

Are Courts Limiting Design Professionals' Ability to Limit Liability?

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Contract clauses limiting design professionals' liability, "once considered unprofessional,"¹ are today "a fact of everyday business and commercial life."² But some recent court decisions are calling into question the enforceability of these clauses. Are these recent decisions outlier cases, or do they signal a trend of courts to blur the distinction between limitations and exculpatory clauses? What is the future for limitation of liability clauses? The answer likely rests in the drafting and the scope of such clauses. That is not to suggest that any such clauses are bulletproof in every jurisdiction, as courts reach different conclusions concerning enforceability when they balance contractual limitations against (1) anti-indemnity statutes, (2) public policy, and (3) business entity and professional licensing statutes.

By way of historical example, in 1984 the Georgia Court of Appeals refused to enforce a limitation of liability contained in a warranty clause in a construction contract because it "essentially" insulated a contractor "from any liability whatsoever except for repair or replacement" of the contractor's work.³ In *Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc.*, the contractor agreed to replace a commercial building's roof but shifted the risk flowing from the roof's potential failure to the building owner. The contractor's warranty provided that "the liability of the contractor shall be . . . confined to the work actually done hereunder, and nothing . . . shall impose upon the contractor any liability for . . . damage to interior fixtures, decorations, stock or equipment, due to leakage."⁴ Refusing to enforce the limitation, the Georgia court construed

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the warranty clause as a "hold harmless" provision, insulating or eliminating the contractor from liability, instead of merely limiting the contractor's liability.

This question, whether a contractual limitation is "essentially" an unenforceable hold harmless provision, represents the central question faced by courts today when faced with limit of liability clauses under state anti-indemnity or business practice and licensing statutes or on public policy grounds.

As previous *Construction Lawyer* articles have discussed,⁵ the general rule is that limitation of liability clauses are enforceable. But *Bicknell* and subsequent extensions of *Bicknell's* holding by various courts to contractual provisions providing monetary limitations on design professionals' liability have caused the design community much consternation in attempting to reliably limit the amount of their potential liability.

This article (a) introduces limitation of liability clauses and the nomenclature courts and commentators use (and misuse) to discuss such clauses; (b) summarizes the state of the law as of the year 2000, when the *Construction Lawyer* last analyzed judicial enforcement of limitation of liability clauses; (c) discusses post-2000 case law analyzing limitation of liability clauses; and (d) discusses what practitioners can learn from recent court holdings striking limitation of liability clauses.

Contractual Limitation of Liability, Exculpatory, and Indemnification Clauses: Distinctions With a Difference?

The differences, or lack thereof, between contractual limitation of liability, hold harmless, exculpatory, and indemnification clauses have been central to courts' treatment of limitation of liability clauses.

Limitation of Liability. "A limitation on liability clause is a contractual agreement, between the parties to the agreement, that limits liability of one to the other in a way defined by the clause."⁶ Although the clause may limit liability in various ways, this article focuses on clauses limiting recovery in monetary terms. Limited liability means "liability restricted by law or contract."⁷

Indemnity. According to *Black's Law Dictionary*, to indemnify means "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default."⁸

Exculpatory Clause. An exculpatory clause is "a contractual provision relieving a party from liability resulting from a negligent or wrongful act."⁹

Hold Harmless. Finally, hold harmless means "to absolve (another party) from any . . . liability arising from

the transaction.”¹⁰ Hold harmless and exculpate are similarly defined; in fact, the words *exculpate* and *absolve* are synonyms.¹¹

Most courts have recognized the differences in these terms as used in contracts and statutes. For example, in *Valhal Corp. v. Sullivan Associates, Inc.*, the Third Circuit found “that there are differences between a contract which insulates a party from liability and one which merely places a limit upon that liability. The difference between the two clauses is a real one.”¹² Similarly, the Arizona Supreme Court summarized, “[t]he policy underlying the anti-indemnification statute clarifies why the distinction between indemnity and liability limitation is important. Anti-indemnification statutes are primarily intended to prevent parties from eliminating their incentive to exercise due care. Because an indemnity provision eliminates all liability for damages, it also eliminates much of the incentive to exercise due care.”¹³ Although the distinction seems clear, surprisingly, it has not ended the inquiry. Rather, some courts have held that limitation of liability clauses violate the state’s public policy or anti-indemnity statute.¹⁴

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The Changing Landscape: Premillennium Enforceability of Limitation of Liability Clauses

Legislative Action and Court Enforcement Prior to 1995

The Construction Lawyer first discussed and analyzed limitation of liability clauses in Howard Ashcraft Jr.’s “Limitation of Liability—The View After *Markborough*.”¹⁵ The 1991 article was penned on the heels of California’s Fourth Appellate District’s 1991 decision in *Markborough California, Inc. v. Superior Court*,¹⁶ in which the court held that arguably competing statutes validated limitation of liability clauses. The article noted an “increased usage of limitation of liability clauses.”¹⁷ Specifically, “model contract documents . . . contain limitation of liability provisions” and “[r]ecently, the American Institute of Architects has also begun experimenting with limitation of liability clauses in connection with its owner-architect agreement.”¹⁸ However, the *Markborough* case left practitioners with little guidance on how to draft enforceable clauses, as “relatively few published decisions construing limitation of liability clauses in construction contexts” existed.¹⁹

Much has been written about *Markborough*.²⁰ In

short, *Markborough* held that California Civil Code section 2782.5 allows limitation of liability clauses, as long as the clause is not unconscionable or otherwise contrary to public policy.²¹ Factors to determine whether a clause violates public policy include whether the clause is the result of “an arm’s length transaction between parties of relatively equal bargaining power” who have a “meaningful choice” in obtaining the services provided by the agreement’s scope.²²

Besides *Markborough* in California, courts in Florida,²³ New York,²⁴ and Arkansas²⁵ had reviewed limitation of liability clauses. The Florida court, in *Florida Power & Light Co. v. Mid-Valley, Inc.*,²⁶ and the New York court, in *Long Island Lighting Co. v. IMO DeLaval, Inc.*,²⁷ enforced “clear and unequivocal”²⁸ clauses limiting the defendants’ liability to the amounts of its insurance coverage. In both cases, the contracts at issue were between sophisticated parties.

In a breach of contract case, *W. William Graham, Inc. v. Cave City*, an Arkansas court held that, generally, “if the clause limits liability, it is the duty of this Court to give effect to such a clause.”²⁹ But the court expressed its reluctance to adopt too liberal a rule in enforcing such clauses,³⁰ and on its specific facts refused to apply the specific limitation of liability clause because the clause limited the engineer’s liability only for “the engineer’s professional negligent acts, errors or omission” and did not specifically limit its liability for breach of contract actions.³¹ Notably, a decade later an Alaska court in *City of Dillingham v. CH2M Hill Northwest, Inc.* addressed the issue and determined that:

an exculpatory clause that limits liability for a party’s “negligent acts, errors, or omissions” should be construed to limit liability for “negligent acts, errors, or omissions” only. Since negligent acts, negligent errors, or negligent omissions when committed in the context of contract performance *may be* contract breaches, we conclude that . . . the clause *applies* to breaches of contract and fiduciary duty, but only insofar as the breaches are negligent.³²

Additionally, legislatures in Texas³³ and California,³⁴ as noted above, specifically allowed limitation of liability clauses in contracts, while Wisconsin³⁵ legislated against them. And while New York’s legislature voided clauses in contracts affecting real property where the clauses purported to excuse “liability for injuries to person or property caused by or resulting from the negligence of such contractor,”³⁶ subsequent court interpretation called into question the statute’s applicability to contracts involving projects for new construction.³⁷

A 1994 *Construction Lawyer* article updated the legal status of limitation of liability clauses.³⁸ By 1994, the Fourth Circuit, in separate unpublished cases applying South Carolina and Georgia law, extended limitation of liability clauses like the clause in *Cave City* to apply to

breach of contract actions.³⁹ At least one court addressed limitation of liability clauses in contracts between homeowners and home inspectors.⁴⁰ And in a measure that did not appear on its face to implicate limitation of liability clauses, Virginia passed legislation impacting enforcement of limitation of liability clauses.⁴¹

The Fourth Circuit, applying South Carolina law in *Georgetown Steel Corp. v. Law Engineering Testing Co.*, used the familiar factors of negotiation and bargaining power to justify enforcing the limitation of liability clause.⁴² The court found particularly “tolerable” the clause’s option to eliminate the limit if the client agreed to “pay additional consideration of 4% of our total fee or \$200.00 whichever is greater.”⁴³

Similarly, when applying Georgia law, in *Gibbes, Incorporated, II v. Law Engineering, Inc.*, the Fourth Circuit unwittingly foreshadowed a later decision (discussed below) by holding the limitation of liability clause enforceable because the parties were sophisticated and the plaintiff “identified no Georgia statute that prohibits engineers from limiting their liability.”⁴⁴

In addition, by 1994, several states, including California,⁴⁵ Alaska,⁴⁶ and Pennsylvania,⁴⁷ had passed “anti-indemnity” legislation. “Opponents of liability limitations have argued that limitation of liability is *de facto* indemnification and should be prohibited by anti-indemnity statutes.”⁴⁸ By April 1994, however, such arguments had “no merit when applied to a basic limitation clause since the basic clause does not obligate the client to indemnify the design professional or to otherwise protect it from third-party liability.”⁴⁹

It appears that, as of April 1994, no published authority refused to enforce a design professional’s limitation of liability clause on the grounds that it violated a state’s anti-indemnity statute.⁵⁰ In the leading case at that time, *Markborough*, the court specifically distinguished the enforceable limitation of liability clause from an unenforceable indemnification provision.⁵¹

Similarly, in the 1987 case *Burns & Roe, Inc. v. Central Maine Power Co.*,⁵² “the court held that the limitation of liability afforded no protection against third-party claims and that the engineer had no right to be indemnified against such claims since the clause did not explicitly create an obligation to indemnify.”⁵³ Indeed, in the early 1990s and before—excluding Wisconsin and contracts with homeowners—legislatures and courts permitted limitation of liability clauses to be given effect.

