LEGAL FOUNDATIONS

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Key Concepts for Litigation

By: Nan E. Hannah

While sitting in a complex mediation recently, key words on which attorneys and clients alike should focus began to surface. Those words are SUCCESS; CREATIVITY; FLEXIBILITY; PATIENCE; AND COST/BENEFIT. Examining the words in the litigation context may help you prepare for your next case.

SUCCESS – In modern society, "success" is viewed almost exclusively in terms of a win or a loss. That narrow view may cause problems in litigation because rarely is the litigation process so black and white. The plaintiff may be virtually guaranteed a win if the term "win" means obtaining a judgment for every penny claimed including interest and attorney's fees. The result is an enforceable piece of paper which may be utterly uncollectable. Is that a success? What is that judgment worth to the plaintiff's bottom line? The reality is that most businesses would view recovery of some amount to be a greater success than attainment of that piece of paper. It is possible for "success" to end in a win-win. Keep that odd concept in mind and keep reading.

CREATIVITY can lead to the win-win. If the plaintiff/creditor is focused on maximizing recovery, then it will be open to creative resolutions. Solutions may involve security, payments over time, and/or creative sources of revenue. The key is paying attention to the opposing parties' reality/circumstances. A creative settlement might produce a financial recovery and even preserve a business relationship.

FLEXIBILITY – You truly cannot get blood from a turnip. If a party is rigid in what is required to resolve a case, opportunities to maximize recovery may be missed. "We have to recover 100% of principal" may negate an offer to settle for 80% early in a case. There is a good bet the party will spend more than the 20% difference on litigation costs before the case ends. There is no guarantee a judge will award attorney's fees and no promise the other party will not empty its coffers defending the action. Neither compromise nor a cost-benefit analysis should be viewed as weakness. Flexibility may well be prudent.

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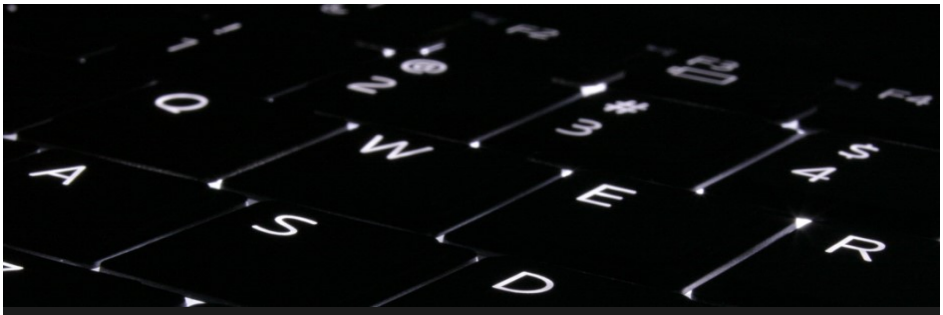

Contract Law

Indemnification, Duty to Defend, & Hold Harmless

By: Cody R. Loughridge

Often lumped together and buried in the small print of business and construction contracts, indemnification, duty to defend and hold harmless provisions are often accepted without much examination or fanfare. However, these three distinct provisions can have major consequences. An examination of each illustrates why it may not always be "best-practice" to accept these provisions without objection or scrutiny.

Indemnification. An indemnification provision, in short, shifts the liability of one party to another. Said differently, where Party A agrees to indemnify Party B, Party A agrees to be responsible for the liability or loss incurred by Party B in connection with the transaction. When examining an indemnification provision in a contract, it is important to examine: who is being indemnified (does it include employees, representatives, and affiliates or is it limited to the party him\herself?) and the limitations on indemnification (is there a monetary cap of the indemnification, is the indemnification the exclusive remedy of the party, or is there any baseline threshold before the indemnification obligation is triggered?).

Duty to Defend. The contractual provision known as "duty to defend" is simply that: where one party agrees to provide a defense and pay the legal expense associated with the defense. Perhaps the most commonplace example of duty to defend can be found in the insurance arena. By way of example, an insurance carrier/insurer would have the duty to defend its policyholder/insured against a claim by a third party. A similar scenario arises in the construction context: a contractor may have a duty to defend an owner against claims by a subcontractor (i.e. a lien). In that scenario, the contractor would be agreeing to provide the owner's defense against the subcontractor's lien, likely including the costs of attorneys' fees. It should be noted that exercising a duty to defend provision can create a situation where the defending party and the party being defended are at odds or disagree with the counsel retained, the litigation strategy being utilized, or potential terms of settlement.

