

THE GREAT ESCAPE

How to Draft Exculpatory Clauses That Limit or Extinguish Liability

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Exculpatory clauses extinguish or limit liability of a potentially culpable party through the use of disclaimer, assumption of risk and indemnification clauses as well as releases of liability. For decades, Florida courts have wrestled with issues relating to the enforcement of exculpatory clauses where liability arises from personal injury, real estate, construction, and commercial disputes.

These provisions gain significance as parties seek to shift the monetary risk of business transactions to others. Frequently these clauses are showcased in contractual agreements involving common carriers, promoters of sporting events, providers of design/construction services, and among participants to e-commerce transactions. As lawyers, we constantly draft and interpret exculpatory clauses hoping that the product of our efforts will withstand judicial scrutiny. Recognizing that the economic stakes often are high, counsel must be aware of the pitfalls associated with the drafting and interpretation of such clauses. These issues should be of enormous interest to lawyers because when the deal goes sour, disgruntled clients may seek to recoup their losses by challenging the lawyer's advice through claims for legal malpractice.

This article examines how Florida courts interpret exculpatory language as utilized in releases, waivers of liability, assumption of risk and indemnification agreements as well as other types of contracts. As similar legal principles apply to drafting these various types of clauses, they will collectively be discussed and referred to throughout this article as "exculpatory clauses." In addition, this article will offer practical

suggestions to assist counsel in drafting enforceable exculpatory clauses.

Legislation and Public Policy Considerations Limit Enforcement of Exculpatory Clauses

Exculpatory clauses will be enforced as long as the language is clear and unequivocal.¹ These same concepts apply to indemnification agreements, which shift liability for damages to another party, and to releases of liability.² On the other hand, exculpatory clauses that extinguish liability for intentional torts or reckless harm will generally be declared null and void.³

Florida statutes prohibit the use of exculpatory clauses in certain transactions such as residential lease agreements that disclaim or limit a landlord's liability to a tenant for breach of the implied warranty of habitability;⁴ condominium documents that disclaim liability for breach of the statutory implied warranties of fitness and merchantability to a purchaser of a new condominium;⁵ agreements that waive the right to assert a construction lien law claim in advance of improving real property;⁶ indemnification provisions in construction contracts that encompass claims or damages resulting from gross negligence, willful, wanton, or intentional misconduct, or for statutory violations.⁷ Likewise, a clause in a fee agreement that exculpates or limits the liability of an attorney for his own negligence to avoid a claim for legal malpractice is prohibited.⁸

Florida law prohibits common carriers such as an airline or railroad from extinguishing liability for its own negligence when acting as a common carrier, as opposed to when it engages in private enterprise.⁹ In interpreting

these clauses, courts typically will analyze the relative bargaining strength of the parties, especially when the indemnitee is a public utility, common carrier, or a provider of an essential public service to a large group of individuals.¹⁰ This analysis is employed to evaluate whether a clause runs afoul of public policy.¹¹ It is noteworthy that public policy considerations will defeat an exculpatory clause if doing so would frustrate a statute or ordinance that has the very purpose of insuring the safety of persons.¹² This concept would apply to violations of the fire code, building codes, or any other penal statute or ordinance imposing a positive duty.

Florida courts have failed to squarely address whether the common law implied warranty associated with a real estate transaction can be disclaimed. In *Hesson v. Walmsley Construction Co.*, 422 So. 2d 943 (Fla. 2d DCA 1982), the court addressed whether the implied warranty of habitability in the package sale of a new home and lot by a builder-vendor to an original purchaser could be disclaimed.¹³ In considering this issue the court commented as follows:

One final point should be mentioned. Disclaimers under the Uniform Commercial Code cannot apply here since the seller is not a “merchant,” and the house and lot are not “goods” within sections 672.104 and .105, Florida Statutes (1981). See *Gable v. Silver*. However, we know of no reason why parties to a contract cannot mutually agree on the reallocation of risks such as subsurface conditions if the disclaimer is in clear and unambiguous language and clearly reflects both parties’ expectations as to what items are not warranted. See *Sloat v. Matheny*, 625 P.2d 1031 (Colo. 1981); Note, *Housing Defects: Homeowners Remedies—A Time for Legislative Action*, at 88. (Emphasis added.).¹⁴

Following the lead of *Hesson*, another court acknowledged that an “implied warranty can be avoided by a disclaimer in the documents of the sale transaction.” *In re Barrett Home Corp.*, 160 B.R. 387, 390 (M.D. Fla. 1993). In *Barrett*, a bankrupt developer constructed a home below the required elevation, which resulted in frequent flooding. In an

effort to escape liability for breach of the implied warranty of habitability, the developer asserted that the buyer executed a contractual disclaimer of “all warranties, written or oral.”¹⁵ However, the disclaimer clause failed to specifically mention implied warranties and, consequently, the court declined to rule that these warranties were disclaimed. Other courts have been reluctant to enforce disclaimers of implied warranties.¹⁶ Sellers of residential real estate face greater challenges when attempting to disclaim any duty to disclose the existence of facts that may materially affect the value of the property. The Florida Supreme Court has held that the “as is” sale of residential real estate does not relieve the seller from the duty to disclose latent defects to a buyer.¹⁷

