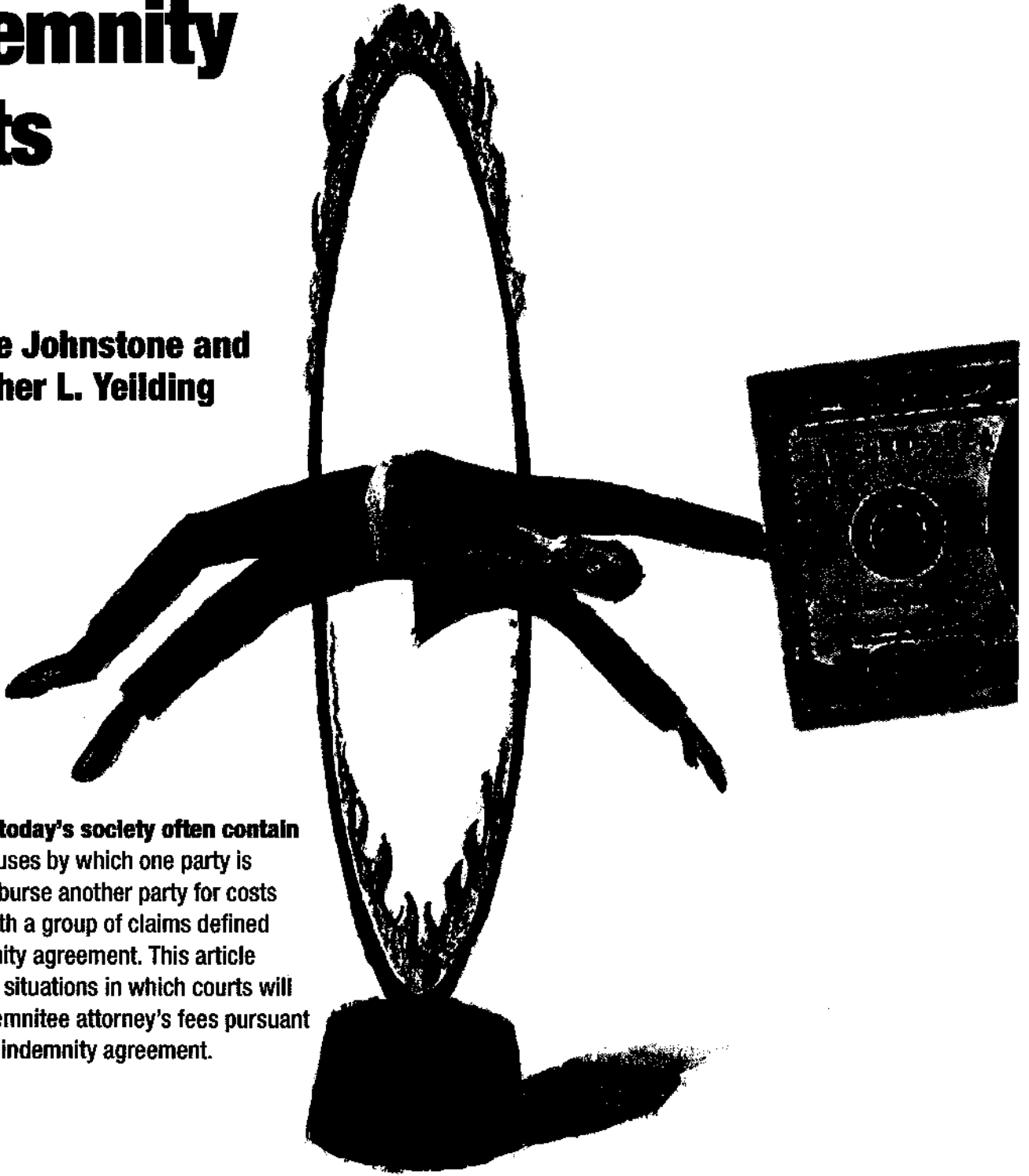


Getting Paid

The Recovery of Attorney's Fees in Contractual Indemnity Suits

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Contracts in today's society often contain indemnity clauses by which one party is asked to reimburse another party for costs associated with a group of claims defined by the indemnity agreement. This article discusses the situations in which courts will award an indemnitee attorney's fees pursuant to an express indemnity agreement.



