INDEMNIFICATION PROVISIONS WITH PUBLIC INSTITUTIONS OF HIGHER LEARNING: BEST PROCUREMENT CONTRACTING PRACTICES SURVEY AND ANALYSIS

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I. INTRODUCTION

Every day the purchasing departments[1] of public institutions of higher learning[2] procure goods and services from vendors[3] to meet the universities' needs. Everything from software to office supplies, guest speakers to insurance, is procured for the benefit of the institution's staff, students, and guests.[4] Unlike private institutions, public institutions face unique state constitutional and statutory requirements, in addition to state and federal regulations.[5] These requirements create a host of legal challenges for public institutions in how they structure their procurement process and contractually enter into agreements with vendors.[6] The cumulative result of these issues can be a headache for both the purchasing departments and the private vendors that service them.

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[1] Purchasing departments are also referred to as "procurement offices."

[2] Public institutions of higher learning are institutions created by state statute. They include: state colleges, state universities and community colleges.

[3] Vendors are also referred to as "contractors." Vendors can be any company that provides goods or services to a public institution of higher learning regardless of whether vendors specialize in serving public intuitions or selling their goods or services to the public at large.

[4] The Univ. of Texas at Austin, *Contracts Transparency Report*, https://purchasing.utexas.edu/resources/purchase-and-contract-transparency-report/contracts (last visited May 13, 2017); Daniel Hurley, Doreen Murner & Alene Russel, *Public College & University Procurement A Survey of the State Regulatory Environment, Institutional Procurement Practices and Efforts Toward Cost Containment,* AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES NATIONAL ASSOCIATION OF EDUCATIONAL PROCUREMENT, at 18 (2010), http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/aascunaepfinal(1).pdf.

[5] Daniel Hurley, Doreen Murner & Alene Russel, at 20.

[6] *Id*. at 18-19; Cory Harms, Paula DeAngelo, Jim Twetten & Jason Ferguson, *Are You Clicking Your Life Away?*, EDU. PROCUREMENT J. 16, 20 (2014).

One problem both parties face is mutual agreement on indemnification or hold harmless[7] provisions.[8] Many public universities and colleges are generally prohibited from entering into indemnification provisions by anti-deficiency laws and/or because of state sovereign immunities. Procurement contracts with public institutions of higher learning can contain express provisions stating their unwillingness or inability to indemnify vendors.[9] Contracts can also remain silent regarding the vendors' indemnification rights.[10] Furthermore, purchasing departments or the university's counsel often edit or completely remove indemnification provisions from a vendor's terms and conditions – even when the terms are fair to both parties.[11] As a result, these regulations create a challenge for vendors who may rightfully expect to be fully protected from third party lawsuits or harm that may occur as a result of doing business with public institutions of higher learning.

This paper will examine the indemnification issues that arise when vendors and public institutions of higher learning contract. First, this paper will examine what indemnification provisions are and what function they serve in the agreements. Second, it will examine why public institutions of higher learning are generally prohibited and/or limited when offering indemnification based on the interplay of state constitutions, statutes and jurisprudence regarding: anti-deficiency laws, tort claims acts, state sovereign immunity and the sovereign privilege of *nullum tempus*. Third, in light of these legal hurdles, we will then analyze survey responses from public institutions of higher learning on how they address indemnification provisions in light of the legal restrictions placed upon them. Finally, this paper will recommend that vendors to public universities find alternative means of protecting themselves from liabilities incurred as a result of doing business with public institutions of higher learning, because indemnification agreements, even when agreed to, may not be actionable in a court of law.

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[7] Although indemnification provisions and hold harmless provisions are legally distinguishable, this note treats them similarly for indemnification purposes based on their potential to be temporally and monetarily indeterminate.

[8] *See infra* Table 1, Q2.

[9] Clemson Univ., *Clemson University Standard Terms and Conditions – Revision C*, at 5 (2015), http://www.clemson.edu/procurement/documents/vendors/Bidding-Termsconditions.pdf.; West Virginia Univ., *West Virginia University and Its Affiliates Purchase Order Terms and Conditions*, at 1, http://procurement.wvu.edu/files/d/d5154c67-9435-4dca-ac0a-5f9776f47f4f/po-terms-conditons-02_16_16.pdf.

[10] Ohio State Purchasing Dep't, *OSU-Purchasing Department-Standard Purchase Order Terms and Conditions*, at 5 (2016), http://purchasing.osu.edu/FileStore/PDFs/OSU_TermsAndConditions.pdf.

[11] *See infra* Table 1, Q11.

II. HURDLES TO INDEMNIFICATION

A. Contractual Indemnification Generally and Indeterminate Liability

Indemnification or hold harmless provisions are among the most fought over provisions in contracts with public universities of higher learning.[12] Indemnification is defined generally as "[t]he action of compensating for loss or damage sustained."[13] Thus, an indemnification provision between two parties requires the "party breaching its representations or covenants . . . to indemnify the other party for all costs, damages, and losses incurred as a result of breach."[14] This act of compensation for the loss or damage of one party to an agreement by another party creates an indemnitor-indemnitee relationship. For example, a "[p]atent licensee requires that a [s]tate university indemnify it for any infringement claims arising from the use of the patented technology."[15] This hypothetical example from the Ohio Attorney General demonstrates a contractual indemnification provision where the patent licensee (the indemnitee) expects to be indemnified by a state university (the indemnitor) in a suit by a third party such as the patent holder. This indemnification provision is reasonable in the event the state university, its faculty, guests or students violate the patent license, giving rise to an infringement lawsuit against the patent licensee.[16]

Furthermore, the above indemnification provision between a patent licensee and a state university creates a "contingent liability that is temporally and monetarily indeterminate."[17] That is, there is no limit ("cap") on the monetary amount an indemnitee can recover for damages or a limitation on the amount of time in which an indemnitee may bring a claim for recovery. Indefinite monetary and temporal indemnification provisions are prominent factors preventing public institutions of higher learning from accepting indemnification agreements because they create a contingent liability.[18]

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[12] *See infra* Table 1, Q10.

