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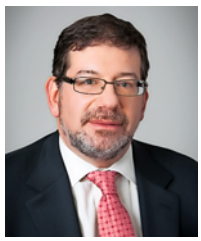
While parties to a lawsuit generally pay their own legal fees and expenses, contracting parties can include indemnification clauses in their agreements to establish a loser pays rule for lawsuits between each other. For those clauses to work in New York, however, they must be unmistakably clear. Attorneys from Weil, Gotshal & Manges LLP look at the ''unmistakably clear'' standard and suggest how it can be met, including the precision needed to draft an indemnification clause implementing a loser pays regime.

Clarifying the 'Unmistakable Clarity' Standard In Contractual Indemnification Provisions



BY RICHARD L. LEVINE, PETER FEIST AND JESSICA N. DJILANI

Under the ''American Rule'' in litigation, the prevailing party and the losing party *each* are responsible for their own legal fees and expenses. As a result, contracting parties often include indemnification provisions in their agreements with the intention of establishing a ''loser pays'' rule in the event of future lawsuits between the parties.

Mr. Levine is a partner in, and Ms. Djilani is an associate with, the Securities Litigation Practice Group in the Litigation Department of Weil, Gotshal & Manges LLP; Mr. Feist is a partner in the Private Equity Practice Group in Weil's Corporate Department.

New York State and federal courts applying New York Law, however, construe the reach of contractual indemnification provisions very narrowly as a result of the New York Court of Appeals' 1989 decision in *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 548 N.E.2d 903, 549 N.Y.S.2d 365 (1989). There, New York's highest court held that, in order for an indemnification provision to apply to the claim of one contracting party against the other (as opposed to a third-party claim against one of the contracting parties), the language of the indemnification clause must be ''unmistakably clear'' as to such intent.

Notwithstanding the *Hooper* decision and its progeny, contracting parties still often fail to sufficiently specify if their indemnity is intended to cover claims by

 ISSN 0148-8139

one contracting party against another (*i.e.,* ''direct claims'')—in addition to claims made by third-parties against one of the contracting parties (*i.e.*, ''third-party claims''). The failure to be ''unmistakably clear'' that the indemnity is intended to cover direct claims will likely be fatal to attempts by the winning litigant in lawsuits between the contracting parties to recover its legal fees from the losing party. Accordingly, parties who wish to cover direct claims in their indemnification provisions – and thereby contract around the American Rule—must ensure that their indemnification agreement meets the ''unmistakable clarity'' test first set out in *Hooper*.

This article thus examines what the ''unmistakable clarity'' standard promulgated in *Hooper* has come to mean in the years since that case was decided. This article also examines some of the instances where courts applying New York law have held that indemnification provisions in contracts, including merger and acquisition agreements, do – and do not – cover direct claims. Finally, this article will provide some general principles designed to assist practitioners in achieving the outcome intended by the parties.

'Unmistakable Clarity' Standard

In *Hooper*, the plaintiff, Hooper Associates, hired defendant AGS Computers to design, supply, and install a computer system. Hooper Associates later sued AGS claiming breach of contract, breach of express and implied warranties, and fraud in the inducement, and sought indemnification from AGS for the legal fees incurred in prosecuting its claims against AGS. Hooper Associates relied on an indemnification clause in the parties' contract that required the defendant to '' 'indemnify and hold harmless [plaintiff] . . . from *any and all* claims, damages, liabilities, costs and expenses, *including reasonable counsel fees'* arising out of breach of warranty claims [or] the performance of any service to be performed . . . and the like.'' *Id.* at 492, 548 N.E.2d at 905, 549 N.Y.S.2d at 367 (emphasis added).

After a jury trial which resulted in a verdict on liability in favor of the plaintiff, the trial court granted plaintiff's motion for summary judgment on its indemnification claim for attorneys' fees and the Appellate Division, First Department, of New York State Court (the ''First Department''), affirmed without opinion. *Hooper Assocs., Ltd. v. AGS Computs., Inc.*, No. 04657/81, 1988 WL 1533033 (Sup. Ct. N.Y. Cty. Jun. 23, 1988), *aff'd*, 536 N.Y.S.2d 693, 146 A.D.3d 465 (1st Dep't 1989).