Inevitably, the question arises as to what extent the indemnifying party need pay attorney's fees incurred in connection with the indemnity agreement. The answer depends on the context in which the request for attorney's fees arises. These four contexts are: (1) attorney's fees incurred in defending a suit brought by a third party; (2) attorney's fees incurred in prosecuting a suit against the indemnitor for indemnification; (3) attorney's fees incurred in prosecuting claims against third parties; and (4) attorney's fees incurred in non-indemnity claims between the contracting parties.

Attorney's Fees Incurred in Defending Third-Party Claims

The first and most often recovered species of attorney's fees are fees incurred by the indemnified party in defending claims brought by a third party that fall within the indemnity agreement. Courts repeatedly have held that an indemnitee "is entitled to recover, as part of the damages, reasonable attorney's fees which it is compelled to pay as a result of suits against it in reference to the matter against which it is indemnified." *Stone Building Co. v. Star Electrical Contractors, Inc.*, 796 So.2d 1076, 1091 (Ala. 2000) (quoting *Jack Smith Enterprises v. Northside Packing Co.*, 569 So.2d 745, 746 (Ala. Civ. App. 1990); see *Peter Fabrics, Inc. v. S.S. "Hermes"*, 765 F.2d 306, 315 (2nd Cir. 1985); *Natco, Ltd. Partnership v. Moran Towing of Florida, Inc.*, 267 F.3d 1190, 1194 (11th Cir. 2001); *United States Fidelity & Guaranty Co. v. Love*, 538 S.W.2d 558, 559 (Ark. 1976); *Lavorato v. Bethlehem Steel*

Corp., 459 N.Y.S.2d 170, 171 (N.Y. App. Div. 1983); *Insurance Co. of N. America v. M/V Ocean Lynx*, 901 F.2d 934, 941 (11th Cir. 1990); *Tullos v. Cal Dive Int'l, Inc.*, 188 F.Supp.2d 709, 714 (S.D. Tex. 2002); *Burlington Northern R.R. Co. v. Farmers Union Oil Co.*, 207 F.3d 526, 534 (8th Cir. 2000). Accordingly, courts will interpret the language of an indemnity agreement broadly to include these expenses. Judge Friendly, writing for the Second Circuit, explained the rationale of this rule, stating:

Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims. Legal fees and expenses incurred in defending an indemnified claim are one such cost and thus fall squarely within the obligation to indemnify. Consequently, attorney's fees incurred in defending against liability claims are included as part of an indemnity obligation implied by law and reimbursement of such fees is presumed to have been the intent of the draftsman unless the agreement explicitly says otherwise.

Peter Fabrics, Inc., 765 F.2d at 316.

Natco Ltd. Partnership v. Moran Towing of Florida, Inc. provides an illustration of this approach. See 267 F.3d 1190 (11th Cir. 2001). In *Natco Ltd. Partnership*, the Eleventh Circuit affirmed an award of attorney's fees incurred in the defense of an action brought by a third party. *Id.* at 1194. In reaching this result, the court noted that the indemnity clause provided indemnity for "any and all loss, damage or liability" and that similar language had been held to encompass attorney's fees. *Id.* The court stated that attorney's fees fell within the contract's language because the indemnitee was seeking "to recover its attorneys' fees 'not as attorneys' fees *qua* attorneys' fees, but as part of the reasonable

expenses incurred in defending against the claim[s]." *Id.* The court further noted that "the rule with respect to the kinds of damages covered by an indemnity agreement is that general, broad words operate to encompass most legitimate expenses," and it would be unrealistic not to regard the considerable sums Moran spent in attorneys' fees defending these claims... as a legitimate 'loss.'" *Id.* Similarly, in *Burlington Northern R.R. Co.*, the Eighth Circuit interpreted an indemnity agreement that provided:

Lessee... agrees to indemnify and hold harmless Lessor for loss, damage, injury or death from any act or omission of Lessee, Lessee's invitees, licensees, employees, or agents, to the person or property of the parties hereto and their employees and to the person or property of any other corporation while on or near said premises....