[13] *Indemnification*, BLACK'S LAW DICTIONARY, (10th ed. 2014).

[14] CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 27 (2d ed. 2008).

[15] ESSENTIAL TERMS, http://www.ohioattorneygeneral.gov/Business/Commercialization/Essential-Terms#ohioLaw (last visited Sept. 26, 2016).

[16] *See generally Id.* (cited for the idea that a lawsuit can be brought against the patent licensee).

[17] *Id*.

[18] ESSENTIAL TERMS, *supra* note 15; Ohio Att'y. Gen. Op. No. 96-060 at 3 (1996); *See* discussion *infra* Section II.b.3, III.b.1 (discussing ways of capping indemnification provisions to comply with a state's law).

Indemnification provisions can have caps and carve-outs ("exceptions") that limit the extent and scope of an indeterminate indemnification provision.[19] For example, "[p]atent licensee requires that a [s]tate university indemnify it for any infringement claims arising from the use of the patented technology [up to 1 million dollars and for a period of 2 years]."[20] The added language places a monetary cap of one million dollars for patent infringement and a temporal limit of two years. Therefore, indemnification provisions in contracts generally may be capped in order to prevent an indemnification provision from creating a contingent liability.[21]

For practical purposes, contracts used by vendors and public institutions of higher learning tend to have indefinite monetary and temporal indemnification provisions like Google's terms of service.[22] This is because they provide blanket protection in agreements whose terms are not usually negotiated between the parties and are used in multiple transactions with various parties. For example, Google's Terms of Service (synonymous with "Terms & Conditions") contains "Click-wrap," which is a general contract that millions of people agree to when they sign-up to use Google's free services.[23] This general agreement is convenient for both Google and its customers because it allows millions of transactions to occur in a fast and convenient manner. When an employee of a public institution of higher learning signs up for Google's free services in their official capacity, the employee may be entering into an agreement with an indemnification provision that the public institution is prohibited from entering into under state law.[24] This is a problem for public universities who are subject to state limitations despite the convenience indeterminate clauses may afford vendors and employees serving in their official capacity.[25]

On the other hand, public institutions of higher learning can create an issue for vendors when the institution's contract is mute regarding the university's duty to indemnify the vendor.[26] In some instances, public institutions will directly cite the laws that prevent the institution from

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[19] Fox, *supra* note 14, at 27.

[20] ESSENTIAL TERMS, *supra* note 15 (adding temporal and monetary caps to the Ohio Attorney General's hypothetical example to illustrate caps on indemnification).

[21] Fox, *supra* note 14, at 27.

[22] TERMS OF SERVICE, https://www.google.com/intl/en/policies/terms/ (last visited Mar. 6, 2017).

[23] *Id.*

[24] ESSENTIAL TERMS, *supra* note 15 (for further discussions of the issue).

[25] Harms, DeAngelo, Twetten & Ferguson, *supra* note 4, at 20.

[26] Univ. of Washington, *University of Washington General Terms and Conditions*, 4 (2015), https://f2.washington.edu/fm/ps/sites/default/files/purchasing/terms-and-conditions/UWTermsandConditions10.2.15.pdf.

indemnifying vendors in the contract.[27] Vendors are also informed about the institution's lack of ability to indemnify them through the contract editing process known as redlining.[28] Public institutions of higher learning may also provide memorandums outlining their indemnification policy online or are able to provide them upon request.[29] Irrespective of how public institutions inform vendors to their inability to indemnify them, many vendors are generally left without indemnification protection and an understanding as to what limit of protection they may be entitled to under a particular state's Tort Reform Act and applicable case law.

B. Arm of the state: State Sovereign Immunity, Rights of the State and Restrictions

Understanding what indemnification is, public institutions of higher learning are unable to agree to indemnification provisions based on their status as an arm of the state which: (1) clothes them in state sovereign immunity that is narrowly relinquished under state Tort Reform Acts; (2) endows them with the sovereign power of *nullum tempus* that enables public institution to bring a suit in the absence of a statute of limitations against the state; and (3) anti-deficiency laws that prevent state arms from entering into agreements without the appropriation of funds.[30]

1. State Sovereign Immunity

Because the Eleventh Amendment clothes an arm of the state in state sovereign immunity, the arm is immune from suit for monetary damages unless it has expressly accented to suit in statute.[31] State sovereign immunity is derived from the common law which protects the state or state entity with

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[27] Univ. of Mississippi, *University of Mississippi Terms and Conditions*, 2, http://procurement.olemiss.edu/wp-content/uploads/sites/55/2014/08/Purchasing_Terms_and_Conditions.pdf, at 2 (last visited Mar. 6, 2017); West Virginia Univ., *supra note 9*, at 1.

[28] *See infra* Table 1, Q11.

[29] Memorandum from Office of University Counsel, University of New Mexico (Apr. 7, 2006) (on file with Ohio State Business Law Journal) (demonstrating indemnification memorandum available online); Memorandum Regarding Indemnification & Choice of Law, Ohio State Purchasing Dep't (demonstrating indemnification memorandum made available by the university upon request).

[30] Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997) (citing Poindexter v. Greenhow, 114 U.S. 270, 287 (1885)); In re Ayers, 123 U.S. 443, 487 (1887); Smith v. Reeves, 178 U.S. 436, 438-439, (1887); Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459 (1945); Clissuras v. City of Uni. of N.Y., 359 F.3d 79 (2nd Cir. 2004); Irizarry-Mora v. Uni. of P.R., 647 F.3d 9, (2011)); Raj v. La. State Univ., 714 F.3d 322, 329 (5th Cir. 2013); Ariz. Students' Ass'n. v. Ariz. Bd. of Regents, 824 F.3d 858, 864 (9th Cir. 2016).

[31] *Hans v. La.*, 134 U.S. 1, 11 (1890).

