



Claim Trends and Contracting Safeguards

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Stuckey Insurance's Insured Day

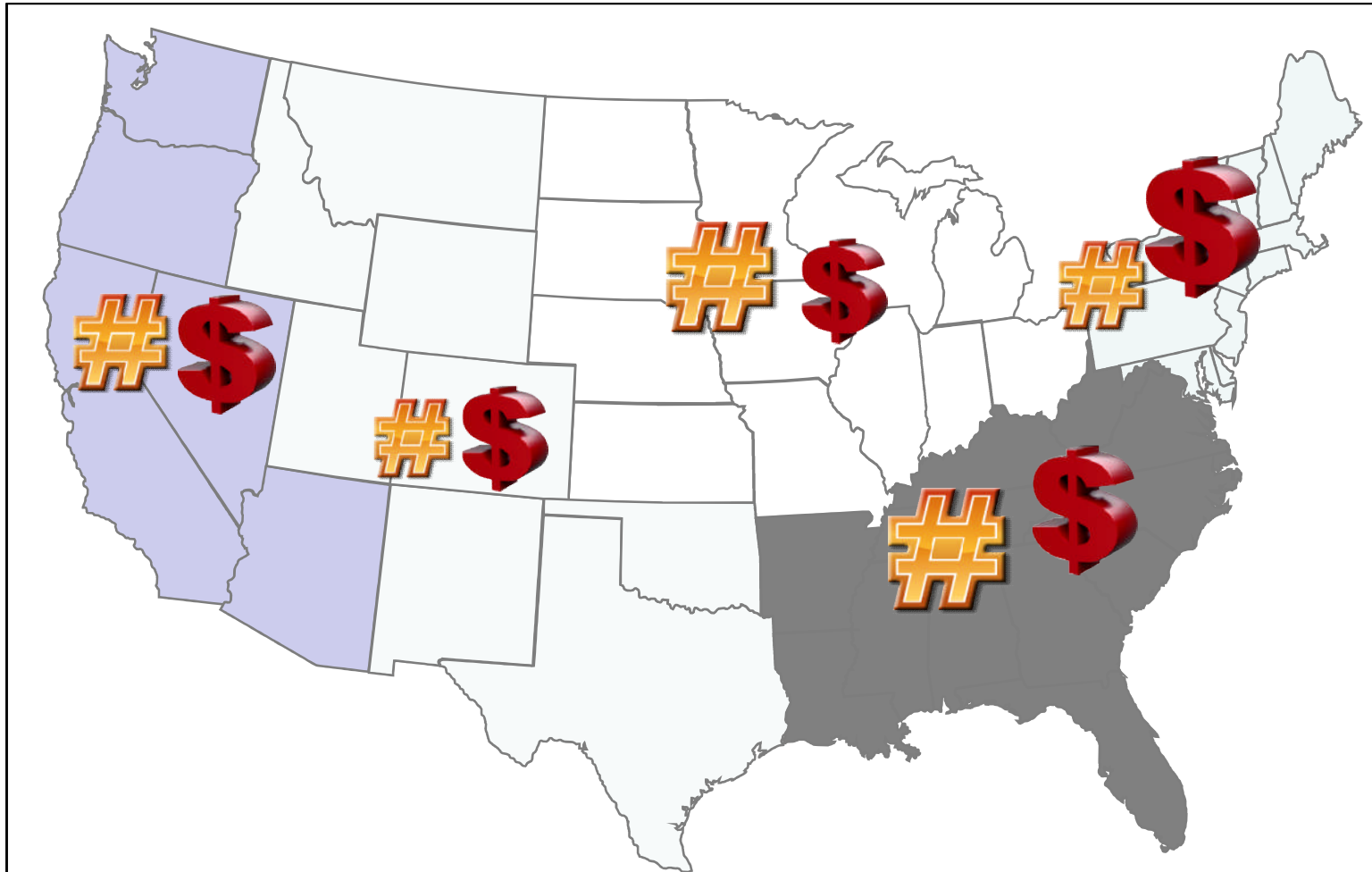
May 17- 18, 2011

West