207 F.3d at 530. In finding that this clause supported the award of defense costs, the court stated that "an indemnity clause that does not specifically refer to attorney's fees provides a sufficient contractual basis for an award of attorney's fees, provided the terms of the clause are sufficiently broad to evidence an intent that the clause encompass a wide range of losses." *Id.* at 534 (internal citations omitted). Finally, in *Lavorato v. Bethlehem Steel Corp.*, the Fourth Department of the New York Supreme Court, Appellate Division, interpreted an indemnity agreement which provided that the indemnitor would indemnify and hold harmless the indemnitee "from and against all loss or liability for or on account of any injury... or damages received or sustained by... any employee of the indemnitor." 459 N.Y.S.2d 170, 171 (N.Y. App. Div. 1983). The court stated, "We agree that the broad language of the indemnification provision spells out the intention of the parties that Bethlehem would be entitled to an award of counsel fees reasonably incurred in defense of the action brought by the plaintiffs." *Id.*

One issue that arises when seeking recovery of defense costs is whether an indemnitor is required to pay defense costs arising from a lawsuit alleging the



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indemnitee's own negligence. See generally George E. Powell, Jr., Annotation, *Indemnitor's Liability to Indemnitee for Attorney's Fees and Expenses Arising out of Defense of Action Alleging Indemnitee's Negligence*, 59 ALR 5th 733. Since attorney's fees are merely one species of litigation costs indemnified against, the extent to which one can recover attorney's fees in defending allegations of his or her own negligence will depend upon the particular jurisdiction's stance on such indemnification. Several jurisdictions bar indemnification for an indemnitee's own negligence. See, e.g., *Reynolds v. County of Westchester*, 704 N.Y.S.2d 651, 652 (N.Y. App. Div. 2000) (noting that statute made any construction contract purporting to require indemnification for indemnitee's negligence void and unenforceable); *Federated Dept. Stores v. Superior Drywall and Acoustical, Inc.*, 592 S.E.2d 485, 489 (Ga. App. 2003) (noting that under Georgia statute contract which purported to require subcontractor to indemnify contractor for contractor's sole negligence was void). In these jurisdictions, attorney's fees may not be recoverable when they arise out of a defense of allegations of the indemnitee's negligence. The majority of jurisdictions allow indemnification for one's own negligence as long as the indemnity agreement expressly so provides. See 41 Am.Jur.2d *Indemnity* §§8, 9 (1995). In these jurisdictions, attorney's fees generally will be recoverable to the same extent as any other cost that is indemnified against. See Powell, *supra*, at §§2, 3.

Attorney's Fees and Expenses Incurred in Establishing Right to Indemnity

Separate and apart from the issue of an indemnitee's right to attorney's fees and expenses incurred in *defending* a third-party claim is the issue of the indemnitee's right to indemnity for fees and expenses in establishing (*i.e.*, prosecuting) its right to indemnity from the indemnitor. In this context, the presumption in favor of including fees as a category of the expenses indemnified against is reversed and the general rule is that, in the absence

of express language giving the indemnitee such a right, an indemnitee cannot recover its attorney's fees incurred in establishing its right to indemnification. See, e.g., *Tullos v. Cal Dive International, Inc., et al.*, 188 F.Supp.2d 709 (S.D. Tex. 2002) (stating this general rule) (citing *Weathersby v. Conoco Oil Co.*, 752 F.2d 953 (5th Cir. 1984) and *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981)); *Peter Fabrics, Inc. v. Hermes*, 765 F.2d 306 (2nd Cir. 1985);

Broad words operate to encompass most legitimate expenses.

