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TO ERR IS HUMAN; KNOWING WHO TO BLAME IS RISK TRANSFER

Defending premises liability claims requires eliminating or minimizing liability to the Defendant. Critically, this requires implicating other entities. This can include other defendants, non-parties and Plaintiffs themselves. This article will provide a summary of risk transfer methods, including indemnity, attributing liability to non-party defendants and attributing contributory fault to plaintiffs.

Contractual Indemnity

Indemnity is the principle of law which allows one defendant to shift his entire loss to other responsible defendants. Indemnification claims may be contractual or equitable in nature. [1]

"A contract for indemnity is an agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party." [2] "Indemnity contracts are subject to the general rules of contractual construction; thus an indemnity contract must be construed based on the intentions of the parties." [3] Accordingly, "[i]n cases involving contractual indemnity, the terms of the agreement will determine whether the indemnitor is obligated to reimburse the indemnitee for a particular claim." [4] Indeed, contractual indemnity is intended to offset the concept of common law indemnity, which "shifts the entire loss from one who, although without active negligence of 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 liable." [5]

Although contracts with indemnity agreements which offer indemnification for one's own negligence are disfavored in Florida and strictly construed, [6] these indemnity agreements are generally upheld under certain conditions. [7] A general provision indemnifying the indemnitee "against any and all claims," standing alone, is not sufficient. [8] Rather, "an indemnity agreement which indemnifies against the indemnitee's own negligence must state this in 'clear and unequivocal language.'" [9] Accordingly, for an indemnity clause to indemnify against an indemnitee's own negligence, "the agreement or contract must expressly state that such liability is undertaken by the indemnitor." [10]

Further, the principle of contractual indemnity is subject to statutory modification or modification by case law. Indeed, there are several statutes that the Florida legislature has enacted which affect the right to obtain indemnity against liability for tort claims, some which have been enacted for purposes of public policy.

Landlord-Tenant

For example, with respect to the Florida Residential Landlord and Tenant Act, specifically section 83.47, Florida Statutes, a provision in a rental agreement that limits a landlord's liability to the tenant or vice versa is prohibited and is considered void and unenforceable. [11]

Despite this provision, there has still been litigation over potential exceptions to section 83.47, Florida Statutes, such as in the matter *Ray v. Tampa Windridge Associates, Ltd.* [12] Pursuant to section 83.51(2)(a)(2), Florida Statutes, "unless otherwise agreed in writing ... a landlord ... shall, at all times during the tenancy, make reasonable provisions for ... locks ..." [13] The landlord in *Ray* contended that section 83.51(2)(a) permits a landlord-tenant agreement, relieving the landlord of its statutory duty to make reasonable provisions for locks following injuries to one of its tenants at the hands of an intruder to the tenant's apartment complex. [14] The Court in *Ray* did not reject this argument. Indeed, upon its review of the landlord-tenant agreement, the agreement did not dispense of the duty of the landlord to make reasonable provisions for locks. Rather, the landlord-tenant agreement included a provision expressing the tenant's understanding that the landlord "will not check the lock after the tenant moves into the apartment and a provision saying that the landlord does not guarantee the tenant's personal security or other effectiveness of the locks." Effectively, the landlord-tenant agreement shifted this duty to the tenant and precluded liability of the landlord for breach of its duty to make reasonable provisions for locks. The Court held that this provision was prohibited under section 83.47, Florida Statutes.

Parent-Child

As a general rule, "a pre-injury release executed by a parent on behalf of a minor child is unenforceable against the minor or the minor's estate in a tort action arising from injuries resulting from participation in a commercial activity." [15] In *Claire's Boutiques v. Locastro,* [16] Florida's Fourth District Court of Appeal extended the reasoning in *Kirton* to ***31** indemnification agreements by invalidating a contract that required a parent to indemnify a commercial entity for that entity's negligent actions that injured the parent's child. In reaching its decision, the District Court noted that the provision at issue in *Locastro* conflicted with the public policy expressed in *Kirton*, which *"requires* the state 'to assert its role under parens patriae to protect the interests of the minor children' where ... indemnity, would impact a child's well-being and leave a parent with the prospects of bearing the financial burden caused by the negligence of the activity provider ..." [17]

Common Law Indemnity

The second category of indemnity is common law indemnity. Common law indemnity is an equitable remedy. [18] Like contractual indemnity, common law indemnity "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". [19] To plead a cause of action for common law indemnity in Florida, the party seeking indemnity must allege three elements: "1) that he is wholly without fault; 2) that the party from whom he is seeking indemnity is at fault; and 3) that he is liable to the injured party only because he is vicariously, constructively, derivatively, or technically liable for the wrongful acts of the party from whom he is seeking indemnity." [20]

