

North Carolina Supreme Court Rules That Indemnification Agreement Creates Tripartite Attorney-Client Relationship Among Counsel, Indemnitor and Indemnatee

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The Supreme Court of North Carolina ruled that a tripartite attorney-client relationship arises from an indemnification agreement because the indemnitor and indemnatee share a common interest in defeating liability against the indemnatee. *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 805 S.E.2d 664 (N.C. 2017).

An asset purchase agreement between Bally and Blast Fitness transferred all obligations arising under certain property leases from Bally to Blast. The agreement contained an indemnification clause wherein Blast agreed to defend and indemnify Bally against any losses relating to the leases. Thereafter, a real estate investment firm sued Bally for payment of back rent and other charges due under a certain lease. Blast agreed to defend and indemnify Bally pursuant to the agreement.

During discovery, plaintiff's counsel moved to compel the production of "post-suit correspondence and documents exchanged between [Bally] and Blast." Bally objected and moved for a protective order based on attorney-client privilege. After an *in camera* review, a North Carolina trial court summarily granted the motion to compel. An appellate court affirmed, holding that a tripartite attorney-client relationship did not exist between Bally, Blast and defense counsel because "an indemnification provision in an asset purchase agreement, standing alone, is insufficient to create a common legal interest between a civil litigant indemnatee and a third-party indemnitor." The North Carolina Supreme Court modified the ruling and remanded the matter.

The North Carolina Supreme Court ruled that the indemnification agreement created a tripartite relationship among Bally, Blast and defense counsel because the legal interests of Bally and Blast were contractually aligned. However, the court noted that the existence of such a relationship did not automatically trigger privilege. Rather, for privilege to apply, the communications must satisfy a five-factor test that considers the content and timing of the communication, among other things. The court held that because the factual record below was "bare" (lacking findings of fact or conclusions of law), it could not conclude that the trial court abused its discretion in compelling disclosure of the documents at issue. The court remanded the matter for additional proceedings.

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