

Are Exculpatory Clauses Enforceable?

Community association boards and managers often ask their lawyers to create a document which will protect them if owners or other users of the association's facilities are injured. The communities often intend to require users of the facilities to sign these documents as a condition of allowing them to use the facilities in the hope of minimizing the association's exposure to liability. Many times, there are issues of whether owners and others have legal rights to use the facilities which preclude the association imposing such conditions, but, for purposes of this article, let us assume we get past those issues so we may consider whether such agreements are enforceable at all.

Agreements which serve to insulate one from liability often include what are referred to as "exculpatory clauses." Such clauses are intended to deny an injured party the right to recover damages from a person who may have negligently caused his injury. Florida courts have long disfavored such clauses for public policy reasons because they relieve one party of the obligation to use due care and serve to shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid the injury and bear the risk of loss. Since the law disfavors such clauses, they are strictly construed against the party seeking to be relieved of liability. Courts have held that exculpatory clauses are enforceable only where and to the extent that the intention to be relieved from liability is made clear and unequivocal. The wording must be so clear and understandable that an ordinary and knowledgeable person will know what he is contracting away. Given the wiggle room courts have created in evaluating such clauses it is often difficult to advise a client whether requiring users of the community facilities will afford the association any protection from liability at all.

A recent Florida case considered by the 5th District Court of Appeal (which hears appeals from cases from Volusia County trial courts) illustrates how difficult it is to make exculpatory clauses stick in Florida. *Blakely v. Stetson* 48 FLW D45 (5th DCA 2022) involved a young athlete who died after collapsing during football practice. The university had required its student athletes to sign participation releases and waivers of liability. The university argued that it was not even necessary for the court to consider whether the university was negligent or whether any such negligence contributed to the athlete's death because he had signed away any such claims. While the trial court agreed that the athlete's estate could not recover from the university because of the release, on appeal, the court held that the exculpatory clause in the release did not adequately relieve the university from negligence claims and held that the agreement was so poorly worded that it was rendered unenforceable.

The result in this case illustrates how difficult it is to avoid liability simply by requiring users of association facilities to sign such agreements. The strict construction rules applied to such clauses often cause courts to look for any reason to find that the exculpatory clauses are not enforceable. Does that mean associations should not bother asking the users of their facilities (particularly those such as gyms where there is potentially dangerous equipment) to sign waivers with exculpatory clauses? Not necessarily. Some people may choose to honor the spirit of the agreements they sign even if they may not be clearly legally enforceable. Also, some injured parties whose injuries are not severe may choose not to file claims for nominal injuries where the litigations costs over the interpretation of the clause may be costly. Provided that boards recognize that there may be challenges to such waivers and exculpatory clauses, there may still be legitimate reasons to consider them. If your community believes it may benefit from a waiver with an exculpatory clause, consult with your association's attorney.

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