

Commercial division update: Navigating common law indemnification claims

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In this edition of their Commercial Division Update, Thomas J. Hall and Judith A. Archer discuss recent cases that have provided additional insight into the application of the requirements for seeking common law indemnification.

Our legal system aims to compensate an injured party for losses incurred while simultaneously disciplining the wrongful party for causing such harm by its improper actions or failure to act. By virtue of vicarious liability, however, an innocent party may be held liable for injuries caused by another party due to the legal relationship between the innocent party and injured third-party, for example a building owner's liability to third parties for the acts of its tenants. Frequently, indemnification claims arise from express indemnification agreements, but the right to seek indemnification can also be implied at law despite the absence of an agreement. While these doctrines allow one party to shift a loss to another, they generally are strictly enforced. Recent Commercial Division decisions have provided additional insight into the application of the requirements for seeking common law indemnification.

General standard

An express contractual indemnity generally will be enforced according to its terms, except where public policy precludes its enforcement, for example, because of criminal or other highly culpable conduct by the indemnitee. Otherwise, the parties are free to specify in the indemnification clause its scope of coverage, the circumstances under which indemnification is required and the procedures for same. Unlike implied indemnification, express indemnifications are enforceable to indemnify the indemnitee for its own

negligence, provided the language of the indemnity supports such a result.

Common law indemnification is of a different nature. Under the doctrine of implied indemnification, also known as common law indemnification, courts can impute a quasi-contractual obligation to indemnify. Under New York law, quasi-contractual obligations are imposed by law, where there has been no agreement by the parties, to assure a just and equitable result. Common law indemnification typically applies when, by operation of law, one is held responsible for another's actions due to their relationship. See *Konsky v. Escada Hair Salon*, 113 A.D.3d 656, 658 (2d Dep't 2014) (citation and internal quotation marks omitted) (stating that "the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee"). Pursuant to this relationship, which itself is often created by a written contract, the indemnitee delegates his or her responsibilities to the indemnitor but does not relinquish his or her obligations to a plaintiff. For example, New York courts typically recognize such a relationship between a general contractor and its subcontractors, allowing a general contractor, who is found liable for a subcontractor's wrongdoing, to seek common law indemnification from the subcontractor. *Sparks v. Essex Homes of WNY*, 20 A.D.3d 905, 906 (4th Dep't 2005).

Because common law indemnification is implied, the courts must determine its terms. New York courts routinely hold that, for common law indemnification to apply, the proposed indemnitee must establish that: (1) the indemnitor had exclusive responsibility for the actions or omissions that resulted in plaintiff's loss and (2) the indemnitee did not commit any wrongdoing itself that contributed to the plaintiff's loss. The second factor, that the indemnitee be free from fault, is of utmost importance. As Justice Margaret Chan of the New York County Commercial Division recently explained: "With respect to the proposed common law indemnity claims, it is well established that 'since the predicate of [such claims] is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that the party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.'" *XPO Logistics v. Malcomb*, 2021 WL 408243, 2021 NY Slip. Op. 30352(U), at *5 (N.Y. Co. Feb. 5, 2021) (quoting *Trustee of Columbia Univ. v. Mitchell/Giurgolas Assoc.*, 109 A.D.2d 449, 453 (1st Dep't 1985)).

In the *XPO Logistics* case, the plaintiff retained an architect to provide design services and separately contracted with a general contractor. Plaintiff sued the architect for malpractice, negligence and breach of contract. The architect then brought a third-party claim against the general contractor for contribution and indemnification. The general contractor moved for summary judgment dismissing the common law indemnification claim. In granting that motion, the court observed that the architect and general contractor had independent contractual duties to plaintiff and that any liability the architect is found to have would not be vicarious liability solely attributable to the general contractor's wrongdoing. As such, the doctrine of implied indemnity was inapplicable.

In *FTF Lending v. Mavirides Moyal Packman & Sadkin*, 2021 NY Slip Op. 31502(U) (N.Y. Co. May 4, 2021), the plaintiff sued the defendant for legal malpractice over a loan transaction. In connection with that transaction, the third-party defendant law firm, which represented that counterparty to the transaction, provided a title report that allegedly was fraudulent. The defendant brought a third-party claim against that third-party defendant for, inter alia, common law indemnification. In dismissing that claim, Justice Margaret Chan of the New York County Commercial Division again reasoned: "That said, however, the court finds that the third-

party complaint is insufficient to state a claim for common law indemnification. It is well established that 'since the predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that the party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.'" *FTF Lending*, 2021 NY Slip Op. 31502(U), at *8 (quoting *Trustee of Columbia Univ. v. Mitchell/Giurgolas Assoc.*, 109 A.D.2d 449, 453 (1st Dep't 1985)); see also *Board of Mgrs. of the St. Tropez Condominium v. JMA Consultants*, 2021 NY Slip Op. 31646(U), at *8 (N.Y. Co. May 12, 2021) (Justice Borrok dismissed defendant's common law indemnification claim against third-party defendants, explaining that the claim failed because plaintiff had not "alleged in the first-party action that [defendant] should be held vicariously liable for other parties, but only for its own alleged wrongdoing").

