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Bruner and O'Connor on Construction Law | June 2018 Update
Philip L. Bruner and , Patrick J. O'Connor, Jr.

Chapter 10. Indemnity and Contribution

§ 10:11. Interpretation of indemnity language

References

Probably no other clause receives more attention or is the subject of more negotiations between counsel than the indemnification provision. These agreements have also captured the attention of lawmakers. Some jurisdictions have enacted laws that provide guidance to how indemnity provisions are to be construed. [1] Yet if pressed to state what it means to "indemnify" or "hold harmless," many are at a loss. General purpose sources are often little help, as they suggest that the obligation is in the nature of safeguarding against harm. [2] Legal authorities are somewhat more to the point. A common definition of the indemnity obligation is the requirement that the indemnitee be restored, by way of payment or replacement, to a position occupied prior to the loss. [3]

The concepts most often associated with indemnification are reimbursment and restitution. [4] Reimbursement is a right arising under the common law in the nature of recoupment, entitling a party to recover from the primary wrongdoer its losses and expenses occasioned by the harm created by the wrongdoer. [5]

Perhaps the more commonly held basis for indemnity is restitution. Restitution is grounded on the concept that, where one person is unjustly enriched at the expense of a second, that person is responsible for indemnifying the second person to the extent of the benefit conferred. [6] Technically, the grounding of indemnity on reimbursement as opposed to restitution may result in a different measure of recovery. As set forth in the Restatement Third, Suretyship and Guaranty:

> The amount recoverable by the secondary obligor [in the case of the Restatement, a surety, but for our purposes an indemnitee] pursuant to its right of restitution will usually be relatively close to the amount that would be recoverable pursuant to the principal obligor's (contractor-indemnitor) duty to reimburse if that duty were present. The difference is that, under the duty to reimburse, the secondary obligor is entitled to reimbursement for its reasonable outlay, while under the right of restitution, recovery is limited to the amount of the principal obligor's enrichment. These will differ when the secondary obligor's cost of performance exceeds the cost of the performance of which the principal obligor was relieved. [7]

In other words, the measure of recovery under reimbursement is the reasonable expense and loss incurred by the indemnitee, whereas the measure of recovery under restitution principles is the unjust benefit conferred on the indemnitor. [8] Where indemnity is viewed as a remedy to secure restitution or reimbursement, few interpretive problems are presented for the courts. One entitled to restitution or reimbursement is generally viewed as a victim, and courts do not look for obstacles to deny victims a remedy.

Indemnity agreements that undermine or conflict with the equitable underpinnings of indemnity create tension between doctrine and practice. A provision that grants an owner indemnity from a contractor for a loss occasioned from the

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owner's negligent acts is difficult to square with the principles of restitution and reimbursement. In a certain sense, broadly drafted indemnification agreements turn the concept of unjust enrichment on its head by permitting one to recover from another for loss occasioned by its own fault. On the other hand, there is nothing in contract law or theory that abhors such agreements where the parties freely consent.[9] This tension between the equitable underpinnings of indemnity, couched in terms of unjust enrichment, and the first principle of contract law, expressed in terms of the freedom to reach mutual assent, has given rise to a judicial and legislative framework for indemnity that is characterized by wildly divergent and often contradictory interpretations and enforcement.

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Footnotes

1 California Civil Code § 2778 provides in pertinent part:

> In the interpretation of the contract of indemnity, the following rules are to be applied, unless a contrary intention appears: 1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims, demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof; 3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the cost of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion; 4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so; 5. If after request, the person indemnifying neglects to indemnify the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against in the former… .

Cal. Civil Code § 2778, subd. 4, quoted in United States Elevator Corp. v. Pacific Investment Co., 30 Cal. App. 4th 122, 126, 35 Cal. Rptr. 2d 382, 384 (2d Dist. 1994).

2 See Webster's New World Dictionary of the American Language, 2d College Edition (1980) (to "indemnify" is defined as, among other things, "to protect against or keep from loss, damage, etc."); Webster's New Collegiate Dictionary, G. & C. Merriam Co. (1981) (to "indemnify" is defined, among other things, as "secure against hurt, loss, or damage").

3 See Black's Law Dictionary (7th ed.) (definitions of "indemnify" and "indemnity").

4 The concepts of implied indemnity and reimbursement as they apply to suretyship are often used interchangeably. In the absence of an express indemnity agreement, the law will imply a contract between the principal and the surety which requires the principal to indemnify the surety for payment made by the surety in compliance with its contract of suretyship. See Pearlman v. Reliance Ins. Co., 371 U.S. 132, 136, 83 S. Ct. 232, 9 L. Ed. 2d 190 (1962); Fidelity and Deposit Co. of Maryland v. Bristol Steel & Iron Works, Inc., 722 F.2d 1160 (4th Cir. 1983); American Surety Co. of New York v. De Carle, 25 F.2d 18, 20 (C.C.A. 9th Cir. 1928); Glenn v. American Sur. Co., 160 F.2d 977, 981, 47-1 U.S. Tax Cas. (CCH) ¶ 9220, 35 A.F.T.R. (P-H) ¶ 1075 (C.C.A. 6th Cir. 1947). This implied indemnity contract has been referred to as "reimbursement":

> The terms "indemnity" and "reimbursement" are frequently used as synonymous in describing the duty owed to a person, who has discharged

> a duty which is owed by him but which as between himself and another should have been discharged by the other … .

Restatement, Security § 104, special note.

5 Peoples' Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 1986 A.M.C. 1884 (2d Cir. 1986); Strong v. Prince George's County, 77 Md. App. 177, 549 A.2d 1142 (1988) (indemnification is an agreement to reimburse one who has been held liable for the amount of another's loss).

6 See Restatement Second, Torts § 886B, comment on subsection (1); Restatement, Restitution, §§ 1 (unjust enrichment) and 76 (indemnity-general rule).

7 Restatement Third, Suretyship and Guaranty § 26, cmt. d.

8 This difference was, however, glossed over in the Restatement, Restitution wherein an indemnitee's recovery is defined as reimbursement even though this remedy arose out of restitution:

> § 80 — Amount of Recovery
>
> A person who has discharged a duty which, as between himself and another, should have been performed by the other, and who is entitled to indemnity from the other under the rules stated in §§ 76-79, is entitled to reimbursement, limited
>
> (a) To the amount of his net outlay properly expended, except where he became subject to the duty by the fraud or duress of the other, and
>
> (b) If the payor became a party to the transaction without the consent or fault of the other, to the amount by which the other has thereby benefited.

Restatement, Restitution § 80.

9 See Pettit Grain & Potato Co. v. Northern Pac. Ry. Co., 227 Minn. 225, 35 N.W.2d 127 (1948) (indemnity against own negligence is not contrary to public policy); A and B Const., Inc. v. Atlas Roofing and Skylight Co., 867 F. Supp. 100, 106 (D.R.I. 1994); Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 693 A.2d 1209 (App. Div. 1997). See also Johnson, Collapsing the Legal Impediments to Indemnification, 69 Ind. L. J. 867 (Summer 1994). The author argues that there is nothing "unsavory" or "undesirable" about indemnification agreements in the construction industry to warrant the legislative and judicial hostility towards these covenants:

> …the impediments to indemnification operate against several prevalent and arguably legitimate values of contract law. The essential difficulty for a 'moral' contract law rests in promoting 'altruism, community, democratic participation, [and] equality … without destroying freedom [autonomy] and economic efficiency.' … When the public policy exception is implicated, decision-makers purportedly must balance the interest in freedom of contract with the interests of society… . Whether the 'harshness' of indemnification caused decision-makers to find such arrangements 'unsavory' is worth brief appraisal. To deny enforcement to such agreements because of 'harshness' suggests adherence to the doctrine of substantive unconscionability. Like those regarding concerns with safety, this motive has been imputed only conjecturally. But, 'harshness' as limited solely to the resultant allocations of the transactions stands weakly in relation to doctrines of classic contract law. Far more importantly, as understandings of the underpinnings of contract law grow beyond the primitive notions of the classical contract, some commentators have begun to recognize that 'contract law's proper function [is] as a transfer mechanism that is conceptually dependent on more fundamental notions of individual entitlements.' The moral prerequisite to contractual obligation under this entitlement theory of

> contract is consent, and, thus, the harshness of a bargain would be important only as evidence that the parties would not have consented to the agreement.

Johnson, Collapsing the Legal Impediments to Indemnification, 69 Ind. L. J. 867, 868-873 (Summer 1994). See also Barnett, A Consent Theory of Contracts, 86 Colum. L. Rev. 269 (1986); Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 238, 123 A.L.R. 502 (1939) ("[T]here can be no unconscionable enrichment, no advantage upon which the law will frown, when the result is but to give one party to a contract only what the other party has promised… .").

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3 Bruner & O'Connor Construction Law § 10:12

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Chapter 10. Indemnity and Contribution

§ 10:12. Interpretation of indemnity language—Strict construction

References

A common judicial approach to interpreting indemnity language is to invoke a heightened standard of review. Indemnity agreements must be "clear and unequivocal" in order to be enforced. How this plays out under specific facts and contractual language differs from jurisdiction to jurisdiction, but the Montana Supreme Court's decision in *United National Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, [1] is not unusual. A subcontractor's employee was injured when he fell off a scissor lift owned and provided by the general contractor. The general contractor sought indemnity from the subcontractor upon being sued by the injured worker. Their contract contained an indemnity provision which read:

> INDEMNITY[:] To the fullest extent permitted by law, the subcontractor shall defend, indemnify and hold harmless the contractor, the contractor's other subcontractors … from and against all claims, damages, loss and expenses, including but not limited to attorneys' fees, costs and expenses arising out of or resulting from the performance of the Subcontractor's Work. [2]

Was this language sufficiently "clear and unequivocal" to require the subcontractor to indemnify the contractor for loss due to the latter's own fault? The court determined that it was not. [3]

The only interpretive rule with universal application to express indemnity agreements is that the broader the scope of the purported indemnity obligation and the less specific the language utilized, the more difficult the enforcement. This rule applies, although perhaps not with equal force, whether the interpretive model used is the "strict construction" test or some other interpretive rule. The policy concerns that drove state legislatures to undertake tort reform allocating responsibility according to comparative fault principles also had an effect on the judiciary. A number of courts became more sensitive to the complaints of indemnitors that the all-or-nothing nature of broad contractual indemnity agreements were counter to a comparative fault model of risk allocation. [4] The application of a strict rule of construction for agreements whereby the indemnitee obtains indemnification for its own negligence was well established before the tort reform efforts of the last two decades of the twentieth century.

