

When Is Negligence Gross? Understanding Indemnification Provisions in Hotel Management Agreements

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Hotel management agreements, like other commercial contracts, often contain clauses apportioning liability among the parties for potential losses or damages arising out of specific events or actions. Known as indemnification provisions, this language is of particular importance in hotel management agreements given the nature of the parties' relationship—where an owner is ceding operational control of its hotel to the manager, often for decades.

These provisions need to strike a balance between the interests of the owner and manager. Hotel managers, who typically earn a fee for their management services but do not meaningfully share in the profits of the hotel business, generally want assurances that, like any service provider, they will not be held responsible for liability arising out of hotel operations.

From a manager's perspective, since the hotel owner owns the business, it should also be responsible for any liability arising out of business operations. Conversely, the owner, who is entrusting a highly valuable asset to the hotel manager, desires protection against a rogue operator who incurs liability by running the hotel business in an irresponsible manner.

In this article, we discuss how hotel industry stakeholders attempt to address these competing



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concerns in hotel management agreements through indemnification language, how courts interpret these provisions, and considerations for hotel owners and managers when negotiating such provisions.

Common Indemnification Language in Hotel Management Agreements

Indemnification provisions in hotel management agreements often adopt one of a few forms. Most frequently, hotel owners agree to indemnify managers from and against any claims or liability of any kind arising from or related to the management, operation, or maintenance of the hotel, except to the extent such claim or liability is the result of the manager's "gross negligence or willful misconduct."

In some cases, before a hotel owner may avail itself of the foregoing exception, it must further obtain a final determination from a court of competent jurisdiction that the liability was “solely” the result of the manager’s gross negligence or willful misconduct; in other words, if the manager’s gross negligence or willful misconduct was only one of several causes for the liability, the hotel manager remains indemnified.

Sometimes, the protections granted to the hotel manager are arguably even broader, by explicitly indemnifying the manager even in cases where liability arises out of the negligent acts of the manager, or by failing to caveat the owner indemnity for any level of misconduct by the hotel manager.

Additionally, in some instances, the exception is applicable only if the underlying act or omission resulted from gross negligence or willful misconduct of specifically identified senior property-level personnel (such as the General Manager and other director-level positions) or above-property supervisory personnel.

When a Manager’s Conduct is Protected

This type of indemnity language—which protects a hotel manager except in cases of gross negligence or willful misconduct—acts as a significant shield for managers against liability for conduct which does not rise beyond the level of ordinary negligence. In practice, the question then turns to what acts or omissions by a hotel manager cross the line from ordinary negligence to gross negligence so as to trigger the indemnity exception found in many hotel management agreements.

While it is natural to think of gross negligence as a slightly more serious version of ordinary negligence, New York courts have made clear that it is to be viewed as a different kind, rather than different degree, of conduct. To be considered gross negligence and pierce a limitation of liability in a commercial contract, the conduct in question must “smack of intentional wrongdoing” and “evinced a reckless indifference to the rights of others.” *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554 (1992) (citing *Kalisch-Jarcho, Inc. v. City of New York*, 58 n.Y.2d 377, 384-85 (1983)).

In applying this standard, courts are reluctant to find gross negligence excepting an owner’s indemnity obligation absent wanton and egregious conduct by a hotel manager. For instance, in *Sheraton*

Operating Corp. v. Castillo Grand, LLC, the Westchester County Commercial Division rejected an argument that Sheraton’s conduct was grossly negligent, such that the hotel owner would not be obligated to indemnify Sheraton. 34 Misc.3d 1207(A), *58-59 (Sup. Ct. Westchester Cnty. 2011) (Scheinkman, J.).

The underlying facts were that, in August 2006, Sheraton’s Associated Director of Sales entered into a contract for an event scheduled to take place during the week of the Super Bowl in February 2007. *Id.* at *57. Sheraton entered into this contract even though, weeks earlier, it had already canceled several scheduled events because of concern the hotel would not be open in time. *Id.* at *58. Sheraton then waited several months until November 2006 to cancel the Super Bowl contract, which is when Sheraton claimed it became aware that the hotel would not be opening on time. *Id.* at *57.

Under the hotel management agreement, the hotel owner had agreed to indemnify Sheraton from all third-party claims relating to the operation of the hotel, except for Sheraton’s “Grossly Negligent or Willful Acts,” defined as “gross negligence, willful misconduct or fraud.” *Id.* at *58.

