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Contract Provisions Can Indemnify A Contractor's Negligence

By **Keith Broll** (December 13, 2018, 1:04 PM EST)

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What if parties themselves could dictate which of them would be ultimately responsible for liabilities stemming from the business transaction and what if that was done with enforcement from the courts? Moreover, what if your agreement could be enforceable even where it dictates that one or more of the parties is responsible for another party's own faults or negligence?[1]

This type of contractual arrangement is designed to offset the concept of common law indemnity, which "shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable."[2]

It has been held that "weighing of the relative fault of tortfeasors has no place in the concept of indemnity for the one seeking indemnity must be without fault."[3] In addition, "for a common law indemnity claim to stand, a two-pronged test must be satisfied: (1) the indemnitee must be faultless and (2) the indemnitee's liability must be solely vicarious for the wrongdoing of another."[4]

One way to think about pushing back on this is whether there should be any restraint on full capacity parties to state exactly what they agreed to in a contract, and does the state's authority recognize such individual agreements so as not to limit that capacity (especially in business transactions where criminal and family types of matters are not at issue)?

As it turns out, there is case law where courts are accepting some indemnity provisions as enforceable such that a contractor in a business transaction setting is to be indemnified even if found to have negligence or fault in creating the liability.

A recent example of this was widely seen in a case published by the Community Associations Institute this year of an Illinois decision related to a contractor's own negligence. With the heading, "Association Has to Indemnify Contractor for Contractor's Negligence," the case of Hussar v. The Brewster Condo. Corp.,[5] gained national attention because the Appellate Court of Illinois held that broad indemnity terms in the contract obligated an association to defend and indemnify its contractor for that contractor's own negligence, which would only change if the contractor was solely negligent.

According to CAI's reporting of the case, the Brewster Condominium Association governed an eight-story condominium in Chicago, and in 2011 the association contracted with Thornton Tomasetti Inc. to

inspect the building. The services agreement included an indemnification clause requiring the association to hold harmless, defend and indemnify TTI from any and all claims arising out of the association's negligence on the project, TTI's negligence in performing the work or supplying the materials or the negligence of other parties relative to the project, except that TTI would be liable for all claims due to TTI's sole negligence. In August 2013, plaintiffs sued the association, TTI and the association's property manager (the defendants) alleging that a water tank on the roof collapsed and fell into the alleyway injuring them.

The plaintiffs alleged their injuries were caused by the defendants' negligence. In December 2013, another plaintiff file suit making the same claims, and the two lawsuits were consolidated. By July 2014, TTI demanded the association defend and indemnify it for the claims alleged in the lawsuits and then sent two more letters to the association tendering its defense of the claims and demanding indemnification, to which the association never responded. So, TTI filed a counterclaim in May of 2015 against the association for breach of contract and indemnification and contribution for the claims alleged against TTI.

Although the association argued the agreement did not entitle TTI to indemnification for its own negligence, TTI successfully argued the stated terms of the agreement are binding in the requirements that the association must indemnify TTI for the association's negligence, the negligence of other contractors hired by the association or the negligence of any other party relative to the project, such that "any other party relative to the project" included TTI with only one exception for TTI's sole negligence.

Reversing the trial court, the appeals court agreed with TTI that the association was obligated to defend and indemnify TTI under the contract terms but, cautioned that an indemnity contract will not be interpreted as indemnifying one's own negligence unless that intent it is abundantly clear from the contract's terms, and the words "any and all" are all inclusive and may indicate that the parties intended for a party to be indemnified for his own negligence.

The appeals court also noted the agreement language favoring TTI was extremely broad and could include TTI under the clear obligations that the association was to indemnify TTI for "any and all" claims arising from the negligence of "any other party relative to the project". The only exception was where the claims were due to the sole negligence of TTI and for that exemption to apply the damages sustained by the injured parties must have arisen exclusively from TTI's negligence to the exclusion of negligence by the association, other contractors or anyone else.

As for Florida courts, Zeiger Crane Rentals v. Double A Indus.[6] allowed a subcontractor's breach of contract claim against a general contractor where the sub demanded indemnity from the general under the indemnity clause of the parties' agreement, even though the injured party alleged the sub to have been grossly negligent. The contract for work on the project site included the indemnity clause, as follows:

> RESPONSIBILITY FOR USE. Lessee [Double A] agrees to indemnify, defend and hold harmless Lessor [Zeiger], its employees, operators and agents from any and all claims ... for bodily injury ... resulting from the use, operation or possession of the crane and operator whether or not it be claimed or found that such damage or injury resulted in whole or in part from Lessor's negligence, from a defective condition of the crane or operator, or from any act, omission or default of Lessor. See Id.at 913.