The most common manifestation of this approach was articulated by the U.S. Supreme Court in its 1970 decision, U. S. v. Seckinger, [5] i.e., "the principle that indemnification for the indemnitee's own negligence must be clearly and unequivocally indicated as the intention of the parties… ." [6] The tort reform efforts sweeping the country in the latter part of the twentieth century operated to strengthen the resolve of a number of courts to apply a strict rule of construction to indemnity agreements. These courts would employ the strict construction approach to the indemnity clause even though the remainder of the parties' agreement would be subject to a more liberal interpretive approach.

The most common articulation of the strict construction test is the search for "clear and unequivocal" language. [7] Other variants, however, abound. These are often expressed in the negative such as "general, broad, and all-inclusive language

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that … is not sufficient" to permit indemnity. [8] Other courts refuse to permit an indemnitee indemnification for its own negligent acts "unless the purpose to do so is spelled out in unmistakable terms." [9]

Employing a strict construction approach to indemnity is not necessarily outcome determinative. For example, in Russ v. Woodsite Homes, Inc., [10] a contractor successfully used an indemnity agreement to thwart an indemnitor's own injury claims against the builder. The builder agreed to construct the home pursuant to a contract that cautioned the owners that the construction site was a dangerous place and required them to limit their visits and hold the builder harmless in the event of any injuries arising from a site visit. One of the owners died from injuries sustained during a site visit and the surviving spouse brought suit against the builder. Summary judgment was granted in favor of the builder based upon the indemnity provision. The court found that to constitute a clear and unequivocal expression of intent to indemnify for a party's own negligence, the indemnity clause did not have to contain specific language to that effect, but rather the language and the purpose of the entire agreement, together with the surrounding facts and circumstances, could provide a clear and unequivocal expression of the parties' intent. [11]

At times, the search for a clear and unequivocal expression can appear to be quite divorced from a search for the parties' true intentions. Thus, in Batson-Cook Co. v. Industrial Steel Erectors, [12] a general contractor was denied indemnity against its subcontractor for claims brought by an injured worker because the provision "[did] not contain these talismanic words: 'even though caused, occasioned or contributed to by the negligence, sole or concurrent' of the indemnitee, or like expressions." [13] A number of commentators have expressed disappointment over the search for magic words. [14] The language necessary to obtain indemnification for one's own negligence is a moving target. This is so even where a court has consistently employed the same general test. After reading a number of indemnity decisions, it becomes clear that enforcement is no more predictable merely because one knows the particular interpretive test that will be employed. What is clear and unequivocal to one court may very well be ambiguous to another. One court may find that a provision clearly expresses an intention to provide indemnity for another's negligence even though there is no language expressly covering the indemnitee's negligence. [15] For other courts, clear and unequivocal language requires the use of particular language stating in some form or another that the indemnity extends to the indemnitee's own negligence. [16] Thus, in Commander v. BASF Corp., [17] an indemnity provision requiring a contractor to indemnify an owner for injury "as the result of contractor's prosecution of the work" did not extend to injuries caused in part by the owner's negligence. [18]

The American Law Institute has weighed in on the subject:

> On the issue of the specificity of language required to effectively provide for indemnity for the indemnitee's own negligence, the rule stated in this section follows the nearly universal rule that the parties must state such an intention in clear and unequivocal terms. The rule does not, however, require incantation of specific words. It is often difficult in a contract to specify all of the specific causes of action that might give rise to liability. As long as the parties are clear, their failure to use a specific word should not defeat their objective intent. Of course, the presence or absence of specific words will often help the court interpret the contract. [19]

The Restatement's approach is a sound one as it places the emphasis squarely where it belongs: upon reading indemnity language for the purpose of determining the parties' intentions.

What if the language is ambiguous? Does the right to indemnity automatically fail, or can the court look to extrinsic evidence to determine what the parties intended? As a general rule, the inquiry ends upon the finding of an ambiguity. Moreover, if the language of the agreement clearly expresses a particular intention, under an objective theory of

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interpretation, the parties' intentions have been determined and it is unnecessary to look to parol evidence to determine their true intentions.

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Footnotes

1 United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 2009 MT 269, 352 Mont. 105, 214 P.3d 1260 (2009).

2 United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 2009 MT 269, 352 Mont. 105, 214 P.3d 1260, 1268 (2009).

3 A similar conclusion was reached in American Stores Properties, Inc. v. Spotts, Stevens & McCoy, Inc., 648 F. Supp. 2d 700 (E.D. Pa. 2009), where the clause in question required the owner to indemnify its engineering consultant "against all claims … directly or indirectly arising or resulting from an action taken or required to be taken or on behalf of [the owner]." In a suit brought by the owner against 12 contractors, including the engineering consultant, because of failing retaining walls at the owner's distribution center, the engineering consultant sought summary judgment based upon the indemnity clause. contending that, to the extent the owner was seeking to hold it responsible for the negligence of the other defendants, it was entitled to relief. The court concluded otherwise:

> Indemnification clauses are disfavored under Pennsylvania law and a party must meet a high burden before an indemnification clause can be construed to relieve a party for acts it has committed … High [engineering consultant] has not demonstrated that the Indemnification Clause was drafted with enough specificity to relieve High of liability for its alleged breach of the ASPI [owner]-High Agreement. The language used in the Indemnification Clause does not set forth with particularity an intention to relieve High of liability for its own breach of the ASPI-High Agreement. High is not explicitly named as being within the scope of the Indemnification Clause in the event ASPI brings a claim against High directly. No such language appears in the Indemnification Clause, and such an intention cannot be presumed. Construing the Indemnification Clause strictly against High and resolving all ambiguity in favor of plaintiff, the Court concludes that High has not met the substantial burden to overcome the disfavor with which Pennsylvania courts view indemnification clauses.

American Stores Properties, Inc. v. Spotts, Stevens & McCoy, Inc., 648 F. Supp. 2d 700 (E.D. Pa. 2009). See also Boulder Plaza Residential, LLC v. Summit Flooring, LLC, 198 P.3d 1217 (Colo. App. 2008) (language in indemnity agreement requiring subcontractor to indemnify the general contractor "against all claims for damage to persons and property growing out of the execution of the work …" was insufficiently clear to evidence a mutual understanding that the subcontractor would provide indemnification beyond loss arising from its own negligent acts, breach of contract or intentional torts); Heppler v. J.M. Peters Co., 73 Cal. App. 4th 1265, 87 Cal. Rptr. 2d 497 (4th Dist. 1999) (language requiring indemnity for loss arising from the work was insufficiently specific to evidence a mutual understanding of the parties that the subcontractor would indemnify the contractor even if its work was not negligent). But see Public Service Co. of Colorado v. United Cable Television of Jeffco, Inc., 829 P.2d 1280 (Colo. 1992) (clause that required indemnification against damages "in any way arising out of, connected with or resulting from the exercise" of indemnitor's rights under the contract evidenced an intent that indemnity would extend to loss occasioned by the beneficiary's own negligence).

4 See Wash. Rev. Code Ann. § 4.24.115 (1988); McDowell v. Austin Co., 105 Wash. 2d 48, 710 P.2d 192 (1985); Minn. Stat. § 377.02 (1984); Braegelmann v. Horizon Development Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985).

5 U.S. v. Seckinger, 397 U.S. 203, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1970).

6 U.S. v. Seckinger, 397 U.S. 203, 215, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1970). Most characterizations of the rule speak in terms of the indemnitee seeking coverage for its own negligence. Indeed, some courts concluded that if the only issue was whether the indemnitor was required to indemnify for its own fault, then the strict rule of construction would not apply. See Cities Service Co. v. Northern Production Co., Inc., 705 P.2d 321 (Wyo. 1985).

See also Category 5 Management Group, LLC v. National Cas. Ins. Co., 480 Fed. Appx. 536, 539 (11th Cir. 2012) (emphasis in original) (Section 8.1 of the contract between CMT and CAT 5 states: "The Sub-contractor shall save and hold Contractor … harmless against all suits, claims, damages and losses for injuries to persons or property *arising from or caused by errors, omissions or negligent acts of the Subcontractor*, … or its employees." The contract does not unequivocally state that CMT will indemnify CAT 5 for CAT 5's own negligent acts. The Sprinkles' complaint, as stated above, alleged direct liability claims against CAT 5 and not vicarious liability claims. Therefore, CMT is not required to indemnify CAT 5.).

7 Keawe v. Hawaiian Elec. Co., Inc., 65 Haw. 232, 649 P.2d 1149 (1982); Reynolds Metals Co. v. J. U. Schickli & Bros., Inc., 548 S.W.2d 841 (Ky. 1977); Sweet v. Colborn School Supply, 196 Mont. 367, 639 P.2d 521 (1982).

8 Bonenberger v. Associated Dry Goods Co., 738 S.W.2d 598 (Mo. Ct. App. E.D. 1987). See also McGraw v. S.D. Warren Co., 656 A.2d 1222 (Me. 1995) ("words of general import will not be read as expressing such intent").

