

Limitation of Liability Provisions

A Victor Practice Management Webinar

January 26, 2022



LIMITATION OF LIABILITY PROVISIONS

Victor Insurance Managers Inc.
January 26, 2022

AIA CES INFORMATION

LIMITATION OF LIABILITY PROVISIONS

Credit: 0.5 Learning Units
Provided by: Victor US
Provider Number: K048
Course Number: VOS666-DE
The speaker is: Nahom Gebre

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REPORTING YOUR PARTICIPATION

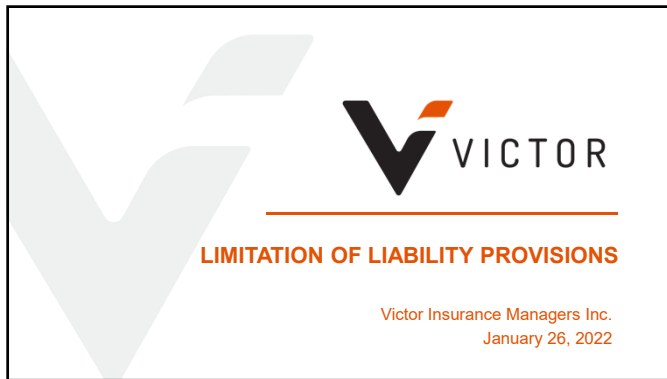
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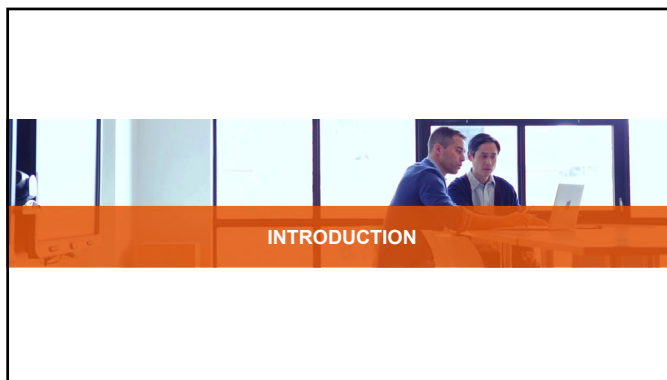
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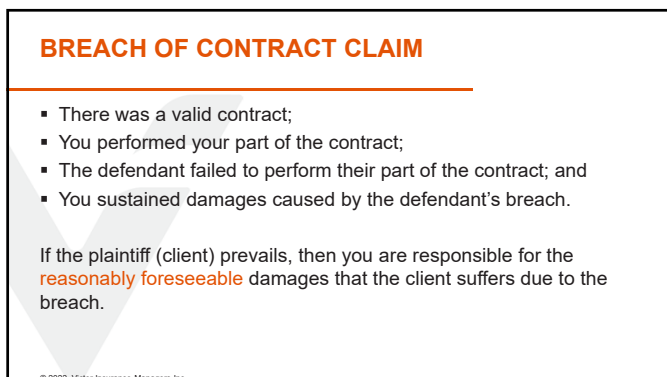
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TYPES OF DAMAGES

Direct damages compensate for direct losses caused by the breach and include basic financial damages and reimbursement of costs.

Indirect damages (also known as consequential damages) are less directly related damages that are nevertheless foreseeable as a result of the breach.

In the absence of a limitation of liability clause, a party is liable and responsible for all of the **reasonably foreseeable damages** that it causes

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LIMITATION OF LIABILITY

Limitation of liability clauses are an important contractual tool designed to manage overall risk by limiting a party's potential liability for damages.

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JUSTIFICATIONS FOR LIMITING LIABILITY

- Design firms are often the target of third-party suits
- Lack of power and authority to control the risk factors that have an impact on your exposure
- You are providing a limited scope of services for a limited fee

Each project must be evaluated to determine whether a logical basis exists for a limitation of liability clause

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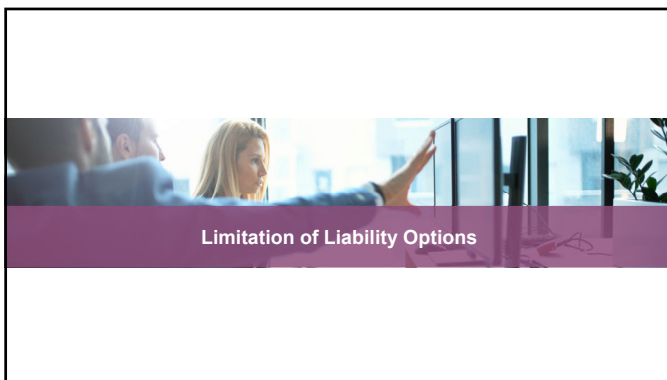
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LIMITATION OF LIABILITY ENFORCEABILITY

- The contractual language allocating risk must be unambiguous
- The types of risk being allocated must be clearly defined, such as risks associated with negligence, breach of contract, or breach of warranty
- The parties bargained freely and the bargaining strengths of the parties were relatively equal
- The retained risk bears some logical relation to the scope of services being performed and the fee being paid;
- The client was advised of and afforded the opportunity to increase the scope of services, negotiate a fee acknowledge the significant risk that the firm has to bear, or insure a portion of the risk by agreeing to project insurance

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LIMITATION OF LIABILITY OPTIONS

- Waiver of Consequential Damages
- Limiting Liability to Fees
- Limiting Liability to Stated Amount or Fees
- Limiting Liability to Insurance Coverage
- Limiting Liability for Change Orders

Both AIA and EJCDC Standard form documents have sample limitation of liability clauses.

