction contracts, the Louisiana legislature must then articulate legislation that compliments this clear and modern public policy.

A. The Louisiana Legislature's New Formulation of A Clear and Modern Public Policy

Starting with a clean slate, the Louisiana legislature must articulate clear policy as to the state's view on additional insured agreements and indemnity agreements, particularly in public construction contracts. The current statutory regime raises policy concerns of whether indemnity agreements and additional insured agreements warrant identical treatment and whether public construction contracts deserve unique treatment from private construction contracts. The best place to begin answering these policy questions is to first see how indemnity agreements fit within the general law of contracts in Louisiana and then decide if additional insured agreements should be treated similarly.

To start, indemnity provisions in construction contracts fall somewhere in the gray area between the many competing contractual and tort theories in Louisiana. As a civilian state, Louisiana allows all parties to contract freely for any contractual object so long as the object is

344. *See supra* Part I.B.1 for further discussion of policy considerations of private and public construction contracts. *See also supra* Part I.B.2 for further discussion of policy considerations of additional insured agreements.

lawful.[345] Louisiana finds it unlawful for a party to exclude or limit their own liability in advance through contractual agreement for intentional or gross fault or for physical injury that the party causes another.[346] Consequently, this prohibition allows parties to freely limit their liability for their own negligence or strict liability through contractual agreement prior to the negligence occurring, so long as other statutory provisions permit.[347] Likewise, indemnity provisions are contractual devices that limit the financial risk of negligence, hence why the comments of the Louisiana Civil Code suggest that Louisiana's prohibition on limiting liability for intentional or gross fault or for physical injury does not govern indemnity agreements.[348]

The Louisiana Civil Code likely draws this distinction because, unlike a non-liability stipulation or a waiver of liability that affects a contracting party's right to recover damages, an indemnity agreement only affects those who a damaged third party may recover against.[349] More simply, rather than leaving the injured party with no one to recover against, indemnity agreements transfer the risk of compensating for damages to another viable party, never affecting the injured party's right to recover for their suffered harm.[350] Transferring one's risk of financial responsibility for liability for their own negligence through an indemnity agreement can be seen as an exception to Louisiana Civil Code article 2315, the fountainhead of Louisiana's tort law, which obligates the tortfeasor to personally rectify the injured party for the damages caused.[351]

Nevertheless, Louisiana employs a comparative fault system, which requires every party at fault, solely or partially, to be responsible for their virile share of damages.[352] Because of this and the adverse impacts on an innocent contracting party,[353] Louisiana, along with 44 other states, disfavors broad form indemnity agreements and intermediate form

345. LA. CIV. CODE art. 1971 (2023) ("Parties are free to contract for any object that is lawful, possible, and determined or determinable.").

346. *Id.* art. 2004 ("Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party. Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.").

347. *See* SCALISE JR., *supra* note 10, § 11.13.

348. LA. CIV. CODE ANN. art. 2004 cmt. e (2023).

349. *See* SCALISE, INDEMNITY OR HOLD HARMLESS AGREEMENTS, *supra* note 10.

350. *Id.*

351. *See* LA. CIV. CODE art. 2315.

352. *Id.* art. 2323.

353. *See* discussion *supra* Part I.B.2.

indemnity agreements requiring full indemnification in construction contracts.[354] This is not because they adversely impact the injured party, but because indemnity agreements effectuate financial responsibility for another's liability upon an innocent and usually less financially robust contracting party.[355] Being that indemnity agreements seek to exploit unbalanced power dynamics between parties in construction contracts,[356] anti-indemnity statutes further the intent of Louisiana's comparative fault system, which is to have each party be financially responsible for their virile share of the fault.[357]

Additional insured agreements do not necessarily manipulate Louisiana's comparative-fault theory because the at-fault party is still liable except now that party has an additional primary insurance coverage that another party purchased.[358] Unlike an indemnity agreement, additional insured agreements do not transfer the risk of financial responsibility to a less financially robust party, such as a public entity transferring the risk of financial responsibility to a privately owned contractor.[359] Additional insured agreements also do not directly burden the contractor who procured the insurance because the additional insured agreement only requires that the contractor's insurer, not the contractor, provide defense and reimbursement to the owner.[360]

However, the reason that states enact anti-indemnity statutes is to protect a party with less bargaining power and less financial prowess.[361] Even though additional insured agreements are not as egregious of a risk transfer mechanism as indemnity agreements, additional insured agreements still exploit the inferior party while also causing that party to suffer indirect consequences from the insurance policy.[362] While the contractor as named insured pays all the premiums to the insurer, the

354. *See generally ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15. *See* discussion *supra* note 166 regarding intermediate form indemnity agreements requiring full or partial indemnification.