9 Arkansas Kraft Corp. v. Boyed Sanders Const. Co., 298 Ark. 36, 764 S.W.2d 452 (1989).

10 Russ v. Woodside Homes, Inc., 905 P.2d 901 (Utah Ct. App. 1995).

11 See Grunley Const. Co., Inc. v. Conway Corp., 676 A.2d 477 (D.C. 1996); W.M. Schlosser Co., Inc. v. Maryland Drywall Co., Inc., 673 A.2d 647 (D.C. 1996).

12 Batson-Cook Co. v. Industrial Steel Erectors, 257 F.2d 410 (5th Cir. 1958).

13 Batson-Cook Co. v. Industrial Steel Erectors, 257 F.2d 410, 412 (5th Cir. 1958).

14 See Johnson, Collapsing the Legal Impediments to Indemnification, 69 Ind. L.J. 867, 878 (Summer 1994) ("but even when courts 'strictly construe' indemnification provisions, the search is often for 'magic words' rather than for the parties' true understanding"); Kleinberger, No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification, 13 Wm. Mitchell L. Rev. 775 (1987).

15 See Bartlett v. Davis Corp., 219 Kan. 148, 547 P.2d 800 (1976) ("it is not necessary that the agreement contain specific or express language covering the owner's negligence, if the intention to afford such protection clearly appears from the contract, the surrounding circumstances and the purposes and objects of the parties"); Shea v. Bay State Gas Co., 383 Mass. 218, 418 N.E.2d 597 (1981) ("something less than an express reference… will suffice… so if the intent otherwise sufficiently appears from the language and circumstances").

16 See Funk v. General Motors Corp., 392 Mich. 91, 220 N.W.2d 641 (1974) (abrogated on other grounds by, Hardy v. Monsanto Enviro-Chem Systems, Inc., 414 Mich. 29, 323 N.W.2d 270 (1982)); Paul Hardeman, Inc. v. J. I. Hass Co., 246 Ark. 559, 439 S.W.2d 281 (1969); Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627 (Fla. 1992).

17 Commander v. BASF Corp., 785 F. Supp. 1236 (M.D. La. 1992), judgment rev'd, 978 F.2d 924 (5th Cir. 1992).

18 Commander v. BASF Corp., 785 F. Supp. 1236, 1237-38 (M.D. La. 1992), judgment rev'd, 978 F.2d 924 (5th Cir. 1992). This form of strict construction requires the indemnity provision to state in some specific terms that indemnity extends to the indemnitee's negligence:

> Language which includes liability resulting from the owner's liability would certainly be more encompassing than liability resulting from contractors' prosecution of the work.

The Fifth Circuit reversed the District Court's decision on grounds other than its interpretation of the indemnity agreement. The appellate court concluded that while the indemnity agreement did not permit indemnification for the owner's negligence, there was a material issue of fact still outstanding as to whether the owner was negligent. If the harm was due solely to the contractor's actions, then indemnity would run to the owner and the contractor would be responsible for reimbursing the owner's defense costs. But see Cunningham v. Goettl Air Conditioning, Inc., 194 Ariz. 236, 980 P.2d 489 (1999) (indemnity agreement enforced even though it was silent as to the nature of the indemnitee's conduct, as the court would not mechanically apply a rule prohibiting indemnity case unless indemnitee was free from fault, as to do so would be contrary to determining the parties' intent).

19 Restatement Third, Apportionment of Liability § 31, cmt. f (proposed final draft).

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§ 10:13. Interpretation of indemnity language—Stricter than strict: Express negligence approach

References

Texas is an example of a jurisdiction that has found the standard strict construction test to be wanting. As early as 1972, Texas had adopted a strict test that required the parties to express, in "clear and unequivocal terms," their intentions but, significantly, did not require an "express negligence" reference or similar "magic language" to trigger the indemnification obligation. [1] By 1987, this had changed when the court revisited the issue in Ethyl Corp. v. Daniel Constr. Co., [2] where a contractor's employee was injured and sought relief from the owner under a premises liability theory. The owner sought to enforce against a contractor an indemnity clause that read in part:

> Contractor shall indemnify and hold owner harmless against any loss or damage to persons or property … as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of contractor… . [3]

The owner impleaded the contractor. The case was tried to a jury that returned a verdict finding the owner 90% at fault and the contractor 10% at fault. The trial court awarded the owner full indemnity under the clause quoted above. The Court of Appeals reversed, reasoning that the clause did not "clearly and unequivocally" express an intention by the contractor to indemnify the owner for its own negligence. The Texas Supreme Court, in affirming the decision, adopted yet another model for evaluating indemnification clauses:

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. The result has been a plethora of law suits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine. [4]

The "express negligence" test requires the clause to state specifically that the parties' intention is to indemnify the indemnitee for its own negligence. Unfortunately, the Texas courts have not provided any safe harbor language. Since the adoption of the express negligence test, obtaining indemnification for one's own negligence has become difficult in Texas. For example, in Glendale Constr. Services, Inc. v. Accurate Air Systems, Inc., [5] a general contractor sought indemnity from a heating, ventilation, and air conditioning subcontractor for liability to a duct mechanic who was electrocuted when the duct work he was installing became electrically charged. The indemnification agreement stated that the subcontractor would indemnify the contractor for losses "arising out of or resulting from the performance of the subcontractor's work." [6] The agreement also stated that the subcontractor owed an obligation to indemnify the general contractor to the extent that loss was "caused in whole or in part by a negligent act or omission of the subcontractor …

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regardless of whether it is caused in part by a party indemnified hereunder." [7] The Texas court of Appeals held that the indemnity agreement contained in the subcontract did not indemnify the general contractor for its own negligence. [8]

Yet, the Texas courts have declined to apply the "express negligence" test where the facts indicate that no attempt is made to recover for the indemnitee's negligence, regardless of the language of the indemnity clause. Thus, in M.M. Sundt Constr. Co. v. Contractors Equip. Co., [9] a lessee of a crane was required to indemnify the equipment lessor in spite of Texas's "clear and unequivocal" or "express negligence" rule of construction as:

> [t]he obligation to indemnify is absolute, and it arises out of the obligation of Sundt with regard to the return of the equipment and not from any negligence on the part of Contractors [equipment supplier]. Where the damages result from conduct for which indemnity is provided and which does not involve the negligence of the indemnitee, liability is established. In such cases, the 'express negligence' rule is not applicable. [10]

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Footnotes

1 See Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 822 (Tex. 1972) (overruled by, Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705 (Tex. 1987)). The Texas courts, however, did, at times, refer to the holding in Fireman's as the "express negligence" rule. See M.M. Sundt Const. Co. v. Contractors Equipment Co., 656 S.W.2d 643, 645 (Tex. App. El Paso 1983).

2 Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705 (Tex. 1987).

3 Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705, 707 (Tex. 1987).

4 Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705, 707-08 (Tex. 1987).

5 Glendale Const. Services, Inc. v. Accurate Air Systems, Inc., 902 S.W.2d 536 (Tex. App. Houston 1st Dist. 1995), writ denied, (Dec. 22, 1995).

6 Glendale Const. Services, Inc. v. Accurate Air Systems, Inc., 902 S.W.2d 536, 538 (Tex. App. Houston 1st Dist. 1995), writ denied, (Dec. 22, 1995).

7 Glendale Const. Services, Inc. v. Accurate Air Systems, Inc., 902 S.W.2d 536, 538 (Tex. App. Houston 1st Dist. 1995), writ denied, (Dec. 22, 1995). Hernandez v. Big 4 Inc., 241 F. Supp. 2d 715 (S.D. Tex. 2003) (under "express negligence" test, indemnity clause must be conspicuously written, i.e., not hidden in fine print and "a party seeking indemnity from the consequences of its own negligence [must] express that intent in specific terms within the four corners of the contract," and where language required subcontractor to indemnify general contractor only to the extent of subcontractor's fault, but also purported to require the subcontractor to defend the general contractor from all claims, including those alleged to have been caused by the sole negligence of the general contractor, the test was not met and the clause was unenforceable).

8 See also U.S. Rentals, Inc. v. Mundy Service Corp., 901 S.W.2d 789, 29 U.C.C. Rep. Serv. 2d 26 (Tex. App. Houston 14th Dist. 1995), writ denied, (Dec. 7, 1995); Fisk Elec. Co. v. Constructors & Associates, Inc., 888 S.W.2d 813, 59 A.L.R.5th 893 (Tex. 1994) (where indemnity agreement fails to meet express negligence test, there is no obligation for indemnity to pay attorneys' fees even if indemnitee eventually found to be non-negligent); R.L. Jones Co., Inc. v. City of San Antonio, By and Through City Public Service Bd., 809 S.W.2d 565 (Tex. App. San Antonio 1991) (a city was not entitled to indemnity from a general contractor for amounts paid in settlement of a claim brought by a driver who drove her car into a trench dug by the contractor during the process of lowering a gas pipeline under a city street. The parties' indemnity provision did not expressly provide for indemnification against the city's own negligence and unless the city conclusively established in its motion for summary judgment that it was not negligent, it would not be entitled to relief at this stage of the proceedings).

But see Webb v. Lawson-Avila Const., Inc., 911 S.W.2d 457 (Tex. App. San Antonio 1995), writ dismissed, (Feb. 9, 1996) (indemnity provision providing that a steel erector would indemnify a general contractor "irrespective of whether such liability, damages, losses, claims, and/or expenses are actually or allegedly, caused wholly or in part, through the negligence of contractor or any of its agents, employees, or other subcontractors," was sufficient to provide indemnity for the general contractor from the consequences of all degrees of negligence, including gross negligence); Foster, Henry, Henry & Thorpe, Inc. v. J.T. Const. Co., Inc., 808 S.W.2d 139 (Tex. App. El Paso 1991), writ denied, (Sept. 5, 1991) (architectural firm entitled to be indemnified for costs incurred in defending a suit by a property owner for damage resulting from work performed by a contractor in accordance with plans prepared by the architect. The jury had found that (a) the contractor was 90% negligent in failing to protect the construction site — resulting in damage to an adjacent property during a substantial rainfall — and (b) the architectural firm was free from fault and the language of the indemnity provision in the owner/contractor agreement stated that the contractor was to indemnify the owner and architect for losses, including attorneys' fees, resulting from the contractor's negligence).