"armor" against suit.[32] The theory incorporates the belief that the "the King can do no wrong" and thus cannot be sued without consent.[33] The Supreme Court abrogated the doctrine of sovereign immunity in *Chisholm v. Georgia* in 1793.[34] However, Congress responded quickly to the Supreme Court's decision by passing the Eleventh Amendment in 1794 as a means of protecting states from suit without their consent. The Eleventh Amendment was facially interpreted as protecting states from suits by citizens of foreign states, but extended to include the state's citizens after *Hans v. Louisiana*.[35]

Understanding this history, state colleges and public universities have been defined as "arms of the state" with few exceptions. An arm of the state is "an entity created by a state [that] operat[es] as an alter ego or instrumentality of the state, such as a state university . . . ."[36] Historical and statutory names for an arm of the state include "state instrumentality," "governmental entity" and "state agency."[37] State colleges and public universities are often directly defined under the arms of the state category in state statute.[38]

In contrast, divisions of the state often considered by the public as a state entity do not receive state sovereign immunity.[39] These entities included cities and school districts that are classified as political subdivisions for federal court purposes.[40] This classification largely derives from the Supreme Court's holding in *Mt. Healthy School District* that political subdivisions are not granted state sovereign immunity under the Eleventh Amendment.[41] In *Mt. Healthy School District*, the Court based its ruling on a two factor test that focused on (a) the state's characterization of the political subdivision in state statute and (b) the ability of the political subdivision to raise its own funds.[42] Because Ohio did not classify school districts as arms of the state

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[32] 240 Wyo. Op. Att'y. Gen. 5 (1979).
[33] *Id.*
[34] *Chisholm v.* Georgia, 2 U.S. 419, at 478 (1793).
[35] Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 733-735 (2002).
[36] *Arm of the State*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[37] OHIO REV. CODE §123.10(C) (2015); S.C. CODE ANN. § 15-78-30 (d)-(e) (2008); V.T.C.A., GOV. CODE §468.001 (2001).
[38] *Id.*
[39] Alex E. Rogers, *Clothing State Government Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1246 (1992).
[40] *Id.*
[41] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977).
[42] Rogers, *supra* note 34, at 1244. *See also* 1 Cyc. of Fed. Proc. § 2:68, *Immunity of State agency as arm or alter ego of state*, (3rd ed. 2016) (There is no single test or set of factors that determines how to dissolve an arm of the state of its sovereign immunity).

and the school district had the ability to raise funds through bond measures, it was not considered an arm of the state for Eleventh Amendment immunity purposes. In light of the Court's ruling, states like Colorado enacted statutes that defined school districts and cities as arms of the state.[43] These statutory classifications clothed state subdivisions with state sovereign immunity protection from law suits brought under state law only.[44]

One example where a public institution of higher learning was successfully stripped of its sovereign immunity centered on the state's categorization of the public institution in a state statute, or lack thereof. In *Soni*, a former employee of the University of Tennessee sued the University.[45] Focusing on part "a" of the *Mt. Healthy School District* test, the Sixth Circuit determined that the University's creation was not expressly authorized by statute and therefore not exempt from suit by state sovereign immunity.[46] The Tennessee legislature responded to the Sixth Circuit's ruling by passing Tennessee Code § 20-13-102(b). This statute expressly authorized the university's creation and clothed it in sovereign immunity.[47]

Although courts unanimously agree that a state statute must authorize the creation of an arm of the state to receive state sovereign immunity, there remains a lack of consensus regarding other pertinent factors. For this reason, the test for determining whether a state arm is protected by the Eleventh Amendment was not settled by the Court's ruling in *Mt. Healthy School District* and its complexity has grown with subsequent Court rulings at both the state and federal levels. The most recent Supreme Court precedent on the issue in *Regents of the University of California v. Doe* did little to provide clear guidelines. The suit was brought against the University of California ("University") by a prospective employee and New York resident.[48] The University operated a laboratory in accordance with a federal Department of Energy contract that indemnified the University against litigation, which included adverse judgments.[49] When the prospective employee was unable to obtain a security clearance, the prospective employee sued for breach-of-contract contending that the "Laboratory wrongfully refused to perform the contract of employment by peremptorily determining that [he] could not obtain a security clearance from the

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[43] Deb Asimus & Michelle Reese, *Clarifying the Boundaries of Eleventh Amendment Immunity*, 27 COLO. LAW. 51 (1998).
[44] *Id*.
[45] Soni v. Bd. of Trs. of the Univ. of Tenn., 513 F.2d 347, 347-48 (6th Cir. 1975).
[46] *Id*. at 352-53.
[47] *See generally* Univ. of Tenn. v. U.S. Fidelity & Guar. Co., 670 F. Supp. 1379, 1380 (E.D. Tenn. 1987); Gross v. Univ. of Tenn., 448 F. Supp. 245, 247-248 (W.D. Tenn. 1978); Woolsey v. Hunt, 932 F.2d 555, 565 (6th Cir. 1991).
[48] *Regents*, 519 U.S. at 426.
[49] *Id.* at 426-27.

Department [of Energy]."[50] The District Court ruled in favor of the University, holding that it was "an arm of the state" for Eleventh Amendment purposes.[51]

The Ninth Circuit Court of Appeals reversed the District Court's decision and ruled in favor of the prospective employee. The court used a five-factor test in their analysis to consider the University's source of funding.[52] The factors were:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.[53]

The Ninth Circuit considered the State of California's liability for money judgment as "the single most important factor in determining whether an entity is an arm of the state."[54] For this reason, the court found the first factor in favor of the prospective employee because the University was indemnified by the Department of Energy and the State of California was not responsible for the payment of funds.[55] The Ninth Circuit found that the University served a central government function and held the second factor in favor of the University. The University based this decision on the fact that there was ample case precedent determining: that the University was an arm of the state; a California Attorney General Opinion confirming that the University was an arm of the state; and a state statute defining the University as an arm of the state in the performance of a "central government function."[56] The third factor weighed against the University because the California Constitution Article 9 § 9(f) granted the University "the power to sue and be sued" in accordance with factor three.[57]

