

Business Law Practice Tip
April 2009

Drafting Indemnification Provisions

This month's practice tip is based on a case from 1999 involving the enforcement of an indemnification provision. Indemnification provisions show up in almost every contract, whether it be an asset or stock purchase agreement, employment agreement, commercial lease, or as in this case, a consulting agreement. While not a new issue to the world of business law, this case nevertheless is a reminder (or perhaps a lesson to new attorneys) of the importance of carefully drafting and/or reviewing these types of provisions in agreements.

Jerry J. Coady v. Strategic Resources, Inc.
258 Va., 12; 515 S.E.2d 273 (1999)

Question: Can an indemnitor be required to pay the indemnitee's attorney's fees even in a suit to enforce the provisions of a contract against the indemnitee?

Short Answer: Under the facts of this case . . . YES!

Facts: On April 22, 1996, Strategic Resources, Inc. ("SRI") and Jerry J. Coady ("Coady") entered into a consulting agreement in which Coady was hired to perform certain consulting services for SRI. The consulting agreement included an indemnification clause stating:

CONSULTANT shall indemnify SRI . . . and hold [it] harmless from any and all claims, suits, proceedings, costs, losses, expenses, damages and liabilities, including but not limited to attorney's fees and court costs, caused by or arising out of, or in connection with, CONSULTANT'S performance or non-performance under this Agreement.

In September 1996 Coady submitted an invoice to SRI for his work during that month. SRI refused to pay the entire bill, but sent a check for approximately half the amount along with a letter stating that the check represented payment for approved hours and expenses.

Coady subsequently filed a warrant in debt against SRI in the General District Court of Fairfax County. SRI responded and filed a counter claim against Coady. The General District Court ultimately dismissed the case, but allowed SRI to file a motion for attorney's fees based upon the indemnification provision of the consulting agreement and awarded fees to SRI. Coady appealed to the Circuit Court and then to the Supreme Court of Virginia.

Court's Discussion: The Court stated that the indemnification provision in the case controlled over any statutes or jurisprudence with respect to the award of attorney's fees. Moreover, the Court stated that "[t]here is nothing in the language of the indemnification clause

that hinges the allowance of attorney's fees and costs upon a determination whether SRI was the prevailing party or not, was a winner or not, or was given a final judgment or not." The Court cited *Chesapeake & Potomac Telephone Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 362 S.E.2d 723 (1987) in coming to its decision, reiterating its opinion in that similar case where it stated that parties could contract in whatever manner they saw fit so long as they agreed to was not forbidden by law or against public policy.

Having determined that the indemnification provision did in fact control, the Court next discussed whether SRI's attorney's fees were incurred in connection with Coady's performance under the contract. The Court held that the fees did fall within the "broad and all-encompassing" terms of the provision.

This outcome holds important considerations for drafting indemnification provisions. Under the facts of this case, even if Coady had won, he could still have been required to pay SRI's attorney's fees in defense of this case under the indemnification provision. When, if ever, should such broad language be used? If you are representing the indemnitee, you likely would want a provision like this. On the other hand, the indemnitor should run away screaming from such a provision.

Other Considerations: How does a reciprocal indemnification affect drafting? Does it negate the effect of this kind of provision? What effect does a separate attorney's fees provision in the contract have on the terms of this indemnification provision?

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