The HMA further provided that “acts or omissions of Hotel Personnel,...other than Senior Executive Personnel...are not to be imputed to Sheraton or deemed Grossly Negligent or Willful Acts unless the acts or omissions resulted from gross negligence or willful misconduct by Sheraton’s Corporate Personnel or the Senior Executive Personnel in supervising the Hotel Personnel.” *Id.*

Analyzing Sheraton’s conduct under this language, the court held that while the actions of the Associate Director of Sales made “little sense,” there was no evidence that Sheraton willfully contracted while knowing that the hotel would not be ready or willfully failed to notify the counterparty that the hotel would not be ready. *Id.* at *59.

Further, the court found that, even if the Associate Director of Sales was, in fact, grossly negligent, her acts could not be imputed to Sheraton unless its Corporate Personnel or Senior Executive Personnel were grossly negligent in supervising her, which they were not. *Id.*

New York courts have similarly declined to find gross negligence sufficient to nullify indemnity provisions in

other circumstances where the conduct was deemed simply imprudent. See *Brevet Direct Lending—Short Duration Fund, L.P. v. Aprio LLP* 228 A.D.3d 449, 450 (1st Dep’t 2024) (defendant’s failure to check if email addresses were legitimate did not meet the standard of recklessness sufficient to find gross negligence, even where conduct fell short of commonly accepted standards for consulting services); *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823-824 (1993) (alarm company’s failure to wire a skylight did not evince the recklessness necessary to rise to the level of gross negligence and overcome indemnification obligation).

When the Exception to Indemnity Does Apply

Nevertheless, courts have held that certain types of conduct do constitute gross negligence or willful misconduct, warranting an exception to indemnity obligations. For example, New York courts are more likely to find gross negligence nullifying an indemnification obligation when the indemnified party’s acts or omissions pose a significant threat to life safety.

In *Abacus Federal Savings Bank v. ADT Sec. Services, Inc.*, the Court of Appeals held that where plaintiff alleged that defendant alarm companies had knowledge for weeks, if not months, that their installed equipment was malfunctioning, failed to investigate the source of the malfunction, and failed to notify anyone at plaintiff’s bank branch of the potential security concern, such conduct was precisely the type of conduct that evinces a reckless indifference to the rights of others sufficient to void an indemnity provision. 18 N.Y.3d 675, 683-84 (2012).

In another alarm case, the Second Department held in *Federal Ins. Co. v. Honeywell, Inc.* that an expert security consultant’s report, setting forth with specificity numerous deficiencies in the installation and maintenance of the alarm system, was sufficient to support a finding of gross negligence and overcome the indemnity obligation. 243 A.D.2d 605, 606 (2d Dep’t 1997).

In addition to a clear focus on safety, New York courts will find gross negligence in cases where the party seeking indemnification was aware of a risk and failed to act. See, e.g., *Valuable Holding Corp. v.*

Midtown Vault Corp., 120 A.D.2d 356, 356 (1st Dep’t 1986) (indemnity provision did not apply where defendant continued to employ a security guard despite knowledge that he had misappropriated valuable goods from vault); *Dillon v. Motorcycle Safety School, Inc.*, 22 Misc.3d 1127(A), *2 (Sup. Ct. Bronx Cnty. 2008) (indemnity provision inapplicable where plaintiff repeatedly complained that motorcycle was malfunctioning, and instructors refused to allow him to switch to another one).

Moreover, even where provisions purport to indemnify hotel managers for all conduct, without limitation, courts will not enforce such provisions as a matter of public policy when the damages are found to be the result of manager’s gross negligence or willful misconduct. *Colnaghi*, 81 N.Y.2d at 823 (citing *Sommer*, 79 N.Y.2d at 554). Therefore, it is essential for both owners and managers to understand what types of conduct rises to the level of gross negligence or willful misconduct.

The Takeaway

While indemnity provisions in hotel management agreements typically provide hotel managers with significant protection against liability, the scope and extent of that protection largely depends on the specific language negotiated and, in all events, is not unlimited. Careful consideration and drafting can eliminate some of the uncertainty around whether the owner or manager will ultimately be responsible for damages resulting from specific types of conduct by the manager.

When negotiating hotel management agreements, hotel owners should bargain for clear language, carving out specific behavior for which the manager, rather than the owner, ought to be held responsible. Managers, on the other hand, should advocate for language shielding them from liability absent clear evidence—as finally determined by a court—that their senior personnel acted with gross negligence or willful misconduct and were the sole cause of the liability.

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