



Limitation of Liability Provisions in Arizona: Enforceable and Distinguishable from Indemnity Provisions and the Assumption of Risk Defense Estimates

Limitation of liability provisions are an important tool for design professionals in that they allow a party to contractually limit its potential exposure to an agreed upon amount. While limitation of liability provisions place a ceiling on potential damages, indemnity provisions essentially have an exculpatory effect of relieving one party of the cost of liability that it would otherwise have to bear. The enforceability of both limitation of liability and indemnity provisions is treated differently on a state-by-state basis. As discussed below, while some states have enacted statutes to bar such provisions, others deem them enforceable because they are in the best interests of the bargaining parties.

Similarly, the “assumption of risk” defense, which is typically raised when a plaintiff expressly or impliedly has consented to a defendant’s negligent conduct, is interpreted differently depending on the jurisdiction. Although it is possible for a limitation of liability clause to operate as an assumption of risk defense, as examined below, the two concepts are separate and distinct in Arizona.

The Supreme Court of Arizona recently held a limitation of liability provision in a surveyor’s contract with a developer to be valid and enforceable. 1800 Ocotillo, LLC v. The WLB Group, Inc., 196 P.3d 222 (Ariz. 2008). This important decision distinguishes limitation of liability provisions from both indemnification and assumption of risk clauses, and preserves the ability of design professionals to negotiate their potential contractual liability.

The WLB Group, Inc. (“WLB” or “defendant”), a surveying and engineering firm, contracted with developer, 1800 Ocotillo, LLC (“Ocotillo” or “plaintiff”), for professional services in connection with the construction of townhouses near a canal (the “Project”). Specifically, WLB was responsible for preparing a survey that identified boundary lines and rights-of-way. The contract contained a “Standard Condition” limitation of liability provision (“Provision”) that stated:

Client agrees that the liability of WLB, its agents and employees, in connection with services hereunder to the Client and to all persons having contractual relationships with them, resulting from any negligent acts, errors and/or omissions of WLB, its agents and/or employees is limited to the total fees actually paid by the Client to WLB for services rendered by WLB hereunder.

Following WLB’s completion of the survey for the Project, the canal operator asserted a right-of-way that had not been accurately identified in WLB’s survey. As a result, the City of Phoenix denied Ocotillo certain building permits. Ocotillo sued WLB on the basis that WLB had negligently prepared the survey and thereby caused Ocotillo to incur additional costs from construction delays, as well as additional engineering services and designs. WLB raised the defense that its liability was limited by the Provision in the parties’ contract.

The trial court rejected Ocotillo’s argument that the Provision is unenforceable as contrary to public policy and granted partial summary judgment limiting WLB’s potential liability to the fees (\$14,242.00)

that WLB had received from Ocotillo. Because Ocotillo felt that the trial court made an incorrect legal finding regarding the enforceability of the Provision, Ocotillo appealed the judgment of the trial court.

Upon reviewing the case, the Court of Appeals agreed that the Provision does not violate public policy, and upheld the decision of the trial court in favor of WLB. As a separate issue, Ocotillo first raised on appeal the question of whether the Provision is subject to the requirement in Article 18, Section 5 of the Arizona Constitution that the defense of assumption of risk is required to be submitted to the jury. The Court of Appeals remanded the case to the trial court to determine whether to enforce the Provision.

However, subsequent to the Court of Appeals decision, WLB petitioned for review of the assumption of risk issue while Ocotillo cross-petitioned for review of whether the Provision violated public policy. The Supreme Court of Arizona granted both petitions, recognizing that “they concern important issues of statewide interest.” 1800 Ocotillo, LLC, 196 P.2d at 224.

In addressing the parties’ positions, the Supreme Court of Arizona (“Court”) first stated the principle that, in Arizona, contract provisions are unenforceable where they violate legislation or public policy. Id. However, the Court further explained that while it will weigh the interest in enforcing the provision against the opposing public policy interest, courts are generally hesitant to invalidate contractual provisions on public policy grounds. Id. The Court reasoned that private parties are typically in the best position to determine whether certain contractual terms benefit their interests. Id.

In response to Ocotillo’s argument that an anti-indemnity statute (A.R.S. § 32-1159 (2008)) governing architect-engineer professional service contracts should render the Provision unenforceable, the Court held that the statute applies only to agreements to “indemnify,” “hold harmless,” or “defend” the promisee for its sole negligence. Id. at 224-225. Notably, the Court contrasted agreements to indemnify or hold harmless from provisions that limit a party’s liability. Id. at 225. The Court expounded on this distinction in stating that indemnification provisions essentially absolve a party from responsibility, while limitation of liability provisions only place a ceiling on a party’s potential liability. Id.

The Court also recognized that anti-indemnity statutes are intended primarily to prevent parties from eliminating their incentive to act with due care. Id. The Court distinguished such provisions from the Provision in the case at bar, reasoning that WLB retained a substantial interest in exercising due care because it was induced to take the Project based on the fees it would receive from Ocotillo. Id. Ultimately, the Court determined that because the Provision did not limit WLB’s liability, but rather, capped it at an amount that incentivized WLB to exercise due care, the statute cited by Ocotillo did not apply. Id.

Finally, the Court addressed the question of whether the Provision constitutes an “assumption of risk” pursuant to Article 18, Section 5 of the Arizona Constitution. Id. at 226-227. Section 5 specifically provides: “[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.” Id. at 226. The Court ultimately concluded that limitation of liability provisions typically are not a form of “assumption of risk” within Section 5 of the Arizona Constitution. Id. at 227. Again, the Court distinguished between provisions that offer full relief for a party from a duty to exercise due care, from provisions that place a ceiling on recoverable damages. Id. at 227-228. The Court emphasized that the Provision “does not purport to relieve WLB of all liability nor does it have that effect. It does not abrogate WLB’s duty toward Ocotillo, but instead limits the recoverable damages if the duty is breached.” Id. at 228.

In conclusion, limitation of liability provisions are enforceable in Arizona, except where contrary to an otherwise identifiable public policy that outweighs any interest in the enforcement of such provisions.

Limitation of liability provisions also serve a different function than indemnity and assumption of risk clauses, and are an effective and important means of limiting potential liability for design professionals.

Risk Management Prevention Tip

Although based on Arizona law, this case reminds you that specific contract language can help protect your firm by limiting your potential liability. That's why it's crucial you carefully review each contract you enter into and seek the advice of experienced legal counsel—well versed in the local rules and laws of your state—for any recommendations necessary to help minimize your exposure. Just remember: the applicability and enforceability of these provisions do vary by state, making it essential you work with an attorney familiar with your particular jurisdiction.

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