

Corrections, public use of shooting ranges, liability

Number: INFORMAL

Date: July 27, 1998

Mr. Harry K. Singletary, Jr.
Secretary
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

RE: DEPARTMENT OF CORRECTIONS--SHOOTING RANGES--RELEASE OR WAIVER OF LIABILITY--whether release or waiver of liability would protect Dept. of Corrections if department sued for public use of shooting range.

Dear Secretary Singletary:

You have asked for this office's assistance in determining the effectiveness of a release or waiver of liability clause in protecting the interests of the Department of Corrections and the State of Florida if the department allows private citizens to use its shooting ranges. You ask whether a release or waiver of liability would protect state interests under such circumstances. Attorney General Butterworth has asked me to respond to your letter.

Article X, section 13, of the Florida Constitution states that: "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Thus, the power to waive the state's immunity rests exclusively with the Legislature.[1]

The Legislature has explicitly waived sovereign immunity in tort for personal injury, wrongful death, and loss or injury of property with the enactment of section 768.28, Florida Statutes. State agencies are potentially liable in such actions to pay awards up to the statutory recovery limit of \$100,000 per person or a total judgment for all claims arising from the same accident of \$200,000.[2]

Although no express legislative waiver has been granted for contract claims, the Florida Supreme Court in *Pan-Am Tobacco Corporation v. Department of Corrections*,[3] found an implied waiver of sovereign immunity in contract on the premise that legislative authorization for state entities to enter into contracts reflected an intent that such contracts to be valid and binding on both parties. However, the court emphasized in *Pan-Am* that "our holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter." [4]

In addition, while section 768.28, Florida Statutes, limits recovery against a governmental entity absent a claims bill, the courts have determined that it does not limit the right of a party to proceed to judgment for the full amount of damages against the state or its agencies.[5] Rather, a claimant may seek a judgment for an excess sum as a preliminary step to seeking a claims bill.

Thus, the State and its agencies and subdivisions have acknowledged liability for certain legal actions that may be brought against them and the potential for greater liability has been recognized by the courts. Ultimately however, any determination of the enforceability and sufficiency of a waiver of liability clause included in a contract or elsewhere will depend primarily on the facts of the situation in which it is tested. These facts cannot be anticipated and a definitive resolution of the viability of any such waiver may only be accomplished by a jury.

I trust that these informal comments will assist you in considering the implementation of a program for the use of Department of Corrections shooting ranges by private citizens.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] See, e.g., Op. Att'y Gen. Fla. 90-21 (1990), and *Davis v. Watson*, 318 So. 2d 169 (Fla. 4th DCA 1975), *cert. denied*, 330 So. 2d 16 (Fla. 1976).

[2] Section 768.28, Fla. Stat.

[3] 471 So. 2d 4 (Fla. 1984).

[4] *Pan-Am* at p. 6. And see *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997), discussing the doctrine of sovereign immunity and its application to implied covenants or conditions of an express written contract.

[5] See *Gerard v. Department of Transportation*, 472 So. 2d 1170, 1172-1173 (Fla. 1985); *Paushter v. South Broward Hospital District*, 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995).