



Limitation of Liability

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RLI Design Professionals
DPLE 213
June 3, 2020

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Course Description



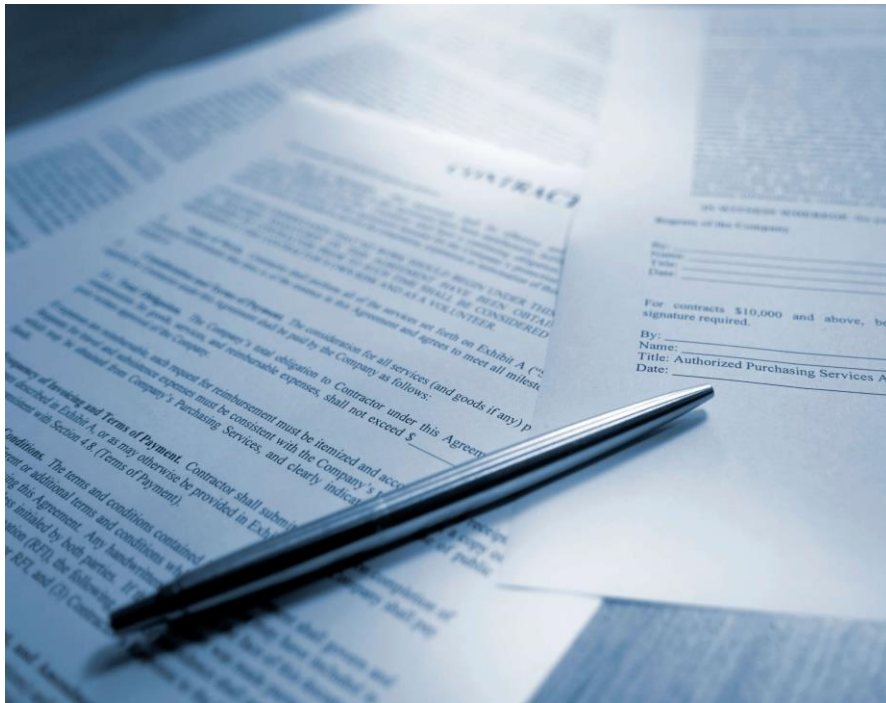
This session will be a discussion on limitation of liability provisions in professional services agreements – what they are, how to negotiate for them, and considerations when crafting a strong limitation of liability clause for a given jurisdiction and circumstances.

Learning Objectives

Participants will learn:

- 1** Understand various alternatives for limiting liability in professional service agreements;
- 2** Identify appropriate situations in which to discuss limitation of liability (LOL) provisions in professional service agreements;
- 3** Explore the interrelationship of an LOL clause with other risk reduction clauses that should be part of standard design agreements; and
- 4** Develop negotiation strategies for conversations with clients concerning limitations of liability.

Limitation of Liability Clause



Limitation of Liability

It is a contractual clause between a design professional and their client that limits the damages recoverable by the client from the design professional.

Case Law

Limitation of Liability (LOL) & Public Policy Exception

Design firm's liability capped at \$50,000 where Contractor alleged over \$1 million in damages due to a limitation of liability clause in the contract.

*LOL clause upheld because it did not violate public policy.



Limitation of Liability Clause

Contract Term:

To the fullest extent permitted by law, [Design Professional] and Client waive against each other, and the other's employees, officers, directors, agents, insurers, partners, and consultants any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project and agree that [Design Professional]'s total liability to Client under this Agreement shall be limited to \$50,000.

Third Party Claims



Third Party Claims

It is not applicable in a third party injury case – a pedestrian hit by glass that falls out of the building or a job site injured worker. The claims of these non-signatories to the design contract are not affected by the Limitation of Liability clause.

Basic Requirements

Things to address...

- ✓ Protect individual professionals and employees in addition to the firm.
- ✓ Some form of monetary limitation.
- ✓ Broad description of claims limited.

Personal Liability

Florida Statute § 471.023

*Similar statutes for Architects and Landscape Architects can be found at Florida Statute §§ 481.219 & 481.319.

(3) Except as provided in s. 558.0035, the fact that a licensed **engineer** practices through a business organization does not relieve the licensee from **personal liability for negligence**, misconduct, or wrongful acts committed by him or her...Any officer, agent, or employee of a business organization other than a partnership shall be **personally liable** and accountable only **for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control, while rendering professional services on behalf of the business organization...**

*See also Florida Statute § 558.0035, allowing design professionals to limit their individual liability in certain instances.

Case Law

Personal Liability

Design professional held personally liable for damages in excess of \$4 million where the court affirmed a finding that the LOL clause did not apply to the design professional in his individual capacity.