General Rules for Drafting Exculpatory Clauses

At the heart of every analysis over enforcement of an exculpatory clause lies the issue of conspicuousness of the language employed. In one case, a condominium conversion developer successfully disclaimed all express and implied warranties because the disclaimer was bold and conspicuous.¹⁸ In the sale of goods, under the Florida version of the Uniform Commercial Code,¹⁹ a disclaimer of a warranty must be in writing and conspicuous. On this score, conspicuous means a larger type size, a different type style, e.g., bold or all capitals, or a different color.²⁰ While this statute is not controlling beyond the sale of goods, the underlying rationale suggests that similar considerations would apply to exculpatory language utilized in other transactions such as those involving real estate.²¹

Intent of the Parties Is of Paramount Importance

Intent of the parties is of paramount importance when determining the enforcement of disclaimers, waivers, releases of liability, and indemnification clauses.²² Exculpatory clauses although disfavored will be enforced if the intent to re-

lieve a party of its own negligence is clear and unequivocal.²³ In describing exculpatory language that will be enforced, one court stated, “The wording of such an agreement must be so clear and understandable that an ordinary and knowledgeable party to it will know what he is contracting away.”²⁴

Drafters of exculpatory clauses must be sufficiently specific to release liability for certain conduct yet be broad enough to encompass other related acts and conduct that may result in liability. The same challenge applies to drafting assumption of the risk clauses. A plethora of cases discussing these various issues arise in the context of summary judgment. For example, in one unreported trial court decision,²⁵ a participant to a boxing match executed a “Release, Assumption of Risk and Indemnification Agreement” in favor of the owners and operators of the facility hosting the event.²⁶ The agreement waived and released the owner from all “risks inherent in boxing.”²⁷ During the boxing match the plaintiff sustained injuries and thereafter initiated a lawsuit against the owner for negligence arising from the owner’s failure to provide emergency post-injury medical treatment.²⁸ The owner’s motion for summary judgment was denied based upon the fact that the agreement failed to specifically release and hold harmless the owner for his own negligence.²⁹ Additionally, the agreement was devoid of any language applicable to events that arose following the fight.³⁰ In that instance the agreement was strictly confined to “risks inherent in boxing” and nothing more.

Similarly, in *O’Connell v. Walt Disney World Company*, 413 So. 2d 444 (Fla. 5th DCA 1982),³¹ a nine-year-old child sustained injuries while horseback riding at Walt Disney World. Prior to participating in this activity, the child’s parents executed a document that released and held harmless Walt Disney World from liability.³² In addition, the form executed by the parents consented to the minor’s “assumption of the risks inherent in horse-

back riding.”³³ During the course of the trail ride a Walt Disney World employee, on horseback, caused a stampede.³⁴ As a result, the child was thrown from the horse and thereafter, his parents initiated a lawsuit to recover damages.³⁵ The court denied summary judgment filed by Walt Disney World.³⁶ In reaching its decision the court held that the release form did not specifically mention that Walt Disney World would be released for the negligence of its own employees.³⁷ As a general rule, a release must clearly demonstrate that it releases one from his or her own negligence before it will be effective.³⁸ In contrast, far too often the use of overly broad language in a release may also prove unsuccessful.

When a patron fell from a mechanical bull ride due to the negligence of the defendant, the Fourth District Court of Appeal analyzed the scope of a release signed by the patron of “any and all claims, demands, damages and causes of acts whatsoever.”³⁹ The court concluded that the release failed to include language manifesting an intent to release or indemnify the defendant for his own negligence.⁴⁰

The Florida Supreme Court, in *University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973), adopted a strict test regarding what constitutes clear and unequivocal language that will relieve the indemnitee of his or her own negligence.⁴¹ In *University*, a gas line exploded beneath a barbershop, killing the tenant. Thereafter the estate of the deceased sued the landlord, who defended based upon an indemnification provision in a lease that required the tenant to indemnify the landlord against “any and all claims for damages for any personal injury or loss of life in and around the demised premises.”⁴² It is significant to note that the tenant had no control over the exploding gas line. The court held that the “any and all claims” language in the lease was not sufficiently clear and unequivocal to exculpate the landlord from liability for his own negligence.⁴³

When confronted with enforcing exculpatory clauses, courts consider whether a releasing party appreciated and knowingly waived the risk. This factor found the spotlight in *Parkham v. East Bay Raceway*, 442 So. 2d 399 (Fla. 2d DCA 1983). In *Parkham*, a patron paid \$1 for insurance in order to view a car race from a restricted pit area in close proximity to the racetrack.⁴⁴ In conjunction with payment of the insurance fee, the patron was asked to sign a “form for insurance.”⁴⁵ In fact, the document consisted of a standard form release that contained multiple signatures of other patrons.⁴⁶ When the form was presented to the patron for signature, only the signatures of other patrons were displayed. The form was folded over concealing the upper half of the document where the printed exculpatory language appeared.⁴⁷ As a result, the critical language was not visible when the patron executed the document.⁴⁸ The language released the raceway from “all liability in the event of an injury to a signatory in any restricted area.”⁴⁹ Thereafter, the patron was struck by a racecar and initiated a lawsuit against the raceway.⁵⁰ In response, the raceway defended based upon the existence of the patron’s signature on the release.⁵¹