9 M.M. Sundt Const. Co. v. Contractors Equipment Co., 656 S.W.2d 643 (Tex. App. El Paso 1983).

10 M.M. Sundt Const. Co. v. Contractors Equipment Co., 656 S.W.2d 643, 645 (Tex. App. El Paso 1983). The indemnity agreement contained in the equipment lease required Sundt to indemnify the equipment supplier for loss "because (or as a result) of the return of the leased equipment."

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3 Bruner & O'Connor Construction Law § 10:14

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Chapter 10. Indemnity and Contribution

§ 10:14. Interpretation of indemnity language—Role of parol evidence under strict construction test

References
Texas is not the only jurisdiction to use an express construction test, although few jurisdictions actually express it as such. There are numerous opinions that apply a standard that indemnity for one's own negligence must be expressly stated in the terms of the provision. [1] Often this requirement for explicitness will be couched in terms of the typical strict construction approach. [2] The essence of the express negligence test is that the intent to indemnify another's negligence must be expressly stated "within the four corners of the contract." [3] In other words, the parties' intention with respect to indemnity is not to be gleaned by reviewing parol evidence. Either the agreement expressly states it or no such indemnity is afforded. [4]

The refusal to look to extrinsic evidence in the event that the contract language is not clear and unequivocal is fairly typical. [5] From this perspective, indemnity agreements are treated differently than most other contractual writings. [6] Courts that find parol or extrinsic evidence irrelevant to the inquiry of whether the parties intended an indemnity undertaking, whether couched in terms of express negligence or a strict construction rule, depart from standard practice in contract interpretation. [7] This is so whether an objective or a subjective standard of contract interpretation is adopted. [8] Standard contract interpretation holds that where the language of the contract is ambiguous, one may consider parol evidence for the purpose of resolving ambiguities and determining the intent of the parties. [9] The parties' prior negotiations may be considered for the limited purpose of clarifying ambiguities. [10]

Under standard contract interpretation theory, the many purposes for which extrinsic evidence can be offered complicates the parol evidence rule, which holds that in the absence of ambiguous language no extrinsic evidence shall be admitted for the purpose of contradicting clear contractual language. [11] Even under the parol evidence rule, prior negotiations and discussions, as well as other surrounding circumstances can be introduced for the purpose of interpreting, explaining, or clarifying the meaning of a word, term, symbol, or drawing. [12] Moreover, subsequent discussions, under certain circumstances, may be admissible to modify contract terms. [13] Pursuant to standard contract rules of interpretation, the presence of an ambiguity leads to further inquiry outside the terms of the writing to determine the parties' intent.

Standard practice with respect to indemnity agreements, however, is to call off further inquiry once it is determined that the clause is either ambiguous or not sufficiently clear on its face to evidence an intent to indemnify against another's negligence. [14] The Supreme Judicial Court of Maine's decision, in McGraw v. S.D. Warren Co., [15] is typical. An owner of a pulp mill hired a contractor for demolition and construction services. One of the contractor's employees became ill after being exposed to emissions from one of the pump mill stacks. He brought suit against the owner and ultimately recovered a jury verdict in the amount of $111,250. [16] The owner sought indemnification from the general contractor under an agreement that required it to indemnify the owner from all claims and losses

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> "arising out of injury to any person including owner's or contractor's employees … caused in whole or in part by contractor or any of contractor's subcontractors, materialmen, or anyone directly or indirectly employed or otherwise controlled by any of them while engaged in the performance of any work hereunder." [17]

In declining to afford any indemnity to the owner, the court explained:

> It is only where the contract on its face by its very terms clearly and unequivocally reflects a mutual intention on the part of the parties to provide indemnity for loss caused by negligence of the party to be indemnified that liability for such damages will be fastened on the indemnitor, and words of general import will not be read as expressing such an intent in establishing by inference such liability. Because there is no clear and unequivocal language in the contract at issue that reflects "a mutual intention … to provide indemnity for loss caused by" Warren's negligence, the court did not err in finding that Cianbro had not agreed to indemnify Warren for damage caused by Warren's negligence. [18]

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Footnotes

1 See Dykstra v. Arthur G. McKee & Co., 100 Wis. 2d 120, 301 N.W.2d 201 (1981) ("specific and express statement in the agreement"); Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols, 583 N.E.2d 142 (Ind. Ct. App. 1991) ("the indemnity for the indemnitee's own negligence must be specifically, not generally, prescribed"); Westinghouse Elec. Corp. v. Williams, 183 Ga. App. 845, 360 S.E.2d 411 (1987) ("in the absence of explicit language" indemnity will not be found).

2 See National Hydro Systems, a Div. of McNish Corp. v. M.A. Mortenson Co., 529 N.W.2d 690 (Minn. 1995).

3 Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705 (Tex. 1987).

4 See Atlantic Richfield Co. v. Petroleum Personnel, Inc., 768 S.W.2d 724 (Tex. 1989); Chevron Oil Co. v. E. D. Walton Const. Co., Inc., 517 F.2d 1119 (5th Cir. 1975) (applying Texas law).

5 See Steffl v. J.I. Case Co., 862 F.2d 692, Prod. Liab. Rep. (CCH) ¶ 11985 (8th Cir. 1988) (applying North Dakota law); Olympic, Inc. v. Providence Wash. Ins. Co. of Alaska, 648 P.2d 1008 (Alaska 1982); McIntyre Refrigeration, Inc. v. Mepco Electra, 165 Ariz. 560, 799 P.2d 901 (Ct. App. Div. 1 1990); Price v. Shell Oil Co., 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722 (1970); Scarboro Enterprises, Inc. v. Hirsh, 119 Ga. App. 866, 169 S.E.2d 182 (1969); Minden v. Otis Elevator Co., 793 S.W.2d 461 (Mo. Ct. App. E.D. 1990).

6 The refusal to look at extrinsic evidence does afford one potential advantage to an appellant — it allows an appellate court to review the decision on a de novo basis. See Continental Heller Corp. v. Amtech Mechanical Services, Inc., 53 Cal. App. 4th 500, 61 Cal. Rptr. 2d 668 (2d Dist. 1997); Rivers & Bryan, Inc. v. HBE Corp., 628 A.2d 631 (D.C. 1993); Scarborough v. Ridgeway, 726 F.2d 132 (4th Cir. 1984) (applying Maryland law).

7 See §§ 3:42 to 3:47.

8 "Objective" intent is that which one reasonably infers from the reading of the language. An objective theory of contract interpretation assumes that clear and unambiguous language reflects the parties' subjective intent, whether such is the case or not. Most courts follow an objective standard of interpretation. After the 19th century, almost no court employed a purely subjective standard. The term "subjective" now means that it is permissable to evaluate parol evidence to determine intent even if the contract language is facially unambiguous. See §§ 3:34, 3:35. See also Corbetta Const. Co. v. U. S., 198 Ct. Cl. 712, 461 F.2d 1330 (1972); Sturm v. U. S., 190 Ct. Cl. 691, 421 F.2d 723 (1970);

Appeal of Heil Co., A.S.B.C.A. No. 10047, 65-2 B.C.A. (CCH) ¶ 4924, 1965 WL 474 (Armed Serv. B.C.A. 1965). See also 4 Williston on Contracts (3d ed.) § 600A. But see Appeal of Gresham Sand & Gravel Co., G.S.B.C.A. No. 6858, 84-1 B.C.A. (CCH) ¶ 17019, 1983 WL 13446 (Gen. Services Admin. B.C.A. 1983), on reconsideration, G.S.B.C.A. No. 6858-R, 84-2 B.C.A. (CCH) ¶ 17359, 1984 WL 13340 (Gen. Services Admin. B.C.A. 1984), aff'd, 776 F.2d 1061 (Fed. Cir. 1985) (board rejects the objective standard in favor of the Restatement Second, Contracts § 202 quasi-subjective standard).

9 See American Druggists Ins. Co. v. Henry Contracting, Inc., 505 So. 2d 734 (La. Ct. App. 3d Cir. 1987), writ denied, 511 So. 2d 1156 (La. 1987) (ambiguity as to whether contract is fixed price or based on amount of work completed); H.J. Kramer Plumbing & Heating, Inc. v. Scharmer, 386 N.W.2d 742 (Minn. Ct. App. 1986); Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385, 390 (1986) ("[P]arol evidence is admissible to clarify … the ambiguity, whether it is created by the language of the instrument or by extrinsic or collateral circumstances."). See also §§ 3:42 to 3:47.

10 See Kehne Elec. Co. v. Steenberg Const. Co., 287 Minn. 193, 177 N.W.2d 309 (1970); Hott v. Tillotson-Lewis Const. Co., 682 P.2d 1220 (Colo. App. 1983); Delzer Const. Co. v. South Dakota State Bd. of Transp., 275 N.W.2d 352 (S.D. 1979); Gibbs v. U. S., 175 Ct. Cl. 411, 358 F.2d 972 (1966). See also McBain, The Rule Against Disturbing Plain Meaning of Writing, 31 Calif. L. Rev. 145 (1943).

