



COMMERCIAL DIVISION UPDATE

Expert Analysis

Extending Indemnification Clauses To Claims Between Contracting Parties

The New York Court of Appeals in *Hooper Associates, Ltd. v. AGS Computers, Inc.*¹ established the principle that a claim under an indemnification clause for the recovery of attorney's fees by one contracting party against the other is allowed only where the clause makes it "unmistakably clear" that it was intended to apply to disputes between the parties. In the more than 20 years since that decision, New York courts continue to be faced with considerable litigation on this issue. In almost all cases, such litigation arises because the indemnification clause at issue fails to address directly the issue of claims between the contracting parties. While in many cases this lack of clarity is a result of the push and pull of contract negotiations, with ambiguity being the accepted outcome, such ambiguity frequently falls short of satisfying the unmistakably clear standard.

A recent decision by Justice Eileen Bransten of the New York County Commercial Division in *Gotham Partners, L.P. v. High River L.P.*,² and its subsequent review by the First Department, amply demonstrate the struggles that New York courts continue to have in applying the *Hooper* standard to indemnification clauses that do not directly address coverage for claims between the contracting parties.

The 'Hooper' Decision

In *Hooper*, defendant AGS Computers had contracted with plaintiff Hooper Associates to design, install and supply a computer system. A dispute arose and Hooper filed suit for breach of contract, which it won. Hooper then pursued a claim against AGS to recover the attorney's fees it incurred in the underlying suit, relying on an indemnification clause in the contract which provided, in relevant part:

(A) AGS shall at all times indemnify and hold harmless HLT [Hooper], its successors and assigns and any of its officers, directors, employees representatives, and/or agents, and their heirs, executors, administrators, successors and assigns or each of them against and from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees



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arising out of:

(i) Any breach by AGS of any express or implied warranty hereunder and any express representation or provision hereof.... (Emphasis added.)

The trial court held that this clause was "clear and unambiguous" and applied to "all claims," including disputes between the contracting parties.³ The First Department affirmed without opinion, and AGS Computers appealed.

In a unanimous reversal, the Court of Appeals held that the clause did not apply to disputes between the parties. The Court cited the long-standing American rule that attorney's fees are incidents of litigation that the prevailing party is not entitled to recover from the losing party unless the parties have so agreed.⁴ While

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recognizing that indemnification for third-party claims is a common practice, the Court of Appeals cautioned that courts must take care to ensure that a party has unequivocally assumed an obligation to indemnify the opposing party, as it is "contrary to the well-understood rule that parties are responsible for their own attorneys' fees."⁵ Thus, the Court held that it must be "unmistakably clear from the language" of the clause and the surrounding circumstances that the parties agreed to indemnification for disputes between the contracting parties.⁶

The Court noted that, in the clause at issue in *Hooper*, the parties did not use specific language addressing inter-party disputes. In addition, the

types of claims referenced in that contract, such as breach of warranty, are typically seen in third-party disputes; none of the claims listed were "exclusively or unequivocally referable to claims between the parties... or support an inference that [the parties] promised to indemnify [each other]... in an action on the contract."⁷

Finally, the Court took note of another clause in the contract providing that Hooper must "promptly notify" AGS of "any claim or litigation to which indemnity... shall apply," and AGS may "assume the defense of any such claim or litigation with counsel satisfactory" to Hooper.⁸ In the Court's view, this provision further demonstrated that the indemnification clause was not intended to apply to disputes between the contracting parties. Although an indemnification clause may "seem to admit of a larger sense... [it must be] strictly construed to avoid reading into it a duty which the parties did not intend to be assumed."⁹

'Gotham Partners' Decisions

In *Gotham Partners*, the New York County Commercial Division was called upon again to determine whether an indemnification clause satisfied the *Hooper* standard. In that case, plaintiff Gotham Partners had sold its interest in a real estate partnership to defendant High River. Under the sales contract, High River agreed to pay an additional amount if it sold or transferred that interest within 36 months. Within 36 months, High River sold its newly acquired interest. When High River refused to pay the additional amount due under the contract, Gotham filed suit for breach of contract and prevailed on summary judgment. Gotham then moved for reimbursement of its attorney's fees pursuant to an indemnification clause in the sales contract, which provided:

Purchaser agrees to indemnify and hold Sellers... and each of their respective officers, directors, partners, managers and employees (each, a 'Seller Indemnified Person') harmless from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, charges, expenses and disbursements (including reasonable fees and expenses of counsel) which may at any time be imposed on, incurred by or asserted against any such Seller Indemnified Person, as a result of any action taken by (or failure to act of) Purchaser or its Affiliates following the execution... of this Agreement with respect to, or associated

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or in connection with, the Partnership or Purchaser's interest therein, including the Sale Units (provided, that for avoidance of doubt, such obligation of Purchaser shall not arise out of the entry of the parties into this Agreement or any breach by Sellers...of any of their representations, warranties, covenants or agreements hereunder). (Emphasis added.)

