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"INCLUDING" VS. "INCLUDING WITHOUT LIMITATION"
FIRST CIRCUIT'S LESSON ON PRECISION IN LOAN CONTRACT DRAFTING

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In *VFC Partners 26, LLC v. Cadlerocks Centennial Drive, LLC*, the First Circuit Court of Appeals highlights the necessity to precisely draft loan contract language to allocate liability between the borrower and the lender.[1]

At issue, an indemnity agreement provided that the borrower's principal and a related entity would indemnify the lender from all costs and liabilities "of any kind or nature whatsoever … sought from or asserted against [the lender] in connection with, in whole or in part, directly or indirectly, … the presence, suspected presence, release, suspected release, or threat of release of any Hazardous Material" on or around the financed property. It further specified that "[s]uch liabilities shall include" seven particular categories of liability, including only one potentially applicable at issue: "the cost required to take necessary precautions to protect against the release of any Hazardous Materials in, on, or under the Property, the air, [or] any ground water … ."

The First Circuit reversed the District Court's judgment ordering the borrower's indemnitors to reimburse the lender for the costs of environmental testing and held that the District Court interpreted these provisions too broadly ignoring important limitation language.

The Court rejected the lender's argument that the seven specified categories of liability were "non-exclusive examples of certain types of liability covered" rather than a limitation on the "much broader" preceding sentence. The Court started its analysis with the "well-established principle" that "a subsequent specification impliedly limits the meaning of a preceding generalization." The Court noted that "[u]nless the second sentence operates as a limit, the first sentence would expose [the indemnitors] to liability even for environmental testing that was completely unreasonable or necessary." Further, the Court found that the absence of language such as "shall include but not be limited to" or "without limiting the foregoing, [the term] shall include" weighed against interpreting the second sentence as a list of "non-exclusive examples." As a result, the Court concluded that the environmental testing was not covered because it was not done to protect against the *release* of any Hazard Materials, but rather only to confirm that the presence of a dangerous toxin (tetrachloroethylene) in the air was at a safe level. The Court held that those costs fall outside the Indemnity Agreement on the lender.

The Court also held that the first sentence limited indemnification to environmental liability "sought from or asserted against" the lender. This provision requires "the existence of a third party imposing some type of liability against" the lender. Accordingly, "any costs that [the lender] incurred on its own behalf, for its own purpose, do not fall within the scope of the Indemnity Agreement."

The First Circuit's lesson is to carefully review so-called "boiler-plate" language in loan documents and other contracts, particularly with respect to high-cost risks such as environmental liability, and use precise language to allocate such liability between the parties.

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[1] *See* Opinion, *VFC Partners 26, LLC v. Cadlerocks Centennial Drive, LLC.*, No. 13-1128 (1st Cir. Nov. 12, 2013).