Fracking Contamination Lawsuit Raises Issue of Whether Indemnity Extends to Expense Of Enforcing Indemnity Provision

I. Southern District of Ohio rules that indemnity provisions must specifically refer to expenses of enforcing them if such expenses are to be paid by the indemnitor

The United States District Court for the Southern District of Ohio recently found that an indemnity provision in a drilling contract *did not* include indemnification for expenses (including attorneys' fees) incurred in enforcing the provision against the operator.[1] The dispute arose out of lawsuit brought by landowners who claimed a drilling company contaminated their water with fracking fluid. The drilling company demanded that the operator defend and indemnify it for any losses arising out of the lawsuit, but the operator refused. The drilling company then brought suit to enforce the indemnity provision and sought reimbursement from the operator for attorneys' fees and costs the drilling company incurred in enforcing it. The court ruled that indemnification for expenses incurred in enforcing the indemnity provision was *not* proper where the hold harmless language stated that the operator would hold its drilling contractor

> . . . harmless from and against any loss, damage [or] expense . . . for pollution or contamination . . . arising out of or connected with services performed [by the drilling contractor] . . . .

The court explained that "Pennsylvania courts, if faced with the issue, would decide that hold harmless language in an indemnification agreement does not shift the obligation for attorneys' fees incurred to establish the right to indemnity unless the agreement expressly identifies such attorneys' fees as an expense for which the indemnitor agrees to hold the indemnitee harmless."

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[1] *Warren Drilling Co., Inc. v. Equitable Production Company*, Case No. 2:12-cv-425, 2014 WL 4243769 (S.D. Ohio August 26, 2014).

II. Failing to expressly state that expenses incurred in enforcing indemnity provisions are subject to indemnification may preclude their recovery from indemnitors

The court predicated its ruling on two bases: (1) how Pennsylvania courts have addressed statutory fee-shifting provisions; and (2) how other courts nationwide have addressed the issue. The court first noted that under Pennsylvania law, a statute must expressly authorize fee shifting in order to overcome application of the American Rule under which litigants are responsible for their own attorneys' fees.[2] For example, in *Merlino v. Delaware County*, the Supreme Court of Pennsylvania held that Pennsylvania's Storm Water Management Act, which provides that, "[t]he expense of [a citizen suit] shall be recoverable from the violator . . . ," did not expressly provide for shifting of attorneys' fees, because "a statutory provision must be explicit in order to allow for the recovery of this particular form of expense."[3]

The court also cited two cases, one from the Second Circuit and the other from Maryland's highest court. In *Peter Fabrics, Inc. v. S.S. Hermes*, the Second Circuit held that a provision whereby one party agreed to "defend, indemnify, and hold harmless [the other party] from an against all claims . . . and expenses, including but not limited to cost of suit and attorneys' fees, based on or arising from the acts or omissions of [the first party]" was insufficient to shift attorneys' fees incurred in enforcing the indemnity provision itself.[4] There, the court explained that, "[m]erely including the words 'attorneys' fees' among the expenses indemnified against in the main action cannot reasonably be viewed as causing a shifting of fees in an action to establish the obligation to indemnify." Similarly, in *Nova Research, Inc. v. Penske Truck Leasing Co.*, the Court of Appeals of Maryland held that an indemnity provision that failed to explicitly mention fees incurred in enforcing the fee-shifting provision did not require the indemnitor to pay for such fees.[5]

The *Nova Research* Court also noted that a number of other states apparently follow this rule requiring specific reference to expenses of enforcing an indemnity provision if such expenses are to be paid by the indemnitor. A non-exhaustive list of such states includes: California,[6] South Carolina,[7] and New York.[8]

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[2] *Herd Chiropractic Clinic, P.C. v. State Farm Mut. Auto. Ins. Co.*, 64 A.3d 1058, 1066 (Pa. 2013)
[3] 728 A.2d 949, 951 (Pa. 1999).
[4] 765 F.2d 306, 316 (2d Cir. 1985)
[5] 952 A.2d 275, 284–286 (Md. 2008).
[6] *Otis Elevator Co. v. Toda Constr.*, 27 Cal.App.4th 559, 563–64 (1994).
[7] *Smoak v. Carpenter Enterprises, Inc.*, 460 S.E.2d 381, 383 (S.C. 1995).
[8] *See, e.g., Luna v. American Airlines*, 769 F.Supp.2d 231, 243–46 (S.D.N.Y. 2011).

III. How to ensure that expenses incurred in enforcing an indemnity provision are shifted to the indemnitor

If a company wants to ensure that it will be indemnified for expenses it incurs in enforcing its indemnity provisions, its contracts should expressly state that such expenses will be paid by the indemnitor. For example, the *Nova Research* court quoted a case where enforcement expenses were shifted to the indemnitor. The indemnity provision there stated that the indemnity agreement covered "any and all Loss," and defined "Loss" in relevant part as "[a]ny and all damages, costs, charges, and expenses of any kind, sustained or incurred by [the indemnitee] in connection with or as a result of: (1) the furnishing of any Bonds; and (2) the enforcement of this Agreement . . . ."[9] The specific language connecting "Loss" to "enforcement" was enough to ensure that enforcement expenses were shifted to the indemnitor.

As with all legal drafting, special care must be taken to ensure that a court will interpret a contract to mean what the parties want it to mean. This is especially true when it comes to indemnity provisions. This recent Ohio case reinforces the importance of crafting indemnity provisions as specifically as possible to ensure that they clearly reflect the parties' intention that expenses incurred in enforcing the indemnity provision will be paid by the indemnitor.

[9] *Atlantic Contracting & Material Co., Inc. v. Ulico Cas. Co.*, 844 A.2d 460, 469 (Md. 2004).