Passing the Buck: Legal Limitations on Transferring Construction Risks

Restrictions on Risk Allocation for Design Inadequacies and Changes in the Law

Margaret D. Lineberry
Shook, Hardy & Bacon L.L.P.
Kansas City, Missouri

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INTRODUCTION

Methods of restricting liability or allocating risk are important to any design professional. Although many methods have been attempted, courts and legislatures have limited their application in certain instances. This paper examines the restrictions that have been imposed by case law and statutes on six methods of attempted risk allocation and liability restriction for design inadequacies. These methods include (1) assigning owner risk through “design/build” contracting and performance specifications, (2) delegating design responsibility through requirements for contract document review and “coordination drawings,” (3) disclaiming liability for architectural review of submittals, (4) clauses placing dollar limits on designer liability, (5) disclaiming liability for items missed in inspection, and (6) assigning risk of changes in applicable laws and/or building codes.

I. ASSIGNING OWNER RISK THROUGH “DESIGN/BUILD” CONTRACTING AND PERFORMANCE SPECIFICATIONS

As soon as a design professional decides to join a design/build effort, that design professional takes on additional risk. Described as the ultimate vehicle for shifting design risk away from the owner, the design/build delivery system causes additional risk to be “pushed” from the owner to the design/build contractor.¹

A. Design Professional’s Heightened Exposure to Liability in Design/Build Projects.

Most design/build entities are either contractor-led, joint venture, or design professional-led.² When the design/build entity is contractor-led, the owner contracts with a contractor who, in turn, contracts with the design professional.³ In this form of design/build, the design professional is working for a contractor, not for the owner, and this non-traditional relationship may present two problems for the design professional.⁴ First, uneducated or
unsophisticated owners still may expect and demand the design professional to behave as if it had a contract relationship with the owner,\(^5\) not understanding that, in the design/build context, the owner must give up control over design of the facility at a fairly early stage.\(^6\) Second, because the design/build method eliminates some of the checks and balances of the more traditional design-bid-build method of project delivery (such as the designer’s traditional responsibilities for reviewing the contractor’s payment requests, approving changes, and observing the work), the design professional is unable to exercise its independent professional judgment on behalf of the owner. Instead, the design professional’s interests are aligned with those of the contractor.\(^7\)

A second form a design/build entity may take is that of a joint venture between a design professional and a contractor. These organizations are commonly formed for a single project and then dissolved upon completion.\(^8\) In this situation, the owner contracts with the joint venture entity, resulting in joint and several liability on the part of both the contractor and the design professional for success or failure of the project.\(^9\)

Finally, a design/build entity may consist of a design professional-led organization. In this instance, the owner contracts with the design professional to provide not only the design services but also the construction services for the project. The design professional may either subcontract with a contractor to perform the construction services, or the design professional may provide the construction services itself as a general contractor. Much like the traditional building delivery system, the design professional maintains an agency relationship with the owner and is responsible for the professional services rendered for the project. The difference is that the design professional now is also liable for the construction services, either directly or vicariously.\(^10\)
Regardless whether a contractor, design professional, or joint venture team leads the design/build entity, increased liabilities are experienced by the design/build entity when compared with the traditional project delivery method. Under the traditional method, the design professional usually provides no warranty that the project will perform as stipulated, and the design professional typically may be subjected only to breach of contract and negligence claims. A design professional is expected only to conduct himself consistent with the knowledge and skill of an ordinary person in that profession, and the design professional owes the client a duty of care commensurate with the degree of care, skill, and proficiency competently exercised by ordinarily careful and prudent professionals. In fact, earlier court decisions differentiated the product of design professionals from those of mass producers by characterizing the designer’s effort as “an inexact science which must provide for random factors that are incapable of precise measurement.”

Under the traditional project delivery system, the contractor typically warrants its work, but only to the extent of the plans and specifications supplied by the owner. In order to prove fault on the part of the contractor to establish a claim for breach of contract or warranty, the owner must show that the work is defective or deviates from the plans and specifications supplied by the owner. With the design/build entity, however, the contractor is in a contractual relationship with the design professional, and the owner no longer warrants the sufficiency of the plans and specifications provided to the contractor. Instead, the design/builder warrants the accuracy of the design and specifications and bears the risk of any design defects. From the design professional’s perspective, the design professional participating in a design/build organization assumes...
responsibility for all design and construction matters, including job safety, construction means, methods, sequences, and procedures, and construction defects.\textsuperscript{17}

\section*{B. Design/Builder’s Heightened Exposure to Liability under Performance Specifications.}

Another way in which the potential liability of design professionals involved in design/build projects may be increased involves the type of specifications issued by the owner.\textsuperscript{18} Under the design/build delivery method, the owner typically issues “performance specifications” in conjunction with its request for proposals. The design/build entity, once again, may experience heightened liability as a result of these performance specifications.

Specifications used for the construction of buildings typically fall into two categories: design specifications and performance specifications.\textsuperscript{19} Design specifications, used in the traditional design-bid-build method of project delivery, describe in precise detail the materials to be supplied by the design/builder and the specific manner in which the construction work is to be performed. These specifications leave no discretion to the contractor, who is required to follow them as one would a road map.\textsuperscript{20} Performance specifications, on the other hand, simply set forth an objective or standard to be achieved, and the successful design/build bidder is expected to exercise its ingenuity in achieving the required objective or standard of performance, by first selecting the means and then assuming a corresponding responsibility for that selection.\textsuperscript{21} The design/build contractor is given the freedom of choosing its materials and construction methods but, correspondingly, the design/builder must ensure that the end product performs in conformance with the owner’s expectations.\textsuperscript{22}

A construction contract may contain design specifications, performance specifications, or a mixture of both. If the contract contains only design specifications,
responsibility for any deficiencies in those specifications rests with the party who provided them. That party impliedly warrants that the specifications are adequate to produce the required or desired result.\textsuperscript{23} This is the familiar \textit{Spearin} doctrine, arising out of the U.S. Supreme Court’s holding that a contractor is bound to build according to plans and specifications provided to it by the owner, and if the contractor does so it will not be responsible for the consequence of defects in the plans and specifications.\textsuperscript{24} Alternatively, if the construction contract includes performance specifications that simply indicate the desired end result, then the responsibility for potential deficiencies in the finished product lies with the design/builder who has assembled the mechanism intended to provide the desired result.\textsuperscript{25} In other words, whether an implied warranty attaches to the specifications depends upon the type of specifications at issue.\textsuperscript{26}

In determining the character of the specifications, whether design or performance, courts look to the contract between the parties as well as the drawings and specifications themselves. Whether a contract provision is determined to be a performance specification or a design specification depends on the language of the contract as a whole. The kind of language in a contract that may assist a trier of fact in distinguishing the type of specification that is included in a project includes the nature and degree of design/builder involvement in the specification process and the degree to which the design/builder is allowed to carry out the specification process and performance under the contract.\textsuperscript{27} A performance specification is typically found when the design responsibility is placed upon the design/builder, not the owner, by the contract language.\textsuperscript{28} In fact, contract provisions alone may be sufficient to support a court’s determination that a contract is performance oriented.\textsuperscript{29}
Whether specifications are determined to be design or performance also depends upon the drawings and specifications supplied by the owner. When the information set forth in the materials provided by the owner does not explicitly instruct the design/builder in how to construct a particular system included in the project, courts tend to characterize the specification as a performance specification. In addition, when drawings lack many essential details, a reasonable conclusion is that the design/builder is to achieve the end result based upon performance criteria as opposed to a design specification directive.

C. Case Law Interpretation of Obligations Imposed by Performance Specifications.

A case illustrating the difference between performance specifications and design specifications, and resultant liability associated therewith, is *Aleutian Constructors v. United States.* In *Aleutian,* the contractor agreed to provide the roofing system for an Air Force hangar located off the Aleutian Islands in Alaska. The Government provided information and requirements for the contractor to meet, including the requirement that the roof be able to withstand winds of up to 138 miles per hour. Sections of the contract described the materials and methods to be used in the construction of the hangar, and included a few drawings of the work that the contractor was expected to perform. The contractor warranted the roof for five years. When the roof was damaged in a wind storm, a lawsuit resulted. The contractor claimed that the specifications were design specifications, while the Government asserted that the crucial elements still required the contractor’s ingenuity and expertise to achieve the Government’s desired performance.

The United States Claims Court held that even though a contract may contain some design specifications, when a crucial element of the contract requires the contractor to use its own expertise and ingenuity, “a *Spearin* warranty does not arise with respect to that element of the
contract.” Holding that the contract involved performance specifications rather than design specifications, the court noted that the Government had left the achievement of certain expectations and requirements totally to the contractor’s ingenuity, expertise, and judgment. The contractor was required to select a roofing manufacturer who would exercise skill and judgment in designing and providing instructions for roofing the structure in such a way that the roof would withstand winds of up to 138 miles per hour. The court concluded that, in the absence of specific instruction provided by the Government, i.e., design specifications, the contractor could not prevail by asserting that the specifications were defective. The court concluded that the contractor was not entitled to relief under the Spearin doctrine of implied warranty of adequacy.
II DELEGATING DESIGN RESPONSIBILITY THROUGH REQUIREMENTS FOR
CONTRACT DOCUMENT REVIEW AND "COORDINATION DRAWINGS"

A0 Introduction.
Design professionals may attempt to delegate design responsibility to contractors in at least two ways. One way is through the design professional’s common practice of requiring the contractor to study and analyze the design drawings and specifications and report any errors or inconsistencies discovered therein. In another kind of design delegation, the design professional may provide to the contractor schematic drawings that illustrate the general locations of ductwork, conduit, and other items, and issue instructions requiring the contractor and its specialty subcontractors to submit detailed shop drawings or “coordination drawings” depicting the precise location of each of these elements.

Both of these methods of design delegation, and responsibility therefor, have been addressed in standard contract forms such as the AIA General Conditions, in the federal procurement regulations, and in decisions of courts and Boards of Contract Appeals.

B0 Design Delegation in AIA Contract Documents and in Federal Procurement Regulations.

The first method of design delegation referenced above has historically been provided for in the AIA General Conditions of the Contract for Construction (AIA Document A201) by the requirement that the contractor engage in a “careful” review of the contract documents prepared by the architect, and report to the architect any errors, omissions, or inconsistencies discovered in them. The 1987 edition of the AIA General Conditions imposed the following obligations upon the contractor:

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 The Contractor shall carefully study and compare the Contract Documents with each other and with information
furnished by the Owner pursuant to Subparagraph 2.2.2 and shall at once report to the Architect errors, inconsistencies or omissions discovered. The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions in the Contract Documents unless the Contractor recognized such error, inconsistency or omission and knowingly failed to report it to the Architect. If the Contractor performs any construction activity knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Architect, the Contractor shall assume the appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

3.2.2 The Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor with the Contract Documents before commencing activities. Errors, inconsistencies or omissions discovered shall be reported to the Architect at once.

3.2.3 The Contractor shall perform the Work in accordance with the Contract Documents and submittals approved pursuant to Paragraph 3.12.

The 1997 edition of the AIA General Conditions substantially expanded the contractor’s responsibility (and potential liability) for review of the contract documents:

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering
errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that the Contractor’s review is made in the Contractor’s capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.

3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor’s notices or requests for information pursuant to Subparagraphs 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the
Contract Documents unless the Contractor recognized such
error, inconsistency, omission or difference and knowingly
failed to report it to the Architect.

According to other provisions of the AIA General Conditions, a contractor is not
required to provide professional services which constitute the practice of architecture or engineering
unless those services are specifically required by the contract documents, or unless the contractor
needs to provide such services in order to carry out the contractor’s responsibilities for construction
means, methods, techniques, sequences, and procedures.\textsuperscript{39} If professional design services are
expressly required of the contractor by the contract documents, the owner and the design
professional are to specify all performance and design criteria that such services must satisfy. In
turn, the contractor is required to ensure that such services are provided by a properly-licensed
design professional, whose signature and seal “shall appear on all drawings, calculations,
specifications, certifications, Shop Drawings and other submittals prepared by such professional.”\textsuperscript{40}
The owner and the design professional are entitled to rely upon the adequacy, accuracy, and
completeness of the services performed by the contractor’s design professional. The contractor,
however, shall not be responsible for the adequacy of the performance or the design criteria required
by the contract documents.\textsuperscript{41}

These AIA contract provisions assist design professionals by clarifying the
procedures by which they may delegate professional design responsibilities to a contractor. These
provisions, however, make certain that the design professional retains responsibility for the quality
of its contract documents, thus allowing the contractor to avoid potential liability for inadequate
drawings or missed details. The contractor must meet only the criteria expressly established by the
design professional or the owner, and is not responsible if those criteria are later determined inappropriate.

The federal procurement regulations illustrate the second method of design delegation referenced above by imposing upon contractors, especially mechanical subcontractors, the responsibility to provide coordination drawings. For example, the “Work coordination” regulation of the Department of Veterans Affairs requires as follows:

852.236-81 Work coordination (alternate provision).

