Contractual Indemnification Provisions: Clear Drafting is Essential

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A recent California Court of Appeal Case, *Morlin Asset Management LP v. Edward M. Murachania*n, 2 Cal.App.5th 184 (2016), provides a strong reminder of the importance of clear and precise drafting of indemnification provisions. In *Morlin*, a carpet cleaner hired by the tenant suffered injuries when he slipped and fell in the stairwell of the building in which the leased premises were located. In response to the carpet cleaner's action against the landlord, the landlord cross-complained against the tenant, among other things, for express contractual indemnification based upon the terms of the lease agreement.

On appeal, the trial court's grant of the tenant's motion for summary judgment on the issue of indemnification was sustained on the basis that, as a matter of law, the lease indemnification agreement was limited to injuries arising within the leased premises and not in the building's common areas over which the tenant had no control.

The indemnification provision at issue in the lease was fairly typical, providing as follows:

"Lessee shall indemnify, protect, defend and hold harmless the Premises, Lessor and its agents... from and against any and claims, loss of rents and/or damages, liens, judgments... arising out of, involving or in connection with, the use and/or occupancy of the Premises by Lessee."

The tenant's motion for summary judgment was based upon the fact that the carpet cleaner's injuries occurred in the building common area stairwell and not in the leased premises and thus, beyond the scope of the contractual indemnification provision. The trial court agreed, concluding that the tenant's express indemnification obligation under the lease was limited by its terms to claims involving the leased premises themselves and did not extend to areas and facilities outside the leased premises (including common areas/stairs) over which the landlord has exclusive control.

On appeal, the landlord argued that the contractual indemnification provision (in particular, the "arising out of" language) should be liberally construed in favor of the indemnitee. The landlord cited to numerous insurance cases consistently giving a broad interpretation to phrases like "arising out of" or "arising from". The appellate court, however, rejected application of a broad interpretation as the case at hand was not an insurance case. Quoting from a prior California Supreme Court case, *Crawford v. Weather Shield Mfg., Inc*., 44 Cal.4th 541 (2008), the court stated the following:

- "[t]hough indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly... a public policy concern influences to some degree the manner in which noninsurance indemnity agreements are construed... if one seeks, in a noninsurance agreement to be indemnified...language on the point must be clear and explicit, and will be construed strictly against the indemnitee."

Applying the foregoing principle, the appellate court rejected the landlord's claim that the indemnification provision in the lease be read broadly to cover the injuries suffered by the tenant's carpet cleaner. The court held that the injuries to the tenant's carpet cleaner outside the leased premises did not arise out of the tenant's use of the leased premises.

Also of interest is the appellate court's rejection of the landlord's claim for equitable indemnification. Quoting from, *E.L. White, Inc. v. Huntington Beach*, 21 Cal.3d 497 (1978), the court stated that "[W]hen parties by express contractual provision establish a duty in one party to indemnify another, the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity... An express indemnity clause, rather than the equitable principles behind comparative indemnity, governs the scope of any duty to indemnify."

The key lesson is that clear and careful drafting of indemnification provisions is critical as interpretation will focus on the specific contract language, public policy will dictate a narrow construction and additional factors such as fault will be ignored. The entire issue may have been avoided had the lease indemnification provision specifically addressed injuries suffered in or about the building's common areas caused or suffered by the tenant and/or its employees, agents or invitees. Although the *Morlin* case arises in the context of a lease agreement, the same analysis is expected to hold true as to all other noninsurance indemnification agreements. Consequently, every contractual indemnity provision should be carefully reviewed and crafted to assure it fits the specific set of facts and range of potential claims.

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