Furthermore, the fourth and fifth factors were found in favor of the perspective employee. The Fourth factor went against the University because the University possessed the power to take property in the name of the Regents of California.[58] In the Ninth Circuits eyes the fifth factor weighed heavily against the University because the state's constitution established the

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[50] Doe v. Livermore Nat'l. Lab., 65 F.3d 771, 772 (9th Cir. 1995).
[51] Doe v. Livermore Nat'l. Lab., 131 F.3d 836, 839 (9th Cir. 1997).
[52] *Doe*, 65 F.3d at 774.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Doe*, 65 F.3d at 775.
[58] *Id.*

University as a "corporation known as 'The Regents of the University of California.'"[59] Thus, the application of the five-factor test led the Circuit court to conclude that the University was not "entitled to Eleventh Amendment immunity for all of its functions."[60]

The Supreme Court granted certiorari and reversed the Ninth Circuit's decision, siding with the lower court's dissenting opinion.[61] The Court held that divesting an arm of the state of sovereign immunity is not based on "who pays in the end; it is who is legally obligated to pay the judgment that is being sought."[62] That is, the Court disagreed with the Ninth Circuit because the Court viewed the "entity's potential legal liability" as "relevant" to whether the Eleventh Amendment should apply and not "its ability or inability to require a third party to reimburse it."[63] Thus, in determining that the State of California did not waive its right to sovereign immunity the Court only considered the first two factors as relevant and disregarded the last three.

Since Hans v. Louisiana, the federal and state governments remained largely immune from suit until Congress passed the Federal Tort Claims Act ("TCA") in 1946.[64] The statute expressly accented to suits against the federal government by private individuals for tort and contract claims.[65] The states soon followed Congress's example by passing TCAs or State Claims Acts ("SCA"). STCs are also known as Government Claims Acts or Board of Claims Acts.[66] TCA and STCs are similar in that that a number of them have placed caps and limitations that mitigate and/or continue to protect states from suit.[67] In fact, 33 states cap damages that may be awarded against the state "and at least 29 states prohibit a judgment against the state from including punitive or exemplary damages."[68] However, the fact that TCAs

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[59] *Id. (*citing CAL. CONST. art. IX, § 9, subsec. a).
[60] *Id.*
[61] *Regents,* 519 U.S. at 432.
[62] *Id.* at 428, 431 (citing *Doe,* 65 F.3d 771).
[63] *Id.* at 431.
[64] National Conferences of State Legislatures, *State Sovereign Immunity and Tort Liability Act*, (last visited Apr., 2017), http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx; 28 U.S.C §2674.
[65] *Id.*
[66] LA. STAT. ANN. § 13:5101 (2010); KY. REV. STAT. ANN. § 44.072 (West 2017).
[67] Jaime Rall, *Weather or Not? State Liability And Road Weather Information Systems*, NATIONAL CONFERENCES OF STATE LEGISLATURES (Apr. 2010) (50 state table listing applicable TCAs and SCA and limitations on recovery) Appendix B at 56-63, http://www.ncsl.org/documents/transportation/Weather_or_Not_Full_Report_Rall_04.30.10.pdf.
[68] *Id.* at 22, 50.

and STAs were enacted does not necessarily prevent states from raising immunity from suit as demonstrated by the Supreme Court's ruling in *Regents of California v. Doe*.[69] This is because the TCA or STA in general must expressly state the types of suits that may be brought against the state.[70]

2. Nullum Tempus

If sovereign immunity acts as the armor of the state, then the doctrine of *nullum tempus* acts as the sword. Viewed as "opposite sides of the same coin" as sovereign immunity, *nullum tempus* enables an arm of the state to bring a suit against a party irrespective of express statutory or contractual limitations on time.[71] Moreover, the "historical and doctrinal underpinnings" of the two doctrines has led some courts to treat the two doctrines similarly from a policy standpoint.[72] That is, both doctrines protect "public fisc by allowing the government to pursue wrongdoers in vindication of public rights and property without regard to the time limitations applicable to other parties."[73] The specific policy reason upholding *nullum tempus* focuses on the state's ability to bring suits against tortious actors in order to exact justice while protecting the state's finances.[74] For example, a suit against a private actor for industrial pollution should not bar a sovereign state from seeking redress when the statute applies to private citizens. Statutes of limitations or repose therefore do not bar states from seeking redress unless specifically assented to in statute.[75]

The doctrine of *nullum tempus* is illustrated in *State v. Lombardo Brothers*.[76] A contract dispute arose between the University of Connecticut School of Law ("University") and the contractor, the defendants.[77] The defendants were tasked with constructing a library that would last 100 years.[78] However, the building was negligently constructed and required the University to spend over $15 million in corrective work.[79] The University sued the defendants for the cost of the work, but the defendants challenged the assumption that the doctrine of *nullum tempus* was adopted from the common law.[80] In addition, the defendants argued that the state's chief

[69] *See generally Regents,* 519 U.S. 425.
[70] 57 Am. Jur. 2d Municipal, etc., Tort Liability § 1.
[71] Conn. v. Lombardo Bros. Mason Contractors, Inc., 307 Conn. 412, at 430, 437-41 (2012).
[72] *Id*. at 437.
[73] *Id*. at 437 (quoting Pamela v. Ment, 244 Conn. 296, 328, (1998)).
[74] *Id*. at 430-31.
[75] *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. at 438-439.
[76] *See generally, Id.*
[77] *Id.* at 421.
[78] *Id.* at 420.
[79] *Id.* at 421.
[80] *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. at 422.

deputy commissioner of public works ("commissioner") waived the state's ability to raise *nullum tempus* in contract and agreed to be bound by the state's statute of repose.[81] The trial court held in favor of the defendants holding that the state never adopted the doctrine of *nullum tempus* directly from the common law.[82]

The Connecticut Supreme Court ("the court") overruled the trial court's decision holding that the doctrine of *nullum tempus* was a longstanding doctrine accepted by the courts of Connecticut at both common law and longstanding acceptance in case law.[83] More pertinent to our discussion, the court then rejected the defendant's argument that the commissioner waived the state's right of *nullum tempus* by signing the contract.[84] Even though the commissioner was authorized by state statute to enter into contracts on behalf of the University, he was not authorized "expressly or by force of necessary implication" to waive the state's right of *nullum tempus*.[85] That is, only an express mandate in statute can authorize the commissioner to waive the right of *nullum tempus*.[86]

The above point is an important one for vendors seeking to do business with public institutions of higher learning. Even though an indemnity provision may limit the institution's ability to bring such a claim within a specified period of time, the agreed upon clause may be unenforceable because the authorized representative does not have the statutory authority to waive the state's right to bring a claim. A university representative therefore cannot waive statutory requirements placed on the university in statute that is based in the state's constitution or statue. Therefore, a representative authorized to enter into contracts on behalf of the state cannot waive state sovereign immunity unless expressly authorized to do so in statute.