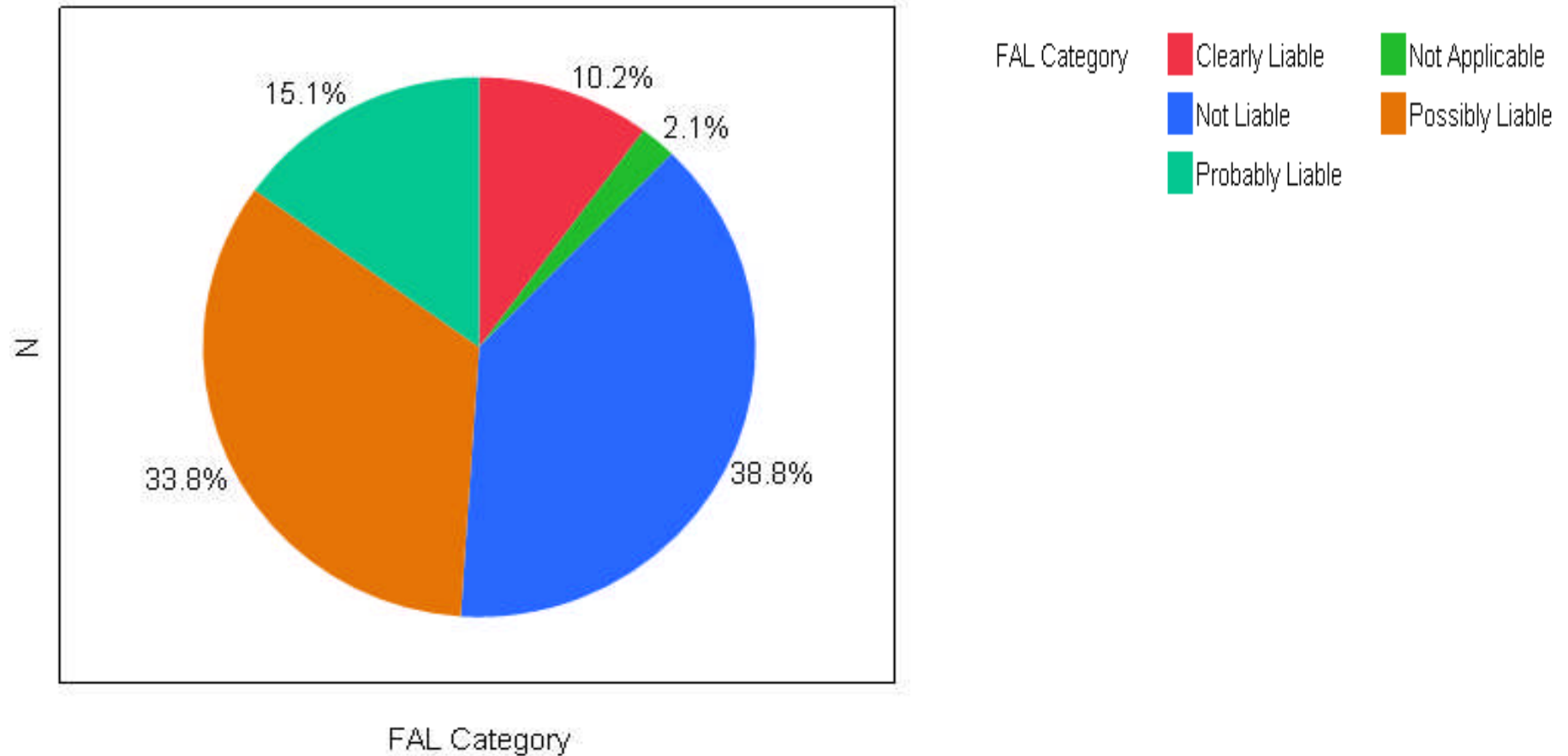


- **Top Project Types**
 - Single Family Subdivisions (28.3%)
 - Single Family Homes (22.1%)
 - New Condos (9.8%)
 - Commercial < 9 Stories (9.6%)
 - Road & Highway (8.9%)
- **LoL% = 23.2% yes**

