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The North Carolina Court of Appeals Upholds the Use of Limitations of Liability Clauses by Engineers and Surveyors

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On April 1, 2008, the North Carolina Court of Appeals upheld the validity of limitations of liability clauses commonly used by design professionals. The Court of Appeals overturned the decision of the Harnett Superior Court Judge that prohibited the use of limitations of liability clauses by land surveyors. The Judge's decision was the subject of a previous article in the Summer 2007 edition of The Professional Engineer.

To review, limitation of liability clauses are typically used by engineers to limit their contractual liability on a project to an agreed upon amount with the client. Typically, the limitation on liability is capped at either the (1) amount paid by the client to the engineer under the contract, (2) amount of insurance coverage obtained by the engineer, or (3) a stipulated amount.

In the case before the Court of Appeals, the defendant land surveyor contracted with the plaintiff grading contractor to provide surveying services. The contract contained a "Risk Allocation" provision which limited the surveyor's liability to the grading contractor to $50,000. Because the surveyor incorrectly set the benchmarks for the complex 1.66 to 1.7 feet higher than specified in the design plan, the grading contractor was required to import fill to raise the elevation of the site. The contractor sued the surveyor for damages caused by the surveyor's allegedly negligent work. The jury found the surveyor negligent, and returned a verdict of $574,714 against the surveyor. The Superior Court Judge did not let the jury consider application of the Risk Allocation provision during the first phase of the trial. The Judge subsequently held that the Risk Allocation provision was against public policy and was not enforceable.

The Court of Appeals considered the following two issues: (1) whether a professional engineer/surveyor may limit its liability when contracting with another party; and (2) whether the Risk Allocation provision violated the North Carolina anti-indemnity statute (N.C. Gen. Stat. § 22B-1).

The Court of Appeals held that the contract's limitation of liability did not run afoul of public policy in North Carolina. The Court found no reason to limit the contractor's and surveyor's freedom to include such a provision in their contract. Although the practices of professional engineering and surveying are regulated by North Carolina, there was no public policy exception to their use of limitation of liability clauses. The Court found that breach of contract actions involving only economic loss does not constitute provision of a public service. The Court noted that its ruling did not affect any claims third parties might bring against the engineer or surveyor. The contract's limitation of liability was not enforceable against a person who is not a party to that contract.

The Court also held that North Carolina's anti-indemnity statute did not apply to this situation. In its most simplified terms, the anti-indemnification statute prohibits enforcement of contract provisions that require one party to indemnify another party for damages caused by the latter party's negligence. The Risk Allocation provision in the surveyor's contract did not require the contractor to indemnify the surveyor for damages caused by the surveyor's negligence. The Risk Allocation provision only limited the surveyor's liability to the contractor.

While the Court of Appeal's decision was decisive, the Court did leave open some interesting questions. It was interesting to note the Court's focus on economic loss in a breach of contract action as not constituting provision of a public service. This is an important distinction because if the engineer or surveyor is providing a public service, the Court may be more likely to prohibit use of a limitation of liability clause. Has the Court left open the possibility that negligence actions for personal injury and/or property damage between contracting parties may not be subject to any contractual limitation of liability provisions?

The Court of Appeals did not define what constitutes provision of a public service. What if the engineer or surveyor is providing professional services on a public job, such as for the UNC system or NCDOT? Would a breach of contract action for economic loss be considered provision of a public service in this context?

Even though the Court of Appeals upheld the use of limitations of liability clauses, it first made sure there were no "formation irregularities" in the contract. Thus, it is important to keep the following considerations in mind when including such clauses in a contract. Limitation of liability clauses should be bargained for freely by the contracting parties and the parties should have equal bargaining power. The clause should not be contained in small-font boilerplate language or hidden on the back page of a proposal. The language of the clause should be clear and unambiguous. The better practice is for the engineer to raise the issue of limitation of liability with the client along with their agreement on a scope of work and contract price.

Bio

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