CALIFORNIA Family Law Monthly

In re Marriage of Vaughn

This case holds that a third-party debt assigned to husband in the dissolution judgment was non-dischargeable in Bankruptcy because its discharge would have directly and adversely impacted his ex-wife's financial interest. Fascinating to learn that the state trial court has concurrent jurisdiction with the Bankruptcy Court to determine dischargeability of debts. A chief teaching point of the case, somewhat underemphasized in the opinion, is the proper drafting of indemnity clauses in settlement agreements and judgments. This essential protection is often overlooked in the midst of scheduling and dividing of assets and liabilities. As the opinion points out, debts can be direct debts owed by one spouse to another, or indirect debts owed to a third party. The indemnity clause must be drafted broadly to provide protection for the indemnified spouse for any and all debts and obligations, direct and indirect. [Practice Tip: Cite *Vaughn* as part of your indemnity clause to sanctify the intent and scope of the intended indemnity]. Whether an indemnity agreement covers direct liability, third-party liability, or both, is a question of contract interpretation for independent review by the court. The goal of such interpretation is to determine the intent of the parties when they include an indemnification provision in the Judgment of Dissolution.

Family law practitioners are well-advised to remember that these type of contractual provisions require us to look outside the confines of family law cases and treatises for guidance. In that regard, *Alki Partners, LP v. DB Fund Services*, LLC (2016) 4 Cal.App.5th 574 (rehearing denied), a case where investors sued a hedge fund's administrator for breach of contract, provides a worthwhile review of indemnity provisions in a contract. The *Alki Partners* appellate opinion explains that a contractual indemnity provision may be drafted either to cover claims between the contracting parties themselves, or to cover claims asserted by third parties, and that indemnity agreements are construed under the same rules that govern the interpretation of other contracts. An indemnity provision is to be interpreted to give effect to the mutual intention of the parties, and the intention of the parties is to be ascertained from the clear and explicit contract language (Civil Code sections 1636, 1638.) There appears in the *Alki Partners* opinion an often overlooked distinction, i.e., language in an indemnity provision stating "husband agrees to indemnify and save wife harmless from any and all losses including reasonable attorney's fees arising from any cause or for any reason whatsoever" does not provide for attorney's fees between the parties for breach of that contractual provision. In such circumstances, there exists no language which reasonably can be interpreted as addressing the issue of a claim between the parties on the contract. Similarly, an indemnification clause in which one party promises to indemnify the other from "any, all and every claim" which arises out of the performance of the contract deals only with third-party claims, and cannot support an award of attorney's fees in an action for breach of contract between the parties to the agreement. *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, determined that the indemnity provision there did not afford a right to attorney's fees incurred in breach of contract litigation

between the parties to the indemnity agreement, even though, as in *Alki*, the contract provided that the indemnity agreement was to be enforced to the fullest extent permitted by law.

Let the *Vaughn* case teach us not to leave the indemnity provisions of our judgments to the boilerplate in our word processors. Protection from debts assigned to the other spouse are just as critical as the award of assets to our own clients. Don't let the fact that *Vaughn* is a “Bankruptcy case" divert attention from this important aspect of our drafting responsibilities. Indemnity provisions deserve renewed scrutiny and careful drafting.

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