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COURT OF APPEALS

STATE OF NEW YORK

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SAGE SYSTEMS, INC.,

Respondent,

-against-

NO. 75

MICHAEL LISS,

Appellant.

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20 Eagle Street  
Albany, NY 12207  
September 13, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE CANNATARO: Good afternoon. The  
2 first appeal to be argued on today's calendar is number 75,  
3 Sage Systems v. Liss.

4 Counsel?

5 MR. RAIMONDI: Your Honors, Christopher Raimondi,  
6 of Raimondi Law, P.C., for the appellant. I'd like to  
7 reserve two minutes of time for rebuttal.

8 CHIEF JUDGE CANNATARO: Two minutes? Yes.

9 MR. RAIMONDI: Thank you, Your Honor.

10 CHIEF JUDGE CANNATARO: You may proceed.

11 MR. RAIMONDI: Thank you, Your Honor.

12 Your Honors, in this case, the partnership  
13 agreement at issue does not provide for attorneys' fees in  
14 direct actions. That is abundantly clear. The Court of  
15 Appeals has made it repeatedly clear that where an  
16 indemnification provision is not unmistakably clear in  
17 providing for indemnification of attorneys' fees in direct  
18 actions, the recovery of such fees are not permitted.

19 JUDGE GARCIA: Counsel, is your argument  
20 primarily that it had to say the words "attorneys' fees" or  
21 rather that it had to say that you get recovery in direct  
22 actions?

23 MR. RAIMONDI: Well, it's two parts. I mean,  
24 one, it doesn't mention attorneys' fees at all, Your Honor,  
25 nor does it even mention a duty to defend. So there's no



1 mention of attorneys' fees whatsoever.

2 JUDGE GARCIA: And is that determinative in your  
3 view?

4 MR. RAIMONDI: No, it is not solely  
5 determinative. The second part of it is, that it is of  
6 such wide reaching language, that it doesn't, in any way,  
7 specify that it applies to direct actions, and that is  
8 something that this court has required in Hooper Associates  
9 v. AGS Computers, most recently in Ambac Assurance  
10 Corporation v. Countrywide Home Loans.

11 And I believe that three of the justices here  
12 today were actually present on the bench, when that  
13 decision was rendered in 2018, where the court took a look  
14 at Hooper and said, no, no, we got this right, and this is  
15 what should be followed. There must be - - - in fact, in  
16 Ambac, it said, it must be an unmistakable promise to cover  
17 the attorneys' fees in a direct action. Hooper said that  
18 the intent must be unmistakably clear. In fact, the  
19 Appellate Division First Department, in Gotham Partners,  
20 looking at Hooper and applying it, went so far as to say  
21 that the intention "must be virtually inescapable."

22 JUDGE RIVERA: And you're saying there's a  
23 different standard if it's direct actions versus third-  
24 party?

25 MR. RAIMONDI: Well, only - - -



1 JUDGE RIVERA: Or the same standard? What - - -  
2 where are you on that?

3 MR. RAIMONDI: So, the standard is that yes, it's  
4 - - - that Hooper applies here, and so does Ambac, and that  
5 the issue here is that there is no language. 13.02(b) can  
6 be read to cover third-party claims without question. It  
7 would be a stretch to have it cover direct actions. But  
8 the stand - - -

9 JUDGE GARCIA: So I'm sorry, it could be read to  
10 cover attorneys' fees in third-party actions. So let's - -  
11 -

12 MR. RAIMONDI: I - - -

13 JUDGE GARCIA: So let's say, that's a little of a  
14 confusing question, sorry. But let's say, we have this  
15 clause, and you - - - it's between the two of us. You get  
16 sued by a third-party based on my actions. You lose or you  
17 win, defending it. You now come after me for  
18 indemnification, right?

19 MR. RAIMONDI: That's a third-party action. Yes,  
20 Your Honor.

21 JUDGE GARCIA: That's the third-party action.

22 MR. RAIMONDI: Correct.

23 JUDGE GARCIA: And so, that would be - - - would  
24 that be enough, the language that you have in here, to  
25 allow you to recover from me for attorneys' fees?



1 MR. RAIMONDI: Is it not clear from this language  
2 that attorneys' fees are even covered, but the best  
3 argument would be in the context of a third-party action,  
4 that there may be coverage for it.