Lee v. Scotia Prince Cruises Ltd., 843 A.2d 753 (Me. 2004); *Rosati v. Vaillancourt*, 848 So.2d 467 (Fla. Dist. Ct. App. 2003); *Astro Oil v. Gherlone*, 2001 WL 1004254, 2001 Conn. Super. LEXIS 1310 (Aug. 3, 2001); *Stone Bldg. Co. v. Star Elec. Contractors, Inc.*, 796 So.2d 1076 (Ala. 2000); *Pavoni v. Nielsen*, 999 P.2d 595 (Utah Ct. App. 2000); *Christiansen v. Riscomp Industries, Inc.*, 1999 WL 410355, 1999 Minn. App. LEXIS 699 (June 22, 1999).

Courts rely on a number of different rationales to deny requests for attorney's fees and expenses incurred in pursuing indemnity. In *Hermes*, cited *supra*, the Second Circuit stated:

[F]ees and expenses incurred in establishing the existence of an obligation to indemnify... are not by their nature a part of the claim indemnified against. Rather, they are costs incurred in suing for a breach of contract, to wit, the failure to indemnify. As such, fees and expenses incurred in establishing the indemnity obligation fall within the ordinary rule requiring a party to bear his own expenses of litigation.

Hermes, 765 F.2d at 316 (citations omitted). Most courts hold that standard indemnity provisions are only designed to indemnify one of the parties to the indemnity agreement with respect to claims brought by third parties, not to claims between the parties to the indemnity agreement. See, e.g., *Levin, et al. v. Septodont, Inc., et al.*,

2002 WL 654098, 2001 U.S. Dist. LEXIS 2475 (4th Cir. Apr. 22, 2002). Other principles cited in support of the general rule against the recovery of fees and expenses incurred in pursuing indemnity are that prevailing parties are not entitled to an award of attorney's fees or expenses, *in the absence of statutory or contractual language*, see, e.g., *National Minority Supplier Development Council Business Consortium Fund, Inc. v. First National Bank of Olathe*, 83 F.Supp.2d 1200, 1207 (D. Kansas 1999), as well as the general rule that indemnity agreements are to be interpreted narrowly, e.g., *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989). Courts also cite other provisions contained in contracts containing indemnification provisions such as notice provisions whereby the indemnitee must give notice to the indemnitor of any claims covered by the provision as well as provisions whereby the indemnitor has the right to take over defense of the claims. Courts hold that allowing an indemnitee to recover its fees and expenses in prosecuting a claim against the indemnitor (*i.e.*, the other party to the agreement) would "render these provisions meaningless because the requirement of notice and assumption of the defense has no logical application to a suit between the parties [to the indemnity agreement]." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989). Based on the above principles, most courts interpret indemnity provisions narrowly and will not allow an indemnitee to recover its fees and expenses in establishing its right to indemnity unless there is express contractual language giving the indemnitee such a right.

Those courts applying the general rule precluding an award of attorney's fees and expenses incurred in enforcing an indemnity provision still will allow such an award if the indemnity provision expressly so provides. For example, in *Continental Heller Corporation v. Amtech Mechanical Services, Inc.*, 53 Cal.App.4th 500 (1997), the indemnity section of the contract included the following separate provision immediately after the standard indemnity clause:

And the subcontractor shall indemnify the Contractor, and save it harmless from

any and all loss, damage, costs, expenses, and attorney's fees suffered or incurred on account of any breach of the aforesaid obligations and covenants [the indemnity obligations], and any other provision or covenant of this subcontract.

