Risk Management Advisory

ARCHITECTS AND ENGINEERS
PROFESSIONAL LIABILITY INSURANCE

Limitation of liability clauses*

Design consulting firms should have an executed, written contract in place with their clients before providing services. Beyond the scope, time and payment clauses, most written contracts between design consultants and their clients have terms and conditions that allocate and transfer risks and obligations between parties. Not all design firms have the capacity to provide all of the design services that the client requires for a particular project, so design firms routinely engage other design consultants to perform part of the services using inter-professional agreements.

Design consultants have to be cognizant of the terms and conditions in both the prime agreement and inter-professional agreements, and make sure that the appropriate terms and conditions in the prime agreement are passed through to the inter-professional agreements. Limitation of liability clauses are often part of the terms and conditions in both prime and inter-professional agreements. Design consultants should know how these particular clauses relate to the coverage terms of the professional liability policy.

Limitations of liability in the prime agreement

Design consultants may attempt to limit their potential liability to a client by using a limitation of liability clause. These limitation of liability clauses can limit the liability of the design consultant to an obligation to complete services over again that fall below the applicable standard of care either to the amount of the professional services fee, a set dollar amount or the amount of available insurance coverage. Similarly, the design consultant may attempt to limit the potential liability due to negligent performance to direct and indirect damages. Design consultants seek these terms and conditions in recognition of the limited fees that they can charge, and the potentially unlimited exposure that they face.

Design firms should seek the advice of local counsel before a limitation of liability clause is used in an agreement. In some jurisdictions, there may be prohibitions which apply to the use of limitation of liability clauses for certain professionals. When determining whether a particular limitation of liability clause is enforceable, courts will also look at the language used as well as the conduct of the parties during the negotiation stage for evidence that the limitation of liability clause was part of the agreed-upon exchange. The advice of local counsel is essential to obtaining an enforceable limitation of liability clause. A limitation of liability clause in the prime agreement is a risk management tool, especially when the potential liability exposure greatly exceeds the scope of services and fees charged.

*This English version includes comments relative to the Quebec Civil Code.

Limitations of liability in inter-professional agreements

Inter-professional agreements define the scope of services, set the time for performance of services, and outline the conditions for the exchange of payment for services and deliverables between the prime design consultant and subconsultants. They are essential to successfully manage the risks presented when design teams work together on a project. The allocation of risk and transfer of rights and obligations in inter-professional agreements has to be carefully scrutinized as they relate to the scope of coverage of the professional liability policy. The professional liability policy is written to provide coverage for the negligence of a design consultant.

For a design consultant to be held negligent, a plaintiff must prove that the design consultant had a duty, and that the design consultant breached that duty, which in turn was the proximate cause of the plaintiff's harm. In Quebec, certain provisions of the Civil Code may apply to trigger presumptions of liability, thereby altering this burden of proof. The most common sources of duty can be found in common law (or civil law in Quebec)—the professional standard of care—and in contract law. According to common law (or civil law in Quebec), a professional is required to act as competently as could reasonably be expected of other professionals practising under substantially similar circumstances. The law does not require perfection, merely reasonable skill and care.

A prime consultant who agrees to limit the liability of a subconsultant has contractually assumed an obligation to be responsible for any damages caused by that subconsultant beyond the stated limit, significantly increasing their potential liability.

Victor's professional liability policy provides coverage for the vicarious liability of the insured for the subconsultants' failure to perform their services in a non-negligent manner. However, it excludes coverage for any liability assumed by contract that would not have been present in the absence of that contract. A limitation of liability clause is a contractually assumed obligation by the prime consultant to take on additional responsibility that may exceed the vicarious liability exposure the insured would have faced in the absence of a limitation of liability clause. If there is a limitation of liability clause in the contract between the prime design consultant and a subconsultant, it is wise to make sure that there is a similar limitation of liability in the agreement between the client and prime design consultant.

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