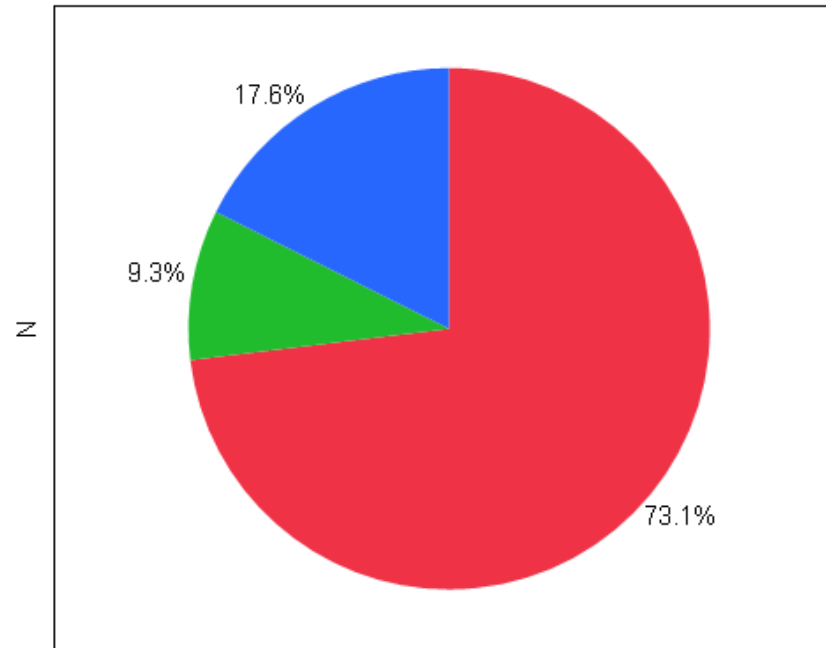
Relative Frequency and Claims Experience



Were They Liable?



How About LoL?



LoL in Contract

LoL in Contract ■ No ■ Unavailable
■ Yes

What can your company do to protect itself?

- Client Selection
- Project Selection
- Team Selection
- Contract Negotiation
- Project Management
- Document Management
- Money Management

Do Contracts Help?

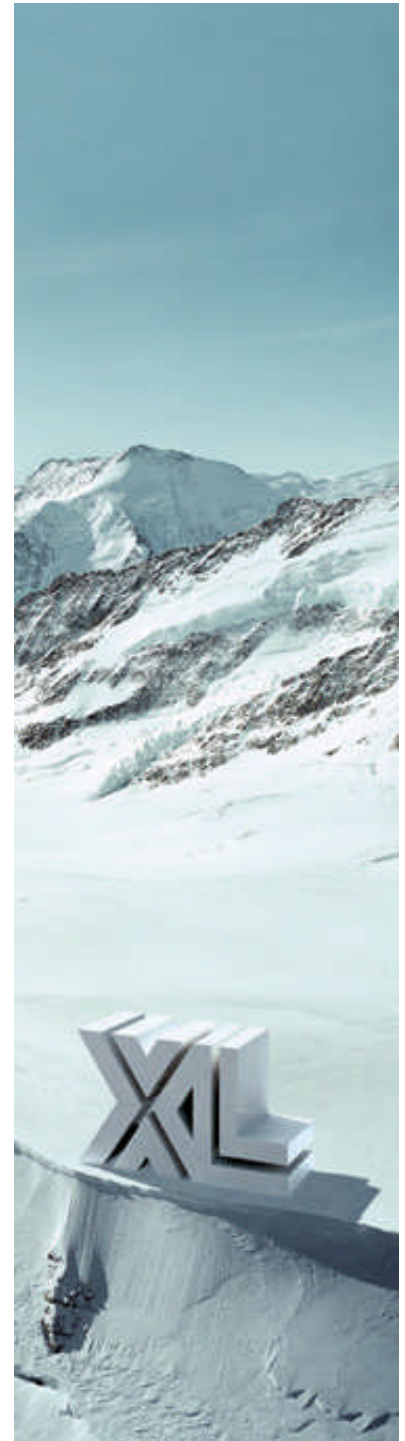
- In over 50% of the claims, the contract used was the insured's own or the association standard
 - Even good contracts won't save you from a claim
 - They do help with the outcome

Contract Negotiation

- Do you have a contract?
- Have you read that contract?
- Has your agent or attorney read the contract?
- Is your scope of work well defined?
- Is your indemnity obligation defined?
- Do you have a LOL or Waiver of Consequential Damages?
- Are you Prime or Sub?

