

Caveat Indemnitor

Top Court Highlights Importance of Understanding Indemnity Clauses

By Jeffrey Murphy, Esq.

Many commercial real estate contracts—including purchase and sale agreements, loan documents, construction contracts, joint venture agreements, and commercial leases—contain an indemnity clause, which requires one party (the indemnitor) to compensate another party (the indemnitee) for certain losses. A recent decision by Maryland’s highest state court underscores the need to consider the scope of, and potential liability under, an indemnity clause.

In *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLLP*, the Maryland Court of Appeals held that an indemnity clause in an easement agreement expressly entitled the indemnitee to recover attorneys’ fees in a first-party indemnification action and awarded more than \$3.5 million in attorneys’ fees to the indemnitee.

Bainbridge was constructing a 17-story apartment building on its land in downtown Bethesda adjacent to two single-story buildings that White Flint owned. The parties entered into an agreement permitting Bainbridge to install tie-backs and piles in the ground below White Flint’s property in connection with excavation on Bainbridge’s property.

The agreement contained a provision stating that “Bainbridge hereby indemnifies, and agrees to defend and hold harmless White Flint...from any and all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs, expenses, fees, and liabilities (including reasonable attorney’s fees, disbursements, and litigation costs) arising from or in connection with Bainbridge’s breach of any terms of this Agreement...”

White Flint’s property was damaged. White Flint claimed that the damage was caused by Bainbridge’s breach of the agreement. White Flint terminated the agreement and sued Bainbridge for breach of contract.

Maryland follows the common law American Rule that an indemnitee may be awarded attorneys’ fees that it incurs defending claims from any third parties but not prosecuting a direct action against the indemnitor (a “first-party” action). However, one exception to this rule is an express contractual agreement to shift first-party attorneys’ fees.

The court stated that “the question of whether first-party attorney’s fees are covered under the contract is determined by basic contract interpretation principles in order to determine the scope of the indemnification provision and whether the clause covers first-party enforcement rights.”

In this case, the Court of Appeals found that the indemnity clause contained sufficient language to constitute an express agreement to authorize first-party fee shifting.

Therefore, it is imperative that indemnitors and indemnitees understand and appreciate—and negotiate—indemnity clauses to ensure that the language provides the protection that they seek or limits the liability that they are willing to assume.

When negotiating an indemnity clause, pay particular attention to the who, what, when, where, why and how:

- Who is being indemnified? Is the right to indemnification limited to the named indemnitee or does it run to affiliates or third parties? Is it assignable?
- What is the indemnitor’s obligation and what types of losses are covered? Must the indemnitor only compensate or also defend the indemnitee? Are losses limited to actual damages or do they include incidental and consequential damages?
- When (if ever) does the indemnity expire? Does it terminate on a fixed date or upon the occurrence of a certain event, or does it survive indefinitely?
- Where can or must the indemnitee bring a claim? What other procedural requirements apply to an action for indemnification?
- Why are the parties including an indemnity clause? Do they intend to include first-party fee-shifting and, if so, is the language adequate?
- How is the indemnitor’s liability mitigated? Do the indemnitee’s acts or omissions lessen or eliminate the indemnitor’s obligations? Is there a liability cap? Is the indemnitor’s exposure reduced by the extent that insurance proceeds from a policy maintained by the indemnitee are available for the loss?

A greater comprehension of the terms and conditions of indemnity clauses will better reflect the intent and protect the interests of indemnitors and indemnitees with respect to any potential indemnification.