As referenced in Zeiger Crane Rentals v. Double A Indus., Florida courts traditionally “disfavor contracts that attempt to indemnify a party against its own negligence.”[7] Under Florida law, the parties' contract is enforceable, however, where it expresses in clear and unequivocal terms a party’s intent to indemnify another party against its own or its employees' own wrongful acts.[8][9]

Although indemnity contract provisions may be drafted to be enforceable, examples of contract language that failed to express such clear and unequivocal terms as to apply to one’s own negligence are, as follows:

> The COMPANY shall have no responsibility, direction or control over the manner of erection, maintenance, use or operation of said equipment by the LESSEE. The LESSEE assumes all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold the COMPANY harmless from all such claims.[10]

And,

> Licensee shall indemnify, protect and save the Licensor forever harmless from and against any and all claims and demands for damages to property and injury or death to any persons including, but not restricted to, employees of Licensee and employees of any contractor or sub-contractor performing work for Licensee ... which may arise out of or be caused by the erection, maintenance, presence, use or removal of said attachments ....[11]

Furthermore, if the parties do not limit the term "negligence" in the contract itself, then it is not for the court to step in and arbitrarily limit that term to only mean a specific type of negligence, whether simple or gross.[12][13]

Florida statutes tend not to allow indemnification in business dealings under various wrongful conduct type scenarios.[14] One indemnity area with statutory impact on more common business transactions in Florida, however, are the requirements listed throughout §725.06, Florida Statutes, under the heading “Construction contracts; limitation on indemnification.”

The language of §725.06 is very broad as to any contracts in connection with construction and development of real property and applies to the owner, architect, engineer, general contractor, subcontractor, sub-subcontractor or materialman. In order to be legally enforceable, however, §725.06 is quite specific that any such indemnity “… shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any.”

The statute also mandates “the monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity of contract with such owner shall not be less than $1 million per occurrence, unless otherwise agreed by the parties.” And limits indemnification provisions to individuals and entities related to the construction contracting parties. Note, the details of this statute dictate that involvement with indemnity provisions in these agreements often warrants the advice of experienced practitioners for this area of business law.

While it may not be the intuitive law school answer, other state courts and Florida courts have allowed parties to accept indemnity obligations in a business contract setting. Accordingly, contractors and other parties to their contracts should carefully consider any language that may contractually shift the liability

for their own negligence to another party. Taking into consideration the size and scope of your contract, it might be more important than ever for contractors, other parties and their legal counsel to redraft the liability provisions before entering those contracts and note whether or not you are accepting or providing indemnity for another party's actions, which are often not in your control once the contract is signed.

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[1] This article does not attempt to explain or analyze potentials related to determinations of fault or negligence, instead it assumes a finding of fault or negligence for the purposes of analyzing contractual enforceability to indemnifying one's own actions.

[2] Zeiger Crane Rentals v. Double A Indus., 16 So.3d 907, 911 (Fla. 4th DCA 2009) (quoting Houdaille Indus., Inc. v. Edwards, 374 So.2d 490, 493 (Fla.1979).

[3] Id.

[4] Id. citing Gen. Portland Land Dev. Co. v. Stevens, 395 So.2d 1296, 1299 (Fla. 4th DCA 1981) (discussing Houdaille, 374 So.2d 490)

[5] Hussar v. The Brewster Condo. Corp., 2018 IL App (1st) 172524-U, No. 1-17-2524 (Ill. App. Ct. Jun. 22, 2018)

[6] Zeiger Crane Rentals v. Double A Indus., 16 So.3d 907 (Fla. 4th DCA 2009)

[7] Id. at 914 citing Charles Poe Masonry Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So.2d 487, 489 (Fla. 1979).

[8] Id.

[9] See Cox Cable Corp. v. Gulf Power Co., 591 So.2d 627, 629 (Fla.1992).

[10] Charles Poe Masonry Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So.2d 487, 489 (Fla. 1979) (extending to joint liability the indemnity principles where “courts of law rightfully frown upon the underwriting of wrongful conduct, whether it stands alone or is accompanied by other wrongful acts”).

[11] Cox Cable Corp. v. Gulf Power Co., 591 So.2d 627, 629 (Fla. 1992).

[12] See Borden v. Phillips, 752 So.2d 69 (Fla. 1st DCA 2000) (finding the term `negligence', as used in an indemnity clause, is not limited and it should be construed as intending to encompass all forms of negligence, simple or gross with only intentional torts being excluded); see also Theis v. J & J Racing Promotions, 571 So.2d 92 (Fla. 2d DCA 1990) (noting that a waiver releasing a party from "negligence" excused that party from liability for all forms of negligence, simple or gross, because the term was not limited in the contract).

[13] Zeiger Crane Rentals v. Double A Indus., 16 So.3d 907, 911 (Fla. 4th DCA 2009).

[14] See e.g. Fla. Stat. §605.0105.3(p) Operating agreement; scope, function, and limitations (stating … "An operating agreement may not … Provide for indemnification for a member or manager under s. 605.0408 for … Conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law. … A transaction from which the member or manager derived an improper personal benefit" etc.)