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Intra-Party Indemnification: Deciphering Party Intent

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Contractual indemnification provisions provide an incentive to contract that often serves the interests of both parties. As a result, they are commonplace in all manner of commercial agreements. When parties to an agreement containing an indemnification provision find themselves at odds in a litigation, however, the alignment of interest fractures. If the indemnification provision is silent as to intra-party actions or claims, a question arises as to how courts will ultimately interpret the agreement. (We note that courts and practitioners utilize "intra-party" and "inter-party" interchangeably to refer to disputes between the contracting parties. In this article, we utilize the term "intra-party" only.) This article identifies the factors that courts consider when determining whether an indemnification provision extends to intra-party disputes.

A Bright-Line Rule in 'Hooper Assocs. v. AGS Computers'

In New York, *Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989], is the seminal case on whether an indemnification provision extends to actions between the contracting parties. In *Hooper*, plaintiff sought indemnification from defendant under the parties' agreement after plaintiff prevailed on a breach of contract action for the purchase of computer equipment and services. *Id.* at 489-90. The court was asked to determine whether defendant had agreed to intra-party indemnification when it had agreed to indemnify and hold harmless [plaintiff] *** from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees arising of breach of warranty claims, the performance of any service to be performed, the installation, operation and maintenance of the computer system, infringement of patents, copyrights or trademarks and the like …. *Id.* at 492 (alteration in original) (quoting the language of the agreement). The trial court found the contract to be "clear and unambiguous in its terms and in providing for indemnification of all claims, including reasonable attorney's fees, by defendant to plaintiff." *Hooper Assoc. v. AGS Computers*, No. 04657/81, 1988 WL 1533033, at *1 [Sup Ct, NY County June 23, 1988]. The Appellate Division, First Department affirmed. *Hooper Assoc. v AGS Computers*, 146 AD2d 465 [1st Dept 1989].

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On appeal, the New York Court of Appeals not only reversed, but it also took the opportunity to lay out a new interpretive rule for indemnification clauses: an indemnification provision must be "strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper*, 74 NY2d at 491. In other words, indemnification should not extend to actions between the contracting parties "unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Id.* at 491–92. This new rule was of course anchored in

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the age-old American Rule: each party bears the cost of its own attorneys' fees as an incident of litigation, and the prevailing party cannot recover attorneys' fees from the losing party unless specifically granted by statute or contract. *Id.* at 491.

In applying the new rule, the *Hooper* court found that the indemnification provision at issue did not make it unmistakably clear that the parties intended to provide for intra-party indemnification because the types of claims covered by the indemnification provision – namely, "'. . . all claims, damages, liabilities, costs and expenses, including reasonable counsel fees' arising out of breach of warranty claims, the performance of any service to be performed, the installation, operation and maintenance of the computer system, infringement of patents, copyrights or trademarks and the like" – are also susceptible to third-party actions. *Id.* at 492. The *Hooper* court also examined the other provisions of the agreement and concluded that they did not support a claim for intra-party indemnification. The Court of Appeals found that a notice provision – which required plaintiff to notify defendant of any claims for which it would seek indemnification – and a provision that allowed defendant to "assume the defense of any such claim or litigation with counsel satisfactory to [plaintiff]" made it clear that indemnification applied only to third-party actions, because otherwise these provisions would be rendered meaningless if indemnification extended to actions between the parties. *Id.* at 492–93. Thus, the *Hooper* court held that "[c]onstruing the indemnification clause as pertaining only to third-party suits affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." *Id.* at 493 (citation omitted).

At bottom, *Hooper* established the following two principles: *First*, the language of the agreement must reflect a "virtually inescapable" intention to cover intra-party disputes and not just a mere inference. *See Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 209 [1st Dept 2010] (construing *Hooper*). The standard set forth in *Hooper* is not met if the indemnification provision only arguably or potentially covers intra-party actions. *Second*, the contract must be examined and construed as a whole. Practically speaking, all contract provisions must be reviewed to determine if any refute intra-party indemnification or if any provisions would be rendered meaningless if intra-party indemnification were granted. In certain cases, a holistic review of the contract itself may cut the other way, supporting the conclusion that the parties intended to provide for intra-party indemnification. *See, e.g.*, *Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325, 326 [1st Dept 1997] (affirming the viability of an intra-party indemnification claim where interpreting one portion of the subject indemnification clause as applicable only to third-party claims would render another portion of the clause mere surplusage); *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v Fine Host Corp.*, 418 F3d 168, 178–179 [2d Cir 2005] (comparing provision indemnifying defendant for activity arising from the negligence of plaintiff's personnel with provision indemnifying plaintiff for "any activity" under the Agreement and concluding that parties intended for defendant to indemnify plaintiff based on broader indemnification language).

The application of *Hooper's* two principles is illustrated in the following cases. In *Oscar Gruss & Son, Inc. v. Hollander*, defendant appealed an award of attorneys' fees and costs to plaintiff pursuant to the indemnification clause in the parties' agreement on the ground that the clause covered actions brought by third-parties only. 337 F3d 186, 198 [2d Cir 2003]. The Second Circuit agreed with defendant and vacated the attorneys' fee award to plaintiff. *Id.* at 198–200.