For new construction work with complex mechanical-electrical work, the following clause relating to work coordination may be substituted for paragraph (b) of the clause set forth in 852.236-80:

Work Coordination (Apr 1984)

The contractor shall be responsible to the Government for acts and omissions of his/her own employees, and subcontractors and their employees. The contractor shall also be responsible for coordination of the work of the trades, subcontractors, and material suppliers. The contractor shall, in advance of the work, prepare coordination drawings showing the location of openings through slabs, the pipe sleeves and hanger inserts, as well as the location and elevation of utility lines, including, but not limited to, conveyor systems, pneumatic tubes, ducts, and conduits and pipes 2 inches and larger in diameter. These drawings, including plans, elevations, and sections as appropriate shall clearly show the manner in which the utilities fit into the available space and relate to each other and to existing building elements. . . . Drawings may be composite (with distinctive colors for the various trades) or may be separate but fully coordinated drawings (such as sepia or photographic paper reproducibles) of the same scale. Separate drawings shall depict identical building areas or sections and shall be capable of being overlaid in any combination. The submitted drawings for a given area of the project shall show the work of all trades which will be involved in that particular area. . . . The objectives of such drawings are to promote carefully planned work sequence and proper trade coordination, in order to assure the expeditious solutions of problems and the installation of lines and equipment as contemplated by the contract documents while avoiding or minimizing additional costs to the contractor and to the
Government. In the event the contractor, in coordinating the various installations and in planning the method of installation, finds a conflict in location or elevation of any of the utilities with themselves, with structural items or with other construction items, he/she shall bring this conflict to the attention of the contracting officer immediately. In doing so, the contractor shall explain the proposed method of solving the problem or shall request instructions as to how to proceed if adjustments beyond those of usual trades coordination are necessary. Utilities installation work will not proceed in any area prior to the submission and completion of the Government review of the coordinated drawings for that area, nor in any area in which conflicts are disclosed by the coordination drawings until the conflicts have been corrected to the satisfaction of the contracting officer. . . .

C0  Legality of Design Delegation.

An initial consideration in this area, of course, is whether the attempted design delegation is unlawful. This issue is illustrated by the opinion in *General Building Contractors of New York State, Inc. v. New York State Education Department.* The General Building Contractors of New York (the Contractors) challenged an amendment to Rule 29.3(b) of the Rules of the Board of Regents of the New York Department of Education (which govern the licensure of design professionals). As amended, Rule 29.3(b) would exclude from the definition of “unprofessional conduct” the delegation of design work from one licensed design professional to another licensed design professional through an intermediary (typically a contractor or subcontractor).

In resisting this amendment, the Contractors argued that it would allow design professionals to “utilize contractors and subcontractors, often against their wishes, as integral participants in the performance of professional design work that they are neither licensed nor qualified to perform.” The Contractors also argued that they would be required to engage in certain activities “such as supervising the [delegatee design professional’s] activity to ensure
compliance with the contract which, in petitioner’s opinion, constitutes the practice of design work.”

In rejecting the Contractors’ request for invalidation of the amended rule, the court responded that the amended rule was more consistent with what had become customary in the practice of the building industry, and noted that the amendment brought the rule into conformance with the 1997 edition of the AIA General Conditions of the Contract for Construction, which contemplate the delegation of design responsibility under terms comparable to those provided by the amended rule.

D0 Case Law Interpretation of Design Delegation and Responsibility.

While the design professional may delegate some design activities to the contractor, such as imposing upon the contractor the responsibility for reviewing contract documents or for preparing supplemental drawings such as coordination drawings, there are limitations on the responsibility for design that the design professional may transfer to the contractor. Generally, the design professional may not make the contractor responsible for correcting defects in the design drawings prepared by the design professional. It is typically the design professional’s obligation to provide appropriate design drawings. Similarly, the design professional likely will not be able to successfully impose upon the contractor responsibility for refining or upgrading the original design. If required to do so under the guise of preparing “coordination drawings,” the contractor may recover for its extra work. Finally, a contractor’s obligation to “check” the original design drawings will not result in the contractor being required to re-engineer those drawings.

Appeal of J.G. Watts Construction Co. illustrates the principle that a designer may not escape responsibility for its own poor design by imposing upon the contractor the obligation to
prepare coordination drawings. In *Watts*, the contractor sought additional compensation for removing, reorienting, and reinstalling certain mechanical and electrical equipment (which necessitated a 90-degree rotation of the switchgear, lateral movement of the converter and pumps, and piping revisions) to satisfy the owner’s requirement for access to the rear of the switchgear cabinet.

The owner argued the contractor should bear these costs because of the contractor’s obligation to have coordinated the mechanical and electrical requirements in advance, pursuant to the following contract provision:

44-03(b) Shop Drawings and Catalog Cuts. – Before fabricating any work, the contractor shall prepare and submit shop drawings for approval in accordance with the requirements of Part III, Special Conditions, showing all dimensions and all details of construction as well as installation in relation to adjoining and related construction where specifically required or such construction would require revision because of the Contractor’s activities, or where close fitting is involved, and shall show all other work required for complete installation. *** ‘Approval’ of drawings shall mean the approval of the general method of construction and detailing. The Contractor shall be responsible for scheduling, quantities of material required, physical size of equipment to suit available space, electrical characteristics, and other features of the work.

The Armed Services Board of Contract Appeals rejected this interpretation of the provision, instead finding that its purpose was to impose continuing responsibility on the contractor, notwithstanding shop drawing approval, for the contractor’s own errors in its shop drawings. In other words, the contractor was required to maintain in its shop drawings the existing clearances shown in the original design. But to the extent there were errors or deficiencies in the clearances included in the original contract drawings, this provision certainly was not a device to impose upon the contractor any responsibility therefor. Because the owner’s design had provided insufficient space for the
installation of the mechanical and electrical components in juxtaposition, the contractor was allowed to recover additional compensation for its re-work.\textsuperscript{48}

Similarly, \textit{Appeal of Avery Mays Construction Co.}\textsuperscript{49} involved a dimensional error in the original design. Three drawings provided by the Government depicted the floor plan for the mechanical equipment room, with conflicting information as to the dimension of the south wall.

The Government argued that the contractor should bear the cost of relocating the wall because the General Conditions of the contract required the contractor to coordinate relevant contract drawings before the commencement of work. Had the contractor done so, the Government argued, the contractor would have discovered the dimensional conflict in the design documents and could have sought clarification before the improper placement of the wall. The General Conditions provisions read as follows:

20.\textsuperscript{\textbullet} \textbf{SHOP DRAWINGS, COORDINATION DRAWINGS AND SCHEDULES}

20.1 The Contractor shall submit shop drawings, coordination drawings and schedules for approval . . . as required by the specifications or requested by the contracting officer . . .

* * *

20.5 The Contractor shall check the drawings and schedules, shall coordinate them (by means of coordination drawings wherever required) with the work of all trades involved before submission and shall indicate thereon his approval. Drawings and schedules submitted without evidence of the Contractor’s approval may be returned for resubmission.

Rejecting the Government’s argument, the General Services Board of Contract Appeals noted that coordination drawings may be prepared by a contractor, after contract award, to detect or resolve conflicts between the work of different trades. Coordination drawings are not always essential,
however, and they are not always prepared. Here, there was no evidence that the contractor had prepared or been requested by the Government to prepare such drawings. Hence, the contractor was entitled to an equitable adjustment for the costs it incurred in relocating the wall after the error was discovered.\textsuperscript{50}

Appeals of Chaney & James Construction Co.\textsuperscript{51} involved the mechanical subcontractor’s assertion of a claim for essentially being required to re-design the mechanical portion of the project under the guise of preparing coordination drawings.

The contractor acknowledged that the contract provisions imposed an obligation to prepare coordination drawings:

Para. 43-17. COORDINATED LAYOUTS – The Contractor shall prepare and submit to the Construction Engineer large scale coordinated composite layouts showing on both plan and elevation all ducts, piping, conduits, etc., in equipment rooms and in other congested areas. All mechanical and electrical services shall be shown on each composite drawing. These drawings shall be submitted directly to the Construction Engineer for approval.

The contractor also conceded that Paragraph 43-22, INTERFERENCES, required the Contractor to coordinate the work of different trades in order that any interferences between mechanical, electrical, architectural, and structural work would be avoided.

The contractor agreed that these provisions were not unusual, based on its prior experience in government contract work and industry practices, but asserted that its mechanical subcontractor had anticipated only two areas in which it would be necessary to prepare coordination drawings: the equipment room and the well pump room, as the subcontractor considered these to be the only “congested areas” in the project.
The Armed Services Board of Contract Appeals acknowledged that the owner’s A/E legitimately might require the contractor to provide supplemental drawings, as occasionally the equipment actually purchased differs from that anticipated by A/E; therefore, piping or connections in the immediate area of such items of equipment might differ from the placements shown on the plans and specifications. Here, however, the mechanical subcontractor was required to go far beyond the typical requirements in that (1) the A/E demanded that the subcontractor’s supplemental drawings show the exact location of every pipe, valve, fitting, hanger, bolt, and nut – approximately 10,000 were involved – which resulted in a very intricate and expensive drawing exercise; and (2) in its preparation of the original contract documents, the A/E had failed to account for the Government’s unique “shock-proof” requirements for the facility, which resulted in the contractor being required to prepare 122 separate and additional drawings to illustrate these features.

“The evidence indicates that the Government in fact shifted to [the contractor] the responsibility for preparing drawings which would result in giving [the Government] the information it needed as a basis for approvals for the type of structure it desired,” because of the unique “shock-proof” nature of the building. The Government’s A/E had not provided an original design with this level of detail, and the Government needed it, to make sure it was getting a “shock-proof” building. The interpretation of the contract provisions imposed on the contractor by the Government ultimately resulted, in the Board’s view, in the upgrading of the specifications by the contractor, for which the contractor was entitled to additional compensation.52

In *North American Philips Co. v. United States*,53 the contractor also received an equitable adjustment for re-engineering the Government’s design drawings. In this case, the Government had solicited bids from interested parties for the manufacture of a signal generator. As
part of the Invitation for Bids, the contractor had been allowed to make a visual examination of a
display model of the signal generator to be produced, and had been provided with specifications and
a copy of the Army Technical Manual containing descriptive data, pictures, diagrams, and a parts
list. However, no production drawings were available at the time of the Invitation for Bids. The
current manufacturer of the signal generator was to deliver production drawings to the Government,
which would then make the drawings available for use by the successful bidder (who also would be
allowed to disassemble the display model and use the information derived therefrom in the
production process). The production drawings were delivered to the Government, which reviewed
and approved them four days prior to the award of the contract, without checking them to determine
whether they accurately reflected the signal generator.

The contract required that the signal generator produced by the contractor conform to
the model, and provided that the specifications governed over the drawings and the model. The
contractor contended that the production drawings supplied by the Government were defective and
not in accordance with either the model or the specifications, and that both the model and the
specifications not only were in conflict with each other but also were defective and described a
product not ready for manufacture as a production item.

Based on the contractor’s evidence as to the re-engineering required to be performed
on the production drawings, the court found that the drawings had become the ultimate
specifications but that they were not usable. As the ultimate specifications, the production drawings
became subject to the Spearin rule that the Government implicitly represents that if its specifications
are complied with, satisfactory performance will result. This warranty was breached in this instance.
In an attempt to avoid paying the costs incurred by the contractor in correcting the production drawings, the Government placed much reliance on the following contract provision:

It is understood that the contractor agrees to thoroughly check Government furnished drawings . . . against the Government furnished models of those components and applicable specifications. . . . The responsibility for assuring that the drawings have been corrected will be the contractor’s, and the Government will not be responsible for damages or extra costs as a result of the inaccuracies or omissions in the corrected drawings.

The court did not read this requirement as excusing the Government’s obligation to pay the contractor’s additional costs, as all of the references to “corrected” drawings were to those supplemental drawings that might be prepared by the contractor, not to the production drawings provided by the Government.  

