

**LIMITATION
OF LIABILITY**



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OF LIABILITY**



**MARITIME
INDUSTRY**

MARITIME INDUSTRY

Amalfitan Table
11th Century

MARITIME INDUSTRY

Amalfitan Table
11th Century

A commercial code developed in
Amalfi, then a sea-faring city/state
on the coast of today's Italy.

CONCEPT

CONCEPT

Shipowners must deal with severe weather, pirates, and other perils of the sea, along with crews that are susceptible to human error.

CONCEPT

If shipowners have to guarantee perfection, and reimburse traders for their losses no matter how severe...

CONCEPT

...there'll be no more shipowners and no more maritime industry. Thus...

The liability of a shipowner shall be limited to the value of the ship.

CONCEPT
The risk of severe loss gives shipowners a reasonable incentive to strive for excellence while removing the threat of ruinous loss...

CONCEPT
...that would harm the city/state and all its citizens, as well as commercial traders, in addition to the shipowners.

MARITIME INDUSTRY

English "Rules of Oleron"
1150

MARITIME INDUSTRY

Boucher v. Lawson
1733

MARITIME INDUSTRY

Boucher v. Lawson
1733

Shipowners were held personally
liable for a cargo of gold and silver
bars stolen by the master.

MARITIME INDUSTRY

Responsibility of
Shipowners' Act
1734

MARITIME INDUSTRY

Responsibility of
Shipowners' Act
1734

Shipowners' liability limited to
the value of the ship in cases
where the crew steals the cargo.

MARITIME INDUSTRY

The Responsibility of Shipowners' Act
served as the model for
laws passed in two sea-faring
U.S. states.

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Massachusetts (1819)

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Massachusetts (1819)
Maine (1821)

MARITIME INDUSTRY

*New Jersey Steam Navigation
Company v. The Merchant's
Bank of Boston
(The Lexington)
1848*

MARITIME INDUSTRY

A fire aboard the Lexington
destroyed the ship and all its cargo.

MARITIME INDUSTRY

A fire aboard the Lexington
destroyed the ship and all its cargo.
Among the cargo was a
wooden crate containing
\$18,000 worth of commercial
“paper” owned by the bank.

MARITIME INDUSTRY

The contract between the shipowner
and the bank included a
limitation of liability (LoL) provision

MARITIME INDUSTRY

The contract between the shipowner and the bank included a limitation of liability (LoL) provision but the U.S. Supreme Court found the shipowner culpable for the loss and held the LoL unenforceable.

MARITIME INDUSTRY

Limitation of Liability Act
1851

MARITIME INDUSTRY

Limitation of Liability Act
1851

Shipowners' liability limited to the RESIDUAL value of the ship.

MARITIME INDUSTRY

Limitation of Liability Act 1851

When the Titanic went down, claims amounted to \$22 million. The residual value of the ship was \$91,805.54 (lifeboats, etc.).

MARITIME INDUSTRY

Limitation of Liability Act 1851

The law still exists,
basically unchanged.

CONCEPT

CONCEPT

Good lobbyists can really pay off!



CONCEPT

ALSO

CONCEPT

Users of a service need to protect themselves through insurance and other means (e.g., careful selection of the service provider)

CONCEPT

because users should not expect a service provider to be perfect

CONCEPT

because users should not expect a service provider to serve both as a provider and as an insurance policy.

INTERNATIONAL AVIATION INDUSTRY

**INTERNATIONAL
AVIATION
INDUSTRY**

**Warsaw Convention
1929**

**INTERNATIONAL
AVIATION
INDUSTRY**

**Warsaw Convention
1929**

**Carriers' liability limited for loss of
life and property.**

**OTHER
TRANSPORT
INDUSTRIES**

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TRANSPORT
INDUSTRIES**

**"Reasonableness"
Applies**

**OTHER
TRANSPORT
INDUSTRIES**

**"Reasonableness"
Applies
(But the Higher the Limit,
the More You Pay.)**

**PARKING-LOT
INDUSTRY**

**PARKING-LOT
INDUSTRY**

Look at the
back of the ticket.

**PARKING-LOT
INDUSTRY**

Don't leave valuables
in plain sight
inside your car.

**HOSPITALITY
INDUSTRY**

**HOSPITALITY
INDUSTRY**

Look at the
back of the door.

**HOSPITALITY
INDUSTRY**

Use the safe at the
front desk to store
your valuables.

1965

**Geotechnical engineers
were being sued so often
and for so much money...**



**They were unable to
obtain conventional
professional-liability (PL)
insurance from any carrier
anywhere in the world.**



**Because professionals were
(and still are) *personally
liable*, the lack of PL
coverage meant that the
geotechnical engineers...**



...had to put their personal assets (home, savings, etc.) at risk for every project they accepted.



A group of ten met with two insurance specialists in Chicago in December 1968. There, they conceived the Associated Soil and Foundation Engineers (ASFE).