5 JUDGE GARCIA: But didn't we say in Breed that  
6 this language did provide coverage for - - -

7 MR. RAIMONDI: Well, that - - - Breed's a  
8 different situation, Your Honor, okay. In Breed, the  
9 agreement at issue was not a partnership agreement as we  
10 have here. This was an escrow agreement, where a law firm  
11 - - -

12 JUDGE GARCIA: No, I understand the difference in  
13 the contracts, but the language in Breed was exactly - - -  
14 pretty much exactly the same as what you have here.

15 MR. RAIMONDI: No, the difference here, Your  
16 Honors, is that this court was unable to conceive of any  
17 way possible that that language could apply to a third-  
18 party - - -

19 JUDGE GARCIA: Right.

20 MR. RAIMONDI: - - - action, given the nature of  
21 the contract.

22 JUDGE GARCIA: But it didn't say attorneys' fees  
23 in that language.

24 MR. RAIMONDI: It did not say attorneys' fees in  
25 that action, but the issue was, what other damages would



1           there be to an escrow agent, an attorney acting as an  
2           escrow agent, in the event that something went wrong. It  
3           would be that they would be sued and have to defend against  
4           those claims.

5                   JUDGE GARCIA: I thought it was more that in what  
6           other context would this apply than in a direct action.

7                   MR. RAIMONDI: Well, correct. It is that. And  
8           that's because it was an escrow agreement. If this were  
9           not an escrow agreement, it's not clear to me that the same  
10          decision would occur.

11                   JUDGE RIVERA: Okay - - -

12                   CHIEF JUDGE CANNATARO: So as a baseline rule, if  
13          the conclusion that it covers attorneys' fees is  
14          inescapable in the context of the agreement, the fact that  
15          it doesn't say attorneys' fees, could still permit such a  
16          recovery?

17                   MR. RAIMONDI: In the narrow application of Breed  
18          Abbott based upon the type of agreement that it is. This  
19          is not that type of agreement.

20                   JUDGE RIVERA: Okay. So I need to get back to my  
21          question, because I - - - I - - -

22                   MR. RAIMONDI: Yes, Your Honor.

23                   JUDGE RIVERA: Perhaps you were trying to answer  
24          it, but I didn't understand the answer. Is there a  
25          different standard that applies, if it's a direct action,



1           versus a third-party action?

2                   MR. RAIMONDI: Is there a different standard? I  
3           - - - I don't - - -

4                   JUDGE RIVERA: Yes, a standard to determine  
5           whether or not broad language, like what we have here, like  
6           what existed in Breed, encompasses attorneys' fees.

7                   MR. RAIMONDI: It - - - well, the issue is the  
8           language -

9                   JUDGE RIVERA: Or is it always the same standard.  
10          The standard either way.

11                  MR. RAIMONDI: It is always the un - - - in my  
12          understanding - - -

13                  JUDGE RIVERA: Yes.

14                  MR. RAIMONDI: - - - from the decisions of this  
15          court - - -

16                  JUDGE RIVERA: Yes.

17                  MR. RAIMONDI: - - - and back in Hooper - - -

18                  JUDGE RIVERA: Yes.

19                  MR. RAIMONDI: - - - is that it must be  
20          unmistakably clear. There must be an unmistakable promise  
21          that one party is going to cover another party's attorneys'  
22          fees in a direct action. And if it does not do so, then  
23          such a recovery of attorneys' fees - - -

24                  JUDGE RIVERA: Okay, so my - - -

25                  MR. RAIMONDI: - - - is not possible.



1 JUDGE RIVERA: I get that. Okay. So my question  
2 is, does that mean it's a different standard if it's a  
3 third-party action? That's the question I'm trying to get  
4 you to answer.

5 MR. RAIMONDI: No, no. I think - - - I think the  
6 answer is this. If the - - - with the third-party action,  
7 I don't think that there's a question that it covers third-  
8 party actions. I think that the language does cover - - -  
9 cover third-party actions. Broad language, this court, has  
10 found does cover third-party actions, and in fact, we - - -

11 JUDGE RIVERA: Third-party actions to recover  
12 attorneys' fees?

13 MR. RAIMONDI: Correct. Damages, attorneys'  
14 fees, yes. That is correct. That I - - -

15 JUDGE RIVERA: So you're saying then it is a  
16 different standard - - -

17 MR. RAIMONDI: No, it - - -

18 JUDGE RIVERA: - - - for a direct action?

19 MR. RAIMONDI: The - - - the - - -

20 JUDGE RIVERA: It's a straightforward question.  
21 Is it the exact same standard?

22 MR. RAIMONDI: I don't believe it's a different  
23 standard. I believe that - - - I believe the Ambac and  
24 Hooper standards are the standards that should be applied,  
25 which is based upon the language.





