



Eleventh Circuit Reverses Itself in *Hanover Ins. Co. v. Atlantis Drywall & Framing, LLC*, Calming Concerns that Indemnity Actions are Subject to Arbitration Absent Arbitration Clauses in Indemnity Agreements

Posted in [Legal Alerts](#) by Ty G. Thompson on Fri Jun 5, 2015

Recently, the United States Court of Appeals for Eleventh Circuit vacated its August 2014 order requiring a surety to arbitrate its indemnity claims against its principal and indemnitors, despite there being no arbitration provision in the indemnity agreement. The facts in *Hanover Ins. Co. v. Atlantis Drywall & Framing, LLC*, 2015 WL 3372199 (11th Cir. May 26, 2015) are similar to those in most indemnity salvage actions. There, the contractor/obligee contracted to build a new student-housing complex on the University of Alabama's campus in Tuscaloosa, Alabama (the "Project"). *Id.* at *1. The contractor/obligee entered into a subcontract with the subcontractor/principal to perform the drywall work on the Project. *Id.* The subcontract contained a broad arbitration clause requiring that any claim arising out of or related to the subcontracted work be brought in arbitration. *Id.*

Hanover Insurance Company ("Hanover") was the principal's performance and payment bond surety. *Id.* at *2. A condition of Hanover issuing the bonds was that the principal, individual indemnitors, and others execute an indemnity agreement protecting it from any loss if the principal failed to perform its work on Project. *Id.* The indemnity agreement did not contain an arbitration clause. *Id.*

The principal defaulted on the Project, which required Hanover to step in and make payments under the bonds. *Id.* The principal and indemnitors failed to collateralize or otherwise protect Hanover from its losses, forcing it to initiate legal proceedings against them in the United States District Court for the Northern District of Alabama. *Id.* In response to the complaint, the principal and indemnitors moved to compel arbitration and to stay the judicial proceedings, arguing that the indemnity agreement essentially incorporated the subcontract – which it did not – and therefore, the arbitration clause. *Id.*

The district court denied the motions to compel. *Id.* However, on interlocutory appeal, a panel of the Eleventh Circuit surprisingly reversed and remanded the case with instructions to order arbitration. *Id.* at *3. Following Hanover's petition for rehearing and the Surety & Fidelity Association of America's amicus curiae brief in support, the Eleventh Circuit vacated its panel opinion and granted rehearing. *Id.*

On rehearing, the Eleventh Circuit affirmed the district court's order denying the motion to compel arbitration. *Id.* The court noted that Hanover and the sole remaining indemnitor (the principal and all other indemnitors had settled with the Hanover at this point) were not parties to the subcontract. *Id.* at *4. However, the court recognized that under Alabama law, a nonparty to an agreement may compel or be compelled to arbitration in four unique situations, including: (1) where one contract incorporates another with an arbitration clause; (2) if another document should be read together with the document containing an arbitration clause because "together the documents memorialize the terms of a 'single transaction'"; (3) if the nonparty is a third-party beneficiary of the contract containing the arbitration clause; and (4) where the doctrine of "intertwining" is satisfied (where arbitrable and nonarbitrable claims are so closely related where the two should be arbitrated together). *Id.* at *4 -*5.

After discussing each of situation in depth, the Eleventh Circuit decided to simply focus on the arbitration provision itself, which unequivocally allowed **only the contractor/obligee to compel arbitration**. *Id.* at *5. Because the contractor/obligee had not demanded arbitration in the case, and because no other party could compel arbitration – including the nonparty indemnitor – the Eleventh Circuit had no choice but to give meaning to the arbitration clause and sustain the district court's denial of the motion to compel arbitration. *Id.* at *6.