The New York Court of Appeals, however, reversed the award of attorneys' fees. It determined that, given the American Rule, a ''court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is *unmistakably clear* from the language of the promise.'' *Hooper*, 74 N.Y.2d at 492, 548 N.E.2d at 905, 549 N.Y.S.2d at 367 (emphasis added). Therefore, even if an agreement to indemnify 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.'' *Id.* at 491, 548 N.E.2d at 905, 549 N.Y.S.2d at 367.

Because the Court of Appeals found that the indemnification clause at issue was ''typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim,'' and the types of claims covered were not ''exclusively or unequivocally referable to claims between the parties themselves,'' it held that the indemnity covered *only* third-party claims. *Id.* at 492, 548 N.E.2d at 905, 549 N.Y.S.2d at 367.

It is now well-established under New York law that, in order for direct claims to be covered by an indemnification provision, the language upon which the party seeking its legal costs relies must meet the ''unmistakably clear'' standard. The requisite ''unmistakable clarity'' is to be found—as *Hooper* (and its progeny) instructs—from the ''language and purpose of the entire agreement,'' as well as ''the surrounding facts and circumstances.'' *Id.*

Rebuttable Presumption Against Direct Coverage. As was observed by the U.S. District Court for the Southern District of New York (the ''Southern District'') in *Refco Securities Litigation*, the ''unmistakable clarity'' standard is really a ''misnomer for an approach that provides what amounts to a rebuttable presumption against a finding of indemnification of attorneys' fees in a suit between the contracting parties.'' *Krys v. Aaron (In re Refco Sec. Litig.)*, 890 F. Supp. 2d 332, 341 (S.D.N.Y. 2012).

In other words, a court will apply a presumption against indemnification for direct claims which may be rebutted by the party seeking recovery of legal fees by offering evidence that the parties, in fact, intended the indemnification clause to apply to direct claims.

The case of *Gotham Partners, L.P. v. High River Ltd. Partnership*, 906 N.Y.S.2d 205, 76 A.D.3d 203 (1st Dep't 2010), exemplifies the application of this presumption. There, the contract provided that the defendant was obligated to indemnify the plaintiff for any litigation-related costs, subject to two carve-outs: (i) for losses arising out of entry into the agreement, and (ii) for any breach of the agreement by the plaintiff. *Id.* at 206, 76 A.D.3d at 204-05.

The plaintiff argued that such carve-outs only made sense if the indemnity was construed to cover direct claims. The First Department, however, held that the indemnification clause only covered third-party claims despite the two carve-outs that arguably implied the parties' intention to cover direct claims—precisely because the indemnification provision could be read ''at least as easily'' to apply solely to third-party claims. *Id.* at 207, 76 A.D.3d at 208.

The *Gotham Partners* court explained that although it was not ''irrational'' to interpret the indemnification provision as covering direct claims, the provision should be construed to apply solely to third-party claims because, in order to cover direct claims, the *Hooper* standard requires ''more than merely an arguable inference of what the parties must have meant.'' *Id.* at 209, 76 A.D.3d at 209. The court concluded that, in order to cover direct claims, ''the intention to authorize an award of fees to the prevailing party . . . must be virtually inescapable.'' *Id.*

In evaluating whether an indemnification provision should be construed to cover to direct claims, courts applying New York law will examine:

(i) the precise language of the indemnification provision;

(ii) any additional, relevant provisions of the contract surrounding or referring to the indemnification provision (and, in certain circumstances, other agreements drafted or entered into contemporaneously with, or

  LW ISSN 0148-8139

prior to, the contract with the indemnification provision);

(iii) the circumstances under which the contracting parties entered into the contract; and

(iv) the types of claims that were foreseeable at the time of contracting.

Thus, unlike most contractual disputes, it is not merely the language used in the agreement but also the situation in which the parties were negotiating that will be determinative of whether direct claims—including associated attorneys' fees and expenses—are covered by the indemnification provision at issue.