III. DISCLAIMING LIABILITY FOR ARCHITECTURAL REVIEW OF SUBMITTALS

The Hyatt Regency skywalk collapse that occurred in Kansas City in 1981, resulting in 114 deaths, was the catalyst for significant changes in the design industry. The Missouri court that affirmed the revocation of the Hyatt design engineers’ licensure found unpersuasive the engineers’ testimony that the custom and practice in the industry was that designers relied on fabricators to design certain structural steel connections. This court further emphasized the sweeping scope of the Missouri licensure statute, which states in part that:

[T]he owner of the [engineering] seal shall be responsible for the whole . . . engineering project . . . when he places his personal seal on any plans, specifications, estimates, plats, reports, surveys or other documents or instruments for or to be used in connection with any . . . engineering project . . . unless he shall attach a statement over his signature, authenticated by his personal seal, specifying the particular plans, specifications, plats, reports, surveys or other documents or instruments intended to be authenticated by the seal, and disclaiming any responsibility for all other plans, specifications, estimates, reports, or other documents or instruments relating to or
intended to be used for any part or parts of the . . . engineering project . . . \textsuperscript{57}

As a result of this decision, and ensuing uncertainty about the scope of architects’ and engineers’ liability, many designers’ review stamps began to include language no longer “approving” shop drawings but instead simply stating “no exceptions noted” or similar language.\textsuperscript{58}

A. \textbf{Submittals Disclaimer in AIA General Conditions.}

Beginning with the 1987 edition of the AIA General Conditions,\textsuperscript{59} the AIA began to reflect this pulling back on the part of architects. Paragraph 3.2.18 of the General Conditions stated that (1) the contractor was not relieved from responsibility for errors or omissions in its shop drawings or other submittals by reason of the architect’s approval thereof; and (2) the contractor was not relieved of responsibility for deviations from the contract documents by the architect’s approval of submittals unless the contractor had given the architect specific written notice of the deviation and the architect had approved in writing the noted deviation.\textsuperscript{60}

Similarly, Paragraph 4.2.7 of the General Conditions obligated the architect to review the contractor’s submittals “but only for the limited purpose of checking for conformance with information given and the design expressed in the Contract Documents,” not “for the purpose of determining the accuracy and completeness of other details,” and provided that such review by the architect would not relieve the contractor of its obligations under, \textit{inter alia}, Paragraph 3.2.18.\textsuperscript{61}

These restrictions on designers’ liability for review of submittals were replicated in the 1997 edition of the General Conditions,\textsuperscript{62} in Paragraphs 3.2.18 \textsuperscript{63} and 4.2.7.\textsuperscript{64} The net effect of these, and similar, changes to the AIA forms was to incorporate into the contract provisions the disclaimer language that had begun to appear in many architects’ submittal stamps.\textsuperscript{65}

B. \textbf{Case Law Interpretation of Submittals Disclaimers.}
While the case law generally has upheld designers’ disclaimers of liability for review of shop drawings, a number of cases have refused to give effect to a submittal disclaimer.

1. **Actual Notice of Deviation.**

Certainly a disclaimer should not be enforced in cases such as *Appeal of Montgomery Ross Fisher & H.A. Lewis, A. Joint Venture,*\(^{66}\) in which the contractor gave clear written notice in its shop drawings of its intent to deviate from the project plans and specifications.

*Montgomery Ross Fisher* involved a contract for the restoration of a federal office and court building, in which the specifications called for gate valves. The contractor transmitted shop drawings showing butterfly valves to be installed in the heating system, along with a separate written submittal stating “Note: We intend to use butterfly valves on all services 2 ½ inches and over in lieu of gate valves.”

The A/E’s shop drawing stamp affixed to the contractor’s heating submittals stated in part:

> Review is only to check for conformance with the design concept of the project and general compliance with Contract Documents . . . . Changes to contract requirements are not authorized except by Change Order or separate written authorization.

The stamp also had several options for the A/E to check, reading:

No exceptions taken.

Make corrections noted – Do not resubmit.

Make corrections noted – Resubmit.

Rejected – Revise.

The A/E checked the “No exceptions taken” statement.
The A/E also reviewed the contractor’s shop drawings and affixed a stamp stating in part:

APPROVAL OF SUBMITTALS IS GENERAL AND SHOULD NOT BE CONSTRUED AS PERMITTING A DEPARTURE FROM CONTRACT REQUIREMENTS. (SEE SHOP DRAWING REQUIREMENTS OF THE GENERAL PROVISIONS AND GENERAL CONDITIONS.)

Similar to the heating submittals, the A/E checked the “No exceptions taken” statement on the shop drawing stamp.

After the contractor had installed 64 butterfly valves, the owner ordered they all be replaced with the specified gate valves. In the contractor’s subsequent claim for additional compensation, the General Services Board of Contract Appeals noted Clause 15 of the contract’s General Provisions, which stated in pertinent part:

(a) The term “shop drawings” includes drawings, diagrams, . . . descriptive literature, and similar materials furnished by the Contractor to explain in detail specific portions of the work required by the contract.

(b) . . . The Contracting Officer will indicate his approval or disapproval of the shop drawings and if not approved as submitted shall indicate his reasons therefor. Any work done prior to such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (c) below.

(c) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation(s), he shall issue an appropriate contract modification, except that, if the variation is minor and does not
involve a change in price or in time of performance, a modification need not be issued.

The Board emphasized the owner’s obligations under Clause 15, which were that (1) The Contracting Officer will indicate his approval or disapproval of the shop drawings and other submittals; and (2) if not approved as submitted, the Contracting Officer shall indicate his reasons therefor. The Board found that the Government’s “muddled” approval did not satisfy its obligations under the this clause. One of the stamps affixed by the A/E to the heating submittals and shop drawings approved them, while at the same time cautioning that the approval was “general” and that any deviation from the plans and specifications would require separate approval. The other stamp also approved the submittal but stated that it authorized no “departure from the contract requirements.”

The Board found that the contractor had fulfilled its responsibilities by submitting shop drawings and submittals and by clearly calling out on the latter the contractor’s proposed deviation from the specifications. The Board concluded that when a contractor provides a submittal that varies the specifications, and contemporaneously calls out this variance by a conspicuous separate writing, approval of the submittal constitutes approval of the variance.

2. **Constructive Notice of Deviation.**

Even in those cases in which the contractor has failed to give actual notice of its deviation from the project documents, the court or board reviewing the matter may ignore a submittal disclaimer and give effect to the approval of a shop drawing evidencing a deviation from the project documents if the reviewing tribunal concludes that the owner or its designer was or should have been aware of the deviation.
Appeal of Joseph Morton Co. provides an example of this situation. The contract in dispute was for alterations to existing airmen's dormitories, including installation of new shower stalls. The specifications required fiberglass shower stalls with dimensions of 36 in. x 36 in. x 84 in. high, “approximately.” The contractor submitted to the architect a catalog cut showing a shower stall with a height of 77-1/2”. The reverse side of the submittal document included a requirement that submittals not in conformance with the plans and specifications be accompanied by a written statement to that effect; the contractor did not include such a statement.

The architect approved the catalog cut, impressing a stamp thereon that disclaimed all responsibility on the part of the architect as to fit or conformity, and that cautioned the contractor to verify all dimensions at the job site and be responsible for same. The architect's approval was given subject to two conditions, one of which related to the requirement that shower heads and valves be located as indicated in the specifications. Further, an inspector for the owner had occasion to examine a sample shower stall in the field, prior to installation, and to speak directly by telephone with the supplier for clarification of certain installation instructions.

After the contractor had installed approximately 100 stalls out of 225, the owner’s engineer informed the contractor that the shower stall failed to meet the height requirements in the specifications, which the engineer considered to be 84 inches.

In the contractor’s proceeding for additional time and compensation resulting from the owner’s rescission of its prior approval of the shower stalls, the owner’s defense relied on the contract’s Shop Drawings Clause reading, in part, as follows:

SP-4. SHOP DRAWINGS: * * * The approval of the drawings by the Contracting Officer shall not be construed as a complete check, but will indicate only that the general method of construction and detailing is satisfactory. Approval of such drawings will not relieve
the contractor of responsibility for any error which may exist as the contractor shall be responsible for the dimensions and design of adequate connections, details and satisfactory construction of all work. The contractor or an official of the company authorized to act on behalf of the contractor shall certify, with each submittal of shop drawings, that he has reviewed the shop drawings in detail and that they are correct and in strict conformance with contract drawings and specifications except as may be otherwise explicitly stated.

The Armed Services Board of Contract Appeals noted that, while the purpose of the Shop Drawing Clause is to relieve the Government of the unfair consequences of an unwitting approval of non-conforming shop drawings submitted by a contractor, here the contractor had submitted to the architect a shop drawing clearly setting forth the proposed height of the shower stalls. The markings on the drawing indicated that the architect and the contracting officer had focused their attention on the dimensions of the shower stall, including its proposed height. Thereafter, the Government inspector examined a sample stall, engaged in discussions with the stall supplier, and approved the installation of a significant number of stalls.

“Under such circumstances the contracting officer and his representatives were estopped from rescinding the Government' s approval to the detriment of the [contractor]. The subsequent requirement for an increase in the height of the stall constituted a change for which the [contractor] is entitled to an equitable adjustment pursuant to the terms of Changes clause.”

3. **Conflicting Contract Language.**

In other cases in which the contractor has deviated from the plans and specifications without giving actual written notice of the deviation, the owner’s own contract language may prevent its submittal disclaimer from being given effect. Such was the case in *Appeal of City Electric Anchorage, Inc.*, involving a contract for the installation of fire detection and alarm systems.
After the owner’s designers rejected two sets of shop drawing submittals, the contractor’s engineer had two face-to-face meetings with the designers in which the requirements for installation of the systems were discussed, after which the contractor re-prepared and re-submitted the shop drawings for the installation. These shop drawings were approved. After the contractor had installed the systems in conformance with the approved shop drawings, the owner ordered the contractor to rework a portion of the fire alarm system to encase the wiring in metal conduits.

In the contractor’s subsequent proceeding for additional compensation, the owner relied upon the contract’s shop drawing disclaimer to argue that, despite approval of the shop drawings, there had been no waiver of the contractual requirement that the wiring installation conform to a particular provision of the National Electrical Code. This disclaimer read as follows:

**SP 1-18, “Shop Drawings”:**

The Contractor shall submit to the Contracting Officer for approval four (4) copies of all shop drawings as called for under the various headings of these specifications. These drawings shall be complete and shall contain all required detailed information. If approved by the Contracting Officer, each copy of the drawings will be identified as having received such approval by being so stamped and dated. The Contractor shall make any corrections required by the Contracting Officer.

Three (3) sets of all shop drawings will be retained by the Contracting Officer and one set will be returned to the Contractor. The approval of the drawings by the Contracting Officer shall not be constructed as a complete check but will indicate only that the general method of construction is satisfactory. Approval of such drawings will not relieve the Contractor of the responsibility for any error which may exist, as the Contractor shall be responsible for the dimensions and design of adequate connections, details, and satisfactory construction of all work.

The Armed Services Board of Contract Appeals focused on another portion of the contract in determining that the contractor was entitled to additional compensation:
Section TP 1-10, “Data and Drawings”:

Each bidder shall furnish with his bid a detailed list of the materials which are proposed to be installed, with model number and catalog description of each major item, and satisfactory evidence of approval and listing by Underwriters’ Laboratories, Inc., or the Factory Mutual Testing Laboratories, for use in the system combination proposed. Before proceeding with the work the successful bidder shall prepare drawings showing the layout of the system in each type of building, with detail installation wiring diagrams, and shall submit them to the Contracting Officer for approval. Upon approval by the Contracting Officer these list of materials and drawings will become an integral part of the contract. No deviations or changes will then be permitted without prior written approval from CS/Installations, Headquarters Alaskan Air Command.

The Board reasoned that this section provided that the shop drawings, upon their approval, had become an integral part of the contract and no deviations therefrom (including installation of the system in conformance with the original project documents) were permitted without particular written approval, which the owner had not obtained. Therefore, the owner’s requirement that the contractor re-install the wiring in a manner not conforming with the approved shop drawings constituted a change to the contract that entitled the contractor to additional compensation.

4. **Ambiguous Plans and Specifications.**
The contract specifications called for “hardboard” scuttle closures for attic access for the housing units to be constructed, and the contract drawings gave no further description of the type of hardboard scuttle closures that were permissible for use. The contractor’s shop drawing clearly showed use of a perforated hardboard closure. The shop drawing was approved, and the contractor installed perforated hardboard closures. The owner then required the contractor to remove all the perforated hardboard closures and substitute solid hardboard closures. The contractor sought additional compensation, arguing that the substitution was a contract change.

The owner contended that its approval was in error and that the shop drawing provision (identified as SC-4 but not quoted in the opinion) did not authorize a departure from the specifications. However, the fatal weakness in this argument was that the specifications did not require non-perforated hardboard. The owner, by its approval of the perforated hardboard shop drawings, confirmed the contractor’s interpretation of the contract documents that use of perforated hardboard was acceptable. The contractor was successful in its request for additional compensation.

_In re Universal Ecsco Corporation_ also involved ambiguous plans and
specifications. The net result in this case was that the contractor’s approved layout drawings were given effect despite the contract’s submittal disclaimer.

The contractor was to install mechanical mail-handling equipment in a post office. The issue in dispute was the Government’s requirement that the contractor re-engineer its shop drawings relating to certain spiral chutes, to flare them from 30 inches to 36 inches in the first 90 degrees of the spiral of the chutes (instead of widening them at the bottoms of the chutes as was reflected in the contractor’s layout drawings, which apparently had been accepted without objection by the Government). The purpose of the chutes was to connect 30” wide conveyors on the second floor with 36” wide conveyors on the first floor.