If we apply the above information to our above patent licensee example, we obtain a similar result. Assume that our fictitious state university enters into an indemnification agreement with the patent licensee that requires both parties to indemnify each other up to two years, and there is no statute or constitutional provision expressly limiting the time frame the state can bring a suit. With these conditions, we can assume that the state may bring a suit against the patent licensee. Under the common law, the state retains the right of *nullum tempus* unless the doctrine was abolished by case law. The contractual provision of repose barring the state from bringing an indemnification claim is therefore unenforceable.

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[81] *Id.* at 419.
[82] *Id.* at 418-419.
[83] *Id.* at 426.
[84] *Id.* at 420.
[85] *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. at 457-59.
[86] *Id.* at 420

3. Anti-Deficiency Provisions in State Constitutions and Statutes

The final hurdle for public institutions of higher learning entering into indemnification provisions are anti-deficiency provisions embodied in state constitutions and statutes.[87] Anti-deficiency provisions in state constitutions and statutes prohibit, or limit, arms of the state from entering into agreements that would require the state to take on an unspecified amount of debt.[88] Anti-deficiency provisions act as a shield for the public fisc by nullifying contracts in violation of such provisions.[89] While the origin behind these provisions are a product of history, the fiscal policy behind controlling excessive government spending remains the same today as it was at the time of their enactment.[90]

In the mid-to-late 1800s many states faced fiscal problems brought on by massive spending on government financed railroads and canals.[91] For example, the state of New York led the way in massive debt expenditures for financing the construction of canals in the belief that adequate revenue would flow in from their construction to finance them.[92] The anticipated revenue did not materialize.[93] By 1842 New York was out of money and state debt reached $20 million which was exacerbated by a depression in 1837.[94] To address deficit spending New York enacted constitutional debt limitations in 1846.[95] No state constitution contained anti-deficiency limitations in their constitution prior to 1840.[96] By 1855 nineteen states enacted anti-deficiency limitations in their state constitutions.[97] Moreover, the proliferation of anti-deficiency limitations in state constitutions continued after the civil war.[98] Southern states faced high deficits due to corruption and government spending run amuck.[99]

Anti-deficiency limitations were effective in reigning in state debt, but made it difficult for states to raise funds for public projects and enter into

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[87] *See, e.g., infra* Appendix (for a partial list of the 50 state anti-deficiency laws).
[88] Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1302-3 (1991).
[89] Ohio v. Medbery, 7 Ohio St. 522, 522 (1857).
[90] *Id.* at 1367.
[91] *Id.* at 1302.
[92] *Id.* at 1307.
[93] Sterk & Goldman, *supra* note 69, at 1307.
[94] *Id.* at 1307-8.
[95] *Id.* at 1309.
[96] *Id.*
[97] *Id.*
[98] Sterk & Goldman, *supra* note 69, at 1311.
[99] *See generally Id.* at 1311.

certain contractual agreements. Today, "[m]ore than three-quarters of the states retain debt limitations in their current constitutions."[100] These constitutional provisions can be broken down into 6 groups. For example:

> A handful of constitutions prohibit state debt altogether. About a dozen states limit state debt to a maximum amount, measured either in dollars, or in percentage of state revenues, or in percentage of assessed value. A few states set a maximum amount, but require a public referendum or legislative supermajority even for debt that does not exceed the maximum. Another group of states permits unlimited debt, but only if the debt is approved by public referendum. A few states permit unlimited debt without referendum if approved by a legislative supermajority. Finally, still another group requires *both* a legislative supermajority *and* approval by public referendum. [101]

In light of these limitations, most state courts use "escape devices" such as the public authority doctrine, to circumvent the various anti-deficiency limitations placed on these different groups which are fact and court specific.[102]

Pertinent to our understanding of indemnification provisions between vendors and public institutions of higher learning is the dichotomy between the states of New Jersey and Ohio, and the middle ground between the two states. The difference between these three groupings sheds light on why some public institutions of higher learning are able to indemnify vendors while others are not. Both New Jersey and Ohio have anti-deficiency limitations in their state constitutions that limit the amount of debt the state can take on.[103] Per Ohio's constitution, the state cannot take on debt in excess of $750,000 that is not expressly authorized by the state constitution.[104] New Jersey on the other hand is limited to taking on debt in excess of 1% of the state's budget without a referendum.[105]

The major divergence between these two states is in their respective case law. The Supreme Court of New Jersey has effectively "eviscerated the debt limitations principally through liberal use of the public authorities doctrine."[106] States that do not have anti-indemnity limitations or case law that renders the state's anti-indemnity limitations superfluous create fewer

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[100] *Id.* at 1315.
[101] *Id.* at 1315-16.
[102] *Id.* at 1329-30.
[103] Sterk & Goldman, *supra* note 69, at 1334-37.
[104] *Id.* at 1334
[105] *Id.* at 1337 (referencing N.J. CONST. art. VIII, § 2, para. 3).
[106] *Id.* at 1338.

barriers for public institutions of higher learning to indemnify vendors. In sharp contrast Ohio jurisprudence has firmly upheld Ohio's anti-indemnity limitations since the seminal case *State v. Medbery*.[107]