Limitation of Liability Clause

Contract Term:

In recognition of the relative risks and benefits of the project to both [Client] and [Design Firm], the risks have been allocated such that [the Client] agrees, to the fullest extent permitted by law, to limit the liability of [Design Firm] and its sub consultants to the total dollar amount of the approved portions of the scope for the project ... so that the total aggregate liability of the [Design Firm] and its sub consultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [Design Firm's] total fee for services rendered on this project, whichever is greater. Such claims and causes include, but are not limited to negligence, professional errors or omissions, strict liability, breach of contract or warranty.

Monetary Limitation

1

Set Fee

“not to exceed \$__ amount.”

shall not exceed the total amount of \$____ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

2

Contract Price

“not to exceed contract price.”

shall not exceed the total compensation received by Engineer under this Agreement.

3

Insurance Coverage

“to the extent such provisions or indemnity is covered by the design professional’s professional liability insurance.”

shall not exceed the total insurance proceeds paid on behalf of or to Engineer by Engineer’s insurers in settlement or satisfaction of Owner’s Claims under the terms and conditions of Engineer’s insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal).

Covered Claims

Things to consider:

- ✓ Broad description of covered claims
- ✓ Any exclusions?
- ✓ Any caps?

“ “ Limitation of Liability

To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provision of this Agreement, **the total liability, in the aggregate, of Engineer** and Engineer’s officers, directors, members, partners, agents, employees, and Consultants, to Owner and anyone claiming by, through, or under Owner for any and all injuries, claims, losses, expenses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project, Engineer’s or its Consultants services or this Agreement from any cause or causes whatsoever, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied of Engineer or Engineer’s officers, directors, members, partners, agents, employees, or Consultants **shall not exceed the total amount of \$ _____ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.**

” ”

Sample Clause

American Institute of Architects (AIA)

AIA B503-2017

Except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's consultants, nor their agents or employees shall be jointly, severally or individually liable to the Owner in excess of the compensation to be paid pursuant to this Agreement or Dollars (\$ ____), whichever is greater.

Sample Clause

American Institute of Architects (AIA)

AIA B503-2017

Except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's consultants, nor their agents or employees shall be jointly, severally or individually liable to the Owner in an amount **in excess of the Architect's compensation.**

Sample Clause

American Institute of Architects (AIA)

AIA B503-2017

Except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's consultants, nor their agents or employees shall be jointly, severally or individually liable to the Owner in excess of the proceeds of the available professional liability insurance coverage required under this Agreement.

Sample Clause

Other Sample Language

There are a variety of risks which potentially affect the Architect by virtue of entering into an Agreement to perform professional services on Owner's behalf. In order for the Owner to obtain the benefit of a fee which does not need to account for unlimited risks, Owner agrees to limit the Architect's liability to the Owner. To the fullest extent permitted by law, the total liability of the Architect with regard to the Project under any and all theories of liability shall be limited to the Architect's fee under this Agreement.

Sample Clause

Other Sample Language

Limitations on liability provided in the Agreement are business understandings between the parties and shall apply to all theories of liability, including breach of contract or warranty, tort including negligence, strict or statutory liability, or any other cause of actions. The limits of liability may be negotiated with appropriate compensation to the Architect.

Legality and Enforceability

It Depends

Generally, well written clauses have been upheld. However, it is a state by state issue and analysis of the law applicable to the design contract is essential.



Enforceability of LOL Clauses

Things to consider...

- 1** Licensing laws
- 2** Anti-indemnity statutes
- 3** Public policy

VA Licensing Law

Pre-2010 Virginia Statute

... No such organization shall limit the liability of any licensee or certificate holder for damages arising from his acts or limit such corporation, partnership, sole proprietorship, limited liability company, or other entity from liability for acts of its employees or agents.

VA Licensing Law

2010 Virginia Statute

... No such corporation, partnership, sole proprietorship, limited liability company, or other entity, or any affiliate thereof, shall on its behalf or on behalf of any such licensee or certificate holder, nor any licensee or certificate holder, be prohibited from ... (iv) limiting liability through contract.

AK Anti-Indemnity Statute

Alaska Anti-Indemnity Statute

A provision, clause, covenant, or agreement...affecting a construction contract that purports to indemnify the promisee against liability for damages ... or expense arising... from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to the promisee is against public policy and is void and unenforceable.

Freedom to Contract/Public Policy

“

The fundamental tenet of modern contract law is freedom of contract; parties are free to mutually agree to terms governing their private conduct so long as those terms do no conflict with public laws...

To permit the avoidance of a written contract because the terms of the contract now appear burdensome or unreasonable would defeat the very purpose of placing a contract into writing.

”

Public Policy Exception

“

[Public law] is not violated when business entities contractually limit liability but do not eliminate liability entirely.

”

Sub Consultant Agreements



Hiring Sub Consultants

If your Prime Agreement with the Client does not contain a limitation of liability clause, beware of agreeing to limit your sub consultant's liability.

Thank you for your time!

QUESTIONS?

**This concludes The American Institute of Architects
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