MARKS & WEINBERG, P.C.

Cincinnati Insurance Company v. Torke Coffee Roasting Company

2002 WL 31416104 (Wis. App.)

Any party that desires to be indemnified with respect to losses that result from its own negligence would be wise to make sure their contracts explicitly say so.

Torke Coffee Roasting Company (ñTorkeò) entered into an agreement with Heinemannôs Candy Company (ñHeinemannôsò) pursuant to which Torke provided Heinemannôs with a coffee machine at no cost so long as Heinemannôs agreed to purchase all of its products from Torke. The agreement: (1) required Torke to check and service the machine at periodic intervals to insure the safe operation of the equipment; and (2) required Heinemannôs to indemnify and save Torke harmless from any and all claims or damages arising out of the use of such equipment by Heinemannôs or its employees or patrons.

A water supply line that was attached to equipment broke and resulted in damage to Heinemannôs property. Heinemannôs collected from its insurance provider (ñCincinnatiò) who stepped into Heinemann's shoes with respect to all of Heinemann's rights against Torke. Cincinnati brought suit against Torke, alleging that Torke breached its duty to service and maintain the equipment. The trial court dismissed the suit, holding that: (1) Cincinnati's claim (which derived from Heinemann's claim) could only be brought if Heinemann's itself could bring the claim; and (2) since Heinemann's was obligated to

indemnify Torke for any losses resulting from the suit, it was barred from bringing the suit in the first place.

On appeal, the Wisconsin Appellate Court reversed, noting that a contractual agreement to indemnify a party against the consequences of its own negligence is not against public policy but that the general rule is that an indemnification agreement will not be construed to cover an indemnified party for its own negligent acts absent a specific and express statement in the agreement to that effect. According to the court, the underlying rationale is that the indemnifying party: (1) is unlikely to have good information about the likelihood of the indemnified party behaving negligently; and (2) is not in a position to prevent such behavior. Therefore, it is unlikely that the indemnifying party will have agreed to insure the other party against the consequences of that party's negligence. Accordingly, indemnification agreements will generally only be interpreted to insure a party for its own negligent acts if the agreement expressly states so. In the instant case, there was no express provision and Heinemannôs therefore had no obligation to indemnify Torke for any damages.

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