

# MARKS & WEINBERG, P.C.

## **Mavis Blanchfill v. Better Builds, Inc.**

982 P.2d 53(Or. App., 2000)

An injured plaintiff brought negligence and strict liability claims against manufacturer-lessor of exercise equipment and brought negligence claim against the lessee health club. The manufacturer-lessor sought indemnity from lessee, and the lessee sought contribution from manufacturer-lessor. The trial court entered judgment on the jury's verdict, apportioning negligence among the parties. The trial court denied the indemnity claim but found the manufacturer-lessor liable for contribution. The manufacturer-lessor appealed.

The lease form among the parties contained the following provision:

"The lessee í agrees to defend, at lessee's own expense, any and all actions brought against either or both of the parties hereto for damages to persons or property caused by the leased property or by its operation, and agrees to hold lessor free and harmless of and from any and all claims and demands that may arise or be occasioned to any person or to any property by or through the use of the leased property or by its operation and agrees to hold lessor free and harmless of and from any and all claims and demands that



may arise or be occasioned to any person or to any property by or through the use of the leased property during the term of this lease or any renewal hereof."

The lease further provided that the lessee would be responsible for any and all repairs and supply and pay for any and all parts and accessories needed to maintain the equipment. The lessor, however, retained the right to have free access to the lessee's property during business hours for the purpose of inspecting or watching its use and operation or of altering, repairing, improving, or adding to it or determining the nature or extent of lessee's use.

The machine that caused the injury was defectively designed in that the weighted metal T-bar or lever was to be placed on supporting pegs when not being used, but the pegs lacked safety flanges to prevent the bar from slipping off the pegs. Complaints were made about the problem, but the problem was never adequately addressed. The bar slipped off and crushed the hand of the plaintiff, Mavis Blanchfill.

As previously indicated, the trial court apportioned the damages among the parties. After reading the award for plaintiffs, his own regional court entered judgment that the lessor and the health club were jointly liable. The court then considered the lessor's indemnity claim and took evidence as to the intent and enforceability of the "hold harmless" provision. Ultimately, the court denied indemnity because the lease language did not explicitly obligate the health club to indemnify the lessor. The lessor appealed, arguing that the lease agreement "unambiguously" obligates the lessee-health club to indemnify the lessor for "any and all claims and demands." The lessor also argued that even if the agreement was not explicit in that regard, the breadth of the contract use language compels indemnity.



The court concluded that when a larger agreement includes broad indemnification language that does not specifically allocate the particular risk factors, then the following factors should be considered:

1. The parties' relative status, including their financial strength, their sophistication and appreciation of potential risks, and the dynamics of their bargaining, particularly whether the indemnification language was specifically negotiated.
2. The extent to which the putative indemnitor's activities exposed the putative indemnitee to new or different liability, both generally and with respect to the particular risk--and, conversely, the extent to which the particular liability arose from circumstances, including the indemnitee's conduct, that were beyond the indemnitor's control.
3. The putative indemnitor's reasonably anticipated benefit ("privilege" or "profit") under the agreement versus its concomitant potential exposure to liability for the indemnitee's conduct.

The appeals court applied the factors and concluded that because the lessor and the lessee were equally sophisticated companies and the parties did not discuss appointment of risk (much less specifically negotiate risk), the lessor was not entitled to indemnification. In sum, the court concluded, none of these factors favored indemnity in this case. Rather, an objectively reasonable equipment lessee would not have assumed liability for injuries from defectively designed equipment and a reasonable manufacturer/supplier/lessor would not have expected to be indemnified for its own fault in that regard. Thus, the trial



court did not err in concluding that the broad hold harmless language in the agreement did not obligate the lessee to indemnify the lessor for its own fault.

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