Two of the Government’s contract drawings did indicate a flare in the first 90 degrees of the spiral chute but, from the manner of its depiction in the drawings, the flare could be interpreted as having been the result of haste or inexperience on the part of the plans’ drafter. The specifications did not call for a flare, and no dimensions for the chutes were given in the drawings. The only way to determine that a flare was anticipated to be made in the first 90 degrees of the spiral chute would have been to scale the drawings, which is not a recognized engineering procedure to determine dimensions.

As stated, the contractor submitted layout drawings to the Government that showed the widening of the spiral chutes at their bottom to accommodate the size difference between the first-floor and second-floor conveyors. The Government approved some of these drawings or discussed the general area of the equipment with the flared chutes without mentioning the chutes themselves, thus implying approval of them. Only four months later did the Government call the contractor’s attention to the location of the flares within the chutes. Because of the congestion of the
area involved, the contractor was required to expend 1672 hours in its re-engineering effort, voiding 75 drawings and extensively revising 80 drawings in the process.

In resisting the contractor’s claim for additional compensation, the Government pointed to the shop drawing disclaimer in the specifications, which read:

> 3-21 Shop drawings for the mail-handling equipment shall be furnished in triplicate for approval prior to commencing any fabrication or construction. The approval of shop drawings will be general and will not relieve the Contractor from the responsibility of the proper fitting, construction, and operation of the equipment, nor from furnishing materials and work required by the contract, which may, or may not, be indicated on the shop drawings when approved.

The Board of Contract Appeals found that the evidence indicated overwhelmingly that the difference in location in the flare -- between the top or the bottom of the chute -- had no real operational significance. Further, the Government was aware that two other contractors had had similar misunderstandings on other projects yet had done nothing to clarify the contract documents. The Board observed that if the Government had such a high regard for inclusion of this feature, dimensions should have been stated in the drawings and specifications.

Because of the ambiguity in the contract documents, and despite the shop drawing disclaimer, the Board allowed the extra compensation to the contractor.

5. **Owner’s Control over the Design Process.**

*Toombs & Co. v. United States*° is another example of the refusal to give effect to a shop drawing disclaimer, in the situation in which the Government has assumed complete design control over all aspects of the work except for a small portion, but then exercises control over that portion through the submittals approval process.°°

*Toombs & Co.* involved a contract to erect an air traffic control tower in Fairbanks, Alaska, pursuant to plans and specifications prepared by the Government’s A/E. These plans and
specifications had been used on six other airport projects and site-adapted for use on the Alaska project.

The design called for metal siding panels for the tower. The contractor submitted shop drawings on the proposed siding panels. Dealing directly with the siding supplier, the Government’s A/E made certain changes to the shop drawings, approved other changes proposed by the supplier, and approved the shop drawings. When work on the tower was 85% complete, several fasteners for the metal panels sheared off on two of the floors. After the contractor implemented the remedial work ordered by the Government, the contractor brought a claim for additional compensation.

The Government argued that the fastening system for the metal panels was in the nature of a performance specification whereby the contractor was required to select fasteners of an appropriate strength to resist negative loads. The Government further argued that, pursuant to the shop drawing disclaimer in the contract documents, the Government’s approval of the contractor’s shop drawings did not alter the performance aspects of the specifications.

The Government’s shop drawing disclaimer was found in two provisions of the contract. The first, Article 15 of the General Provisions, stated in part:

Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (c) below.

In addition, Paragraph 14 in the Special Contract Conditions provided in part:

The approval of the drawings by the Contracting Officer shall not be construed as a complete check, but will indicate only that the general method of construction and detailing is satisfactory. Approval of such drawings will not relieve the Contractor of the responsibility for
any error which may exist as the Contractor shall be responsible for
the dimensions and design of adequate connections, details, and
satisfactory construction of all work.

The court disagreed with the Government’s assertion of the shop drawing disclaimers
as a defense to the contractor’s claim, concluding that the Government had provided a complete
design of the wall panel system, including the materials to be used and the manner in which the work
was to be performed. Further, the A/E’s participation in the project was “unique and pervasive.”
The A/E’s control over the design continued after contract award, as evidenced by the above-
referenced handling of the shop drawings. After the fastener failure, the supplier proposed a
remediation solution. While Government personnel concluded that the proposal appeared to be
acceptable, they cautioned that it could not be undertaken until the A/E had approved it.

The Government also argued that the shop drawing disclaimers prevented the A/E’s
approval of the shop drawings from altering the performance aspects of the specifications. The court
refused to accept the proposition that these disclaimers could overcome the detailed requirements of
the contract design and the control exercised by the A/E over the materials used and the manner in
which the work was to be performed. This “elaborate system” of preparing, reviewing, and
approving the shop drawings “removes this case from the simple approval action for which these
cited clauses were designed.” The Government may not construct a system whereby its control over
implementation of its design is complete, and at the same time avoid responsibility for consequences
of defects in the plans and specifications by such general disclaimers. Fairly read, the specifications
established in precise detail the type, size, strength, and materials required of the fastening screws.
Further, the A/E’s review and approval of the shop drawings “was tantamount to their incorporation
in the specification” for purposes of the Government’s implied warranty that conformance with the design requirements will result in satisfactory completion of the work.

Thus, the court concluded that the Government had exerted such “control” over the design process that the fastener requirements in fact were design specifications to which the owner’s implied warranty\textsuperscript{74} was extended – and that the contractor’s approved shop drawings became part of these design specifications – resulting in liability on the part of the Government for the defective design of the fastener system.

\textbf{IV. \quad CLAUSES PLACING DOLLAR LIMITS ON DESIGNER LIABILITY}

\textbf{A. \quad Limitation of Liability Clauses Defined.}

The purpose of a limitation of liability clause is to allow the owner and the design professional to agree in advance upon a predetermined type or amount of damages to which the owner may be entitled if the design professional does not properly perform.\textsuperscript{75} Unlike exculpatory clauses, limitation of liability clauses do not completely insulate a party from liability; rather, they “cap” the party’s liability at a pre-determined level.\textsuperscript{76} Such clauses typically limit the design professional’s liability to one or more of the following: (1) a stipulated amount, (2) the design professional’s contract fee, (3) the actual amount of fees received by the design professional, and/or (4) the architect’s insurance coverage. In addition, such clauses may include a disclaimer of liability for consequential and incidental damages.\textsuperscript{77}

Limitation of liability clauses have become a fact of every-day business life for allocating unknown or indeterminate risk.\textsuperscript{78} Legislatures and courts throughout the United States have expressed diverse opinions on the enforceability of clauses purporting to limit a contracting
party’s liability, typically weighing the importance of the clause against the public policy disfavoring a party’s ability to limit its liability for its own negligence.

**B. Cases Refusing to Enforce Design Professionals’ Limitation of Liability Clauses.**

Despite the public policy concerns expressed by many courts, only a few reported cases have refused to enforce limitation of liability clauses against design professionals. Those cases generally fall into three categories: (1) cases finding that limitation of liability clauses violate an applicable anti-indemnification statute; (2) cases engaging in a sufficiently narrow interpretation of the limitation of liability clause that, despite the clause, the claimant has been allowed to proceed against the design professional (albeit on other causes of action); and (3) cases that forthrightly conclude that enforcement of the clause would result in inequity to the claimant.

1. **Violation of Anti-Indemnification Statute.**

In
After the contractor on the project sued the owner for increased costs due to differing site conditions, the owner filed a third-party complaint against the engineer for breach of contract, breach of the duty of care, and breach of fiduciary duty. In its defense, the engineer asserted the limitation of liability clause.

In response, the owner argued that Alaska’s anti-indemnification statute prohibits limitation of liability clauses such as the one under consideration. The owner’s reasoning was that limiting the amount of damages payable by the engineer to the owner for the engineer’s fault was equivalent to requiring the owner to indemnify the engineer (in that amount of the owner’s damages it was prevented by the clause from recovering from the engineer) against liability for the engineer’s own fault, which would constitute a violation of the anti-indemnification statute. Noting that early drafts of the statute included a broad statement contemplating inclusion of limitation of liability clauses in the statute’s scope, and also noting the absence in the statute of an exemption for limitation of liability clauses, the Alaska Supreme Court construed the statute to prohibit limitation of liability clauses and found the instant clause to be void and unenforceable.

Similarly, *Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc.* found a limitation of liability provision to violate Georgia’s anti-indemnification statute. In *Bicknell*, the contractor re-roofed the owner’s building and issued to the owner a guarantee stating that the contractor would repair or replace defective work, but that the contractor would not be liable for “damage to the building upon which such work has been done; nor to interior fixtures, decoration, stock or equipment, due to leakage . . . .”
After the work had been completed, the owner discovered a serious leak in the rear portion of the roof; the cumulative water leakage damaged the interior tile ceiling and carpet. Despite at least three attempts at repair, the contractor never was able to eliminate the leak. The owner eventually sued the contractor for negligent installation and repair of the roof, and for breach of warranty.

The contractor moved for partial summary judgment based on the limitation of liability clause. The owner argued that the Georgia anti-indemnification statute prohibited enforcement of the clause. The court agreed that the limitation of liability provision in the contractor’s warranty violated public policy under the statute and thus did not prevent assertion by the owner of a negligence claim against the contractor.

2. Narrow Interpretation of Limitation of Liability Clause.

Other cases considering the application of a limitation of liability clause have interpreted the clause in such a narrow manner that, while the clause may prevent assertion of certain causes of action against the design professional, the claimant is not precluded from pursuing its claim against the design professional under a different theory of recovery.

In *W. William Graham, Inc. v. City of Cave City*, the design engineer contracted with the City to prepare plans for a wastewater treatment facility. The contract provided that the plans were to be completed within 135 days, as the City’s failure to submit the design plans to another governmental agency within this time frame would result in a reduction of the funding the City could receive from the agency from a 75% level to 55%.

The engineer failed to perform within the time agreed, resulting in a reduction in the City’s funding in the amount of $338,935. The City sued the engineer for this amount. The
engineer sought to limit its liability to the City by pointing to the limitation of liability clause included in its agreement with City:

The OWNER agrees to limit the ENGINEER’s liability to the Owner and to all Construction Contractors and subcontractors on the Project, due to the ENGINEER’s professional negligent acts, errors or omissions, such that the total aggregate liability of the ENGINEER to those named shall not exceed Fifty Thousand Dollars ($50,000.00) or the ENGINEER’s total fee for services rendered on this project, whichever is greater.

The engineer argued that the City’s recovery was limited to $99,214, which was the sum of the fees the engineer had received on the project.

Noting the jury’s finding that the engineer had breached its contractual duty to perform within the time frame mutually agreed upon, and concluding that the limitation of liability clause protected the engineer only against claims arising out of its negligent acts, not its breach of contract, the court affirmed the judgment against the engineer in the full amount of $338,935.

*Sear-Brown Group v. Jay Builders, Inc.* was another case in which the court gave effect to the design professional’s limitation of liability clause, but construed it narrowly so as not to preclude all of the plaintiff’s claims against the design professional.

In *Sear-Brown*, the engineer sued for its fees for engineering services performed for two residential development projects. The owner counterclaimed for $1 million, alleging negligence and gross negligence in the engineer’s performance of its contractual duties on one of the projects. The engineer moved for partial summary judgment, asserting that its liability was limited to $304,660 pursuant to the contracts’ limitation of liability clauses (not quoted in the opinion).

Rejecting the owner’s argument that the limitation of liability clauses violated New York’s anti-indemnification statutes, the court found that those sections apply only when a party
seeks to protect itself from claims for personal injury and property damage, and here the owner was seeking damages for economic loss. However, the court noted that limitation of liability clauses do not apply to misrepresentations made to induce a party to enter into a contract, and that limitation of liability clauses may not be used to insulate a party from damages caused by its gross negligence. Thus, the owner still was allowed to maintain its counterclaim against the engineer.

3. **Refusal to Enforce Limitation of Liability Clause Because of Inequitable Result.**

The courts in two cases involving negligent inspection of houses prior to their purchase by plaintiffs refused to enforce the inspecting engineers’ limitation of liability clauses because of the inequitable results that would ensue to the homeowners.

*Estey v. MacKenzie Engineering Inc.* involved performance of a “limited visual review” of a house the plaintiff intended to purchase, for an inspection fee of approximately $200, pursuant to a contract stating that “The liability of [the engineering firm and its employees] are limited to the Contract Sum.”

The engineering firm’s employee, a licensed professional engineer, conducted the review and issued a two-page report. The report advised there had been some past water infiltration into the foundation and some previous movement of the foundation and structure, but concluded that no “major failure or immediate movement of the foundation” was imminent.

Plaintiff purchased the house, and six weeks later discovered that a broken water pipe had been leaking under the house since before the date of the inspection. Plaintiff hired a second engineering firm to inspect the house. This firm reported that the eastern portion of the house probably was resting on uncompacted fill that had settled over time, resulting in the breaking of the water line and additional settlement due to saturation of the underlying soil.
Plaintiff brought suit against the engineering firm that performed the original inspection, claiming negligence, negligent misrepresentation, and breach of contract, seeking $340,000 in damages (which included the $190,000 plaintiff had already spent on repairs and an additional $150,000 he anticipated spending to further repair and stabilize the house). The engineering firm moved for summary judgment on the basis of its limitation of liability clause. Plaintiff claimed the limitation of liability clause was unenforceable.

