

# KPM LAW wins Virginia Supreme Court case making indemnity contracts easier to enforce

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Practically every business, in some form or fashion, relies on contractors and vendors to efficiently operate. Almost all contracts governing these relationships contain some form of an indemnity clause. Whether it is a retailer, restaurant, or service industry

contract, these indemnity provisions allow parties to deliberately and intelligently control risk.

Unfortunately, when something goes wrong, enforcing those indemnity agreements can be more difficult than getting a party to agree to indemnity in the first place. Recently, KPM LAW sought to enforce one such indemnity provision for one its clients. In doing so, we opened the door to allow for an easier means of enforcing indemnity agreements in Virginia.

On February 1, 2018, in the case of *Dominion Nuclear Connecticut, Inc. v. Securitas Security Services USA, Inc.*, \_\_\_ Va. \_\_\_ (2018) Record No. 170130, the Virginia Supreme Court agreed with KPM LAW attorneys and ruled that Dominion could rely upon issues raised in its affirmative defense to trigger the duty to defend in an indemnity clause.

The facts of the case were largely undisputed. Dominion operated a Nuclear Power Plant in Connecticut. As part of its operations, it contracted with Securitas to provide security services at the power plant. The contract contained an indemnity provision requiring Securitas to defend and indemnify Dominion to the extent the claim arose from Securitas's negligence. One day, a Securitas guard slipped and fell on ice as she was performing her security rounds at the power plant. She sued Dominion under a premises liability theory. The only allegation in her Complaint was that Dominion was negligent for failing to clear the snow and ice from the property. Plaintiff did not sue any other entity or allege that any entity other than Dominion was negligent. Through discovery, it became clear that the employee had failed to wear her company-issued slip resistant shoes, despite the fact that she had them with her and had known that there was ice in the exact area where she fell. Dominion pleaded the affirmative defense of Comparative Negligence. It then sought defense and

indemnity from Plaintiff's employer, Securitas. In short, Dominion argued that, because Plaintiff was in the scope of her employment, her negligence was imputed to Securitas. To the extent the Plaintiff's negligence contributed to the accident, Securitas's negligence contributed to the accident, and the duty to defend was triggered.

Securitas rejected Dominion's tender claiming that, under the "Eight Corners" rule, the only facts which could trigger the duty to defend were those in the Plaintiff's Complaint. And in this case, the Plaintiff did not allege negligence from any entity other than Dominion. The case was ultimately heard by the Virginia Supreme Court, who agreed with Dominion and KPM LAW. Specifically, the opinion ruled that the Plaintiff's Complaint constituted a claim within the scope of the indemnity provision. The Virginia Supreme Court held that Dominion's responsive pleading, which included an assertion of Plaintiff's Comparative Negligence, triggered the duty to defend. This ruling implicitly expands the Eight Corners rule to consider the issues raised by the entire Claim, rather than strictly those facts alleged in a Complaint.

Thus, the Plaintiff's personal injury claim opened the door to Dominion's comparative negligence claim. This, in turn, implicated Securitas and triggered the duty to defend.

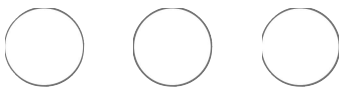
The ruling on this case is important because of the practical realities of litigation. There exists no scenario where a Plaintiff will allege her own negligence caused an accident. Further, because of the worker's compensation bar that exists in most jurisdictions, no plaintiff will allege negligence on the part of an employer, from whom she cannot recover. If Securitas had prevailed, no indemnity provision could ever be enforced against a party who was not specifically identified in a Complaint. For example, if a contractor who was unknown to Plaintiff created a hazard on the Defendant's property, the Plaintiff would not include any allegations against the

contractor in her Complaint. Therefore, the owner-Defendant would be unable to assert an indemnity claim against the responsible contractor.

Under this new ruling, the Supreme Court will continue to look at issues implicated by a Plaintiff's Complaint. But it will also consider facts and allegations from other sources incident to the Complaint (including from a defendant's responsive pleadings) to determine if the duty to defend is triggered.

Nevertheless, it should be clear that an unsupported claim of negligence is unlikely to trigger the duty to defend. In the *Dominion v. Securitas* case, there existed concrete, specific facts that unquestionably raised the issue of Plaintiff's comparative fault. This Supreme Court decision will be an important and effective tool to help businesses enforce indemnity agreements. It is not, however, a panacea.

If you have any questions about the handling of an indemnity clause and if a tender is proper, KPM LAW attorneys are ready to assist.



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