

Have you looked at the limitation of liability language in your contract lately?

Here's how to make sure it will stand up in court.

You've heard it before: Negotiating a limitation of liability (LOL) clause in your client contracts is one of the most effective strategies for managing risk and preventing loss. But what you may not realize is that not just any old LOL clause will do. Recently, XL's Design Professional group has seen LOLs that, while not exactly harmful, aren't effective either.

Courts look very carefully at limitations of liability. Generally, if the LOL clause is agreed upon by parties of relatively equal bargaining strength and is clearly drafted, it will be enforceable. An exception would be the existence of a state law to the contrary or a determination that enforcement of the limitation would be unconscionable.

You and your attorney should make certain that your LOL provision is suitable for your projects and jurisdiction (not every jurisdiction accepts LOLs). Keep in mind the following points:

- The clause should make clear that you and your client reached agreement on it and that the dollar amount was negotiated.
- Highlight the clause in your contract in some way, e.g., bold type, italics or a place for your initials and those of your client. This is most important when the client is small, unsophisticated or of unequal bargaining strength.
- Set a reasonable dollar limit, e.g., "\$50,000 or the consultant's fee, whichever is less." Don't try to limit the liability to an amount that a court would find unreasonable.
- The clause should clearly state that it applies to every legal theory or cause of action, including negligence, breach of contract and warranty. It should also state that it is enforceable "to the fullest extent permitted by law."
- Keep the LOL clause separate from any indemnification clause in the contract.

There are many variations of LOL clauses. On page 2 is one example that has been effective in California. Remember, each state is different, so consult with your attorney about language for your jurisdiction.

XL Group
Insurance



Design Professional

How effective
is your LOL?



Limitation of Liability

In recognition of the relative risks and benefits of the Project to both the Client and the Consultant, the risks have been allocated such that the Client agrees, to the fullest extent permitted by law, to limit the liability of the Consultant and the Consultant's officers, directors, partners, employees and sub-consultants (hereinafter jointly referred to as "Consultant") to the Client for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, including attorneys' fees and costs and expert witness fees and costs, so that the total aggregate liability of the Consultant for the entire Project which is the subject of this Agreement, regardless of how limited in scope the services under this Agreement may be, shall not exceed \$_____, or the Consultant's total aggregate fee received for services for the Project, whichever is less.

The Client further agrees, to the fullest extent permitted by law, to defend, indemnify and hold harmless the Consultant against all claims, demands, causes of action, damages, liabilities or costs including attorneys' fees, defense and expert costs, pursued by third parties not party to this Agreement, including but not limited to general contractors, subcontractors, suppliers and construction managers, arising out of or in any way connected with this Project, so that Consultant's total aggregate liability for the entire Project which is the subject of this Agreement, as discussed above and regardless of how limited in scope the services under this Agreement may be, shall not exceed \$_____, or the Consultant's total aggregate fee received for services for the Project, whichever is less.

It is intended that this limitation of liability clause and indemnification clause apply to any and all liability or cause of action however alleged or arising.



XL's Design Professional group feels so strongly about limitation of liability that we offer substantial premium credits to our insureds that implement LOL clauses in their contracts. For more information about the program, other loss prevention resources and to find an agent in your area, visit xldp.com or phone 800 227 8533 x2102508.

Contact

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The information contained herein is intended for informational purposes only and does not constitute legal advice. For legal advice, seek the services of a competent attorney. Any descriptions of insurance provisions are general overviews only.
Coverages are underwritten by the following XL Group plc insurance companies: Greenwich Insurance Company, Indian Harbor Insurance Company, XL Specialty Insurance Company, and XL Insurance Company Limited—Canadian Branch. Coverages not available in all jurisdictions.
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