AIA B503-2017 C-6 and EJCDC E-500 Exhibit I

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WAIVER OF CONSEQUENTIAL DAMAGES

To the fullest extent permitted by Laws and Regulations, Owner and Engineer waive against each other, and the other's officers, directors, members, partners, agents, employees, subconsultants, and insurers, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to this Agreement or the Project, from any cause or causes. Such excluded damages include but are not limited to loss of profits or revenue; loss of use or opportunity; loss of good will; cost of substitute facilities, goods, or services; and cost of capital.

EJCDC E-500

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LIMITING LIABILITY TO FEES

Client agrees that, to the fullest extent permitted by law, FIRM's total liability to client for any and all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to the Project or this Agreement from any causes including, but not limited to, FIRM's negligence, errors, omissions, strict liability, or breach of contract, and whether claimed directly or by way of contribution, shall not exceed the total compensations received by FIRM for the relevant work authorization or proposal under this Agreement.

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LIMITING LIABILITY TO STATED AMOUNT OR FEES

In recognition of the relative risks and benefits of the Project to both Client and FIRM, the risks have been allocated such that Client agrees, to the fullest extent permitted by law, to limit the liability of FIRM and FIRM's consultants and to all construction contractors and subcontractors on 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 FIRM and FIRM's consultants to all those named shall not exceed \$50,000, or Professional's total Fee for services rendered on this Project, whichever is greater.

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LIMITING LIABILITY TO INSURANCE COVERAGE

The liability of the FIRM to the Client for any actions, damages, claims, demands, judgments, losses, costs, and expenses arising out of or resulting from the FIRM's or its consultants' negligent acts, errors, or omissions is limited to the amount of professional liability insurance maintained by the Design Professional and available at the time of determination of liability.

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LIMITING LIABILITY FOR CHANGE ORDERS

Owner recognizes and expects that certain Change Orders may be required to be issued as the result in whole or part of imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies in the Drawings, Specifications, and other design documentation furnished by Engineer or in the other professional services performed or furnished by Engineer under this Agreement ("Covered Change Orders"). Accordingly, Owner agrees not to sue or to make any claim directly or indirectly against Engineer on the basis of professional negligence, breach of contract, or otherwise with respect to the costs of approved Covered Change Orders unless the costs of such approved Covered Change Orders exceeds _____ % of Construction Cost, and then only for an amount in excess of such percentage. Any responsibility of Engineer for the costs of Covered Change Orders in excess of such percentage will be determined on the basis of applicable contractual obligations and professional liability standards.

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LIMITING LIABILITY FOR CHANGE ORDERS

For purposes of this paragraph, the cost of Covered Change Orders will not include any costs that Owner would have incurred if the Covered Change Order work had been included originally without any imprecision, incompleteness, error, omission, ambiguity, or inconsistency in the Contract Documents and without any other error or omission of Engineer related thereto. Nothing in this provision creates a presumption that, or changes the professional liability standard for determining if, Engineer is liable for the cost of Covered Change Orders in excess of the percentage of Construction Cost stated above or for any other Change Order.

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PRIME/SUBCONSULTANT LIMITATION OF LIABILITY

- Prime has vicarious liability for the activities of the subconsultant
- Limiting the liability of a subconsultant means that the prime has contractually assumed an obligation to be responsible for any damages caused by the subconsultant beyond the stated limit
- Unless there is a similar enforceable limitation of liability in the Prime-Owner agreement, the Prime has contractually assumed much more risk.

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PRIME/SUBCONSULTANT LIMITATION OF LIABILITY

The Prime Consultant should

- Require insurance coverage of the subconsultant
- Compensate the subconsultant adequately for the services being provided and the risk the subconsultant assumes in providing professional services; and
- Refuse to arbitrarily limit the liability of the subconsultant, unless that limitation can be passed on to the project owner.

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Conclusion

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CONCLUSION

- The CNA program does not mandate that you insert Limitation of Liability clauses.
- Be prepared with alternatives if you have a limitation of liability clause.
- If you are engaging a subconsultant, make sure that you have not agreed to take on more liability than you would normally have.
- If you are a subconsultant, prepare options and make the necessary business decisions if the limitation of liability clause is not accepted.

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OUR NEXT WEBINAR

February 23, 2022 at 1PM Eastern

Yvonne Castillo, Director of Risk Management at Victor, will interview Liz Farmer, a fiscal policy expert who specializes in state and local government spending.

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