Indemnification contracts

Number: INFORMAL

Date: March 21, 1997

Ms. Helene C. Rosen
General Counsel, Palm Beach
County Health Care District
Post Office Box 810037
Boca Raton, Florida 33481-0037

Dear Ms. Rosen:

You ask whether the Palm Beach County Health Care District may, by contract, agree to indemnify and to hold harmless another agency, whether governmental or nongovernmental, for any damage, loss, or injury arising out of the negligent or wrongful acts of the district or its employees. Attorney General Butterworth has asked me to respond to your letter.

Article X, section 13, Florida Constitution, provides in part that "[p]rovision shall 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 sovereign immunity rests with the state Legislature.[1]

With the enactment of section 768.28, Florida Statutes, the Legislature has created a limited waiver of the state's immunity in tort.[2] Monetary limitations are specified allowing payment of a judgment against the state or its agencies or subdivisions by any one person not to exceed $100,000 for any claim or judgment which, when totaled with all other claims paid by the state arising out of the same incident or occurrence, does not exceed $200,000.[3]

While there is no analogous statutory waiver of sovereign immunity in contract, The Supreme Court of Florida has stated that where the Legislature has, by general law, authorized the state and its agencies to enter into contracts, it has, in effect, waived the state's immunity in contract.[4] As stated by the Court, however, the waiver of the state's immunity in contract "is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter."[5]

This office, in considering whether public agencies may enter into indemnification or hold harmless agreements with private or public entities, has previously stated that in the absence of statutory authorization, such agreements are impermissible.[6] For example, in Attorney General Opinion 80-77, this office concluded that the Governor could not, in the absence of a statute, waive the immunity of the state by agreeing the state would waive certain defenses and hold the United States harmless for any violations that the state or its employees might commit. Similarly, in Attorney General Opinion 90-21, this office stated that the Department of Corrections was not authorized to indemnify and hold a private company harmless for any damage, loss or injury caused by the department, its employees or agents.

The waiver of the state's immunity in tort has already been accomplished by section 768.28, Florida Statutes. I am not aware of any statutory provision which authorizes the department to alter the terms of section 768.28 by contract. While the courts have recognized that a legislative grant of the power to contract constitutes a waiver of the state's sovereign immunity to be sued in contract, I am not aware of any decision concluding that such authority encompasses the power to waive the state's sovereign immunity in tort beyond that which is already provided in section 768.28.

In Attorney General Opinion 95-12, this office considered the language in section 768.28(18), Florida Statutes, which states:

"Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence."

The county took the position in the above opinion that the language of section 768.28(18) only prohibited a clause in which the Department of Health and Rehabilitative Services would indemnify or assume liability for the county's negligence but would not prohibit a contractual provision holding the county harmless for any damage, loss or injury caused by the department, its employees or agents. This office concluded, however, that the first sentence of section 768.28(18) clearly prohibits a state agency from waiving *any* defense of sovereign immunity or increasing the limits of its liability when entering into a contract with a political subdivision of the state. Thus, the department could not enter into an agreement containing indemnification or hold harmless provisions that alter the state's waiver of immunity in tort or otherwise impose liability on the department for which it would not otherwise by law be responsible.

In a subsequent informal opinion to the Assistant City Attorney for Coral Springs, this office was asked to comment upon the validity of an interlocal agreement provision providing that the city agreed to bear the responsibility for the defense of and cost incurred in defending the school board from any and all liability resulting from the city's own actions. While this office recognized that it will not pass on the validity of any particular contractual provision, it stated that the city could not waive any defense of sovereign immunity or increase the limits of its liability by contract: "This conclusion would not preclude a contractual provision in the interlocal agreement which would clearly provide that each party will be liable for any losses or damages for which that party may be found legally responsible; however, it would appear to preclude any indemnity or hold harmless provisions in this contract."

As noted in the informal opinion, this office will not pass on the validity of any particular contractual provision. The opinions of this office, however, have recognized that a public agency may not, in the absence of a statute, enter into hold harmless or indemnification agreements which alter the state's waiver of immunity in tort or otherwise impose liability on the agency for which it would not otherwise be responsible. While a public agency would not be precluded from entering into a contract with a provision that clearly states that each party will be liable for any losses or damages for which that party may be found legally responsible, contractual provisions requiring a public agency to hold harmless or indemnify another entity for the public agency's

acts may be construed by the courts as extending the liability of the agency beyond that which it would otherwise be legally liable.

I am enclosing copies of several of the Attorney General Opinions which discuss this issue. I trust, however, that the above informal comments may be of assistance to you in resolving this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

Enclosures: Ops. Att'y Gen. Fla. 90-21 (1990) and 95-12 (1995); Inf. Op. to Mr. Leonard Rubin, dated November 6, 1996.

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[1] *See Arnold v.* Shumpert, 217 So. 2d 116 (Fla. 1968); *Davis v. Watson*, 318 So. 2d 169 (Fla. 4th DCA 1975), *cert. denied*, 330 So. 2d 16 (Fla. 1976).

[2] *See* s. 768.28(1), Fla. Stat., stating in part:

"In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. . . ."

[3] Section 768.28(5), Fla. Stat.

[4] *Pan-Am Tobacco Corporation v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984).

[5] *Id.* at 6.

[6] *See*, *e.g.,* Ops. Att'y Gen. Fla. 78-20 (1978) (state agency may not, in absence of general law so providing, enter into indemnification contract imposing liability upon state); 84-103 (1984) (city prohibited from agreeing to indemnify private corporation for any financial losses it might suffer over term of agreement).