dmissibility of Insurance/Indemnity Agreements

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A motion in limine to exclude evi dence of insurance is familiar to every trial attorney who practices in the personal injury field. As a matter of course, defendants seek to exclude all evidence that insurance and/or indemnity agreements may cover any verdict rendered by the jury pursuant to Evidence Code § 1155. In most cases, this motion is not opposed by plaintiff's counsel and no mention of this fact is made at trial.

The decision, however, not to oppose this motion in limine may be too hasty in some cases, especially construction cases that involve indemnity agreements. While black letter law provides that evidence of insurance is inadmissible to prove *negligence*, evidence of insurance and/or indemnity is admissible to prove possible interest, bias or motive on the part of a witness. (*Hart v. Wielt* (1970) 4 Cal.App.3d 224.) This can be extremely useful evidence in combating hidden bias of witnesses.

A. The Difference Between Indemnity Agreements and Insurance

1. Insurance Agreements

Insurance policies can fall within two general categories. "First party coverage" protects an insured from damage to his own property or personal interest. "Third party insurance" protects against claims brought by others for damage to their own property or interests. It is the latter type of insurance most often involved in complex construction related injury cases.

A holder of third party insurance is generally entitled to two benefits under the policy with the insurance company: (1) *Indemnification*, such that the insurance company agrees to be legally responsible to pay on the insured's behalf up to the policy limits; and (2) *Defense*, such that the insurance company must defend the insured against the third party claims. As stated, although third party insurance policies generally include an indemnity provision with the insured as part of the policy, indemnification goes beyond the simple insurer/insured relationship and exists in a much wider range of situations.

2. Indemnity Agreements

Indemnity agreements are often entered into between individuals and companies as a way to contractually shift the risk of loss from one party to another. In contrast to insurance, indemnity agreements are generally unlimited with regard to liability. A typical indemnity agreement taken from the AIA General Conditions (1987 revision) § 3.18.1 reads, in part, as follows:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner ... from and against all claims, damages, losses and expenses ... arising out of or resulting from performance of the Work ... but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, [or] a subcontractor....

The foregoing standard indemnity language requires the promisor/contractor, or the promisor/contractor's third party insurance company,1 to pay any judgment rendered against the promisee/owner that arises, at least in part, from the work of the contractor or a subcontractor. This policy can allow for full indemnity to the owner by the contractor even if the owner is found 99% responsible and the contractor is found 1% responsible.2

B. Indemnity on Construction Projects

On many large construction projects it is the custom and practice for indemnity agreements to start with the owner and pass through the general contractor down to the subcontractors. Under the indemnity agreements, the subcontractors agree to indemnify and hold harmless the general contractor for any injuries arising out of their work. In turn, the general contractor makes the same promise to the owner of the premises. The net result of such agreements is that a case brought by an injured

The net result of such agreements is that a case brought by an injured employee of subcontractor X against the owner of the premises and the general contractor will be defended by the insurance policy of subcontractor X.3

An example of a typical construction injury illustrates the potential bias that can result from this indemnity agreement. On a large public works project, a general contractor is hired on the job by the public entity. The general contractor agrees to indemnify and hold the public entity harmless for any injuries. The general contractor hires a subcontractor to work on the job. The subcontractor agrees to indemnify general contractor for any injuries arising out of their work. During the progress of the work, an employee of the subcontractor is injured because no fall protection system was engineered into the job by the general contractor and the employee falls 35 feet to the ground. Plaintiff files suit against the negligent general contractor. Under this scenario, generally the insurance policy that defends the case will be the policy held by the subcontractor employer of the injured worker.

Why should a plaintiff attorney care whose insurance policy is defending this action? The reason is bias. Even though under the exclusive remedy provision of Labor Code § 3602 the subcontractor employer cannot be a defendant in the lawsuit, the employer's insurance policy defends the case. Plaintiff's co-worker employees, especially in management positions, are often keenly aware their insurance policy is on the line. This leads to situations in deposition and trial when co-employee witnesses – that ostensibly have no interest in the litigation – are extremely biased and testify in an adverse manner toward the plaintiff to protect the general contractor who is indemnified by subcontractor X.

Obviously, the fact that subcontractor X may be personally responsible for any judgment against the general contractor or owner could well have a negative effect upon the testimony of co-workers in attempting to establish liability against the general contractor or owner. These indemnity agreements create an extremely strong, hidden potential bias among witnesses that should not be overlooked by the trial attorney.

C. Method by Which the Evidence Arises in Deposition or Trial

The testimony of the biased co-worker from subcontractor X comes in two basic forms: (1) blaming the entire incident on the plaintiff as comparative fault; (2) proverbially falling on the sword and claiming the entire incident was the fault of subcontractor X, plaintiff's employer.

