Fine Print

A Quarterly Publication of The Ohio State Bar Association and Our Members

Issue 64 • Summer 2015

Construction Contracting: Ohio Generally Prohibits Indemnification Clauses

By Andrew L. Smith

In the world of construction law, those who prepare the terms and conditions of construction contracts and project agreements often try to require subcontractors, design professionals and other agents, partners or independent contractors to indemnify them, even if they are at fault for any resulting liability or damage. Subcontractors and other parties sometimes feel forced to enter into such contracts to obtain work and outbid others.

So what, exactly, is indemnification? To indemnify another party is to completely compensate that party for loss or damage that has already occurred. For example, when you submit an insurance claim to your insurance company for wind or hail damage to your home, the insurance company agrees to pay for the loss, even though the damage was not in any way the fault of your insurer.

Ohio law broadly prohibits indemnification clauses that seek to indemnify liability for sole or partial negligence. Parties to a construction contract cannot simply shield themselves by implementing indemnification clauses. This provides protection against indemnification to subcontractors, design professionals and other agents, partners or independent contractors.

For instance, in *C.J. Mahan Constr. Co. v. Mohawk Re-Bar Servs.*, 2005-Ohio-5427, the court found that an indemnity clause in a construction contract between a contractor and a subcontractor was "against public policy" because the language in the agreement clearly indemnified the contractor for damages claimed as a result of the joint acts of the contractor and the subcontractor.

Most Ohio statutes apply to a very broad range of construction projects, including terminology such as this: "...a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, struc-

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In my opinion...

Franchise Buyers Don't Need a Lawyer – Yeah, Right!

By Jim Meaney

Okay, so I am biased. But it is a well-developed bias based on years of experience and shattered dreams. And years of hearing the same refrains: "I couldn't afford a lawyer when I bought my franchise," "I used the lawyer who drafted my will and he said the contract was fine," and "I heard I would be wasting my money because the franchisor would not change the contract anyway."

These are excuses I usually hear when I meet with a franchise owner who is finally asking for advice because he or she is dissatisfied with a franchise relationship. Sometimes it is too late to help them.

The best time to seek the help of knowledgeable franchise counsel is *before* you buy a franchise. Here are the top 10 reasons why:

1. Franchising is *complicated*.
2. Unless you have a lot of experience buying franchises, you *don't know* what to look for.
3. If you *cannot afford* a qualified franchise attorney, you *cannot*

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ture, highway, road, appurtenance and appliance, including moving, demolition and excavating connected therewith." *(See, e.g., Ohio Rev. Code ß 2305.31.)* However, in certain circumstances, Ohio's statutes prohibiting indemnification may not cover the scope of a particular project. It is wise to consult an attorney to find out if Ohio's indemnification laws apply to your project.

Whether you are a project owner, general contractor, subcontractor, design professional or other agent, partner or independent contractor, you need to pay particular attention to the terms of your construction contract or project agreement indemnification provisions.

Don't be left on the hook!

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afford the franchise.
4. Lawyers who *do not* practice franchise law *cannot* effectively help you.
5. Qualified franchise lawyers *can educate* you on the best way to search for a franchise and how to use their services.
6. Qualified franchise lawyers start with an *investigation* of the franchise system and the Franchise Disclosure Document, not the franchise agreement.
7. Good counsel can help you *avoid* selecting the wrong franchise.
8. Knowledgeable franchise lawyers have resources and connections that you don't.
9. Proper negotiation of a development or franchise agreement is a matter of timing and nuance.
10. The cost of a good franchise lawyer may not be more than 1 to 3 percent of your overall investment.

Lawyers who practice regularly in the franchise arena can "read between the lines" of a Franchise Disclosure Document.

There are many other reasons, but you get the picture. Lawyers who practice regularly in the franchise arena can "read between the lines" of a Franchise Disclosure Document, know what is missing, and can detect a bad deal or even a scam.

The most effective use of a franchise lawyer may be following advice to take a pass on that franchise deal that could have resulted in the loss of your home, retirement fund and savings account, not to mention that loan from your mother.

Choose wisely when deciding whether to buy a franchise... but choose an experienced franchise lawyer first!

Jim Meaney, a lawyer with the Zaino Law Group, LPA in Columbus, has represented franchisors and franchisees for nearly 30 years.

What Employers Should Know:

DOL Updates FMLA Model Forms

by Patricia F. Weisberg

The U.S. Department of Labor (DOL) issued new FMLA model notices, which now include a reference to the Genetic Information Nondiscrimination Act (GINA) in the instructions to health providers on the Certification of Health Condition forms.

The new Certification of Health Care Provider for Employee's Serious Health Condition directs health care providers NOT to provide information regarding genetic tests or genetic services, or the manifestation of disease or disorder in the employee's family. The new Certification of Health Care Provider for Family Member's Serious Health Condition directs health care providers NOT to provide information regarding genetic tests of genetic services. The new language in these forms is not the entire "safe harbor" language, so employers should continue to include the "safe harbor" language on any requests for medical information from employees.

What employers should do now:
1. Access and use the updated forms from the DOL website (www.dol.gov/whd/forms/WH-380-E.pdf; www.dol.gov/whd/forms/WH-381.pdf; www.dol.gov/whd/forms/WH-382.pdf; www.dol.gov/whd/forms/WH-384.pdf; www.dol.gov/whd/forms/WH-385.pdf);
2. Include the GINA "safe harbor" language when requesting any health information from an employee; and
3. Stay up to date on the proposed FMLA rule revision.

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