Commercial Premises Owners in Personal Injury Construction Cases

Tendering the Defense to the Responsible Insurer and Compelling Acceptance of the Tender

By Adam A. Larson

Air-tight contractual indemnity and insurance clauses will go a long way, but commercial premises owners also have other means by which they can compel tender acceptance.

A construction worker employed by a contractor falls 20 feet from scaffolding to the ground and sustains crippling injuries. While many times when this happens, a worker is comparatively negligent, and the worker files a negligence claim against the premises owner alleging the premises were unsafe, the real tortfeasor, other than the plaintiff, is typically the plaintiff's employer, a construction contractor. But the contractor has paid worker's compensation insurance benefits to the plaintiff, and the plaintiff is barred from suing the employer by state law. The next target for the plaintiff is the owner of the commercial premises. While the law is clear that there is a non-delegable duty of a landowner to keep the landowner's premises safe, the practical reality is that a commercial landowner may have dozens of contractors on its property, all performing various jobs, all tackling a specialized issue that requires their expertise. The premises owner relies on them to provide not only competent work, but also to oversee the safety of their employees while on the job. This article will examine how commercial premises owners can protect themselves through indemnity and insurance provisions in a contract with a contractor after an employee of a contractor sues a commercial premises owner for personal injuries.

Strengthening Contracts Generally

It is extremely important for a premises owner to have a signed contract with every contractor that enters or that will have employees that enter the property to perform work. Among other things, a contract should have an air tight indemnity

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clause and insurance clause. The indemnity clause should require at a minimum that a contractor will defend and indemnify the premises owner for loss, liability, injuries, or damages arising from, growing out of, or connected with, the performance of the contractor's work under the contract, including attorney's fees and costs related to defending any action brought by a third party, including the contractor's employees. The insurance clause should require that a contractor carry substantial commercial general liability insurance and name the premises owner as an additional insured. The premises owner should request a copy of the actual applicable policy, not just the certificate of insurance.

Asserting that Injuries "Arose Out of" Third-Party Operations

Even with air-tight indemnity and insurance clauses, however, there are many ways that a contractor or the insurer for a contractor will try to deny a tender of defense or to limit the payment of attorney's fees and costs when the tender is accepted.

One basis for denial is that a third party will assert that a premises owner's sole negligence contributed to a plaintiff's injuries, and therefore, a contract's indemnity provision, or the additional insured endorsement to the policy to which a party tenders, does not provide coverage due to the premises owner's sole negligence; after all, the plaintiff in our hypothetical above has filed a negligence claim against the premises owner.

However, this ignores the fact that the plaintiff in these situations always has worked within the scope of his or her employment with the third party, and that third party was performing work under the contract with the premises owner. To attack this "sole negligence" approach, a premises owner needs to assert that a plaintiff's alleged injuries "arose out of" the third party's work in the sense that the alleged harm occurred while the plaintiff performed a task that was assigned to the third party under the contract between it and the premises owner.

Framed in that manner, a plaintiff's alleged injuries arose out of the third party's ongoing operations for the premises owner and are covered by the third party's insurance policy under the contract. *See, e.g., Transamerica Insurance Group v. Turner Construction Co.*, 33 Mass. App. Ct. 446, 449–51 (Mass. App. Ct. 1992) (holding that general contractor was entitled to coverage under additional insured endorsement restricted to liability arising from insured subcontractor's work where there was a "causal link" between the subcontractor's work and the subcontractor employee plaintiff's injury when a piece of granite fell onto the subcontractor employee); *Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity & Guarantee Co.*, 143 F.3d 5, 9–10 (1st Cir. 1998) (stating that a liability insurer has duty to defend underlying third-party action against its insured if allegations in a complaint are "reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy issued to its insured"). S*ee, also, National Union Fire Insurance Co. of Pittsburgh v. Lumbermens Mutual Casualty Co.*, 385 F.3d 47, 52 (1st Cir. 2004) (holding that a general contractor is entitled to coverage under additional insured endorsement restricted to liability arising out of insured subcontractor's work where subcontractor employees "were injured within the general area where the subcontractor's work was being performed, and their presence there was directly related to their work obligations, even if the employees were merely traveling to or from work or to or from a lunch break."). While the cases that have upheld this approach have analyzed indemnity issues between a contractor and subcontractor, the same principles apply when a premises owner seeks indemnification from a contractor.