1 JUDGE RIVERA: Regardless if it's direct or a  
2 third-party action, is that your point?

3 MR. RAIMONDI: Correct. Well, that's how you  
4 deter - - - yes, that's how the determination is made.  
5 Yes, through that standard.

6 JUDGE GARCIA: But - - - so I guess that I come  
7 back to we un - - - this provision is an indemnification  
8 provision, right? So it clearly applies if, in my  
9 hypothetical, you get sued by a third-party, you have to  
10 defend based on my misconduct, right?

11 MR. RAIMONDI: Okay. This - - - Your Honor, this  
12 particular provision actually has a threshold question of  
13 bad faith, before we get to that - - -

14 JUDGE GARCIA: Um-hum. Understood. Understood.

15 MR. RAIMONDI: - - - but let's assume - - -

16 JUDGE GARCIA: Understood.

17 MR. RAIMONDI: - - - that for the moment, and the  
18 purpose of your question.

19 JUDGE GARCIA: Good point. Let's assume it.

20 MR. RAIMONDI: Okay. So assuming that they're -  
21 - -

22 JUDGE GARCIA: So, in that case, you turn around  
23 to me - - - you win, but you spend money defending the  
24 action, and I've committed something that got you sued, my  
25 conduct, you turn around, and you want to recover your



1 fees, expenses, et cetera, under this indemnification  
2 provision, yes or no?

3 MR. RAIMONDI: I think under this indemnification  
4 provision, the question of attorneys' fees is up for  
5 debate, and I don't believe that it would be recoverable in  
6 that context.

7 JUDGE WILSON: Because it doesn't say attorneys'  
8 fees or why?

9 MR. RAIMONDI: Because it doesn't say attorneys'  
10 fees. It also does not reference a duty to defend. There  
11 is nothing to indicate that these expenses or fees would  
12 cover attorneys' fees.

13 JUDGE WILSON: So would one or the other be  
14 sufficient?

15 MR. RAIMONDI: Something to indicate that the  
16 parties - - - I, personally, based upon this court's  
17 rulings, it should be unmistakable - - - an unmistakable  
18 promise, or a clear, unequivocal language it was intended.

19 JUDGE WILSON: Oh, I thought we were talking  
20 about third-party action now, not about an action between -  
21 - -

22 MR. RAIMONDI: For either. It should really be  
23 clear what the parties intended. There's nothing wrong  
24 with having a clear contract.

25 JUDGE GARCIA: Let's say this said attorneys'



1 fees, right. And now, it says attorneys' fees, same  
2 hypothetical we've just been using. Now you turn around  
3 and you want indemnification from me. Let's say - - -  
4 different case. It says attorneys' fees. Same provision,  
5 but it has attorneys' fees in it. Now you sue me directly  
6 for something under the partnership agreement, right. I've  
7 done something wrong. Do you - - - and you win. Do you  
8 get attorneys' fees or does it have to say it's a direct  
9 act - - - it a direct action?

10 MR. RAIMONDI: Right, exactly. It does not say  
11 direct action. There is nothing to indicate direct action,  
12 so - - -

13 JUDGE GARCIA: Even if it had the specific  
14 language, you'd still need something to indicate it applies  
15 in direct actions?

16 MR. RAIMONDI: Yes, Your Honor. I see my time  
17 expired; may I answer?

18 JUDGE GARCIA: That's okay.

19 CHIEF JUDGE CANNATARO: Yes.

20 MR. RAIMONDI: Thank you.

21 So the answer is this, with respect to third-  
22 party actions, if the word attorneys' fees was in this  
23 provision, they'd be entitled to attorneys' fees for third-  
24 party actions. In - - - with respect to direct actions, as  
25 there's no language showing any intent, and certainly not



1 clear intent, of the parties to be bound to each other to  
2 pay for attorneys' fees in a direct action, attorneys' fees  
3 are not recoverable.