But opponents of limited liability clauses scored an important victory in Alaska’s 1994 case *City of Dillingham v. CH2M Hill Northwest, Inc.*,⁵⁴ in which the court refused to enforce a limitation of liability clause on the grounds that it violated Alaska’s anti-indemnification statute. In *Dillingham*, the design professional’s limitation of liability clause stated:

the OWNER agrees to limit the ENGINEER’S liability to the OWNER and to all construction Con-

tractors, Subcontractors, material suppliers, and all others associated with the PROJECT, due to the ENGINEER’S sole negligent acts, errors, or omissions, such that the total aggregate liability of the ENGINEER to all those named shall not exceed Fifty Thousand Dollars (\$50,000) or the ENGINEER’S total compensation for services rendered on the portion(s) of the PROJECT resulting in the negligent acts, errors, or omissions, whichever is greater.⁵⁵

The City argued that the clause violated Alaska’s anti-indemnification statute:

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 unenforceable⁵⁶

The court’s analysis is somewhat confusing because it neither compares the particular language in the design professional’s clause itself against Alaska’s anti-indemnity statute nor discusses the principles behind indemnity, hold harmless, exculpatory, and limitation of liability clauses.⁵⁷ Instead, the court focused on whether the statute applied to “reasonable limitation of liability clauses” in general.⁵⁸ Indeed, it is arguable that the limitations clause, which sought to limit liability not only as to the owner, but as to third-party “construction contractors, subcontractors, material suppliers, and all others associated with the project,”⁵⁹ toed the line between limitation of liability and indemnity. But the court disregarded the contract language and never made that inquiry.

After rejecting the “plain meaning” rule for interpreting statutory language, the court looked to legislative history to conclude the legislature intended to bar limitation of liability clauses.⁶⁰ It found that “early drafts . . . indicate an intent to prohibit not only indemnity clauses but also limitation of liability clauses,” as demonstrated by the statute’s draft statement of purpose to “promote the public policy that all wronged persons should have a remedy for injury suffered by a result of another person’s negligence” and to “void agreements negating responsibility for a person’s own negligence.”⁶¹ Further, the court concluded that the legislature intended to prohibit liability limits because it rejected a proposed exception to the anti-indemnity statute that would have allowed limitation of liability clauses. The court further disregarded the design professional’s argument that the exemption was unrec-

essary given the statute's clear language.⁶² "The absence . . . of an exemption for limitation of liability clauses indicates that the legislature did not intend to allow an exemption."⁶³ As a result, the court "read the word 'indemnify' as used in [the statute] to mean 'exempt,' and thus construe[d] [the statute] to prohibit limitation of liability clauses. . . . [S]uch an interpretation best fulfills the legislature's express intent to prevent a party to a construction contract from bargaining away liability for his or her own negligent acts."⁶⁴ Leaving no doubt as to the extent of its holding, the court held, "[t]he statute states that an indemnification clause that limits liability for a promisee's sole negligence is void and unenforceable."⁶⁵

Legislative Action and Court Enforcement Between 1995 and 1999

The *Dillingham* holding, striking the limitation of liability clause on grounds that it violated the state's anti-indemnity statute, was an outlier ruling for many years. In fact, it was rebuffed almost immediately by the Third Circuit when applying Pennsylvania law. Less than a year after *Dillingham*,⁶⁶ the Third Circuit enforced a limitation of liability clause in spite of Pennsylvania's anti-indemnity statute.⁶⁷ As noted in the introduction to this article, *Valhal Corp. v. Sullivan Associates, Inc.* held that "real differences" exist "between a contract which insulates a party from liability and one which merely places a limit upon that liability."⁶⁸ Because limitation of liability clauses do not insulate a party from liability, "such clauses are not subjected to the same stringent standards applied to exculpatory and indemnity clauses."⁶⁹ Instead, limitation of liability clauses in contracts between "informed business entities dealing at arm's length," which limit the liability to a "reasonable" amount, which amount is "not so drastic as to remove the incentive to perform with due care," are enforceable unless the liability is for personal or property injury.⁷⁰

In *Valhal*, the limitation of liability clause stated:

The OWNER agrees to limit the Design Professional's liability to the OWNER and to all construction Contractors and Subcontractors on the project, due to the Design Professional's professional negligent acts, errors or omissions, such that the total aggregate liability of each Design Professional shall not exceed \$50,000 or the Design Professional's total fee for services rendered on this project. Should the OWNER find the above terms unacceptable, an equitable surcharge to absorb the Architect's increase in insurance premiums will be negotiated.⁷¹

Pennsylvania's anti-indemnification statute stated:

Every covenant, agreement or understanding . . . in connection with any contract or agreement made and entered into by owners, contractors, subcontractors or suppliers whereby an architect . . . or his [her] agents . . . shall be indemnified or held harm-

less for damages . . . arising out of: (1) the preparation or approval by an architect . . . or his[her] agents . . . of . . . opinions, reports, . . . or specifications, or (2) the giving or the failure to give directions or instructions by the architect . . . or his[her] agents . . . shall be void as against public policy and wholly unenforceable.⁷²

The trial court struck the limitation of liability clause upon finding that "whether or not the statute is directly applicable [to the limitation of liability clause], it certainly establishes that a contract for professional architectural services is a matter of interest to the public, and that an exculpatory provision therein contravenes public policy."⁷³ The Third Circuit reversed and refused to "stretch [the statute's] language or implication beyond the boundaries of the actual statute," and held that the "statute pertain[s] only to indemnity and hold harmless provisions," and not to limitation of liability provisions.⁷⁴ Further, it recognized that the limitation of liability clause was between an architect and a developer, and the anti-indemnity statute only prohibited hold harmless provisions between architects and owners.⁷⁵ Lastly, it noted the practice of architecture did not create duties or a public concern by virtue of state licensing requirements.⁷⁶ This decision stands in stark contrast to the Alaska Supreme Court's ruling.⁷⁷

The court further refused to find that tort claims were excluded from the limitation. Declining to follow the Arkansas case *W. William Graham, Inc. v. Cave City*,⁷⁸ the Third Circuit recognized that in Pennsylvania, nonfeasance (a total failure to perform) properly sounded in tort, while misfeasance (negligence in performance) properly sounded in contract. Even though the damages flowed from the defendant's misfeasance (thus making a breach of contract claim appropriate), the limitation of liability clause applied because the developer's claim arose out of the design professional's negligence.⁷⁹ As a result, liability was limited to the \$50,000 contract limit, and the case was dismissed for lack of subject matter jurisdiction.⁸⁰

By late 1999, courts in New York, New Jersey, Ohio,⁸¹ and Massachusetts and the Louisiana legislature⁸² all weighed in on the enforceability of limitation of liability clauses.

In a sparsely reasoned decision, a New York court in *Sear-Brown Group v. Jay Builders, Inc.*⁸³ held that New York's General Obligations laws sections 5-322.1 and 5-324, which "apply only where a party seeks to protect itself from claims for personal injury and physical damage to property," were not grounds to invalidate the limitation of liability clause.⁸⁴ The court determined that the contractual limit, however, did not extend to limit damages from claims of negligent misrepresentation and gross negligence.⁸⁵

In New Jersey's *Marbro, Inc. v. Borough of Tinton Falls*,⁸⁶ the court similarly held, "parties to a contract may agree

to limit their liability as long as the limitation” is clearly drafted, not unconscionable, and does not violate public policy.⁸⁷ The court was persuaded by the facts that the engineer and client negotiated the limitation, had equal bargaining ability, and agreed on a limitation that equaled the engineer’s fee, which provided an incentive to avoid the “consequences of a breach.”⁸⁸

In *Marbro*, the limitation of liability clause for the engineer’s construction services contract stated:

The Client agrees to limit the Consultant’s liability to the Client and to all Construction Contractors and Subcontractors on this project due to the Consultant’s professional negligent acts, errors or omissions such that the total liability to all those named shall not exceed \$32,500. It is agreed that this paragraph applies only to this contract for construction services.