Other jurisdictions have analyzed the issue, and the majority of them also uphold a similar broad construction that entitles a general contractor or premises owner to defense and indemnity as an additional insured even if a contractor or a subcontractor was not negligent and the premises owner may have some negligence.

The Fifth Circuit, in applying Texas law, held that the majority view around the country is to hold that a broad construction of "arising out of" operations entitles an additional insured to insurance coverage. In *Mid-Continent Casualty Company v. Swift Energy Company*, 206 F.2d 487 (5th Cir. 2000), Swift Energy Company leased and operated an oil drilling site which included Well No. 62. Swift hired Flournoy Drilling Company to drill the well. Flournoy requested that Air Equipment Rental, Inc. provide a casing crew to install casing at the site. Flournoy and Air Equipment entered into a contract for the work to be performed by Air Equipment. Air Equipment employee Oscar Lozano was injured on the drilling site when gas released from Well No. 62 ignited and exploded. Lozano sued Swift and Flournoy, alleging that their negligence caused his injuries. Mid-Continent Casualty Company had insured Air Equipment for the work. Flournoy notified Mid-Continent of Lozano's lawsuit and requested that Mid-Continent assume Flournoy's defense and provide indemnity under the contract. Swift demanded a defense from Flournoy and forwarded Swift's demand to Mid-Continent. Mid-Continent initially accepted the tenders but then rejected them (something that also occurs at times).

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Mid-Continent argued that the limitation in the contract "arising out of your ongoing operations" indicated that the additional insured endorsement applied only to liability resulting from the negli-

gence of Air Equipment, and it excluded liability arising out of the independent negligence of the additional insureds.

The court held that when injured, Lozano was an Air Equipment employee on Swift's premises in connection with Air Equipment's operations. *Mid-Continent Casualty Company,* 206 F.2d at 500. Under previous Texas decisions, Lorenzo's injuries therefore "arose out of" Air Equipment's operations. *Id.* The court rejected Mid-Continent's argument and held that Swift was covered as an additional insured under its policy even though Air Equipment was not negligent. *Id.* The court held that Mid-Continent could have expressly stated in the policy that liability not resulting from Air Equipment's sole negligence was not covered by the additional insured endorsement, but it did not do so, and reading such an additional limitation into the policy's language was contrary to the Texas rule that exclusionary language is narrowly interpreted. *Id.* at 499. *See also McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993) (finding city covered as additional insured with regard to injury suffered at festival because injury "arose out of" festival company's operations, even though city stipulated that it alone was negligent.)

A contract between the premises owner and contractor should state that the contractor's insurance policy is primary with respect to any other similar insurance maintained by the premises owner.

Refuting Contract Time-Period Arguments

Another basis for denial of a tender demand is a third party asserting that a contract was not in effect at the time of the alleged incident because it was either signed after the date of the incident or was not in effect at the time of the incident. First, it is always important to make sure that a contract is signed by both parties and to include a provision that the contract may be executed in counterparts and "all counterparts so executed shall constitute one agreement, binding upon both parties, notwithstanding that both parties are not signatories to the original of the same counterpart."