Always Use A Written Contract

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Always Use A Written Contract

- Never do business on a verbal agreement!
- Contracts need to establish:
 - Scope of services
 - Services not included or provided by others
 - Additional Services
 - Fees and expenses
 - Timeframes and deadlines
 - Liability allocations and risk transfers

Always Use A Written Contract

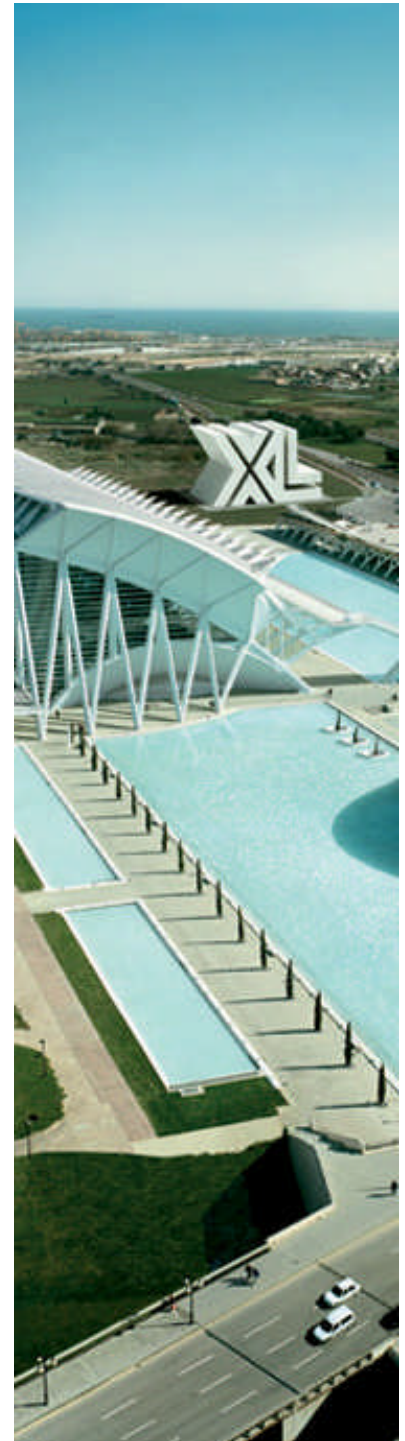
- What are the Owner's responsibilities?
- The contract between Owner and A/E is a two party agreement.
- The owner has a major role in the success or failure of his/her project.
 - What role is the owner going to play?
 - What information is the owner going to provide?
 - What services will the owner provide?

Always Use A Written Contract

- Reality Check:
 - Does your firm always use written contracts on every project?
 - Do your letter agreements include all essential contract elements?
 - Are you violating the laws of your state by not getting a signed contract?
 - Does your firm have formal signing protocols?

The Importance of Indemnity

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Contractual Indemnity

- ❖ What is Indemnity?
 - ❖ An Agreement to Compensate Another Party for a Loss
 - ❖ A mechanism to allocate risk
 - ❖ Express v. Implied

The Golden Rule

The party with the most control and influence over a risk should be responsible for bearing that risk.

Plan for the Worst Case Scenario

The Walnut Creek Pipeline Disaster – Nov. 9, 2004

- Backhoe operator struck a 10” 1,200 psi fuel line
 - 5 fatalities
 - 4 major burn victims
 - 20 lawsuits
 - \$100 million in civil settlements



Chronicle / Mike Kepka

Different Approaches to Indemnity

- Option 1: No indemnity. More common on smaller projects with less sophisticated owners.
- Option 2: Get the client to indemnify you. This scenario is unlikely.
- Option 3: You indemnify the client for your negligence only.
- Option 4: You and the client indemnify each other.
- Option 5: You indemnify the client for everything.

When Negotiating Indemnity Agreements, Know Your Policy Coverage

- Your policy provides coverage for DAMAGES as a result of CLAIM(S) arising out of the rendering of PROFESSIONAL SERVICES.
- PROFESSIONAL SERVICES are “those services performed for others in the practice of architecture, engineering, land surveying, landscape architecture, interior design, construction management, environmental consulting . . .”
- Someone else’s legal fees are not PROFESSIONAL SERVICES.
- Someone else’s negligence is not a PROFESSIONAL SERVICE.
- Contractual Liability Exclusion

Contractual Liability Exclusion

- **4. Contractual Liability**
- That part of any CLAIM(S) based upon or arising from liability of the INSURED assumed under any contract or agreement.
- This exclusion does not apply to liability for DAMAGES arising from a WRONGFUL ACT(S), POLLUTION CONDITIONS or a NETWORK SECURITY COMPROMISE(S) for which the INSURED would have been liable for in the absence of such contract or agreement.