The first method is the most obvious defense. By blaming the plaintiff and creating comparative fault, the respective responsibility of the general contractor is lessened. However, the second method is the most interesting. Workers' compensation is an exclusive remedy, and an employer cannot be held directly liable for any judgment. (Lab. Code § 3602.) Therefore, an effective defense of the general contractor by the subcontractor X employees is to claim the entire incident was the fault of the subcontractor. This has the intended effect of insulating the general contractor from liability, which protects the insurance policy held by the subcontractor. Both of these methods can cause extreme damage to a plaintiff's case if the issue of bias is not properly raised during the trial of the action.

D. Relevance and Admissibility

The black letter law on the inadmissibility of insurance evidence is contained in Evidence Code § 1155, which reads as follows:

> Liability Insurance Inadmissible to Prove Negligence
>
> Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

However, the key qualifier in the above statute is the use of the term, to prove "negligence." The purpose of this legislation is to prevent introduction of insurance in an attempt to show that the defendant must have been negligent, because they had liability coverage to protect themselves from the claim. Secondarily, but not stated, there is a potential

themselves from the claim. Secondarily, but not stated, there is a potential prejudicial effect of letting a jury know that an insurance company will pay for the judgment, and not the individual defendant.

In *Hart v. Wielt*, *supra,* 4 Cal.App.3d 224, 231, the court specifically found there are instances when this general rule preventing introduction of insurance does not apply. The court wrote "facts tending to show interest, bias or motive on the part of a witness may *always* be brought out on cross-examination even though it may thereby be disclosed that the defendant was protected by insurance." (Emphasis added; see also, 2 *Wigmore*, Evidence § 282a, p. 135; Note, 4 A.L.R.2d 779, citing *Moniz v. Bettencourt* (1938) 24 Cal.App.2d 718, 724; see also *Brainard v. Cotner* (1976) 59 Cal.App.3d 790.)

Under federal law, the right to examine a witness as to indemnity or insurance policies that could create bias is even more assured. Pursuant to Rule 411 of the Federal Rules of Evidence.

> Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice or a witness.

Pursuant to both California and federal law, the evidence of indemnity is admissible to prove potential bias of the witness.

E. Indemnity Agreements and Evidence Code § 352

Although evidence of indemnity agreements may be relevant to the action, the evidence may be excluded under Evidence Code § 352:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The major hurtle in getting evidence of the indemnity agreements into evidence involves getting past a section 352 challenge. Defendants will argue that evidence of indemnity has no probative value and will simply prejudice the jury. Typical arguments include that if a jury knows a subcontractor-employer will ultimately pay for a verdict against the general contractor the jury will hold the general contractor responsible even if they believe the incident was totally the fault of the subcontractor. The best argument against this position is that it assumes jury nullification and misconduct. The judge instructs the jury to decide fault based solely on the evidence, and defendants have no basis to believe the jury will ignore that requirement.

Another common argument is to claim that employees of the subcontractor were not specifically aware of the indemnity agreement, and therefore, could hold no bias in regard to their testimony. In the first place, the entire point of introducing this evidence relates to the potential bias of the witness. A biased witness could falsely claim lack of knowledge of the indemnity agreement to protect the insurance policy. Admissibility should not be controlled by the biased witness' claimed lack of knowledge. The way to avoid this argument altogether is to only raise the issue of indemnity with the co-employee who signed the contract. This person has to be aware of the provisions. During closing argument, indemnity can be referred to as potential bias as to all the co-employees who testify.

F. Failure to Raise Issue of Indemnity at Trial

If a plaintiff's attorney fails to raise this issue at trial, the consequences can be severe. The effect of an ostensibly uninterested co-employee testifying strongly against the plaintiff cannot be underestimated. The only reasonable conclusion for the jury is that this "uninterested" witness is telling the truth. However, if the potential bias of that witness is raised to show the jury a financial reason for testifying in such a manner, this potentially devastating evidence can be turned against the witness.

In conclusion, evidence of indemnity is a powerful tool that can be used in construction related cases against co-workers who testify against the plaintiff. Evidence of indemnity also has to be considered whenever there is a lease, rental agreement or purchase agreement that may call for indemnity. All of these situations may call into serious question the bias of the witnesses who may be testifying in the case.

1 In order to protect against the risk of personal liability under an indemnity agreement, it is the custom and practice in the industry for the promisor to obtain third party liability insurance coverage to protect against the liability of themselves, as well as the potential indemnification costs toward the promisee. In fact, many standard construction contracts have a requirement by the owner that the contractor must maintain a minimum level of insurance for the project.

2 Under Civil Code § 2782, it is illegal to attempt to obtain an indemnity agreement for liability arising from the "sole negligence" or "willful misconduct" on the part of the promisee. Section 2782 reads as follows: "Except as provided in Sections 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and which purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to such promisee, or for defects in design furnished by such persons, are against public policy and are void and unenforceable...."

3 While an employer is protected from a direct suit from an employee under the exclusive remedy doctrine within Labor Code § 3602, the Labor Code and Supreme Court case law specifically allows written indemnity agreements between an employer and another. (See Lab. Code § 3864; *Gonzales v. R.J. Novick Constr. Co.* (1978) 20 Cal.3d 798.)