Second, it is also important to make sure that a contract for a premises owner has language that specifically outlines the exact time period for the contract and the beginning and end dates that it is effective. A contract can be signed by a party after the effective date as long as the contract expressly provides when the effective date of the contract begins. Massachusetts appellate decisions, including the Massachusetts Supreme Judicial Court, have held that a contract's effective date is the date set forth in the contract, and not when the contract is signed. *See Suffolk Construction Company, Inc. v. Lanco Scaffolding Co., Inc.*, 47 Mass. App. Ct. 726, 729–30 (Mass. App. Ct. 1999) (holding May 24, 1991 as the effective date of contract as set forth in contract despite contract not being formally sent and signed to subcontractor until June 6, 1991); *Greater Boston Cable Corporation v. White Mountain Cable Construction Corp.*, 414 Mass. 76, 80 (Mass. 1992) (stating that a construction agreement, by its terms, was effective on April 11, 1985 even though subcontractor did not sign agreement until April 23, 1987); *Oliveira v. Cappello Trucking, Inc.*, 22 Mass. L. Rptr. 588 (Worc. Sup. Ct. 2007) (evidence showed that agreement signed after date of accident was in effect at the time of the accident pursuant to terms in contract (citing *Suffolk Construction Company, Inc.,* 47 Mass. App. Ct. 726, 729–30 (Mass. App. Ct. 1999) and *Greater Boston Cable Corporation,*414 Mass. 76, 80 (Mass. 1992)).

Moreover, contracting parties can seek to have portions of a contract apply retroactively, including an indemnification clause. The court in *Bowen Engineering v. Estate of Reeve,* 799 F. Supp. 467, 486 (D. N.J.1992), held that there is no *per se* limitation on the right of parties to have a contract apply retroactively, including to an indemnification clause in a contract. In *Martinez v. Barasch*, 2006 WL 435727 (S.D.N.Y. 2006), a party participating in an employee benefit plan objected to enforcement of a third-party administrator's contractual indemnity rights created by a service contract because the parties added the indemnity clause in March 2002, a year after the litigation began. The court held that Churchill Administrators Inc., the third-party administrator seeking indemnification, was entitled to indemnification. The court cited *Bowen,* ruling that as a matter of law, New Jersey permits "parties to apply an indemnity clause retroactively." *Id.* (citing *Bowen,* 799 F. Supp. at 486). As long as the parties understood that the clause was to apply retroactively, its effect was not limited to the period after the date that the parties signed the contract. *Id.* (citing *Bowen*, 799 F. Supp. at 486–87). The circumstances under which Churchill and the trustees of the benefit fund in this case added an indemnity provision to their contract—specifically, the existence of the ongoing lawsuit—and the broad language of the provision, which promised indemnification for "any and all claims," supported a finding that the parties intended the provision to apply retroactively.

Countering Priority of Coverage and Litigation Costs and Fees Disputes

Third-party insurers will also attempt to demand a copy of the premises owner's insurance policy to determine the priority of coverage and assert that a premises owner's insurance policy has priority over the contractor's policy. A contract between the premises owner and contractor should state that the contractor's insurance policy is primary with respect to any other similar insurance maintained by the premises owner.

Further, once a tender is accepted by a third party, disputes can arise about how much a third party must contribute in attorney's fees and costs to the defense of a case. The majority view holds that for an indemnitee to recover attorney's fees and other litigation costs incurred in the defense of a claim alleging the indemnitee's own negligence, the indemnity agreement must expressly provide this. George E. Powell, Jr., *Indemnitor's Liability for Attorney's Fees and Expenses Arising out of Defense of Action Alleging Indemnitee's*

Negligence, 59 A.L.R. 5th 733, §3 (1998). This is known as the "express-negligence test." *Id.* Texas has adopted the express-negligence rule, which is a "rule of contract interpretation that applies specifically to agreements to indemnify another party for the consequences of that party's own negligence." *See XL Specialty Insurance Co. v. Kiewit Offshore Services, Ltd.*, 513 F.3d 146, 149 (5th Circ. 2008) (citation omitted). Under the rule, "contracting parties seeking to indemnify one party from the consequences of its own negligence must express that intent in specific terms, within the four corners of the document." *Id. See also Thompson v. The Budd Co.*, 199 F.3d 799 (6th Cir. 1999); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 200 F.3d 518 (7th Cir. 1999); *Burlington Northern R. Co. v. Farmers Union Oil Co. of Rolla*, 207 F.3d 526 (8th Circ. 2000).