The court acknowledged that its inquiry would focus not only on the contractual language included in the clause but also on avoiding a harsh or inequitable result. The court specifically declined to require inclusion of the word “negligence” in the limitation of liability clause in order to find such clause to be effective against the negligence claim. However, the court found that the word “liability” used in the clause was not as encompassing as the language found in a limitation of liability clause considered in an earlier case, such that the court could not conclude that the parties “clearly and unequivocally” intended an interpretation that would have required the homeowner to bear the risk of the engineering firm’s negligence.

Further, the court did not believe the homeowner would have understood the limitation of liability clause to effectively immunize the engineering firm from liability for negligently rendering a flawed report, given the importance and expense of the decision the homeowner would be making based on the results of the inspection.

In *Ricciardi v. Frank*, prospective residential purchasers retained a licensed professional engineer to inspect the house they were interested in buying. The engineer performed a one-hour inspection, charged a fee of $375, and issued a 15-page report the next day. That report included provisions reading “Liability Limitations: . . .our liability is limited to the cost of the
inspection” and “Acceptance as Assent: By accepting this report and utilizing it, the prospective owner(s) named above accept the terms, disclaimers, inspection limitations, and liability limitations of this report.”

The report stated that “No water intrusion was apparent through the foundations or slab at the time of inspection.” After the plaintiffs purchased the house, they discovered it had a wet basement. They demanded that the engineer return the inspection fee and pay for the cost of waterproofing. He refused. They sued for negligence, negligent misrepresentation, and violation of New York’s deceptive and unfair business practices statute.

The court refused to enforce the engineer’s limitation of liability clause, for three reasons: (1) the disclaimer failed to mention the term “negligence” or to state that the defendant would be exempted from his failure to use due care in the inspection; (2) the disclaimer failed to give the plaintiffs the option to purchase protection for full liability; and (3) the homeowners’ purported assent was void for lack of notice: there were no pre-agreement negotiations, let alone agreement, as to how and in what manner the engineer’s liability would be limited.

Without expressly acknowledging that this consideration was part of the basis for its decision, the court noted that purchase of a house is the single most important financial decision most people will ever make, and that accurate information about the structural integrity of a house is critical.

C. Fifty-State Survey of Enforceability of Limitation of Liability Clauses.

Set forth below are representative cases from U.S. jurisdictions determining the enforceability of limitation of liability provisions. Particular emphasis has been given to those cases involving attempts by architects or engineers to restrict liability for design inadequacies.
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<td>Colorado</td>
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<td>Limitation of liability clause in yellow pages advertising contract upheld, because parties should be entitled to contract on their own terms even though such contracts may lead to hardship on one side. Such a clause is unconscionable only where one party is penalized to the extent that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice.</td>
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<td><em>Leon’s Bakery, Inc. v. Grinnell Corp.</em>, 990 F.2d 44 (2d Cir. 1993).</td>
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<tr>
<td>Georgia</td>
<td>Potter-Shackelford Construction Co. v. Law Engineering, Inc., No. 96-1073, 1996 U.S. App. LEXIS 33368 (4th Cir. Dec. 23, 1996).</td>
<td>$50,000 limitation of liability in engineering contract was upheld in light of policy that courts will not interfere with freedom of contract, and that a contracting party may waive or renounce that which the law has established when it does not injure others or affect the public interest, because parties to a contract are presumed to have read the provisions and to have understood the contents.</td>
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<td>Hawaii</td>
<td>Fujimoto v. Au, 19 P.3d 699 (Haw. 2001).</td>
<td>Exculpatory clause in partnership agreement was permissible (but unenforceable in this instance for violation of the Uniform Partnership Act). Parties are permitted to make exculpatory contracts and no public policy exists to prevent such contracts. Exculpatory clauses will be held void, however, if the agreement is violative of a statute, contrary to a substantial public interest, or gained through unequal bargaining positions.</td>
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| Idaho                 | Steiner Corp. v. American District | Upholding $250 limitation of liability in fire alarm maintenance contract, stating that express agreements
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<th>State</th>
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<td><em>Telegraph</em>, 683 P.2d 435 (Idaho 1984).</td>
<td>Exempting one of the parties from negligence are to be sustained, except where one party is at an obvious disadvantage in bargaining power, or a public duty is involved, as with public utility companies or common carriers.</td>
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<td>Illinois</td>
<td><em>Normand v. Orkin Exterminating Co., Inc.</em>, 193 F.3d 908 (7th Cir. 1999).</td>
<td>Upholding limitation of liability clause in an agreement for exterminating services between home owner and exterminator. If malice or misrepresentation is evident in the agreement, however, such a clause will not be enforced.</td>
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<td>Indiana</td>
<td><em>Trimble v. Ameritech Publishing, Inc.</em>, 700 N.E.2d 1128 (Ind. 1998).</td>
<td>A limitation of liability clause contained in an advertising contract was upheld because it did not contravene state statute, clearly tend to injure the public in some way, or weigh against the public policy of Indiana. There was no unequal bargaining power between the companies and the transaction did not affect public interest, such as would contracts of utilities, carriers, and other types of businesses generally thought to be suitable for regulation.</td>
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<td>Iowa</td>
<td><em>Baker v. Stewarts’ Inc.</em>, 433 N.W.2d 706 (Iowa 1988).</td>
<td>Waiver signed by customer of cosmetology school before receiving services was not invalid on the basis of public policy preventing enforcement of exculpatory agreements of a party seeking to be exculpated as a professional person subject to licensure by the state. It was nevertheless unenforceable because it was ambiguous as to absolving the school itself from liability based upon the professional acts or omissions of its supervisory staff.</td>
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<td>Kansas</td>
<td><em>Budget Rent A Car of Kansas, Inc. v. Southwestern Bell Telephone Co.</em>, 782 P.2d 75 (Kan. Ct. App. 1989).</td>
<td>Upholding limitation of liability in telephone directory publishing agreement, rejecting customer’s contention that it was unconscionable and inequitable, because yellow pages advertising is not an adhesion contract: Alternative forms of advertising exist and there was no inequality of bargaining power.</td>
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<td>Kentucky</td>
<td><em>Boggs v. Harrison</em>, No. 85-CA-552-MR, 1986 Ky. App. LEXIS</td>
<td>Upholding limitation of liability clause contained in a release signed by a race car driver who was later injured. The clause was upheld on the basis of clear</td>
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<td>Louisiana</td>
<td><em>Yocum v. City of Minden</em>, 649 So. 2d 129 (La. Ct. App. 1995).</td>
<td>Limitation of liability clause was valid between the city and the engineer in a construction agreement, and a subcontractor’s claim that the clause was unenforceable lacked merit because no privity of contract existed between the engineer and the subcontractor.</td>
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<tr>
<td>Maine</td>
<td><em>Hardy v. St. Clair</em>, 739 A.2d 368 (Me. 1999).</td>
<td>Release and waiver signed by member of pit crew at raceway upheld even though the courts exercise a heightened degree of judicial scrutiny when interpreting contractual language that exempts a party from liability for his own negligence if the language expressly spells out with the greatest particularity the intent of the parties contractually to extinguish negligence liability. (Language of the release was insufficient to waive spouse’s loss of consortium claim.)</td>
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<tr>
<td>Maryland</td>
<td><em>Adloo v. H.T. Brown Real Estate, Inc.</em>, 686 A.2d 298 (Md. 1996).</td>
<td>Limitation of liability clause in real estate agreement was held unenforceable because it was ambiguous and unclear. The clause did not clearly, unequivocally, specifically, and unmistakably express the parties’ intention to exculpate the respondent from liability resulting from its own negligence.</td>
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<td>Massachusetts</td>
<td><em>R-1 Assoc., Inc. v. Goldberg-Zoino &amp; Assoc., Inc.</em>, 91-7417-E, 1995 Mass. Dist. LEXIS 395 (Mass. Dist. Ct. Aug. 16, 1995).</td>
<td>Limitation of liability in environmental assessment contract to the aggregate of $50,000 or the engineer’s fee was upheld as not contrary to public policy or the public interest, because the contract was not a standardized adhesion contract of exculpation and it expressly provided that the parties could agree to increase the limit of liability for professional errors, acts, or omissions.</td>
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<td>Michigan</td>
<td><em>Cole v. Ladbroke Racing Michigan, Inc.</em>, 614 N.W.2d 169</td>
<td>Upholding a limitation of liability clause in a release signed by a licensed exercise rider who was injured when thrown from a horse. The text of the release</td>
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<td>Minnesota</td>
<td><em>Arrowhead Electric Cooperative, Inc. v. LTV Steel Mining Co.</em>, 568 N.W.2d 875 (Minn. Ct. App. 1997).</td>
<td>A clause in a maintenance contract exonerating a party from strict liability for damage to a commercial tenant’s property was enforceable and did not violate public policy because the contract did not involve a public or essential service, the clause did not limit liability for bodily injury or other injury to members of the public, there was no disparity of bargaining power, and all known hidden risks had been disclosed.</td>
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<td>Mississippi</td>
<td><em>Palmer v. Orkin Exterminating Co.</em>, 871 F. Supp. 912 (S.D. Miss. 1994).</td>
<td>Upholding extermination contract limiting exterminator’s liability to retreatment, because the exterminator was not responsible for creating the termite infestation and it contracted only to eradicate the insects. The customer’s damages were limited to those set out in the contract, and there was no duty independent from the contract to give rise to a cause of action for negligence.</td>
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<td>Missouri</td>
<td><em>Purcell Tire &amp; Rubber Co. v. Executive Beechcraft, Inc.</em>, No. WD58041, 2000 Mo. App. LEXIS 1776 (Mo. App. Nov. 28, 2000).</td>
<td>Limitation of liability to $1,250 in airplane inspection contract was contrary to public policy. Even though limitations of liability are not per se against public policy, they are disfavored and are strictly construed. The party benefitting from the limitation clause must show that the parties bargained for the specified allocation of economic risk at least implicitly, if not explicitly, and the terms of the clause must be clear, unambiguous, unmistakable, and conspicuous.</td>
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<td>Montana</td>
<td><em>Speth v. Dillon Enterprises, Inc.</em>, 97 F. Supp. 2d 1215 (D. Mont. 1999).</td>
<td>Limitation of liability clause in an outfitter’s contract was held unenforceable. Montana law prohibits exculpatory phrases contained in contracts, regardless whether the activity at issue implicates the public interest.</td>
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<tr>
<td>Nebraska</td>
<td><em>Ray Tucker &amp; Sons, Inc. v. GTE Directories Sales Corp.</em>, 571 N.W.2d 64</td>
<td>Upholding limitation of liability in contract for placing telephone directory advertisement, finding it not to be contrary to public policy as it posed no threat to the safety or welfare of the general public,</td>
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<td>Nevada</td>
<td>Bernstein v. GTE Directories Corp., 631 F. Supp. 1551 (D. Nev. 1986).</td>
<td>Limitation of liability in telephone directory advertising agreement was upheld, as there was no disproportionate bargaining power, and the clause was written in bold letters on the reverse side of the agreement form in clear and concise language. The clause did not seek immunity from gross negligence or willful misconduct and was not so one-sided or unfair as to shock the conscience.</td>
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<td>New Hampshire</td>
<td>Colonial Life Ins. v. Electronic Data Systems Corp., 817 F. Supp. 235 (D.N.H. 1993).</td>
<td>Although holding that a limitation of liability clause in a computer software agreement was not unconscionable as a matter of law, the court added that the clause may not necessarily be binding as a matter of law. Limitations on the enforceability of a limitation of liability clause include fraud, bad faith, or “total fundamental breach.” If these limitations are proven, the clause will not be enforced.</td>
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<td>New Jersey</td>
<td>Marbro, Inc. v. Borough of Tinton Falls, 688 A.2d 59 (N.J. Super. Ct. Law Div. 1996).</td>
<td>Upholding a limitation of liability clause contained within the contract of an engineer and a city. Parties to a contract may agree to limit their liability so long as the limitation is not violative of public policy. The clause did not shield the firm from all liability; if found negligent, the firm could be held liable up to $32,500 or the total fee for the project. The court found the clause clear and unambiguous.</td>
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<td>New Mexico</td>
<td>Lynch v. Santa Fe National Bank, 627 P.2d 1247 (N.M. Ct. App. 1981).</td>
<td>Upholding exculpatory clause in bank’s escrow agreement, stating that such clauses are strictly constructed against the promisee but are enforced unless the promisee enjoys superior bargaining power or the performance of a public duty or public interest is involved.</td>
</tr>
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<td>New York</td>
<td>Sear-Brown Group v. Jay Builders, Inc., 655 N.Y.S. 2d 162 (App. Div. 1997).</td>
<td>Limitation of liability clause found in agreement between contractor and engineer limiting the engineer’s liability was enforceable. Absent language in the agreement to the contrary, however, limitation of liability clauses do not apply to misrepresentations made to induce a party to enter into an agreement. In addition, a party may not</td>
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<td>North Carolina</td>
<td><em>Fortson v. Ross McClellan</em>, 508 S.E.2d 549 (N.C. Ct. App.1998).</td>
<td>Waiver signed in connection with training on motorcycle course was not enforceable because the same interests in public safety addressed by statute and case law are significantly present in motorcycle safety instruction. Having entered into the business of instructing the public in motorcycle safety, a party cannot by contract dispense with the duty to instruct with reasonable safety.</td>
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<td>North Dakota</td>
<td><em>Construction Associates, Inc. v. Fargo Water Equipment Co.</em>, 446 N.W.2d 237 (N.D. 1989).</td>
<td>Provision in sales contract limiting a pipe manufacturer’s liability to resupply of a like quantity of pipe and disclaiming consequential damages was struck down. Under applicable UCC sections, the provision was unconscionable due to a substantial inequality in bargaining power, lack of opportunity to bargain or negotiate, unfair surprise, and ineffectiveness of the remedy.</td>
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<td>Ohio</td>
<td><em>Askenazi v. General Electric Co.</em>, No. 16303, 1997 Ohio App. LEXIS 3560 (Ohio Ct. App. Aug. 8, 1997).</td>
<td>Upholding limitation of liability provision in fire alarm monitoring contract, the court stated that the relative bargaining positions or experience of the parties did not render the contract procedurally unconscionable, nor was it substantively unconscionable simply because it precluded liability for negligence and breach of warranty.</td>
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<td>Oklahoma</td>
<td><em>Elsken v. Network Multi-Family Security Corp.</em>, 49 F.3d 1470 (10th Cir. 1995).</td>
<td>Upheld limitation of liability in alarm services agreement where the contract was properly executed by both parties and the parties dealt with each other at arms’ length; failure of the customer to read the contract did not void the clause.</td>
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<td>Oregon</td>
<td><em>Estey v. Mackenzie Engineering. Inc.</em>, 927 P.2d 86 (Or. 1996).</td>
<td>Limitation of liability clause did not limit an inspector’s liability for the negligent inspection of a residence, because the clause did not clearly and unequivocally express an intent to limit the inspector’s liability for the consequences of his own negligence. The inspector’s attempt to characterize the transaction as “high risk, low cost” was not persuasive.</td>
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<td>Pennsylvania</td>
<td><em>Valhal Corp. v. Sullivan Associates, Inc.</em>, 44 F.3d 195 (3d Cir. 1995).</td>
<td>Clause limiting the liability of engineer to $50,000 or the engineer’s fee for services was upheld, as the clause did not immunize the engineer from its negligence or remove the incentive to perform with due care, and the parties to the contract were sophisticated and dealt in arms’-length negotiation.</td>
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<td>Rhode Island</td>
<td><em>E.H. Ashley &amp; Co. v. Wells Fargo Alarm Services</em>, 907 F.2d 1274 (1st Cir. 1990).</td>
<td>Limitation of liability in fire alarm contract was upheld as not unconscionable, because there was no absence of meaningful choice on the part of one of the parties, the contract terms were not unreasonably unfavorable to the other party, it was not a contract of adhesion or disparity, and there was sophistication or bargaining power between the parties.</td>
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<td>South Carolina</td>
<td><em>Georgetown Steel Corp. v. Law Engineering Testing Co.</em>, No. 92-2588, 1993 U.S. App. LEXIS 23541 (4th Cir. Sept. 14, 1993).</td>
<td>Upholding clause in soils analysis agreement limiting damages to $50,000 or the engineer’s fee, including a clause providing for a waiver of this limitation in the event the client agreed to pay additional consideration. Even though exculpatory clauses are disfavored, this clause was enforceable because the parties were of equal bargaining power, the other party was made aware of the limitation of liability provision, and it was plainly written and easily read in the single-page general conditions to the agreement.</td>
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<td>South Dakota</td>
<td><em>Lucero v. Van Wie</em>, 598 N.W.2d 893 (S.D. 1999).</td>
<td>Limitation of liability in connection with sale of real property was upheld where neither party was in a superior bargaining position, the provision was negotiated, and there was no public interest involved in a private real estate purchase.</td>
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<td>Tennessee</td>
<td><em>Lomax v. Headley Homes</em>, C.A. No. 02A01-9607-CH-00163, 199 Tenn. App. LEXIS 360 (Tenn. Ct. App. May 22, 1997).</td>
<td>Limitation of liability clause in construction loan agreement held unenforceable as contrary to public policy. While parties may contract that one shall not be liable for his negligence to another, the agreement offered by the loan company here satisfied the public interest criterion, which resulted in an unenforceable exculpatory clause.</td>
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<tr>
<td>Texas</td>
<td><em>Arthur’s Garage, Inc. v. Racal-Chubb Security Systems</em>, 997</td>
<td>Upholding limitation of liability in alarm system contract because an agreement to limit one’s liability for future negligence is enforceable if the agreement</td>
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<td>Utah</td>
<td><em>DCR, Inc. v. Peak Alarm Co.</em>, 663 P.2d 433 (Utah 1983).</td>
<td>Limitation of liability provision will be upheld if it clearly and unequivocally expresses an intent to limit the defendant’s liability. Absent such a clear expression of intent in this instance, the court declined to construe the limitation of liability in a burglar alarm monitoring contract to $50 so as to extend it to tort damages.</td>
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<td>Vermont</td>
<td><em>Housing Vermont v. Goldsmith &amp; Morris</em>, 685 A.2d 1086 (Vt. 1996).</td>
<td>Refused to enforce limitation of liability provision in owner/architect agreement. Such a provision will not be enforced unless its language makes unmistakable the intention of both parties to relieve the architect of liability. The clause relied on by the architect did not meet this. Further, the clause contained no reference to negligence or wrongful conduct, and thus could not insulate the architect from liability.</td>
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<td>Virginia</td>
<td><em>Jefferson Loan Office, Inc. v. Midlothian Electronics, Inc.</em>, No. LW-1586, 1993 Va. Cir. LEXIS 811 (Va. Cir. Ct. Sept. 22, 1993).</td>
<td>Limitation of liability clause in contract to hook up and install a computer chip in a security system did not apply, as the clause was expressly limited to sales or leases of security and/or alarm systems.</td>
</tr>
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<td>West Virginia</td>
<td><em>Kyriazis v. University of West Virginia</em>, 450 S.E.2d 649 (W. Va. 1994).</td>
<td>Limitation of liability clause in release form for participation in rugby match at state university was not enforceable and was contrary to public policy, in that by providing recreational activities to its students, the university fulfilled its educational mission and performed a public service, and also possessed a decisive bargaining advantage.</td>
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<td>Wisconsin</td>
<td><em>Wausau Paper Mills Co. v. Chas. T. Main</em>,</td>
<td>Upholding limitation of liability clause excluding owner’s consequential damages found in</td>
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V. DISCLAIMING LIABILITY FOR ITEMS MISSED IN INSPECTION