The requirement that the indemnitee be free from fault gives rise to two interesting procedural issues. The first is whether the court can consider, on summary judgment or otherwise, the merits of the indemnification claim before the main claim against the indemnitee is decided. The second is whether the settlement of the main claim against the indemnitee has any effect on the indemnification claim. The Commercial Division has recently been called upon to address both issues.

Procedural posture

While the merits of a common law indemnification claim are frequently decided after or simultaneously with the determination of the main action, at times the alleged indemnitee might seek an early determination on the indemnity claim, for example on summary judgment.

Justice Joel Cohen of the New York County Commercial Division addressed this issue in *Shah v. 20 E. 64th St.*, 2020 NY Slip Op. 31002(U) (N.Y. Co. April 20, 2020). The court concluded that "[a] party may seek a conditional indemnification order prior to resolving the main action, so long as there are no issues of fact as to that party's active negligence." The court granted summary judgment on the common law indemnity claim conditionally, dependent on a finding that the indemnitors were negligent, the court having already ruled on summary judgment that the indemnitee was not actively negligent, but could be found vicariously liable for

damages resulting from negligence of the alleged indemnitor. That outcome may have been different, with a denial of summary judgment, had the court not already ruled that the indemnitee had engaged in no active wrongdoing.

Effect of settlement

Another procedural issue courts face is how the settlement of the main claim against the indemnitee may affect the indemnitee's claim for indemnification against the indemnitor.

In the recent decision in *Board of Mgrs. of 141 Fifth Ave. Condominium v. 141 Acquisition Assoc.*, 2021 NY Slip Op. 50343(U) (N.Y. Co. April 19, 2021), Justice Andrew Borrok of the New York County Commercial Division held that a common law indemnification claim failed when the putative indemnitee settled the main claim against it without a final finding of liability. That dispute arose out of a building renovation, after which the building's board of directors sued the renovation project's sponsor for deficiencies in the work. The project's sponsor had hired an architect to assist with the project's design, including compliance with Local Law 11 applicable to building façades. The sponsor subsequently hired a construction company to further help with the work, including work relating to the Local Law 11 requirements. In 2010, upon completion of the construction company's work, the architect certified the safety of the building façade in compliance with Local Law 11. A subsequent report three years later, however, revealed that safety issues with the façade were in fact not remediated and many deficiencies still remained.

After plaintiff initiated suit, the defendant sponsor filed a third-party complaint against the architect for common law indemnity, breach of contract, and professional negligence, and cross-claims against the construction company for contractual indemnity, common law indemnity, and breach of contract. Soon after, plaintiff and defendant entered into a confidential settlement, whereby defendant agreed to assign to plaintiff its third-party and cross claims, including its common law indemnification claims against the architect and

construction company. Justice Borrok dismissed the assigned common law indemnification claims, holding that, as a matter of law, the claims could not prevail because defendant settled the claims against it before any finding of liability and, thus, "no common law indemnification is warranted, either to it or to [plaintiff] by way of an assignment of the claim." By assigning its claim for common law indemnification, the prerequisites for common law indemnification could not be established. Accordingly, Justice Borrok explicitly found that defendant "may have been entitled to common law indemnification if it was found vicariously liable" to plaintiff as a result of another's wrongdoing, however, such a finding was not possible once defendant assigned the claim to the plaintiff. Thus, plaintiff's "common law indemnification claim ... lack[ed] an appropriate predicate finding." The plaintiff would be "double dipping" if the court upheld defendant's assignment of its common law indemnification claims.

Conclusion

As recent Commercial Division cases illustrate, to pursue a common law indemnification claim successfully, careful procedural navigation may be required. For one, an indemnitee must consider the timing of seeking a decision on the merits of its indemnification claim, and whether it makes sense to await the outcome of the main claim against the indemnitee. An indemnitee considering a settlement of the main claim against it must assess the impact such a settlement may have on the indemnification claim and whether it would be prudent to involve the purported indemnitor in the settlement.

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