Further, the clause’s scope was consistent with the contract’s indemnity provision.⁸⁹

The Client agrees to defend and indemnify the Consultant against any action at law instituted by anyone against the Consultant related to or by reason of his rendering of services pursuant to this Agreement unless and until a court of competent jurisdiction finds that the Consultant has acted outside the scope of his duties and/or acted contrary to law and is liable for damages.⁹⁰

The court read the two clauses in harmony. The limitation of liability clause “establishes a cap” on the engineer’s liability, while the indemnification clause required the client to defend and indemnify the engineer from claims related to the engineer’s services “unless and until a court . . . finds that [the engineer] . . . is liable for damages.”⁹¹

Last, the clause did not violate New Jersey’s anti-indemnification statute, which was “virtually identical” to Pennsylvania’s statute.⁹² Relying heavily on *Valhal*, the New Jersey court determined that the statute “does not express a blanket public policy against engineers contractually limiting their liability. The statute does not apply to limitation of liability clauses.”⁹³

In a Massachusetts case, *R-I Associates, Inc. v. Goldberg-Zoino & Associates*,⁹⁴ the court held that an engineer’s environmental site assessment did not trigger a duty under Massachusetts’s Hazardous Materials Act. Thus, the Massachusetts law prohibiting contracts that “serve to shield a defendant from responsibility for violation of a statutory duty” did not apply to the limitation of liability clause.⁹⁵ Further, the clause survived review under the balancing test⁹⁶ set forth in *Tunkl v. Regents of the University of California*,⁹⁷ which, in essence, provides that “individuals should not be compelled by practical necessity to agree to limitations of liability.”⁹⁸

The Changing Landscape: Postmillennium Enforceability of Limitation of Liability Clauses

Since 2000, many courts have analyzed limitation of liability clauses under various forms of “public policy” principles. Those principles, discussed in the preceding section, remain effective today. The challenges today for limitation of liability clauses is to withstand scrutiny under state licensing or anti-indemnity statutes. This section discusses notable post-2000 decisions analyzing limitation of liability clauses.

The court further refused to find that tort claims were excluded from the limitation.

In a 2001 unpublished case interpreting Washington law, the Ninth Circuit held a liability limitation clause did not violate Washington’s anti-indemnification statute.⁹⁹ In *Kelly v. Heron Ridge, Inc.*, the court interpreted Washington’s statute to void “only those construction contracts purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property . . . [c]aused by or resulting from the sole negligence of the indemnitee.”¹⁰⁰ Because the engineer’s limitation of liability clause merely “limits the amount of damages [the engineer] must pay for any injury or loss on account of any error, omission or other professional negligence to \$50,000 or [the engineer’s] fee, whichever is greater,” the enforceable clause did not trigger the anti-indemnity statute.¹⁰¹

Avoiding Versus Limiting Liability

In the unpublished 2006 case *Omaha Cold Storage Terminals, Inc. v. The Hartford Insurance Co.*,¹⁰² the engineer unsuccessfully sought summary judgment before a Nebraska court to enforce the limitation of liability clause that provided

[Engineer’s] total liability to the Client for any and all injuries, claims, losses, expenses, damages or claim expenses arising out of this agreement, from any cause or causes, shall not exceed the total amount of \$100,000, the amount of [Engineer’s] fee (whichever is less) or other amount agreed upon. . . . Such causes include, but are not limited to, [Engineer’s] negligence, errors, omissions, strict liability, breach of contract or breach of warranty.¹⁰³

Nebraska's anti-indemnification statute provided:

In the event that a public or private contract or agreement for . . . work dealing with construction . . . contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement or combination thereof shall be void as against public policy and wholly unenforceable.¹⁰⁴

Like the Alaska court in *Dillingham*, the Nebraska court refused to enforce the limitation of liability clause, finding that it “clearly contains language which operates to insulate or limit [the engineer’s] liability for its negligent acts.”¹⁰⁵ The court declined to distinguish between clauses that “insulate” liability and clauses that “limit” liability and, like the Alaska court in *Dillingham*, deemed both to operate as hold harmless or exculpatory agreements.¹⁰⁶

Also in 2006, the New Mexico Court of Appeals reversed a trial court decision that refused to enforce a geotechnical engineer’s liability limitation on the grounds that it violated the state anti-indemnification statute.¹⁰⁷ In *Fort Knox Self Storage, Inc. v. Western Technologies, Inc.*, the geotechnical engineer’s contract stated:

Courts in Georgia, North Carolina, and Arizona analyzed limitation of liability clauses under state anti-indemnity statutes.

Notwithstanding any other provision of this agreement, [engineer’s] total aggregate liability in connection with this agreement and work performed hereunder shall be strictly limited to an amount equal to the greater of \$50,000 or the total contract price paid to [engineer] under this agreement (less direct third-party costs), whether such liability is asserted for breach of representation or warranty, under any indemnity, in any other respect under or for breach of contract, or as a liability arising in tort or by statute. Client hereby waives and discharges all present and future claims against [owner] and (for actions in such capacity) its shareholders, directors, officers, agents, employees, and subcontractors, for any claim other than those described in the preceding sentence or any liability amount in excess of the aggregate limitation stated in the preceding sentence.¹⁰⁸

New Mexico’s anti-indemnification statute provided in relevant part:

Any provision, contained in any agreement relating to the construction, installation, alteration, modification, repair, maintenance, servicing, demolition, excavation, drilling, reworking, grading, paving, clearing, site preparation or development, of any real property, or any improvement of any kind[,] . . . by which any party to the agreement agrees to indemnify the indemnitee, or the agents and employees of the indemnitee, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by, or resulting from, in whole or in part, the negligence, act or omission of the indemnitee . . . is against public policy and is void and unenforceable.¹⁰⁹

Unlike the Alaska court in *Dillingham* and the Nebraska court in *Omaha Cold Storage*, which both declined to distinguish between indemnity and limitation of liability, the New Mexico trial court in *Fort Knox Self Storage* “reasoned that [the owner] ends up indemnifying [the engineer] if the losses are more than [\$]50,000, because they don’t get to collect them from [the engineer].”¹¹⁰ The New Mexico Court of Appeals held that the engineer’s limitation of liability clause did not violate New Mexico’s anti-indemnification because the limitation did “not seek to contract away all liability for [the engineer’s] negligence but seeks to limit the amount of damages [the engineer] must pay for its own negligence. . . . Indeed, it provides that [the engineer] may be liable for damages, based on its own negligence, that are twenty-eight times higher than the amount of the” engineer’s contractual fee.¹¹¹ The court analogized to the “strikingly similar” factual situation in *Valhal*, in which “the amount of liability is capped, but [the beneficiary] still bears substantial responsibility for its actions.”¹¹²

The court acknowledged “the similarities between exculpatory clauses, indemnity clauses, and limitation of liability clauses,” but also recognized, “as did the court in *Valhal*, that there is a significant difference between contracts that insulate a party from any and all liability and those that simply limit liability.”¹¹³ The key element of the limitation of liability clause was the amount at which it capped the damages as compared with the contractual fee.¹¹⁴ If the amount is “so minimal compared to one’s expected compensation as to negate or drastically minimize concern for liability for one’s actions,” then the limitation could act as an exculpatory provision.¹¹⁵ Importantly, the difference between the capped damages amount and the damages claimed by the party seeking to set aside the cap is not part of the analysis.¹¹⁶ In *Fort Knox*, the engineer’s cap of \$50,000, twenty-eight times the amount of its fee, left the engineer “exposed to substantial damages and does not negate” its liability.¹¹⁷

In what the plaintiff argued was a departure from *Valhal*, the New Mexico court enforced the limitation even though the owner’s damages in this case included damage

to property.¹¹⁸ The court reasoned that *Valhal's* cited authority collectively stood for the proposition that losses that arise out of "consequential damages to commercial real property" are among those that may be capped by liability limitations.¹¹⁹ The New Mexico court was quick to note, however, that a different result could attach if the "beneficiary of a similar clause sought to enforce the clause against a consumer rather than a commercial entity" because the parties could have disparate levels of sophistication.¹²⁰

Addressing a unique argument that the limitation of liability was an unenforceable liquidated damages provision, the *Fort Knox* court reasoned that the parties did not "agree in advance on the measure of damages to be assessed in the event of default," but rather set outside limits of damages that could be recovered in the event of default.¹²¹

2008's Trilogy of Cases

2008 was an active year in litigating limitation of liability clauses, with varying results. Courts in Georgia, North Carolina, and Arizona analyzed limitation of liability clauses under state anti-indemnity statutes. North Carolina and Arizona upheld the clauses at issue, while Georgia determined it to be unenforceable. The courts' decisions emphasize the importance of investigating the precise language of the challenged clause and measuring it against the state's particular statutory protection.