11 See Whitaker-Merrell Co. v. Profit Counselors, Inc., 748 F.2d 354 (6th Cir. 1984); Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Engineering Sales, Inc., 436 N.W.2d 121, 8 U.C.C. Rep. Serv. 2d 21 (Minn. Ct. App. 1989). See also Restatement Second, Contracts §§ 209, 210(i), 213(1); 3 Corbin on Contracts § 573; 4 Williston on Contracts (3d ed.) §§ 630, 631; Appeal of Mann Const. Co., Inc., E.B.C.A. No. 361-6-86, 87-1 B.C.A. (CCH) ¶ 19517, 1986 WL 20330 (Dep't Energy B.C.A. 1986) (government barred from introducing evidence that in telephone conversation it reserved the right to pursue a claim which a written modification had settled); Peeples Const. Co., Inc. v. Escoe Green, Inc., 522 So. 2d 493 (Fla. 1st DCA 1988).

12 See Tripp v. Cotter Corp., 701 P.2d 124 (Colo. App. 1985); U.S. v. Bethlehem Steel Co., 215 F. Supp. 62 (D. Md. 1962), judgment aff'd, 323 F.2d 655 (4th Cir. 1963); United States v. Lennox Metal Manufacturing Co., 225 F.2d 302 (2d Cir. 1955); Sun Shipbuilding & Dry Dock Co. v. U. S., 183 Ct. Cl. 358, 393 F.2d 807, 1968 A.M.C. 2202 (1968).

13 See Kenko, Inc. v. Lowry Hill Const. Co., 392 N.W.2d 18 (Minn. Ct. App. 1986).

14 But see International Minerals & Chemical Corp. v. Avon Products, Inc., 889 S.W.2d 111 (Mo. Ct. App. E.D. 1994) (ambiguity would permit parties to resort to extrinsic evidence, and indemnity agreement would not apply to loss not within the contemplation of the parties).

15 McGraw v. S.D. Warren Co., 656 A.2d 1222 (Me. 1995).

16 McGraw v. S.D. Warren Co., 656 A.2d 1222, 1224 (Me. 1995).

17 McGraw v. S.D. Warren Co., 656 A.2d 1222, 1224 (Me. 1995).

18 McGraw v. S.D. Warren Co., 656 A.2d 1222, 1224 (Me. 1995). Interestingly, the court did not have to deny indemnity on this basis, because the trial court found that the employee's injuries were not proximately caused by any conduct engaged in by the general contractor. In other words, the factual record established that the employee's injuries were not "caused in whole or in part by" the general contractor as required by the clause. Nevertheless, the court did not employ this analysis, but instead merely construed the contractual language to be insufficiently clear and ruled that on this basis alone indemnity could be refused.

This same analysis was also clearly set forth in Rivers & Bryan, Inc. v. HBE Corp., 628 A.2d 631 (D.C. 1993). In this case an employee of a masonry subcontractor fell through a hole in the roof and died as a result of a 26-foot fall to the ground below. Both the general contractor and the masonry subcontractor were cited by the Occupational Safety and Health Administration (OSHA) for violation of OSHA's safety regulations. The employee's mother, as personal representative of the decedent's estate, filed a survival and wrongful death action against the general contractor and a roofing subcontractor. (The roofing subcontractor had created the hole.) On a subrogation theory, the employer's (the masonry subcontractor) workers' compensation carrier also joined suit in seeking to recover benefits paid to the decedent's estate. The general contractor sought indemnity from the masonry subcontractor pursuant to the following provision:

> Subcontractor agrees to observe and comply with all federal, state and local statutes and/or ordinances relating to the performance of this subcontract (including the Occupational Safety and Health Act of 1970, as amended), to assume all responsibilities of the contractor thereto, and to indemnify and hold harmless contractor from all penalties, damages or other loss resulting from subcontractor's failure to do so. Subcontractor shall pay the costs of all permits and licenses required to perform this subcontract.

The above-quoted indemnity agreement was on a preprinted form. The parties had, in addition, typed at the bottom of the page the following language: "Subcontractor is not responsible for others who are not in conformance with OSHA." Rivers & Bryan, Inc. v. HBE Corp., 628 A.2d 631, 634 (D.C. 1993). In declining to grant the general contractor indemnity under this provision, the court held:

> While parties are free to enter into indemnification agreements, even ones providing that an employer who would otherwise be protected by the Workers' Compensation statute [will indemnify a third party], such agreements are narrowly construed by the courts "so as not to read into [them] any obligations the parties never intended to assume" (citation omitted). If parties seek to provide indemnification not just for the actions of the indemnitor, but also for the actions of the indemnitee, so that the indemnitee would be entitled to full reimbursement pursuant to the indemnification clause (in this case $300,000) when the indemnitee is itself negligent, the criterion is even stricter. In order to find that a party contracted away its own liability by receiving full indemnity therefor, there must be a clear intention to do so that is apparent from the face of the contract… . Thus, if the alleged intention to provide this type of protection for the indemnitee is at all ambiguous, this standard is not satisfied. Contractual language is ambiguous if it is susceptible to more than one reasonable interpretation and the question of whether a contract is ambiguous is reviewed by this court de novo.
> The general rule for contract interpretation is that if a contract is determined by the court to be ambiguous, then external evidence may be admitted to explain the surrounding circumstances and the positions and actions of the parties at the time of contracting. The ultimate interpretation then becomes a question for the finder of fact. Conversely, if a court determines that a contract is unambiguous, the interpretation is a question of law for the court. In this area of indemnity, however, where a party purports to have the right to indemnity for its own negligence, there are unique rules. If the court determines that the contract is ambiguous on the issue of indemnifying the negligence of the indemnitee, then rather than the interpretation becoming a jury question, a particular result is required, namely that there is no indemnification for the indemnitee's own negligence.

Rivers & Bryan, Inc. v. HBE Corp., 628 A.2d 631, 635 (D.C. 1993). (Citations omitted.) The court concluded that the addition of the language that the subcontractor was not to be responsible for others who were not in conformance with OSHA created an ambiguity because it was not clear whether the term "others" was meant to refer to other subcontractors or also intended to include the general contractor as well. See also District of Columbia v. Royal, 465 A.2d 367, 13 Ed. Law Rep. 751 (D.C. 1983); U.S. v. Seckinger, 397 U.S. 203, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1970); Moses-Ecco Co. v. Roscoe-Ajax Corp., 320 F.2d 685, 7 Fed. R. Serv. 2d 218 (D.C. Cir. 1963).

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3 Bruner & O'Connor Construction Law § 10:15

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Chapter 10. Indemnity and Contribution

§ 10:15. Interpretation of indemnity language—"Construed against the drafter" rule

References

Another method for truncating inquiry into the parties' intentions with respect to indemnity beyond the terms of the agreement is to invoke the "construed against the drafter" principle of contract construction. [1] As a general rule, indemnitors do not offer agreements requiring them to indemnify another for that person's negligence. On the other hand, many indemnity agreements encountered in the construction industry are part of standard forms drafted by organizations representing one or more interests in the industry. Because the standard forms are often either jointly drafted by a number of organizations representing the interests of both the indemnitor and the indemnitee or at least endorsed and approved by organizations representing the interests of both parties, it is difficult to see how the traditional "construed against the drafter" rule would apply. [2]

In cases where a nonstandard contract form is used, the "construed against the drafter" rule arguably has more force. [3] Still, one must find an ambiguity. This requires that the court conclude that there are at least two reasonable meanings apparent from the face of the agreement. [4] Most decisions declining to find indemnity for the indemnitee's negligence do so because the language is not sufficiently clear, rather than because the language affords at least two reasonable interpretations (one of which is that the clause merely requires the indemnitor to provide indemnity for its own negligence). [5] Even if one were to conclude that general or otherwise unclear language inevitably creates ambiguities, the "construed against the drafter" rule is generally applied only where ambiguities are not otherwise resolvable. [6] In other words, this rule is not a substitute for attempting to resolve ambiguities by exploring extrinsic evidence. To the extent that a court fastens upon this rule in the first instance, then it is treating indemnity as an exception to the standard rules of contract interpretation.

To the extent that the "clear and unequivocal" standard becomes a substitute for applying standard rules of contract interpretation, including investigating extrinsic evidence in the case of ambiguous or unclear language, the interpretive process becomes divorced from what is primary in all contract interpretation—namely, seeking the parties' intentions. The search for "clear and unequivocal" meaning becomes just the opposite: a search for ambiguity or equivocation, even of the most remote, latent, or hidden kind, so as to permit a termination of the inquiry. [7]

Many courts begin their analysis of indemnity agreements with an examination of the basic rules governing the interpretation of such language. Some jurisdictions treat indemnity agreements like any other contract and apply the same basic rules of interpretation. Other jurisdictions view indemnity agreements as a distinct species of contractual undertaking governed by separate interpretation rules. A middle ground was staked out by the New Jersey Supreme Court in *Kieffer v. Best Buy*, [8] where the court examined whether indemnity language obligated a cleaning subcontractor to indemnify a general contractor for the legal defense costs incurred by the general contractor and owner in defending against a "slip-and-fall" suit that was dismissed for lack of evidence. In concluding that the subcontractor owed no such obligation, the court utilized standard contract interpretation principles with the exception of construing any ambiguous language against the party seeking indemnification:

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> Our analysis begins with some basic rules governing the interpretation of contracts and indemnification provisions…. The objective in construing a contractual indemnity provision is the same as in construing any other part of a contract—it is to determine the intend of the parties…. However, indemnity provisions differ from provisions in a typical contract in one important aspect. If the meaning of an indemnity provision is ambiguous, the provision is strictly construed against the indemnitee. The strict-construction approach is taken for two apparent reasons. One is that a party ordinarily is responsible for its own negligence and shifting liability to an indemnitor must be accomplished only through express and unequivocal language. Another is that, under the American Rule, absent statutory or judicial authority or express contractual language to the contrary, each party is responsible for its own attorneys' fees.