4 JUDGE GARCIA: Another way to say that, though,  
5 would be if we agree with you on direct action, we don't  
6 have to go - - - get to the language issue.

7 MR. RAIMONDI: Well, cor - - - well, you have to  
8 use the language to get to direct action. You have to look  
9 at the language of the agreement in order to determine - -  
10 -

11 JUDGE GARCIA: But if we say it doesn't apply to  
12 direct action, who cares what it says?

13 MR. RAIMONDI: Well, Your Honor, it's not what I  
14 said. The motion court the motion court itself said, "the  
15 provision contains no reference to direct claims between  
16 the parties." That's the record at page 10. That was in  
17 the decision of the motion court. The motion court found  
18 it didn't apply to direct actions.

19 CHIEF JUDGE CANNATARO: Thank you, Counsel.

20 MR. RAIMONDI: Thank you, Your Honor.

21 MR. SEEMAN: May it please the court, my name is  
22 Fred Seeman, and I represent the respondent in this - - -  
23 in this action, and the plaintiff in the original action,  
24 Sage Systems.

25 I believe that if we go back to the underlying



1 action there is every justification for the trigger of this  
2 indemnification clause. Otherwise - - -

3 JUDGE TROUTMAN: What is the un - - -

4 MR. SEEMAN: - - - you're going - - -

5 JUDGE TROUTMAN: What is the unmistakably clear  
6 language that requires attorneys' fees?

7 MR. SEEMAN: In Section B of the agreement,  
8 "shall be indemnified and held harmless by each partner  
9 from any and all claims and" - - - "and causes of action of  
10 any nature whatsoever arising out of, or incidental to any  
11 act performed by a partner, which is not performed in good  
12 faith, not reasonably believed to be by such partner to be  
13 in the best interest of the partnership, and" - - - I'm  
14 just skipping a little - - - "and is not reason" - - - "is  
15 not reasonably believed by such partner, to be in the best"  
16 - - -

17 JUDGE RIVERA: But that doesn't go - - - that  
18 doesn't go to the recovery, which is, I believe, what Judge  
19 Troutman is asking about. Where's the part that says you  
20 can recover attorneys' fees, given everything else?

21 MR. SEEMAN: Okay. Again, I would go back to the  
22 original action that was really - - -

23 JUDGE RIVERA: No, no, no, in this provision.

24 MR. SEEMAN: It doesn't say that - - - it doesn't  
25 say that specifically. If you go - - - if you're going to



1 parse the language - - -

2 JUDGE RIVERA: We wouldn't be here if it said it  
3 specifically.

4 MR. SEEMAN: Right. Exact - - -

5 JUDGE RIVERA: So here's the question.

6 MR. RAIMONDI: Right.

7 JUDGE RIVERA: What - - - where can one infer or  
8 somehow conclude from this language that it includes  
9 attorneys' fees? Or is there some precedent of ours that  
10 you would say, that tells you - - -

11 MR. SEEMAN: I would - - - I would go to the lan  
12 - - -

13 JUDGE RIVERA: - - - that this language equates  
14 with attorneys' fees?

15 MR. SEEMAN: Your Honor, I'd go to the language  
16 of Breed. Breed says, if not here, when then? If - - - it  
17 doesn't have attorneys' fees - - -

18 CHIEF JUDGE CANNATARO: But Counsel, to that  
19 question, the language you just read could include  
20 attorneys' fees, but it could include many other items of  
21 indemnification. So my question is, how - - - what makes  
22 it inescapably, pardon me, concludable, that it was meant  
23 to include attorneys' fees as well?

24 MR. SEEMAN: I would go - - - again, I would  
25 refer this court to the language of Breed, where the court



1 used the common sense - - -

2 JUDGE TROUTMAN: What about the argument that  
3 Breed was applied to those unique facts only?

4 MR. SEEMAN: I think we have those unique facts  
5 here, Judge. You have, what I would amount to, a judicial  
6 mugging, by one partner of another. What we're really  
7 saying is, the motion court, Justice James was unbelievably  
8 kind and polite, and in a sense, I'm here - - -

9 JUDGE RIVERA: But no, no, the unique facts that  
10 I think that question that Judge Troutman is asking is  
11 related to, is not the nature of the trigger, right, the  
12 bad conduct. It is the whole point of the provision,  
13 right?