355. *See* SCALISE, INDEMNITY OR HOLD HARMLESS AGREEMENTS, *supra* note 10. *See generally ANTI-INDEMITY STATUTES IN ALL 50 STATES*, *supra* note 15.

356. *See* discussion *supra* Part I.B.2.

357. LA. CIV. CODE art. 2323.

358. *See* SCALISE, INDEMNITY OR HOLD HARMLESS AGREEMENTS, *supra* note 10. *See also* Galganski et al., *supra* note 79, at 16.

359. Galganski et al., *supra* note 79, at 11. For a more full discussion, *see supra* Part I.B.2.

360. Galganski et al., *supra* note 79, at 20. For a more full discussion, *see supra* Part I.B.2.

361. *See* Podolak & Casanova, *supra* note 26, at 32.

362. Strode, *supra* note 38, at 717–20. *See also* Galganski et al., *supra* note 79, at 20.

insurer requires more expensive premiums from the contractor to incorporate the increased risk the insurer undertakes by covering the owner as an additional insured.[363] These increased premiums are only felt by the named insured, which is the contractor who has lower bargaining power.[364]

The named insured also feels these indirect consequences when the additional insured makes claims to the insurance limit.[365] When the additional insured makes a claim, the claim reduces the available insurance coverage for the contractor who procured the insurance.[366] The additional insured's claim also makes it more expensive, if not impossible, for the contractor to procure insurance the next time the contractor needs insurance because an insured party utilized part of the coverage on the contractor's last insurance policy.[367] In addition, if a third party sues the contractor and the owner together, and the owner provokes the additional insured coverage, the insurance company will need to obtain two separate attorney groups to represent the contractor and owner to avoid any conflict of interests.[368] While the owner as additional insured accumulates expenses against the insurance policy limit, the contractor receives less coverage for an insurance policy that it must pay increased premiums for with its own finances.[369] All of these consequences are present at the negotiating table when the contractor must decide if it will undertake a construction project with an additional insured agreement or let the owner find someone who will embrace the added risk for a lower price.[370] This difficult decision for the contractor is the same difficult decision the contractor faces when a contract contains an indemnity agreement.[371]

Just like indemnity agreements, additional insured agreements take advantage of uneven bargaining powers between the contracting parties, which inevitably paralyzes one party's ability to freely negotiate a contract. Thus, additional insured agreements only serve to accomplish the same result as a broad form indemnity agreement, which is to allow the owner to exploit its greater bargaining power over the contractor. Though

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363. *See* discussion *supra* Part I.B.2.

364. Strode, *supra* note 38, at 718; Mehta, *supra* note 81, at 186–87.

365. Galganski et al., *supra* note 79, at 20; Strode, *supra* note 38, at 717–20. For a more full discussion, *see supra* Part I.B.2.

366. Galganski et al., *supra* note 79, at 20.

367. Strode, *supra* note 38, at 717. For a more full discussion, *see supra* Part I.B.2.

368. Galganski et al., *supra* note 79, at 21.

369. *Id.* at 20. For a more full discussion, *see supra* Part I.B.2.

370. *See* Strode, *supra* note 38, at 724.

371. *See* discussion *supra* Part I.B.2.

most states do not currently treat indemnity agreements and additional insured agreements identically, Louisiana should embrace treating these risk transfer mechanisms identically and prohibit both because of their one-sided nature. With the first policy consideration decided, the second policy consideration of whether public construction contracts warrant unique treatment from private construction contracts must be determined.

The biggest concern for separating public and private construction contracts is the fiscal impacts that a public entities' liability has on the public entities' budget, which derives from the citizens' tax dollars.[372] Public entities in Louisiana do not have government immunity and can be held liable up to $500,000 in damages for personal injuries and wrongful death.[373] This financial impact on state actors and the tax payers was at the forefront of concern when the Louisiana legislature enacted the Louisiana Construction Anti-Indemnity Act,[374] but the Act ultimately treated these types of contracts identically.[375] Though protection of the state's money is a high priority, protection of the state's citizens health and safety is even higher. Allowing public entities in Louisiana to transfer the burden of financial risk for its own negligence through any risk transfer mechanism reduces the public entities' incentive to act with a higher standard of care. Though this argument can feel attenuated,[376] a lackadaisical approach to safety that begins at the top permeates its way down the chain of command to the workers on these construction sites, which increases injuries to both these workers and third parties. In addition, Louisiana promotes, and is proud of, its comparative fault system where each party to the lawsuit is responsible for their allocated share of the fault.[377] Providing Louisiana public entities additional protection through additional insured agreements directly contradicts Louisiana policy that require public entities to be held liable "in the same manner and to the same extent as a private individual under like circumstances."[378] More importantly though, allowing the

372. *See* discussion *supra* Part I.B.1.

