NEW YORK STATE BAR ASSOCIATION

Journal

JULY/AUGUST 2014
VOL. 86 | NO. 6

So, You Want to Be an Adjunct Law Professor?

The Processes, Perils, and Potential

by Catherine A. Lemmer and Michael J. Robak

Also in this Issue

CONTENTS

JULY/AUGUST 2014

SO, YOU WANT TO BE AN ADJUNCT LAW PROFESSOR?

The Processes, Perils, and Potential 10

BY CATHERINE A. LEMMER AND MICHAEL J. ROBAK

DEPARTMENTS

CARTOON © CARTOONRESOURCE.COM

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

Melissa Curvino (mcurvino@mcoblaw.com) is an associate at McCormick & O'Brien, LLP. She obtained a J.D. in 2013 from Emory Law and a B.A. in 2010 from the University of Notre Dame.

Liam O'Brien (lobrien@mcoblaw.com) is the managing partner and the head of the litigation practice group for McCormick & O'Brien LLP. He is a 1991 graduate of Fordham University School of Law and obtained his baccalaureate from Fordham University in 1988.

First-Party Indemnification for Attorney Fees

By Melissa Curvino and Liam O'Brien

In the United States, each party to a lawsuit generally bears its own costs of litigation, including attorney fees, regardless of whether it wins or loses.[1] This general rule holds true in New York, where the prevailing party may not collect attorney fees from the losing party unless authorized by an agreement between the parties or by statute.[2] It is therefore common for contracting parties to include an indemnity clause promising that each party will hold the other harmless for certain enumerated losses, including for attorney fees. But because such a fee shifting arrangement changes the general rule that parties must bear their own costs of litigation, indemnity clauses are strictly construed by New York courts.[3] When a party seeks indemnity for attorney fees resulting from a suit among the parties to the contract – a first-party suit, as opposed to a third-party suit – courts are even more suspicious.[4]

The New York Court of Appeals examined the issue of fee shifting in indemnity clauses in the 1989 case *Hooper Associates, Ltd. v. AGS Computers, Inc.* In that case the plaintiff, Hooper, had sued the defendant, AGS, for breach of contract.[5] In addition to contract damages, Hooper sought to recover attorney fees incurred in bringing the action against AGS.[6] The contract between the parties contained an indemnity clause providing that AGS must indemnify Hooper for "reasonable counsel fees" but did not define the scope of that promise.[7] Because the indemnity clause did not contain "unmistakably clear" language requiring AGS to indemnify Hooper for attorney fees resulting from a suit between them, the court held that the indemnity clause did not create this obligation.[8]

The *Hooper* case set the precedent for New York law in the area of contractual fee shifting. New York courts will not infer a party's intention to indemnify the other party for attorney fees from a first-party suit without "unmistakably clear" language in the indemnity clause.[9] Even when a provision can be fairly read to include first-

party indemnity, courts will not give the provision such a reading if it is not explicit.[10] The Appellate Division, First Department has said that in order to award attorney fees to the prevailing party in a first-party suit "the intention . . . must be virtually inescapable."[11]

But what is "unmistakably clear" language? How can contract drafters explicitly state their intention to include a fee shifting provision for first-party suits in the indemnity clause? And the answer is not clear. Perhaps because of the high bar set by *Hooper* there have not been many decisions finding that an indemnification provision unmistakably provides for attorney fees arising out of first-party suits. There is some evidence that an indemnity provision meets the *Hooper* standard when the provision specifically references a claim between the parties as a ground for indemnification.[12] In *Getty Petroleum Corp. v. Delorio*, the Appellate Division, Second Department held that an indemnity provision in a lease, which provided for recovery of attorney fees "in defending any claim brought against [Lessor] by Lessee against which [Lessor] successfully defends," was patently clear.[13] Because this indemnity clause unmistakably provided for indemnification for first-party suits, the court held that the lessee was required to pay the lessor's attorney fees.[14] But *Getty* has not yet been cited for this proposition, so it is not clear whether this decision will be followed as precedent.

Even when a provision can be fairly read to include first-party indemnity, courts will not give the provision such a reading if it is not explicit.

Although it is not known what will satisfy *Hooper*, we can draw lessons from a number of cases finding that indemnity clauses were not unmistakably clear. Cases decided in 2013 and 2014 show that an indemnity "against any and all claims" is not enough to provide for first-party indemnification for attorney fees; and an indemnity clause that includes notice and assumption of defense provisions is evidence of an intention for third-party indemnity, and thus will not be construed as providing for first-party indemnification of attorney fees.

Courts Do Not Construe an Indemnity "Against Any and All Claims" as Providing for First-Party Indemnification

In *Ocwen Loan Servicing, LLC v. Ohio Public Employees Retirement System*, a case decided on February 18, 2014, the Supreme Court, New York County, refused to construe a broad grant of indemnity against any and all claims as requiring the parties to indemnify each other for attorney fees resulting from first-party suits.[15] *Ocwen Loan Servicing* concerned contracting parties who had signed an indemnity clause agreeing broadly to indemnify "against any and all claims, losses, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, fees and expenses that any certificate holder may sustain in any way related to the failure of the servicer to perform its duties."[16] Also within the indemnity clause was a specific grant of indemnity for third-party liabilities, stating that the parties would indemnify each other against claims "if such claim relating to the servicer is made by a third party with respect to this agreement."[17] The plaintiff argued that this specific grant of third-party indemnity should be contrasted with the broad grant of indemnity for all claims, meaning that the parties had intended for the broad grant of indemnity to apply to first-party claims.[18] Although the court found that it would be reasonable to read the broad grant of indemnity as requiring the parties to indemnify each other for suits between themselves, the court refused to do so.[19] Under the exacting standard of *Hooper*, the court held that the failure to specifically require first-party indemnity meant that the parties were not obligated to indemnify each other for first-party suits.[20]

