Quarterly Review

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Ohio Association of Civil Trial Attorneys

A Quarterly Review of Emerging Trends In Ohio Case Law and Legislative Activity...

OACTA Ohio Association of Civil Trial Attorneys

The Source for Defense Success

Contents

Tender of Indemnity and Insurance Issues – Additional Insured and Supplemental Payment Coverages

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A. Contractual Indemnification

It is common in many liability contexts for one party to attempt to shift to another party responsibility for claims connected to that party's operations. Initially, it is necessary to determine which state's law controls and is applicable to an indemnification agreement to determining its enforceability. Often indemnification contracts do not contain any specific provision indicating which state's law controls its interpretation. Thus, it is necessary to look closely at the agreement and the factors involved in its formation in determining what forum's law will govern the agreement.

Many courts, including those in Ohio, have reasoned that questions involving the nature and extent of the parties' contractual rights and duties are to be determined under Sections 187 and 188 of the Restatement of the Law Second, Conflict of Laws (1971). Restatement §188 provides that, in the absence of an effective choice of law by the parties, their rights and duties under the contract are determined by the law of the state that, with respect to that issue, has "the most significant relationship to the transaction and the parties." *Gries Sports Enterprises, Inc. v. Modell* (1984), 15 Ohio St.3d 284, syllabus; Restatement at 575, Section 188(1). To assist in making this determination, Section 188(2)(a) through (e) more specifically provides that courts should consider (1) the place of contracting, (2) the place of negotiation, (3) the place of performance, (4) the location of the subject matter, and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.

Many indemnification contracts impose upon one party (the "indemnitor") a duty to defend and indemnify another party (the "indemnitee"). Such an agreement may provide that the indemnitor agrees to defend, indemnify, and hold harmless the indemnitee from and against any (1) claims, damages, liabilities, losses, injuries and expenses (2) suffered by the indemnitee (3) arising out of negligent acts, errors, or omissions of the indemnitor.

In certain contexts, such as construction contracts, so-called "anti-indemnity" statutes restrict or prohibit agreements in which the promisor agrees to indemnify the promisee for damages caused by or resulting from the negligence of the promisee, regardless of whether such negligence is sole or concurrent. *Kendall v. U.S. Dismantling Co.*, 20 Ohio St.3d 61 (1985). There are 41 states with some form of anti-indemnity statute. The public policy at the heart of the statute is to make parties responsible for their own negligence.

Generally, however, contracts outside the construction context which provide for indemnification in the case of the indemnitee's negligence are considered valid and not contrary to public policy. When drafting such a provision, however, the language used must clearly and unequivocally indicate that the purpose and intent of the parties in entering into the contract is to cover losses occasioned by the indemnitee's own negligence. *Mikula v. Miller Brewing Co.*, 281 Wis.2d 712, 736, 701 N.W.2d 613, 624-625 (Wis.App.,2005). Because contracts requiring indemnitees to be indemnified for their own negligence are disfavored, they are strictly construed and must be clear and unambiguous.

Assuming an indemnification provision is facially valid and enforceable, the next question is whether the assumption of liability in the indemnification agreement can be passed on to an insurance carrier. While the language of each policy must be carefully examined, CGL policies typically contain provisions excluding coverage for contractual liability. Such policies provide that the insurance for bodily injury and property damage does not apply to:

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"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or
(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

Thereafter, an "insured contract" is defined to mean:

That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

In other words, many types of liability which an indemnitor may contractually assume potentially qualify as an "insured contract." The key factor in determining whether a contract is an "insured contract" is the insured's assumption of liability in the contract at issue. Assuming a contract containing an indemnification provision is an "insured contract," then it falls within an exception and the contractual liability exclusion will not apply. Note that any defense costs that are paid would actually be included as damages for bodily injury or property damage.

The Supplementary Payments provisions of a typical CGL policy also contains a provision for a defense for indemnity, subject to certain limitations. The supplemental payment portion of a typical CGL policy provides in pertinent part as follows:

If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:
(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of paragraph 2.b(2) of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages), such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys fees and necessary litigation expenses as Supplementary payments ends when:

a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or

b. The conditions set forth above, or the terms of the agreement described in paragraph f. above, are no longer met.

The potential problem with this application is section (d) and section (e). These require that there be no conflict between the insured and the indemnitee in order for the supplementary payments to apply and that the same counsel provide the defense. In that case, unlike the contractual liability portion of the Policy, the attorneys fees of additional counsel should not be considered as damages but will be included within supplementary payments and thus will not reduce the limits of insurance.

B. Additional Named Insureds

Another means by which parties seek to protect themselves from liability for property damage and bodily injury is by requiring that they be made additional insureds under the indemnitor's CGL policy.

1. Policy Forms

Additional insured status is meant to more clearly define the parties' obligations and responsibilities. The additional insured status is intended to provide extra coverage to the indemnitee in the event of an insurance claim. This status is provided by an endorsement or written amendment to the underlying policy.