Medbery sued the state of Ohio over a contract with the Board of Public Works that was to be paid in 5 yearly installments totaling $1,375,000.[108] The Supreme Court of Ohio invalidated the agreement based on the anti-deficiency limitations in the Ohio Constitution.[109] The constitutional provisions separately prohibited debt over $750,000 and all other debt not expressly authorized in section 2 related to bonds.[110] By not using an escape device like the New Jersey Supreme Court, the Ohio Supreme court came to another conclusion. The court held that if a state agency incurs a liability, direct or contingent, in the absence of an expressed appropriation to pay such liability, debt is created.[111] That is, the state of Ohio is prohibited from taking on unspecified debts that are monetarily and temporally indefinite because they violate the biennium's appropriation of state funds. Ohio courts have distilled this reasoning into a two-part test that requires a contract to: (1) make appropriations made and revenue provided for each two-year obligation and (2) limit each agreement to not to exceed two years.[112]

Ohio is not alone in its interpretation. Other states also view anti-deficiency limitations as prohibiting state arms from entering agreements when funding is not appropriated.[113] States subject to strict adherence to anti-deficiency limitations such as Ohio, cannot be contractually required to be a party to contract that goes beyond the state's periodic[114] appropriation of funds.[115] Understanding this, indemnification provisions in contracts between institutions of higher learning and vendors are permissible so long as the amount being indemnified for is specified and the institution is not

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[107] *Medbery*, 7 Ohio St. 522.
[108], 7 Ohio St. at 522.
[109] *Medbery,* 7 Ohio St. at 542.
[110] *Medbery,* 7 Ohio St. at 527.
[111] *Medbery,* 7 Ohio St. at 535.
[112] Butler Cty. Transp. Improvement Dist. v. Tracy, 120 Ohio App. 3d 346, 346 (1997); Ohio *ex rel*. Preston v. Ferguson, 170 Ohio St. 450, at 456 (1960).
[113] Ala Att'y. Gen. Op. No. 2008-177; N.M. Att'y Gen. Op. No. 200-04.
[114] Rob Snell, *State Experiences with Annual and Biennial Budgeting*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 2011) http://www.ncsl.org/research/fiscal-policy/state-experiences-with-annual-and-biennial-budgeti.aspx (demonstrating how most states appropriate funds per annum while Ohio uses a state biennium for appropriation of funds).
[115] Butler Cty. Transp. Improvement Dist. v. Tracy, 120 Ohio App. 3d at 346 (1997); Ohio *ex rel*. Preston v. Ferguson, 170 Ohio St. 450, at 456 (1960); Ferguson, 170 Ohio St. at 456.

required to indemnify the vendor beyond the state's periodic appropriation of funds. Changing our above Patent licensee example to Ohio State demonstrates that it is possible for states with anti-deficiency limitations to indemnify vendors, subject to limitations. Ohio State can theoretically indemnify our hypothetical Patent licensee as long as the indemnification amount is capped and the university's obligation does not exceed the state biennium of two years.

C. Summary of State Sovereign Immunity and Rights of the State

Unfortunately, the diversity of jurisdictions in a federal legal system make it difficult for interstate companies to draft general indemnification and hold harmless agreements that are enforceable in every jurisdiction. Standard indemnification practices in one state may be entirely unacceptable in another. General government indemnification provisions should therefore take into consideration the possible interplay of state statute, constitutional articles and case precedent regarding state sovereign immunity, *nullum tempus* and anti-deficiency limitations. These three state rights act as armor, sword and shield by which a court may sever an agreement between a vendor and a public institution of higher learning. As a general rule of thumb, only the absence of express statutory waiver of a state's right or the presence of long standing case precedent may render an arm of the state compliant with an indemnification provision. Vendors therefore may wish to seek alternative means in order to ensure that they may be indemnified by the state discussed in Section IV.

III. EMPIRICAL ANALYSIS

A. Description of Survey and Responses

The 50 state survey was conducted by sending surveys out to purchasing departments and general counsels of public institutions of higher learning. The overall goal of the survey was to obtain a general overview of how public institutions of higher learning realistically deal with vendor indemnification and hold harmless agreements in light of the statutory and constitutional restrictions discussed in Section I and Section II. Not every state is represented in this voluntary 50 state survey. Moreover, not every state that responded completed the survey. The data therefore provides a rough overview of how public institutions of higher learning respond to vendor agreements.

Respondents in every state were sent an anonymous 13 question Qualtrics survey via an emailed link. The target respondents were composed of university counsel and university purchasing departments. Both university counsel and purchasing departments could respond. In addition, responses from other university departments were solicited to respond if familiar with

indemnification provisions in vendor contracts with the university. Over 50% of respondents were from university legal counsel with 42.11% of respondents from university purchasing departments. Only 5.26% of respondents were from neither department.[116]

The survey then shifted to information regarding indemnification provisions. A whopping 73.68% of respondents indicated that indemnification clauses were highly contested between universities and vendors.[117] Only 21.4% of respondents indicated that indemnification provisions were not highly contested.[118] When asked if their university was prohibited by state law from indemnifying other parties, approximately 68.42% of respondents stated that they were prohibited by state law from indemnifying other parties while 31.58% were not prohibited from indemnifying other parties.[119] "Yes" responses to legal prohibitions against indemnification were asked to provide specific constitutional sections, statutes, attorney general opinions and/or case law that prohibited the institution from indemnifying another party.[120] Answers from these respondents were added to the table in the Appendix.

B. Alternative Indemnification Approaches

1. Narrowly Tailored Indemnification Provision

Question 11 and Question 5 provided a glimpse of contract redlining undertaken by universities to make vendor agreements comply with state law. At 46.15%, the majority of respondents indicated that they initially strike indemnification provisions.[121] This type of edit is problematic for vendors. By eliminating an indemnification provision the contract remains mute or silent on the issue. In its absence, courts may fill the gap with standard case law or other statutory/constitutional requirements. This silence puts vendors at a further disadvantage because arms of the state receives sovereign rights such as state sovereign immunity, *nullum tempus* and are protected by anti-deficiency laws. Tied for second and third place with 23.08% is the addition of the phrase "to the extent permitted by law" or a "negligent acts or omissions clause."[122] These additions also place vendors at risk, especially in a jurisdiction like Ohio which severely limits the state's ability to indemnify vendors. Moreover, negligent acts or omissions clauses only state that each party to the agreement is responsible for their own

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[116] *See infra* Table 1, Q1.
[117] *See infra* Table 1, Q2.
[118] *Id.*
[119] *See infra* Table 1, Q3.
[120] *See infra* Table 1, Q4, Q5.
[121] *See infra* Table 1, Q11.
[122] *See infra* Table 1, Q11.