The court held that this language satisfied the *Hooper* standard as it was "unmistakably clear" in providing indemnification for disputes between the parties.¹⁰ While referencing the broad "any and all" claims language, Justice Bransten observed that the clause carved out only two exceptions to indemnification, being losses arising out of entry into the agreement and any breach of the agreement by the seller, Gotham.¹¹ To the court, this carve-out language demonstrated that the parties considered the indemnification of disputes between the parties, agreed to release Gotham from this obligation to indemnify, and retained this obligation as to High River.

On appeal, the First Department reversed and held that the provision did not mandate indemnification for this dispute between the parties.¹² The Appellate Division observed that the trial court's interpretation of the contract was not irrational, but that "the strict standard imposed by *Hooper* requires more than that."¹³ Indeed, the court considered the trial court's interpretation to be just as plausible as High River's contrary interpretation that the provision merely protected Gotham from being subject to any costs incurred as a result of High River's ownership in the real estate partnership. But because *Hooper* "requires more than merely an arguable inference of what the parties must have meant [and] the intention to authorize an award of fees to the prevailing party in such circumstances must be virtually inescapable," the contract was not clear enough to provide for indemnification in a dispute between the parties.¹⁴

Other Decisions

While *Gotham Partners* is perhaps the most recent Commercial Division decision to consider whether an indemnification clause extends to disputes between contracting parties, earlier cases addressing this issue have focused on the language of the clause, other provisions in the contract, the nature of the parties involved and the nature of their relationship.

Frequently, courts have found that the exacting standard of *Hooper* has not been met.¹⁵ For example, in *2626 BWAY LLC v. Broadway Metro Associates, L.P.*,¹⁶ the New York County Commercial Division rejected a claim for attorney's fees in a commercial landlord-tenant dispute. In that case, a landlord filed suit against a commercial tenant for failure to obtain insurance as required in the lease, and later sought eviction. The landlord sought the recovery of attorney's fees pursuant to an indemnification clause in the lease, which provided for indemnification for:

Any failure on the part of the Tenant promptly and fully to comply with or perform any of the terms of, covenants or conditions of this Lease, or performance of any labor or services or the furnishing of any materials or other property in respect of the [premises] or any part thereof by reason of such occurrence...Tenant, upon

Landlord's request and at Tenant's expense, shall resist and defend such suit, action or proceeding, or cause same to be resisted and defended by counsel designated by Tenant and approved by Landlord.

The court was unpersuaded that this language expressed a clear intent by the parties to indemnify each other in a dispute between them. Notably, the lease included another provision that detailed occurrences for which the tenant would be liable to third parties, including "claims, damages, fines, penalties, interest [and] causes of action," which further demonstrated to the court that it was not "unmistakably clear" that the indemnification clause was meant to apply in inter-party disputes. Instead,

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it was more "typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim."¹⁷

Other Commercial Division courts, however, have found that the contracts before them satisfied the unmistakably clear standard.¹⁸ In a case last year before Justice Ira Warshawsky of the Nassau County Commercial Division, *Washington Mutual Bank, F.A. v. Peak Health Club, Inc.*,¹⁹ Washington Mutual sought the recovery of legal fees and expenses from a mortgagor after prevailing in foreclosure proceedings. The mortgagor argued that the indemnification clause in the mortgage did not apply to disputes between the parties in light of *Hooper*. The clause provided for indemnification:

With respect to any and all Liabilities and Expenses...incurred by, imposed upon or asserted against [Washington Mutual]...by reasons of, or in connection with...any failure by Mortgagor to comply with any of the terms, conditions or other provisions set forth in this Mortgage.