373. LA. REV. STAT. § 13:5106(B)(1)–(2) (2023).

374. Louisiana House of Representatives Floor Debate, S.B. 625, *supra* note 303, at 3:12:05–4:20:56. For further discussion, *see supra* Part IV.B.

375. *See* LA. REV. STAT. §§ 38:2216, 9:2780.1.

376. *See supra* Part I.B.2. *See also* Mehta, *supra* note 81, at 186.

377. LA. CIV. CODE art. 2323 (2023).

378. *See* LA. REV. STAT. § 39:5138(B). Though this quote from Louisiana Revised Statutes § 39:5138(B) only refers to the state and its agencies, this express policy applies with equal force to political subdivisions based on Article XII, Section 10(A), which prohibits sovereign immunity for the state and state agencies and prohibits government immunity for political subdivisions. LA. CONST. art. XII, § 10(A).

government as owners of construction contracts to be the only party in the state that can circumvent the comparative fault system through a risk transfer mechanism implies that the tax dollars that the Louisiana citizens produce is more important than their health and safety.

While it is true that insurance, as opposed to appropriating funds through legislative actions, virtually ensures that there are funds to pay the plaintiff,[379] allowing a public entity to use a contractor's procured insurance does not hold the damaging party in retribution for its actions. Instead, the innocent contractor is ultimately the one held in retribution because the contractor procured the policy and paid the premiums.[380] The contractor experiences retribution by having their premiums increased and having the likelihood of procuring insurance in the future diminished due to the negligent actions of another party named on, but not contributing to, the contractor's policy.[381] Essentially, by using an additional insured agreement, Louisiana public entities are placing the burden of compensating an injured party and the burden of suffering retribution for a public entity's actions on an innocent contractor, which is more than likely a tax-paying entity and citizen within the state of Louisiana.

Therefore, Louisiana ought not safeguard public entities as owners in construction contracts. Rather, Louisiana should govern public and private construction contracts identically in regard to indemnity and additional insured agreements. In summation of the two major policy concerns Louisiana needed to reconsider before reformulating its anti-indemnity statutes, Louisiana should prohibit both indemnity agreements and additional insured agreements, and Louisiana should do so in both public and private construction contracts. By outlining these policy concerns before drafting new legislation, the Louisiana legislature will convey clear public policy for the courts to apply.

B. The Necessary Legislative Changes to Louisiana's Anti-Indemnity Regime that Articulate Louisiana's Modern Public Policy

To fulfill Louisiana's new-found public policy, a handful of changes must be made to the current anti-indemnity regime. Since the legislature's recent action implies the legislature's intent to maintain the Louisiana Public Works Act as sui generis, Louisiana Revised Statutes §38:2195 should be used as the building block for the reconfiguration. However, the first action by the Louisiana legislature should be to repeal Louisiana

379. *See* discussion *supra* Part I.B.2.
380. *See* discussion *supra* Part I.B.2.
381. *See* discussion *supra* Part I.B.2.

Revised Statutes § 38:2216(G) entirely since it is now merely superfluous and no longer fits within Louisiana's new public policy for risk transfer mechanisms.

Next, the legislature should remove the exception for additional insured agreements in subpart (B) of Section 2195. Louisiana's newly revised public policy is more advantageously promoted by removing additional insured agreements across the board. Thus, subpart (B) of Louisiana Revised Statutes § 38:2195 should read as follows:

> It is hereby declared that any provision contained in a public contract which requires a contracting private party to assume liability for damages arising out of injuries or property damage to a public entity caused by the negligence of anyone other than the contracting private party, its employees, or agents, is contrary to the public policy of the state of Louisiana. Any and all such provisions in any and all public contracts shall be null and void.[382]

Though these amendments are likely sufficient since the Louisiana Public Works Act is sui generis, another amendment should be made to add a new subpart to Section 2195 that mirrors subpart (I) of the Louisiana Construction Anti-Indemnity Act.