Below, we address several key principles that emerge from the case law that seem to guide how courts construe indemnification provisions.

Indemnification Provisions That Likely Will Apply Solely to Third-Party Claims

As discussed above, absent careful drafting, a party suing, or sued by, its contractual counterparty likely will not benefit from an indemnity covering attorneys' fees and expenses.

Principle A: Broad, Nonspecific Language Won't Suffice. Where an indemnification provision contains expansive but nonspecific language as to the nature of the claims covered and the provision does not directly reference claims between the contracting parties, a court is likely to find that the indemnification provision applies *solely* to third-party claims—even if covered claims are expressly tied to the underlying contract.

> *Example*: ''Party A agrees to indemnify and hold harmless Party B from *any and all claims, damages, liabilities, costs and expenses*, including reasonable counsel fees, *arising out of any breach of this agreement*.''

In *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186 (2d Cir. 2003), for example, plaintiff investment firm Oscar Gruss & Son, Inc. (''OGSI'') brought a breach of contract claim against Hollander, the owner of a software company, for the alleged failure to deliver warrants under an engagement letter and Hollander cross-claimed for, among other things, breach of contract. *Id.* at 190-91. After OGSI prevailed on the merits, it sought reimbursement of its attorneys' fees and expenses under a provision in the parties' engagement letter that required Hollander to:

> reimburse [OGSI] promptly for any legal or other expenses reasonably incurred by it in connection with . . . any lawsuits, investigations, claims or other proceedings arising in any manner out of or in connection with rendering of services by [OGSI] hereunder (*including, without limitation, in connection with the enforcement of this Agreement* and the indemnification obligations set forth herein).

Id. at 199 (emphasis by the court).

Citing *Hooper*, the U.S. Court of Appeals for the Second Circuit (the ''Second Circuit'') concluded that this provision, including the phrase ''in connection with the enforcement of this Agreement,'' ''in light of the surrounding provisions . . . can apply only to a situation where Hollander refuse[d] to indemnify OGSI from a third-party action and not to an action commenced by OGSI against Hollander.'' *Id.* at 200.

Similarly, in *Canpartners Investments IV, LLC v. Alliance Gaming Corp.*, 981 F. Supp. 820 (S.D.N.Y. 1997), the Southern District held that plaintiff-lender was not entitled to indemnification of attorneys' fees and expenses under a financing commitment letter relating to the funding of a tender offer. Under that letter defendant-borrower agreed to indemnify each lender for ''any and all claims, damages and liabilities (including reasonable fees, expenses and disbursements of counsel) which may be incurred by or asserted against [a Lender] in connection with or arising out of any . . . litigation or proceeding arising out of or in connection with this letter agreement.'' *Id.* at 827 (grammatical changes in original).

Citing *Hooper*, the Southern District reasoned that, notwithstanding the broad language of the provision at issue, indemnification for attorneys' fees was not covered for the breach of contract claims asserted by the plaintiff because the language in the commitment letter was ''typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim.'' *Id.*

Thus, without specific language covering direct claims, and even where there is a reference to the enforcement of the underlying agreement, a court applying New York law is unlikely to find that the presumption against coverage of direct claims has been overcome.

Principle B: Possibility of Third-Party Claims. Where an indemnity provides that a party is entitled to indemnification without specifying coverage of direct claims, and the party challenging the applicability of the provision to direct claims can offer examples of potential third-party claims that could have been anticipated at the time of contracting that would be covered by the indemnification provision—even if the indemnitee can identify potential claims between the contracting parties that also would be covered—the court again is likely to find that the indemnification provision applies only to third-parties.

> *Example*: ''Party A is entitled to indemnification for any and all losses, claims, damages, costs (including reasonable costs of counsel), and liabilities in connection with any matter in any way relating to the agreement or arising out of the matters contemplated under the agreement,'' where Party B can provide examples of possible third-party claims that were foreseeable against Party A at the time the contract was drafted.

