

This article appears in Builder Architect Magazine



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WRITE YOUR OWN TICKET

Using Limitation of Liability Clauses to Reduce Risk

According to Dictionary.com the idiom, “write your own ticket”, means “to set one's own terms or course of action entirely according to one's own needs or wishes”. Design professionals who understand and effectively use limitations of liability can “write their own ticket” by reducing the risk they are exposed to from a particular project contract.

A limitation of liability is a clause in a contract which specifically defines the amount of risk one (or both) of the parties to the contract is agreeing to accept. For example, a simple clause might read “...*To the maximum extent permitted by law, the Owner agrees to limit the Design Professional's liability arising for the performance of services pursuant to this contract to the sum of \$_____ or the Design Professional's fee, whichever is greater...*”

A properly drafted limitation of liability clause is valid and enforceable. However, since the effect of such clauses is often to severely diminish an Owner's right to recover otherwise legitimate damages the Court's carefully scrutinize them. For that reason, I advise consulting with a knowledgeable attorney to develop a set of standard clauses that fit your practice and can be inserted into your contracts when appropriate. Look, I know the idea of a trip to an attorney's office *before* a dispute has arisen is as appealing to many of you as visiting your dentist to have a perfectly good tooth pulled. But, in this case, being proactive can not only save you money in the long run but may also provide peace of mind.

I often speak with design professionals about the potential benefits of limitations of liability. More often than not, raising the subject results in expressions of skepticism and doubt so let me try and read your mind and answer some of the questions you may have.

Yes, Owners do knowingly sign contracts containing limitation of liability clauses. Wise design professionals openly discuss the subject of allocation of risk particularly on projects in which the risk being assumed is high in relation to the fees being paid. One style of limitation of liability clause offers the Owner the option of paying an additional fee in exchange for the design professional's assumption of a higher limit of exposure.

No, negotiating a limitation of liability clause is not necessarily more of a benefit to your insurance company than to your firm. The clause can provide that your liability is limited to the amount of insurance coverage available to you at the time a claim arises. If you carry adequate insurance, a reasonable Owner should be willing to allow you to protect your firm's assets (and your personal assets) in this manner. On the other hand, it is better to identify an Owner who insists that your firm be exposed beyond its insurance coverage before you decide to take on a project.

A final word of caution, limitation of liability clauses can also be used to limit one design professional's liability to another. I've handled dozens of cases in which a design professional signed a contract with a sub-consultant which limited the sub-consultant's liability even though the design professional's liability to the Owner had not been limited. With apologies in advance to my friends in the structural engineering community here is a hypothetical (but all too common) example of what can happen in that situation:

- Architect enters into contract with Owner to design a multi-story office building.
- Architect retains structural engineer to perform structural design by signing the structural engineer's "proposal letter" (which contains attached terms and conditions including a clause limiting the engineer's liability to \$50,000).
- After construction and occupancy of building a heavy snow results in deflection of roof structure. Investigation reveals error by engineer in calculating loads.
- Owner brings claim against Architect to recover \$1,500,000 cost of repair and lost rental income. Architect's limits of insurance are \$1,000,000.
- Architect brings claim against structural engineer but is limited to recovering \$50,000 as the limitation of liability clause is determined to be valid.

You'll sleep better if you become involved in a claim and you have, 1) consulted a knowledgeable attorney and developed and implemented a set of limitation of liability clauses that fit your practice, and 2) recognized clauses limiting the liability of others you contract with.

The Sugarman Law Firm, founded in 1909, provides a full range of legal service to professionals, business owners and individuals, through its offices in Syracuse, Auburn and Buffalo. For more information on issues related to practice as a design professional or construction law, please visit our website at www.sugarmanlaw.com or contact us:

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