Georgia. Before a Georgia court in *Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc.*, the engineering firm and developer agreed that

[i]n recognition of the relative risks and benefits of the project both to [developer] and [engineer], the risks have been allocated such that [Lanier] agrees, to the fullest extent permitted by law, to limit the liability of [engineer] and its sub-consultants to [developer] and to all construction contractors and subcontractors on the project or any third parties for any and all claims, losses, costs, damages of any nature whatsoever[,] or claims expenses from any cause or causes, including attorneys' fees and costs and expert witness fees and costs, so that the total aggregate liability of [engineer] and its subconsultants to all those named shall not exceed [engineer's] total fee for services rendered on this project. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.¹²²

The engineer sought summary judgment to limit its liability for any damages owed to the developer to \$80,514, the amount of the engineer's fee. The trial court granted summary judgment in the engineer's favor and the appellate court affirmed.¹²³

Georgia's anti-indemnity statute provided:

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 damages 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, provided that this subsection shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer.¹²⁴

In Georgia, indemnity means "the obligation or duty resting on one person to make good any loss or damage another has incurred by acting at his request or for his benefit."¹²⁵ The court held that "[a]lthough the clause at issue in this case does not exculpate [the engineer] from all monetary liability, it is an indemnity as defined above and as prohibited by" the anti-indemnity statute.¹²⁶ In particular, the engineer's limitation of liability as to "any third parties" specifically violates Georgia's anti-indemnity statute.¹²⁷ "[W]hile a third party is not precluded from suing [the engineer] for any negligent actions in constructing the [work], the clause at issue here allows [the engineer] to recover any judgment amount entered against it from [the developer] once the \$80,514 threshold has been surpassed, including judgment amounts on third-party claims for which [the engineer] is solely negligent."¹²⁸ The court took issue not only with the clause's reference to "third parties," but also to shifting the engineer's liability for its sole negligence. Distinguishing *Valhal v. Sullivan Assoc., Inc., 1800 Ocotillo, LLC v. WLB Group, Inc.* (appellate court decision), and *Fort Knox Self Storage v. Western Technologies*, the court noted the clauses in those cases did not limit liability as to third parties or for sole negligence.¹²⁹

However, in two separate decisions, the Court of Appeals of Georgia drew a bright line between indemnity and limitation of liability. It interpreted the *Lanier* holding to bar only limitation of liability clauses that seek to limit liability as to third parties.¹³⁰ The court declined to address whether engineers are under other obligations to avoid liability-shifting prohibitions¹³¹ or whether the *Lanier* clause violated Georgia's statute regulating professional engineers.

North Carolina. The North Carolina case *Blaylock Grading Co., LLP v. Smith* was the second in 2008 to analyze a limitation of liability clause within the parameters of the state's anti-indemnity statute.¹³² The court determined that the limitation of liability clause did not violate the state's anti-indemnity provision. In *Blaylock*, the surveyor and grading company agreed:

[Defendants' liability to plaintiff] for any and all injuries, claims, losses, expenses, damages or claim expenses arising out of this agreement, from any cause or causes, shall not exceed the total amount of \$50,000, the amount of [defendants'] fee (whichever is greater) or other amount agreed upon when added under Special Conditions. Such causes include, but are not limited to, [defendants'] negligence, errors, omissions, strict liability, breach of contract or breach of warranty.¹³³

Although courts in some states will uphold the distinction and enforce contractual limitations, a more cautious drafting approach is to specifically exclude indemnity obligations from the limitation of liability provisions.

In North Carolina, freedom of contract principles generally support enforcement of limited liability clauses.¹³⁴ Unless the clause is unconscionable or the agreement is with a common carrier or public utility (public service exceptions), parties to a contract “should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side.”¹³⁵ Though surveying services are regulated by North Carolina and surveyors must be licensed, those facts do not “automatically convert a profession into a public service” such that the public service exception applies.¹³⁶ Further, the clause does not impact public health or safety because the surveyor, despite the clause, maintains a duty of due care toward the public to avoid foreseeable economic or other injury.¹³⁷

North Carolina's anti-indemnity statute provides:

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee,

its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable.¹³⁸

The court held that the limitation of liability clause is “not an indemnity clause whereby one party agrees to be liable for the negligence of the other party.”¹³⁹ The key factor distinguishing the limitation of liability clause from an indemnity clause is reference to third parties. “[T]he statute only limits a promisee from recouping damages paid to a third party as a result of personal injury or property damages when the damages were caused by the promisee.”¹⁴⁰

Arizona. Also in 2008, the Arizona Supreme Court enforced a limitation of liability clause limiting a surveyor's liability to the amount of its fees and found that the clause did not run afoul of the state's anti-indemnification statute.¹⁴¹ In *1800 Ocotillo, LLC v. WLB Group, Inc.*, the surveyor and client agreed that

the liability of [surveyor], its agents and employees, in connection with services hereunder to the Client and to all persons having contractual relationships with them, resulting from any negligent acts, errors and/or omissions of [surveyor], its agents and/or employees is limited to the total fees actually paid by the Client to [surveyor] for services rendered by [surveyor] hereunder.¹⁴²

The client, a developer, attacked the provision under grounds that it was (1) void under Arizona's anti-indemnity statute, (2) void as violating Arizona's professional corporation laws, (3) generally contrary to public policy, and (4) an assumption of the risk clause, which by Arizona constitution must be submitted to the jury “in all cases.”

Arizona's anti-indemnity statute provides:

A covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract that purports to indemnify, to hold harmless or to defend the promisee from or against liability for loss or damage resulting from the sole negligence of the promisee or the promisee's agents, employees or indemnitee is against the public policy of this state and is void.¹⁴³

The statute “concerns attempts to shift *all* liability for one's own negligence to another party,” such as agreements to indemnify or hold harmless.¹⁴⁴ But the surveyor's limitation of liability clause “does not completely insulate [the surveyor] from liability, as would an indemnity or hold harmless provision, nor does it require [the client] to defend [the surveyor]. The provision merely limits liability.”¹⁴⁵

It is possible that a liability limit could be so low as to essentially eliminate a beneficiary's motivation to perform

with the required care.¹⁴⁶ In *1800 Octotillo*, however, the liability limit was the surveyor's fee amount; the surveyor thus had "a substantial interest in exercising due care because it stands to lose the very thing that induced it to enter into the contract in the first place."¹⁴⁷

In an argument that would later prove successful in other states (as discussed below), the plaintiff attempted to use statutes regarding business formations to show that limitation of liability clauses are not enforceable as to the individual professionals who perform the services at issue.¹⁴⁸ Under Arizona statute, "a shareholder of a professional corporation 'is personally and fully liable and accountable for any negligent or wrongful act or misconduct' the shareholder commits while rendering services on behalf of the professional corporation."¹⁴⁹ Further, "[e]ach member, manager or employee performing professional services' on behalf of a limited liability company 'shall remain personally liable for any results of the negligent or wrongful acts, omissions or misconduct committed by him.'"¹⁵⁰ Moreover, "a partnership 'is liable for loss or injury caused to a person . . . as a result of a [partner's] wrongful act or omission, or other actionable conduct' in the course of the partnership's business or with its authority."¹⁵¹

The court dismissed this argument, holding that the statutes "do not address contractual limitations of liability" and did not apply because the surveyor was a traditional corporation.¹⁵² Further, the professional corporation and limited liability company statutes simply "establish that professionals who organize under them do not enjoy the same protections against personal liability that generally results from incorporation or formation of a limited liability company," and the partnership provision merely recognizes "that a partnership is liable for the acts of the partners."¹⁵³

Nor was the limitation of liability clause unenforceable according to "judicially identified public policy."¹⁵⁴ Again the court noted the difference between an exculpatory clause, which removes a party's incentive to take due care, and a clause that limits the amount of recoverable damages.¹⁵⁵ With regard to clauses or situations in which "coercion or otherwise improper bargaining" exists, "other contractual doctrine . . . serve to protect against their enforcement."¹⁵⁶ The court discussed and distinguished decisions in *Dillingham* and *Lanier*. Arizona lacked the legislative history regarding limitation of liability clauses relied on in *Dillingham*. *Lanier's* analysis was inapplicable because the limitation of liability to third parties made the case inapposite to *1800 Octotillo*.¹⁵⁷

Addressing an argument perhaps unique to Arizona, the court held that the limitation of liability clause was not an "assumption of risk" clause and, thus, subject to Arizona's constitutional right to jury review. The constitution provides, "[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."¹⁵⁸ Assumption of risk clauses "refer only to defenses

that effectively relieve the defendant of any duty."¹⁵⁹ As a result, because limitation of liability clauses do not "effectively relieve the defendant of any duty," they are not considered to be an "assumption of risk" clause appropriate only for jury determination.¹⁶⁰

Limitation of Liability Clauses and Professional Licensing Statutes

In addition to arguments employing anti-indemnity statutes, public policy, and others, opponents of limitation of liability clauses have also succeeded in using professional licensing and professional corporation statutes to set aside liability limits. Cases at the appellate court level in Florida, and the trial court level in Virginia, signal what is perhaps the next wave of arguments against limitation of liability clauses.