Unlike most other types of contractual disputes, when construing whether an indemnity covers direct claims, courts will examine the overall facts and circumstances without first making a finding of ambiguity. For example, in *Broadhurt Investments, L.P. v. Bank of New York Mellon*, No. 09 Civ. 1154 (PKC), 2009 BL 384481, 2009 WL 4906096 (S.D.N.Y. Dec. 14, 2009), plaintiff Broadhurt sued Bank of New York Mellon (''BNY Mellon'') alleging that the investment banking fees that BNY Mellon charged exceeded the contractually-permitted amount. *Id.* at *1. BNY Mellon counterclaimed for attorneys' fees for the costs of its defense based on an indemnification provision in the parties' agreement, which entitled BNY Mellon to indemnification for ''any and all losses, claims, damages and liabilities (including, without limitation legal fees and other expenses . . .), in connection with any matter in any way relating to or referred to in this Instruction Letter, and/or Losses arising out of the matters contemplated in the Instruction Letter . . . .'' *Id.*

While BNY Mellon admitted there was a potential for third-party claims at the time the parties negotiated the

agreement, it argued that the ''most likely scenario'' in which this provision would be invoked involved a dispute between the contracting parties themselves. The Southern District rejected this argument, reasoning that the question of whether the indemnification provision covered direct claims was ''not one of likelihood, but rather whether the clause [was] 'exclusively or unequivocally referable to claims between the parties themselves' '' and concluded that, in light of the potential for third-party claims at the time the agreement was negotiated, it was not. *Id.* at *3.

The same reasoning applied in *Goshawk Dedicated Ltd. v. Bank of New York*, No. 06 Civ. 13758 (MHD), 2010 BL 418140, 2010 WL 1029547 (S.D.N.Y. Mar. 15, 2010). There, the Southern District held that where it was foreseeable at the time the parties entered into the operative agreement that third-party claims against Bank of New York, as collateral and escrow agent, were possible, neither of two indemnification provisions could ''definitively be read to refer to non-third-party claims,'' and, thus, ''the parties' intent to indemnify [direct claims] [was] not unmistakably clear.'' *Id.* at *9.

Principle C: Clauses Inapplicable to Direct Claims. Where an indemnification provision contains clauses that are inapplicable to direct claims such as those (i) requiring a notice of claim to be given to the indemnitor; (ii) allowing the indemnitor to assume the indemnitee's defense; or (iii) allowing the indemnitor to select counsel, and there is no alternative provision explicitly applying to direct claims, the court is likely to find that the indemnification provision applies solely to claims by third-parties.

> *Example 1*: ''Each party indemnifies and holds harmless the other against and from any claim or loss resulting from the indemnitor's breach of this agreement, including reasonable attorneys' fees, court costs and litigation expenses, arising from the defense of any claim and enforcement or collection of a judgment, provided the indemnitor is given notice and an opportunity to defend the claim.''

> *Example 2*: ''Party A agrees to indemnify and hold harmless Party B from and against any and all claims, actions, causes of action, liabilities, losses, costs (including reasonable attorneys' fees), or damages claimed or arising directly from any breach by Party A of the agreement, provided that Party A shall have the right to defend or conduct and control, through counsel of its choosing, any such action or suit.''

In *Coastal Power International, Ltd. v. Transcontinental Capital Corp.*, 10 F. Supp. 2d 345 (S.D.N.Y. 1998), *aff'd*, 182 F.3d 163 (2d Cir. 1999), plaintiffs, buyers of a company that owned a floating power plant, asserted breach of contract and breach of warranty claims against the developer and seller, seeking to recover amounts necessary to reinstate certain types of the plant's insurance. *Id.* at 347-48. The plaintiffs also sought attorneys' fees, citing an indemnification provision that obligated the defendant to indemnify the plaintiffs for all ''Claims'' in connection with any covenant breach. *Id.* at 370. The indemnification provision, however, required the indemnified party, upon obtaining knowledge of facts that might provide a basis for a claim, to give notice to the indemnifying party, and also included a proviso stating that the right to indemnification survived a failure to give notice except in certain limited circumstances. *Id.* at 371.

