

IN BRIEF

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An Insurance Industry Newsletter of Recent Issues and Opinions in Virginia Law By

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Indemnity, Pre-injury Release Provisions, Personal Injury, Future Negligence, Public Policy...Sorting It All Out!

Indemnity clauses are ‘standard issue’ in contract language. They provide the means by which contracting parties can determine who will be responsible for paying the bills should negligent injury or property damage occur during the duration of a contract. But can a party negotiate an indemnity provision whereby they are indemnified if they should injure a third party in the future? On March 2, 2007, two cases were decided by the Virginia Supreme Court in which the validity of indemnity clauses was challenged. In these cases indemnity was demanded because a third party suffered physical injury due to negligence. In W.R. Hall, Inc. v. Hampton Roads Sanitation District, (“Hall v. HRSD”) the validity of clauses indemnifying a party for *any* negligent infliction of personal injury is challenged as being against public policy and, therefore, void. In Estes Express Lines, Inc, et al. v. Chopper Express, Inc., (“Estes v. Chopper”) the challenge is limited to indemnification when the indemnitee is the party responsible for inflicting the injury.

In Estes v. Chopper, the trial court found that “indemnity agreements contained in contracts wherein a private party indemnifies itself against the possibility of its own future negligence for personal injuries are against public policy and void”. The trial court based its decision on two cases, Johnson v. Richmond & Danville R.R. Co., 86 Va 975, 11 S.E. 829 (1990) and Hiett v. Lake Barcroft Community Ass’n, 244 Va. 191, 418 S.E. 2d 894 (1992) which state that “indemnity agreements involving claims for personal injury are against public policy and void”, that to be enforceable, indemnity clauses must only refer to property damage. Estes appealed this decision to the Supreme Court on the sole question of whether or not the indemnitee may enforce the provisions and receive

indemnification from the indemnitor when the loss was the result of personal injury allegedly caused by the indemnitee's negligence. Estes asserts that Johnson and Hiatt referred only to pre-injury release provisions in contracts. Chopper contends that both pre-injury release provisions and indemnity clauses are against public policy in that they allow potential tortfeasors to negotiate away their responsibility and liability for personal injury and this puts the indemnitor at the mercy of the indemnitee's conduct.

The Court begins its opinion by stating that "the law looks with favor upon the making of contracts between competent parties" Shuttleworth, Ruloff & Giordano, P.C. v. Nutter, 254 Va. 494, 498, 493 S.E. 2d 364, 366 (1997). The illegality of a provision in a contract must be very clear before the Court will hold it unenforceable on the ground of public policy. Ibid. The Court's decision in Estes v. Chopper distinguishes between pre-injury release provisions and indemnity clauses. A pre-injury release provision "extinguishes the [injured] party's right to recover for future bodily injuries caused by the other party's negligence" and is, therefore, against public policy. By comparison, indemnity clauses merely pre-determine "how potential losses incurred during the course of a contractual relationship will be distributed between the potentially liable parties." Safeway, Inc. v. DPI Midatlantic, Inc., 270 Va. 285, 619 S.E. 2d 76 (2005). The difference between the two is the injured party's right to recover – which makes all the difference to the Court. The Supreme Court maintains that, while pre-injury release provisions are unenforceable because they are not in the public interest, indemnity provisions are valid and enforceable. The Court feels that these indemnity provisions do not violate public policy because they do not eliminate a third party's ability to recover based on the indemnitee's negligence, but allow the indemnitee to seek reimbursement from an indemnitor. The Court further addressed the argument that an indemnity provision which absolves an indemnitee of all responsibility for its own negligence eliminates all motivation for the indemnitee to guard against its, or its employees', negligence. However, the Court rejected this argument on the basis that the indemnitor may be unable to indemnify for reasons such as insolvency, therefore, the indemnitee should remain vigilant.

The Court reinforces this decision in Hall v. HRSD, which it bases in part on the Estes v. Chopper decision. The Court finds that the only difference between this case and Estes v. Chopper is that "Hall contends that any indemnity provision entitling a party to be indemnified for losses resulting from the negligent infliction of personal injuries, even those not caused by or otherwise related to the indemnitee's own negligence, are void. The Court states that it would be inconsistent for it to hold that a party cannot indemnify itself against losses from third party personal injury in which it has no liability, when it can indemnify itself against losses from third party personal injury in which the party was involved!

With the Estes v. Chopper and Hall v. HRSD decisions, the validity and enforceability of indemnity provisions in contracts appears to be settled law – at least until a new set of circumstances challenges the status quo.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA
REGARDING INSURANCE INDUSTRY & LITIGATION ISSUES
FEBRUARY 26- MARCH 2, 2007 SESSION**

The case summaries that follow involve insurance and litigation issues. We have downloaded these summaries directly from the website of the Supreme Court of Virginia. We offer them to you with brief clarifications (in green) where necessary. However, if you would like a more complete legal analysis or the full text of any of these cases, please make your request by return e-mail. If you would like to discuss the ramifications of any of the decisions, please call (804) 378-7600: ext. 3304 for Ray; 3305 for Kevin or 3316 for Mark.

060369 Moses v. Southwestern Va. Transit Mgmt. Co. 04/20/2007

In a personal injury lawsuit, the circuit court erred in setting aside a jury verdict for the plaintiff and entering judgment for the defendants on the basis that the plaintiff's decedent was guilty of contributory negligence as a matter of law. The issue of proximate causation relating to contributory negligence was properly submitted to the jury for resolution, and reasonable minds could differ as to the conclusions to be drawn from the evidence presented. Consequently it was reversible error for the circuit court to set aside the jury verdict for the plaintiff. The judgment of the circuit court is reversed and final judgment is entered for the plaintiff.

061000 Isbell v. Commercial Investment Associates 04/20/2007

The circuit court correctly dismissed a tenant's personal injury suit against a landlord for failure to maintain the premises in a safe condition. The comprehensive scheme of landlord and tenant contractual rights and remedies in the Residential Landlord and Tenant Act does not create a statutory personal injury cause of action for a tenant since the General Assembly did not plainly manifest an intention therein to abrogate the common law rule that a landlord is not liable in tort for a tenant's personal injuries caused by the landlord's failure to repair premises under the tenant's control and possession. The judgment of the circuit court is affirmed.

061050 Baldwin v. McConnell 04/20/2007

In an assault and battery case, the trial court abused its discretion in ordering remittitur of a jury award of compensatory and punitive damages when, taking the evidence in the light most favorable to plaintiff, the jury's award of compensatory damages was not excessive as a matter of law, and an independent review of the \$100,000 punitive damages award shows that it is not shocking to the conscience or otherwise inappropriate in light of defendant's egregious conduct, and hence was not excessive as a matter of law. The judgment is reversed and final judgment is entered for plaintiff.

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