

Design Professional Industry Trends

Is your Limitation of Liability clause enforceable?

The Georgia Court's decision in Lanier at McEver, L.P. (Lanier) v. Planners and Engineers Collaborative Inc. (PEC) ruled that the Limitation of Liability (LoL) was actually a far-reaching indemnity and as such violated the state's anti-indemnity statute.

Though the design professional firm in this case should be applauded for its efforts to insulate itself from liability, unfortunately, the LoL language used—which became a critical factor in the court's decision—was expanded well beyond any recommended language found in current and previous editions of *The XL Insurance Contract Guide*.

Many states have anti-indemnity statutes that essentially prohibit one party to a contract from being indemnified by the second party to the contract from liability for accidents caused by the first party's sole negligence.

The LoL used and ruled upon by the Georgia Court stated:

"In recognition of the relative risks and benefits of the project both to Lanier and PEC, the risks have been allocated such that Lanier agrees, to the fullest extent permitted by law, to limit the liability of PEC and its subconsultants to Lanier and all construction contractors and subcontractors on the project or any third parties for any and all claims, losses, costs, damages and 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 PEC and its subconsultants to all those named shall not exceed PEC's total fee for services rendered on this project. It is intended that this limitation applied to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law." (Emphasis added.)

THE GEORGIA COURT'S DECISION FOCUSED ON TWO AREAS OF A PARTICULAR LOL CLAUSE.

While the court recognized that other jurisdictions had enforced LoL for design professionals, it distinguished this case based on two statements:

- it limited liability regarding "any third parties for any and all claims" and
- it stated that the limitation "would apply to any and all liability or cause of action however alleged or arising."

The court found that this language made this LoL overly broad and therefore ruled that it violated the anti-indemnity statute.

STEPS YOU CAN TAKE:

- 1. Use caution not to make the LoL overly broad.** The LoL is intended to limit your liability to your client. Crafting language to have the LoL reach outside your

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client relationship to that of third parties is beyond the role of the LoL. The *XL Insurance Contract Guide* offers a sound starting point for the development of an effective and enforceable LoL.

2. Be careful in establishing reasonable amounts for the limitations set forth in the LoL. If your fee is small, say \$1,500, a court could easily deem it unreasonable, so consider using a fixed amount such as \$50,000. Clients need to understand that the LoL is negotiable; and, if they seek a higher fixed amount, you may want to increase your fee to compensate for the additional risk. If your client fights the LoL, your fall-back position can be “the amount of available insurance” from your professional liability policy.

3. Treat your LoL provision as any other and don't “hide” it in your agreement. For example, if all other provisions are identified by a title, then be sure to do so with the LoL. In some cases, you may want to highlight the LoL by using a bolder font so the provision is even more readily apparent. Add space for the client to initial the LoL. If the provision includes the initials of the contracting parties, it can signal mutual agreement and understanding of the LoL. In our experience, in cases where the LoL has been specifically initialed, judges have been more inclined to enforce the provision.

4. Ask your attorney and insurance agent or broker to review your contracts. Your attorney can help you understand the legal implications and your agent or broker can explain insurance-related issues.

Visit our Loss Prevention Library at xldp.com for more risk management information on this and other topics or visit xldp.com/tools for complimentary risk management resources.

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