It is important to note that additional insured agreements are not entirely prohibited in private construction contracts according to the Louisiana Construction Anti-Indemnity Act. Rather, subpart (I) of the Louisiana Construction Anti-Indemnity Act leaves available the opportunity for additional insured agreements to be enforceable if there is intermediate fault[383] and the owner as additional insured compensates the contractor as named insured.[384] Insurance is a necessary function for carrying out large high-risk projects, like construction contracts,[385] but limiting additional insured agreements to a narrow exception keeps the purpose of protecting the party with a lower bargaining power intact. This narrow exception ensures two things. First, it ensures that the public entity is held in retribution for its negligent actions by having to compensate an injured party from a policy that the public entity paid premiums for.[386] Second, it ensures that an innocent party is not having to, via an insurance agreement, essentially indemnify a negligent party for the negligent

382. *See supra* note 319 regarding Louisiana Revised Statutes § 48:251.7.
383. For further discussion, *see supra* Part I.A.2.
384. LA. REV. STAT. § 9:2780.1(I)(2) (2023).
385. O'Connor, *supra* note 93.
386. *See supra* Part VI.A.

party's sole negligence, which would function like a broad form indemnity agreement—a prohibited agreement in Louisiana.

Additionally, adding this exception to Section 2195 in the Louisiana Public Works Act aligns the Louisiana Public Works Act with the Louisiana Construction Anti-Indemnity Act and the Louisiana Oilfield Anti-Indemnity Act since both maintain this same exception.[387] Thus, by adding this exception to Section 2195 of the Louisiana Public Works Act, Louisiana promotes a unified front in allowing additional insured agreements but only when the public entity helps pay the premiums and both the public entity and the contractor are liable. The Louisiana legislature should accomplish this by amending Louisiana Revised Statutes § 38:2195 to include a new subpart (C) that reads as follows:

> Any clause in a public construction contract that requires a contracting private party to procure insurance or name the public entity as an additional insured on the contracting private party's policy of insurance is null, void, and unenforceable unless such insurance coverage is provided only when the contracting private party procuring the insurance is at least partially at fault and there is evidence that the contracting private party recovered at least half the cost of procuring and maintaining the required insurance in the contract price.

With this new subpart, the Louisiana Public Works Act, the Louisiana Construction Anti-Indemnity Act, and the Louisiana Oilfield Anti-Indemnity Act will finally advance a unified and cohesive anti-indemnity regime for Louisiana that prohibits both indemnity agreements and additional insured agreements with only a limited exception.

Repealing subpart (G) of Section 2216 and removing the additional insured agreement exception from subpart (B) of Section 2195 sufficiently treats additional insured agreements in public construction contracts identical to indemnity agreements in private construction contracts, which is the goal of Louisiana's new public policy. The addition of subpart (C) to Section 2195 leaves room for some additional insured agreements in narrow circumstances and properly aligns the Louisiana Public Works Act with the rest of Louisiana's anti-indemnity regime. Even with this exception, Louisiana's new public policy remains the same: a negligent public entity cannot transfer its responsibility of redressing a caused harm to an innocent contractor.

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387. *See* discussion *supra* note 235.

CONCLUSION

Insurance is a necessity for the construction industry because it encourages contractors and owners to engage in large endeavors, which ultimately progresses society's infrastructure.[388] Using insurance to circumvent established prohibitions, however, curtails the purpose that insurance agreements serve. States, including Louisiana, refuse to allow owners to manipulate contractors with lower bargaining power by using indemnity agreements in the construction contracts but refuse to recognize an additional insured agreements' manipulative power. The newly amended Louisiana Revised Statutes § 38:2195(B) promotes incoherent policy and unacceptably protects parishes from financial responsibility for their liability, which ultimately affects the tax-paying citizens and entities in Louisiana.

Though most states do not recognize the similar characteristics between indemnity agreements and additional insured agreements, the Louisiana legislature should do so and act accordingly. Removing additional insured agreements from the arsenal that public entities use to exploit innocent contractors promotes the prohibition against inappropriate risk transfer that is found in anti-indemnity statutes and is a necessary fix to Louisiana's laws. This change will create a modern philosophy for Louisiana's public policy that both promotes Louisiana's current prohibition on risk transfer mechanisms and harmonizes such prohibition with Louisiana's comparative-fault scheme. More importantly though, Louisiana should remove additional insured agreements from public construction contracts because doing so sends a message to the citizens of Louisiana that their health and safety is more important than their money.

388. *Id.*