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# Limitation of Liability



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# Limitation of Liability Clauses

- What is a limitations of liability clause
  - Limitations of liability attempt to limit, define or eliminate damages occasioned by a parties conduct or breach of contract

## Limitation of Liability Clauses - EXAMPLES

- Waiver of Consequential Damages
- Liquidated Damages
- No Damages for Delays
- Exculpatory Provisions Expressly Limiting Liability
- Indemnification Provisions

## Limitation of Liability Clauses – rules of construction

- Exculpatory provisions which attempt to relieve a party of his or her own negligence are generally looked upon with disfavor, and Florida law requires that such clauses be strictly construed against the party claiming to be relieved of liability.”
  - Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1166 (11th Cir. 2009)



## Limitation of Liability Clauses – rules of construction

- In general, to be enforceable all Limitations of Liability need to be clear and unambiguous



## Limitation of Liability Clauses – rules of construction

- Cases where courts have found a limitation clause ambiguous and unenforceable, include where the clause was unclear as to the circumstances in which it would be effective, see generally Orkin v. Montagano 359 So.2d 512 (Fla. 4<sup>th</sup> 1978) (two competing clauses);
- or the clause did not clearly release the party for their own negligence, see generally O'Connell v. Walt Disney World Co. 413 So.2d 444 (Fla. 5th DCA 1982).

## Limitation of Liability Clauses – rules of construction

- Said another way, exculpatory provisions must clearly and unequivocally indicate the parties' intent
- No exculpation from intentional torts





## Limitation of Liability Clauses – WAIVER OF CONSEQUENTIAL DAMAGES

- *What is a consequential damage?*
- AIA A-201 General Conditions (1997) defines consequential damages as:
- Damages incurred by the Owner for rental expenses, for loss of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons, and
- Damages incurred by the Contractor for principal home office expenses including the compensation of personnel stationed there, for loss of financing, business, and reputation, and for loss of profit except for anticipated profit arising directly from the work.

## Limitation of Liability Clauses – WAIVER OF CONSEQUENTIAL DAMAGES

- **The list of consequential damages in the waiver, however, is non-exhaustive**
- “The waiver does not limit its applicability to the examples specifically listed.”
  - Bartram, LLC v. C.B. Contractors, LLC, 2011 WL 1299856 (N.D. Fla. Mar. 31, 2011)

## Limitation of Liability Clauses – WAIVER OF CONSEQUENTIAL DAMAGES

### Drafting notes:



- The contract should state that a waiver of consequential damages should survive termination
- If you have other provisions in the contract, providing for defined damages, for instance in the termination for convenience context, (“Reasonable overhead and profit on work not performed”) you should delineate which measure trumps the other

## Limitation of Liability Clauses – liquidated damages

- A liquidated damage provision operates to quantify the damages one party would owe the other upon the occurrence of a specified event.

## Limitation of Liability Clauses – liquidated damages

- It is well settled that in Florida the parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach.
  - Poinsettia Dairy Prods. v. Wessel Co., 123 Fla. 120, 166 So. 306 (1936); Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000 (1916).

## Limitation of Liability Clauses – liquidated damages

- Unenforceable if found to be a penalty
  - In Hyman v. Cohen, 73 So.2d 393 (Fla.1954), the Florida Supreme Court established the test as to when a liquidated damages provision will be upheld and not stricken as a penalty clause.
- First, the damages consequent upon a breach must not be readily ascertainable.
- Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.

## Limitation of Liability Clauses – No damage for delays

- In the event of a delay the contractor is only entitled to an extension of time, and no additional compensation.
- Prevalent in government contracts



## Limitation of Liability Clauses – No damage for delays

- A no damage for delay clause is not enforceable where the damages result from “fraud, concealment, or active interference with performance under a contract.”
  - Newberry Square Dev. Corp. v. S. Landmark, Inc., 578 So.2d 750, 752 (Fla. 1st DCA 1991).
- Moreover, such a clause will not be enforced in the face of “a ‘knowing delay’ which is sufficiently egregious” or the “willful concealment of foreseeable circumstances which impact timely performance.” *Id.*



## Limitation of Liability Clauses – No damage for delays

- These exceptions arise out of the “implied promise and obligation not to hinder or impede performance.”
- Note, the implied obligation of good faith arguably applies to all of these waivers

## Limitation of Liability Clauses – No damage for delays

- Under what circumstances is a no damage for delay provision unenforceable?
- “Mere lethargy or bureaucratic bungling” will not overcome a no damage for delay clause.
  - See Southern Gulf Util. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970)

## Limitation of Liability Clauses – No damage for delays

- Triple R v. Broward County 774 So.2d 50 (Fla. 4th DCA 2000)
- Two design flaws, one known and one unknown to the owner and its agents
- The flaw of which the owner was aware – unenforceable
- The flaw of which the owner was not aware - enforceable

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- Examples are often found in contracts from design professionals or notice companies, where they limit the amount of damages recoverable to a sum certain



## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- If the clause is deemed clear and unequivocal, “[t]o the extent that a contractual limitation defeats the purpose of a remedial statute, the limitation may be found void as a matter of law.”
  - VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc., 912 So.2d 34 (Fla. 4th DCA 2005).

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- “A remedial statute is ‘designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.’ It is also defined as ‘(a) statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before.’ Black's Law Dictionary, 5th Ed., 1979.”
  - Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981).

