

Contract Clauses – Limitation of Liability

by
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When surveyor liability occurs, the liability is often unexpected and the amount of the damages sought can be shocking.

There are several contract clauses that will help reduce or eliminate surveyor liability. One contract clause often employed in written contracts is the limitation of liability clause.

The limitation of liability clause is a clear and unequivocal expression of the intent by the client to cap or limit the surveyor's liability. The clause pegs the limit of damages that the client can collect in the event the surveyor is found liable to the client in a civil action.

Limitation of Liability: The Client agrees to limit the Surveyor's liability for damages to the client to the sum of \$__ or the fee charged for the surveying services, whichever is greater. This limitation of liability shall apply regardless of the cause of action or legal theory pled or asserted by the Client. Should this limitation be unacceptable to the Client, the Client will notify the Surveyor in writing and pay the Surveyor an additional \$__ for every \$1,000 increase in liability. The written notice increasing the limitation must be sent to the Surveyor before services start and the additional money must be paid to the Surveyor before completion of the services.

The willingness of courts to enforce the limitation of liability clause varies from state to state. Generally, limiting liability is not favored by the courts. Accordingly, the limitation of liability contract clause must be relied upon with some trepidation that the court will void the clause.

The validity of the clause will depend upon whether the client has a clear understanding of the burdens imposed by the clause. The clause should be discussed during "arms length" negotiation. Arms length negotiation requires the clause be brought to the party's attention and the client have the option to agree or reject the clause (not a contract of adhesion). When dealing with a business or sophisticated business-person, arms length negotiation is generally presumed.

The courts tend to reject the clause where there is a severe imbalance between the amount of the limitation and the foreseeable amount of liability (e.g., limit of \$200 mortgage survey fee for a home purchase that cost in excess of \$200,000). The courts surmise that if the surveyor is allowed to reduce their risk to nothing or next to nothing, there will be no incentive to exercise due care. Accordingly, the amount of the limitation must appear reasonable given the potential liability arising from the services performed. Ordinarily, placing a limitation on liability equal to the limit of an errors and omission insurance policy appears both logical and reasonable and allows the court to give credence to the clause. Furthermore, pegging the limit of the liability to the amount of insurance coverage gives the surveyor some relief that their personal assets will have some protection under the clause.

In some states enforcement of the clause hinges upon the client deriving some benefit. Consequently, enforcing the clause requires the clause strike a reasonable balance between a benefit and burden. In other words, the client that assumes a greater share of the risk should expect to have a lower fee, be served sooner, or have faster service.

Limitation of Liability: The Client agrees to limit the Surveyor's liability for damages to the client to the sum of \$__ or the fee charged for the surveying services, whichever is greater. This limitation of liability was agreed upon after discussing the risks of the surveying services and the difficulty of providing services within both the limitations imposed by the Client and the price cap sought by the Client. Client's initials indicate the Client has read and agrees to this clause _____

Surveyors that employ the clause should not believe they have prevented all possibility of excessive damages in the event of liability. Even if the clause is enforceable against the client, the clause does not protect the surveyor from other sources of liability. The clause derives its authority from the contract. Therefore, only the parties to the contract are bound by the terms of the clause. As a result, the clause offers no protection where the source of liability is from a person not a party to the contract. Accordingly, neighbors, successors-in-title, and others are not bound by the clause and may seek damages that exceed the limit set by the clause.

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