Like a primary insurance policy, additional insured coverage generally provides both a defense and indemnity to the additional insured. Insurance companies, in response to a surge in various types of claims, have been steadily revising their standard additional insured endorsements. Thus, the terms of any additional insured endorsement must be reviewed in order to determine exactly what coverage is provided. The Insurance Services Office ("ISO"), has developed a series of standard form endorsements for additional insured coverage. These forms are identified by a form number and a date which usually appear in the bottom left corner of the endorsement page.

Most policies contain versions of two basic Additional Insured Coverage Forms: CG 20 09 and CG 20 10. The "CG 20 09" form excludes contractual liability coverage, which is essential when the additional insured assumes liability under an indemnity agreement. By contrast, the "CG 20 10" form provides coverage for certain contractually-assumed liabilities, but amendments to that form have steadily reduced the scope of coverage available for certain types of liabilities.

The ISO also has developed an endorsement that automatically provides additional insured status to any party when such status is required by contract. This form, CG 20 33, has also undergone a series of revisions since it was first issued in 1997, aimed at curtailing coverage for certain types of liabilities (*e.g.*, construction defect cases).

2. Certificates of Insurance

Often, a party who is to be named as an additional insured is provided with an Accord "Certificate of Liability Insurance". Such a certificate purports that the additional insured is

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named on the indemnitor's policy of insurance. However, the certificate of insurance should never be accepted as a substitute for a copy of the policy including the additional insured endorsement. The certificate of insurance does not confer any rights upon the certificate holder, and states on its face:

> THIS CERTIFICATE IF ISSUES AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

This clause makes the intent of the certificate clear. The Certificate of Insurance itself will not make any other party an additional insured under the policy—only the additional insured endorsement can do that.

Nevertheless, many parties continue to rely on certificates of insurance as satisfaction of the indemnitor's obligation to name them as an additional insured through an additional insured endorsement. For example, the following statements appear in an article entitled "Insurance Issues in Corporate Transactions," published by the Practicing Law Institute in April 1999:

> A document commonly used in both real estate and construction transactions is the "certificate of insurance". In leases and construction contracts worth many millions of dollars, drafting attorneys confidently attach certificates of proof that the insurance coverage required in the contract actually exists.
>
> Unfortunately, these documents do not create or alter coverage – a fact discernable by anyone who reads the very fine print. Their legal significance is as a representation by the broker that certain coverage terms exist, such as a loss payee clause, or as a recitation of the liability limits of a policy. It is not as representation by the insurer that coverage exists. The broker, unlike a traditional insurance agent, represents the insured, not the carrier.

See also Lawrence A. Steckmen and James J. Cleary, Jr., Construction Industry AIEs: Problems of Contract Interpretations and Solutions, 65 Defense Counsel Journal 78 (January 1988) ("the mere use of the phrase 'additional insured' in an insurance certificate, however, does not insure that an 'additional insured' relationship will be created").

As observed by Couch on Insurance:

> A certificate of insurance in some jurisdictions is only evidence of coverage and cannot alter the terms and conditions of the policy. In those jurisdictions, a practitioner must review the actual policy before drawing any coverage conclusions.

11 Couch on Insurance §154:42, Construction of Policy (Third Edition) ("Where an entity requires another to procure insurance naming it an additional insured, that party should not rely on a mere certificate of insurance, but should insist on a copy of the policy. A certificate of insurance is not part of the policy. 17 Couch on Insurance 3d § 242.33 2000).

In all matters of indemnification contracts and additional insured issues, there is no substitute for obtaining a complete copy of the contract or policy and analyzing its terms. Understanding the scope of what indemnification or additional coverage is or is not provided is the first step to effectively managing the risks that inherent in contractual arrangements with other parties.

Appendix

Page	Document
A1-A13.	Commercial General Liability Coverage Form (1998 Edition)
B.	AI Endorsement CG 20 10 (1985 Edition)
C.	AI Endorsement CG 20 10 (1993 Edition)
D.	AI Endorsement CG 20 10 (1997 Edition)
E.	AI Endorsement CG 20 10 (2001 Edition)
F.	AI Endorsement CG 20 10 (2004 Edition)
G.	AI Endorsement CG 20 37 (2001 Edition)
H.	Sample Acord Certificate of Insurance

Megan Faust: I focus my practice on insurance coverage, bad faith litigation and appellate matters, as well as general liability defense and litigation. I have handled trial and appellate work in Ohio's state and federal courts, and argued in courts of appeals throughout the country. I have partnered with a wide range of clients, including major corporations nationwide. As practice group manager, I oversee the growth of the group and development of specialties in the area of construction, transportation and insurance coverage litigation. I supervise of the group as a whole to ensure the best service is provided to our clients.

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