14 MR. SEEMAN: That is correct.

15 JUDGE RIVERA: And in - - - in Breed - - -

16 MR. SEEMAN: I agree with that.

17 JUDGE RIVERA: - - - it's - - - the court is  
18 actually looking beyond the language, and saying, the only  
19 point to this clause is to ensure that legal expenses are  
20 covered, which includes attorneys' fees.

21 MR. SEEMAN: And I would conclude, as did the  
22 Appellate Division and the motion court, that that's the  
23 same reasoning that ought to apply here. That you want not  
24 - - -

25 JUDGE RIVERA: But that's based on the



1 relationship there, because it's an escrow account. And  
2 it's an escrowee - - -

3 MR. SEEMAN: In the relationship - - -

4 JUDGE RIVERA: - - - which is not - - - these are  
5 partners.

6 MR. SEEMAN: Understood, Your Honor. And the  
7 relationship here is a partner.

8 JUDGE RIVERA: Um-hum.

9 MR. SEEMAN: One partner attacks another partner  
10 to dissolve the partnership. So in the language of this  
11 particular indemnification, it's certainly not in the best  
12 interest of the corporation.

13 JUDGE RIVERA: Well, I'm not going to debate with  
14 you that it might very well fall within a category of  
15 conduct that allows for an action. The question is, are  
16 attorneys' fees recoverable? Maybe you can get the costs,  
17 damages, expenses, so the question is, why don't I see the  
18 words attorneys' fees or even the word fee?

19 MR. SEEMAN: We ought not - - - I respectfully  
20 submit, we ought not as a court - - - as a court, to  
21 require practitioners to parse the words in such detail  
22 that here - - -

23 JUDGE RIVERA: Well, if the court says, you got  
24 to include the words attorneys' fees, wouldn't that make it  
25 easy? Everybody moving forward knows, always include them.





1 You won't have to - - - you won't have an appealable issue.

2 MR. SEEMAN: I respectfully submit that that  
3 would not be a particularly good policy - - -

4 JUDGE WILSON: But you didn't - - -

5 MR. SEEMAN: - - - because now - - -

6 JUDGE WILSON: - - - you didn't in your papers  
7 address Ambac. Would you like to address it? I mean,  
8 Ambac - - - the language in the contract in Ambac actually  
9 says attorneys' fees, and we nevertheless said they were  
10 not recoverable.

11 MR. SEEMAN: Right.

12 JUDGE WILSON: So this is your chance to say  
13 something about Ambac, if you'd like.

14 MR. SEEMAN: I don't - - - we didn't address it  
15 in the papers. We don't think that it is persuasive here.  
16 Now we think that - - - we rely upon Breed. As the  
17 language in Ambac was a traditional indemnification, but it  
18 was - - - it was - - -

19 JUDGE WILSON: That included attorneys' fees  
20 expressly.

21 MR. SEEMAN: Yes, it did - - - yes, it did.

22 JUDGE WILSON: Yeah.

23 MR. SEEMAN: But in that instance - - - in that  
24 instance, the relationship was different. It was between  
25 two very independent parties. Here, you have two partners.



1 So I fall back to the relationship of the - - - of the  
2 facts. Meaning, you have two partners, and you have an  
3 attack on the very partnership itself. A very different  
4 situation than exists in Ambac.

5 JUDGE SINGAS: Counselor?

6 MR. SEEMAN: Yes.

7 JUDGE SINGAS: You keep commenting on Breed. But  
8 didn't Breed stand for the proposition that if there was no  
9 other cost, other than attorney fees, and we could rely on  
10 that for attorneys' fees. Is your contention here that  
11 there are no other costs - - -

12 MR. SEEMAN: That's exact - - -

13 JUDGE SINGAS: - - - that would be covered?

14 MR. SEEMAN: That is exactly correct, Judge.  
15 Thank you. That's - - - if - - - and this is an instance  
16 where we - - - how have we been damaged? By a completely  
17 false accusation, a completely baseless complaint. How  
18 else have we been damaged but for forcing us to defend  
19 ourselves and pay for attorneys' fees. So yes, I - - -  
20 that is - - - that is the proposition that I set forth  
21 before Your Honors.

22 JUDGE RIVERA: Can I ask? I'm sorry if you've  
23 answered it. It's the same question I was asking to your  
24 adversary. Is it your view that it's the same or a  
25 different standard that applies to a direct action, versus



1 a third-party action?

