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S.C. Supreme Court Holds Limit of Liability Provision Is Neither Unconscionable nor Against Public Policy

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Practice Areas:
- Insurance Coverage
- Professional Liability

Contractual limitation of a home inspector's liability does not violate South Carolina public policy and, as a matter of law, is not unconscionable, according to a March 2013 opinion of the S.C. Supreme Court. Finding such limit of liability clauses are enforceable, the court specifically noted the lack of a requirement that home inspectors carry E&O insurance as evidence of South Carolina's public policy.

In Gladden v. Boykin, in the course of purchasing a home, Mrs. Gladden entered into a contract with Palmetto Home Inspection Services, LLC ("Palmetto") for a home inspection. The contract contained a limit of liability clause, limiting Palmetto's liability to the amount of the home inspection fee. After Mrs. Gladden contacted Palmetto about certain conditions that were not included in the home inspection report, Palmetto returned the fee. The Gladdens subsequently sued, among others, Palmetto, alleging a cause of action for breach of contract for failing to conduct the inspection in a thorough and workmanlike manner and to report defective conditions. The Gladdens and Palmetto filed cross motions for summary judgment, each directed at the enforceability of the limit of liability provision. The trial court denied the Gladdens' motion and granted Palmetto's motion, finding the provision enforceable. On appeal, the Gladdens argued the limit of liability provision was not enforceable because (1) it contravened South Carolina public policy; and (2) it was unconscionable. The court disagreed.

Public Policy: Courts must determine public policy by reference to legislative enactments whenever possible. Holding the limit of liability provision did not violate public policy, the court found the legislature had spoken on the issue of home inspections and liability for undisclosed defects in the sale of residential property. The court specifically noted that, unlike in New Jersey, in South Carolina, the general assembly did not require home inspectors to carry E&O insurance, distinguishing Gladden from Lucier v. Williams, 841 A.2d 907 (N.J. Super. Ct. App. Div. 2004), on which the Gladdens and the dissent heavily relied. [1] The court found this distinction particularly significant since the enforcement of a liability limit in the home inspection contract would conflict with the clear intent of the New Jersey legislature that purchasers have recourse to insurance coverage in the case of a home inspector's negligence. The court further noted that although the general assembly declined to require such coverage, residential homeowners were not left without a remedy, citing the Residential Property Condition Disclosure Act, which imposes liability on a seller that knowingly withholds information regarding known defects.

Unconscionability: Unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Finding the terms of the limit of liability

clause were not oppressive, the court noted that such clauses are commercially reasonable in some cases because they permit the provider to offer the service at a lower price, in turn making the service available to people who would otherwise be unable to afford it. The court also found that the evidence failed to support an inference that Mrs. Gladden lacked meaningful choice, noting her sophistication and the fact that she sought out the services of Palmetto, declining to employ a different home inspector she had interviewed. Accordingly, the court found the limit of liability provision enforceable, thereby affirming the trial court's order granting summary judgment to Palmetto.

[1] The Lucier court pointed to the requirement under New Jersey statutory law that home inspectors maintain E&O insurance and called this fact "[i]mportant to [its] analysis[.]"

Story Sidebar: Gladden v. Boykin was featured as the front page story this week in South Carolina Lawyers Weekly.

Buyer Beware! by David Donavon focuses on the "sharply divided ruling that the clause in the contract limiting the inspector's liability was enforceable." Collins & Lacy attorneys Joey McCue and Logan Wells represented Palmetto in this case. As Donavon writes, "The decision likely will have major ramifications for the home inspection industry." Here is the story from http://sclawyersweekly.com.

"Buyer beware" by David Donovan
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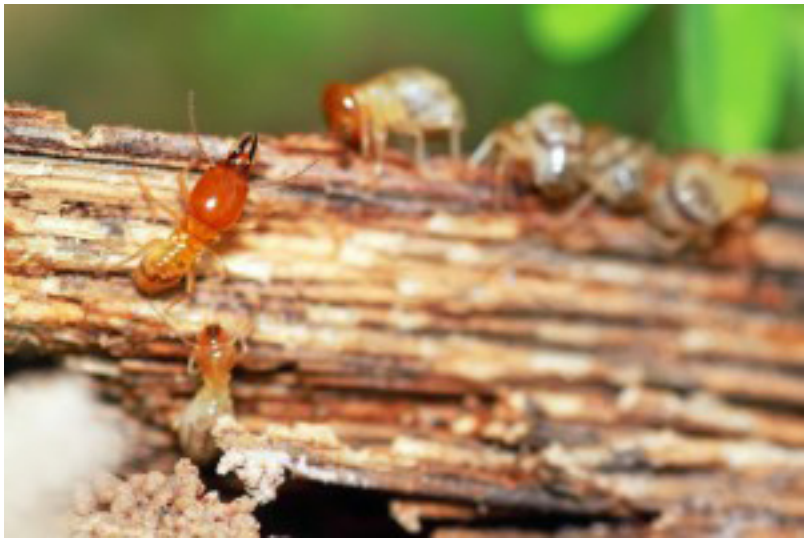

Vera Gladden claims the home she bought in Kershaw County had a litany of defects that a home inspection report failed to uncover. She sued the inspection company for almost $80,000. Instead, she'll get the maximum amount allowed under her contract with the company — the return of her $475 fee.