The Southern District held that while the word ''Claim'' was defined broadly so as to include the attorneys' fees incurred by plaintiffs, without ''language clearly evidencing an intention'' to cover direct claims, along with the notice requirement the indemnification provision was limited to third-party claims. *Id.*

Similarly, in *Sequa Corp. v. Gelmin*, 851 F. Supp. 106 (S.D.N.Y. 1994), the Southern District held that an indemnity which included (i) a notice requirement, (ii) an assumption of defense clause, and (iii) a clause providing that the indemnitor ''shall be subrogated to the rights of'' indemnitees ''whenever [indemnitor] pays any amount'' pursuant to the indemnity agreement covered solely third-party claims, as these clauses had ''no application'' to direct claims). *Id.* at 111.

Indemnification Provisions That Likely Apply To Direct Claims

Without explicit language demonstrating the intention of the parties to cover direct claims, it will be difficult to rebut the presumption that an indemnification provision applies solely to third-party claims. Below, we distill some principles from the case law which suggest how contracting parties can satisfy the ''unmistakable clarity'' standard and overcome the rebuttable presumption against coverage of direct claims.

Principle A: Explicit Language, Clear Facts. An indemnification provision that is explicit in obligating one contracting party to indemnify the other for claims between the contracting parties should cover direct claims.

> *Example 1*: ''In the event of a final judicial determination of a breach by Party A, the undersigned, Party A, agrees to pay all reasonable attorneys' fees and expenses of Party B in litigation between such parties relating to such breach.''

> *Example 2*: ''Party A must reimburse Party B for all reasonable attorneys' fees and other expenses that Party B may incur in connection with claims asserted by Party B against Party A relating to the services to be performed pursuant to this agreement if Party B is successful in such litigation.''

In *Bristol Investments Fund, Inc. v. Carnegie International Corp.*, 302 F. Supp. 2d 177 (S.D.N.Y. 2003), an indemnity provision in a securities purchase agreement (and the same provision in a separate registration rights agreement) stated that, ''[t]he party which does not prevail in any dispute arising under this agreement shall be responsible for all fees and expenses, including attorneys' fees, incurred by the prevailing party in connection with such dispute.'' *Id.* at 178 n.1. Additionally, a provision in a debenture between the parties provided that ''[i]f default is made in the payment of this Debenture, the Borrower shall pay the Holder hereof costs of collection, including reasonable attorneys' fees.'' *Id.*

The Southern District determined that recovery of attorneys' fees and costs by the successful contracting party in a suit against the other was proper under the first provision because such provision ''specifically allow[ed] the *prevailing party* to recover the costs and attorneys' fees associated with the enforcement of the agreements'' from the party that did not prevail, which necessarily contemplated a suit between the two contracting parties. *Id.* at 179 (emphasis in original). The court also determined that direct claims were covered by the provision in the debenture which specifically provided for indemnification, including reasonable attorneys' fees, of the holder by the borrower. In sum, the

  LW ISSN 0148-8139

language in each of the provisions was precise enough to evidence the parties' intention to cover direct claims and there was no language suggesting otherwise.

Similarly, in *Resort Sports Network Inc. v. PH Ventures III, LLC*, 886 N.Y.S.2d 5, 67 A.D.3d 132 (1st Dep't 2009), the First Department concluded that defendant investment funds, after being found liable in damages for breach of the price adjustment provision in a merger agreement, were obligated, pursuant to the merger agreement, to reimburse the target company, RSN, for attorneys' fees, and that such attorneys' fees were not capped.

The merger agreement expressly provided in one section that the defendants were required to ''reimburse RSN for all fees, 'including, *without limitation*, any and all reasonable Legal Expenses.' '' *Id.* at 9, 67 A.D.3d at 137. Another section of the merger agreement contained a non-exclusive list of ''Indemnifiable Losses,'' which were subject to a cap.

The court concluded that, by discussing legal expenses ''without limitation'' separate from ''Indemnifiable Losses,'' the parties meant to exclude legal expenses from the category of ''Indemnifiable Losses'' subject to a cap, and held that plaintiff was entitled to reimbursement of all its reasonable legal expenses, in addition to damages. *Id.*

While explicit language is preferable, it may not be necessary for a court to find that direct claims are covered in the correct circumstances. For example, in *Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, No. 01 Civ. 2946 (DLC), 2005 BL 24176, 2005 WL 1863832 (S.D.N.Y. Aug. 8, 2005), the Southern District concluded that an indemnification provision in a deposit agreement between plaintiff Bank of New York and defendant NCL was sufficiently clear to overcome the presumption against coverage of direct claims. *Id.* at *8.

