Risk Allocation for One's Own Negligence and the Exception to Mississippi's Anti-Indemnity Statute

By Scott F. Singley and Lindsey S. Wiseman

Scott F. Singley is a partner in the Columbus office of Brunini, Grantham, Grower & Hewes, P.L.L.C. He is a member of the firm's litigation department and focuses his practice in the areas of commercial litigation, labor and employment, and health care. Singley graduated from Mississippi State University, magna cum laude, *in 1997 with a B.B.A. in economics. He received his J.D.,* cum laude, *from The University of Mississippi in 2000 where he served as Associate Articles Editor on the* Mississippi Law Journal *and was a member of the National Trial Competition Team.*

Lindsey S. Wiseman is an associate in the Columbus office of Brunini, Grantham, Grower & Hewes, P.L.L.C., and a member of the firm's litigation department. Her practice focuses in the areas of commercial litigation, labor and employment, and health care. Wiseman graduated from Mississippi College, summa cum laude, *in 2006 with a B.S.B.A. in accounting. She received her J.D.,* cum laude, *from The University of Mississippi in 2009, where she served as Associate Articles Editor on the* Mississippi Law Journal *and was on the Executive Council of the Law School Student Body.*

Agreements to Indemnify v. Agreements to Procure Insurance

Within the construction context, it is well established in Mississippi, as in many other states, that contractual provisions requiring one party to indemnify another party for its own negligence are void as against public policy. However, more recently, courts have expounded upon the application of the increasingly more popular use of the exception to various anti-indemnity statutes. This exception allows one party to contractually agree to obtain insurance for the other party's own negligence. The logic is fair: Where one may obtain insurance to cover liability for his negligence, traditionally through an insurance broker or agent, he also should be permitted to contract with another to purchase the same on his behalf. A contract such as this is enforceable in most states, including Mississippi. Still, it is common for the agreement between construction-related entities to contain both an indemnity provision and an insurance provision. The distinction between provisions to indemnify and provisions to procure insurance is important, as the validity of both balances on their scope and severability.

The Rule and Its Exception

In Mississippi, certain indemnification agreements are invalid where the indemnitor must hold the indemnitee harmless for the indemnitee's own negligence. Section 31-5-41 of the Mississippi Code Annotated provides in relevant part:

> With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

In contrast, the promisor may contract to purchase insurance to cover all liability, regardless of who is at fault. The reconciliation of these two facially antithetical statements is both legal and technical and is made by way of the saving exception to the anti-indemnity statute:

> *This section does not apply to . . . insurance contracts or agreements.*

§31-5-41 (emphasis added). The exception is clear: Contracts or contractual provisions for insurance are enforceable. The practical application is a little more difficult, but with some analysis and by taking a few technical precautions in drafting, we can arrive at a satisfactory "insurance contract" as intended by the exception.

Distinguishing Coverage — Shifting Provision from Indemnity Provision

Applying Mississippi law as a matter of first impression, the Court in *Roy Anderson Corp. v. Transcontinental Ins. Co.* reasoned that "if the Mississippi Supreme Court were to address this issue, the court would distinguish agreements to procure insurance coverage from agreements to indemnify." 358 F. Supp. 2d 553, 566-67 (S.D. Miss. 2005) (noting that, unlike a promise to indemnify, "[w]hen there is a promise to obtain insurance, the promisor agrees to procure, and pay for, insurance but bears no responsibility in the event of injury or damages once the insurance is obtained"). The following further clarifies the difference:

> A contractual obligation to indemnify is distinct from a contractual obligation to procure insurance. Under an agreement to indemnify, the promisor assumes liability for all injuries and damages upon the occurrence of a contingency. In contrast, an agreement to obtain insurance involves the promisor's agreement to obtain or purchase insurance coverage, regardless of whether [a] contingency occurs.

FabArc Steel Supply, Inc. v. Composite Const. Sys., Inc., 914 So. 2d 344, 362 (Ala. 2005) (citations omitted).

In practice, the latter typically comes in the form of an insurance clause that requires the promisor to name the promisee as an "additional insured" on the promisor's

various policies, such as its commercial general liability ("CGL"), automobile, and umbrella policies. *See, e.g.*, *Roy Anderson*, 358 F. Supp. 2d at 567 (granting summary judgment in favor of contractor and finding contractor was entitled to coverage as an additional insured under subcontractor's policy), *distinguishing Certain London Mkt. Ins. Cos. v. Penn. Nat'l Mut. Cas. Ins. Co.*, 269 F. Supp. 2d 722 (N.D. Miss. 2003) (voiding provision because contractor was not named an additional insured).[1]

Severability

Moreover, a void indemnity provision has no bearing on a severable and otherwise valid insurance provision within the same contract. *See Roy Anderson*, 358 F. Supp. 2d at 567 ("[W]hen an agreement to procure insurance coverage is a separate obligation from the indemnity obligation, Miss. Code Ann. § 31-5-41 does not void the agreement to procure insurance coverage."); *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co.*, 602 F.3d 677, 683 (5th Cir. 2010) ("This circuit has upheld additional insured provisions despite void indemnity provisions."). Further, "[a] contract provision that extends direct insured status as an additional insured is deemed separate and independent from the indemnity agreement." *Travelers*, 602 F.3d at 682.