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- **identify the causes of claims, and**
- **develop claims preventives.**

PL INSURANCE

They created their own PL insurer, Terra Insurance Company,

PL INSURANCE

They created their own PL insurer, Terra Insurance Company, today the second-oldest, highest-rated U.S. insurer specializing in PL coverage for geoprofessionals.

CAUSES OF CLAIMS

**Basic lack of "soft skills"
(i.e., the skills you MUST
possess if you are to be
successful in the
professional-services
industry)**

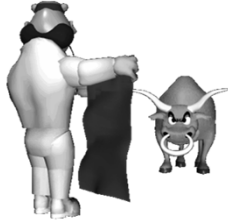
CLAIMS PREVENTIVES

**A wide array, but limitation
of liability was the first
major breakthrough and
still an essential.**

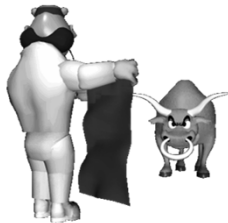
**The National Society of
Professional Engineers and
the American Institute of
Architects were strongly
opposed to LOL.**



They said that design professionals should be 100% responsible and liable for their work.



They said that it was wrong to initiate a project by discussing what could go wrong.



Instead, talk about how wonderful things will be because they'll go right.



**They also said that
limitation of liability:**

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They also said that limitation of liability:

- **was unprofessional,**
- **would never be accepted by clients, and**
- **would not withstand a court challenge.**

**But ASFE – today
ASFE/The Geoprofessional
Business Association (GBA) –
was a feisty youngster, and
was not about to give up.**



**Members made presentations
from coast to coast, explaining
why LoL was appropriate.**



Unprofessional?

It's a contract issue, principally on a business-to-business basis; an agreement between two sophisticated parties.



Unprofessional?

It's not a matter of ethics or professional conduct.



Unprofessional?

And even if it were, LoL would be deemed 100% ethical and professional.



Clients won't accept it?

Now used nationwide by geoprofessionals, civil and other engineers, and architects, among others.



Won't hold up in court?

Refer to GBA's *Design Professional Limitation Of Liability Case Index*.



Won't hold up in court?

LoL has been upheld in almost all states, although some impose certain requirements you and your attorneys need to be aware of.



**LIMITATION OF
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Some professionals believe they can eliminate their liability by contract; e.g.:
"CONSULTANT shall bear no liability for reimbursing CLIENT for losses resulting from alleged negligent errors included within CONSULTANT's instruments of professional service."

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UNENFORCEABLE.**

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**PROFESSIONAL
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UNENFORCEABLE.**

Courts will disregard them. Public policy holds that professionals require liability exposure as a spur to excellence. If professionals cannot be found liable, they may not bother to do a good job, the courts believe; lay people have no choice but to trust them.

**HOW MUCH LIABILITY IS
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HOW MUCH LIABILITY IS ENOUGH FOR AN LOL TO BE ENFORCEABLE?

ASFE/GBA asked that question of 12 law firms nationwide in 1969. Their answer? On average, "\$50,000 or the fee, whichever is higher." The most recent survey shows that limit still is the most common when the LoL addresses the consultant's negligence liability to the client.

THE LIMIT SHOULD BE NEGOTIABLE

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**THE LIMIT SHOULD BE
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But it does not have to be static.

**THE LIMIT SHOULD BE
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But it does not have to be static. Some firms have the limit change with time, moving from a high number to a lower one over several years.

AN LOL PROVISION CAN ADDRESS MORE THAN NEGLIGENCE LIABILITY.

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One of the sample provisions in the *ASFE/GBA Limitation of Liability Handbook* covers "CONSULTANT's negligence, errors, omissions, breach of contract, breach of warranty, strict liability, negligent misrepresentation, statutory liability, or other acts giving rise to liability based upon contract, tort, or statute."

AN LOL PROVISION CAN ADDRESS MORE THAN LIABILITY TO THE OWNER.

AN LOL PROVISION CAN ADDRESS MORE THAN LIABILITY TO THE OWNER.

It can also make the owner responsible for claims filed by all third parties or, probably better, constructors and (separately) other third parties, probably with a different limit for each.

WHY WOULD AN OWNER ACCEPT AN LOL PROVISION?

LIMITATION OF LIABILITY

In order for CLIENT to obtain a lower fee from CONSULTANT, among other benefits, and in order for CONSULTANT to reduce its residual risk created by providing services to CLIENT, CLIENT and CONSULTANT agree that, to the fullest extent permitted by law, CONSULTANT's total aggregate liability to CLIENT is limited to \$50,000 or the fee, whichever is higher, for any and all of CLIENT's injuries, damages, claims, losses, expenses, or claim expenses arising out of this AGREEMENT from any cause or causes. Such causes include, but are not limited to, CONSULTANT's negligence, errors, omissions, breach of contract, breach of warranty, strict liability, negligent misrepresentation, statutory liability, or other acts giving rise to liability based upon contract, tort, or statute. CLIENT understands that dollar limits higher than \$50,000 are available, and that CONSULTANT might be willing to waive the limitation of liability altogether. (If CLIENT wishes to discuss other limits or the possibility of waiving this provision, and the resulting impact on CONSULTANT's retained risk and fee, CLIENT shall so notify CONSULTANT in writing. If CLIENT fails to issue such notification prior to accepting this AGREEMENT, through signature or, without signature, by orally or in writing authorizing CONSULTANT to commence services, CLIENT shall be deemed to have accepted the limit of \$50,000 or the fee, whichever is higher.) This provision takes precedence over any conflicting provisions of this AGREEMENT.