Reading the agreement ''as a whole'' and placing it ''in the context of the commercial arrangement to which it was addressed'' and given the absence of any provision suggesting that the indemnity was intended to cover solely third-party claims (such as a notice provision or assumption of defense clause), the court found it covered direct claims. *Id.* at *7-8. The court's analysis focused on the contrast between BNY's ''specific, limited duties'' under the agreement, which were ''crafted to shield BNY from liability for anything not listed,'' and the indemnification provision, which was ''broad, embracing all litigation in which [BNY] could reasonably be expected to become embroiled.'' *Id.* at *7 & n.13.

The court concluded that given the ''tightly crafted document'' and the fact that the deposit agreement was entered into by ''essentially all of the parties among whom litigation could reasonably be expected to occur if there were any dispute over BNY's conduct,'' the indemnification agreement would be construed to cover direct claims. *Id.* at *7-8.

Principle B: Separate Direct and Third-Party Provisions. Where an indemnification provision distinguishes between direct claims and third-party claims and purports to cover both, the court likely will find that direct claims are covered.

> *Example:* One provision states ''Party A agrees to indemnify and hold harmless Party B from and against any and all claims, causes of action, costs or damages, including reasonable attorneys' fees, resulting from any breach by Party A of any of its covenants or representations in the agreement, in connection with any claim relating to any such breach successfully brought by Party B against Party A,'' and another provision provides that ''each party agrees to indemnify and hold harmless the other from and against any and all claims, causes of action, costs or damages, including reasonable attorneys' fees, arising out of a claim or cause of action brought or prosecuted by a third-party based on any action or failure to act by the indemnifying party.''

Courts interpreting agreements with several indemnification provisions will infer from the structure and the language of the various clauses whether the parties intended each provision to cover direct claims or third-party claims, or both. In *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131 (S.D.N.Y. 2004), for example, the Southern District concluded that the structure of the parties' purchase agreement demonstrated an intent to cover both direct claims and third-party claims by comparing and contrasting the language of the various indemnification clauses in the agreement.

Where an indemnification provision distinguishes between direct claims and third-party claims and purports to cover both, the court likely will find that direct claims are covered.

The court observed that several of the indemnification provisions evinced an intent to cover third-party claims, because they included a notice of claim procedure, specific provisions governing instances where a party sought indemnification as a result of a third-party suit, and other language specifying that the indemnifying party would have the right to conduct and control the defense and could employ counsel at its own expense. *Id.* at 145-46 (citing Sections 8.3 and 8.4 of the Purchase Agreement). It determined that *other* provisions covering ''any breach by [the defendant] of any of its covenants or agreements in the Agreement'' and ''any breach of warranty or representation'' addressed direct claims. *Id.* at 145-46 (citing Section 8.2 of the Purchase Agreement).

The court concluded that the structure of the agreement and the contrasts between the various indemnity clauses evinced the parties' intent to cover both direct and third-party claims and that to hold otherwise would be to render some language mere surplusage. *Id.* at 146-47.

In another twist on this type of analysis, in *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168 (2d Cir. 2005), the Second Circuit addressed the scope of indemnification under the contract at issue by analyzing the indemnity provision in the body of the contract with the indemnity contained in an addendum that was added before the contract was executed. *Id.* at 178-79. It found that the indemnification clause in the body of the agreement required indemnification in certain third-party actions. Comparing that provision to the broad language in the addendum, the court concluded that the addendum ''unmistakably'' applied to direct claims. *Id.* at 178.