The duties of a design professional may consist only of the preparation of plans and specifications, or they also may include some involvement in the construction process (such as “observing,” “monitoring,” “supervising,” or “inspecting” the construction). The question becomes, in the latter instance, under what circumstance the design professional will be held liable if the construction performed by the contractor is unworkmanlike or fails to comply with the plans and specifications.

A. AIA Disclaimer Language.

Beginning with the 1976 version of the General Conditions, the AIA began to limit the architect’s duty and liability for review of the quality and quantity of the contractor’s work by providing that the architect’s certification of the contractor’s application for payment did not mean that the architect had performed an exhaustive or continuous on-site inspection:

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on his observations at the site as provided in Subparagraph 2.2.3 and the data comprising the Application for Payment, that the Work has progressed to the point indicated; that, to the best of his knowledge, information and belief, the quality of the Work is in accordance with
the Contract Documents . . . ; and that the Contractor is entitled to payment in the amount certified. However, by issuing a Certificate for Payment, the Architect shall not thereby be deemed to represent that he has made exhaustive or continuous on-site inspections to check the quality or quantity of the Work or that he has reviewed the construction means, methods, techniques, sequences or procedures, or that he has made any examination to ascertain how or for what purpose the Contractor has used the moneys previously paid on account of the Contract Sum.\(^2\)

Over the intervening years, the AIA’s standard documents have further reworked the scope and explanation of the design professional’s duty to oversee the progress of construction. The 1987 edition of AIA Document B141, Standard Form of Agreement Between Owner and Architect,\(^3\) continues to refer to the architect’s “observation” of the contractor’s performance:

2.6.5 The Architect shall visit the site at intervals appropriate to the stage of construction or as otherwise agreed by the Owner and Architect in writing to become generally familiar with the progress and quality of the Work completed and to determine in general if the Work is being performed in a manner indicating that the Work when completed will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the Work.

* * *

2.6.9 The Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor’s responsibility under the Contract for Construction. The Architect shall not be responsible for the Contractor’s schedules or failure to carry out the Work in accordance with the Contract Documents. The Architect shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other person performing portions of the Work.\(^4\)
The 1997 version of the AIA Owner-Architect Agreement deletes any reference to the architect’s “observation” of the work. Over the last 50 years, under the various editions of the AIA documents, the architect stopped “supervising” the work and now, by implication, the architect has stopped “observing” it, too. The AIA standard-form contracts no longer refer to the architect’s site responsibility as “observation” but instead speak in terms of “administration” of the contract. According to the 1997 edition of the AIA Owner-Architect Agreement:

2.6.2.1 The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor’s operations, or as otherwise agreed by the Owner and the Architect in Article 2.8, (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor’s rights and responsibilities under the Contract Documents.

2.6.2.2 The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor. However, the Architect shall not be responsible for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect’s negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work.

B. Case Law Interpretation.
In those decisions involving construction administration by a design professional, a frequent issue is whether the design professional should have discovered an alleged defect in construction during one of the design professional’s site visits, or should have been on site during a critical time during construction. Owners frequently assert that the design professional has a duty during site observation to detect and either prevent or notify the owner of construction defects or deviations from the contract documents. Design professionals respond by pointing to the kinds of contract provisions examined above. In not all instances have those provisions been enforced in favor of the design professional. (This Section examines only those cases involving damage to property; cases involving safety or injury to subcontractors or third-parties have not been considered.)

In those instances in which a design professional has simply failed to conduct site visits at all, the design professional may be held liable for improper construction work performed by the contractor because the design professional has breached its duty to the owner to attempt to guard the owner against deficiencies in the work. Similarly, in those instances in which the architect or engineer has actual knowledge of defects in the construction, but fails to require that such defects be remedied or fails to bring them to the attention of the owner, the architect or engineer may be held liable, again for its breach of duty to the owner. The more vexing question involves those factual situations in which the designer has conducted inspections but has failed to become aware of the contractor’s failure to comply with the plans and specifications. On this issue, the courts have split.

First National Bank of Akron v. Cann involved the architect’s complete failure to visit the job site. The contractual provision between the owner and the architect read as follows:

(The Architect) will make periodic visits to the site to familiarize himself generally with the progress and quality of the work and to
determine in general if the work is proceeding in accordance with the Contract Documents. He will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work and he will not be responsible for the Contractor’s failure to carry out the construction work in accordance with the Contract Documents. During such visits and on the basis of his observations while at the site, he will keep the Owner informed of the progress of the work, will endeavor to guard the Owner against defects and deficiencies in the work of Contractors, and he may condemn work as failing to conform to the Contract Documents. Based on such observations and the Contractor’s Applications for Payment, he will determine the amount owing to the Contractor and will issue Certificates for Payment in such amounts. These Certificates will constitute a representation to the Owner, based on such observations and the data comprising the Application for Payment, that the work has progressed to the point indicated. By issuing a Certificate for Payment, the Architect will also represent to the Owner that, to the best of his knowledge, information and belief based on what his observations have revealed, the quality of the work is in accordance with the Contract Documents. He will conduct inspections to determine the dates of substantial and final completion and issue a final Certificate for Payment.102

After a bench trial, the court found that the architect’s duty included inspections and monitoring of a nature that would have uncovered the vast majority of defective construction conditions on the portion of the construction that failed.103 The court found that the purpose of the contract documents, taken as a whole, was the performance of a remodeling project with good quality workmanship and materials. To the extent there was an internal conflict in the quoted provision between the general-supervision clause and the no-exhaustive-or-continuous-on-site-inspection clause, the general-supervision clause was more essential to the satisfactory completion of the project.104 As the court stated:

That exhaustive, continuous on-site inspections were not required, however, does not allow the architect to close his eyes on the construction site, refrain from engaging in any inspection procedure whatsoever, and then disclaim liability for construction defects that even the most perfunctory monitoring would have prevent.105
Thus, the court construed the architect’s duty under this provision to include inspections and monitoring of the construction such that the architect would have noted the defective condition of the wall that failed. The court found that the architect’s failure so to perform constituted a material breach of the architect’s agreement with the owner, and imposed liability upon the architect despite the contractual disclaimer.  