Wholly Without Fault

The party seeking indemnity must first show it is without fault. [21] Even slight fault will preclude recovery under common law indemnity. A party's fault or lack thereof is a factual matter left for the jury. [22] However, there have been instances where directed verdict was warranted where there was no record evidence of a premise owner's active negligence. [23] For instance, a premises owner was entitled to a directed verdict where the escalator installer negligently installed an escalator with no evidence of active negligence on part of the premises owner. [24] By extension, such premises owner would be entitled to summary judgment under the new standard. [25] Conversely, a premises owner would have some fault if it knew of a dangerous condition and allowed it to remain. [26]

The Party from Whom Indemnity Is Sought Is at Fault

The party seeking indemnity must show the other party is at fault, such as a reseller of a defective or harmful product who may seek common law indemnity against a manufacturer where the reseller was not involved in the design, manufacturing or marketing of a product. [27] In addition, a hotel may seek indemnity against a shower door fabricator where the glass of

the shower door spontaneously shatters into small pieces and the hotel is only "vicariously, constructively, derivatively or technically liable." [28]

Special Relationship

The term "special relationship" merely describes a relationship which makes a faultless party only vicariously, constructively, derivatively, or technically liable for the wrongful acts of the party at fault. [29] The absence of a special relationship precludes a common law indemnity claim. For instance, courts denied a common law indemnity claim brought by a landlord and premises owner against his tenant where the landlord had control over the condition of the premises. [30] Active negligence, even if slight, of the party, seeking common law indemnity also precludes a claim under the doctrine. [31]

Procedural Considerations for Indemnity

An action for indemnity may be brought either as a third-party action, crossclaim, counterclaim or independent action. A third-party action is appropriate where the indemnitor is not a party to an underlying action. [32] A crossclaim is appropriate where the indemnitee and indemnitor are co-parties. [33] A counterclaim is appropriate where the indemnitee and indemnitor are opposing parties. [34] An independent action is generally appropriate in any circumstance. However, the opposing party will likely seek to consolidate the actions. While courts have broad discretion in consolidating actions, consolidation may be mandatory in certain indemnity actions. [35]

Non-Party Defendants

Florida law allows for apportionment of damages to non-parties by placing them on the verdict form. [36] Non-parties are typically referred to as Fabre defendants. A defendant seeking to apportion liability to the Fabre defendant must "describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented". [37] As a practical matter, Fabre defendants are identified in the affirmative defenses. If a Fabre defendant is later discovered, a defendant may move to amend any affirmative defense to include the newly discovered Fabre defendant. A Fabre defendant's liability is generally a matter for the jury. A Fabre defendant's fault must be proven by the party asserting their liability by a preponderance of the evidence. [38]

Comparative Negligence of Plaintiff

Before the passage of HB 837 in 2023, Florida was a pure comparative negligence state where each party was apportioned liability based on its percentage of fault. [39] In passing HB 837, the Florida legislature modified Florida comparative negligence to bar a plaintiff from recovery if their negligence is greater than 50%. [40] Where comparative ***32** negligence is alleged, the trier of fact must hear the totality of fault' of each side," i.e., the specific acts of negligence of each party. [41] A defendant must plead a plaintiff's comparative negligence as an affirmative defense. [42] Special verdicts are required in all jury trials involving comparative negligence. [43] However, plaintiffs cannot be charged with comparative fault in intentional tort actions. [44] Further, a premises owner cannot shift liability to a party committing an intentional tort in a premises liability action based on an intentional tort. [45]

Conclusion

In practice, a well-drafted indemnity agreement may provide security to the indemnified party by eliminating the risks inherent in a commercial transaction. To maximize the beneficial aspects of contractual indemnity, the risks discussed above must be identified and analyzed proactively to tailor the indemnity agreement to the specific needs of the parties to the transaction. Nevertheless, attorneys defending premises liability actions should always look to transfer risk to anyone. This includes any party or non-party that created, altered or had a duty to maintain the allegedly dangerous condition.

EDITOR'S NOTE: Assessing the potential for risk transfer is an essential step in defending premises liability claims. Contractual indemnity is one aspect of risk transfer, but practitioners should be aware of the ways statutory law and common law affect the right to indemnification.

Footnotes

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1 *See*, e.g., *Allstate Ins. Co. v. Metro. Dade Cty.*, 436 So. 2d 976, 978 (Fla. 3d DCA 1983).