Id. at 508-09 (emphasis added). The court therefore held that it was proper to award the indemnitee its attorney's fees and expenses incurred in prosecuting the indemnity action. *Id.* See also, *City and County of Honolulu v. Churchill, et al.*, 167 F.Supp.2d 1143, 1159 (D.Hawaii 2000) (in addition to standard indemnity language, provision further provided that indemnitor would hold harmless indemnitee "from and against any loss, cost, damage or liability arising from any failure... to observe and perform this guaranty [the standard indemnity agreement].") Accordingly, regardless of the jurisdiction, it would be prudent for any indemnitee to include in its indemnity agreement a separate provision whereby the indemnitee is entitled to recover its fees and expenses resulting from any breach by the indemnitor of the indemnity agreement itself. This would entitle the indemnitee to recover its fees and expenses in prosecuting a claim for indemnity against the indemnitor, whether in a complaint, cross-claim, counterclaim, third-party claim, etc.

Recovery Allowed Despite Absence of Express Provision

Where there is no separate provision expressly addressing the issue, courts in some jurisdictions have been more liberal than others in interpreting standard indemnity contractual language to allow an indemnitee to recover its fees and expenses in prosecuting an indemnity claim, despite the general rule discussed above. For example, in *Laboratory Corporation of America Holdings, Inc. v. Clinical Laboratory Consultants, Inc. et al.*, 121 F.3d 699 (4th Cir. Sept. 5, 1997), the indemnity provision merely provided that the indemnitor agreed to indemnify the indemnitee "from any and all liability... arising directly or indirectly from the negligence of wrongful acts of [the indemnitor's] employees." The Fourth Circuit held that this language

was "broad enough to include the recovery of legal fees incurred in enforcing the indemnification agreement;" therefore, the court allowed the indemnitee to recover its fees and expenses incurred in prosecuting an indemnity claim against the indemnitor. *Id.* at *2.

In *Rappold v. Indiana Lumbermens Mutual Insurance Company*, 431 S.E.2d 302, 304-05 (Va. 1993), the Virginia Supreme Court applied a similarly broad interpretation to an indemnity agreement. The agreement provided that the indemnitor [a subcontractor] was to "indemnify and save [indemnitee (a construction surety)] harmless from and against every claim, demand, liability, loss, cost, charge, counsel fee,... expense, suit, order, judgment, and adjudication whatsoever and any and all liability therefor, sustained or incurred by [indemnitee] by reason of having executed... said bonds or obligations..." *Id.* at 303. The court found that "it was just as much 'by reason of' its having executed the bond that [the indemnitee] was required to incur counsel fees and costs in maintaining this action to enforce the indemnity agreement against the [indemnitor]." *Id.* at 305. The court also observed that the language "by reason of" had the same effect as the words "resulting from" and established "causation as the test for determining whether a particular loss or expense is recoverable..." *Id.* at 304. Under this test, the typical "arising out of or resulting from" language found in many agreements would be broad enough to recover fees expended in pursuit of indemnity.

Problems with the General Rule

The general rule that an indemnitee cannot recover attorney's fees incurred in establishing its right to indemnity against the indemnitor can lead to illogical and unfair results. For example, A Corp. is the owner on a construction project and B Corp. is the general contractor. The contract between A and B contains a standard indemnification provision whereby B must indemnify A for all losses, damages, attorney's fees, etc. arising out of the project. B Corp. then subcontracts with C Corp. to perform work on the project. The subcon-

tract also contains a standard indemnification provision whereby C Corp. must indemnify B Corp. for all losses, damages, attorney's fees, etc. arising out of C Corp.'s work on the project. During the course of the project, the negligence of an employee of C Corp. causes significant damages to the owner's property. A Corp. is thus entitled to indemnity from B Corp. under the indemnity provision in their contract, and B Corp. is entitled to indemnity from C Corp. pursuant to the indemnity provision in the subcontract. Instead of litigating the issue of whether it owes A Corp. indemnity, B Corp. accepts its responsibility and indemnifies A Corp. for A Corp.'s damages. Unfortunately for B Corp., C Corp. chooses not to fulfill its obligation of indemnifying B Corp. Therefore, B Corp. is forced to file a lawsuit against C Corp. seeking to enforce its right to indemnity. The general rule described above precludes B Corp. from recovering any attorney's fees or expenses incurred in establishing its right to indemnity from C Corp.

