

To Indemnify or Not To Indemnify

It happens with regularity. You receive a letter demanding that you indemnify and defend a claim against another company. Do you accept the tender or deny it? Recent case decisions in Virginia have altered the traditional evaluation in cases involving contractual indemnification clauses.

Until March of 2007, the general rule in Virginia was that indemnification clauses which served to contract away an indemnitor's negligence in personal injury cases violated public policy. Also until March of 2007, insurers in Virginia could successfully deny tender requests on this basis by arguing that one cannot contract away its own negligence. However, the Virginia Supreme Court clarified and narrowed this rule in *Estes Express Lines v. Chopper Express, Inc.*, 641 S.E.2d 476 (2007); see

also *W.R. Hall, Inc. v. Hampton Roads Sanitation District*, 641 S.E.2d 472 (2007).

In *Estes*, *Estes* leased trucks to *Chopper Express*. The lease agreement between *Estes* and *Chopper* contained two indemnity provisions. In the first provision, *Chopper* agreed to indemnify, defend and hold *Estes* harmless from: "[a]ny and all loss, cost, claim, expense, cause of action, loss of use and liability by reason of injury (including death) to persons or damage to property arising out of the use, operation, ownership, maintenance or control of a [leased] Vehicle whether covered by insurance or not" In the second provision, *Chopper* agreed to indemnify *Estes* from "[a]ny liability by reason of any claim asserted by an agent or employee of [Chopper]".

A driver of one of the leased trucks who was employed by *Chopper* was injured and filed a personal injury lawsuit against *Estes* and a repair company, alleging that the negligence of *Estes* and the repair company caused his injuries. Naturally, *Estes* demanded that *Chopper*

reimburse *Estes* for the settlement amount that was reached and also for the attorneys fees *Estes* incurred in getting to settlement. *Chopper* denied the tender, arguing that the indemnity agreement was void as against public policy. In making this argument, *Chopper* relied upon the holdings in *Johnson's Adm'x v. Richmond & Danville R.R. Co.*, 11 S.E. 829 (1890) and *Hiatt v. Lake Barcroft Community Association, Inc.*, 418 S.E.2d 894 (1992) which essentially were that indemnity agreements involving claims for personal injury are against public policy and void.

The Supreme Court in *Estes* distinguished *Hiatt* and *Johnson* explaining that *Hiatt* and *Johnson* involved pre-injury release provisions, which are still clearly prohibited as void against public policy. The Court stated that indemnity provisions are substantially different from such pre-injury releases because pre-injury releases effectively prevent a party of any possibility of recovery and extinguish his or right to sue. Indemnity provisions,



on the other hand, do not bar a party from suing. Rather, they shift the loss to a another party via contract. The Court further explained that the “law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes.” *Estes*, 641 S.E.2d at 478 (quoting *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 493 S.E.2d 364, 366 (1997)).

Another issue to consider in determining whether to indemnify or not to indemnify is that the party entitled to indemnification of any judgment or set-

tlement amount is also entitled to reasonable attorney fees incurred in defending the plaintiff’s case. This is true whether the right to indemnification arises out of an express agreement or is implied by law. Notice to the indemnitor is not necessary in order to recover attorney fees. *General Electric v. Mason & Dixon Lines, Inc.*, 186 F. Supp. 761 (1960); see also *Southern Rwy. v. Arlen Realty & Development*, 257 S.E.2d 841 (1979). For this reason, it is economically beneficial to make the determination of whether to indemnify or not to indemnify as soon as possible and before litigation begins. At

the same time, however, it is important to note that fees incurred while attempting to have a tender accepted cannot be recovered unless the indemnification contract contains language allowing for those costs and fees.



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