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LEGAL ALERT

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BEWARE WHAT YOUR CONTRACT SAYS: IT JUST MIGHT BE ENFORCED

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When reviewing a contract, how often have you had the following thoughts: "That provision is so one-sided, there's no way it will be enforced the way it's written!" Or "I won't worry about negotiating that provision; a court would never enforce it as written."

A recent decision from Ohio's Tenth District Court of Appeals illustrates the risks of that kind of thinking. The procedural history of the dispute is complex, but worth digesting for one important reminder: it's always better to negotiate troublesome provisions yourself rather than counting on a judge or arbitrator to do it for you in the future.

THE *CLEVELAND CONSTRUCTION V. RUSCILLI CONSTRUCTION* CASE

In *Cleveland Construction, Inc. v. Ruscilli Construction Co., Inc.*, 10th Dist. Franklin No. 18AP-480 and 21AP-375, 2023-Ohio-363, the Tenth District confronted a long-running construction dispute between a general contractor, Ruscilli Construction Company ("Ruscilli"), and its subcontractor, Cleveland Construction, Inc. ("Cleveland"). The subcontract at issue contained an indemnification provision that stated, in relevant part, that Cleveland would "indemnify and hold harmless [Ruscilli] from any against claims, damages, losses and expenses, including but not limited to its **actual attorneys' fees** incurred, arising out of or resulting from performance of" the subcontract. Id. at ¶ 23 (emphasis added). The provision further stated: "This indemnity shall include, but not be limited to, the following: . . . The **prosecution** of any claim by [Ruscilli] against [Cleveland] or any of its subcontractors or suppliers for breach of contract, negligence or defective work [or] . . . The **defense** of any claim asserted by [Cleveland] against [Ruscilli] whether for additional compensation, breach of contract, negligence, or any other cause." *Id.* (emphasis added).

Stated plainly: Cleveland agreed that if it ever brought a claim against Ruscilli, or Ruscilli brought a claim against Cleveland, Cleveland would pay all of Ruscilli's attorneys' fees. Surely no court or arbitrator would ever enforce such a provision, right? Well, dear reader, do you think you'd be reading this article right now if that were the case?

Various disputes arose between the parties and the case was ultimately tried to a three-member arbitration panel. Ruscilli asserted claims against Cleveland for over $900,000 in damages resulting from Cleveland's alleged breach of contract, while Cleveland asserted various counterclaims totalling just under $1.4 million. Of particular note, both sides requested an award of attorneys' fees.

The arbitration panel ultimately determined that Cleveland was entitled to an award of just over $100,000 on its claims but was not entitled to an award of attorney fees. However, the panel determined that Ruscilli **was** entitled to such an award. Relying on the indemnification language quoted above, the panel reasoned that "[t]he Parties are two sophisticated commercial entities that entered into a negotiated, lengthy Subcontract agreement that included several specific provisions that shifted the risk of [Ruscilli's] attorneys' fees and costs onto [Cleveland] in **any dispute between the parties**." (Emphasis added.) Interestingly, while the indemnification provision provided for fee-shifting in Ruscilli's favor for both prosecuting and defending claims, the panel's award specifically cited only the provision for prosecuting claims. Accordingly, the panel directed Ruscilli to submit a petition for fees. Ruscilli submitted a total of $837,387 in attorneys' fees, expert fees, and related costs, of which the panel awarded $624,087.45 to Ruscilli. After several years of further post-arbitration proceedings which are too complex to summarize here, Ruscilli was awarded an additional $86,805.96 by a magistrate judge.

Both the arbitration panel and the magistrate judge's rulings were ultimately upheld by the Tenth District. Despite Cleveland's insistence that the post-arbitration attorneys' fees did not "arise out of or result from performance of the Subcontract," the court did not agree that the provision was limited to fees incurred in the arbitration proceedings themselves. *Id.* at ¶ 26. The court also relied on the broad phrasing of the provision that Cleveland's indemnity obligations "shall include, but not be limited to," the listed categories. *Id.* at ¶ 27. The net result? Cleveland was awarded just over $100,000 on its claims but ordered to pay over $700,000 in Ruscilli's attorney fees.

LESSONS LEARNED

While the history of the case is convoluted, one thing is clear: Cleveland certainly wishes it had negotiated to remove—or at least put limitations on—the troublesome indemnification provision in the subcontract. What can a party do if it is confronted with an indemnification provision similar to the one in the Cleveland-Ruscilli subcontract? There are several options. Most obvious would be to remove an obligation for either party to pay the other's attorneys' fees in any claims brought by one party directly against the other, but that is not always feasible. As a compromise, the obligation to cover attorneys' fees could be limited in various ways. For instance, the obligation could be limited to paying attorneys' fees incurred in defending claims that are ultimately determined to be frivolous, or if the other party prevails on more of the claims than the claimant does. Certainly, a common and reasonable compromise in any fee-shifting provision is to limit the obligation to "reasonable" attorneys' fees, as opposed to any and all "actual" fees. Cleveland was fortunate that the arbitrators only awarded Ruscilli its reasonable fees, despite the subcontract's allowance for actual fees.

Above all, parties should remember that even if a provision seems unfair, unreasonable, or perhaps even unenforceable, there is always a risk that a judge or arbitrator will enforce it as written. This is especially true for sophisticated players such as Cleveland and Ruscilli, who may or may not be represented by in-house or outside counsel in the contract negotiation process. It is always better to confront such provisions head-on, rather than simply hoping they will not be an issue in the future or that a merciful judge or arbitrator will not enforce them as written. No one wants to find themselves in the situation of Cleveland: winning the battle (at least in part) but paying the other party for the privilege of doing so.

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