"negligent acts or omissions."[123] The phrase provides little protection from third parties. In conjunction with Question 5 many universities explicitly stated that they modify indemnification provisions to state "to the extent provided by law."[124] One exception however noted that they do not use the word "extent" as their jurisdiction does not place a limit on the phrase.[125] One response to Question 5 indicated that insurance was another tool used in conjunction with indemnity. The specific language provided that: "[t]he University agrees, to the extent of its obligations and abilities under [state's] law and its insurance applicable to this agreement, to indemnify . . . ." Lastly, a minority of respondents at 7.69% chose other.[126]

The survey further indicates that over 66.7% of jurisdictions are willing to narrowly tailor indemnification requirements to comply with their state law.[127] In states like Ohio that require indemnification amounts to be specified and indemnification periods to not to exceed 2 years may provide little protection for vendors depending on the type of product being used. In contrast, certain products with short life expectancy may only require a short two-year indemnification period. Vendors that do frequent business with universities under similar law may wish to narrowly tailor their contracts in these situations. A narrowly tailored indemnification provisions can provide protection for both parties and are preferable to agreements that are silent on indemnification rights.[128] Narrowly tailored indemnification provisions also provide more protection than agreements with the phrase "to the extent permitted by law."[129] If the indemnification provision does not meet the required state standard, then it may be as ineffective as a contract that is silent on the issue in a given jurisdiction.

2. Principal-agent

Lastly, the survey indicates that about 33.33% of universities are willing to use a principal-agent relationship to circumvent laws against indemnification.[130] A principal-agent is a contractual relationship – although not exclusively – whereby the agent acts on behalf of the principal.[131] In the event that the vendor requires indemnification for breach of the agreement, the vendor will be paid by the agent and not the principal.[132] The more risk

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[123] *Id.*
[124] *See infra* Table 1, Q5.
[125] *Id.*
[126] *See infra* Table 1, Q11.
[127] *See infra* Table 1, Q6.
[128] 16 RICHARD A. LORD, WILLISTON ON CONTRACTS, § 49:10 (4th ed. 2014).
[129] *See infra* Table 1, Q5.
[130] *See infra* Table 1, Q9.
[131] 19 RICHARD A. LORD, WILLISTON ON CONTRACTS, § 54:14 (4th ed. 2016).
[132] *Id.*

involved in an indemnification provision results in a higher cost for the principal-agent relationship.[133] However, public universities have a unique advantage over other arms of the state through the amicable bonds formed with their alumni. Alumni associations for example have been used as agents on behalf of the university. Vendors may be able to exploit the willingness of alumni associations and other university affiliated organizations as a means of acting as agents on behalf of public universities for indemnification purposes. This may be especially true in agreements where the university is buying a good or service that impacts or is used by the alumni association. The survey also indicates that principal-agent relationships are used in about less than 1% of total contracts between vendors and universities.[134] Never the less, principal-agent relationships may prove to be a promising tool for expensive contracts.

3. Liability Insurance

Lastly, survey results have also indicated that vendors should seek to protect themselves from losses by requiring universities to provide liability insurance or name the vendor as an ensured.[135] Vendors can require some public universities to insure them from the negligent acts or omissions of the university.[136] However, certificates of insurance typically may be used to cover the university's negligent acts or omissions and not third party claims.[137] Universities may also be prohibited by their state's Tort Reform Act or applicable law from being required to insure vendors.[138] This may prevent coverage in the event of a third party breach, but it provides a further means of protection when the university is limited in its ability to accept an indemnification agreement.

Table 1: Responses to Indemnification Survey

Q1: Which university department do you work for? If other, please explain.	University Purchasing Department 42.11%	University Legal Counsel 52.63%	Other 5.26%
Q2: Are indemnification	Yes	No	

[133] *Id.*
[134] *See infra* Table 1, Q5.
[135] *See infra* Table 1, Q5.
[136] *See infra* Table 1, Q5.
[137] 16 RICHARD A. LORD, WILLISTON ON CONTRACTS, § 49:10 (4th ed. 2014).
[138] *See infra* Table 1 Q5.

clauses highly contested between the university and vendors?	73.68%	26.32%
Q3: In accordance with state law, is the university generally prohibited from contractually entering into indemnification provisions?	Yes 68.42%	No 31.58%
Q4: Please state your state's constitutional sections, statutes, attorney general opinions, and/or case law that prohibit the university from indemnifying other parties?	See Description of Survey & Responses	
Q5: If you are prohibited by state law from indemnifying vendors, what alternative language or provision do you typically use in place of indemnification? For example: does the contract remain silent on indemnification; is some form of liability language used; or is the phrase	See Description of Survey & Responses	