In 1999–2000, the La Gorce Country Club retained Gerhardt Witt's engineering firm, Gerhardt M. Witt and Associates, Inc. (GMWA), to provide hydrogeologic and project coordination consulting services while a third-party contractor designed and built a reverse osmosis water treatment system for golf course irrigation.¹⁶¹ The project did not turn out as La Gorce Country Club expected, and it brought suit against Mr. Witt, his firm, and the design-build contractor, ITT Industries, Inc., to recover damages in excess of \$4 million.¹⁶² GMWA's contracts with La Gorce contained a limitation of liability clause.

In recognition of the relative risks and benefits of the project to both La Gorce and [GMWA], the risks have been allocated such that La Gorce agrees, to the fullest extent permitted by law, to limit the liability of [GMWA] and its subconsultants to the total dollar amount of the approved portions of the scope for the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [GMWA] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [GMWA's] total fee for services rendered on this project, whichever is greater. Such claims and causes include, but are not limited to, negligence, professional errors or omissions, strict liability, breach of contract or warranty.¹⁶³

The trial court held the clause did not protect Mr. Witt individually, and even if it did, the clause would be unenforceable as a matter of law.¹⁶⁴ First, Mr. Witt was "not a party to the agreements and, therefore, not entitled to the benefit of any such limitation."¹⁶⁵ The court did not discuss whether Mr. Witt was an intended third-party beneficiary to the agreement. Second, the clause did not apply to Mr. Witt "because [Florida supreme court case *Moransais v. Heathman*¹⁶⁶] . . . suggests that, 'it is questionable whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same

way that a manufacturer could do with a purchaser in a purely commercial setting.”¹⁶⁷ Upon review, the District Court of Appeal held that, under the “instructive” decision in *Moransais*, limitation of liability clauses are unenforceable as to individual professionals.¹⁶⁸

Moransais concerned a dispute between a home buyer and an engineer hired to inspect the home; an agreement for the inspection contained a clause limiting the engineering firm’s liability to \$50,000.¹⁶⁹ The Florida Supreme Court held “the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature and the aggrieved party has entered into a contract with the professional’s employer.”¹⁷⁰ Further, “Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party.”¹⁷¹

Based on the direction provided in *Moransais* to set aside the economic loss rule in cases against a professional in his individual capacity, the District Court of Appeal analyzed whether Florida’s section 492.111, which governs professional geologists, provided the basis for a claim against an individual professional geologist.

The fact that a licensed professional geologist practices through a corporation or partnership **shall not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts committed by her or him.** Partnership and all partners shall be jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity. **Any officer, agent, or employee of a corporation shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by her or him or committed by any person under her or his direct supervision and control, while rendering professional services on behalf of the corporation.** . . . The corporation shall be liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on behalf of the corporation in the rendering of professional services.¹⁷²

Florida’s section 492.111, according to the District Court of Appeal, explicitly allows “a cause of action against an individual professional geologist for professional negligence, irrespective of whether the geologist practices through a corporation.”¹⁷³ As a result, under section 492.111 and *Moransais*, the economic loss rule does not apply to claims against professionals, and, thus, GMWA’s limitation of liability clause did not apply to La Gorce’s claims against Mr. Witt.¹⁷⁴

Similarly, trial courts in Virginia have held that Virginia’s professional business entity regulations prohibit the

use of limitation of liability clauses with respect to professional engineers.

Virginia Code Annotated section 54.1-411 provides:

Nothing contained in this chapter or in the regulations of the Board shall prohibit the practice of architecture, engineering, land surveying, landscape architecture or the offering of the title of certified interior designer by any corporation, partnership, sole proprietorship, limited liability company, or other entity provided such practice or certification is rendered through its officers, principals or employees who are correspondingly licensed or certified. No such organization shall limit the liability of any licensee or certificate holder for damages arising from his acts or limit such corporation, partnership, sole proprietorship, limited liability company, or other entity from liability for acts of its employees or agents. No such corporation, partnership, sole proprietorship, limited liability company, or other entity, or any affiliate thereof, shall, on its behalf or on behalf of any such licensee or certificate holder, be prohibited from (i) purchasing or maintaining insurance against any such liability; (ii) entering into any indemnification agreement with respect to any such liability; or (iii) receiving indemnification as a result of any such liability.¹⁷⁵

Commentators have long described Virginia’s statute to prohibit limitation of liability clauses.¹⁷⁶

Section 54.1-411 prevents any business entity from limiting the liability of any licensed architect for “damages arising from his acts,” or otherwise limiting the liability of the entity itself for the “acts of its employees or agents.” This provision would appear on its face to render unenforceable any effort by contract to limit liability for acts or omissions occurring during the performance of architectural services.¹⁷⁷

In 1996, persuasive authority disagreed. In *Roanoke Properties Limited Partnership v. Dewberry & Davis*,¹⁷⁸ the U.S. District Court for the Eastern District of North Carolina, applying Virginia law, held that a party attempting to use Virginia Code Annotated section 54.1-411 to prohibit limitation of liability clauses against engineers “misconstrues . . . the scope of the statute[,] . . . which pertains to the organization of entities offering engineering services to the public, [and] merely proscribes structuring an organization in such a way as to limit an agent’s liability or his acts or an entity’s liability for the acts of its agents. Nothing in the statute is relevant to the question of whether an engineer or an engineering firm may contractually limit its liability to a client. In fact, Virginia law provides that parties to a contract may determine how liability will be apportioned.”¹⁷⁹ In other cases, proponents of the limited liability clause have submitted affidavits from legislators

who drafted the Virginia legislation to demonstrate a lack of intent to prohibit limitation of liability clauses.¹⁸⁰

Recently, however, several lower courts have agreed with commentators and struck limitation of liability clauses as violating Virginia Code Annotated section 54.1-411.¹⁸¹ Unlike *Gerhardt M. Witt v. La Gorce Country Club, Inc.*,¹⁸² however, the lower Virginia courts held the *company* liable, not the individual engineer.¹⁸³ No published appellate-level opinion has addressed the issue.

Outliers? Or Trend?

As the court in *Valhal* remarked in 1995, limitation of liability clauses are “a fact of everyday business and commercial life.”¹⁸⁴ There is no indication that their use is waning. And as states’ anti-indemnification statutes become more common, the collision of limitation of liability clauses and anti-indemnification statutes also should increase.¹⁸⁵ As of December 2007, forty-four states had enacted some form of anti-indemnity legislation,¹⁸⁶ and nearly every state has a statute regulating the corporate entities through which designers may practice.¹⁸⁷

Since 1994, courts in three states—Alaska, Nebraska, and Georgia—have struck limitation of liability clauses as violating state anti-indemnity provisions, and two states have struck limitation of liability clauses as violating state licensing and business entity statutes. Looking closely at the reasons given by these courts for refusing to enforce the clauses shows that these decisions are likely outliers, not indications of trends. In addition, the recent decisions provide lessons for practitioners interested in better anticipating arguments against limitation of liability clauses, and drafting clauses in a manner that increases the likelihood of court enforcement.

Learning From Challenges to Limitation of Liability on Anti-indemnity Grounds

A majority of jurisdictions have found differences between *limiting* and *eliminating* liability. For example, nothing in the opinions from courts in Alaska, Nebraska, or Georgia indicates any trend towards abolishing the definitional difference between those two words. From these cases, practitioners in many jurisdictions may cautiously assume that courts will preserve the status quo and uphold unambiguous and otherwise-enforceable limitation of liability clauses even in the face of sweeping anti-indemnity legislation.

In jurisdictions that do not follow the apparent majority or for practitioners who choose to exercise additional caution, some lessons can be learned from the concerns of courts that refused to enforce certain clauses at issue. Yet, as will be discussed below, the additional caution in drafting comes at the expense of the protection that may otherwise be offered by a more robust limitation of liability clause. These cautions come in the areas of (1) anti-indemnity statutes and (2) limitations for sole negligence or liability to third parties.