Defense v. Indemnity – Big Difference

- Defense = Attorneys' Fees
- In most jurisdictions, indemnity does not automatically cover the cost of defense. You have to specifically agree to defend another party.
 - Caveat: In California, you must expressly deny any duty to indemnify
- The cost of defending another party is not necessarily covered by insurance.
- Indemnity obligations typically accrue once the Indemnitee pays money.

Is the Defense Obligation Always a Deal Breaker?

- Commercial reality: you might have to agree to defend a client if you want the project
- Make an informed business decision
- Evaluate your risk
- Be mindful of your subconsultants' contracts

What to do if you have to defend a client

- Try to negotiate the following:
 - Negligence trigger (backdoor indemnity)
 - Counsel of your choosing or counsel “reasonably acceptable” to you
 - At reasonable rates for that type of work in that particular community
 - Reimbursement for reasonable fees actually paid
 - When there is a claim, you defend the issue

What to do if you have to indemnify a client

- Try to negotiate the following:
 - Indemnify your client for your negligence
 - Negligence triggers – “upon a finding of negligence”
 - Mutual indemnity provisions – they can cancel each other out.

Common Indemnity Provision

The Consultant shall defend, indemnify and hold harmless the Client, its officers, directors, attorneys, lenders and employees against all actions, causes of action, demands, damages, fees, expenses and costs, including any attorney's fees, arising directly or indirectly, resulting from or connected in any way in whole or in part with the Consultant's performance of the services under this Agreement.

What to Negotiate

- The Consultant shall defend, indemnify and hold harmless the Client, its officers, directors, attorneys, lenders and employees against all actions, causes of action, demands, damages, fees, expenses and costs, including any attorney's fees, arising directly or indirectly, resulting from or connected in any way in whole or in part from the Consultant's negligent performance of the services under this Agreement.

Prevailing Party Attorneys' Fees

- If the parties have a dispute arising out of the contract, the prevailing party is entitled to its reasonable attorneys' fees.
- The thought is that this will encourage people to resolve their problems without litigation.

Prevailing Party Attorneys' Fees

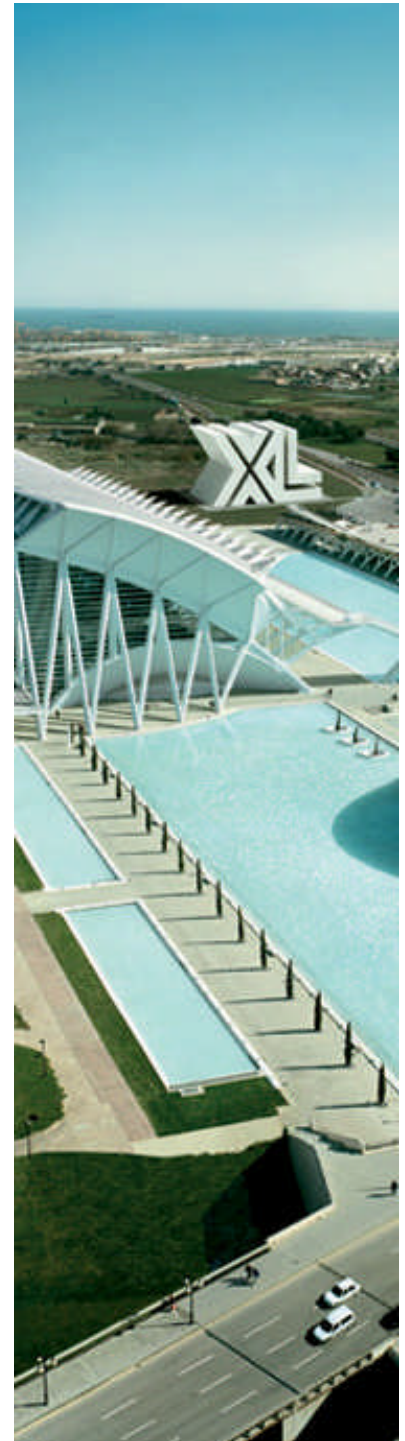
- Absent some agreement to the contrary, each party to a lawsuit usually must pay his or her own legal expenses, which includes attorneys' fees, court costs, expert-witness fees and other related expenses.

