NJ Justices Clarify First-Party Indemnification Availability

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For many years, New Jersey law has been well established with respect to the analysis that is applicable to contractual indemnification claims for third-party liability — meaning matters in which the party seeking indemnification is sued by an outside person or entity, such as an injured plaintiff.

More specifically, under the rule established by the New Jersey Supreme Court's 2003 decision in *Azurak v. Corporate Property Investors*, in order for a party to be indemnified for its own negligence for claims for bodily injury or property damage suffered by a third party, the agreement upon which the indemnity claim is based must explicitly and unambiguously say so.[1]

Under this bright-line test, New Jersey courts mandate that the absence of clear and unequivocal language addressing such indemnification precludes recovery for the indemnitee's portion of the judgment or defense costs.

Indeed, the Supreme Court set forth the appropriate rule in sharp and distinct words: "In order to allay even the slightest doubt on the issue of what is required to bring a negligent indemnitee within an indemnification agreement, we reiterate that the agreement must specifically reference the negligence or fault of the indemnitee."[2]

The *Azurak* rule has been applied in dozens of decisions in New Jersey, all of which stemmed from third-party claims.

In general, the trend within the case law is fairly simple to interpret: New Jersey courts will hold the clause in question to be enforceable where the provision includes the identity of the indemnitee, whether by name or category, and the word "negligence," but courts will find that contracts do not include an "unequivocal intention" that a party be indemnified for its own negligence where the provision includes conditional or less specific language.

On May 30, the Supreme Court of New Jersey handed down its opinion in *Boyle v. Huff*, which addressed an indemnification issue in a different setting.[3] More specifically, the court in *Boyle* examined the question of whether indemnification may be available in a first-party claim, as the individual seeking to be indemnified, Patrick Boyle, filed suit against the entity from which he sought indemnification, the Ocean Club Condominium.

While the court concluded that such an indemnification could exist under New Jersey law, it held that the provision at issue, as set

forth in the condominium association's bylaws, was ambiguous and, thus, was to be construed against Boyle. As such, the court held that Boyle was not entitled to be indemnified under the particular facts of his claim.

By way of background, Boyle and his wife were owners of a unit in the Ocean Club Condominium in Atlantic City. The board of the condominium association appointed Boyle to the board, though the relationship between Boyle and his fellow trustees deteriorated over financial "errors and anomalies" that Boyle believed he uncovered.

After the board removed Boyle as a trustee, he filed a lawsuit against the trustees who ousted him, claiming that the process by which he was expelled was inappropriate. During the course of the litigation, Boyle amended his complaint to assert a claim for indemnification under the bylaws of the association.

Both the Superior Court of New Jersey, Chancery Division, Atlantic County, and the Appellate Division concluded that Boyle was entitled to indemnification under the applicable provision of the bylaws. However, the Supreme Court reversed.

In so holding, the unanimous opinion, which was written by Justice Michael Noriega, began with a review of the general body of New Jersey case law on indemnification issues. Under this case law, indemnification provisions are strictly construed against the indemnitee, the party seeking indemnification, both because of the requirement that the shifting of liability via indemnification can only be accomplished via "express and unequivocal language," and the "American Rule," which holds that parties are typically obligated to pay their own attorney fees.

Examining the language of the indemnification clause in the association's bylaws, the New Jersey Supreme Court concluded that the provision was ambiguous when read as a whole.

Although the court acknowledged that the key language calling for indemnification may have met the strict test for fee shifting, the panel ultimately determined that the entirety of the provision indicated an intent to apply only to third-party claims by unit owners against trustees, as opposed to first-party claims such as Boyle's.

As such, the court found that the provision was ambiguous as to whether indemnification could be permitted in a first-party claim and, given the interpretive requirements of New Jersey law, that Boyle was not entitled to have his substantial legal fees reimbursed.

The court also explicitly held that indemnification in first-party matters is permissible under New Jersey law. In so finding, it expressly overruled any previous decisions to the contrary. In short, the opinion holds that "indemnification may also apply to first-party claims if that is the clear intent of the parties as expressed by their deliberate word choices when drafting contracts. Those word choices will govern whether an indemnification supports a first- or third-party claim for damages."

Moving forward, in light of the specific recognition by the Supreme Court that indemnification may exist in the first-party context, parties to such contracts will need to consider whether and how to draft in-

demnification provisions that may trigger for claims, such as the one considered in *Boyle*.

Until recently, the question of whether New Jersey law even supported claims for indemnification directly between parties to litigation — as opposed to claims by an outside party — was an open one. Now, with the issue settled by the Supreme Court, drafters of employment or service-type agreements will need to be mindful of whether and under what circumstances indemnification of the claimant will be permitted.

While first-party indemnification claims are likely to be less frequent than their typical third-party cousins, which arise in nearly every litigation over worksite accidents or construction defect claims, the court's decision in *Boyle* will likely yield more litigation, especially in light of the substantial legal fees that are often incurred over in-house disputes.

Boyle presents a classic example of the sort of disagreement that may yield litigation and a related claim for indemnification. In the future, similar claims seem likely to arise in both the private sector, such as with corporate boards of directors and shareholders, and in the public sector, such as in school boards and among elected officials.

Ultimately, the outcome of any claim for first-party indemnification will now depend on the same, familiar standard applied by New Jersey courts that consider third-party indemnity clauses under *Azurak*. The crafting of the language of the indemnification clause will be critical, and it is fair to expect extensive discussions and negotiations about the process of drafting agreements that include provisions that may give rise to both first- and third-party indemnity claims.

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[1] *Azurak v. Corporate Property Investors*, 175 N.J. 110 (2003).
[2] Id.
[3] *Boyle v. Huff*, 257 N.J. 468 (2024).