However, if B Corp. had acted like C Corp. and not fulfilled its indemnity obligation to A Corp., then A Corp. would have been forced to file suit against B Corp. A Corp. also would have sued C Corp. for its negligence, and B Corp. could have filed a cross-claim for indemnity against C Corp. If A Corp., however, did not also sue C Corp., B Corp. could have filed a third-party claim against C Corp. to enforce the indemnity agreement between B and C. Either way, under the general rule, B Corp. would have been entitled to recover from C Corp. its attorney's fees incurred in defending the lawsuit filed by A Corp. Also, B Corp. possibly could have recovered its attorney's fees incurred in prosecuting the cross-claim for indemnity in certain jurisdictions or the third-party claim for indemnity in some jurisdictions. At the very least, even under the general rule in most jurisdictions, there would have been substantial overlap in the attorney's fees incurred by B Corp. in both defending the claims by A Corp. and prosecuting the indemnity claims against C Corp. The end result is that, when strictly looking at the situation from an attorney's fees perspec-

tive, B Corp. is much better off (*i.e.*, likely to be reimbursed for significantly more attorney's fees) if B Corp. chooses not to live up to its agreement to indemnify A Corp. (thereby forcing A Corp. to file suit). Such a result obviously does not promote fulfillment of contractual obligations nor does it promote judicial economy.

At least one court has addressed a similar situation, and its holding avoided this result. In *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322 (9th Cir. 1981), the Ninth Circuit held that the indemnitee was entitled to indemnification for attorney's fees necessary to establish its right to indemnity where the indemnitee conceded its liability and paid the injured party, but the indemnitor refused to concede its indemnity liability to the indemnitee, thereby forcing the indemnitee to file suit to establish its right to indemnity.

Fees Incurred In Prosecuting Claims against Third Parties

In general, an indemnitee may not recover attorney's fees expended in pursuing a claim against a third party. *Lavorato v. Bethlehem Steel Corp.*, 459 N.Y.S.2d 170, 171 (N.Y. App. Div. 1983) (rejecting claim for fees incurred in prosecuting third-party claim and stating, "It is well settled that a litigant may not recover damages for the amounts expended in the successful prosecution of its rights."). However, at least one court has held that indemnity clauses cover fees incurred in prosecuting certain claims against third parties. In *Perchinsky v. State of New York, et al.*, 660 N.Y.S.2d 177 (N.Y. App. Div. 1997), the court did not allow the indemnitee to recover its fees and expenses from its cross-claim for indemnity but did allow the indemnitee to recover its fees incurred in prosecuting "defensive" third-party claims against entities other than the indemnitor. In that case, the court interpreted indemnity language providing indemnification "against all claims, actions, damages, and costs" to allow the indemnitee/contractor to recover its costs in prosecuting third-party actions that it filed against subcontractors on the

grounds that the third-party claims were "defensive" claims that were an "essential component of the [indemnitee's] defense of the main action." *Id.* at 181. The court distinguished this situation from the general rule precluding an award of fees and expenses in prosecuting an indemnity claim by noting that the award of fees was "not an award of counsel fees in an action between the indemnitor and the indemnitee." *Id.* Thus, it also is worth keeping

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in mind that the general rule discussed in this section does not necessarily mean that (in the absence of express language) an indemnitee can only recover those fees and expenses incurred in *defense* of a claim; there is some authority that suggests that an indemnitee may also be able to recover fees and expenses incurred in prosecuting third-party claims (or counterclaims or cross-claims) that a court considers to be in defense of the underlying claim against the indemnitee.