Similarly, in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, a case decided on January 15, 2014, the Supreme Court, New York County, held an indemnity clause that required the defendant to "promptly reimburse . . . the Trustee for any actual out-of-pocket expenses reasonably incurred" did not create an obligation to indemnify for attorney fees arising out of first-party suits.[21] Because this indemnity did not exclusively or unequivocally refer to first-party claims, the parties were not obligated to indemnify each other for first-party claims.[22] And in its 2013 opinion in *J.P. Morgan Securities v. Ader*, the Supreme Court held that an indemnification "against any and all loss, damage, liability or expense, including reasonable costs and attorney fees" stemming from any misrepresentation, breach of warranty, or breach of covenant was not sufficient to create an obligation to indemnify for first-party suits.[23] Although the language providing indemnification against claims stemming from a breach of warranty or a breach of covenant could be fairly read to include first-party suits, the clause did not unequivocally cover first-party suits, so the court held that it did not create an obligation to indemnify for attorney fees arising out of first-party suits.[24]

Even clauses that obligate one party to indemnify the other against liabilities caused "as the result of any action taken by (or failure to act of) [party 2]" do not create an obligation for first-party indemnification.[25] Although

that language can be read as applying to suits between the contracting parties, the parties did not explicitly or unequivocally state their intention to indemnify each other for attorney fees arising from first-party suits.[26] Without explicit language, New York courts will not shift attorney fees.

An Indemnity Clause That Includes Notice and Assumption of Defense Provisions Is Evidence of an Intention for Third-Party Indemnity, and Thus Will Not Be Construed as Providing for First-Party Indemnification

For example, in *Hooper* the indemnification clause required one party to "promptly notify [the other] of any claim or litigation to which the indemnity provision shall apply."[27] The court held that this obligation to notify the other party of the claim was an indication that the indemnity clause was meant to apply to third-party suits because the other party would not need to be notified if it had brought the suit.[28] To read the indemnity clause as applying to first-party suits would, in the court's estimation, render the notification provision meaningless.[29] The contract interpretation rule that requires courts to read the contract as a whole, giving fair meaning to all of the provisions, means that one provision cannot be read in such a way as to make another provision meaningless.[30] Therefore, when an indemnity clause includes a notice and assumption of defense provision, courts hold that the indemnity is for third-party suits.[31] Any indication that the indemnity clause was meant to apply to third-party suits means that it does not exclusively or unequivocally apply to first-party suits and thus fails the *Hooper* standard.[32]

In 2013, the Supreme Court, New York County reiterated this holding in *AMBAC Assurance Corp. v. First Franklin Financial Corp.*[33] In that case the indemnity clause provided for the insured to indemnify the insurance company "for any payment made by the Insurer under the Policy" and to "notify the Indemnifying Party in writing" any time "any action or proceeding . . . shall be brought or asserted."[34] The court held that if the indemnity clause applied to first-party suits, the notice requirement would be superfluous, which would violate the rule of construction that a reading of one provision of a contract must not render another provision moot or meaningless.[35] Therefore, to avoid making the notice requirement superfluous, the court held that the indemnification provision did not create an obligation to indemnify for the attorney fees arising out of first-party claims.[36]

Conclusion: An Intention to Indemnify for Attorney Fees Arising Out of First-Party Claims Must Be Unmistakably Clear

Although the courts have not provided much guidance as to what language will satisfy the *Hooper* standard, there is guidance as to what language is not unmistakably clear. Neither an indemnification clause that uses broad language, such as "any and all claims," nor a clause that requires the parties to notify each other of the intention to seek indemnity meet the *Hooper* standard. Contract drafters who seek to create an obligation to indemnify for attorney fees arising out of a first-party suit should not include those two clauses in the indemnity provision. ■

1. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245–47 (1975). There are a few exceptions to the general rule. For example, if the plaintiff brings a case in bad faith, courts can award attorney fees to the defendant. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991). There are also some fee-shifting statutes that require a losing defendant to pay the winning plaintiff's attorney fees. *See* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Probs. 233, 240–41 (1984). Generally these statutes are seen in areas where there is a strong public interest in improving access to the court system for litigants who otherwise couldn't afford it. *Id.*
2. *Mount Vernon City Sch. Dist. v. Nova Cas. Co.*, 19 N.Y.3d 28, 39 (2012) (quoting *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986)).
3. *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989).
4. *Id.* at 492.
5. *Id.* at 489.
6. *Id.*
7. *Id.* at 491.
8. *Id.*
9. *Id. Accord Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 207 (1st Dep't 2010); *Ocwen Loan Servicing, LLC v. Ohio Pub. Emps. Ret. Sys.*, 2014 N.Y. Misc. LEXIS 831 *18–19 (Sup. Ct., N.Y. Co. 2014).
10. *Gotham Partners*, 76 A.D.3d at 207–09.
11. *Id.* at 209.
12. *Id.*
13. 194 A.D.2d 762, 764 (2d Dep't 1993).
14. *Id.*
15. 2014 N.Y. Misc. LEXIS at *19.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at *20.
20. *Id.* at *21.
21. 42 Misc. 3d 1213(A) (Sup. Ct., N.Y. Co. 2014).
22. *Id.*
23. 2013 N.Y. Misc. LEXIS 2341 *25–28 (Sup. Ct., N.Y. Co. 2013).
24. *Id.* at 28.
25. *Gotham Partners*, 76 A.D.3d at 205.
26. *Id.*
27. *Hooper*, 74 N.Y.2d at 492.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *See id.*
33. 40 Misc. 3d 1214(A) (Sup. Ct., N.Y. Co. 2013).
34. *Id.*
35. *See id.*
36. *Id.*