The court denied summary judgment because it was unclear whether the patron was deceived or misled by the raceway employee when instructed to sign a form where the release language was hidden from view.⁵² The holding in *Parkham* emphasizes that the party benefiting from the release must demonstrate that the injured party knowingly waived and released a known risk. This decision highlights the importance of having separate release forms executed by each individual that is waiving and releasing another from liability. Toward that end, the form containing the exculpatory language should be dated and witnessed.

Language That Works

The Fifth District Court of Appeal in *Hardage v. Enterprises, Inc. v.*

Fidesys Corp. N.V., 570 So. 2d 436, 437 (Fla. 5th DCA 1990), held that “There are no words of art required in a release if the intent of the parties is apparent from the language used.”⁵³ *Hardage* stands for the proposition that the specific use of the word “negligence” is not required. However, from a practical standpoint, utilization of the word “negligence” should increase the likelihood of enforcement. Most frequently, the enforcement of exculpatory clauses frequently occurs in connection with personal injury lawsuits arising from a participant’s involvement in high risk sporting activities cases such as car racing, bicycle racing, horseback riding, and boxing. In most instances, courts generally will bar a party from recovering damages when an executed waiver or release of liability acknowledges the risk sought to be limited or extinguished.⁵⁴

In *Theis v. J & J Racing Promotions*, 571 So. 2d 92 (Fla. 2d DCA 1990), the court granted summary judgment and barred the recovery of damages sustained by a participating driver to a sprint car race known as the “Dash for Cash.” During the Dash for Cash a nonracing vehicle improperly entered the track and struck the driver, resulting in his death.⁵⁵ Prior to the race, the deceased driver executed a release and waiver clause that “released the track from liability whether caused by the negligence of the releasees or otherwise.”⁵⁶ The court found the exculpatory language to be “clear, unambiguous, unequivocal, broad enough and specific enough to protect appellees (race promoters) from their own negligence, even if their actions constituted gross negligence.”⁵⁷ In reaching its holding, the court focused specifically on the “own negligence . . . or otherwise” phrase in determining that the exculpatory language was broad enough to “encompass all forms of negligence, simple or gross.”⁵⁸

Courts have a tendency to enforce these clauses when the language reveals a clear intent of the parties to negotiate away a known risk. Illustrating this point is *Banfield v.*

Louis, 589 So. 2d 441 (Fla.4th DCA 1991), in which a participant to the 1985 Bud Light United States Triathlon Series competition completed and executed an official entry form stating “I understand that this waiver includes any claims based on negligence, action or inaction of the above parties.”⁵⁹ During the competition, the participant, while riding a bicycle, was struck by an automobile and sustained injuries. As a result, the participant filed a lawsuit against the race promoters. Against this factual backdrop, the court barred recovery, holding that the above clause was clear and unequivocal to release the race promoters from their own negligence.⁶⁰

In a line of burglar alarm cases, exculpatory clauses utilized to defeat claims for consequential losses have been upheld against claims of breach of contract and gross negligence.⁶¹ For example, in *L. Luria & Son, Inc. v. Alarmtec International Corp.*, 384 So. 2d 947 (Fla 4th DCA 1980), an alarm company was held not responsible for \$135,000 in losses arising from alleged breach of contract, breach of implied warranties, and negligence in installing and maintaining a burglar alarm system. It appears that the court based its decision on that portion of the clause which provided an *option to the customer to increase liability coverage* by paying an additional sum.⁶² This factor strongly supports the conclusion that both parties intended to exculpate the alarm company. In fact, several decisions have similarly followed this logic in the context of limiting a design professional’s liability for damages.⁶³

In *Florida Power & Light Co. v. Mid-Valley, Inc.*, 736 F.2d 1316 (11th Cir. 1985), the U.S. Court of Appeals for the 11th Circuit considered whether a limitation of liability and indemnification clause would exculpate a professional engineer from his own negligence. The contract contained the following provision:

Engineer shall provide the following insurance: Workmen’s Compensation—Statutory; Employer’s Liability—\$100,000; Comprehensive General Liability—Bodily Injury: \$100/300,000, Property Damage: \$50,000; Compre-

hensive Automobile Liability—Bodily Injury: \$ 100/300,000 and Property Damage: \$50,000. Upon written request of Owner received within five days of the acceptance hereof, Engineer will provide additional insurance, if available including increased coverage and/or limits, and the Owner will pay Engineer an agreed amount for the increased coverage. Engineer’s liability to Owner for any indemnity commitments or for any damages arising in any way out of the performance of this contract is limited to such insurance coverages and amounts. *In no event shall Engineer be liable for any indirect, special or consequential loss or damage arising out of the performance of services hereunder including, but not limited to, loss of use, loss of profit, or business interruption whether caused by negligence of Engineer, or otherwise, and Owner shall indemnify and hold Engineer harmless from any such damages or liability.* (Emphasis supplied by the court.)⁶⁴