The court stated that, in drafting the indemnification clause in the addendum, the parties did not ''simply copy the structure and wording of the first provision,''

but rather, ''wrote an indemnity clause that sweeps more broadly,'' providing for reimbursement of attorneys' fees for ''any and all liabilities . . . damage . . . expenses (including reasonable attorneys' fees, court costs, and other costs) or actions of any kind or nature'' in connection with the agreement. *Id.* In order to give each provision effect, and so as not to render any provision superfluous, the court concluded that the indemnity in the addendum applied to actions of any kind or nature, including direct claims, while the other indemnity provision applied solely to third-party claims. *Id.* at 178-79.

Principle C: No Possibility of Third-Party Claims. Where it can be shown that there was no possibility of a third-party claim that would have been covered by the indemnity at the time of contracting—even where the indemnification provision contains general, nonspecific language and does not directly refer to claims between the contracting parties—a court is likely to find the indemnification provision covers direct claims.

> *Example*: ''Party A shall pay all costs, expenses and attorneys' fees which may be incurred or paid by Party B in enforcing the covenants and agreements of the contract,'' where it can be shown that, at the time of contracting, such a suit could have only been brought by Party B against Party A.

Thor 725 8th Ave. LLC v. Goonetilleke, No. 14 Civ. 4968 (PAE), 2015 BL 410527, 2015 WL 8784211 (S.D.N.Y. Dec. 15, 2015), *aff'd*, No. 16-139(L)-cv, 2017 BL 9138, 2017 WL 123282 (2d Cir. Jan. 11, 2017), exemplifies this principle. In evaluating an indemnification provision in a commercial lease between plaintiff landlord and defendant lessee, the Southern District concluded that the indemnification clause requiring the lessee to ''pay all costs, expenses and attorneys' fees which may be incurred or paid by Landlord in enforcing the covenants and agreements of this Lease'' covered the plaintiff landlord's attorneys' fees because ''[s]uch a suit could be brought *only against [defendant] as tenant*,'' and because it was '' 'difficult, if not impossible' to conceive of how this clause might apply to third-party claims.'' *Id.* at *6 (emphasis added).

Similarly, in *Sery v. Medina*, No. 13-CV-165 (RLE), 2015 BL 422968, 2015 WL 9450844 (S.D.N.Y. Dec. 23, 2015), the Southern District found a provision which stated that ''in the event of default, the undersigned [borrowers] agree to pay all costs of collection and reasonable attorney's fees'' of the lender to be unmistakably clear in the parties' intention to shift attorneys' fees from one contracting party to the other in the event of a default. *Id.* at *7. In holding that the direct claim was covered by the agreement, the District Court pointed to the similar contractual provision at issue in *Bristol Investments Fund, Inc. v. Carnegie International Corp.*, 302 F. Supp. 2d 177 (S.D.N.Y. 2003), discussed above, which also provided for indemnity for reasonable attorneys' fees in the event of a default in payment by the borrower. *Sery*, 2015 WL 9450844, at *7.

Finally, in *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131 (S.D.N.Y. 2004), the District Court held that the parties intended to cover direct claims where a Purchase Agreement provided for indemnification by defendants for a breach of warranty or representation because, the court reasoned, it would be '' 'difficult to imagine a third-party action as a result of' the indemnifying party's misrepresentation.'' *Id.* at 146.

Therefore, even absent explicit language addressing direct claims, where there is little possibility of a third-party action at the time of contracting, a court is likely to find that direct claims are covered.

Conclusion

Cases post-*Hooper* demonstrate that precision in drafting indemnification provisions is crucial to ensuring that the contract is later interpreted consistently with the parties' intentions to cover or not to cover direct claims.

While case law illustrates that explicit language is not always necessary for direct claims to be found to be covered, it also makes clear that courts interpreting an indemnity clause under New York law apply a presumption against coverage of direct claims, thereby making it highly unlikely that direct claims will be covered where there is any room for doubt. Further complicating the matter is the courts' willingness to look beyond the four-corners of the agreement to the facts and circumstances surrounding the negotiation of the indemnification provision and the claims that were foreseeable at the time of contracting, in order to determine the intent of the parties.

Accordingly, the best practice is to ensure that all indemnification provisions governed by New York law intended to cover direct claims are ''unmistakably clear'' in that regard by so stating expressly.

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