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Subcontract Indemnification Clause Did Not Require Sub to Indemnify Prime for Damages Caused By Prime's Own Negligence

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Indemnification clauses in a construction subcontract for steel work on a Home Depot store, were wrongly determined by a trial court to require the subcontractor to indemnify the prime contractor for damages caused by the prime contractor's own negligence. The primary clause in question required the subcontractor to indemnify the prime for damages to the extent caused in whole or in part by any negligent act or omission of the subcontractor regardless of whether the damages were also caused in part by the prime contractor or project owner.

The language of the contract was deemed by the appellate court to be ambiguous and did not clearly and unequivocally state an intent that the prime contractor's own negligence would be indemnified. By making the indemnification conditioned by "to the extent" caused by the subcontractor, there were two possible readings of the meaning of the clause.

As explained by the court, "To the extent" can be read to mean "if"; that is, [subcontractor] is required to indemnify [prime] only "if" subcontractor is also found negligent. Under that reading, "to the extent" is not inconsistent with complete indemnification of prime contractor, even for its own negligence, as long as subcontractor is also negligent "to some extent." But the phrases also can be read to require subcontractor to indemnify prime contractor only "to the extent" of subcontractor's (or its subcontractors') share of fault.

Neither the "regardless of" phrase nor the "to the extent" phrase answers the question whether such indemnification would include prime contractor's own share of fault. For these reasons, as further explained in the balance of this case note, the appellate court reversed the trial court decision which had the subcontractor to fully indemnify the prime contractor for damages caused by the prime contractor's own negligence.

In *Englert v. The Home Depot and Raimondo & Sons Construction*, 389 N.J. Super 44, 911 A. 2d 72, there were two indemnification clauses in the subcontract that the court considered. In addition to the clause discussed above, the contract contained a Rider that provided a combination insurance/indemnification clause. This clause of the Rider differed significantly from the language in the base contract in that it required the subcontractor to indemnify the prime contractor for any damages "caused in whole or in part by the acts or omission of subcontractor..." Unlike the base contract language, there was no condition about "to the extent caused" nor was there a provision stating that the indemnification applied "regardless of whether" damages were caused by an indemnified party. Finally, it is worth noting that this indemnification was apparently intended to be broader in that it applied without regard to whether the acts or omissions were "negligent."

How the indemnification of this contract was interpreted and applied had serious economic consequences for all concerned. The damages at issue were for bodily injuries sustained when an employee (steel worker) of a steel erecting sub-subcontractor fell thirty feet while welding structural steel and moving from one beam to another while wearing no safety harness and not otherwise protected by a net or other equipment. During the trial of the injured worker and the prime contractor, the prime agreed to settle the plaintiff's claims for \$2.35 million. On a motion for summary judgment, the trial court ordered the

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subcontractor to indemnify the prime for the full amount of the settlement, plus the prime contractor's attorneys fees.

In analyzing whether the trial court correctly applied the contract provisions, the appellate court considered first the law in New Jersey with respect to contractual indemnification for an indemnitee's own negligence. So long as the contract is unambiguous in its intent that the indemnitee be indemnified for its own negligence the New Jersey court honor the contractual intent. However, there must be no doubt about the intent and the agreement must specifically reference the negligence or fault of the indemnitee. In this case, the contract was drafted by the prime contractor and the ambiguity must be interpreted against the drafter to not allow indemnification for its own negligence.

Comment: Several issues concerning the indemnification clauses in the contract at issue in this case commonly occur in contracts that I review for clients. As an initial matter, it is surprising how often a contract contains an appendix or attachment that amends the contract with an "insurance" provision that also contains indemnification provisions that are different from those contained in the base contract. In many cases the language appears to be intended to supplement rather than delete and replace the similar clause in the form contract. In supplementing the contract language, however, the addenda may (as here) contain conflicting language that causes ambiguity. Such ambiguity may prevent a court from granting a summary judgment to enforce the contractual indemnification provisions. Because ambiguous provisions will be interpreted against the drafter, it is critical that the drafter pay attention to the details and get the contract right. For this reason, when reviewing the risk allocation clauses of contracts, I request a copy of the terms and conditions of the entire contract rather than permit the client to send me just the few clauses they think need to be reviewed.

When the trial court granted summary judgment in favor of full indemnification, the judge explained that he did not believe the "to the extent" language was intended to modify the language intended to require indemnification. According to the judge, "To the extent" simply requires that there be at least some liability on the part of the sub-contractor, or anyone directly employed by him, regardless of whether that liability may also be caused in part by an indemnified party." The judge also quoted from previous decisions holding that there is no inherent public policy against allowing one to be indemnified for their own negligence, and that in fact, "Parties to a construction contract are free to allocate risk and responsibility for injuries related to the construction." My advice to professionals that are reviewing contracts that require indemnification for damages caused "in whole or in part" by your client, includes:

1. Read the entire contract – don't get surprised by inconsistent language found in other sections of the contract or in an addendum the client didn't provide you. Also read the prime contract if it is incorporated by reference in the subcontract since it too may contain conflicting and superseding language;
2. Assume the intent is that if your client is even just a little bit responsible for the damages, he will be required to indemnify for ALL of the damages. Many courts will interpret the provisions as done by the trial court in this case to find that the "in whole or in part" language is not a comparative fault provision;
3. Even if language such as "to the extent" is added to the "in whole or in part" language, it is wise to expect a court will not use that language to limit the amount of indemnification.
4. Ask to have the "in whole or in part" language deleted from the indemnification clause on the basis that it is too confusing and misunderstood. Replace it with language that more plainly states that your client will indemnify others only for damages "to the extent caused by your client's negligent act, error or omission." Note that it is important that the "negligence" trigger be included if the



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Indemnitor is a design professional. I believe contractors should also ask to limit their indemnification in the same manner.

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