2 MR. SEEMAN: I believe it's the same standards.  
3 That if you committed - - - if one partner committed a  
4 fraud, and forced a third-party to sue the partnership - -  
5 -

6 JUDGE RIVERA: No, no, I mean, in terms of  
7 interpreting the provision. Interpreting this provision.

8 MR. SEEMAN: I - - - I - - - I thought I  
9 understood that.

10 JUDGE RIVERA: Is it - - - is the Hooper  
11 standard?

12 MR. SEEMAN: Yes. I'm sorry?

13 JUDGE RIVERA: Is it the Hooper standard?

14 MR. SEEMAN: No, it's going to be - - - no, it's  
15 not going to be the Hooper standard. It's going to be - -  
16 - I would go - - - that's difficult, yes. I would say,  
17 yes, because, you know, depending on the facts. Here, I  
18 believe, that the facts as before you are very close to  
19 Breed. I think you'd have to - - -

20 JUDGE GARCIA: Well, your provision is exactly  
21 the same, almost as Breed, right. It doesn't say  
22 attorneys' fees, and either did the provision in Breed.  
23 Whereas the provision in Ambac said attorneys' fees. So it  
24 seems the one rule we could gather from those cases is  
25 whether or not in a direct action versus a third-party



1 action, the inclusion specifically of the magic words  
2 attorneys' fees isn't determinative, right?

3 MR. SEEMAN: I agree with that. I agree with  
4 that. I think that Your Honors are going to have to look,  
5 and the court's going to have to look at the set of facts  
6 in each instance.

7 JUDGE RIVERA: Yeah, but so if it's not  
8 determinative, what are the factors or considerations for a  
9 court to look at?

10 MR. SEEMAN: Where - - -

11 JUDGE RIVERA: If the words themselves are not  
12 good enough?

13 MR. SEEMAN: Where it's unequivoc - - -  
14 unequivocally referable. Where you look at the facts, you  
15 look at the language, there's no other conclusion that you  
16 can draw. And I would, again, respectfully submit that  
17 that's what happened here. You can't - - -

18 JUDGE GARCIA: But I guess the question to me  
19 would be what's inescapable? Is it attorneys' fees are  
20 included or that the indemnification provision provides to  
21 direct actions between these parties?

22 MR. SEEMAN: That the direct - - - that the  
23 indemnification provides for the direct action between the  
24 parties. And it is meant to deter the kind of conduct that  
25 occurred here. That's why that provision what in that, to



1 prevent the filing of baseless claims against one partner  
2 by another, to destroy that partnership.

3 And I know Your Honors, or at least today I'm  
4 getting a sense, it's - - - obviously, in retrospect, it  
5 would have been nice if it said attorneys' fees, and you're  
6 correct. But I don't think that should be the hard and  
7 fast rule. I believe that you do have the kind of facts  
8 here - - -

9 JUDGE RIVERA: But why - - - why not? Why not  
10 have that rule?

11 MR. SEEMAN: Because you're going to hurt - - -

12 JUDGE RIVERA: There's obviously some confusion.

13 MR. SEEMAN: I - - - you're going to - - - I  
14 think it goes against - - -

15 JUDGE RIVERA: Let me say this. If it didn't say  
16 damages, do you think damages are covered?

17 MR. SEEMAN: Yes. No, if it didn't say damages?

18 JUDGE RIVERA: If it didn't have the word  
19 damages, could you recover damages?

20 MR. SEEMAN: No. If it - - - it has to say  
21 damages, otherwise, that's the broadest of all.

22 JUDGE RIVERA: So if it doesn't say attorneys'  
23 fees, why should attorneys' fees be covered?

24 MR. SEEMAN: Because attorneys' fees are a subset  
25 of damages. In this instance, the only damage we - - - the



1           only damage we suffered was attorneys' fees. That's why  
2           it's recoverable here, with this clause. And I think it'd  
3           be wrong - - - I think it - - -

4                    JUDGE RIVERA: Did you make that argument below  
5           that fees are actually are actually subsumed by the word  
6           damages?

7                    MR. SEEMAN: No. We did not. I did not argue -  
8           - - I argued that now, because that's - - - those are - - -

9                    JUDGE RIVERA: You agree that there, of course,  
10          are many lawyers who, in their string sight of what's  
11          recoverable, do not - - - do include attorneys' fees as a  
12          separate category from damages.