The court recognized that the option to pay an additional fee in exchange for more insurance coverage represented a critical factor in its decision to enforce the limitation of liability clause.⁶⁵

In a construction setting, owners often seek to exculpate their own monetary liability for delays they may cause to contractors engaged in construction on their behalf. Construction contracts often contain “no damage for delay” clauses. Florida courts generally enforce these clauses subject to certain exceptions such as delays not reasonably contemplated by the parties and active interference by the owner.⁶⁶ These clauses will be enforced as long as the contractor is provided with a remedy for delay such as an extension of time to complete the project.⁶⁷ This factor evidences an intent that the existing risk was appreciated and negotiated between the parties.⁶⁸

Miscellaneous Clauses

Although not technically exculpatory clauses, various language is frequently included in agreements to discourage parties from asserting their rights. Consequently, the impact is the same, namely, a disclaimer of liability. For example, clauses that require a dispute arising from a construction contract to be litigated or arbitrated outside the

state of Florida have been declared null and void.⁶⁹ Similarly, the Florida Legislature has statutorily invalidated contract provisions that attempt to shorten the applicable statute of limitations.⁷⁰ However, parties are permitted to agree to a waiver of jury trial or stipulate that the law of a foreign jurisdiction shall apply to the judicial resolution of a dispute.

A clause in an executory contract or unexpired lease that purports to give a right of termination for insolvency or bankruptcy is void and unenforceable.⁷¹

Checklist for Drafting Enforceable Exculpatory Clauses

The following checklist for drafting exculpatory clauses has been compiled based upon the statutory and case law referenced in this article:

1) The exculpatory language of the clause should be bold and conspicuous through the use of larger type, boldfaced type or a special color, *e.g.*, **DO NOT BE RELUCTANT TO DRAW ATTENTION TO EXCULPATORY CLAUSE.**

2) Specify in the document that you are seeking to obtain a releasing for your own negligence and specifically use the word “negligence.”

3) Broadly identify the extent of the risks involved, *i.e.*, it is important to make clear whether the exculpatory language is for all risks that might arise. Otherwise the clause may be limited to known risks or risks that are inherent in the activity.

4) Specify whether the disclaimer, indemnity provision, or release is for past wrongful acts or future wrongful acts. Courts are more likely to find an exculpatory clause unenforceable as applied to future acts.

5) Specify whose wrongful conduct is being exculpated, *i.e.*, the indemnitor, the indemnitee, or a third party. Courts disfavor these clauses absent clear and unequivocal language expressing the intent of the parties.

6) When feasible, make sure that a person with authority to speak for

the organization is available to explain the risks to the other party. This supports the proposition that the clause was the result of the bargaining process reflecting the intention of the parties.

7) Draft the document to provide an option to the person accepting the risk to elect to acquire more protection by paying additional fees. Often this risk can be insured especially with professional services.

8) Courts are more inclined to enforce monetary limitations on liability as opposed to extinguishing liability.

9) The document containing the exculpatory language should be properly executed and witnessed. The person executing the document should initial the exculpatory clause.

10) A separate release or waiver form should be executed by each individual party to avoid multiple signatures on the same document.

11) In the event a complete release is being furnished without any limitations or exclusions it should be labeled a "GENERAL RELEASE" or "UNCONDITIONAL AND FULL GENERAL RELEASE" as opposed to "RELEASE." Releases should include the following elements: a) any and all claims, b) demands; c) damages; d) actions; e) causes of action; f) suits in equity of whatever kind or nature; g) use of the word "negligence" to clarify that the release in an exculpatory clause encompasses negligent conduct.

12) Indemnification agreements should include provisions to deal with an arrangement where one party has the duty to defend and hold harmless the other party in litigation. Under these circumstances, the agreement should include a "cooperation clause" requiring the indemnified party to supply documents and arrange for witnesses to be available for consultation as well as for testimony. Additionally, the indemnification agreement should specifically address the rights of the indemnified party to control the litigation arising from the indemnification obligation. These rights include the manner in which a

litigated claim will be settled. Additionally, should a third party initiating the litigation seek equitable relief such as an injunction, these allegations may impact other business interests of the indemnified party. Under those circumstances, the indemnified party may elect to represent itself in the proceedings. The indemnification agreement should establish a standard of care applicable to the lawyer assigned to defend an indemnified party. On this point, the agreement should obligate counsel to provide for interim litigation progress reports and notification of all hearings. Finally, the agreement should employ procedures for resolving conflicts of interest that may arise during the litigation. A sample provision dealing with these indemnification issues has been furnished for review.⁷²

