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Beware What's in Your Indemnification Clauses

By Jeff Lewis, Esq., and Knox Withers, Esq.

A logistics business that routinely uses contracts containing an indemnity clause should ask an important question: Does that provision require the company to indemnify its contract partner in the event of a loss that is caused by the partner's own negligent acts?

Generally, the law resists putting the burden of negligent acts upon an innocent party; instead, most states encourage companies to proceed carefully, rather than recklessly, knowing that someone else (the indemnitor) will bear the risk. Thus, a company expecting indemnification for its own negligent acts (the indemnitee) must usually include express language to that effect in its contracts.

Although many states follow this general rule, judicial interpretation varies. Whether a company's contracts offer sufficient protection depends upon the state or states in which it operates. Consider these three examples:

In Georgia, unless a contract for indemnification explicitly and expressly states that the indemnitee's negligence is covered, courts will not interpret such contracts to save the indemnitee from its own negligence. Courts have, however, enforced provisions where coverage for the indemnitee's negligence is fairly implied.

For example, a contract covering all losses "except such as . . . resulted from [the indemnitee's] sole negligence" are enforceable as long as someone other than the indemnitee is partially responsible for the loss. But without language that expressly calls for, or at least clearly implies, coverage for the negligence of the indemnitee, Georgia courts will interpret these provisions against such sweeping coverage.

New York courts also adhere to the general rule requiring express language covering the indemnitee's own negligence, but interpret this requirement more liberally than do Georgia authorities.

For example, a clause requiring one party to indemnify the other "against all claims and demands . . . of whatever kind or nature" would also include coverage for the indemnitee's own negligence. As long as the intention to

indemnify the negligent party for its own acts can be clearly implied from the language and purposes of the entire agreement and from the surrounding facts and circumstances, it is unnecessary for the clause to refer expressly to the negligence of the party being indemnified.

California adheres to the general rule as well, but its courts also look to determine whether the indemnitee was actively or passively negligent. A partner that commits an affirmative act of malfeasance would be considered actively negligent; committing a negligent act by omission constitutes passive negligence.

This distinction yields varying results, depending on the contractual language. A provision expressly requiring one company to indemnify another, even if the loss arises from the indemnitee's own negligence, will be enforced regardless of whether the indemnitee was actively or passively negligent. In contrast, a provision purporting to indemnify a party for all claims and damages, but failing to expressly mention the indemnitee's own negligence, will cover the indemnitee's passive negligence, but not its active negligence.

Finally, a provision requiring one party to indemnify the other for losses arising from the indemnitor's negligence, but which fails to address losses arising from causes other than the indemnitor's negligence, will not cover any negligence on the part of the indemnitee, whether active or passive.

Thus, the laws of three states with similar public policies yield different results. The lesson, of course, is that a company's indemnification clauses must consider not only the general rules in the state or states in which it operates, but must also account for judicial interpretation of those rules. Further, the language required will also depend on whether the company is seeking indemnification, or will instead bear the burden of indemnifying the other.

When it comes to indemnification, it's not only what you say, but how you say it, that counts.

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