



## Know When to Hold'Em

### *Georgia Supreme Court Says Court Holding of Insured's Liability is Required for Indemnification*

By: Mark A. Deptula, Molly McGinnis Stine and John Williamson

In *Lloyd's Syndicate No. 5820 v. AGCO Corp.*, 2014 WL 998700 (March 17, 2014), the Georgia Supreme Court recently held insurance policy language that triggered the insurer's duty to indemnify only after the insured was "held legally liable" requires an "actual holding of legal liability by a court, not merely the possibility of such a holding or the prediction of such a holding by the insured."

#### Background

AGCO Corp. (AGCO), a manufacturer of agricultural spray applicators called the "RoGator," sought a declaration that the insurance policy covered claims against it based on alleged design defects in the applicator wheel. Lloyd's Syndicate No. 5820 doing business as Cassidy Davis Insurance (CDI) provided the master policy of insurance for AGCO's extended protection plan program (EPP), which it offered to its customers. In September 2008, after it had paid over 25 claims related to the alleged defect, CDI denied further payment for several reasons, including that there was no indemnification obligation as the policy promised "to indemnify [AGCO] for all sums which [AGCO] *shall be held legally liable to pay* in respect of [AGCO's] contractual liability" to its customers under the EPP (emphasis added). CDI asserted that this language required a court finding of liability to trigger indemnification. AGCO sued CDI for breach of contract and bad faith denial of insurance coverage. The trial court granted summary judgment for AGCO and, relevant here, rejected CDI's argument that a court-entered judgment establishing AGCO's legal liability was required to trigger the duty to indemnify. The trial court determined "indemnify" is broad enough to include any liability, not just liability resulting from judgment. The Court of Appeals affirmed.

The Georgia Supreme Court reversed. The Court held that the policy does not provide indemnification for EPP claims for which AGCO is "legally liable," only claims for which AGCO has been "*held legally liable.*" Thus, CDI is required to indemnify AGCO only when there has been "an actual *holding* of legal liability by a court, not merely the possibility of such a holding or the prediction of such a holding by the insured."



The Court was not persuaded that the policy language was subject to interpretation because of CDI's voluntary reimbursement of a number of RoGator claims. Instead, the Court noted AGCO's "goodwill" payments to some customers and said that CDI can similarly make commercial accommodations for a client. According to the Court, because the phrase "held legally liable" is not ambiguous, it would not consider extrinsic evidence as to the parties' intent.

### Commentary

The indemnification obligation under an insurance policy will depend on policy-specific language, applicable state law and the facts of a particular claim. *AGCO* spotlights the importance of policy language; even one word (here, "*held* legally liable" as opposed to "legally liable") can make a significant difference. *AGCO* may also be relevant when the language of an indemnification policy provides for reimbursement of defense costs as part of the policy's coverage, including, for example, whether defense costs are reimbursed as such costs are incurred or whether such costs are reimbursed only after the underlying action has resulted in a holding of legal liability. While some could argue that the decision suggests that an insured has to or should lose an underlying case in order to recover insurance, *AGCO* confirms that for policies such as the *AGCO* policy, this situation is what the insured contracted for and is what the plain language of the contract provides. This Georgia Supreme Court decision also makes clear that extrinsic evidence – such as voluntary payments of claims as a goodwill gesture to a client – is not to be considered when an insurance policy's language is clear.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

**Mark A. Deptula** | 312-443-1728 | [mdeptula@lockelord.com](mailto:mdeptula@lockelord.com)

**Molly McGinnis Stine** | 312-443-0327 | [mmstine@lockelord.com](mailto:mmstine@lockelord.com)

**John Williamson** | 404-870-4669 | [jwilliamson@lockelord.com](mailto:jwilliamson@lockelord.com)