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**COST SAVINGS
AND OTHER
BENEFITS**

COST SAVINGS

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Lower Fee

COST SAVINGS

Lower Fee

to consider your lessened risk.
It's not for less insurance for the client
(as it might be for motor freight),
although it may lead to less costly
coverage for your firm.
Conversely, a higher limit
that occasions a higher fee does not
buy more insurance for the client.

COST SAVINGS

**Less Need for
Defensive Design**

COST SAVINGS

Less Need for Defensive Design

Would you recommend more innovative
(i.e., somewhat riskier), potentially
more cost-effective approaches when
The contract requires you to play
“bet the firm”?

Or would you go with “off-the-shelf,”
conservative, “tried and true” approaches
that are safer, but more
expensive to implement?

COST SAVINGS

More Opportunity To Innovate

COST SAVINGS

More Opportunity To Innovate

When the client is willing to share
the risk, innovative approaches – which
can save money and/or time – become
far more practical.

FAIRNESS

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Avoid "Heads I Win,
Tails You Lose"

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Avoid "Heads I Win,
Tails You Lose"
Few owners do everything they can to lower risk and achieve a high-quality outcome. When they do less, they derive the benefit of fee-cost savings. The geoprofessional earns a smaller fee and smaller profit and must accept more risk. At the very least, the owner should accept some of the additional risk it imposes to derive its benefit.

FAIRNESS
The Additional Risk
Is Personal

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The Additional Risk
Is Personal
The owner can avoid risk through
corporate dissolution or other means.
Your risk is personal and can last
for your lifetime or even longer.

FAIRNESS
The Additional Risk
Creates More Exposure

FAIRNESS
**The Additional Risk
Creates More Exposure**
The design professionals are
exposed to claims from any party that
alleges it was injured or
damaged by the design professionals'
alleged negligence.

FAIRNESS
**The Additional Risk
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FAIRNESS
**The Additional Risk
Creates More Exposure**
The design professionals face still
more exposure because, at the time the
alleged injury or damage occurred,
the design professionals may be the
only parties available, because of
personal liability.

FAIRNESS
Risk and Benefit Are
Not Proportional

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Not Proportional
Geoprosessionals tend to earn about
a 10% net profit. Earning a \$50,000
fee for services on a \$25 million project
exposes a firm to a \$5 million (or more)
loss for a hoped-for gain of \$5,000.
Consider how much the owner benefits.
Consider how much the
constructor benefits.

WHY SHOULD YOU
MAKE THE EFFORT TO
"SELL" LOL
PROVISIONS?

RISK CONFRONTATION

Especially in the case of new clients, an LoL provision should give you an opportunity to address project risk overall.

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Educate your client representatives.

Doing so can result in a better scope (that generates less risk, more revenue, and more profit) while burnishing your image as a trusted professional advisor.

Ask your PL insurer about discounts you should be eligible for when you reduce the **INSURER'S LIABILITY by being able to include an LOL in your contract.**

**Order from ASFE/GBA
Limitation of Liability: A Handbook for Design and Environmental Professionals
and read it!**

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**John Bachner Webinars Ahead:
NOON-1:00PM EDT**



**John Bachner Webinars Ahead:
NOON-1:00PM EDT**

**May 8, 2013: Taking, Preparing, and
Issuing Meeting Minutes**

**John Bachner Webinars Ahead:
NOON-1:00PM EDT**

**May 8, 2013: Taking, Preparing, and
Issuing Meeting Minutes**

**May 22, 2013: Understanding
Professional-Liability Insurance**

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June 5, 2013: Proofreading 101

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**May 22, 2013: Understanding
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June 5, 2013: Proofreading 101

June 19, 2013: Personal Liability

**July 10, 2013: Acronyms and
Capitalization**

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July 24, 2013: Dirty Words

July 10, 2013: Acronyms and Capitalization

July 24, 2013: Dirty Words

August 7, 2013: Gaining More Referrals

July 10, 2013: Acronyms and Capitalization

July 24, 2013: Dirty Words

August 7, 2013: Gaining More Referrals

August 21, 2013: Understanding Indemnities

July 10, 2013: Acronyms and Capitalization

July 24, 2013: Dirty Words

August 7, 2013: Gaining More Referrals

August 21, 2013: Understanding Indemnities

September 11, 2013: KISS (Keep It Short and Simple)

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Questions?



THANK YOU!