Attorneys' Fees

- Fact: No one has money to pay attorneys.
- Strike attorneys' fees provisions when possible.
 - Attorneys' fees often drive litigation by creating unrealistic expectations that a party can recover its legal fees even if it continues to litigate a matter.
- Attorneys' fees are not covered by insurance.
 - This means that you might not be able to recover fees if you prevail.

Limitation of Liability

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No Project is Perfect

- Today's construction projects:
 - high degree of complexity and sophistication
 - numerous participants
 - greatly compressed time schedules
 - tight budgetary constraints
- Do not accept unlimited liability on a project.

Limitation of Liability

- Limitation of Liability (LoL) is an agreement between the consultant and the client to establish the maximum liability for which the consultant will be liable if there is a claim by the client on the project.
- Purpose: to allocate the risks in some reasonable proportion to the profits and other benefits to be derived by each party.

Limitation of Liability

- Such a clause can make or break your company.
- The nature of the project should dictate whether the absence of a LoL is a deal breaker; e.g., hazardous materials, condominiums, design without construction phase services.
- Be up front with your client about limiting your liability.

Limitation of Liability

- Depends on State law – consult with your attorney first
 - Some states do not allow or strongly disfavor
- Rules of contract interpretation apply
- Generally, if the LoL is agreed upon by parties of relatively equal bargaining strength and is clearly drafted, it will be enforceable.

Choosing a Limitation Amount

- Amount of the fee or \$100,000, whichever is more or less?
- Using a “whichever is more” clause could be risky if your scope of work is constantly expanded.
- Most courts will strike unreasonably small LoLs; e.g., \$100.

Tips for Negotiating an Enforceable LoL

- Was there an “opportunity” to negotiate the LoL?
 - How sophisticated is the client?
 - Is it a standard pre-printed form, or was there a blank to fill in which evidences that the clause was negotiated?
 - Was there a space for the client to initial, thereby evidencing consent and the opportunity to negotiate?
 - Does the provision stand out in the contract?
 - Did your proposal reference your prior conversation in which you agreed upon the LoL?

Tips for Negotiating an Enforceable LoL

- Use this language: “...but in no event shall the Consultant’s liability exceed the amount of available insurance proceeds.”
 - This clause ties your LoL to your remaining policy aggregate.
 - Try to use this clause even if you cannot limit your liability to your fee or a set dollar amount.

Sample Limitation of Liability

- Consultant and Client have discussed the risks and benefits associated with this project as well as the Consultant's fee for services. Consultant and Client agree to the fullest extent permitted by law, that all claims for damages of any kind arising out of the Services furnished under this Agreement and any Change Orders to this Agreement, asserted against Consultant by Client (including client's officers, directors, employees, shareholders, members, agents, architects, other consultants, contractors and subcontractors) including claims against Consultant's officers, directors, employees, shareholders, members, and agents, are limited to ...

Sample Limitation of Liability

- The lesser of (i) \$100,000; or (ii) the total invoiced dollar value of the Services provided by Consultant under this Agreement and paid by Client, but in no event shall Consultant's liability exceed the amount of Consultant's available insurance proceeds.

Waiver of Consequential Damages

- Protection in addition to LoL
- Consequential Damages:
 - Loss of use, profits, income, business
 - damage to reputation
 - delays
 - punitive damages

Notices and Disclaimers

- *"XL Insurance" is a registered trademark of XL Capital Ltd. XL Insurance is the global brand used by member insurers of the XL Capital Ltd group of companies. In the US, the XL Insurance companies are: Greenwich Insurance Company, Indian Harbor Insurance Company, XL Insurance America, Inc., XL Insurance Company of New York, Inc., XL Select Insurance Company, and XL Specialty Insurance Company. Not all of the insurers do business in all jurisdictions nor is coverage available in all jurisdictions.*
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