The other extreme in this inquiry is the situation in which the architect, by inspection or otherwise, becomes aware of defects in the contractor’s construction but fails to act on them. Under this scenario, the courts also have refused to enforce contractual disclaimers of liability. For example, in *Board of Education of Hudson City School District v. Sargent, Webster, Crenshaw & Folley*, the owner and an architectural firm entered into an AIA agreement for the preparation of plans and specifications and the provision of supervisory architectural services in connection with the construction of a new high school building. Under the owner-architect agreement, the architect was required to make periodic visits to the site “to determine in general if the work is proceeding in accordance with the Contract Documents.” The architect was required to keep the owner “informed of the progress of the work, [and] endeavor to guard [it] against defects and deficiencies . . . and . . . may condemn work as failing to conform to the Contract Documents.” The architect was not required to make “exhaustive or continuous on-site inspections to check the quality or quantity of the work” and the architect was not responsible “for the contractor’s failure to carry out the construction work in accordance with the Contract Documents.”

The type of roof specified by the architect for the high school required protection from exposure to precipitation as the layers were applied. In fact, the contractor did not provide such protection, and at least once the architect’s representative observed the contractor’s personnel
shoveling snow off the partially completed roof. The architect directed the contractor to remove and replace the defective roofing, but the contractor refused and the architect ultimately agreed to several less severe remedial measures.109

After the roof failed, the owner sued the architect for breach of contract for failure to have guarded the owner against the contractor’s defective performance. The Appellate Division affirmed the trial court’s refusal to enter a directed verdict in favor of the architect on this count, noting that, first, exculpatory provisions are disfavored and are narrowly construed.110 Secondly, the underlying rationale exonerating an architect from liability under this disclaimer has no application in the instance of defects known by the architect: “The cases reason that an owner who has not contracted and paid for an architect to closely supervise construction should not be able to hold the architect liable for those defects in the contractor’s performance which close supervision would have revealed.”111 However, when “an architect discovers defects in the progress of the work which the owner, if notified, could have taken steps to ameliorate, the imposition of liability upon the architect for failure to notify would be based on a breach of his own contractual duty and not as a guarantor of the contractor’s performance.”112

A similar result was reached in Dan Cowling & Associates, Inc. v. Board of Education of Clinton School District #1,113 in which the architect had made numerous trips to the construction site and was specifically informed and shown by the contractor that the work could not be performed in conformance with the plans and specifications. The court found that the architect’s having inspected the work and approved it in an obviously defective condition provided substantial evidence that the architect had breached his contractual obligation to guard the owner against defects and deficiencies in the construction work.114
The architect also was found to have breached its duty to the owner in *U.R.S. Co. v. Gulfport-Biloxi Regional Airport Authority*. In this case, while the typical exculpatory language was included in the contract documents, the agreement between the owner and the architect also provided that the architect would employ a full-time on-site project representative by whose inspections the architect would “endeavor to provide further protection for [the owner] against defects in the work.” Having found it to be undisputed that the work on the failed roof was not in compliance with the plans and specifications, that the workmanship was of poor quality, and that the architect’s representative was well aware of those conditions, the court found that the architect had breached its contractual duty to the owner to protect it against defects and deficiencies in the work of the contractor.

Another case in which the court refused to enforce the architect’s exculpatory language was *Hunt v. Ellisor & Tanner, Inc.* The exculpatory language read as follows:

[1] The Architect will make periodic visits to the site to familiarize himself generally with the progress and the quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. [2] On the basis of his on-site observations as an architect, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor. [3] The Architect will not be required to make exhaustive on-site inspections to check the quality and quantity of the Work. [4] The Architect will not be responsible for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor’s failure to carry out the Work in accordance with the Contract Documents.

The owner sued the architect for breach of contract, the jury found in favor of the architect, and the trial court entered a judgment n.o.v. in favor of the owner.
Refusing to follow a prior case which had construed an identical provision as absolving the architect from any liability as a matter of law,\textsuperscript{120} the \textit{Hunt} court concluded that the provision “said to be exculpatory constitutes nothing other than an agreement that the architect is not the insurer or guarantor” of the contractor’s duty to cause the work to comply with the plans and specifications.\textsuperscript{121} The court reached this conclusion because the first three sentences of the paragraph imposed a nonconstruction responsibility upon the architect to provide information, not to perform work or make improvements at the job site. Thus, the court reasoned, the fourth sentence existed simply to emphasize the architect’s nonconstruction responsibility and to make certain that the architect was not responsible for the contractor’s malfeasance. In short, the architect, as the provider of information to the owner, does not guarantee that the contractor’s work will be performed in conformance with the contract documents. However, it also follows, held the court, that “the contract does not exculpate [the architect] from liability for the general contractor’s failure to carry out the work in accordance with the contract documents.”\textsuperscript{122}

A similar case is \textit{Gables CVF, Inc. v. Bahr, Vermeer & Haecker Architect, Ltd.}.\textsuperscript{123} Here, the architect contracted with a joint venturer consisting of the appellant and an entity that acted as the general contractor on the project. While the parties’ contract was patterned after the 1977 edition of the AIA Document B141, certain provisions relating to the architect’s inspection and oversight of construction were deleted, and the parties added a provision stating that the architect would be paid “$125 per trip” plus mileage for “Observation of Construction.”\textsuperscript{124} As a result of such observations, the architect reported construction problems to the joint venture partner that was acting as the general contractor for the project. Ultimately, however, the architect wrote to that joint
venture partner stating that the project was found to be “generally in accordance with the intent of the drawings and specifications.”

On appeal, the architect argued that its contractual obligation to observe the construction work imposed upon it the requirement to determine simply the degree of completion of the project but not to discover and report deviations from the plans and specifications. Citing the Hunt decision, the Gables court found that the exculpatory provision did not absolve the architect from liability for a breach of duty, “if one exists,” to inform the owner of deviations from the plans and specifications in the construction. This court also noted that the contract, drafted by the architect, provided for a $125 fee for observation of construction without defining the precise nature of such observation duties. Given that ambiguity, the court found that a factual question existed regarding the architect’s observation duties and concluded that the architect was not entitled to summary judgment.

To similar effect see Dickerson Construction Co. v. Process Engineering Co., considering the liability of the architect and the contractor for the failure of a building due to expansion of the clay soil on which the building was situated. The owner’s theory was that the damage resulted from the failure of the contractor to construct drainage ditches on the east side of the building, while the architect argued that the owner’s negligent use of chemicals after occupancy of the facility had deteriorated the floor slab and allowed process water to saturate the ground beneath the slab. The architect argued that it was error for the court to submit an instruction stating that “it was the duty of the Architect-Engineer to exercise reasonable care and skill in supervision of construction to the extent necessary to attain the purposes intended,” given the contract’s exculpatory language:
The Architect will endeavor by general administration of the construction contracts to guard the Owner against defects and deficiencies in the work of contractors, but he does not guarantee the performance of their contracts. The general administration of the Architect is to be distinguished from the continuous on-site inspection of a Project Inspector.\textsuperscript{130}

The appellate court did not find use of the word “supervision” in the instruction to be reversible error because the architect was required by contract to oversee the contractor’s placement of backfill against the foundation walls, to inspect and approve same before the pouring of concrete, and to make a final inspection that the work had been completed in accordance with the contract documents. This instruction did not imply that the architect had a duty to make continuous on-site inspections or to supervise the contractor’s work, or that the architect guaranteed the contractor’s work. Moreover, the factual issue was whether the architect used reasonable care in conducting the inspections that it did make.\textsuperscript{131} The court concluded that the jury was justified in finding negligence on the part of the architect in failing to require the contractor to construct the building and drainage system in conformance with the contract documents.\textsuperscript{132}

Another case finding a design professional liable despite a contractual disclaimer of inspection obligations is \textit{Erie Insurance Exchange v. Lewis}.\textsuperscript{133} In \textit{Erie}, a fire occurred in an historic three-story building that was under renovation, and the plaintiffs (the first-floor tenant and the property carrier) brought suit against the architect. Although the plans prepared by the architect specified that all water pipes were to be insulated, the architect had subsequently directed non-insulation of the water pipes that ultimately caused the fire. The architect had directed the contractor to place the copper water pipes in question as high as possible against the gypsum board to allow a higher ceiling elevation. This installation failed to comply with fire protection standards and violated the National Fire Protection Code. Because the architect was familiar with the standards
requiring a minimum distance between hot water lines and combustible materials, the plaintiffs maintained that the architect, among other things, was negligent in its subsequent failure to inspect and object to the contractor’s placement of the water pipes that caused the fire.\textsuperscript{134}

The architect pointed to the contractual provision disclaiming any obligation to make exhaustive or continuous on-site inspections. The court responded that this was not the typical scenario where a contractor on his own has deviated from the design plans and the architect failed to discover the deviation.\textsuperscript{135} In such cases, the clause that the architect relied upon would be appropriately asserted.\textsuperscript{136} Here, however, the architect had agreed with the plumbing contractor to eliminate the insulation specified in the contract documents in order to comply with the tenant’s desire for the increased ceiling height necessary to accommodate a suspended ceiling.\textsuperscript{137} According to the court, the contract language made it clear that the architect must honor its obligation to follow the contract documents and endeavor to guard the owner against defects and deficiencies in the project.\textsuperscript{138} Because the architect did not inspect the project properly, the architect was found liable to the plaintiffs for its negligence.\textsuperscript{139}

\textbf{VI. ASSIGNING RISK OF CHANGES IN APPLICABLE LAWS AND/OR BUILDING CODES}

\textbf{A. Contract Provisions Requiring Design in Conformance With Applicable Laws.}

According to the 1997 edition of AIA Document B141, the Owner-Architect Agreement, the architect is obligated to review laws, codes, and regulations applicable to the circumstances.\textsuperscript{140} In addition, the architect is to respond in the design of the project to requirements imposed by governmental authorities having jurisdiction over the project.\textsuperscript{141} According to the Construction Owners Association of America’s COAA Document No. P-300A, “the professional
shall perform all services and prepare all documents in accordance with the requirements of the governmental agency having jurisdiction over the project.”

However, despite a design professional’s best efforts to adhere to applicable laws and codes as required by the contract, a problem occasionally arises when the laws - or the interpretations of those laws - change in the middle of a project or shortly after substantial completion. The issue is whether the design professional or the owner bears the cost of redesigning or rebuilding the project to comply with the new law or new interpretation.

B. Changes in Interpretation of the ADA and Its Effect on the Design Professional.

One enactment in particular that has raised difficult interpretation issues for design professionals is the Americans with Disabilities Act (ADA). Enacted in 1990, the ADA’s purpose is to provide certain rights to disabled Americans. The ADA includes three Titles. Title III of the Act covers use and access to public accommodations and commercial buildings. The interpretation of certain provisions of Title III, and certain regulations promulgated under Title III, has resulted in increased liability for design professionals, particularly with respect to the design of sports and entertainment facilities.

1. Differing Interpretations of Liability under the ADA.

The differing interpretations of design professionals’ liability for ADA violations hinges on two of its sections, § 302(a) and § 303. Section 302(a) provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases . . . or operates a place of public accommodation.

The second relevant provision of the ADA, § 303, states:
As applied to public accommodations and commercial facilities, discrimination for purposes of Section 302(a) includes . . . a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities.\textsuperscript{150}

Section 302(a) covers existing places of public accommodation (such as restaurants, hotels, retail shops, and cinemas), but does not apply to existing “commercial facilities” that are not places of public accommodation (such as office buildings, manufacturing plants, etc.).\textsuperscript{151} Conversely, § 303 applies both to new places of public accommodation and to new commercial facilities, requiring that they be designed and constructed in such a manner as to be accessible to the disabled.\textsuperscript{152} Section 302(a) expressly applies to owners, lessors/lessees, and operators of places of public accommodation, while § 303, which is written in the passive voice, fails to identify those who may be held liable for its violation.\textsuperscript{153} The courts’ interpretations of these statutory provisions have resulted in split decisions, with some cases imposing liability upon design professionals under the ADA, and others refusing to do so.