First, understanding the relationship between limitation of liability clauses and anti-indemnity statutes is essential

to drafting enforceable clauses. Although courts in some states will uphold the distinction and enforce contractual limitations, a more cautious drafting approach is to specifically exclude indemnity obligations from the limitation of liability provisions. If the clause itself specifically recognizes the distinction between indemnity and liability limits, it is more likely that the court will follow suit and similarly recognize the distinction and uphold the limitation of liability clauses. No published decision to date has used an anti-indemnity statute to strike down a contractual limitation when it specifically excluded indemnity obligations from the limitation. The disadvantages of such an express exception to the limitation is that it significantly erodes the protection a limitation of liability clause would otherwise provide to a design professional. Without potential liability to certain third parties included within the limitation, the limitation may not be much of a limitation at all.

While the distinction between anti-indemnity and liability limits should seem apparent, as discussed in more detail above, practitioners cannot assume that courts will always see the distinction so clearly. The Alaska and Nebraska courts’ decision cases are similar because each refused to find a difference between indemnity and limitation of liability clauses. The Alaska court demonstrated this in the statement, “[t]he statute states that an *indemnification* clause that *limits liability* for a promisee’s sole negligence is void and unenforceable.”¹⁸⁸ Similarly, the Nebraska court said the clause at issue “clearly contains language which operates to *insulate or limit* [the engineer’s] liability for its negligent acts.”¹⁸⁹ Indemnification clauses, however, do not insulate *or* limit liability. According to the weight of well-reasoned authority, indemnification clauses eliminate liability; limitation of liability clauses limit liability.¹⁹⁰

As a result, the decision whether to enforce a limitation of liability clause ultimately hinges on whether the court believes that there is such a thing as “limiting” liability. As noted in *Bruner & O’Connor*, “[c]ourts that find the indemnity comparison compelling tend to focus on the broad similarities between [indemnity and limitation of liability] provisions.”¹⁹¹

Second, in addition to indemnity issues, courts interpreting limitation of liability clauses also have expressed concern over “sole negligence” and limits on liability to third parties. Specifically, the *Valhal*, *Ocotillo*, and *Fort Knox* cases made a point of recognizing that the clauses at issue did not limit liability for sole negligence.¹⁹² This distinction, however, is perhaps missing the point of a limitation of liability clause: to limit one party’s liability for its negligence, even its sole negligence.

Learning From Challenges to Limitation of Liability on Licensing and Business Statute Grounds

The recent decisions in Florida and Virginia offer little guidance for steering clear of state business and licensing statutes. Practitioners can, however, relate other state statutes to those in Florida and Virginia to attempt to predict similar challenges.

Florida¹⁹³ and Virginia¹⁹⁴ struck clauses over similar statutory language. The Florida legislature provides:

The fact that a licensed professional geologist practices through a corporation or partnership shall not relieve the registrant from personal liability for negligence [The registrant] shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by her or . . . while rendering professional services on behalf of the corporation.¹⁹⁵

while Virginia similarly provides that

[n]o such organization shall limit the liability of any licensee or certificate holder for damages arising from his acts or limit such corporation, partnership, sole proprietorship, limited liability company, or other entity from liability for acts of its employees or agents.¹⁹⁶

The clauses are similar in that they both prohibit some form of relief from liability. Importantly, no binding authority has provided clear direction on whether such language prohibits limitation of liability clauses, or merely avoids creating an inherent limit on liability based solely on the fact that a firm providing services does so through a limited liability company, limited partnership, or similar corporate entity.¹⁹⁷ Published commentators have long predicted that Virginia's statute could have the effect of a prohibition,¹⁹⁸ but Florida's decision was a surprise; similar predictions about Florida's clause apparently do not exist.¹⁹⁹

Many other state statutes could be construed as similar to Virginia's and Florida's. For example, Alabama provides:

No corporation, firm, or partnership shall be relieved of responsibility for the conduct or acts of its agents, employees, officers, or partners by reason of its compliance with this section, nor shall any individual practicing engineering or land surveying as defined in Section 34-11-1 be relieved of responsibility for work performed by reason of employment, association, or relationship with the corporation, partnership, or firm.²⁰⁰

Further, Illinois,²⁰¹ Maryland,²⁰² Mississippi,²⁰³ and Vermont,²⁰⁴ among others, have similar statutes. However, no published opinion has construed these statutes to favor or prohibit limitation of liability clauses.

Other state business statutes infer that limitation of liability clauses are enforceable. Ohio's architect registration statute provides that "[t]his section does not modify any law applicable to the relationship between a person furnishing a professional service and a person receiving that service, including liability arising out of that service."²⁰⁵

Virginia's and Florida's courts offer little advice to practitioners seeking to steer clear of state business statutes. Practitioners and commentators predicted Virginia's lower court decisions, but no other state statute has received the same treatment. Though the above-mentioned states may have similar statutory language, court treatment and other statutes could provide differing results. Florida and Virginia have not started a trend, but instead should serve as a warning to practitioners that attacks on limitation of liability clauses can come from unlikely and creative sources.

Adverse Decisions Are Guideposts

Despite a handful of courts refusing to enforce limitation of liability clauses, it appears that limitation of liability clauses continue to grow in popularity and are generally enforceable. Design professionals should view post-2000 decisions adverse to limitation of liability clauses in Nebraska, Georgia, Virginia, and Florida as guideposts for negotiating and drafting such clauses, and not as a mine shaft canary signaling the end of limitation of liability clauses in contracts with design professionals. 

Endnotes

1. Howard W. Ashcraft Jr., *Limitation of Liability—The View After Markborough*, 11 Aug. CONSTR. LAW. 3 (1991).
2. Michael S. Zetlin & Francine M. Chillemi, *Building a Safe Haven: Clauses Imposing Monetary Limits on Designer Liability*, 20 Jan. CONSTR. LAW. 5 (2000) (citing *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995)). See also Engineers Joint Contract Documents Committee, *Standard Form of Agreement Between Owner and Engineer for Professional Services*, Exhibit H.
3. *Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc.*, 318 S.E.2d 729, 732 (Ga. App. 1984).
4. *Id.* at 730.
5. See Ashcraft, *supra* note 1, at 3; Howard W. Ashcraft Jr., *Enforceability of Limitation of Liability Clauses*, 14 Apr. CONSTR. LAW. 12 (1994); Allen Holt Gwyn, *Legislative and Judicial Responses to Limitation of Liability Provisions*, 16 Oct. CONSTR. LAW. 61 (1996); Zetlin & Francine, *supra* note 2, at 5.
6. Bruce R. Gerhardt, *Checklist 16: Limitation of Liability Clauses*, in CONSTRUCTION CHECKLISTS: A GUIDE TO FREQUENTLY ENCOUNTERED CONSTRUCTION ISSUES 127 (Fred D. Wilshusen et al. eds., ABA 2008).
7. *Id.*
8. BLACK'S LAW DICTIONARY (8th ed. 2004).
9. *Id.*
10. *Id.*
11. BARTLETT'S ROGET'S THESAURUS 312:10 (Little, Brown and Co. 1996).
12. 44 F.3d 195, 202 (3d Cir. 1995).
13. *1800 Ocotillo, LLC v. WLB Group, Inc.*, 196 P.3d 222, 225 (Ariz. 2008).
14. See, e.g., *Omaha Cold Storage Terminals, Inc. v. Hartford Ins. Co.*, No. 8:03CV445, 2006 WL 695456 (D. Neb. Mar. 17, 2006) (unpublished) (finding no difference between limiting liability and insulating from liability).
15. Ashcraft, *supra* note 1, at 3.
16. 227 Cal. App. 3d 705, 277 Cal. Rptr. 919 (1991).
17. Ashcraft, *supra* note 1, at 5.
18. *Id.* at 3.
19. *Id.* at 4. Despite the relative lack of authority on the issue,

Ashcraft foreshadowed the limitation of liability enforcement battleground in 2010. Ashcraft distinguished limitation of liability clauses from indemnity clauses and noted the risk of relying on limitation of liability clauses in noncommercial contracts. *Id.* at 9.

20. *Id.*; Ashcraft, *supra* note 5, at 12; Gwyn, *supra* note 5, at 61; Zetlin & Chillemi, *supra* note 2, at 5.

21. *Markborough Cal.*, 277 Cal. Rptr. at 925.

22. *Id.* at 925–26.

23. *Fla. Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316 (11th Cir. 1985).

24. *Long Island Lighting Co. v. IMO DeLaval, Inc.*, 668 F. Supp. 237 (S.D.N.Y. 1987).

25. *W. William Graham, Inc. v. Cave City*, 709 S.W.2d 94 (Ark. 1986).

26. 763 F.2d 1316.

27. 668 F. Supp. 237.

28. *Florida Power & Light Co.*, 763 F.2d at 1319.

29. *W. William Graham*, 709 S.W.2d at 95 (“[S]uch clauses are not the favorite of the Court, and they will be strictly construed against the party relying on them and be limited to their exact language.”).

30. *Id.* at 96.

31. *See also id.* at 107–08 (“If appellant had desired to limit its liability for breach of contract, it could have done so, and doubtless this Court would have enforced such contract proviso, as it has many times in the past.”).