Hold Harmless. A hold harmless provision is a contractual term designed to protect a party against the actual loss as well as risk of loss. In other words, Party A agrees not to hold Party B responsible or sue Party B for damages Party A might suffer.

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Key Concepts Cont.

PATIENCE – Litigation is a marathon, not a sprint. One saying among lawyers is "mediations rarely get serious until 4:00." Because of the Rules of Civil Procedure, litigation takes time to unfold. While discovery is a pain, it often results in information which serves to clarify issues. Mediation can do the same. Listening, paying careful attention to not just what is being said but to the context of what is being said, and keeping an open mind can result in a positive result – if you exercise patience.

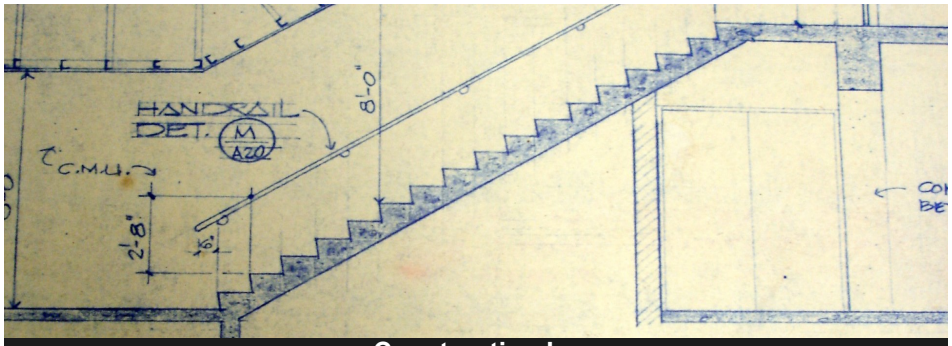
COST/BENEFIT – This aspect of litigation constantly evolves throughout a case. It ties to the first four concepts. As information develops, your analysis should evolve. Your spending related to litigation costs increase. Your understanding of the financial status of the opposing party also increases as well as your knowledge of the other party's position and its relative strengths and weaknesses. This may lead to a decision to cut losses by becoming more creative and flexible, and result in success in the form of recovering as much as possible given the totality of the circumstances.

Or, you may decide this case is a matter of principle such that success will only result from a trial with an outcome determined by a judge or a jury. That is always an option. As attorneys, we want clients to make informed decisions throughout a case. Considering whether a case is a matter of "principal" (actual recovery) or "principle" (standing up for what you believe even if there is no actual recovery in the end) is ultimately the client's decision.

Indemnification Cont.

It is often said that hold harmless and indemnification overlap, being that both provisions serve to absolve a party from responsibility for damage or liability. However, a hold harmless provision may cast a wider net than an indemnification provision, in that an indemnification is generally limited to the reimbursement of damages (read: losses) while hold harmless provisions seems to provide coverage against not just loss, but also risk of loss (read: being sued for loss).

Indemnification, duty to defend, and hold harmless provisions have become increasingly prevalent in North Carolina business contracts. As such, these provisions should be vetted on a case-by-case basis, being mindful of their potentially significant impact on a contractual relationship. The attorneys of Hannah Sheridan Loughridge & Cochran are well versed in negotiating these contractual provisions, and litigating them when necessary. If we can be of assistance to you or your business, please contact our office.



Construction Law

Unlicensed Contracting is a Costly Mistake!

By: Paul A. Sheridan

Oftentimes when there are claims involving quality of construction, non-payment of subcontractors or suppliers, or payments due to a general contractor for money due from an owner, issues of licensure suddenly appear. Whether or not a general contractor and certain types or classes of subcontractors are properly licensed can have a dramatic effect on the outcome of a claim.