Fees Incurred in Non-Indemnity Claims between the Parties

Courts also have addressed the ability of an indemnitee to recover fees incurred in relation to non-indemnity claims between the indemnitee and indemnitor. Courts rarely award fees in this situation. For instance, in *Hooper Assoc., Ltd. v. AGS Computers, Inc.*, 549 N.Y.S.2d 365, 366-67 (N.Y. 1989), the New York Court of Appeals interpreted an indemnity clause that provided for the recovery of "reasonable counsel fees." The plaintiffs sought to recover attorney's fees in connection with breach of contract claims they asserted against the defendant. In rejecting the claim, the court observed, "Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is

contrary to the well-understood rule that parties are responsible for their own attorney's fees, the 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." *Id.* at 367.

Similarly, in *Levin v. Septodent, Inc.*, Nos. 00-2234, 00-2462, 01-1852, 2002 WL 654098 (4th Cir. April 22, 2002), the court found that an indemnity clause that purported to indemnify a party "against any and all lapses, fees, costs, claims, expenses and/or litigation, including reasonable attorneys' fees and expenses, incurred... as a result of the transactions contemplated by this Agreement" did not cover attorney's fees in litigation between the indemnitor and indemnitee reasoning that the indemnity agreement "is a garden variety indemnity clause and... a reasonable person in the position of the [indemnitee] would have understood that the clause was not intended to cover the expenses of litigation between the contracting parties." *Id.* at **9; see also *Kellers Systems, Inc. v. Transport International Pool, Inc.*, 172 F.Supp.2d 992, 998-99 (N.D. Ill. 2001) (rejecting claim for attorney's fees in suit between parties to indemnity agreement); *FleetBoston Robertson Stephens, Inc v. Innovex, Inc.*, 172 F.Supp.2d 1190, 1199 (D. Minn. 2001) (rejecting claim for attorney's fees saying "A contract's language must make the intent to provide for attorney's fee indemnification between the parties 'unmistakably clear.'").

However, at least one court has found that an indemnity clause covered fees incurred in litigation between the indemnitor and indemnitee. In *Natco Ltd. Partnership v. Moran Towing of Florida*, 267 F.3d 1190, 1193 (11th Cir. 2001), the Eleventh Circuit interpreted a clause that provided that the indemnitor "shall indemnify [the indemnitee] for any and all loss, damage or liability arising out of, or in any way contributed by, unseaworthiness of the tow, or by any deficiency in, or failure of, its equipment or the personnel on board." The court found that "[g]iving the broad terms of the indemnity provision

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their commonly understood meaning" it was evident that the clause allowed the indemnitee to recover attorney's fees spent in defending claims brought against it by the indemnitor and other parties as well as *attorney's fees incurred in prosecuting its counterclaim against the indemnitor*. *Natco Ltd. Partnership* provides good support for those seeking to construe the language of an indemnity agreement broadly.

Conclusion

The vast majority of courts interpret indemnity provisions broadly to allow an indemnitee to recover its attorney's fees and expenses incurred in *defending claims* that are brought by *third parties* from the indemnitor, even if the indemnity provision does not specifically mention attorney's fees or defense costs. However, when it comes to an indemnitee recovering its attorney's fees and expenses incurred in other types of actions, such as prosecuting its right to indemnity against the indemnitor or prosecuting

claims against third parties, courts are less willing to allow an indemnitee to recover its attorney's fees and expenses unless the indemnity agreement expressly provides for such a recovery. Accordingly, an indemnitee should insist on the inclusion of language in the indemnity agreement that expressly allows for the recovery of its attorney's fees and expenses arising out of any failure by the indemnitor to fulfill its indemnity obligations. This will allow an indemnitee to recover its fees in prosecuting its right to indemnity against the indemnitor. Further, an indemnitee should also consider including language that provides for indemnity for attorney's fees and expenses incurred in prosecuting claims against third parties where such claims really are in furtherance of the defense of the indemnified claim. Without specific language addressing these issues, it is unlikely that a court will allow an indemnitee to recover its attorney's fees and expenses except for those fees and expenses incurred in *defense* of indemnified claims brought by *third parties*. **FD**