

Recent Decisions Caution Against Broad Indemnity Provisions

By **Gregory Jaske** (July 29, 2025, 3:33 PM EDT)

Recent decisions in disparate jurisdictions serve as an important reminder to legal practitioners and business owners to examine often overlooked, and litigated, indemnification obligations in their governing organizational documents and other contracts.

In particular, these cases remind us of, regardless of jurisdiction, the importance of drafting indemnity provisions with appropriate restrictions so as not to be overly broad, and on terms that not only comply with applicable law but are also inherently fair and reasonable so as to enhance the predictability of enforceability.



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Cashman Equipment and Interpretation Risks in Indemnity Provisions

Take the April 16 decision in *Cashman Equipment Corp. v. Kim Marie Shaughnessy*.

There, the Suffolk County Superior Court of Massachusetts upheld the enforcement of broad indemnity provisions and awarded defense costs to Kim Shaughnessy, a longtime employee who eventually served as chief financial officer of both Cashman Equipment Corp. and Servicio Marina Superior LLC despite a jury finding that Shaughnessy breached her fiduciary duties in the indemnified matter.

Servicio Marina and Cashman Equipment are in the business of marine equipment rentals.

The claim for indemnification arose out of the terms of Shaughnessy's separation from Cashman Equipment and Servicio Marina, wherein the plaintiffs — Cashman Equipment and Servicio Marina — alleged breach of fiduciary duty and other claims against Shaughnessy, who filed a counterclaim for indemnification and contribution.

In 2016, with the approval of the president of Cashman Equipment and Servicio Marina, Shaughnessy established a certified women business enterprise, or WBE, also engaged in the marine equipment rental business, with the intention of involving Cashman Equipment in the business the WBE generated by subcontracting certain rentals with Cashman Equipment.

The WBE was owned 51% by Shaughnessy and 49% by an affiliated insurance trust of the plaintiff-indemnitor, or the trust, of which Shaughnessy was also a trustee.

As part of Shaughnessy's separation from Cashman Equipment and Servicio Marina, it was agreed that

Shaughnessy would surrender her ownership interest in Servicio Marina and acquire the trust's interest in the WBE in exchange for the \$60,000 in capital the trust initially invested in the WBE, plus interest thereon.

A jury trial, held in November 2024, found that Shaughnessy, in her capacity as trustee of the trust, had breached her fiduciary duty to the trust, based on the valuation of the interest Shaughnessy personally acquired from the trust.

The underlying indemnity provisions in Cashman were, by their terms, limited only by the bad faith of the indemnitee, and Massachusetts common law has prohibited indemnification where the indemnitee has been grossly negligent.

Since the jury had only explicitly found that the indemnitee breached her fiduciary duties, the court refused to "compel a finding of bad faith or gross negligence" from a finding of a breach of fiduciary duties.

Builders FirstSource Underscores Risk of Contradictory Language

Also take the Feb. 2 decision in Builders FirstSource-Southeast Group LLC v. Palmetto Trim and Renovation.

There, the South Carolina Court of Appeals upheld the state circuit court's invalidation, by summary judgment, of indemnity provisions contained in construction contracts as ambiguous, conflicting and unconscionable.

In Builders FirstSource, a homeowners' association sought damages for alleged construction defects from a contractor for defective framing and window installation in a 129-unit residential townhouse development, and the prime contractor sought, among other things, indemnification from certain subcontractors.

In a scathing decision, the Court of Appeals took issue with the form and substance of the indemnity obligations that the prime contractor imposed on its subcontractors, including an obligation of the subcontractors to indemnify for the prime contractor's sole negligence.

Specifically, the Court of Appeals upheld the lower court's application of the heightened review standard established under South Carolina common law in the 2018 decision in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland LLC, which requires clear and unequivocal intent of an indemnity obligation to include indemnification for the indemnitee's own negligence.

Under that heightened standard of review, the Court of Appeals upheld the lower court's invalidation of the indemnity provisions due to contradictory language as to the scope of indemnification, and/or as ambiguous based on certain indemnity provisions being buried in unrelated portions of certain subcontracts.

In addition, the Court of Appeals also upheld the lower court's determination that any obligation of the indemnitor to indemnify the indemnitee for the indemnitee's sole negligence is void under South Carolina statutory law — specifically, Section 32-2-10 of the South Carolina Code.

Indemnity Provisions After Cashman and Builders FirstSource

Taking guidance from the principles of law and equity applied in *Cashman* and *Builders FirstSource*, business owners and legal practitioners should be mindful of their contractual indemnity rights and obligations.

The *Cashman* holding reinforces the importance of including reasonable, express limitations on indemnification where the indemnitor would not reasonably expect to be liable for the indemnitee's conduct, such as the indemnitee's breach of fiduciary duties, fraud or other illicit conduct. These exclusions should be specifically identified in each indemnity provision.

The *Builders FirstSource* decision highlights different common defects in indemnity provisions, such as lack of clarity or conflicting terms, either within a single indemnity provision or among different indemnity provisions in the same agreement, and overzealous drafting that imposes unreasonable obligations against counterparties in a weak bargaining position.

Ideally, any contract will have all indemnity obligations contained within a single discrete section of the agreement. When indemnity provisions are scattered throughout a contract, the opportunity is ripe for ambiguity to result in interpretation and enforcement that may be inconsistent with the drafting party's intent.

Furthermore, imposing liability on an indemnitor for conduct that is outside of their control, not due to the indemnitor's fault, or that is otherwise inconsistent with applicable laws limiting indemnity obligations, can be expected to open the door for judicial intervention barring or limiting enforcement of those indemnity obligations.

Business owners and their attorneys should review the objectives of each contractual indemnity provision, discuss their primary objectives in the enforcement thereof, and seek to ensure that the same are compliant under applicable law, and will not be viewed unfavorably when a court is applying principles of equity, asking if the obligation is fair to the indemnitee.

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