32. 873 P.2d 1271, 1275 (Alaska 1994) (emphasis supplied).

33. *TEX. CIV. PRAC. & REM. CODE* § 130.004 (Vernon).

34. *CAL. CIV. CODE* § 2782.5 (West).

35. *WIS. STAT. ANN.* § 895.49 (renumbered § 895.447).

36. *N.Y. GEN. OBLIG. LAW* § 5-323 (McKinney).

37. Ashcraft, *supra* note 1, at 3 (“[A]lthough at least one New York decision has held that the prohibition does not apply to new construction, but is limited in application to ‘such construction which is incidental to the installation or servicing of appliances or equipment.’”) (citations omitted).

38. Ashcraft, *supra* note 5, at 12.

39. *See Georgetown Steel Corp. v. Law Eng’g Testing Co.*, 7 F.3d 223, No. 92-2588, 1993 WL 358770 (4th Cir. Sept. 14, 1993) (unpublished) (applying South Carolina law); *Gibbes, Inc., II v. Law Eng’g, Inc.*, 960 F.2d 146, No. 91-1048, 1992 WL 78830 (4th Cir. Apr. 20, 1992) (unpublished) (applying Georgia law).

40. Homeowner cases against home inspectors are, by their nature, factually unique and generally not discussed in this article. *See, e.g.*, *Schaefer v. Prop. Evaluations, Inc.*, 854 S.W.2d 493 (Mo. App. 1993) (striking clause), *overruled by Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505 (Mo. 2001); *Estey v. MacKenzie Eng’g, Inc.*, 902 P.2d 1220 (Or. App. 1995) (enforcing clause); *Ricciardi v. Frank*, 620 N.Y.S.2d 918 (1994) (striking clause); *Mango v. Pierce-Coombs*, 851 A.2d 62 (N.J. Super. A.D. 2004) (striking clause); *Lucier v. Williams*, 841 A.2d 907 (N.J. Super. A.D. 2004) (striking clause).

41. *VA. CODE ANN.* § 54.1-411(A) (West 2009). *See also* Gwyn, *supra* note 5, at 61 (describing the Virginia statute as one that “prohibits limitation of a design professional’s liability” and “addresses indemnity and limitation of liability clauses executed by certain licensed or certified design professionals rather than the broader category of all parties to construction contracts, which is not addressed in Virginia statutory law.”).

42. 7 F.3d 223, No. 92-2588, 1993 WL 358770, at *3.

43. *Id.*

44. 960 F.2d 146, No. 91-1048, 1992 WL 78830, at *6. Later, in *Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc.*, 663 S.E.2d 240 (Ga. 2008), the Georgia court struck a poorly drafted limitation of liability clause as violating Georgia’s newly enacted anti-indemnity statute.

45. *CAL. CIV. CODE* § 2782 (West 2009).

46. *ALASKA STAT.* § 45.45.900 (1986).

47. 68 PA. ANN. STAT. § 491 (West 2004).

48. Ashcraft, *supra* note 5, at 16.

49. *Id.*

50. *See Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc.*, 318 S.E.2d 729, 732 (Ga. App. 1984) (discussing a contractor’s hybrid warranty clause that also limited liability).

51. *Markborough Cal., Inc. v. Superior Court*, 227 Cal. App. 3d 705, 712, 277 Cal. Rptr. 919 (1991).

52. 659 F. Supp. 141 (D. Me. 1987).

53. Ashcraft, *supra* note 5, at 12 n.57 (citing *Burns & Roe*, 659 F. Supp. at 144–45).

54. 873 P.2d 1271 (Alaska 1994).

55. *Id.* at 1272.

56. *ALASKA STAT.* § 45.45.900.

57. *But cf. Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 202 (3d Cir. 1995) (defining and distinguishing exculpatory, indemnity, hold harmless, and limitation of liability clauses).

58. *City of Dillingham*, 873 P.2d at 1275 (addressing the City’s contention that the “statutory prohibition on indemnification agreements encompasses limitation of liability clauses *such as the one in question*”).

59. *Id.* at 1272.

60. *Id.* at 1276.

61. *Id.*

62. *Id.* at 1277.

63. *Id.*

64. *Id.*

65. *Id.* at 1278.

66. *But without citation or reference to Dillingham.*

67. *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195 (3d Cir. 1995).

68. *Id.* at 202.

69. *Id.* at 204.

70. *Id.*

71. *Id.* at 198.

72. *Id.* at 204 (citing 68 PA. ANN. § 491 (West 2004)).

73. *Id.*

74. *Id.* at 205.

75. *Id.*

76. *Id.* at 207.

77. Alaska’s court added implications to the statutory language; the Third Circuit held to the doctrine that “where certain things are specifically designated in a statute all omissions should be understood as exclusions.” *Id.* (citing *Strunack v. Ecker*, 424 A.2d 1355, 1357 (Pa. Super. 1981)).

78. *Id.* at 208 (citing *W. William Graham, Inc. v. Cave City*, 709 S.W.2d 94 (Ark. 1986)).

79. *Id.* at 208–09.

80. *Id.* at 209.

81. An Ohio court enforced an apparently misnamed “exculpation clause” in a mortgage agreement, which limited the mortgagor’s liability to the mortgagee. *Prudential Ins. Co. of Am. v. Corporate Cir., Ltd.*, 658 N.E.2d 1066 (Ohio Ct. App. 1995).

82. *LA. CIV. CODE ANN.* art. 2004 (prohibiting limitations only in instances of intentional or gross fault).

83. *Zetlin & Chillemi, supra* note 2, at 5 (citing *Sear-Brown Group v. Jay Builders, Inc.*, 244 A.D.2d 966 (N.Y. App. Div. 1997)).

84. *Sear-Brown Group*, 244 A.D.2d at 966.

85. *Id.* at 967.

86. *Zetlin & Chillemi, supra* note 2, at 5 (citing *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159, 162–63 (N.J. Super. Ct. Law Div. 1996)).

87. *Marbro*, 688 A.2d at 162.

88. *Id.* at 162–63.

89. *Id.* at 163.

90. *N.J. STAT. ANN.* § 2A:40A-2 (West 1983).

91. *Marbro*, 688 A.2d at 163.

