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The Value of a Truly Great Indemnity Agreement: When Things Go Bad, Having the Right Business Contract Can Win Your Case, and Reimburse Your Litigation Costs, Including Attorneys' Fees

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BY JOSEPH A. SACHER, ESQ – Never underestimate the power of a clear and concise contract, however short, particularly when it contains broad and unambiguous indemnification provisions providing extensive relief for damaged parties.

In Florida, clear and unambiguous terms in a written agreement will control the course of contractual relationships, and also determine the outcome, if any disputes should arise.

I recently had the pleasure of representing an injured party in a commercial dispute, which was attempting to enforce a one-page Indemnity Agreement executed 10 years before the actual dispute arose, and 12 years before it went to trial.

The case, *Nature's Products, Inc. v. Natrol, Inc., et al.*, Case No. 11-CV-62409-CIV-Dimitrouleas, in the U.S. District Court for the Southern District of Florida, Fort Lauderdale Division, serves as an excellent illustration of the value of a well-written contract that is clear, concise, and provides broad relief.

In 2001, a manufacturer of nutraceuticals ("supplier") entered into a one- page Indemnity Agreement, covering any and all products it supplied to my client ("customer").

That contract expressly stated that supplier would indemnify and hold customer *"harmless from and against any and all damages, losses, expenses, costs, claims, judgments and liabilities, including without limitation, actual attorneys' fees and regulatory penalties, incurred by [customer] arising from or in connection, or in any manner related to"* five broad events, for acts involving third parties (as typically contemplated by most indemnity agreements), and various actions by the supplier.

Those events specifically included, but were not limited to, regulatory actions involving the supplied products, supplier's negligence, and supplier's breaches of representations or warranties

pertaining to the products. Notably, this contract was open-ended, without an expiration date, and expressly stated that its provisions were binding on any successors and assigns, superseded all prior agreements and understandings, and embodied the entire agreement.

It is unclear whether or not the supplier actually heeded the Indemnity Agreement's terms at the time of signing, dismissed its importance as just another piece of paper, or ever intended to honor its terms. Regardless, the supplier wanted to do business with the customer, and was willing to sign the Indemnity Agreement in order to do so. As it turned out, that decision, however innocuous or quickly forgotten it may have been at the time, proved quite prophetic, shaping a legal result for a dispute that arose more than a decade later.

From 2001 through 2009, gel caps were purchased from the supplier. Then, in late 2009, the relationship substantially changed. The supplier orally agreed to begin manufacturing all of the sports nutrition protein powders that the customer required for resale, through one of its leading sports nutrition brands. Global sales continued until September of 2011, when the supplier disclosed, for the first time, that – contrary to the parties' understandings, the supplier's written certifications, and verified allergen statements on the product labels – the products actually contained wheat and gluten allergens. The supplier also advised the customer that the USFDA considered the problem to be a recall event, based on potential health risks to consumers.

The customer immediately demanded that the supplier honor the prior Indemnity Agreement. However, the supplier ignored the demands and, instead, filed suit seeking payment for remaining unpaid invoices. The customer responded with its own counterclaims for breach of the Indemnity Agreement, as well as related breaches of the parties' oral manufacturing agreement and statutory warranties (express and implied). Rather than attempting to work out a global resolution, the supplier chose to actively litigate, in an apparent attempt to avoid its obligations, or at least delay the inevitable result.

Prior to trial, the District Court carefully analyzed Florida contract law, granted partial summary judgment in the customer's favor, and ruled that the supplier had breached the parties' controlling Indemnity Agreement. In doing so, the Court found that the open-ended 2001 Indemnity Agreement applied to all products purchased from the supplier, and rejected the supplier's arguments that the contract was limited to earlier products or modified by other, unrelated agreements in 2009 and 2010.

As explained by the Court, the issue was one of simple contract interpretation. Florida law does not permit courts to consider any extrinsic or parol evidence that would change the plain meaning of an otherwise clear and unambiguous contract. Moreover, Florida law does *not* permit a trial court to "rewrite" a clear contract, to insert additional terms, or make it more reasonable for one of the parties. In fact, when confronted with clear and unambiguous words and phrases, which are *not* subject to more than one meaning, the trial court's job is done, its inquiry must stop, and it does *not* have the discretion to not enforce its terms, which are mandatory.

To the supplier's dismay, the District Court found the Indemnity Agreement to be valid, applicable to the products and disputes at issue, and that the supplier had violated its terms. The amount of the customer's damages was left for the Jury's determination, which awarded damages of $3.3 million to my client. The Court also retained jurisdiction to determine the customer's post-trial entitlement to "any and all damages, losses, expenses, costs … including

without limitation, actual attorneys' fees," as further provided in the Indemnity Agreement, leaving open the potential for an additional, substantial award of the customer's actual litigation costs.

Accordingly, the next time you draft a contract, are presented with a contract, choose to sign a contract, or advise your client or employer about such document, take a moment to reflect on Florida contract law, re-read the contract, and then make sure that all of the terms are clear, unambiguous, and cover any and all foreseeable, and even unforeseeable, situations that may arise in the future. That way, the contracting party fully understands and appreciates what is covered, what is not, and what will happen if anything should go wrong in the future.

About the author

Joseph A. Sacher, Esq. is a name director at Sacher, Zelman, Hartman, Paul, Beiley & Sacher, P.A., located in Miami. He is a member of the Florida and Georgia Bar, and a proud alumnus of Emory University ('94) and the University of Alabama School of Law ('97). Since entering private practice, he regularly defends SEC and related regulatory investigations, and has successfully prosecuted and defended multimillion-dollar lawsuits and appeals. He also regularly organizes and moderates Broker-Dealer Roundtables for the Florida International Bankers Association ("FIBA"), and has also authored various securities-related articles, including, most recently, "Don't Let It Tell You Otherwise: You Can Depose the SEC … Sometimes (A Lesson for Private and Public Securities Litigators, as Well as the Judiciary)," published by The Federal Lawyer, December 2013. The firm is located on the Internet at www.sacherzelman.com.