Kieffer v. Best Buy.[9]

The subcontractor was relieved of responsibility for paying any attorneys' fees because the indemnity provision in the subcontract was narrower than the provision contained in the general contractor's agreement with the owner. The upstream agreement obligated the general contractor to indemnify the owner based upon the assertion of mere "claims" by a party. The subcontract indemnification provision, on the other hand, imposed the responsibility of paying defense costs that were connected to any act of negligence, omission, or conduct arising out of the subcontractor's performance of its services. As there was no judicial finding that some negligent act, omission, or conduct proximately caused injury, there was no basis for finding the subcontractor responsible for any fees incurred by the owner or general contractor.[10]

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Footnotes

1 See §§ 3:58, 3:86.

2 For example, the American Institute of Architects' General Conditions, which contains an indemnity clause requiring the contractor to indemnify the owner and the architect, is endorsed by the Associated General Contractors of America. See AIA Document A201-1987, General Conditions for the Contract for Construction, 14th Edition. The 1997 version of the American Institute of Architects's General Conditions, which contains a somewhat less stringent indemnity, has also been approved and endorsed by the Associated General Contractors of America. (AIA Document A201-1997, General Conditions of the Contract for Construction, 15th Edition. The Engineer's Joint Contract Documents Committee's Standard General Conditions of the Construction Contract, which also contains an indemnity provision requiring the contractor to indemnify the owner and engineer, has also been approved and endorsed by the Associated General Contractors of America. See EJCDC Document No. 1910-8, Standard General Conditions of the Construction Contract (1990). This EJCDC form was revised, renumbered, and reissued in 2002. See EJCDC Document C-700 (2002). The most commonly used subcontract form, which contains an indemnity agreement requiring the subcontractor to indemnify the general contractor, has been jointly drafted by the Associated General Contractors of America, the American Subcontractors Association, Inc., and the Associated Specialty Contractors. The ASC is an umbrella organization composed of the following:

> Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Plumbing-Heating-

> Cooling Contractors, National Electrical Contractors Association, National Insulation and Abatement Contractors Association, National Roofing Contractors Association, Painting and Decorating Contractors of America, Sheetmetal and Air-conditioning Contractors National Association.

AGC/ASA/ASC Standard Form Construction Subcontract, AGC Document No. 640/ASA Document No. 4100/ASC Form No. 52 (1994). The AGC/ASA/ASC Standard Form Subcontract is intended to be generally compatible with the American Institute of Architects' A201 General Conditions. The instructions for completion of the AGC/ASA/ASC Standard Form Construction Subcontract contain the following information:

> This document was developed through the joint efforts of the Associated General Contractors of America, the American Subcontractors Association, Inc., and the Associated Specialty Contractors. The three organizations have a variety of unique and exclusive functions, but at least two common goals: more efficient, timely and economical construction for the mutual benefit of owners, architects/engineers, contractors, subcontractors and suppliers; and equitable and ethical relations between general contractors and subcontractors.

See also § 3:86.

3 See Marathon Steel Co. v. Tilley Steel, Inc., 66 Cal. App. 3d 413, 136 Cal. Rptr. 73 (2d Dist. 1977); Robertson v. Swindell-Dressler Co., 82 Mich. App. 382, 267 N.W.2d 131 (1978); Sherman v. DeMaria Bldg. Co., Inc., 203 Mich. App. 593, 513 N.W.2d 187 (1994); Hortman v. Otis Erecting Co., Inc., 108 Wis. 2d 456, 322 N.W.2d 482 (Ct. App. 1982). See also Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property, 68 A.L.R.3d 7§ 7; Building contractor's liability, upon bond or other agreement to indemnify owner, for injury or death of third persons resulting from owner's negligence, 27 A.L.R.3d 663§ 5.

4 See Restatement Second, Contracts § 206. This section reads:

> INTERPRETATION AGAINST THE DRAFTSMAN
>
> In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

5 A classic example of this reasoning is the line of authority that holds the common language found in a number of indemnity provisions that requires the indemnitor to indemnify the indemnitee against "any and all claims" does not encompass claims for the indemnitee's own negligence. As one court framed the issue:

> As we have stated before, indemnity "is an area in which to cover all does not include one of its parts." Thus, an indemnification of "any and all claims" will not include claims arising from the negligence of the indemnitee, despite the otherwise all-inclusive language in the provision.

Amoco Production Co. v. Forest Oil Corp., 844 F.2d 251, 255 n.4, 25 Fed. R. Evid. Serv. 757 (5th Cir. 1988). See also Seal Offshore, Inc. v. American Standard, Inc., 736 F.2d 1078, 1081 (5th Cir. 1984); Batson-Cook Co. v. Industrial Steel Erectors, 257 F.2d 410, 412 (5th Cir. 1958); Knapp v. Chevron USA, Inc., 781 F.2d 1123, 1127-28 (5th Cir. 1986) (agreement requiring indemnitor to indemnify indemnitee from "any loss, expense claim or demand" does not cover the negligence of the indemnitee).

6 As Corbin explains, the "construed against the drafter" or "contra preferendum" is a rule of last resort:

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> When the terms of a written contract have been chosen by one of the parties and merely assented to by the other, this fact will in some cases affect the interpretation that will be given to these terms by the court. After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court. This doubt may be so great that the court should hold that no contract exists. If, however, it is clear that the parties tried to make a valid contract, and the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is the less favorable in its legal effect to the party who chose the words.

Corbin on Contracts § 559. See also Mott v. ODECO, 577 F.2d 273, 278 (5th Cir. 1978).

7 A number of commentators have expressed concern over this development:

> Courts should strictly construe indemnity agreements, especially when the agreement attempts to indemnify the indemnitee for his own negligence. However, given the increasing sophistication of business transactions, in which parties bargain for indemnity provisions as risk-shifting devices, a rule barring extrinsic evidence is anachronistic. The Ruzzi [Ruzzi v. Butler Petroleum Co., 527 Pa. 1, 588 A.2d 1 (1991)] majority sanctioned an inflexible and mechanical rule of construction that does not consider business realities. When enforcing a contract, the court's goal should be to effectuate the parties' intent. The Ruzzi decision undermines this goal. Further, the Pennsylvania Supreme Court's decision contradicts the well-established purpose of the rules of contract construction. Because Ruzzi does not require a court to examine relevant extrinsic evidence when interpreting a broad, all-inclusive indemnity agreement, it is less likely that the courts will be able to effectuate the parties' actual intent.

Kurke, Contract Law—Has Pennsylvania Adopted an Express Negligence Rule for Interpreting Broad, All-Inclusive Indemnity Agreements?—Ruzzi v. Butler Petroleum Co., 588 A.2d 1 (Pa. 1991), 65 Temp. L. Rev. 679 (Summer 1992). See also Johnson, Collapsing the Legal Impediments to Indemnification, 69 Ind. L. J. 867 (Summer 1994).

8 Kieffer v. Best Buy, 205 N.J. 213, 14 A.3d 737 (2011).

9 Kieffer v. Best Buy, 205 N.J. 213, 14 A.3d 737, 742-43 (2011) (citations and inner quotations omitted).

10 *See also* Ocsai v. Exit 88 Hotel, LLC, 127 Conn. App. 731, 17 A.3d 83 (2011) (term "operations" contained in an indemnity agreement was deemed ambiguous, entitling both parties to present evidence in support of their respective interpretations); Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc., 127 Nev. 331, 255 P.3d 268, 127 Nev. Adv. Op. No. 26 (2011) (provision requiring indemnity against any and all liabilities that arise directly or indirectly out of indemnitor's obligations do not impose a duty to indemnify for losses caused by the indemnitee's negligence, as this language does not explicitly state that the indemnitor has to indemnify for the other's negligence) (citing treatise); Doster Const. Co., Inc. v. Marathon Elec. Contractors, Inc., 32 So. 3d 1277 (Ala. 2009) (broad indemnity clause requiring subcontractor to indemnify general contractor for loss caused by subcontractor's negligence did not contain an exception for any loss to which the general contractor's own negligence may have contributed and therefore, subcontractor was obligated to

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indemnify general contractor for amounts paid by general contractor to crane testing outfit pursuant to a separate indemnity agreement).

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Chapter 10. Indemnity and Contribution

§ 10:16. Interpretation of indemnity language—"Liberal" or "fair construction" rule

References

The label given to a particular method of contract interpretation may say more about the person providing the label than it does about the process so identified. The contract interpretation approach, which treats indemnity agreements no differently from any other contractual language, has, at times, been described as the "neutral," "contractual," "fair construction," or "liberal" method. The first three descriptions are favored by indemnitees, who wish to tie the concept of impartiality to the interpretation process. The last, to the extent that it suggests judicial activism or a lack of intellectual rigor, may be preferred by indemnitors. In the final analysis, however, the labeling of an interpretation as either "strict" or "liberal" provides little insight into process denoted. [1]

The common law favored a neutral approach to enforcing indemnification agreements. Courts faced with deciding whether to require one contracting party to indemnify the other for the other's own negligence simply inquired whether the contract language, fairly construed, evidenced such an intent. If it did, then the courts required indemnification, even to the extent that the indemnitee was 100% at fault. [2] This model of interpretation was quite common until the early 1970s when a number of jurisdictions moved to a "strict construction" approach. [3]

This interpretive approach is characterized by a lack of bias against the use of general language and the tendency to read the language objectively rather than in the indemnitor's favor. [4] Courts employing the liberal approach often enforce indemnity provisions even though the language does not specifically state that the indemnitee is entitled to recover for its own negligence. [5]

While unusual, one court applied to an indemnitor the same contract interpretation rules employed in the insurer/insured context. In *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, [6] a city sought a defense and indemnity from a design firm retained to supervise the construction of a rental car facility at the city airport. Two weeks after the facility opened, a pedestrian injured himself when stepping off a curb. The curb where the pedestrian fell was adjacent to a handicap access ramp resulting in the curb tapering from flush with the street to nearly a foot high. There was no sign warning pedestrians of this change in curb height.