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- Statutes regulating for the public good – i.e. building code
  - No exculpation from a violation of Fla. Stat. §553.84
- Those which create new causes of action, i.e. consumer protection statutes such as FDUTPA or Florida's Nursing Home Resident's Act
  - See Beacon Prop. Mgmt., Inc. v. PNR, Inc., 890 So.2d 274, 279 (Fla. 4th DCA 2004); see Lacey v. Healthcare & Ret. Corp. of Am., 918 So. 2d 333, 334 (Fla. Dist. Ct. App. 2005)

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- Are statutory schemes governing design professionals remedial?
- Fla. Stat. Chapter 471 governs engineers. Fla. Stat. §471.023(3) provides:
- 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. Partnerships and all partners shall be jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity. 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. The personal liability of a shareholder or owner of a business organization, in his or her capacity as shareholder or owner, shall be no greater than that of a shareholder-employee of a corporation incorporated under chapter 607. The business organization shall be liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on its behalf in the rendering of professional services.



## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- Arguably, 471.023 is a regulation conducive to the public good → a remedial statute

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- **Limitations of liability do not protect an individual professional sued in negligence under the Third District Court of Appeals decision in *Witt v. La Gorce*, which may be extended to undermine the contracting entity's protection as well.**

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- In **Witt v. La Gorce**, 35 So.3d 1033 (Fla. 3d DCA 2010), the Third District Court of Appeal affirmed a trial court's decision that found an individual geologist liable for the full amount of the damages caused by his professional negligence, notwithstanding a limitation of liability clause in the Contract entered between the geological service company and the owner.

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- The Witt court did not decide whether a limitation of liability clause would exculpate an engineer for negligence
- The Witt Court relied upon the professional negligence exemption to the economic loss rule (*Moransais*) commenting as follows:

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- Moreover, when discussing the exemptions to the economic loss rule, the Florida Supreme Court, citing *Moransais* as an example, stated that “[a]nother situation involves cases such as those alleging neglect in providing professional services, in which this Court has determined that public policy dictates that liability not be limited to the terms of the contract.”

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- *Indem. Ins. Co.*, 891 So.2d at 537. In *Moransais*, the Florida Supreme Court tacitly acknowledged that an extra-contractual remedy against a negligent professional is necessary because contractual remedies in such a situation may be inadequate. *Moransais*, 744 So.2d at 983 (“While the parties to a contract to provide a product may be able to protect themselves through contractual remedies, we do not believe the same may be necessarily true when professional services are sought and provided.”). By allowing a professional negligence claim against an individual on common law and statutory grounds, and finding that the doctrine designed to prevent “parties to a contract from circumventing the allocation of losses set forth in the contract” does not preclude such a claim, the Florida Supreme Court implicitly acknowledged that claims of professional negligence operate outside of the contract.

## Limitation of Liability Clauses – Exculpatory provisions expressly limiting liability

- I have found no decision whereby the professional negligence exception to the economic loss doctrine serves to eliminate a limitation of liability enjoyed by a contracting entity wherein the contract contains a clear and unequivocal limitation of liability clause. However, the Witt Court's comments concerning the implicit acknowledgement of the Florida Supreme Court could be extended to move a negligence claim against a design professional outside of the contract, rendering the limitation of liability provision unenforceable.

## Limitation of Liability Clauses – INDEMNITY PROVISIONS

- Shift, rather than limit liability – Construed using the same principles as exculpatory provisions
- “Although there is a distinction in definition between an exculpatory clause and an indemnity clause in a contract, they both attempt to shift ultimate responsibility for negligent injury, and so are generally construed by the same principles of law. An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing his injury. An indemnification clause attempts to shift the responsibility for the payment of damages to someone other than the negligent party (sometimes back to the injured party, thus producing the same result as an exculpatory provision).”
  - O'Connell v. Walt Disney World Co., 413 So. 2d 444 (Fla. 5th DCA 1982)



## Limitation of Liability Clauses – INDEMNITY PROVISIONS

- Fla. Stat. §725.06 reads in part:
- Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman *or any combination thereof* wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any.

## Limitation of Liability Clauses – INDEMNITY PROVISIONS

- Griswold Ready Mix Concrete, Inc. v. Reddick, (Fla. 1<sup>st</sup> DCA 2012) relied upon A-T-O, Inc. v. Garcia 374 So. 2d 533 (Fla. 3d DCA 1979) in finding an indemnity provision between pump truck lessor and lessee invalid because it did not contain a limitation of liability
- Applies to all tiers, not just owner contractor



## Limitation of Liability Clauses – INDEMNITY PROVISIONS

- The United States Federal Court for the Southern District of Florida read 725.06 and A-T-O differently in the case of Lexington Insurance v. Morrow Equipment Company, 2010 WL 1029961 (S.D. Fla. 2010), where it held that:

## Limitation of Liability Clauses – INDEMNITY PROVISIONS

- A-T-O simply held that, in order to be valid under § 725.06, an indemnity agreement related to a construction contract must contain a monetary limitation on the extent of the indemnification.
  1. The court in A-T-O did not hold that the indemnity clause itself must contain the required monetary limitation.

## Limitation of Liability Clauses – INDEMNITY PROVISIONS

- The plain language of § 725.06 simply requires that the contract, not the indemnity provision itself, contain a monetary limitation on the extent of the indemnification and that the limitation be at least \$1 million or more per occurrence. In the instant case, the lease agreement supplied the requisite monetary limitation. The Insurance Clause required Formworks to carry public liability insurance with limits not less than \$5 million per occurrence for property damages. Therefore, under the terms of the lease agreement, Formworks was insured to cover property damage incurred by Plaintiffs to an extent greater than required by § 725.06. As a result, I find that the indemnity agreement between the parties complies with the requirements of § 725.06
  - Lexington Insurance v. Morrow Equipment Company, 2010 WL 1029961 (S.D. Fla. 2010)

# THANK YOU!

Please feel free to contact Mr. Clark with further questions.



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