

## Advocate's View: Indemnification agreements — Intra-party vs. third-party claims

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Whether you are a transactional attorney inserting an indemnification clause into a contract, or a litigation attorney determining whether to sue on an indemnification provision, it is important to understand how New York courts distinguish between intra-party and third-party indemnification clauses.

A typical indemnification clause within a contract states:

Party A shall defend, indemnify and hold Party B harmless from any and all claims, losses, expenses, costs, obligations and liabilities, including attorneys' fees, that Party B may incur by reason of Party A's breach of or failure to perform any of its warranties, guarantees, commitments or covenants in this Agreement.

In New York, a general indemnification clause like this creates a duty for Party A to indemnify claims by a third party against Party B; it does not create any duties with respect to claims between Party A and Party B for breach of the agreement.

The New York Court of Appeals explained this distinction in *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 NY2d 487, 491-92 (1989). Hooper sued AGS Computers for breach of a contract to design and install a computer system. The contract contained a general indemnification clause like the one quoted above. The jury ruled in Hooper's favor, and Hooper sought an award of attorneys' fees. Supreme Court awarded Hooper attorneys' fees under the indemnification clause, and the First Department affirmed.

The Court of Appeals reversed, holding that a general indemnification provision does not allow for an award of attorneys' fees in an action between the parties to the contract. The Court explained that a prevailing party may not recover attorneys' fees unless an award is authorized by the agreement between the parties, statute, or court rule. Indemnification clauses create a legal duty to indemnify that does not otherwise exist, and "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed."

A general indemnification clause like the one quoted above “is typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim.” The Court held that, because the indemnification clause did not expressly provide for the indemnification of intra-party claims with “unmistakably clear” language, Hooper was not entitled to recover attorneys’ fees from AGS arising out of AGS’ breach of its obligations under the service contract.

Based on this reasoning, New York courts also do not award “fees on fees,” or attorneys’ fees expended to enforce an indemnification clause, unless the agreement between the parties expressly states that such fees are compensable. See *546-552 W. 146th St. LLC v. Arfa*, 99 AD3d 117 (1st Dept. 2012).

Recently, I successfully argued in the Fourth Department that the rule set forth in Hooper is not limited to claims for attorneys’ fees, and it also bars intra-party claims for damages under standard indemnification agreements. See *Autocrafting Fleet Solutions Inc. v. Alliance Fleet Co.*, 2017 NY Slip Op 02197 (4th Dept. 2017). The Fourth Department agreed, stating “[i]t is hornbook law that ‘a promise of indemnity against loss is a promise by the indemnitor to reimburse the indemnitee after the indemnitee has paid [a] third party.’” *Id.* (Quoting Calamari and Perillo, *Contracts* § 17.8, at 680 (5th ed. 2003).) The Court held that “boilerplate” indemnification clauses do not give rise to intra-party claims for damages among parties to the agreement.

Practitioners should be aware that courts strictly construe the language in indemnification clauses. For the transactional attorney, if the parties intend for an indemnification clause to apply to intra-party claims, it must include language stating that the provision also applies to claims between the parties to the agreement. Alternatively, the parties may include separate clauses setting forth intra-party rights and obligations, such as a separate attorney fee provision applicable to actions between the parties to the agreement. For the litigator, it is important to advise one’s client that he/she will not be entitled to recover attorneys’ fees, or to sue for damages, in an intra-party dispute, based solely on a basic indemnification agreement.

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