The *Oscar Gruss* court concluded that the indemnification clause did not apply to actions between plaintiff and defendant. The court found that the inclusion of the following provisions would have made sense only in the context of third-party actions: indemnification for "any claims, liabilities, or damages resulting from [plaintiff's] services, unless caused by [plaintiff's gross negligence or willful misconduct]"; plaintiff's right to obtain separate counsel; defendant's right to notice of plaintiff's claim for indemnification; and the requirement for defendant to obtain plaintiff's prior written consent before settling any lawsuits. *Id.* at 200. Moreover, the *Oscar Gruss* court noted that limiting indemnification to third-party actions afforded a fair meaning to the contract and left no provision without force or effect. *Id.*

In *Gotham Partners, L.P. v. High Riv. Ltd. Partnership*, plaintiffs and defendant were parties to a unit purchase agreement under which defendant agreed to buy shares in a limited partnership and to pay an additional purchase price in the event defendant transferred or sold those shares within 36 months. 76 AD3d at 204. After defendant merged with another entity within 36 months, plaintiffs sued and prevailed on a contract claim for the additional purchase price and sought their attorneys' fees and costs from defendant pursuant to the following indemnification provision of the unit purchase agreement:

[Defendant] agrees to indemnify and hold [Plaintiffs] harmless from and against all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, charges, expenses and disbursements (including reasonable fees and expenses of counsel) which may at

any time be imposed on, incurred by or asserted against [Plaintiffs], as a result of any action taken by (or failure to act of) [Defendant] following the execution and delivery of this Agreement with respect to, or associated or in connection with, [the shares] or [Defendant]'s interests [in the shares] ….*Id.* at 204–05.

The Appellate Division, First Department held that the indemnification provision failed to satisfy the exacting standard of *Hooper*. In reaching this decision, the *Gotham Partners* court first looked to the language of the indemnification provision itself and concluded that "any action taken by (or failure to act of) [Defendant] … with respect to… [the shares] or [Defendant]'s interests [in the shares]" does not evidence an unequivocal and unmistakable intention to cover intra-party actions because this language could relate to third-party actions as well as actions between the parties. *Id*. at 207; *see also Gate Five, LLC v Knowles-Carter*, 100 AD3d 416, 417 [1st Dept 2012] ("Defendants did not establish that the agreement's indemnification provision satisfied the exacting standard of language 'exclusively or unequivocally referable to claims between the parties themselves' as opposed to third-party claims only") (quoting, in part, *Hooper*, 74 NY2d at 492); *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 39 Misc 3d 1220(A), at *18-19 [Sup Ct 2013] (concluding that indemnification provision does not cover intra-party actions because provision only had the potential to cover claims between the parties, which fails to meet the "unmistakably clear" language required in *Hooper*). The *Gotham Partners* court also found it persuasive that the parties' agreement included a prevailing party attorneys' fee provision in favor of defendant, reasoning that this provision showed that the parties knew how to negotiate and draft an enforceable attorneys' fees provision and could have included one covering plaintiffs for any claims asserted against defendant if the parties intended to do so. *Gotham Partners, L.P.*, 76 AD3d at 206–07.

The Bright-Line Gets Blurry: Courts Distinguish Hooper

In spite of the seemingly straightforward approach to set forth in *Hooper* and its progeny, New York courts have not universally embraced the decision. In some cases, courts have found ways to extend indemnification to actions between contracting parties where *Hooper* would seem to preclude it. As a result, a line of cases has emerged that distinguishes *Hooper*. These cases limit the *Hooper* holding to those agreements that contain narrow and specific indemnification provisions, concluding that *Hooper* has no application to broad and general indemnification provisions. *See Happy Kids, Inc. v Glasgow*, No. 01 CIV. 6434 (GEL), 2002 WL 72937, at *4 [SDNY Jan. 17, 2002] ("[T]o construe *Hooper* to mean that no contract can be found to require indemnification for actions between the parties unless it expressly *includes* such actions – [is] something the *Hooper* court nowhere requires.") (emphasis in original); *Crossroads ABL, LLC v Canaras Capital Mgt., LLC*, 35 Misc 3d 1238(A), 2012 N.Y. Slip Op. 51042(U), at **3–4 [Sup Ct, NY County 2012] (stating *Hooper* is distinguishable because, among other reasons, the indemnification provision in this action does not enumerate specific types of actions that fall within scope of indemnification), *aff'd* 105 AD3d 645 [1st Dept 2013].

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When indemnification provisions are so broad and general as to provide coverage for "any and all claims" without carve-outs for certain types of disputes, both federal and state courts in New York have found that the breadth of such indemnification provisions evidences an intent by the parties to provide for indemnification in intra-party actions.

