

Court of Appeals Provides Guidance on Recoverable Costs, Attorney Fee Accrual Dates in Indemnity Disputes

September 27, 2010

Sticks & Bricks

When an indemnified party first learns about a claim or when the case is initially filed in court, when is an owner, design professional, contractor or subcontractor financially responsible for defending the construction claim? Fortunately, the Michigan Court of Appeals recently shed some much-needed light on the answer.

In *Ajax Paving Ind v VanOpdenbosch Constr Co*, Mich App No. 288452 (unpublished, July 1, 2010), the court provided guidance regarding the accrual date of the right to recover attorney fees. For the owners who are typically in the driver's seat, the court will enforce the plain language of an indemnity provision, a common way of allocating risk to other parties, and will not impose any limitations that cannot be found in the contract.

To understand the appellate court's confirmation, is to understand what owners, design professionals, contractors and subcontractors must do to protect their businesses.

There are an untold number of things that can go wrong on construction projects, ranging from accidents involving construction workers to damage to the construction project itself. A variety of pitfalls arise that may cause a contractor to incur financial loss.

For these reasons, numerous parties, who are contracted to complete a project, attempt to shift some of its own burdens to others. The two most common ways to assign risk allocation are express contractual indemnification clauses (which the appellate courts confirm they will enforce) and additional-insured provisions.

When a design professional, contractor or subcontractor wants to do the work, they are given a contract that contains some form of indemnity or additional-insured obligation. (The same holds true when a general contractor asks a subcontractor to bid on a piece of the work). Indemnity typically runs downhill, and the last party in the contract stream will owe indemnity and/or additional-insured obligations to those above them.

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Usually, the indemnity provisions will require a party to pay another party's costs and attorney fees associated with defending the claims made by a plaintiff in an underlying lawsuit. However, a major issue requiring clarification is when the indemnifying party's "meter" for costs and fees for the defense of a claim begins.

Some indemnitees have argued that their responsibility begins only when the party to be indemnified provides the indemnitor with notice of a loss or tender of defense. The indemnitee will often counter by arguing that the language of the indemnity provision controls the determination of the amount of recoverable costs and attorney fees. As the court suggests in *Ajax*, the "lowest man on the totem pole" is responsible for costs and or fees when the matter is first filed.

In *Ajax*, the dispute involved the company's pursuit of contractual indemnification arising out of a construction project injury sustained from a passenger in a motor vehicle. *Ajax* sought contractual indemnity from VanOpdenbosch, among others.

The underlying personal injury action was filed against *Ajax* on Oct. 12, 2005, but VanOpdenbosch did not become aware of the lawsuit or its potential contractual indemnity liability until April 4, 2007, some 18 months later.

According to VanOpdenbosch, it was not obligated to pay for *Ajax*'s costs and attorney fees incurred before it was notified of the underlying personal injury lawsuit.

Ajax, on the other hand, claimed that the indemnity provision expressly entitled *Ajax* to recover all costs and attorney fees, without limitation, because the indemnity provision contained no language supporting the restriction espoused by VanOpdenbosch. The appellate court agreed with *Ajax*.

The court noted that, inasmuch as the indemnity provision did not require there to be notice or a tender of defense to the indemnitor, the indemnitee's recoverable fees and costs are calculated from the inception of the litigation, not from any date of notice or tender to the indemnitor. In other words, the court determined that there was no notice or tender of defense prerequisite to *Ajax*'s right to recover attorney fees.

In addition, the appellate court stated there is no temporal limitation on the right to recover attorney fees under the parties' indemnification agreement. The party seeking indemnity is entitled to recover its necessary and reasonable attorney fees incurred in the defense of the underlying plaintiff's action from the outset and not from the date on which the indemnitee provided notice to the indemnitor.

Even though the appellate court's decision is not law; owners, design professionals, contractors and subcontractors; who include express contractual indemnification and additional-insured provisions in their contracts; will have the lower courts rule in their favor to hold the defendant(s) responsible for paying attorney's fees and other costs to defend a civil action.

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As is customary on construction projects, risk transfer is a “down hill” process that often leaves lower tier contractors responsible for any and all claims brought for personal injury or property damage. As such, the contractor forming the last link in the chain of contracts will ultimately be responsible for all costs and attorney fees incurred by those contractors higher up in the contract chain from the date that the primary lawsuit is filed, not the date the lower tier contractor was notified of the suit.

For that reason, it is important that lower tier contractors have sufficient insurance coverage to protect against indemnifiable losses and costs that the contractor does not become aware of until a later date.

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