Conclusion

Exculpatory clauses that extinguish or limit liability enable your clients to limit risk and avoid liability. However, the failure to appreciate the legal requirements that trigger enforcement of these clauses can spell financial disaster. When the financial stakes are high these clauses will likely be attacked. Toward that end, valid clauses must be drafted in a clear and unequivocal manner. Furthermore, the clause must disclose the risk being relinquished by the party that has executed the clause. The drafter should be mindful of statutory prohibitions applicable to exculpatory clauses. Florida courts disfavor exculpatory clauses and will declare them invalid should they fail to satisfy applicable legal standards. □

the clause is likely to be unenforceable. In *Orkin Exterminating Co. v. Montagano*, 359 So. 2d 512, 514 (Fla. 4th D.C.A. 1978), the court instructed as follows: "We must require draftsmen of all contracts which contain them [exculpatory clauses] to use clear and unequivocal language totally without a hint of deceptive come-on, or inconsistent, clauses."

² *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So. 2d 487, 489 (Fla. 1979); *Middleton v. Lomaskin*, 266 So. 2d 678 (Fla. 3d D.C.A. 1972).

³ *Fuentes v. Owen*, 310 So. 2d 458 (Fla. 3d D.C.A. 1975); *Mankap Enterprises, Inc. v. Wells Fargo Alarm Services, Inc.*, 427 So. 2d 332 (Fla. 3d D.C.A. 1983).

⁴ Residential leases containing such exculpatory clauses would effectively render the warranty of habitability meaningless. Exculpatory provisions in residential leases have been declared illegal and unenforceable to the extent that they attempt to relieve the landlord of liability FLA. STAT. §83.47 (1977); see *John's Pass Seafood Co v. Weber*, 369 So. 2d 616, 617 (Fla. 2d D.C.A. 1979). Prior to passage of this statute in 1973, an exculpatory clause in a lease would preclude recovery by a tenant against a landlord. *Rubin v. Randwest Corp.*, 292 So. 2d 60 (Fla. 4th D.C.A. 1974), *cert. denied*, 305 So. 2d 786 (Fla. 1974); *Middleton* 266 So. 2d at 678.

⁵ FLA. STAT. §718.203 (2000) provides for certain implied warranties that flow from the developer to the purchaser of a condominium unit and from a contractor (or subcontractor or supplier) to a developer or purchaser. The question arises concerning whether these warranties may be disclaimed. FLA. STAT. §718.303(2) (2000), resolves the question by providing that "a provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner." Since a waiver would adversely affect the benefits derived from the §718.203 warranty provisions, the language of §718.303(2) has the effect of making any attempted disclaimer or waiver unenforceable. Condominium documents and purchase agreements often contain provisions that disclaim all warranties except the statutory warranties described in FLA. STAT. §718.203 (2000). A sample disclaimer of warranty clause is as follows:

“WARRANTY AND DISCLAIMER. Specimen copies of all manufacturer's warranties which will be passed through to Buyer at closing and which are not expressly warranted by Seller have been made readily available for Buyer's review in the 'Binder' located in the sales office and Buyer acknowledges disclosure of such warranties and the location thereof by Seller. Buyer, to the extent permitted by law, is purchasing the Unit and its interest in the recreational facilities and common elements "AS IS" and should undertake whatever inspections of the Unit, common elements and

recreational facilities Buyer so desires in order to assure Buyer as to the quality and condition of the buildings and improvements.

“EXCEPT FOR THE WARRANTIES CONTAINED IN THE DEED OF CONVEYANCE AND ANY WRITTEN WARRANTIES DELIVERED AT CLOSING, NO WARRANTIES, EXPRESSED OR IMPLIED, REPRESENTATIONS, UNDERSTANDINGS, GUARANTIES OR PROMISES HAVE BEEN MADE TO OR RELIED UPON BY BUYER IN MAKING THE DETERMINATION TO EXECUTE AND CLOSE PURSUANT TO THIS AGREEMENT AND, TO THE MAXIMUM EXTENT PERMITTED BY LAW, ALL WARRANTIES, INCLUDING IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY AND HABITABILITY, AND ALL WARRANTIES IMPOSED BY STATUTE (EXCEPT TO THE EXTENT THEY CANNOT BE DISCLAIMED) ARE DISCLAIMED.

“As to any implied warranties which cannot be disclaimed either in whole or in part, incidental and consequential damages are disclaimed and Seller shall have no responsibility for any incidental or consequential damages, including, but not limited to, any claims for personal injury, property damage or emotional distress. No warranties or guaranties are given as to consumer products as defined in 15 U.S.C., §2301 *et seq.* (Magnuson-Moss Warranty Act). Seller has not given and Buyer has not relied on or bargained for any such warranties. This paragraph shall survive closing.”

⁶ FLA. STAT. §713.20(2) (2001).

⁷ Recently, the Florida Legislature revised FLA. STAT. §725.06(1) (2001) dealing with indemnification among parties to a construction contract. The revised statute, effective July 1, 2001, now permits one party to a construction contract to indemnify the other party for its own negligent conduct as long as a stipulated monetary limitation of liability exists. However, this statutory right of indemnification shall not apply to include claims or damages resulting from gross negligence, willful, wanton or intentional misconduct, or for statutory violations. It is also noteworthy that similar provisions declare illegal and unenforceable indemnification provisions that obligate one party to indemnify a public agency for its own negligence. FLA. STAT. §725.06(3) (2001).