"to the extent permitted by law" used in conjunctions with an indemnification provision?				
Q6: In spite of legal restrictions, does the university's legal counsel ever create or accept indemnification clauses that are narrowly tailored to comply with state case law for indemnification purposes?	Yes 66.67%	No 22.22%	Unsure 11.11%	
Q7: Roughly estimate the percentage of agreements that fall through because the vendor will not accept changes to its indemnification clause. Please state if other.	1% or less 53.33%	2% or less 33.33%	5% or less 0.00%	Other 13.33%
Q8: Is the Purchasing Department prohibited from signing-off on agreements over a certain monetary amount?	Yes 80.00%	No 20.00%		
Q9: Has your university ever	Yes	No	Unsure	

used a Principal-Agent relationship in order to circumvent state indemnification laws? Example: a third party bares the cost of indemnification at a cost to indemnify in order for the university to acquire a good or service.	33.33%	55.56%	11.11%	
Q10: What percentage of university contracts with vendors utilizes a Principal-Agent relationship in order to purchase a good or service?	1% or less 100.00%	2% or less 0.00%	5% or less 0.00%	Other 0.00%
Q11: Please rank the following provisions in order from most used to least used when negotiating indemnification provisions.	1. Silence (strike/omit provision requiring the university to indemnify the vendor) 46.15%	2/3. "To the extent permitted by law" (a phrase that qualified as indemnification provision as possibly not enforceable) 23.08%	2/3. "Negligent Acts or Omissions Clause"; also called "Damages" (a clause requiring each party to be responsible for their own negligent acts or omissions) 23.08%	4. Other 7.69%

IV. CONCLUSION

In conclusion, contracting with public institutions of higher learning is unlike contracting with private individuals. As arms of the state institutions of higher learning are afforded sovereign rights and protections which include state sovereign immunity, *nullum tempus* and anti-deficiency limitations. While these sovereign protections and rights effectively hamper the state from undertaking certain actions on the one hand, they can effectively enable courts to invalidate contracts in favor of the state on the other. The risk of a lawsuit in many cases may be unlikely. However, contracts with public universities have the potential to be extremely lucrative. The monetary advantages that come with such an agreement comes with the possibility of higher costs of litigation as a result. Vendors and their counsels therefore should look to reassess their indemnification provisions in procurement contracts with public institutions of higher learning. Vigilant counsels may be able to reduce contractual risk by combining narrowly tailored indemnification provisions with liability insurance. Alternatively, the use of an agent-principal relationship and/or liability insurance may provide some protections in contracts with laws and circumstances that weigh heavily against a vendor being indemnified by an institution of higher learning.

V. APPENDIX

State	Anti-Deficiency Statutes & Constitutional Provisions	Statutory Prohibitions against Indemnification	Attorney General Opinions Advising Against Indemnification	Applicable Case law
Alabama	Ala. Const. art. 1 § 14, art. 12, § 12.			
Arizona	Ariz. Const. art. 5 § 5, § 9; 9 § 5.	Rev. S. § 35-154; V35-144; § 18-134.	Att'y Gen Op. No. 67-36-L.	
Arkansas	Ark. Const. art. 12, §12, art. 5, §20.	§ 19-10-201 et seq.	Ark. Att'y. Gen. Op. No. 2008-177(2008).	2010 WL 2710744 (Ark.P.S.C.) Slip Copy
Connecticut				*St. of Con. v. Lombardo Bros. Mason Contractors, Inc., et al.*, 307 Conn. 412, at 430, 437-41 (2012).
Florida			FL. Att'y. Gen. Op. No. 78-720.	
Georgia	Ga. Const. art. III, § VI, ¶ VI (a); Const. art. VII, § IV, ¶VIII.		Ga. Att'y. Gen. Op. No. 80-67 (1980)., Att'y Gen. Op. No. 80-67 (1980).	*CSX Trasp., Inc. v. City of Garden City*, 588 S.E.2d 688, 690 (2003).
Hawaii		Haw. Rev. Stat. § 304A-110.		

State	Anti-Deficiency Statutes & Constitutional Provisions	Statutory Prohibitions against Indemnification	Attorney General Opinions Advising Against Indemnification	Applicable Case law
Illinois		110 ILCS 306 Uni. of Ill.Act.		
Iowa		Ia. code Ch. 669.		
Massachusetts	Mass. art. § 62 as amended.			*Lovering v. Beaudette*, 30 Mass.App. Ct. 665, 669 (1991); *Raisman v. Cunningham, Inc.*, Civil Action No. 93-5070-G.
Mississippi	Miss. Const. art. 4 § 100; does not wave 11th am. Immunity		Miss. Att'y. Gen. Op. Clark (2002); Att'y Gen. Op. Chamberlin (2002).	
New Jersey		N.J. 59:1-1, et seq.		
New Mexico	N.M. Const. art. XII, §11; AIX, § 8 (might exceed contracting liability); art. IX, Section 14 (lending or pleading credit	N.M. Stat. Ann. § 23-1-5 ;	N.M. Att'y. Gen. Op. No., 2000-04.	

State	Anti-Deficiency Statutes & Constitutional Provisions	Statutory Prohibitions against Indemnification	Attorney General Opinions Advising Against Indemnification	Applicable Case law
	directly or indirectly).			
Ohio	Ohio Const. art. VII, VII § 3,II§ 22.; Rev. Code §5705.4 and §131.33.		Ohio Att'y. Gen. Op. No. 96-060, 1996 Ohio AG.	*State v. Medbery*, 7 Ohio St. 522 (1857).
Tennessee			Tenn. Att'y. Gen. Op. No.93-01, No. 99-095.	*Northland Ins. Co. v. State*, 33 S.W.3d 727 (2000).
Texas	Tex. Const. art. § 49 art. III, XI.		Tex. Att'y. Gen. Op. No. MW-475.	
Utah		Utah Governmental Immunity Act 63F, Ch. 7, UC Ann., 1953		
Washington	Wash. Const. art. VIII § 5 and § 7.	Rev. Code. Wash. 28B.20.250.		
West Virginia	W.VA. Const. art. VI § 35 and Art. X § 6.			
Wisconsin	Wis. Const. art. 4, § 27.	Wis. Stat. Ann. § 285.01 and § 36.03(3).	Wisc. Att'y. Gen. Op. No. 3-88 (1988).	*Lister v. Bd. of Regents of Uni. Wis. System*, 72 Wis.2d 282.

State	Anti-Deficiency Statutes & Constitutional Provisions	Statutory Prohibitions against Indemnification	Attorney General Opinions Advising Against Indemnification	Applicable Case law
Wyoming	Wyo. Const. art. 1 § 8.			*Robert K. Brown, Appellant v. City of Casper and Officer Eric E. Walters*, 248 P.3d 1136 (2011).