In *Thompson*, the contract contained the following indemnity provision:

> With regard to the work to be performed hereunder by the contractor on the owner's premises, contractor agrees to and will indemnify and hold harmless owner from and against any claims, losses, or damages due to the death of or injury to the person or the property of any person, or persons, ... arising out of, or in connection with, contractor's performance hereunder, except as to any such loss or damage which is caused by the sole negligence, or wanton and willful misconduct of owner or owner's agents, servants or employees.

199 F.3d at 810–11.

Because attorney's fees were not expressly in the indemnity provision, the court held that the contract "allows—but does not require—a court to award attorney fees despite the absence of liability [by the indemnitee] unless [the indemnitee] was defending claims that arise out of its 'sole negligence, or wanton and willful misconduct." *Thompson*, 199 F.3d at 811.

In a minority of states, courts have declined to address the nature of the allegations asserted against an indemnitee when determining whether indemnification for fees and costs is warranted. 59 A.L.R. 5th 733, §4. *See Delle Donne & Associates, LLP v. Millar Elevator Service Co.*, 840 A.2d 1244 (Del. 2004). In *Delle Donne & Associates, LLP,* the contractual indemnification clause did cover "reasonable" attorney's fees and expenses stemming from defending against claims under a duty to indemnify. However, the court also held that attorney's fees and expenses may be recovered under an indemnification agreement even when the indemnity clause does not expressly mention attorney's fees. 840 A.2d at 1255.

In addition, even when a contract expressly provides for attorney's fees, in many instances, the date that a tender is made is the date upon which an insurer will begin to pay a premises owner's counsel for attorney's fees and costs incurred defending the claim. However, that is not the case in every state. For example, Virginia law does not require notice to a third party as a condition precedent for reimbursement of pre-tender attorney's fees and costs in defense of an action if the subject contract does not require it. In *Southern Railway Company v. Arien Realty Development Corp.*, 220 Va. 291, 296 (Va. 1979), the court held:

> The general rule is that, in an action by an indemnitee against his indemnitor, a judgment entered in favor of a third party against the indemnitee is not conclusive upon the indemnitor unless the indemnitee gave the indemnitor notice of and an opportunity to defend the prior suit. (citation omitted). This is merely a procedural rule; it does not affect the indemnitee's substantive contract rights against his indemnitor. Unless the contract of indemnity provides otherwise, the indemnitee's failure to give the indemnitor timely notice of and an opportunity to defend against the third party's claim does not bar recovery by the indemnitee against the indemnitor. Such failure only prevents the indemnitee from using the third party's judgment as conclusive evidence of his liability to the third party and of the damages arising therefrom. Arlen's contract with Southern did not make notice of and an opportunity to defend against Martin's action a condition precedent to Southern's right to indemnity; thus, any failure by Southern to timely notify Arlen could not preclude that right.

This right also includes recovering attorney's fees and costs in defending the lawsuit. As a general rule, and unless an indemnity clause in a contract provides otherwise, an indemnitee is entitled to recover, as part of the damages, reasonable attorney's fees. *Southern Railway Company*, 220 Va. at 296, 297. Attorney's fees and costs are recoverable even if an indemnitee failed to notify the indemnitor of the tort action and demand that the indemnitor take over and assume the defense of that action. *Id.* at 297.

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Moreover, many times, a third party is on notice of an incident before receiving a tender letter because the suffered injury typically will involve one of the third party's employees or agents who reports the incident right after it happens. Often an incident report will be filled out by the third party, which the premises owner can use to assert that the third party was on notice of the incident before any tender was made.

Reaping Contracting Forethought Benefits

Commercial premises owners have many concerns other than potential litigation from personal injury claims. However, with some forethought and planning before drafting a contract, a premises owner can avoid the pitfalls and frustration of having to defend itself when a contractor's employee is injured on the job. By drafting contractual insurance and indemnity clauses that comprehend the type of work that will be performed, a premises owner can ensure that it will not have to incur substantial fees and expenses in the event of a personal injury lawsuit.