The pedestrian sued the city for negligent design and construction of the curb. In seeking defense and indemnification from its designer, the city referenced the design contract's indemnification provision which required the designer to defend and indemnify the city against all suits arising out of or resulting from any negligent act, error or omission of the designer in the performance of services under the design contract. The clause also specifically stated that the designer was not required to indemnify the city from or against liability caused by or resulting from, in whole or in part, the negligence, act or omission of the city in the preparation or approval of designs or specifications by the city.

The city contended that the designer owed it a duty to defend because the pedestrian's allegations fell within the terms of the indemnity agreement. The designer countered that this standard only applied to insurance contracts. The court

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sided with the city holding that, while there were differences between insurance contracts and contracts for design and construction services, no different rule applies to the contractual obligation to provide a defense. [7]

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Footnotes

1 Corbin found the tendency to label methods of contract interpretation unhelpful, particularly when juxtaposed with the true purpose of interpretation, which is to divine the parties' meaning:

> One who distinguishes between "strict" and "liberal" interpretation, at least in the field of contracts, may be one who thinks that there is one "correct" meaning, one "true" meaning, one "plain" meaning to words and phrases; that a strict interpreter is one who finds the meaning and declares it irrespective of results; and that a liberal interpreter is one who, although he knows the true and plain meaning, is willing to disregard it in order to produce what he thinks is a socially or morally desirable result. At other times, the words may be used in precisely the contrary manner ….

Corbin on Contracts § 533.

The discussion of "strict" as opposed to "liberal" contract interpretation brings to mind the famous dialogue in Shakespeare's Merchant of Venice wherein Antonio executes a bond on behalf of his good friend, Bassanio, under which he agrees to act as surety for the repayment of the sum of 3,000 ducats to an unscrupulous obligee/lender by the name of Shylock. In the event of a default by Bassanio on his obligation to repay the 3,000 ducats, Antonio is to forfeit a pound of flesh from a place of Shylock's choosing "nearest [Antonio's] heart." As one might guess, a default occurs and Shylock brings suit on the bond against Antonio. While it is pleaded that a "liberal" interpretation of the law of Venice as to penal bonds should be afforded "to do a great right, do a little wrong," in the end judgment is entered entitling Shylock to take a pound of flesh. The court (or rather a wealthy Venetian masquerading as a judge) however, urges Shylock to grant some "charity" upon Antonio, which Shylock foolishly ignores, believing that he need do nothing more than what was agreed upon by the parties and expressed in the bond:

> Portia: "Have some surgeon, Shylock, on your charge, to stop his wounds, least he bleed to death."
> Shylock: "It is so nominated in the bond?"
> Portia: "It is not express, but what of that? T'were good you do so much for charity?"
> Shylock: "I cannot find it. Tis not in the bond."

Shylock's unreasonable and malicious insistence on strict adherence to the express terms of the bond ultimately wins him no favor with the court, which twists the strict construction analysis around to skewer Shylock by pointing out that the strict terms of the bond do not entitle Shylock to spill any of Antonio's blood:

> Portia: "This bond doth give thee here no jot of blood: The words expressly are 'a pound of flesh.' Take then thy bond, take thou thy pound of flesh; But, in the cutting it, if thou dost shed one drop of christian blood, thy lands and goods are, by the laws of Vanice, confiscated unto the state of Venice."

Further compounding Shylock's dilemma, the court finds that in seeking to take a pound of flesh, Shylock sought to take Antonio's life. Pursuant to Venetian law, Shylock was sentenced to death, pardoned on the condition that half his considerable wealth ordered to be turned over to the intended

victim, Antonio, and the other half to the state. As with so much of Shakespeare, a core truth is revealed: in a blind and slavish adherence to a literal interpretation lies ruin. Shakespeare, Merchant of Venice, Act IV, Scene 1.

2 See Graver Tank & Mfg. Co. v. Fluor Corp., Limited, 4 Ariz. App. 476, 421 P.2d 909, 911 (1966); Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226, 228 (1939); Tucci & Sons, Inc. v. Carl T. Madsen, Inc., 1 Wash. App. 1035, 467 P.2d 386, 388-91 (Div. 2 1970) (overruled by, Jones v. Strom Const. Co., Inc., 84 Wash. 2d 518, 527 P.2d 1115 (1974)) and (holding modified by, Brown v. Prime Const. Co., Inc., 102 Wash. 2d 235, 684 P.2d 73 (1984)) (adopting a strict construction interpretation methodology). See also Royal Ins. Co. of America v. Whitaker Contracting Corp., 295 F.3d 1381 (11th Cir. 2002) (an indemnity agreement need not specifically state that the indemnitor agrees to indemnify indemnitee for a non-delegable duty to be enforceable, as contract's broad indemnity provisions included the contractor's non-delegable duty).

3 This movement initially started with the judiciary and was ultimately followed by state legislatures which began to enact anti-indemnification statutes. Minnesota's development is fairly typical of those states that shifted from interpreting indemnity provisions like any other contract language to treating them as exceptions to the general rule. In Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226 (1939), a railroad agreed to accommodate a general contractor in connection with the construction of a sewer through its property, on the condition that it would be indemnified by the general contractor for "loss of or damage to the property of third-persons arising in any manner out of or any manner connected with the … work." Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226, 227 (1939). Once construction had commenced, the railroad negligently permitted several freight cars to come loose. They rolled into pile-driving equipment at the construction site. The owner of the pile driver filed a complaint against the railroad, seeking recovery for its property damage. The railroad paid the claim and then sought indemnification from the general contractor. The contractor argued that the indemnification clause should be subjected to a higher level of scrutiny than the rest of the contract. The contractor reasoned that the court should employ a then-novel approach to the issue called the "strict construction" test that was emerging from a few other courts because to do otherwise would encourage negligent acts by indemnitees.

The Minnesota Supreme Court rejected this entreaty, reasoning that it was the court's job to enforce the arm's-length bargains that were reasonably obvious on their face. The new model, in the court's opinion, seemed "to thwart contractual intention" based solely upon some third-party antagonism to the expressed intention of the contracting parties. Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226, 228 (1939). The court recognized that while public policy prohibited enforcement of contracts whose purpose was to bring about negligent acts, it rejected as "fanciful," the argument that indemnification agreements did so:

> Particularly in the field of … construction contractors, the results of negligence are so onerous and, the humanities and money loss aside, so altogether annoying, that only the extreme of inexperience would harbor the thought that a contract of the instant sort would operate in the slightest degree as a premium on and so an inducement to negligence.

Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226, 228 (1939).

Minnesota continued to follow this "liberal" standard of interpreting indemnification agreements until the mid 1970s. See Christy v. Menasha Corp., 297 Minn. 334, 211 N.W.2d 773, 777 (1973) (overruled by, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838 (Minn. 1979)); Jacobson v. Rauenhorst Corp., 301 Minn. 202, 221 N.W.2d 703, 705 (1974) (overruled by, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838 (Minn. 1979)).

In 1979, however, the Minnesota Supreme Court adopted the "strict construction" test in a dispute between a municipality and a general contractor over the conversion of an alley into a pedestrian walkway. The general contractor entered into a contract with an electrical subcontractor for the underground electrical wiring, removing several inches of grade during the initial construction phase. The subcontractor was not told that the general contractor had already removed much of the original

grade. Later, the electrical subcontractor removed more of the grade and snagged a gas line. Gas leaked into adjacent buildings and an explosion and fire occurred. The owners of the building sued the general contractor who, in turn, tendered its defense to the electrical subcontractor. The subcontract contained the following indemnity language, whereby the subcontractor agreed "… to be directly responsible for damages to persons and property occasioned by failure to [protect his work construction adequately], or by any negligence of the subcontractor or any of his officers, agents, or employees in the performance of his work."
A jury returned a verdict finding both the general contractor and the subcontractor responsible for the property damage. The general contractor argued that its subcontract entitled it to indemnity for its own negligence. The district court disagreed and entered judgment against both contractors. The Minnesota Supreme Court affirmed the judgment, ruling that "[t]here must be an express provision in the contract to indemnify the indemnitee for liability occasioned by its own negligence; such an obligation will not be found by implication." Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979) (court also expressly stated that it was adopting the "strict construction" test). The Farmington "strict construction" test governed indemnity agreements in Minnesota until 1984 when the legislature passed an anti-indemnity statute. This statute renders unenforceable broad agreements in building contracts that require indemnity for anything other than loss caused by the negligence of the indemnitor. Minn. Stat. § 337.02. Nevertheless, contractors may obtain indemnity if the indemnitor agrees to obtain insurance coverage for the indemnity obligation. See Holmes v. Watson-Forsberg Co., 488 N.W.2d 473 (Minn. 1992).