North Carolina requires that any person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is $30,000 or more, or undertakes to erect a North Carolina labeled manufactured modular building meeting the North Carolina State Building Code, shall be deemed to be a "general contractor" engaged in the business of general contracting. Any person or business that falls within this definition is required to be validly licensed with the North Carolina Licensing Board for General Contractors ("Board"), with a few exceptions. Some of the exceptions are federal projects, erecting industrial equipment, power plant equipment, radial brick chimneys, monuments, and most often claimed, when the person or firm when the building is intended solely for occupancy by that person and his family or firm after completion. However, if the building is not occupied in that scenario for at least 12 months following completion, there is a presumption that there was not the requisite intent. In addition to having a license, the Board has created three levels or tiers of General Contractor, based on the contractor furnishing proof of financial responsibility on an annual basis. The Board issues a limited, intermediate, or unlimited license according to a company's working capital, with a maximum cost per project of less than $500,000, less than $1,000,000, and no limit, respectively. Completing a project for more than the respective amount allowed under a licensed contractor's tier, results in almost the same sanction as being unlicensed.

There are many nuances and fact situations that can affect the outcome when licensing is an issue. For instance, although a general contractor always has a choice of performing the entire scope of a contract, in many cases they hire numerous subcontractors. This will not affect the $30,000 calculation. Although several trade subcontractors are also required to be licensed by trade boards, this will not affect the calculation. Interestingly, if a subcontractor is working under a general contractor, and if their scope exceeds $30,000, they do not have to be licensed. However, if a subcontractor deals directly with an owner, and the subcontract exceeds $30,000, then they fall under the $30,000 or more rule and need to be licensed as a general contractor. Also important to note, if the contract later includes change orders that increase the total price above $30,000, it is considered to be a contract of $30,000 or more.

The sanction for the person or firm that enters into a contract without being properly licensed is to have the contract considered void. Thus the unlicensed contractor cannot enforce the terms of the contract, meaning the contractor cannot compel the owner to make payment. This is a harsh result, but the courts place a high burden on the contractor, in order to protect public safety. It is necessary for the contractor to be licensed at the time of the bid, and to maintain their licenses throughout. Entering into a contract with a contractor that is not properly licensed creates issues for all parties involved and can result in outcomes that no one can predict, so be cautioned that it should be avoided "at all costs"!

The Value of a Professional Attorney

By: Chad J. Cochran

Civil Litigation

The practice of law represents a constant lesson in human nature. Clients oftentimes visit with us amid difficult personal and financial situations. Our job is to counsel our clients through tough times and provide them with logical options for the future. The process is not always easy. Oftentimes, the underlying situation involves a heated dispute with another party – a business partner, a family member, a contractor, etc. When the going gets tough, a skilled attorney stays cool, collected, and treats the opposing side with dignity and respect. There is a certainly a time to aggressively and zealously fight it out in court. At the same time, attorneys who exhibit behind the scenes restraint generally leave more money in their client's pocket at the end of the day. This approach is called professionalism.

This Albert Einstein quote hangs on the wall of my office: "More the Knowledge Lesser the Ego, Lesser the Knowledge More the Ego …" I have had two recent conversations with attorneys who bear this principle out into real world dollars. One attorney called me last week and started screaming over the phone from the word go. I literally put the phone down to give my ear a break before I could even tell which case the lawyer was calling about. The lawyer on the other end of the phone just wanted to puff-up and would not listen to logic. If he had listened to logic, the lawyer could have avoided an expensive dispute by reading his statute book and pursuing a simple resolution. Instead, the parties are headed to court unnecessarily. C'est la vie. Another conversation in the last week demonstrates the value of the opposite, professional approach. Lawyers in our firm have worked with opposing counsel previously. Everyone believes that the lawyers at the table are reasonable. Our respective clients are at complete odds in their dispute. Settlement appears far away. In light of this dynamic, the attorneys are calmly discussing how to move through the lawsuit, identifying areas of agreement, and adding efficiencies to the dispute resolution process. Although this dispute is likely headed toward a contentious dispute in court, both sides will incur lower legal fees as a result of behind the scenes restraint.

North Carolina attorneys are governed by the Rules of Professional Conduct. An excerpt from the Rules' Preamble lies at the heart of this article's premise: "Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel … The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave with dignity." All of the attorneys at HSLC remain mindful of this goal and constantly strive to meet its expectations. Thousands of disputes have convinced us that this approach is not only professional, but also profitable for our clients.

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