⁸ Rule 1.8(h) Florida Rules of Professional Conduct. See *The Florida Bar In Re Herman Cohen*, 331 So. 2d 206 (Fla. 1976).

⁹ *Russell v. Martin*, 88 So. 2d 315, 317 (Fla. 1956).

¹⁰ *Banfield v. Louis*, 589 So. 2d 441, 446 (Fla. 4th D.C.A. 1991).

¹¹ In evaluating exculpatory language, Florida has adopted a six-part "public interest" test to evaluate whether a public interest factor will invalidate an exculpatory clause when:

"(1) it concerns a business of the type generally suitable for public regulations;

"(2) the party seeking exculpation is engaged in performing a service of great public importance which is often a matter of practical necessity for some members of the public;

"(3) the party holds himself out as willing to perform this service for any member of the public who seeks it;

"(4) as a result of the essential nature of the service and the economic setting of the transaction, the party seeking exculpation possesses a decisive advantage in bargaining strength;

"(5) in exercising superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation; and

"(6) as a result of the transaction the person or property of the purchaser is placed under control of the party to be exculpated." *Banfield*, 589 So. 2d at 446.

For an excellent discussion of public policy considerations, see Mario R. Arango and William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 19 (1997).

¹² *John's Pass Seafood Co. v. Weber*, 369 So. 2d 616 (Fla. 2d D.C.A. 1979).

¹³ *Hesson*, 422 So. 2d at 945.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Rapallo South, Inc. v. Jack Taylor Development Corp.*, 375 So. 2d 587 (Fla. 4th D.C.A. 1979), cert. denied, 385 So. 2d 758 (Fla. 1980); the court in *Rapallo* relied on *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th D.C.A. 1972), 50 A.L.R.3d 1062, opinion adopted by 264 So. 2d 418 (Fla. 1972), holding that a one-year express warranty in lieu of all other obligations and duties of the defendant did not preclude an action for breach of implied warranty. The court reached this decision based upon the fact that the disclaimer failed to repudiate or renounce implied warranties. One commentator has proposed utilizing the following clause to disclaim implied warranties and limit the buyer to the express warranty coverage enunciated in the provision: "The seller will repair all defects in the property for a period of ___ year(s) from the date of sale. This express warranty covers all types of defects, whether caused by workmanship or flaws in materials. In order to obtain the benefits of this express warranty, the purchaser(s) must give written notice of any defect within year(s) from the date of sale.

This express warranty is the only warranty covering this property. Except for this express warranty, THE PROPERTY IS SOLD 'AS IS.'

"THERE ARE NO IMPLIED WARRANTIES COVERING THIS PROPERTY. THERE IS NO IMPLIED WARRANTY OF HABITABILITY OR OF GOOD WORKMANLIKE CONSTRUCTION. THERE ARE ABSOLUTELY NO IMPLIED WARRANTIES OF ANY KIND COVERING THIS PROPERTY.

"By initialing this contract clause, the purchaser(s) acknowledge(s) that this clause has been read and fully understood, and that the purchaser(s) has had the chance to ask questions about its meaning and significance.

"PURCHASER(S) _____ (initials)"
David L. Abney, *Disclaiming the Implied Real Estate Common-Law Warranties*, 17 REAL EST. L.J. 141 (1993).

¹⁷ *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1986), in which the Florida Supreme Court announced as follows: "Accordingly, we hold that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used." 480 So. 2d at 629 Although applicable to residential property the doctrine of "caveat emptor" remains applicable to the sale of commercial real estate. *Haskell Co. v. Lane Co. Ltd.*, 612 So. 2d 669 (Fla. 1st D.C.A. 1993).

¹⁸ *Belle Plaza Condominium Association, Inc. v. B.C.E. Development, Inc.*, 543 So. 2d 239 (Fla. 3d D.C.A. 1989), rev'd, 551 So. 2d 460 (Fla. 1989).

¹⁹ FLA. STAT. §672.316 (2001).

²⁰ *Bert Smith Oldsmobile, Inc. v. Franklin*, 400 So. 2d 1235 (Fla. 2d D.C.A. 1981).

²¹ See *Hesson v. Walmsley Construction Co Inc* 422 So. 2d 943 (Fla. 2d D.C.A. 1982).

²² *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638 Fla. 1999).

²³ *Banfield*, 589 So. 2d at 444. Courts strictly construe exculpatory clauses against the party seeking to rely on them. *Auto-Owners Insurance Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000). However, the general rule of contract construction is that an ambiguous clause will be construed against the drafter. *City of Homestead v. Johnson*, 760 So. 2d 80 (Fla. 2000); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999). On this score, parties presented with written agreements containing exculpatory clauses prepared solely by the other party should exercise caution. Frequently, these agreements contain a provision that stipulates that the document is the joint product of the parties. Under those circumstances, the party adversely impacted by the clause may lose the ability to have it construed against the drafter.

