Construction Law in North Carolina

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Can a designer limit his liability to his fees for service?

by Melissa Brumback on February 10, 2011

Architects and engineers (and the owners/contractors with whom they contract) often wonder whether limiting liability language is enforceable. The answer, as in much of construction law, is very much dependent on what state's court will be interpreting the contract. Some states allow such limiting language, and others do not. Josh Glazov's *Construction Law Today* blog recently tackled the enforceability of such provisions in the context of a recent Illinois case, in which the Illinois court found such limitations perfectly acceptable, so long as they (1) are not "unconscionable" and (2) do not violate public policy.

North Carolina takes a very similar approach to such limitations of liability. Here, so long as the limitation of liability is not also an agreement to be liable for the other party's negligence (which is barred as against public policy), such a limitation of liability is enforceable. A case discussing this issue from the engineering perspective is *Blaylock Grading Co., LLP v. Smith et al*, 189 N.C. App. 508, 658 S.E.2d 680 (2008). In that case, a surveying engineer limited his liability, via contract, to $50,000. The Court, citing an earlier state Supreme Court decision, ruled that the limitation was valid and enforceable:

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People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts **that actually may be unreasonable** or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability. *Id.* at 511, 658 S.E.2d at 682.

Is this rule absolute? Clearly not, as the above quote indicates. Unconscionable limitations will not be enforced. Moreover, a third party, not subject to the contractual terms, is free to sue in negligence. But as between the contracting parties, such a limitation on damages can be a powerful tool to minimize exposure to risk.

Questions about limitations on liability? Comment below or drop me a line. And be sure to sign up for email delivery of blog posts directly to your inbox.

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