

DUKE LAW, P.C.

THE LIMITS OF LIMITATION OF LIABILITY CLAUSES

Design professionals, among many others, have used limitation of liability clauses (“LOL”) for years to limit the amount of damages they might be potentially liable for. Though they can vary, a typical LOL clause looks something like this:

LIMITATION OF LIABILITY

THE LIMIT OF LIABILITY OF ARCHITECT/ENGINEER TO THE CLIENT FOR ANY CAUSE OR COMBINATION OF CAUSES SHALL BE, IN THE TOTAL AMOUNT, LIMITED TO THE FEES PAID UNDER THIS CONTRACT OR \$50,000, WHICHEVER IS GREATER.

INITIALLED: _____ ARCHITECT/ENGINEER; _____ CLIENT

Texas law requires LOLs to comply with the “fair notice” requirement, which means that the clause should be conspicuous. A term is conspicuous if it is written, displayed, or presented such that a reasonable person should notice it. The test for a court is whether attention can reasonably be expected to be called to the provision. Things that make a provision conspicuous include larger type, all capital letters, bold font, and contrasting colors.

Texas courts tend to uphold limitations of liability if they meet the conspicuousness requirement and there is nothing otherwise unconscionable about the contract. When enforced, these clauses are extremely effective at limiting the amount of a party’s liability.

However, while LOLs are an effective way to mitigate risk and liability, they will not limit a party’s damages for every potential claim (even if they are worded to do so).

In 1973, Texas enacted the Deceptive Trade Practices–Consumer Protection Act (“DTPA”) in an effort to protect consumers. The Act essentially outlaws anything your mother told you not to do (such as providing misleading information about the character of goods or services, advertising goods and services with no intent to sell them, rolling back the odometer on a car or truck, etc.). It also allows for a separate DTPA cause of action for breach of express and implied warranties (this is in addition to common law breach of warranty claims).

The DTPA contains an explicit “no waiver” provision, which essentially sets out that any waiver by a consumer of their DTPA rights is unenforceable and void (unless it is writing, the parties have equal bargaining power, and the waiving party is represented by legal counsel). This no waiver provision can also apply to limitations of liability.

One of the major cases on the non-applicability of limitation of liability clauses on DTPA claims is *Arthur’s Garage, Inc. v. Racal-Chubb Security Systems, Inc.* 997 S.W.2d 803

(Tex.App.–Dallas 1999). There, a commercial customer brought an action against an alarm company with which it had contracted for the installation, service, and motoring of an alarm system following a fire. Investigators eventually discovered that the smoke detector was improperly wired. The fire resulted in over \$450,000 worth of damage; however, the contract between the parties contained a limitation of liability clause that limited liability to \$350.

The plaintiff in that case sued for breach of contract, negligence, breach of implied and express warranties, and violations of the DTPA. The DTPA violations included misrepresentation, breach of express and implied warranties, and unconscionable conduct.

The court stated that the LOL was void as to the plaintiff's DTPA claims based on misrepresentation and unconscionable conduct. The limitation of liability was applicable to the DTPA breach of express warranty claim, but it was void as to the DTPA implied warranty claim (the implied warranty at issue was the implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner). The court noted, however, that DTPA rights on some implied warranty claims could be waived, depending on the implied warranty.

What is the lesson to be learned from this? It is that even valid limitation of liability clauses are not invincible. Knowing potential theories of liability to which LOLs do not apply should provide guidance in the drafting of contract documents and at least partially guide the relationship between parties.