

Limitation of Liability Clause Unenforceable to protect Individual Professional

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A Florida appellate court has found that the limitation of liability clause in a contract between a design firm and its client cannot be applied to limit the liability of an individual professional that is an employee of the firm. "A cause of action in negligence against an individual professional exists irrespective, and essentially independent of a professional services agreement," says the court. A judgment in excess of \$4 million against an individual engineer was allowed to stand because the court held the LoL in the design firm agreement did not apply to actions directly against individual employees, and that even if the clause were applicable to individual employees it would be unenforceable as contrary to law.

In the case of *Witt v. La Gorce Country Club, Inc.*, 34 Fla.L. Weekly D1161a, the case involved a law suit by a country club against G.M. Witt and Associates ("GMWA"). The county club entered into contracts involving the design and construction of a reverse osmosis water treatment process for its golf course. A design-build contract with ITT Industries was for the design and construction of the treatment system. The club entered into separate contracts with GMWA was for hydrogeologic consulting services and overall project coordination. The system suffered many problems and ultimately failed completely.

The club filed suit against GMWA and its principal employee, Mr. Witt, alleging malpractice, breach of contract, and fraud. The trial judge determined that Witt and GMWA were liable for professional malpractice – with the limitation of liability (LoL) provision of the contract applying only to GMWA and not the employee. In finding Witt personally liable but not protected by the LoL, the trial court concluded:

This damage limitation is not applicable to Witt's liability for malpractice. I find it is not applicable both because he was not a party to the agreements and, therefore, not entitled to the benefit of any limitation, and because [*Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999)] ... suggests that, 'it is questionable whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting.'

The LoL clause in question provided as follows:

"In recognition of the relative risks and benefits of the project to both La Gorce and [GMWA], the risks have been allocated such that La Gorce agrees, to the fullest extent permitted by law, to limit the liability of [GMWA] and its subconsultants to the total dollar amount of the approved portions of the scope of the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [GMWA] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [GMWA'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."

In refusing to apply the LoL clause to the action against the individual, the court concluded that although there are no Florida cases specifically addressing whether an LoL provision extends to an individual professional, the *Moransais* decision of the Florida Supreme Court would provide useful guidance to suggest the clause would not apply because (1) the cause of action was deemed by the court to be “extra contractual” in nature and (2) it concluded that individual professional services by individuals such as attorneys cannot limit their liability. (The court essentially equates professional legal services and professional design services in this regard). By finding the plaintiff’s “cause of action in negligence against the individual professional to exist irrespective, and essentially independent of a professional services agreement,” the appellate court found the “limitation of liability provision was, as a matter of law, invalid and unenforceable as to Witt.”

Comment: This is an unfortunate, and poorly reasoned decision. As an initial matter, it should be noted that the court wrongly applied the *Moransais* logic to the facts of this case. Contrary to the court’s suggestion, lawyers and design professionals are not treated the same when it comes to enforcing limitation of liability provisions in contracts. Attorneys are often prohibited by their Codes of Ethics and state licensing laws from limiting their liability to their clients by way of a limitation of liability provision. Yet design professionals in many of those same states are permitted to limit their liability.

It is also illogical to suggest that in the absence of the contract that created a duty of the firm to the client, the individual design professional would have owed any independent duty to a client of the engineering firm for whom he was employed. The engineering firm does not exist in a vacuum. It exists only because it contains a number of individual licensed design professionals working for it and on its behalf.

A firm cannot provide professional services without individual licensed professionals. In this case the licensed professionals worked within the scope of their employment for the engineering corporation. They were not acting *ultra vires* – outside or contrary to their employment. Their employer was fully responsible for their actions.

Any professional liability policy this employer had would have not only insured the corporation, it would also insure each employee acting within the scope of its employment. The fact that insurance policy (contract) treats the corporation and its employees as all part of the same “insured” further demonstrates flaws in the court’s reasoning in which the court created an artificial wall between the corporation and the individual.

If the LoL provision is enforceable to protect the corporation, it must also be enforceable to protect the individuals working for the firm. (Note: An improvement to the LoL clause would have been to specifically state that it applies to all principals, directors, officers, employees, agents and servants of the firm. The absence of that language in this case, however, was not an issue in the court’s reasoning, and does not change the obvious intent of the clause).

By this terrible decision, the Florida court has once again demonstrated the extraordinary risk design professionals assume when working in the state of Florida . This should strike additional fear into the hearts of insurance underwriters considering providing insurance for design professionals in Florida . For those underwriters brave enough to try to help design professionals survive in such an inhospitable environment by providing them coverage, it may be necessary to raise premiums even higher than the heights to which Florida is already used to seeing. There are unfortunate consequences to bad law.

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