The U.S. District Court for the District of Columbia reviewed § 302(a) and concluded that liability thereunder could not be imposed against the A/E for ADA violations in its design of an arena inasmuch as the A/E was not an owner, lessor/lessee, or operator of the facility in question.\textsuperscript{154} Secondly, the court stated, § 303 of the statute refers to a failure to “design and construct” in an accessible manner, which is “distinctly conjunctive.”\textsuperscript{155} The court found that this term refers to only those parties responsible for both the design and the construction functions, such as a design/build entity, a general contractor, or the facility’s owner.\textsuperscript{156} Because A/Es typically are not responsible for both the design and construction of a facility, neither § 302(a) nor § 303 of the ADA has reference to A/Es and they should not be held liable for ADA violations.\textsuperscript{157}
Lonberg v. Sanborn Theatres, Inc. 158 reached a similar result. The Lonberg court focused on the argument that § 302(a) of the ADA imposes liability upon “any person who owns, leases . . . , or operates” in a discriminatory manner a place of public accommodation, while § 303 prohibits discriminatory “design and construction” of public accommodations and commercial facilities. The plaintiffs contended that, read strictly, § 302(a) would allow only the owners, lessors/lessees, and operators of places of public accommodations to be held liable for ADA violations, while no one could be held liable under § 303 for ADA violations with respect to commercial facilities. 159

Importantly, with respect to the plaintiffs’ attempt to impose liability upon the Lonberg architect, the court noted that after a noncompliant building is complete, injunctive relief is meaningful only against the person currently in control of the building: by the time of the lawsuit, the architect is “out of the picture.” 160 Because of this, the court reasoned, making design professionals (and others who do not own, lease, or operate buildings) liable for design and construction discrimination under the ADA would create liability in a person against whom the statute provides no meaningful remedy. 161 As a result, the court held that only an owner, lessor/lessee, or operator of a noncompliant public accommodation could be held liable for “design and construction” liability under § 303.

A number of other decisions, however, have interpreted the ADA (and the Fair Housing Act (FHA), which includes similar accessibility language) in such a manner as to hold design professionals liable. These cases have noted that inclusion of the word “design” in the ADA and the FHA indicates Congress’ intent to subject to liability those who design inaccessible buildings. 163 The notion that two parties working together, one performing the design function and
the other performing the construction function, should thereby be insulated from liability is a “frank absurdity.”¹⁶⁴ Courts imposing liability upon architects for discriminatory design recognize the practical reality that architects often both design and participate in the construction of facilities (in terms of monitoring and administering the construction).¹⁶⁵

These decisions also turn on a basic tenet of statutory construction, that statutes should be interpreted in such a manner that statutory terms are not rendered meaningless. If an entity engaging in discriminatory design were not held liable under the ADA, Congress’ inclusion of the term “commercial facilities” in § 303 would be nullified. In other words, defendants have argued that § 302(a) allows only owners, lessors/lessees, and operators to be held liable under the ADA. However, § 302(a) deals with places of public accommodation while § 303 prohibits discriminatory design and construction in places of public accommodation and in commercial facilities. If these sections were read together, such that owners, lessors/lessees, and operators of places of public accommodation could be held liable for discriminatory design and construction involving places of public accommodation -- but only for places of public accommodation -- then § 303’s prohibition against discriminatory design and construction in commercial facilities would cast its liability net over no one.¹⁶⁶ As a matter of public policy, commercial facilities, as much as places of public accommodation, should be subject to accessibility standards for new construction, and ignoring or de-emphasizing § 303 would remove commercial facilities from the scope of ADA compliance, an interpretation clearly violative of the public interest.¹⁶⁷

2. **Differing Interpretations of the “Line of Sight” Requirement.**
The “line of sight” controversy is another area in which varying interpretations of design requirements have resulted in the sometimes-unexpected imposition of liability upon design professionals.

When the ADA was enacted in 1990, the United States Architectural and Transportation Barriers Compliance Board (Access Board) was directed to issue minimum guidelines for the implementation of Title III. In compliance with the notice-and-comment requirements of the Administrative Procedures Act (APA), the Access Board promulgated the Americans with Disabilities Act Accessibility Guidelines (ADAAG) in 1991. As part of its development of the ADAAG, the Access Board specifically requested comment on the question of requiring enhanced lines of sight for the wheelchair-bound, but ultimately announced its intention to defer the question and to cover the issue in a future regulation.

The same day in 1991 that the Access Board promulgated the ADAAG, the Department of Justice (DOJ) adopted, word-for-word, these guidelines as its own regulations, titled the Justice Department’s Standards for Accessible Design (JDSAD). The DOJ thereafter issued a Technical Assistance Manual (TAM) in 1993. In a 1994 supplement to the TAM, the DOJ first imposed the requirement that wheelchair users be provided with unobstructed lines of sight over standing spectators.

Similar to the ADA’s “design and construct” provision, the “line of sight” requirement has led to varying interpretations, and varying liability on the part of design professionals.

The majority of cases considering the line of sight requirement have imposed liability upon designers and owners of facilities. These cases have reasoned that the DOJ’s
supplement to the TAM was not a substantive rule requiring the notice-and-comment procedure of the APA but instead was an interpretive rule. An interpretive rule is simply an agency’s advice to the public as to the manner in which the agency will construe the statutes and regulations it is charged to administer.

CONCLUSION

Methods of restricting liability or allocating risk are necessary, even vital, to the practice of any design professional. While some risk allocation or limitation of liability provisions may be enforced in favor of the design professional, traps await the unwary. Design professionals, and their counsel, are well-advised to anticipate and attempt to avoid these traps through careful contract drafting and project administration.
ENDNOTES


6. Cushman, at 33.


10. *Id.*


15. *Id.* at XVII.T.12.


18. Whitney at p. 90.


20. Id.

21. Id. at 501.


27. Fruin-Colnon, 180 A. 2d at 230.


30. Id. at 359.

31. Id. at 360.


33. Id. at 374.

34. Id. at 379.

35. Id. at 381.


37.
38. In *Hensel Phelps Construction Co. v. General Services Administration*, the General Services Board of Contract Appeals explained that “coordination drawings” are intended to show the final layout of various mechanical, electrical, and plumbing pipes, conduit, and ducts in the ceiling spaces and elsewhere, as the contract drawings prepared by the project designer may show the layout of these systems only schematically. Coordination drawings are prepared to ensure that the various systems will fit into the limited amount of space available. The purpose of preparing coordination drawings is to take the mechanical, electrical, and plumbing design, as shown by the A/E in the contract drawings, and to fit that design into the building space that is depicted by the A/E in the contract drawings.


40. *Id.*

41. *Id.*

42. 48 C.F.R. § 852.236-81.

43. 670 N.Y.S.2d 697 (Sup. Ct. 1997).

44. *Id.* at 698.

45. *Id.*

46. *Id.* at 700.


48. *Id.*


50. *Id.*


52. *Id.*

53. *Id.*
54. Id.


56. Duncan v. Missouri Board for Architects, Professional Engineers & Land Surveyors, 744 S.W.2d 524, 536 (Mo. App. 1988).

57. Id. at 535.


60. Paragraph 3.2.18 of the AIA General Conditions (1987 edition) provided as follows:

3.12.8 The Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect’s approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and the Architect has given written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect’s approval thereof.

61. Paragraph 4.2.7 of the AIA General Conditions (1987 edition) read as follows:

4.2.7 The Architect will review and approve or take other appropriate action upon the Contractor’s submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect’s action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect’s professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or
performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect’s review of the Contractor’s submittals shall not relieve the Contractor of the obligations under Paragraph 3.3, 3.5 and 3.12. The Architect’s review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect’s approval of a specific item shall not indicate approval of an assembly of which the item is a component.


63. **3.2.18** The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect’s approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect’s approval thereof.

64. Paragraph 4.2.7 of the AIA General Conditions (1997 edition) states:

**4.2.7** The Architect will review and approve or take other appropriate action upon the Contractor’s submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect’s action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor, or separate contractors, while allowing sufficient time in the Architect’s professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect’s review of the Contractor’s
submittals shall not relieve the Contractor of the obligations under Paragraph 3.3 not relieve the Contractor of the obligations under Paragraphs 3.3 [“Supervision and Construction Procedures”], 3.5 [“Warranty”], and 3.12 [“Shop Drawings, Product Data, and Samples”]. The Architect’s review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques sequences or procedures. The Architect’s approval of a specific item shall not indicate approval of an assembly of which the item is a component.


68. Id.


74. See Spearin.


77. Id.

78. Valhal Corp. v. Sullivan Assoc., Inc. 44 F. 3d 195, 204 (3rd Cir. 1995).

79. Id.

80. Id.

81. A provision, clause, covenant, or agreement contained in, collateral to, or affecting a construction contract that purports to indemnify the promisee against liability for damages for (1) death or bodily injury to persons, (2) injury to property, (3) design defects or (4) other loss, damage or expense arising under (1), (2), or (3) of this section from the sole negligence or willful misconduct of the promisee or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable; however, this provision does not affect the validity of an insurance contract, workers’ compensation, or agreement issued by an insurer subject to the provisions of Alaska Stat. § 21, or a provision, clause, covenant, or agreement of indemnification respecting the handling containment or cleanup of oil or hazardous substances as defined in Alaska Stat. § 46.

Alaska Stat. § 45.45.900.


83. A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against public policy and is void and unenforceable . . .


84. 709 S.W.2d 94 (Ark. 1986).


86. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that his section shall not affect the validity of
any insurance contract, workers’ compensation agreement or other agreement issued by an
admitted insurer. This subdivision shall not preclude a promisee requiring indemnification
for damages arising out of bodily injury to persons or damage to property caused by or
resulting from the negligence of a party other than the promisee, whether or not the promisor

Every covenant, agreement or understanding in, or in connection with any contract or
agreement made and entered into by owners, contractors, subcontractors or suppliers
whereby an architect, engineer, surveyor or their agents, servants or employees are
indemnified for damages arising from liability for bodily injury to persons or damage to
property caused by or arising out of defects in maps, plans, designs or specifications,
prepared, acquired or used by such architect, engineer, surveyor or their agents, servants or
employees shall be deemed void as against public policy and wholly enforceable. N.Y. Gen.
Oblig. Laws § 5-324.

88. 927 P.2d 86 (Or. 1996).

89. Southern Pacific Co. v. Layman, 145 P.2 295 (Or. 1944)(interpreting clause providing for
indemnification “against any and all loss, damage, injury, cost and expense of every kind and
nature, from any cause whatsoever, resulting directly or indirectly from the maintenance,
presence or use” of a railroad crossing).

90. 620 N.Y.S.2d 918 (1994).


92. Sweeney Co. of Maryland v. Engineers-Constructors, Inc., 823 F.2d 805, 809 & n.3 (4th Cir.

93. American Institute of Architects AIA Document B141, Standard Form of Agreement
(1987)

94. Similar provisions are found in AIA Document A201, General Conditions of the Contract for
Construction (1987 Edition), under Paragraphs 4.2.2 and Paragraph 4.2.3.

95. Charles M. Sink and Mark D. Peterson, The A201 Deskbook: Understanding the Revised
General Conditions (1998) at 73.

96. General Conditions, Paragraph § 4.2.1.

97. Similarly limiting provisions are found at Paragraphs 4.2.2 and 4.2.3 of the AIA General


102. *Id.* at 435-36.

103. *Id.* at 436.

104. *Id.* at 437.

105. *Id.* at 436.

106. *Id.*


108. *Id.* at 816.

109. *Id.* at 817.

110. *Id.* at 818.

111. *Id.*

112. *Id.* (emphasis added).


114. *Id.* at 217-18.

115. 544 S.2d 824 (Miss. 1989).

116. *Id.* at 827.

117. *Id.*

118. 739 S.W.2d 933 (Tex. App.1987).

119. *Id.* at 935.

121. *Id.* at 937.

122. *Id.*

123. 506 N.W.2d 706 (Neb. 1993).

124. *Id.* at 709.

125. *Id.*

126. *Id.* at 710.

127. *Id.* at 711.

128. 341 So. 2d 646 (Miss. 1977).

129. *Id.* at 648.

130. *Id.* at 650-51.

131. *Id.* at 652.

132. *Id.* at 653.


134. *Id.* at *2.

135. *Id.* at *3.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. AIA B141 (1997 edition), Paragraph 1.2.3.6.

141. *Id.*

143. Friedlander, at § 20.19.

144. Id.

145. Id.

146. 42 U.S.C. § 12101(b)(1).


149. 42 U.S.C. § 12182(a) (“Prohibition of discrimination by public accommodations”).

150. 42 U.S.C. § 12183(a) (“New construction and alteration in public accommodations and commercial facilities”).


152. Id. at 145.

153. Id. at 146.


155. Id.

156. Id.

157. Id.


159. Id. at 1033-34.

160. Id. at 1036.
161. *Id.*

162. [I]t shall be unlawful . . .  
   (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a 
   dwelling to any buyer or renter because of handicap . . . .  
   (3) For purposes of this subsection, discrimination includes . . .  
   (C) . . . a failure to design and construct those dwellings in such a manner that [they] (i) 
   . . . are readily accessible to and usable by handicapped persons . . . .  

42 U.S.C. § 3604(f) (emphasis supplied).

   1997) (ADA).


   Lonberg*, 259 F.3d at 1033-34.

   F.3d 822, 824 (8th Cir. 1998).

168. *See, e.g., Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000); *Paralyzed Veterans of 
   America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997); *United States v. Ellerbe Becket, 
   Entertainment Centre at the Waterfront*, 193 F.3d 730 (3rd Cir. 1999).

   at 1268-69.