Indemnity Provisions: Take My Negligence...Please

Louis F. Eckert and Russel McBrearty

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The practice of seeking indemnity that exempts a party for its own negligence is alive and well, albeit with several exceptions. It is axiomatic that a contract between parties which provides for indemnification will be enforced where the intent that one party indemnifies the other is sufficiently clear and unambiguous.[1] Furthermore, "when the intent is clear, an indemnification agreement will be enforced even it if provides indemnity for one's own or third party's negligence."[2] And, when the intent to indemnify is clear, a court will not interpret a contracted indemnification provision in a manner that will render it meaningless. This is so even where an indemnification clause is "framed in less precise language than would normally be required when the agreement is negotiated by sophisticated parties as to risk allocation."[3]

Statutory Exceptions

There are, of course, two exceptions to the rule. The first is where public policy prohibits a party from exempting itself from gross negligence.[4] The second is where it is prohibited by statute.

The Legislature, in order to curb the practice of parties obtaining indemnification for their own negligence in certain industries and situations, carved out exceptions, found in the General Obligations Law, making any such contractual provision void and unenforceable.

Such statutory exceptions include lessors of real property, "caterers and catering establishments," "owners and contractors in contracts relative to construction, alteration, repair or maintenance of a building...," "certain construction contracts," "building and services contractors," "architect, engineers and surveyors from liability caused by or arising out of defects in maps, plans, designs and specifications," persons who conduct or maintain for hire a garage, parking lot or other similar place, "owner[s] or operator[s] of any pool, gymnasium, place of amusement or recreation."[5] The public policy behind these statutes is strong and shows a disfavor toward contracts exempting a party from its own negligence.

The Court of Appeals has expounded on this when discussing the purposes behind N.Y. GOL §5-322.1 (owners and contractors in construction contracts), where it found that "the purpose behind the provision was to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others. The Legislature concluded that such 'coercive' bidding requirements unnecessarily increased the cost of construction by limiting the number of contractors able to obtain the necessary hold harmless insurance and unfairly imposed liability on subcontractors for the negligence of others over whom they had no control."[6]

Notably, although these statutes cover a great portion of contractual agreements, the Legislature has not gone as far as to say that all contractual provisions exempting a party from its own negligence and seeking indemnity for any such negligence are void and unenforceable.

Case Law

Case law is abundant in finding contractual provisions exempting a party from its own negligence, where there was no gross negligence and no statutory exception applies. The easy case is where such a provision expressly provides for such indemnity. However, some contractual provisions of this nature are written more broadly, and indemnification exempting a party from its own negligence must be shown through interpretation of the provision to be clear and unambiguous. Two examples of this are the Appellate Division, Second Department's decisions in *Cortes v. Town of Brookhaven*[7] and *Sherry v. Wal-Mart Stores East*.[8]

In *Cortes*, defendant DF Stone Contracting contracted with defendant Town of Hempstead for the transportation of ash from the Town of Hempstead to the Town of Brookhaven. DF Stone agreed, pursuant to the contract, to indemnify Brookhaven "against any and all claims, suits or liability which might arise in connection with this agreement [and] from any claims, suits, or liabilities that might arise as a result of transporting, handling, depositing, staging and storing of the Process Residue transported."[9] Plaintiff, a truck driver for DF Stone was injured when the truck he was operating overturned at Brookhaven's landfill. The court found that the indemnification clause obligated DF Stone to "indemnify Brookhaven against liabilities arising out of [plaintiff's action] regardless of the jury's finding that Brookhaven was negligent."[10]

In *Sherry*, defendant Coca-Cola contracted with defendant Wal-Mart Stores East for Coca-Cola to construct and stock its soda in a display at Wal-Mart stores. This contract contained a broad indemnity provision which provided, in part, that Coca-Cola "shall protect, defend, and indemnify [Wal-Mart] from and against any and all claims, actions, liabilities, losses, costs and expenses...arising out of any actual or alleged...injury to any person...resulting or claimed to result in whole or in part from any alleged defect in the merchandise...[and] all of the duties and obligations of [Coca-Cola] set forth in this paragraph shall extend in full force and effect to the pallets or other transport or display provided by or at the direction of [Coca-Cola]."[11]

Plaintiff, in *Sherry*, was injured at Wal-Mart's store when she removed a case of soda from a display stand, constructed and stocked by Coca-Cola, and the merchandise fell from the display. Although the court found that Wal-Mart did not meet its burden of proof to show that it did not have constructive notice of the allegedly dangerous condition, it found that the final sentence of the indemnity provision was applicable "even if Wal-Mart's own negligence may have caused the plaintiff's injuries."[12] As such, Coca-Cola was required to indemnify Wal-Mart, regardless of Wal-Mart's own negligence.

Conclusion

Thus, as the foregoing indicates, when drafting indemnity provisions designed to exempt a party from its own negligence and obtain indemnity from the contracting party for such potential negligence (or seeking to enforce such provisions) it is important to craft such language to be broad enough (but not overly broad) as will allow a court to find that, even if not spelled out in black and white, the provision is clear and unambiguous to show that the intent of the parties was to require one party to unequivocally indemnify the other, even if the other is itself negligent.

Louis F. Eckert *is a partner with Litchfield Cavo.* **Russel McBrearty** *is a senior associate with the firm.*

Endnotes:

1. *Bradley v. Earl B. Feiden*, 8 N.Y.3d 265, 275, 864 N.E.2d 600, 605, 832 N.Y.S.2d 470, 475 (2007).

2. Id.

3. Id., 864 N.E.2d at 606, 832 N.Y.S.2d at 476, citing and quoting *Gross v. Sweet*, 49 N.Y.2d 102, 108, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979).

4. *Colnaghi, U.S.A. v. Jewelers Protection Services*, 81 N.Y.2d 821, 823-824, 611 N.E.2d 282, 293-284, 595 N.Y.S.2d 381, 383 (1993)("[p]ublic policy, however, forbids a party's attempt to escape liability, through a contractual clause, for damages occasioned by grossly negligence conduct. Used in this context gross negligence differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the right of other or smack of intentional wrongdoing") (internal citations and quotations omitted).

5. See N.Y. GOL §§5-321, 5-322, 5-322.1, 5-322.2, 5-323, 5-324, 5-325 5-326, respectively.

6. *Itri Brick & Concrete v. Aetna Casualty & Surety*, 89 N.Y.2d 786, 794, 680 N.E.2d 1200, 1204, 658 N.Y.S.2d 903, 907 (1997.

7. 78 A.D.3d 642, 910 N.Y.S.2d 171 (2d Dept. 2010).

8. 67 A.D.3d 992, 889 N.Y.S.2d 251 (2d Dept. 2009). For other departments, see also, *New York Telephone v. Gulf Oil*, 203 A.D.2d 26, 609 N.Y.S.2d 244 (1st Dept. 1994), *Balysak v. Siena College*, 63 A.D.3d 1409, 882 N.Y.S.2d 335 (3d Dept. 2009), and *McDonald v. M.J. Peterson Development*, 269 A.D.2d 734, 703 N.Y.S.2d 324 (4th Dept. 2000).

9. *Cortes*, supra at 644, 910 N.Y.S.2d at 173.

10. Id. at 645, 910 N.Y.S.2d at 174.

11. *Sherry,* supra at 995, 889 N.Y.S.2d at 255.

12. Id. at 996, 889 N.Y.S.2d 256.