Liability Unlimited:

Engineers' Ever-Eroding Ability to Contractually Manage Risk

By: D. Frank Wright, Esq.[i]

The already diminished ability of individual professional engineers and engineering firms to contractually manage risk is in further jeopardy in the State of Florida.

In 1999, the first blow came when the Florida Supreme Court ruled that individual engineers can be sued for professional negligence even when professional services are provided pursuant to a contract between a client and the firm employing the professional engineer.[ii] Previously, many courts had ruled that the Economic Loss Rule ("ELR") precluded a negligence lawsuit for purely economic damages, given the existence of a contract allocating risks among the parties. Under the ELR, recovery was limited to a breach of contract action. Where an individual engineer was providing services as an employee of a firm, the ELR essentially precluded direct action against such an engineer. In reaching its holding, the Florida Supreme Court stated that the ELR did not apply to individual professionals, thereby eliminating the protection they had previously enjoyed.

Importantly, the Florida Supreme Court did not rule as to whether the ELR precluded a negligence claim against the engineering firm when a contract was in place. That changed, however, in 2004, when the second blow was dealt. That year, the Florida Supreme Court ruled that the ELR was inapplicable to claims related to professional services, thereby permitting negligence actions against engineering firms even when a contract was in place.[iii] Now, both professional engineers and engineering firms can be sued for negligence, even if their services are provided pursuant to a contract.

In response, contract terms tightened, and many professional firms added provisions limiting the liability of the individual engineers and of the engineering firms for all claims, including professional negligence. An engineer sued individually could assert a defense that the contract (with his or her employer) governing the work in question explicitly limited liability of any kind to a specific dollar amount. This was a strong defensive argument until 2010.

In 2010, the Third District Court of Appeal of Florida[iv] ruled that individual professionals[v] could not contractually limit their liability for professional negligence.[vi] Though it was not a decision of the Florida Supreme Court, the 2010 decision was another step at expanding the exposure to professional engineering claims.[vii] It must be anticipated that the next step in this trend is the assertion of an argument that a professional engineering firm cannot limit its liability, either. Such a result would largely eliminate the effectiveness of an engineering contract as a risk management tool, rendering it to be little more than a complex identification of a scope of work. If left unchecked, this trend could have disastrous consequences. For example, if a waiver of consequential damages is considered to be a limitation of liability, it could be deemed unenforceable. In that way, the inability to limit liability could actually expand liability.

In the short term, limitations of liability should still be included within contracts and asserted as defenses.[viii] A limitation of liability: (a) should be written in clear language and not buried in the contract; (b) should reflect that the parties are agreeing to the provision as a method of allocating risk between them; (c) should expressly include protection for professional employees; (d) should expressly contemplate actions for breach of contract, tort actions (including, but not limited to, negligence, professional negligence, and misrepresentation), building code violations, and statutory / regulatory causes of action; and (e) should contain a method for clients to purchase higher limits of liability (by paying a higher fee). Additionally, the contract in which the limitation is located should contain a statement that the invalidation of any portion of any provision of the contract (in whole or as applied to a particular factual scenario) should not impact the application of any other provision (or impact the subject provision as to a different factual scenario).

In the long term, however, the best way of responding to this risk is unclear, though the following should be considered:

- **Legislation.** While legislative change is expensive and time-consuming, it is the most straightforward way to establish reasonable parameters of liability (and the ability to limit same) for both professional engineers and the firms that employ them.
- **Test Case.** Locate a case that is procedurally and factually "clean" such that the sole issue for the court to decide is enforceability of a particular limitation of liability provision (or waiver of consequential damages provision)

in the context of the case. Multiple cases could be pursued with variations on limitation language (i.e., express waivers of statutory rights and of rights under the foregoing cases). The aim would be to have the Florida Supreme Court ultimately issue a ruling. This, too, is expensive and time-consuming, and it has the added difficulty of an unclear outcome with the Florida Supreme Court -- a test case could produce another negative precedent.

- **Third Party Beneficiary.** Include within contracts a statement that the engineering firms' professional employees are intended third party beneficiaries of the terms of the contract, including, but not limited to, provisions limiting liability, provisions waiving consequential damages, and provisions identifying which state's law governs the contract.
- **Educate Clients.** During contract negotiation, notify clients (typically owners) in writing of the limited insurance resources available to the engineering firm and recommend that clients obtain separate coverage. Also consider including such notification within the contract when reciting the parties' intent to allocate risk.
- **Indemnity.** Florida statutory law allows engineers, architects, owners, general contractors, and subcontractors to contract amongst one another to be indemnified for their own negligence. Thus, in theory, an owner-engineer contract could contain a provision that the owner agrees to indemnify the engineer for the engineer's own negligence. However, this indemnity applies only to personal injury and property damage claims, and would not, typically, apply to claims for economic losses due to late or defective work on the part of the engineer. Thus, indemnification provides only a partial protection, and engineers may find it extremely difficult to get clients to agree to such language.
- **Choice of Law.** Consider having your contract provide that the relationship of the parties to the contract shall be governed by the laws of a state that treats limitations of liability favorably. Florida courts generally apply the law of the state chosen by the parties via contract. However, this should be a careful undertaking such that the chosen law is appropriately

favorable. For example, you do not want to choose a jurisdiction that enforces limitations of liability but also allows punitive damages for contract claims.

In conclusion, the ability of those in the engineering business (and, for that matter, design professionals in general) to reasonably manage liability and risk has eroded nearly to the point of extinction. Until legislative change or court reversal occurs, creative risk management solutions are a must.

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[ii] *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

[iii] *Indemnity Insurance Company of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004).

[iv] Florida's Third District Court of Appeal encompasses the southernmost portion of Florida.

[v] The case in question dealt with the liability of a professional geologist, but the statutory and case law foundation of the decision is applicable to professional engineers.

[vi] *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033 (Fla. 3d DCA 2010).

[vii] At one point, the litigants from the *Witt* case sought a ruling from the Florida Supreme Court to provide a final answer on the matter. That appeal, however, was cut short when the parties settled.

[viii] In short, don't give up. While the *Witt* decision may be considered binding authority in the jurisdiction of the Third District Court of Appeal, other jurisdictions may not be so bound. Additionally, defects in the *Witt* decision can be argued, and it may also be factually distinguished.

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