In enforcing a provision of a commercial lease agreement that required the tenant to purchase CGL insurance and include the landlord as an additional insured, notwithstanding an invalid indemnity clause, the Fifth Circuit considered its prior reasoning:

> [T]his court interpreted the contract as imposing two concomitant requirements – indemnification and insurance procurement – and stated "[i]f the parties had determined to condition [the contractor's] assured status upon the legal enforceability of the indemnity agreement, they very easily could have done so."

Id. at 683 (alterations original) (citations omitted) (noting further that "it is not necessary that the additional insured provision and the contractual indemnity provisions be in separate paragraphs, [although] those provisions are in separate paragraphs in [this lease agreement]"). Further, the underlying suit triggers the additional insured provision. *See Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp. 2d 712, 724 (S.D. Tex. 2010) (holding that, as a matter of first impression, additional insured provision was triggered by injured employee's underlying petition).

Failure to Procure Insurance

Failure to name a party as an additional insured or failure to procure the proper type, level, or extent of coverage under these circumstances results in a traditional breach of contract claim, requiring typical demonstration of the elements: a valid, binding contract; breach by the defendant; and monetary damages to the plaintiff. *See, e.g.*, *In re Elevating Boats LLC*, 286 Fed. Appx. 118, 123-24 (5th Cir. 2008) (affirming district court's grant of summary judgment for charterer in breach of contract action to recover $250,000 insurance deductible for subcontractor's failure to list charterer as an additional insured); *Advocare Int'l LP v. Horizon Laboratories, Inc.*, 524 F.3d 679, 688 (5th Cir. 2008) (affirming, in relevant part, district court's grant of summary judgment in favor of distributor for insured supplier's breach of contract for failure to maintain insurance coverage for certain pharmaceutical drug); *Georgia-Pacific, L.L.C. v. Hornady Truck Line, Inc.*, 2009 WL 484629, at *4-6 (N.D. Miss. Feb. 26, 2009) (applying Georgia law) ("breach of contract-failure to procure insurance claim"); *Continental Cas. Ins. Co. v. Zurich Am. Ins. Co.*, 2010 WL 4296626, at *2 (9th Cir. Oct. 28, 2010) (finding that the subcontractor breached agreement to procure primary insurance "issued by A-rated or better carrier satisfactory to [other party]" by using a self-insured retention policy); *Royal & Sun Alliance Ins. PLC v. Rogers Transp. Mgt. Servs., Inc.*, 737 F. Supp. 2d 154 (S.D.N.Y. 2010) (granting motion for summary judgment for breach of contract for obtaining a $100,000 policy rather than a $250,000 as agreed and for failing to name manufacturer as a third-party beneficiary); *FabArc Steel Supply, Inc. v. Composite Const. Sys., Inc.*, 914 So. 2d 344, 362 (Ala. 2005) ("Agreements to procure insurance are generally enforceable . . . , and a party who breaches such an agreement is liable for damages resulting from the failure to obtain the promised insurance.") (citations omitted).

Caveats

However, in some cases, technical shortcomings or other substantive doctrines, such as unclean hands, have prevented a promisee's recovery for breach of contract for failure to procure insurance. *See, e.g.*, *Garrett v. Nelson & Affiliates, L.L.C.*, 2011 WL 213464, at *5 (M.D. Ala. Jan. 25, 2011) (denying summary judgment where contractors failed to allege claim for breach of contract); *Michiana Dairy Processors, L.L.C. v. All Star Beverage, Inc.*, 2010 WL 3999581, at *14 (N.D. Ind. Oct. 12, 2010) (supplier's failure to perform barred its breach of contract claim against distributor, where supplier obtained $1M per occurrence rather than "not less than" $2M per occurrence as agreed).

In sum, section 31-5-41 of the Mississippi Code Annotated does not bar agreements to procure insurance to cover what an indemnity provision cannot, namely, coverage for one's own negligence. Moreover, the clearest way to distinguish the two is through an additional insured provision. Accordingly, should the promisor fail to provide the promisee with additional insured status or fail to procure proper or adequate coverage as agreed, the promisee has recourse through a claim for breach of contract. ■

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[1] As an important side note, in a battle of insurers, the Court noted that Mississippi recognizes the "so-called indemnity exception [not to be confused with Mississippi's 'exception to the anti-indemnity statute' as used here], which shifts the loss to the insurer of an indemnitor despite 'other insurance' clauses" when the indemnitee has additional insured status. *Travelers Property Cas. Co. of Am. v. Federated Rural Elec. Ins. Exchange*, 2009 WL 2900027, at *2 (S.D. Miss. Sept. 3, 2009) (citations omitted). *See PIC Group, Inc. v. LandCoast Insulation, Inc.*, 752 F. Supp. 2d 743, 745 (S.D. Miss. 2010) (insured may agree to indemnify another against liability imposed upon that other by law and obtain insurance coverage to provide against that contingency.) (citations omitted). *Cf. Garrett v. Nelson & Affiliates, L.L.C.*, 2011 WL 213464, at *3 (M.D. Ala. Jan. 25, 2011) (applying Georgia law) ("[W]here an insurance clause shifts the risk of loss to the insurance company, regardless of which party is at fault, an indemnification provision is not made void by [Georgia's anti-indemnity statute]."). (citations omitted)