4 This is not to suggest that there is any dearth of opinions finding indemnity for one's own negligence under a strict construction approach. See McBro, Inc. v. M & M Glass Co., 611 So. 2d 283 (Ala. 1992) (indemnity wherein subcontractor agreed to indemnify the general contractor for all losses "caused in whole or in part by any negligent act or omission of [the subcontractor] … regardless of whether or not it is caused in part by a party indemnified hereunder" was clear and unambiguous); Dillard v. Shaughnessy, Fickel and Scott Architects, Inc., 884 S.W.2d 722 (Mo. Ct. App. W.D. 1994) (American Institute of Architects' indemnity language clear and unequivocal); Webb v. Lawson-Avila Const., Inc., 911 S.W.2d 457 (Tex. App. San Antonio 1995), writ dismissed, (Feb. 9, 1996); Oster v. Medtronic, Inc., 428 N.W.2d 116 (Minn. Ct. App. 1988) (language requiring a contractor to indemnify a construction manager "regardless of whether or not [loss] is caused in part by a party indemnified hereunder" was sufficiently clear to require contractor to indemnify a construction manager by paying the construction manager's share of damages as well as its own); McGoldrick v. Lou Ana Foods, Inc., 649 So. 2d 455 (La. Ct. App. 3d Cir. 1994) (indemnity provision requiring contractor to indemnify owner for loss except in those situations where loss was caused by owner's "sole negligence" required indemnity unless owner completely at fault); Nabholz Const. Corp. v. Graham, 319 Ark. 396, 892 S.W.2d 456 (1995) (indemnity requiring subcontractor to indemnify contractor for all loss "arising out of the performance of this contract, whether attributable in whole or in part to any act, omission, or negligence of the contractor" clearly and unequivocally required the subcontractor to indemnify the general contractor for loss occasioned by the indemnitee's negligence); Russ v. Woodside Homes, Inc., 905 P.2d 901 (Utah Ct. App. 1995).

5 See Duty Free Shoppers Group Ltd. v. State, 777 P.2d 649 (Alaska 1989); Washington Elementary School Dist. No. 6 v. Baglino Corp., 169 Ariz. 58, 817 P.2d 3, 70 Ed. Law Rep. 210 (1991); Laudano v. General Motors Corp., 34 Conn. Supp. 684, 388 A.2d 842 (Super. Ct. Appellate Sess. 1977); James v. Getty Oil Co. (Eastern Operations), Inc., 472 A.2d 33 (Del. Super. Ct. 1983); Hader v. St. Louis Southwestern Ry. Co., 207 Ill. App. 3d 1001, 152 Ill. Dec. 859, 566 N.E.2d 736 (5th Dist. 1991).

6 City of Albuquerque v. BPLW Architects & Engineers, Inc., 146 N.M. 717, 2009-NMCA-081, 213 P.3d 1146 (Ct. App. 2009).

7 See also Crawford v. Weather Shield Mfg. Inc., 44 Cal. 4th 541, 79 Cal. Rptr. 3d 721, 187 P.3d 424 (2008) (subcontractor had duty to defend developer against homeowners' complaints immediately upon developer's demand and obligation remained extant even though subcontractor was subsequently found not negligent).

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Chapter 10. Indemnity and Contribution

§ 10:17. Interpretation of indemnity language—Role of parol evidence under liberal construction test

References

The liberal approach is also characterized by a willingness to go beyond the four corners of the contract to determine the parties' intent in instances where the language is ambiguous. [1] This is in contrast to the approach of simply holding that the purported indemnitee is not entitled to relief, because the indemnity language is ambiguous. Some of the circumstances beyond the language of the contract that courts have looked to in order to determine the meaning and scope of an indemnity provision include: (1) the existence of insurance covering the indemnity obligation; [2] (2) other contractual provisions; [3] (3) sophistication of the parties; [4] and (4) the purpose of the parties' contract. [5]

Permitting the parties to explore parol evidence to determine the existence and extent of an indemnification obligation requires more work for everyone involved and sometimes does not end up clarifying the situation. In Amoco Production Co. v. Forrest Oil Corp., [6] the federal district court, concluding that the indemnity provision was ambiguous, permitted extrinsic evidence to determine intent. Both parties offered testimony from representatives who signed the agreement. [7] Amoco, as the indemnitee, also attempted to offer evidence of an unrelated document where the contractor had used language similar to that contained in Amoco's agreement.

The court did not admit evidence of this unrelated writing, because its language was not identical to the clause at issue. [8] The district court ultimately found that Amoco had failed to prove by a preponderance of the evidence that the parties intended to include Amoco's negligence in the indemnity provision. [9] As one might expect, the contractor's representative testified that he did not intend to include indemnification for Amoco's negligence. Amoco's representative testified that he did not take part in drafting the agreement, nor had he had any discussions regarding negotiations that occurred prior to the signing of the agreement. [10]

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Footnotes

1 See Bartlett v. Davis Corp., 219 Kan. 148, 547 P.2d 800 (1976); Shea v. Bay State Gas Co., 383 Mass. 218, 418 N.E.2d 597 (1981); Paquin v. Harnischfeger Corp., 113 Mich. App. 43, 317 N.W.2d 279 (1982); New York Telephone Co. v. Gulf Oil Corp., 203 A.D.2d 26, 609 N.Y.S.2d 244 (1st Dep't 1994).

2 In Midland Ins. Co. v. Delta Lines, Inc., 530 F. Supp. 190, 195, 1984 A.M.C. 908 (D.S.C. 1982), a federal district court declined to employ a strict scrutiny test which would have invalidated an indemnity obligation, due to the fact that the parties' agreement contained a promise to procure insurance to protect the indemnitee. The court reasoned that this risk allocation scheme clearly expressed an intention to indemnify the indemnitee. See also Fosson v. Ashland Oil & Refining Co., 309 S.W.2d 176 (Ky. 1957) (indemnity agreement covered acts of indemnitee's negligence because agreement required contractor to carry liability insurance satisfactory to owner); Buscaglia v. Owens-

Corning Fiberglas, 68 N.J. Super. 508, 172 A.2d 703 (App. Div. 1961), judgment aff'd, 36 N.J. 532, 178 A.2d 208 (1962) (owner entitled to indemnity even though its negligence resulted in worker injury because contract required contractor to carry liability insurance); McKinney v. South Cent. Bell Telephone Co., 590 So. 2d 1220 (La. Ct. App. 1st Cir. 1991), writ denied, 592 So. 2d 1302 (La. 1992) (scope of indemnity determined, in part, by insurance obligation).

However, some courts have concluded that where the contract contains insurance requirements (with or without waivers of claims covered by insurance), this may be interpreted as placing a limitation on the indemnitor's obligation notwithstanding loss in excess of the insurance limits. See Village of Rosemont v. Lentin Lumber Co., 144 Ill. App. 3d 651, 98 Ill. Dec. 470, 494 N.E.2d 592 (1st Dist. 1986); Tuxedo Plumbing & Heating Co., Inc. v. Lie-Nielsen, 245 Ga. 27, 262 S.E.2d 794 (1980); Berger v. Teton Shadows Inc., 820 P.2d 176 (Wyo. 1991).

3 Sometimes courts attempt to place an indemnity provision in some contextual framework by reviewing other contractual provisions. If the contract contains other clauses wherein the indemnitor is responsible for making good any loss occasioned by its own fault, it has been held that such provisions suggest a limited indemnity. See Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907); Mitchell v. Southern Ry. Co., 124 Ky. 146, 24 Ky. L. Rptr. 2388, 74 S.W. 216 (1903).

4 See Nationwide Mut. Ins. Co. v. Hall, 643 So. 2d 551 (Ala. 1994) (sophistication of owner of apartment buildings supported conclusion that owner knowingly entered into agreement to indemnify apartment manager even for manager's own negligence; furthermore management contract was less than two pages long with indemnification clause on the first page).

5 Employers Mut. Cas. Co. v. Chicago and North Western Transp. Co., 521 N.W.2d 692 (Iowa 1994) (scope of indemnification agreement construed to include the indemnitee's own negligence as there would be little reason for indemnitee railroad to permit indemnitor to build conveyor system on its right-of-way next to the tracks without broad indemnification); Fontenot v. Town of Mamou, 676 So. 2d 677 (La. Ct. App. 3d Cir. 1996), writ denied, 680 So. 2d 646 (La. 1996) (parties' intent to be construed by interpreting indemnity agreement in light of contract as a whole, including custom, usage, or equity incidental to particular contract necessary to carry it into effect.).

6 Amoco Production Co. v. Forest Oil Corp., 844 F.2d 251, 25 Fed. R. Evid. Serv. 757 (5th Cir. 1988).

7 Amoco Production Co. v. Forest Oil Corp., 844 F.2d 251, 257, 25 Fed. R. Evid. Serv. 757 (5th Cir. 1988).

8 Amoco Production Co. v. Forest Oil Corp., 844 F.2d 251, 257, 25 Fed. R. Evid. Serv. 757 (5th Cir. 1988). The court also refused to allow Amoco to cross-examine the contractor's representative with respect to this unrelated writing, nor did it allow Amoco to impeach the contractor's representative through the use of writing.

9 Amoco Production Co. v. Forest Oil Corp., 844 F.2d 251, 257, 25 Fed. R. Evid. Serv. 757 (5th Cir. 1988).

10 Amoco Production Co. v. Forest Oil Corp., 844 F.2d 251, 258, 25 Fed. R. Evid. Serv. 757 (5th Cir. 1988). In Lopez v. Consolidated Edison Co. of New York, Inc., 40 N.Y.2d 605, 389 N.Y.S.2d 295, 357 N.E.2d 951 (1976), parol evidence did not assist a utility in seeking indemnity from one of its contractors. The issue was whether the injury arose out of the contractor's work. The contractor was under no duty to indemnify the utility for injuries that arose out of unrelated activities. The question became whether the contractual obligation of the contractor to provide all "necessary and proper equipment" and all apparatus and appliances that are "useful" in carrying out the work safely extended to gas and gas mains. Parol evidence established through custom and practice revealed that the utility did all work relating to gas and gas mains and possessed the specialized equipment necessary to test for the presence of gas. It was this work that gave rise to the injury, and because the contractor was not responsible for the work, it owed no indemnity obligation to the utility. See also Schiavone Const. Co., Inc. v. Nassau County, 717 F.2d 747, 751, 14 Fed. R. Evid. Serv. 254 (2d Cir. 1983) (where language of indemnity agreement is ambiguous, parol evidence is admissible to clarify the parties' intent).

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