Don Kramer's An Electronic Newsletter of "Nonprofit Law You Need to Know"
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Nonprofit's cost of indemnification agreement is $700,000

The nonprofit Vermont Swim Association has been ordered to pay the City of Rutland $700,000 under the indemnification provision in the contract that allowed the Association to use a city park for its annual swim meet. The Association was ordered to pay the cost of the City's settlement of a claim brought on behalf of a child who fell from playground equipment while attending the meet.

The agreement provided that the Association would "defend, indemnify and hold harmless Rutland … from all claims for bodily injury or property damage arising from or out of the presence of [the Association], including its employees, agents, representatives, guests and others present because of the event or [the Association's] activities in or about [the park]…. [The Association] shall be responsible for all costs of defense, including reasonable attorney's fees, and shall pay all fines or recoveries against Rutland."

The Association argued, as indemnitors often do in cases such as this, that the indemnity clause did not cover the City's negligence, but a trial court said the agreement was "unambiguous" and did cover the City's negligence. The trial court ordered the payment. The state Supreme Court has affirmed.

The Association "cannot escape the plain language of its agreement with the City," the Supreme Court said. "The indemnification clause allocated responsibility to [the Association] for any negligence claims directly arising out of [the Association'] event at the City's park and pool facility…. The intent of the parties could not be more apparent — the City was willing to allow [the Association] to use Whites Park as long as it was completely insulated from liability due to [the Association's] use."

The Court also noted a separate reason for liability. The agreement called for the Association to obtain insurance for the event and to name the City as an additional insured, which the Association failed to do. (*Southwick v. City of Rutland*, No. 2010-128, 5/20/11.)

You Need to Know…. *It isn't clear that anyone from the Association actually read the contract that they signed. If it had obtained event insurance and named the City as an additional insured, this claim would have been covered. Instead, since the indemnification provision creates liability to the City only on the basis of a contract, the claim against the City was not covered by the Association's own insurance. As a result, the Association had to pay not only the $700,000 settlement out of its own pocket but also the cost of the unsuccessful trial and appeal. As we have said so many times, indemnification clauses are dangerous and should be signed only when insurance is in place to protect the parties that are indemnified. If not, the party agreeing to indemnify another is at huge — and usually unappreciated — risk.*