13                   MR. SEEMAN: I do, Your Honor, and I certain - -  
14          - I'm not standing here advocating that, you know, we ought  
15          to be loose and fast. I'm just saying - - -

16                   JUDGE RIVERA: And there are statutes that  
17          expressly allow for recovery of attorney fees, even though  
18          otherwise damages would be recovered. That - - -

19                   MR. SEEMAN: That's correct. I understand that.

20                   JUDGE RIVERA: Right, legislators have found it  
21          necessary to say that, because we have the thing called the  
22          American Rule, right?

23                   MR. SEEMAN: I agree with you, but I think to  
24          slavishly follow that rule here would be a disservice. And  
25          I think that's why we need to - - - that's why I



1 respectfully submit that the decisions below ought to be  
2 affirmed.

3 CHIEF JUDGE CANNATARO: Thank you, Counsel.

4 MR. SEEMAN: Thank you, Your Honors.

5 JUDGE SINGAS: Counsel, can you address the  
6 question that I asked? What other types of disputes do you  
7 think this indemnification provision could cover?

8 MR. RAIMONDI: I think that it can - - - I think  
9 that what it's designed to cover primarily is third-party  
10 disputes, where a partner behaves in a manner that is  
11 outside or a recent detour that creates liability for the  
12 partnership and/or the partners. That's what it was  
13 designed to prevent. It's - - - I don't think it was  
14 designed to prevent direct action between the partners. It  
15 makes no mention of that. It seems to be very well focused  
16 on an act that would be ultra vires, inappropriate. It  
17 talks about fraud. It talks about a partner going off and  
18 doing something that creates liability for the partnership  
19 and its partners.

20 CHIEF JUDGE CANNATARO: So is it your position  
21 that none of these items that are - - - that can be  
22 indemnified under this agreement would be indemnified in a  
23 direct action?

24 MR. RAIMONDI: Yes, because it doesn't apply - -  
25 - it doesn't apply to direct actions, correct.



1 JUDGE GARCIA: And would one way to look at that  
2 be, as I'm thinking about it, the fact that it doesn't  
3 include attorneys' fees, one indication that it doesn't  
4 apply to direct actions? It's not the sole indication, but  
5 one indication.

6 MR. RAIMONDI: It - - - it's not even requiring,  
7 as I had said before - - - it's not even requiring a duty  
8 to defend. Nothing related to attorneys' fees or defensive  
9 action in any way is referenced at all in this provision.

10 JUDGE GARCIA: But I guess my point is, in terms  
11 of indemnification, when you're coming to try to recover  
12 something from me for having to defend against this third-  
13 party action, indemnification covers a number of different  
14 things subsumed in type - - - this type of Breed language.  
15 If it was intended to apply to direct actions, the American  
16 Rule would kick in, and you'd want to specifically mention  
17 attorneys' fees in there?

18 MR. RAIMONDI: Well, correct. I mean, look, the  
19 - - - the right way to do this, Your Honor, is I - - - I  
20 think would be a prevailing party provision that directly  
21 addresses this. That separate provision, as what was found  
22 in other cases, where there is language that is clear that  
23 it applies to direct actions, and other language that - - -  
24 that the more broader language is applied to the third-  
25 party actions, is the correct way to go. I think the best





1 practice here is a separate prevailing party clause related  
2 to direct actions.

3 Just to address something else with respect to  
4 the damages that Mr. Seeman was arguing about. With  
5 respect to the unclean hands' argument, that that was made  
6 here, and we believe that the finding is incorrect, because  
7 it doesn't meet the three-part test of this, the third  
8 branch of which is, that the party was injured by the  
9 conduct. Well, in Ambac, this court specifically said,  
10 "Attorneys' fees are treated as incidents of litigation,  
11 rather than damages, except where an award is authorized by  
12 agreement between the parties, or by statute, or by court  
13 rule."

14 Well, none of that exists here. So the damages  
15 can't make the basis of unclean hands, if there isn't  
16 unclean hands. It was a proper finding by the dissolution  
17 court, then, 13.02, we respectfully submit, does not apply  
18 at all, and therefore, there's no reason to even get to  
19 that part of it.

20 CHIEF JUDGE CANNATARO: Thank you, counsel.

21 MR. RAIMONDI: Thank you, Your Honors.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Sage Systems, Inc. v. Michael Liss, No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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