²⁴ *Fuentes v. Owen*, 310 So. 2d 458 at 459-60 (Fla. 3d D.C.A. 1975).

²⁵ *Silva v. Cousins Club Corp. et al.*, Case No. 98-001615 15th Judicial Circuit in and for Palm Beach County, Florida. Following denial of the defendant's motion for summary judgment a jury trial was conducted in West Palm Beach, Florida. The jury returned a verdict in excess of \$12,000,000 in favor of the plaintiff. Post-trial motions are pending before the court. Telephone in-

terview with Gregg I. Shavitz, counsel for the plaintiff in Boca Raton, Florida (August 31, 2001).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See also *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309 (Fla 1986), dealing with express assumption of the risk which waives only those risks inherent in the sport itself. In *Ashcroft*, the Florida Supreme Court held that horseracing on a track with a negligently placed exit gap is not an inherent risk for jockeys who participate in the sport of horseracing.

³² *O'Connell* 413 So. 2d at 444.

³³ *Id.* at 446.

³⁴ *Id.*

³⁵ *Id.* at 448.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Dilallo v. Riding Safety, Inc.* 687 So. 2d 353 (Fla. 4th D.C.A. 1997).

³⁹ *Van Tuyn v. Zurich American Insurance Co.*, 447 So. 2d 318 (Fla. 4th D.C.A. 1984).

⁴⁰ *Id.*

⁴¹ *Id.* at 508.

⁴² *Id.* at 510.

⁴³ *Id.* Six years following its decision in *University*, the Supreme Court extended its holding to include cases in which the indemnitor and indemnitee were jointly as opposed to solely liable. See *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So. 2d 487 (Fla. 1979).

⁴⁴ *Id.*

⁴⁵ *Id.* at 400.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 401.

⁵² *Id.*

⁵³ See also *Lantz v. Iron Horse Saloon, Inc.* 717 So. 2d 590 (Fla 5th D.C.A. 1998). Courts have held that specifically including a reference in an exculpatory clause or release that identifies a released party by capacity instead of by name (e.g., officer, director, and agent) is sufficient to absolve those parties of liability as a matter of law. *Banfield*, 589 So. 2d at 445.

⁵⁴ *Banfield*, 589 So. 2d at 445.

⁵⁵ *Theis*, 571 So. 2d at 93, 94. In a similar context, the Fourth District Court of Appeal in *Travent Ltd v. Schecter*, 718 So. 2d 939 (Fla 4th D.C.A. 1998), upheld strikingly similar exculpatory language to bar a bicycle participant's claim for personal injury against the tour operator based upon the release. The language released the operator from liability "whether caused by negligence or otherwise."

⁵⁶ *Theis*, 571 So. 2d at 93, 94.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 443.

⁶⁰ *Id.* at 444.

⁶¹ *Continental Video Corp. v. Honeywell, Inc.*, 422 So. 2d 35 (Fla. 3d D.C.A. 1982), *rev. denied*, 456 So. 2d 892 (Fla. 1984); *Ace Formal Wear, Inc. v. Baker Protective Service, Inc.*, 416 So. 2d 8 (Fla. 3d D.C.A. 1982).

⁶² In *Luria*, the exculpatory language addressed by the court was as follows: "It is agreed that Company is *not an insurer* and that the payments hereinbefore named are based solely upon the value of the services herein described and it is not the *intention of the parties* that Company assume responsibility for any loss occasioned by malfeasance or misfeasance in the performance of the services under this contract or for any loss or damage sustained through burglary, theft, robbery, fire or other cause or any liability on the part of Company by virtue of this Agreement or because of the relation hereby established. If there shall, notwithstanding the above provisions, at any time be or arise any liability on the part of Company by virtue of this Agreement or because of the relation hereby established, whether due to the negligence of Company or otherwise, such liability is and shall be limited to a sum equal to the rental service charge hereunder for a period of service not to exceed six months, which sum shall be paid and received as liquidated damages. Such liability as herein set forth is fixed as liquidated damages and not as a penalty and this liability shall be complete and exclusive. That in the event Subscriber desires Company to assume greater liability for the performance of its services hereunder, a *choice is hereby given of obtaining full or limited liability by paying an additional amount under a graduated scale of rates proportioned to the responsibility*, and an additional rider shall be attached to this Agreement setting forth the additional liability of Company and additional charge. That the rider and additional obligation shall in no way be interpreted to hold the Company as an insurer." (Emphasis added.) *Luria*, 384 So. 2d at 948.

⁶³ *Valhal Corp. v. Sullivan Associates, Inc.* 44 F.3d 195, 198 (3d Cir. 1995), *Florida Power & Light Co. v. Mid-Valley, Inc.*, 736 F.2d at 1316 (11th Cir. 1985). In *Valhal*, the exculpatory clause limited the architect's liability to the fee paid or \$50,000 but provided an option to increase insurance liability by the owner paying a surcharge for the increased insurance premiums.