A sharply divided South Carolina Supreme Court ruled 3-2 that the clause in the contract limiting the inspector's liability was enforceable. The decision likely will have major ramifications for the home inspection industry.

Gladden and her husband challenged the clause in her contract with Palmetto Home Inspection Services on two grounds—that it violated public policy, and that it was so unconscionable that courts should refuse to enforce it. The majority brushed aside both arguments as unfounded, although those theories got a spirited defense in the court's dissent.

Addressing the question of public policy for the majority, Justice Costa M. Pleicones said the state's legislature had already given its answer by requiring home inspectors to be licensed but not requiring them to carry liability insurance. The majority said that the state had provided its remedy to homebuyers by imposing liability on the sellers if they intentionally withhold information about defects, and that the court would defer to the legislature's judgment.

"It is one thing to impose greater demands on the builder of a new home, who is in a position to know of the home's defects, and another to impose a similar standard on an inspector who makes only a brief survey of the home with the buyer's full knowledge of the limited service the inspector is offering," Pleicones wrote. "The General Assembly has imposed liability on the party with greatest access to information about the home's defects, where it most logically resides."

In order for the clause to be unconscionable, Pleicones said its terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them, and the disadvantaged party must lack meaningful choice in the matter. Pleicones said clauses limiting liability were routine, and because they make services available at a lower cost, the court could not say that no reasonable person would agree to it.

The majority also said that courts should enforce contracts, even if their terms appear grossly unreasonable, unless there was an extreme inequality in the bargaining power between the two parties. In this case, Palmetto was run by a self-employed home inspector, Scot Roberts, and Gladden had once briefly trained as a real estate agent, although she was not in practice. As such, the court found no inequality in bargaining power.

No equal power
Joey McCue of Collins & Lacy in Columbia, who represented Palmetto along with Logan McCombs Wells of the firm's Greenville office, said it was possible the court might have ruled differently given a less sophisticated plaintiff, although he didn't think it very likely. McCue said the threshold for finding a contract unconscionable in South Carolina was high.

"The court [upheld] the longstanding rule of law in South Carolina that contracting parties owe a duty to each other and to the public at large to learn the contents of the documents they're signing," McCue said. "In the absence of an inability to read or some gross misconduct on the part of the drafter, you are held to the terms that you make."

Justice Donald W. Beatty wrote a lengthy dissent, joined by Justice Kaye G. Hearn, which reached a different conclusion from the majority at nearly every turn. Beatty found that the parties did not have equal bargaining power because Gladden was presented with a take-it-or-leave-it contract after Roberts had performed his inspection and Gladden had no meaningful opportunity to negotiate its terms. The dissent argued that Gladden had no meaningful choice because such clauses are prevalent throughout the industry, and that Gladden's limited experience in the real estate business was not relevant to the case.

"In such cases, particularly when the contract is not shown until after the inspection has taken place, no effort is made to point out the exclusion, there is a great disparity in the bargaining power of the professional service provider and the consumer, and there is a virtual exclusion of all liability for professional negligence, I believe there is an absence of meaningful choice and the terms are oppressive and one-sided, rendering the limitation clause unconscionable," Beatty wrote.

Beatty also noted that the limitation of liability clause did not stand out from the rest of the contract in any way, although Pleicones countered in his opinion that the proper test is simply whether an important clause is particularly inconspicuous, as if the drafter intended to obscure it.

The New Jersey way

The contract also contained a mandatory arbitration provision, and Beatty found that these terms, taken together, effectively left homebuyers with no avenue for recovery at all because the cost to arbitrate exceeded the maximum amount that could be recovered under the contract. The dissent argued that a contract freeing home inspectors from any liability violated public policy and cited a New Jersey court decision that ruled the same way. In response, the majority countered that unlike South Carolina, New Jersey requires home inspectors to carry insurance, and said that difference was "highly significant."

B. Michael Brackett of Moses & Brackett in Columbia represented the Gladdens. He could not be reached for comment.

The 18-page opinion is Gladden v. Palmetto Home Inspections (Lawyers Weekly No. 010-035-13). The full text of the opinion is available online at sclawyersweekly.com.

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About Logan Wells

Logan Wells is an associate practicing in the areas of insurance coverage and professional liability. She also writes about insurance coverage issues and trends in the South Carolina Insurance Law Blog. She received her undergraduate degree in history and political science from Furman University and earned her juris doctor from the University of South Carolina School of Law. During her undergraduate career, she worked for a law firm in Spartanburg as a legal assistant. While in law school, she worked as a summer associate for Collins & Lacy, before joining the firm as an attorney in the fall of 2009.

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