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Illinois Coverage Basics

Illinois Supreme Court Changes Rule for Determining the Scope and Meaning of Indemnification Clauses

For over 60 years, courts in Illinois have interpreted and enforced contractual indemnification clauses according to the rule stated in Westinghouse Electric Elevator Company v. LaSalle Monroe Building Corporation, 395 Ill. 429 (1946). Under that time-tested rule, an indemnification clause would not be construed to indemnify a party for that party's own negligence, unless the contractual clause expressly and unequivocally provided for such indemnification. Under the "Westinghouse rule," an indemnification clause that promised to indemnify a party for "any and all" liability was held to be not sufficiently specific to provide indemnification for an indemnitee's own negligence.

However, in a very recent decision (filed on January 25, 2008), the Illinois Supreme Court effectively overruled the Westinghouse decision and radically redefined the rule governing indemnification clauses in Illinois. Although the Illinois Supreme Court claimed to be merely "clarifying" the "Westinghouse rule," the Court's opinion in Buenz v. Frontline Transportation Corporation (No. 03562) fundamentally changes the way that courts will interpret and enforce indemnification clauses in Illinois.

The Buenz decision arises from an occurrence in which a tractor trailer collided with a minivan, killing the driver of the minivan. The decedent's estate in Buenz sued the truck driver's employer (Frontline) and also the owner of the trailer (COSCO), alleging negligence as to each. COSCO in turn filed a third-party action against Frontline on the theory that the equipment interchange agreement between them required Frontline to indemnify COSCO for COSCO's own alleged negligence.

The indemnification clause contained in the equipment interchange agreement in Buenz defined Frontline's obligations as follows:

> "[Frontline] shall indemnify [COSCO] against, and hold [COSCO] harmless for any and all claims, demands, actions, suits, proceedings, costs, expenses, damages, and liability, including without limitation attorney's fees, arising out of , in connection with, or resulting from the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of [COSCO]."

Frontline contended that the indemnification language of the equipment interchange agreement was not sufficiently clear and specific to require Frontline to indemnify COSCO for COSCO's own negligence. Relying on cases following the 1946 Westinghouse decision, Frontline argued

in response that despite its undertaking to indemnify COSCO for "any and all" liability, that language of the indemnification clause required Frontline to indemnify COSCO only for liability arising from Frontline's negligence and not for COSCO's own negligence. Frontline contended that its position on the "any and all" language of the indemnification provision was consistent with the way most courts have construed the "Westinghouse rule." *See*, e.g. Karsner v. Lechters Illinois, Inc., 331 Ill.App.3d 474 (3rd Dist. 2002).

The Illinois Supreme Court in Buenz rejected Frontline's position, ruling that broad "any and all" language in an indemnification agreement may be sufficient to provide indemnification for an indemnitee's own negligence, so long as the indemnification agreement does not otherwise limit the scope of the indemnification to liability arising from the negligence of the indemnitor. The Court in Buenz insisted that it was not changing the law and it engaged in a lengthy analysis of the prior case law in an attempt to show that Illinois jurisprudence for the past 60 years was consistent with the rule now expressed in its Buenz opinion. However, the Buenz opinion changes not only the substantive rule governing indemnification agreements; it also changes the burden of proof regarding disputes on the scope of indemnification agreements.

Under the old "Westinghouse rule," as it was applied by the courts for several decades, an indemnification agreement that promised indemnification for "any and all" liability was not sufficiently clear to provide indemnification for liability arising from the indemnitee's own fault. The presumption under the "Westinghouse rule" was that an agreement promising indemnification for "any and all" liability without more would not indemnify a party for its own negligence. The burden fell on the person seeking indemnification under Westinghouse to show that other language in the agreement (in addition to an "any and all" reference) reflected a clear and unambiguous intent to provide such indemnification.

In contrast, under the Court's new Buenz opinion, the presumption is reversed. Under Buenz, an indemnification agreement promising indemnification for "any and all" liability is presumed to provide indemnification for the indemnitee's own fault, unless there is other language in the agreement that reflects a more limited intention. Thus, after six decades of holding that "any and all" language in an indemnification agreement is not sufficient to confer indemnification for an indemnitee's own negligence, courts after Buenz will hold that "any and all" language is presumptively sufficient to provide such indemnification.

As a practical matter, Buenz represents a 180-degree change in Illinois' law on the scope of indemnification agreements. Files in which tenders have been made and refused under indemnification agreements in the past should be reevaluated in light of this new authority. Under Buenz, some tenders that were previously denied based on the authority of the "Westinghouse rule" should now be accepted. Moreover, since the Illinois Supreme Court characterized its analysis in Buenz as a clarification of Westinghouse, rather than a change in the law, a re-tender might also include a claim for past expense. A reanalysis of tenders after Buenz may radically affect the exposure on files in which tenders were previously denied.

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If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.