⁶⁴ *Id.* at 1318.

⁶⁵ *Id.* at 1319.

⁶⁶ Florida recognizes the validity of "no damage for delay" clauses, *Triple R Paving, Inc. v. Broward County* 774 So. 2d 50 (Fla. 4th D.C.A. 2001); *Marriott Corp. v. Dasta*, 26 F.3d 1057 (11th Cir. 1994), *reh'g denied*, 37 F.3d 639 (11th Cir. 1994); *Newbury Square Development Corp. v. Southern Landmark Inc.*, 578 So. 2d 750 (Fla. 1st D.C.A. 1991); *Harry*

Pepper & Associates v. Harddrives Company, 528 So. 2d 72 (Fla. 4th D.C.A. 1998).

⁶⁷ In *Marriott Corp. v. Dasta Construction Co.*, 26 F.3d 1057 (11th Cir. 1994), *reh'g denied*, 37 F.3d 639 (11th Cir. 1994), the court enforced the following "no damage for delay" clause: "If the Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner or by any contractor employed by Owner, or by changes ordered in the scope of the Work, or by fire, adverse weather conditions not reasonably anticipated, or any other causes beyond the control of the Contractor, then the required completion date or duration set forth in the progress schedule shall be extended by the amount of time that the Contractor shall have been delayed thereby. However, to the fullest extent permitted by law, Owner and Marriott Corporation and their agents and employees shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner or Marriott Corporation, or their agents or employees, or any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other cause, and Contractor agrees that the sole right and remedy therefor shall be an extension of time." 26 F.3d at 1067.

⁶⁸ *Id.*

⁶⁹ FLA. STAT. §47.025(2001).

⁷⁰ FLA. STAT. §95.03(1982).

⁷¹ 11 U.S.C. §365(e) (1993); *In re Computer Communications, Inc.*, 824 F.2d 725 (9th Cir. 1987).

⁷² Example language: Duty to Cooperate, Provide Documents and Defend

"The parties hereto, at any time and from time to time, following the execution hereof shall execute and deliver all such further instruments or documents and take all such further action as may be reasonably necessary or appropriate in order to more effectively carry out the intent and purpose of this Settlement Agreement.

"Subject to the limitations set forth in this Section, the Indemnifying Party shall assume control of the defense of any Claim asserted by any third party ("Third Party Claim") and, in connection with such defense, shall appoint lead counsel for such defense, in each case at its expense.

"Notwithstanding anything appearing to the contrary in this Agreement, the Indemnifying Party shall not assume or maintain control of the defense of any Third Party Claim but shall pay the fees and expenses of counsel retained by the Indemnified Party if (i) the Third Party Claim relates to or arises in connection with any criminal proceeding, action, indictment, allegation or investigation, (ii) an adverse determination with respect to the Third Party Claim would, in the good faith business judgment of the Indemnified Party, be detrimental in any material respect to the Indemnified Party's reputation or future business

prospects, (iii) the Third Party Claim seeks an injunction or equitable relief against the Indemnified Party or (iv) the Indemnifying Party has failed or is failing to prosecute or defend vigorously the Third Party Claim.

"If the Indemnifying Party shall assume control of the defense of any Third Party Claim in accordance with the above provisions, the Indemnifying Party shall obtain the prior written consent of the Indemnified Party before entering into any settlement of such Third Party Claim, if the settlement does not expressly and unconditionally release the Indemnified Party from all liabilities and obligations with respect to such Third Party Claim or the settlement imposes injunctive or other equitable relief against the Indemnified Party. The Indemnified Party shall be entitled to participate in the defense of any Third Party Claim and to employ counsel of its choice for such purpose. The fees and expenses of such separate counsel shall be paid by the Indemnified Party; *provided, however*, that the Indemnifying Party shall pay the reasonable fees and expenses of such separate counsel (i) incurred by the Indemnified Party after it shall have given notice of such Third Party Claim to the Indemnifying Party and (ii) prior to the date, the Indemnifying Party shall fail or refuse to acknowledge that it will have an indemnity obligation for such Third Party Claim (and any losses, liabilities, costs and expenses relating thereto) as provided hereunder or (iii) if representation of both the Indemnifying Party and the Indemnified Party by the same counsel would, under applicable code or rules of professional conduct or responsibility, create a conflict of interest.

"Each party shall cooperate, and cause its Affiliates to cooperate, in the defense or prosecution of any Third Party Claim and shall furnish or cause to be furnished such records, information and testimony, and attend such conferences, discovery proceedings, hearings, trials or appeals, as may be reasonable requested in connection therewith."

Steven B. Lesser is a shareholder in *Becker and Poliakoff, P.A.*, Ft. Lauderdale, where he devotes his practice exclusively to construction law and litigation. He is a member of the Council for the American Bar Association Tort and Insurance Practice Section and the American Bar Association Forum on the Construction Industry Steering Committee on Owners and Lenders. Mr. Lesser is a graduate of Ohio University and the Cleveland-Marshall College of Law and is admitted to practice in Florida and Ohio.