2 *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 643 (Fla. 1999).

3 *Id.*

4 *Camp, Dresser, & Mckee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072, 1077 (Fla. 5th DCA 2003).

5 *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)).

6 *SEFC Building Corp. v. McCloskey Window Cleaning, Inc.*, 645 So. 2d 1116 (Fla. 3d DCA 1994) (noting 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).

7 *Kellum v. Freight Sales Ctrs., Inc.*, 467 So. 2d 816 (Fla. 5th DCA 1985).

8 *Id.*

9 *University Plaza Shopping Ctr. v. Stewart*, 272 So. 2d 507, 511 (Fla. 1973).

10 *Id.* (emphasis omitted).

11 § 83.47, Fla. Stat., provides:

(1) A provision in a rental agreement is void and unenforceable to the extent that it:

(2) Purports to waive or preclude the rights, remedies, or requirements set forth in this part.

(3) Purports to limit or preclude any liability of the landlord to the tenant or of the tenant to the landlord, arising under law.

(2) If such a void and unenforceable provision is included in a rental agreement entered into, extended, or renewed after the effective date of this part and either party suffers actual damages as a result of the inclusion, the aggrieved party may recover those damage sustained after the effective date of this part.

12 596 So. 2d 676 (Fla. 2d DCA 1991).

13 § 83.51(2)(a)(2), Fla. Stat.

14 *Id.*

15 *Kirton v. Fields*, 997 So. 2d 349, 358 (Fla. 2008).

16 85 So. 3d 1192, 1196 (Fla. 4th DCA 2012).

17 *Id.* (citing *Kirton*, 997 So. 2d at 349, 352-54).

18 *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072 (Fla. 5th DCA 2003).

19 *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 493 (Fla. 1979).

20 *Florida Peninsula Ins. Co. v. Ken Mullen Plumbing, Inc.*, 171 So. 3d 194, 196 (Fla. 5th DCA 2015).

21 *Houdaille Indus., Inc.*, 374 So. 2d at 494.

22 *Atl. Coast Dev. Corp. v. Napoleon Steel Contractors*, 385 So. 2d 676, 681 (Fla. 3d DCA 1980); *Price v. Miller & Solomon Gen. Contractors, Inc.*, 104 So. 3d 1251 (Fla. 4th DCA 2013).

23 *Metro. Dade Cnty. v. Gassin*, 449 So. 2d 828, 828 (Fla. 3d DCA 1984).

24 *Id.*

25 *In re Amendments to Florida Rule of Civil Procedure* 1.510, 317 So. 3d 72, 74 (Fla. 2021).

26 *Florida Power Corp. v. Taylor*, 332 So. 2d 687, 691 (Fla. 2d DCA 1976).

27 *Sorvillo v. Ace Hardware Corp.*, No. 2:13-CV-629-FTM-29, 2014 WL 2506138, at *1 (M.D. Fla. June 3, 2014).

28 *Diplomat Properties Ltd. P'ship v. Tecnoglass, LLC*, 114 So. 3d 357, 363 (Fla. 4th DCA 2013).

29 *Id.* at 362.

30 *Tsafatinos v. Family Dollar Stores of Florida, Inc.*, 116 So. 3d 576, 581 (Fla. 2d DCA 2013).

31 *Houdaille Indus., Inc.*, 374 So. 2d at 494.

32 Fla. R. Civ. P. 1.180.

33 Fla. R. Civ. P. 1.170(g).

34 Fla. R. Civ. P. 1.170(a) & (b).

35 *Holiday Inns, Inc. v. Spevak*, 639 So. 2d 1110 (Fla. 1st DCA 1994).

36 § 761.81(3), Fla. Stat.; Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

37 § 761.81(3)(a)(1).

38 § 761.81(3)(a)(2).

39 *American Home Assur. Co. v. National Ry. Passenger Corp.*, 908 So. 2d 459 (Fla. 2005).

40 § 761.81(6).

41 *Stewart v. Draleaus*, 226 So. 3d 990 (Fla. 4th DCA 2017).

42 *Florida Patient's Compensation Fund v. Tillman*, 487 So. 2d 1032 (Fla. 1986).

43 *Lawrence v. Florida East Coast Ry. Co.*, 346 So. 2d 1012 (Fla. 1977).

44 § 761.81(6), Fla. Stat.

45 *Holley v. Mt. Zion Terrace Apartments Inc.*, 382 So. 2d 98 (Fla. 3rd DCA 1980).

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