Jackson Collinsworth Johnson

Important Protection for Licensed Individuals

Print this article

By Mark E. Jackson, Jackson, Collinsworth & Johnson Insurance Agency

There are two important contract clauses that design professionals should include with every client contract. The first clause provides protection to individuals and the second limits the firm's liability.

Individual Protection

The first clause we recommend gives individual protection for your licensed professionals. In 2013, the State of Florida signed a law relating to design professionals known as the Fairness in Liability legislation. Beginning July 1, 2013, design firms are now able to negotiate contracts that protect their professional employees from being sued individually by their clients.

The new law grants design professional employees immunity from liability for economic damages resulting from negligence occurring during the course and scope of a professional services contact. The law does require that the design firm maintain professional liability insurance as required under the contract.

The new law also extends to individuals the protection of contractual limitation of liability clauses. This comes four years after the courts ruled that individual professional employees were not protected by limitation of liability clauses in a contract. (Florida appellate court case Witt v. La Gorce Country Club, Inc., 34 Fla.L., Weekly D1161a)

Design professionals should take advantage of the benefits of this new law. Your contracts should be amended to include language that an individual employee cannot be held liable for negligence. The law has five conditions for this protection to apply:

1. The contract is made between the design firm and the client.
2. Individual employees are not to be named as a party to the contract. All professional services contracts need to be made between the client and the business entity.
3. The design firm must maintain Professional Liability insurance, as required by contract.
4. The contract contains a prominent statement, in uppercase font that is at least five point sizes larger than the rest of the text, that an individual employee or agent may not be individually liable for negligence.
5. Any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

Sample language to add to your contract is listed below:

It is intended by the parties to this Agreement that the Consultant's services in connection with the project shall not subject the Consultant's individual employees, officers or directors to any personal legal exposure for the risks associated with this project. The Owner agrees that as the Owner's sole and exclusive remedy, any claim,

demand or suit shall be directed and/or asserted only against the Consultant, a Florida corporation, and not against any of the Consultant's employees, officers or directors.

PURSUANT TO SECTION 558.0035 FLORIDA STATUTES, THE CONSULTANT'S CORPORATION IS THE RESPONSIBLE PARTY FOR THE PROFESSIONAL SERVICES IT AGREES TO PROVIDE UNDER THIS AGREEMENT. NO INDIVIDUAL PROFESSIONAL EMPLOYEE, AGENT, DIRECTOR, OFFICER OR PRINCIPAL MAY BE INDIVIDUALLY LIABLE FOR NEGLIGENCE ARISING OUT OF THIS CONTRACT.

Your clients should not have an issue with agreeing to this language. This language does not reduce or eliminate any liability against the design firm. In fact, the law requires that the design firm maintain any contractual requirements to carry Professional Liability insurance in order to uphold the individual protection for the licensed design professional.

Unfortunately, this protection does not apply to claims made by third parties. But since the majority of claims are made by your clients, this is important language to add to your contacts.

The second contract clause that we recommend is Limitation of Liability (LoL).

Limitation of Liability (LoL)

Limitation of Liability (LoL) clauses can be drafted two different ways and will be based on either a set dollar amount or a limit of insurance. The first type of clause specifies a set dollar value or is equal to the amount of your fee. This set-limit clause is desirable for small fee projects. The design firm should not have to expose itself to a large claim for projects that generate very little profit.

The second type of Limitation of Liability clause seeks to limit your exposure to an amount of insurance. This type of clause can be written to include policy limits however; we recommend that the limitation be tied to insurance proceeds available at the time of settlement of a claim.

Limitation of Liability clauses protect the assets of the firm in the event of a large claim or multiple claims. Some key points to consider when drafting LoL language:

- Do not attempt to relieve the firm of all liability. Instead, we want to put a cap on the liability for a pre-determined amount. Language that attempts to eliminate all liability may make it unenforceable.
- Keep the LoL clause and any indemnity clause totally separate and apart.
- Make the LoL clause apply to actions against any principal, officer, agent and employee of the corporation, as well as the corporation itself.
- The LoL clause should apply to all causes of action by the client including breach of contract, breach of warranty, and negligence.
- The clause should not attempt to limit third party claims, but instead should address only claims by the client against the design firm. 63% of claims against design firms are generated by the client.

Not all of your clients will accept a LoL clause but you should ask for it in every contract. Even if only a small portion of your clients agree to it, Limitation of Liability clauses reduce your financial exposure. Also, most insurance companies will give you a discount on the cost of your Professional Liability insurance based on the percentage of your contracts that contain a LoL clause.

If you hire subconsultants, you need to pay attention to LoL clauses in your agreements. Although we stress the importance of getting LoL clauses, you should not grant a LoL to your subconsultants unless you get a LoL from your client.

There is a case where a client filed a claim against an architect due to structural issues on the project. The architect did not have a LoL clause with the client, but their agreement with the subconsultant (structural engineer) capped their liability at $75,000. The claim settled in excess of $2M, but the structural engineer's

contribution was limited to $75,000.

An example of a LoL clause is listed below:

In recognition of the relative risks, rewards and benefits of the project to both the Client and the Architect, the risks have been allocated so that the Client agrees, to the fullest extent permitted by law and notwithstanding any other provisions of this Agreement, to limit the total liability of the Architect to the Client and all subcontractors on the project, for any and all injuries, losses, expenses, damages of any nature whatsoever or claim expenses arising out of this agreement, from any cause or causes, so that the total aggregate liability of the Architect shall not exceed the total compensation received by Architect under this Agreement or $100,000, whichever is less. Such claims and causes include, but are not limited to, strict liability, negligence, professional errors or omissions, breach of contract or breach of warranty. This clause applies to all principals, directors, officers, employees, agents and servants of the Architect.

These are two important provisions that you should consider adding to your standard agreements. This newsletter was published as a risk management service and should not be considered as legal advice. We recommend that questions regarding actual contract language be directed toward legal counsel licensed in Florida.