92. *Id.* (referencing 68 PA. STAT. ANN. § 491 (West 2004)).
93. *Id.* at 420.
94. No. 91-7417-E, 1995 WL 517554 (Mass. Super. Ct. Aug. 16, 1995) (unpublished).
95. *Id.*
96. See Zetlin & Chillemi, *supra* note 2, at 9–10. The *Tunkl* factors are “(1) The contract concerns a business of a type generally thought suitable for public regulation; (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services; (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under control of the seller, subject to the risk of carelessness by the seller or his agents.” *Id.*
97. 383 P.2d 441, 444–46 (Cal. 1963).
98. *R-1 Assocs.*, 1995 WL 517554, at *5.
99. Kelly v. Heron Ridge, Inc., No. 99-36220, 2001 WL 873828 (9th Cir. Aug. 2, 2001) (unpublished).
100. *Id.* at *2 (citing WASH. REV. CODE ANN. § 4.24.115 (West 1986)).
101. *Id.*
102. No. 8:03CV445, 2006 WL 695456 (D. Neb Mar. 17, 2006) (unpublished).
103. *Id.* at *6 (emphasis in original).
104. *Id.* at *6–7 (emphasis in original) (citing NEB. REV. STAT. § 25-21, 187(1)).
105. *Id.* at *7.
106. *Id.* See also City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271, 1276 (Alaska 1994).
107. Fort Knox Self Storage, Inc. v. W. Techs., Inc., 142 P.3d 1 (N.M. App. 2006).
108. *Id.* at 3–4.
109. *Id.* at 4 (citing N.M. STAT. ANN. § 56-7-1 (West 2005)).
110. *Id.* at 4.
111. *Id.* at 5.
112. *Id.* at 5–6 (citing Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 204 (3d Cir. 1995)).
113. *Id.* at 6 (internal citations omitted).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 7.
119. *Id.*
120. *Id.*
121. *Id.* at 8.
122. 663 S.E.2d 240, 241–42 (Ga. 2008).
123. *Id.* at 242.
124. *Id.* (citing GA. CODE ANN. § 13-8-2(b)).
125. *Id.*
126. *Id.* at 242–43.
127. *Id.* at 243.
128. *Id.*
129. *Id.* at 243–44.
130. Precision Planning, Inc. v. Richmark Communities, 679 S.E.2d 43 (Ga. Ct. App. 2009); RSN Props., Inc. v. Eng’g Consulting Servs., Ltd., 686 S.E.2d 853 (Ga. Ct. App. 2009).
131. Lanier at McEver, L.P. v. Planners & Eng’rs Collaborative, Inc., 663 S.E.2d 240 at n.7 (Ga. 2008) (comparing professional engineers to attorneys and physicians “in the degree they are regulated by the state in order to protect the public welfare”).
132. 658 S.E.2d 680 (N.C. Ct. App. 2008).
133. *Id.* at 681.
134. *Id.* (citing Gas House, Inc. v. S. Bell Tel. & Tel. Co., 221 S.E.2d 499, 500–01 (N.C. 1976) (overruled on other grounds)).
135. *Id.*
136. *Id.* at 683.
137. *Id.*
138. N.C. GEN. STAT. ANN. § 22B-1 (West 1993).
139. Blaylock Grading Co., LLP v. Smith, 658 S.E.2d 680, 683 (N.C. Ct. App. 2008).
140. *Id.* at 684.
141. 1800 Ocotillo, LLC v. WLB Group, Inc., 196 P.3d 222, 225 (Ariz. 2008).
142. *Id.* at 223.
143. ARIZ. REV. STAT. ANN. § 32-1159 (1998).
144. 1800 Ocotillo, 196 P.3d at 224–25 (emphasis in original) (citing Valhal Corp. v. Sullivan Assocs., 44 F.3d 195, 202 (3d Cir. 1995)).
145. *Id.* at 225.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* (citing ARIZ. REV. STAT. ANN. § 10-2234 (1996)).
150. *Id.* (citing ARIZ. REV. STAT. ANN. § 29-846 (1996)).
151. *Id.* (citing ARIZ. REV. STAT. ANN. § 29-1025 (1996)).
152. *Id.* at 225–26.
153. *Id.* at 225.
154. *Id.* at 226.
155. *Id.*
156. *Id.*
157. *Id.*
158. ARIZ. CONST. art. XVIII, § 5.
159. 1800 Ocotillo, LLC v. WLB Group, Inc., 196 P.3d 222, 228 (Ariz. 2008).
160. *Id.*
161. Gerhardt M. Witt v. La Gorce Country Club, Inc., Nos. 3D08-1812, 3D08-1825, 2009 WL 1606437 (Fla. Dist. Ct. App. June 10, 2009).
162. *Id.* at *1.
163. *Id.*
164. *Id.* at *2.
165. *Id.*
166. 744 So. 2d 973 (Fla. 1999).
167. Witt, 2009 WL 1606437, at *2 (citing *Moransais*, 744 So. 2d at 983–84).
168. *Id.* at *3.
169. *Moransais*, 744 So. 2d at 974.
170. *Id.* at 983–84.
171. *Id.*
172. Gerhardt M. Witt v. La Gorce Country Club, Inc., Nos. 3D08-1812, 3D08-1825, 2009 WL 1606437, at *2 (Fla. Dist. Ct. App. June 10, 2009) (emphasis in original) (citing FLA. STAT. ANN. § 492.111(4) (West 2004)).
173. *Id.*
174. *Id.* *4.
175. VA. CODE ANN. § 54.1-411 (West 2009).
176. Ashcraft, *supra* note 5, at 12; Gwyn, *supra* note 5, at 62; Zetlin & Chillemi, *supra* note 2, at 7; PHILIP L. BRUNER & PATRICK J. O’CONNOR JR., 6 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 19:52.71 (2010) [hereinafter BRUNER & O’CONNOR].
177. D. Stan Barnhill, *Construction Law*, 43 U. RICH. L. REV. 107, 141 (2008).
178. 1996 U.S. Dist. LEXIS 10521 (E.D.N.C. 1996).
179. *Id.* (citing Chesapeake & Ohio Ry. v. Clifton Forge-Waynesboro Tel. Co., 224 S.E.2d 317, 321 (Va. 1976)).
180. See Coors Brewing Co. v. Jacobs Eng’g Group, Inc., No.

08-cv-009885-RPM, 2008 WL 6565441 (D. Colo. Oct. 8, 2008) (attaching as exhibits affidavits from Clifton A. Woodrum, “Virginia state legislator who sponsored . . . § 54.1-411,” and Robert Nebiker, “legislative liaison for the Board of Architects, Engineers and Land Surveyors and the Department of Professional and Occupational Regulation during the passage of . . . § 54.1-411,” both of whom state that prohibiting limitation of liability clauses was not the legislative intent).

181. *Interstate, L.L.C. v. Triad Eng’g, Inc.*, No. 04-00169 (Va. Cir. Ct. Sept. 12, 2008); *Joule, L.L.C. v. Meyer Consult. Eng’rs Corp.*, No. 06-1410, 2007 WL 6894844 (Va. Cir. Ct. Aug. 30, 2007); *Bromptons @ Cherrydale, L.L.C. v. Meyer Consult. Eng’rs Corp.*, No. 06-1418 (Va. Cir. Ct. Aug. 30, 2007).

182. Nos. 3D08-1812, 3D08-1825, 2009 WL 1606437 (Fla. Dist. Ct. App. June 10, 2009).

183. *Interstate, L.L.C.*, No. 04-00169; *Joule, L.L.C.*, 2007 WL 6894844; *Bromptons @ Cherrydale, L.L.C.*, No. 06-1418.

184. *Zetlin & Chillemi*, *supra* note 2, at 5 (citing *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995)).

185. See AMERICAN SUBCONTRACTORS ASSOCIATION, ANTI-INDEMNITY STATUTES IN THE 50 STATES (2009), available at www.keglerbrown.com/practice-areas/construction/50-state-summaries.aspx (last visited Jan. 29, 2010).

186. Terry J. Galganski, *Colorado’s New Anti-Indemnity Statute: Mere Splash or Next Wave*, UNDER CONSTRUCTION (ABA Forum on the Construction Industry), Dec. 2007, at 1, 4.

187. 5 BRUNER & O’CONNOR, *supra* note 176, § 16:8 (summarizing state laws regulating corporate design practice).

188. *Id.* at 1278.

189. *Omaha Cold Storage Terminals, Inc. v. Hartford Ins. Co.*, No. 8:03CV445, 2006 WL 695456, at *7 (D. Neb. Mar. 17, 2006) (unpublished).

190. See *Markborough Cal., Inc. v. Superior Court*, 227 Cal. App. 3d, 277 Cal. Rptr. 919, 925 (1991); *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195 (3d Cir. 1995); 1800 Ocotillo, LLC v.

WLB Group, Inc., 196 P.3d 222, 225 (Ariz. 2008).

191. 6 BRUNER & O’CONNOR, *supra* note 176, § 19:52.71.

192. 1800 Ocotillo, 196 P.3d at 243–44.

193. *Gerhardt M. Witt v. La Gorce Country Club, Inc.*, Nos. 3D08-1812, 3D08-1825, 2009 WL 1606437 (Fla. Dist. Ct. App. June 10, 2009).

194. *Interstate, L.L.C. v. Triad Eng’g, Inc.*, No. 04-00169 (Va. Cir. Ct. Sept. 12, 2008); *Joule, L.L.C. v. Meyer Consult. Eng’rs Corp.*, No. 06-1410, 2007 WL 6894844 (Va. Cir. Ct. Aug. 30, 2007); *Bromptons @ Cherrydale, L.L.C. v. Meyer Consult. Eng’rs Corp.*, No. 06-1418 (Va. Cir. Ct. Aug. 30, 2007).

195. FLA. STAT. ANN. § 492.111(4) (West 2004).

196. VA. CODE ANN. § 54.1-411 (West 2009).

197. Compare *Interstate, L.L.C.*, No. 04-00169; *Joule, L.L.C.*, 2007 WL 68; and *Bromptons @ Cherrydale, L.L.C.*, No. 06-1418; with *Roanoke Props. Ltd. P’ship v. Dewberry & Davis*, 1996 U.S. Dist. LEXIS 10521 (citing *Chesapeake & Ohio Ry. v. Clifton Forge-Waynesboro Tel. Co.*, 224 S.E.2d 317, 321 (Va. 1976)).

198. *Ashcraft*, *supra* note 5, at 15; *Gwyn*, *supra* note 5, at 61; *Zetlin & Chillemi*, *supra* note 2, at 7; 6 BRUNER & O’CONNOR, *supra* note 176, § 19:52.71; *Barnhill*, *supra* note 177, at 141.

199. *But see* EDWARD K. ESPING ET AL., 8 FLA. JUR. 2D *Businesses and Occupations* § 390 (2010) (discussing statute but not predicting court refusal to enforce private limitation of liability clauses as a result).

200. ALA. CODE § 34-11-9(a)(3) (2009) (titled “Corporate and partnership practice”).

201. ILL. COMP. STAT. 325/23(f) (West 2009) (entitled “Professional design firm registration”).

202. MD. CODE ANN. BUS. OCC. & PROF. § 3-402 (West 2009) (entitled “Form of business for practice of architecture”).

203. MISS. CODE ANN. § 73-13-43 (West 2009).

204. VT. STAT. ANN. tit. 26, § 203 (2009).

205. OHIO REV. CODE ANN. § 4703.18 (West 2009).