The court found this language to be unmistakably clear and expressly provided for indemnification for inter-party disputes. If the right of indemnification was limited to third-party disputes, the court found, the provision would be rendered meaningless.²⁰ Moreover, the court noted that Washington Mutual "would be the first and foremost predominantly affected party as a result of any...failure by the mortgagor."²¹ Unlike other cases where the potential claims specified in the contract were third-party claims, the court found that this provision was "intended to embrace litigation resulting from the [mortgagor's] failure to comply with the terms and conditions of the mortgage"—an inter-party claim.²² As a result, the court did not have to "imply an obligation to pay attorney's fees [like in *Hooper*]...[T]he requirement to pay fees is

unequivocally set forth in the indemnity provision as well as in multiple other provisions of the Loan Documents."²³

Conclusion

Gotham Partners demonstrates *Hooper*'s continuing impact on the application of indemnification clauses to inter-party disputes. The surest way to avoid such disputes is for transactional counsel to address the issue head-on when negotiating contracts. A simple statement, either in the indemnification clause or in a separate attorney's fee clause, that in any dispute between the contracting parties, the prevailing party shall be entitled to recover its legal fees, costs and expenses from the other party, should with rare exception satisfy the *Hooper* standard.

As some precedent reveals, however, such direct language may not be essential to recovery, particularly in light of the language in *Hooper* that a promise to pay the other party's attorney's fees "can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances."²⁴ While the unmistakably clear standard is now well-established, absent a clause directly addressing inter-party claims, what may appear to be unmistakably clear to one court may not be so unmistakably clear to another.

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1. 74 N.Y.2d 487, 549 N.Y.S.2d 365 (1989).
 2. 22 Misc.3d 1121(A), 880 N.Y.S.2d 873, 2009 WL 323386 (N.Y. Co. Jan. 21, 2009).
 3. *Hooper*, 74 N.Y.2d at 490, 549 N.Y.S.2d at 366.
 4. Id. at 491, 549 N.Y.S.2d at 366.
 5. Id. at 492, 549 N.Y.S.2d at 367.
 6. Id.
 7. Id.
 8. Id.
 9. Id. at 491, 549 N.Y.S.2d at 367.
 10. *Gotham Partners*, 22 Misc. 3d 1121(A), 880 N.Y.S.2d 873, 2009 WL 323386, at *4.
 11. Id. at *4.
 12. *Gotham Partners, LP v. High River Limited Partnership*, 2010 N.Y. Slip Op. 06149, 2010 WL 2813498 (1st Dept. July 20, 2010).
 13. Id. at *3.
 14. Id. at *4.
 15. *Adesso Café Bar & Grill, Inc., et al. v. Burton*, 74 A.D.3d 1253, 904 N.Y.S.2d 490 (2d Dept. 2010) (affirming Westchester County Commercial Division ruling denying attorney's fees because indemnification clause was too ambiguous); *Parkway Pediatric and Adolescent Medicine LLC v. Vitullo*, 72 A.D.3d 1513, 900 N.Y.S.2d 563 (4th Dept. 2010) (affirming Monroe County Commercial Division finding that indemnification clause was not "unmistakably clear"); *Digital Broadcasting Corp. v. Ladenburg Thalman & Co.*, 49 A.D.3d 412, 852 N.Y.S.2d 839 (1st Dept. 2008) (affirming New York County Commercial Division ruling that indemnification clause did not extend to disputes between contracting parties); *Goldwasser v. Geller*, 279 A.D.2d 297, 718 N.Y.S.2d 349 (1st Dept. 2001) (affirming New York County Commercial Division finding that indemnification was not clear in providing for attorney's fees in inter-party dispute).
 16. 2009 N.Y. Slip Op. 33002[U], 2009 WL 1832606 (N.Y. Co. Dec. 15, 2009) (Bransten, J.)
 17. Id. at *4.
 18. *West 16th Street, LLC v. 17th and 10th Associates, LLC*, 27 Misc.3d 1230(A), 2010 N.Y. Slip Op 50921(U), 2010 WL 2217822 (N.Y. Co. May 29, 2010) (Fried, J.) ("It is clear that the indemnification provision...includes [an] obligation to indemnify plaintiff for intra-party claims, including reasonable attorney's fees.")
 19. 2009 N.Y. Slip Op. 31334[U], 2009 WL 1832606 (Nassau Co. June 5, 2009) (Warshawsky, J.)
 20. Id. at *4.
 21. Id.
 22. Id. at *5.
 23. Id.
 24. *Hooper*, 74 N.Y.2d at 491-92, 549 N.Y.S.2d at 367.