Indemnity or assumption of risk clauses

Number: INFORMAL

Date: October 27, 2000

The Honorable Everett A. Kelly
Representative, District 42
123 North St. Clair Abrams Avenue
Tavares, Florida 32778

Dear Representative Kelly:

The Department of Business and Professional Regulation has forwarded your letter on behalf of a constituent to this office. The constituent has expressed his concern about assumption of risk and indemnification language contained on the ticket of the local golf club.

The determination of the validity of an indemnity or assumption of risk provision must be made by a court of competent jurisdiction in an appropriate judicial proceeding. In an effort to be of assistance, however, the following general comments are offered.

While certain types of indemnification or hold harmless agreements are impermissible, there is no prohibition against all such agreements.[1] Such contracts, however, are subject to the general rules governing the formation, validity, and construction of all contracts.[2]

Generally, an indemnity agreement is one in which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.[3] An agreement for indemnification that protects an indemnitee against its own negligence is valid as long as the contract expresses an intent to indemnify against the indemnitee's own wrongful actions in clear and unequivocal terms.[4] Contracts providing indemnification for one's own negligence are disfavored in Florida and are strictly construed.[5]

Releases from liability have been upheld as enforceable in sporting events.[6] Thus, the doctrine of express assumption of the risk as a contractual concept is still viable. The courts have held that exculpatory clauses clearly stating that a party is released from liability for its own negligence in clear and unequivocal words are effective.[7]

In *Blackburn v. Dorta*,[8] the Supreme Court of Florida contrasted implied assumption of the risk with "express assumption of the risk" and said:

"Included within the definition of express assumption of risk are express contracts not to sue for injury or loss which may thereafter be occasioned by the covenantee's negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport."

Recently, for example, the First District Court of Appeal in *Borden v. Phillips*[9] upheld the language of an exculpatory clause that was clear and unambiguous, reflecting a diver's

contractual assumption of risks inherent in scuba diving and his intent to release the boat owner, captain, and professional association from all liability, including any resulting from their own negligence. The court held that the release was enforceable in a wrongful death action arising from the diver's drowning while taking scuba training, where a signed release expressly stated that none of the released parties could be held liable for any injury or death resulting from "the negligence of any party, including the released parties, whether passive or active."

I trust that the above informal advisory comments may be of assistance.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

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[1] *See, e.g.,* s. 725.06, Fla. Stat., stating:

"Any portion of any agreement or contract for, or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating connected with it, or any guarantee of, or in connection with, any of them, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman, or between any combination thereof, wherein any party referred to herein obtains indemnification from liability for damages to persons or property caused in whole or in part by any act, omission, or default of that party arising from the contract or its performance shall be void and unenforceable unless:
(1) The contract contains a monetary limitation on the extent of the indemnification and shall be a part of the project specifications or bid documents, if any, or
(2) The person indemnified by the contract gives a specific consideration to the indemnitor for the indemnification that shall be provided for in his or her contract and section of the project specifications or bid documents, if any."

[2] *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999).

[3] *See Dade County School Board v. Radio Station WQBA*, *supra*; *Royal Indemnity Company v. Knott*, 136 So. 474, 479 (Fla. 1931).

[4] *See Cox Cable Corporation v. Gulf Power Company*, 591 So. 2d 627 (Fla. 1992) (provision to indemnify, protect and save forever harmless from and against any and all claims was insufficient to provide indemnity for the indemnitee's own acts of negligence); *University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973).

[5] *United Parcel Service of America, Inc. v. Enforcement Security Corporation*, 525 So. 2d 424 (Fla. 1st DCA 1987); *SEFC Building Corporation v. McCloskey Window Cleaning, Inc.*, 645 So. 2d 1116 (Fla. 3d DCA 1994) (contracts which attempt to indemnify party for its own wrongful acts

are viewed with disfavor and will be enforced only if they express such intent in clear, unequivocal terms).

[6] *See, e.g., DeBoer v. Florida Offroaders Driver's Association*, *Inc.*, 622 So. 2d 1134 (Fla. 5th DCA 1993); *Banfield v. Louis*, 589 So. 2d 441 (Fla. 4th DCA 1991).

[7] *Van Tuyn v. Zurich American Insurance Company*, 447 So. 2d 318 (Fla. 4th DCA 1984).

[8] 348 So. 2d 287, 290 (Fla. 1977). *Cf. O'Connell v. Walt Disney World Company*, 413 So. 2d 444, 448 (Fla. 5th DCA 1982); *Donaldson v. Cenac*, 675 So. 2d 228, 230 (Fla. 1st DCA 1996) (assumption of the risk cannot apply unless a plaintiff actually knows or in law is deemed to know that a particular risk--here the risk of negligent injury--was present, and understood the nature of the risk); *Van Tuyn v. Zurich American Insurance Company*, *supra* (for express "assumption of risk" to be valid, either by contract or by voluntary participation in an activity, it must be clear that the plaintiff understood that she was assuming the particular conduct by defendant which caused her injury).

[9] 752 So. 2d 69 (Fla. 1st DCA 2000).