



Limitations of Liability Provisions in Design Contracts:
Just the Tip of the Iceberg

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Owners and architects often disagree about limitation of liability clauses. Architects generally desire to limit their liability to their fee for service. However, if there is a design defect, the project can go bad quickly. As a result, the owner could incur significant damages. For that reason, owners tend to shy away from limitation of liability clauses.

Though not the case in all states, Kentucky generally upholds limitation of liability clauses. However, standard contract rules still apply. Therefore, if the court finds that the provision is unconscionable or in violation of public policy, then the clause will not be enforced.

Beyond whether the clause will be enforced, the parties need to consider other factors as well. First, a professional can often be found personally liable for damages caused by his or her negligent performance. Often, the contract exists between a design firm and an owner. If the contract contains a limitation on liability clause, the owner may want to consider bringing suit against the professional individually. The design firm may avoid such a result by specifically including its employees and consultants in the limitation on liability provision.

The parties should also consider attorneys' fees clauses. Owners usually want attorneys' fees clauses while design professionals do not. Where such a clause exists, the parties need to consider whether the fees are included in the damages subject to the limitation amount. Alternatively, the fees could be in addition to the limited damages. If the parties do not clarify this in the contract, it opens the door for interpretation, speculation, and, most importantly, litigation.

Further, parties need to consider the types of design professional liability. Such liability could arise from a claim in contract or a claim in tort. A limitation of liability provision easily limits contractual liability. Kentucky provides an additional benefit to design professional by prohibiting punitive damages on contract claims.

Limiting tort liability is often more difficult than limiting contractual liability. Design professionals have added concern in Kentucky as related to tort claims. Design professionals could potentially be liable to third parties for supplying false information upon which the third party relied. Case law is unsettled on this issue. However, it is something of which the design professional should be aware and should consider. Additionally, both parties must consider errors and omissions policies for the design professional. The owner should require adequate coverage in the contract. The standard general liabilities policy may not cover tort claims. Therefore, it is imperative for both parties that sufficient errors and omissions coverage is in place.

In negotiating a design agreement, whether a limitations on liability provision should be included is only part of the question. The parties must also consider the scope of the limitation, attorneys' fees clauses, potential tort liability, and proper insurance coverage.