In *Crossroads ABL, LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645 [1st Dept 2013], the Appellate Division, First Department, affirmed a decision declining to dismiss, among others, a claim for indemnification in an intra-party dispute. Noting that the contract had been negotiated by "commercially sophisticated parties," the *Crossroads ABL LLC* court found that the following factors weighed in favor of intra-party indemnification: (1) that "the indemnification provision at issue [did not] preclude intra-party claims"; (2) that the contract contained no "provisions . . . that would be rendered meaningless" by reading the indemnification provision to include intra-party claims; (3) that the indemnification provision at issue was "extremely broad" because it applied to "'any and all claims, demands, actions, suits or proceedings'"; and (4) that the provision was not limited by a list of "the types of proceedings for which indemnification would be required." *Id.* at 645–46.

In *Happy Kids, Inc. v. Glasgow*, the Southern District of New York reached a similar conclusion with respect to the following indemnification clause: [Happy Kids] shall indemnify [Glasgow] to the fullest extent permitted by law if [he] … becomes a party to … any threatened, pending or completed action … arising

in part out of … any event or occurrence related to the fact that [he] is or was a director, officer, employee, agent or fiduciary of [Happy Kids] … or by reason of any action or inaction on [his] part … while serving in such capacity.

Happy Kids, 2002 WL 72937, at *3 (first alteration added). The *Happy Kids, Inc.* court relied upon the preamble to the indemnification clause, which provided indemnification and advancement of expenses "to the maximum extent permitted by law," and held that indemnification must extend to intra-party litigation because such an extension would not be prohibited by law. *Id.* at *3. The *Happy Kids, Inc.* court stated that "[t]he all-encompassing nature of the indemnity provided, the clear expressions of intent to reach to the maximum lawful extent of liability, and the express exception of certain categories of litigation between the parties compel the conclusion that the parties unmistakably intended an indemnity for other forms of litigation between them." *Id.* at *4.

In re Bridge Const. Servs. of Fla., Inc., No. 12 CIV. 3536 (JGK), 2016 WL 4625687 [SDNY Sept. 6, 2016] ("*Bridge IV*"), provides yet another example of a court holding that a broad indemnification provision fell outside the scope of the *Hooper* rule. There, the case concerned a general contractor and a subcontractor that both worked on the Tappan Zee Bridge rehabilitation project. A dispute arose when the general contractor's employee was knocked off of a barge and into the river as the result of a collision allegedly caused by the subcontractor's tugboat. *In re Bridge Const. Servs. of Fla., Inc.*, 39 F Supp 3d 373, 378 [SDNY 2014] ("*Bridge I*"). Prior to trial on the injured worker's common law negligence claims, each contractor separately settled with the victim and then petitioned for exoneration or limitation of liability on the basis of, primarily, contractual indemnification. After consolidating the actions, the court granted the general contractor's motion for summary judgment on its claim for indemnification for defense costs incurred as a result of the incident, including attorneys' fees, because the contract contained a clause establishing the subcontractor's duty to defend against all claims arising out of its acts or omissions without regard to its negligence or culpability. *In re Bridge Const. Servs. of Fla., Inc.*, 140 F Supp 3d 324, 335 [SDNY 2015] ("*Bridge II*"). Later, following a non-jury trial, the court resolved the apportionment issue and held that the subcontractor was required to indemnify the general contractor for liability caused by its own negligence, which had resulted in 40% of the total damages. *In re Bridge Constr. Servs. of Fla., Inc.*, 185 F Supp 3d 459, 475 [SDNY 2016] ("*Bridge III*").

The merits thus resolved, the general contractor made its application for legal fees. Opposing the application in part, the subcontractor argued that the indemnification provision required only that it reimburse the general contractor for fees incurred up to the date of settlement with the injured worker, the conclusion of the third-party action. Payment for fees arising out of the subsequent apportionment was not required, the subcontractor asserted, because at that stage the dispute had become an intra-party action and it was not "unmistakably" clear that the parties had intended for the provision to cover such matters. *Bridge IV* at *2 (quoting *Hooper*, 74 NY2d at 492). The court rejected this argument, stressing "the limited nature of *Hooper*'s holding" and some of the factors raised in *Crossroads*, namely, that the indemnification clause was "broad and general" and was not "limited to a specific list of items." *Id.* at *3. Accordingly, the court concluded that the broad language indemnifying for "costs caused by, arising out of or resulting from the acts or omissions of [the subcontractor]" evinced a clear intent to cover fees incurred in the intra-party apportionment action, which in the court's view arose out of both the third-party action and the acts or omissions of the subcontractor. *Id.*

Key Takeaways to Avoid Unintended Consequences

Parties who wish to avoid unintended consequences – either paying for intra-party indemnification when it was not intended or being denied indemnification when intra-party indemnification was intended – should be explicit as to their intentions in their contract. If the parties intend to include intra-party indemnification, they would be wise to include language indemnifying for "any and all claims whatsoever, including claims between the parties hereto." If they wish to exclude intra-party indemnification, parties should include disclaimer language such as "this provision applies only to claims made by third-parties, and nothing herein shall be construed as requiring indemnification for any claims between signatories to this agreement."