Limitation of Liability Clauses: Do They Protect You?

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This article discusses a matter that is central to geotechnical engineering commercial risk management: Limitation of Liability Clauses - their reach and effectiveness.

Contractual language limiting liability exists in many different forms. For example, where these sorts of clauses appear in professional service agreements, they may limit the engineer's liability to the value of the fees paid for services rendered or to the value of available and collectable professional liability insurance. In addition, a limitation of liability clause may restrict a party's exposure to damages caused by negligent acts. Limitation of liability clauses may also exclude liability for certain types of damages, for example, consequential damages, business interruption losses, or damages arising from loss of profit. These types of clauses often limit the time within which one party to a contract can make a claim against another. These limitation of liability clauses are legally effective as between the contracting parties. There are other limitation of liability clauses that can extend further to limit liability to non-contracting parties. These include "non-reliance" clauses and what are sometimes referred to as *"caveat* contractor" clauses found in a tendering context.

While perhaps once regarded as "weasel clauses," limitation of liability clauses have come to be considered a necessary component of an engineering risk management strategy. If properly drafted and implemented, limitation of liability clauses can provide effective protection to a geotechnical professional.

Limitation of Liability clauses are typically found in professional service agreements. While many in-house risk managers draft these clauses, in the final analysis it is a question of legal drafting that determines their effectiveness. It is critical to the legal efficacy of these clauses that they are carefully drafted to ensure that they reflect the amount of risk that the geotechnical professional is willing to accept given the nature of the engagement. For example, the limitation of liability clause should be broad enough to incorporate the full scope of the engineering services. Moreover, if liability is sought to be limited to available insurance, care must be taken to ensure that the clause is compatible with the insurance coverage and any exclusions. In addition, the scope of the protection should be circumscribed with reference to the amount of available and *collectable* insurance. Finally, the directors, officers, agents, or employees of the engineering firm may also incur liability and a limitation of liability clause should therefore extend its protection to these individuals.

These sorts of clauses are among the most difficult contractual clauses to draft. Although Canadian Courts have certainly recognized the right of contracting parties to allocate risk between themselves as they see fit, Canadian Courts look at limitation of liability clauses with a jaundiced eye. Because one party is asking the Court to use the clause to relieve it from liability, the Court will take a stricter attitude towards the clause and will look very carefully at its validity, meaning, and application. A Court may also rely on the doctrine of *contra proferentem* to assist

with the interpretation of a limitation of liability clause. According to this doctrine, that, where a clause in a contract is capable of two meanings, a Court will choose the interpretation which is against the interests of the person who drafted the clause. This doctrine can be of great importance in the context of a limitation of liability clause, where the party seeking to rely on the clause is also often the person who drafted it, and the Court can therefore rely on the doctrine to adopt an interpretation that does not exclude or limit the party's liability.

There is a second sphere of exposure that can be mitigated through language in the geotechnical professional's work product. This concerns claims brought by persons with whom the geotechnical professional has no contractual relationship, for example, claims brought by third parties for resulting property losses caused by errors and omissions in design or field services. This may include claims brought by contractors who incur unanticipated construction costs in reliance on a geotechnical professional's work product. Can the geotechnical professional exclude or limit its liability against these sorts of claims?

The answer to this question appears to be "no" in relation to claims for: (1) personal injury or property damage; and (2) remediation costs to render safe a condition that imposes a substantial risk to persons. The Supreme Court of Canada has dealt directly with both of these scenarios and, as a result, both corporate and individual engineers are exposed to liability for both of these types of losses. Therefore, limitation of liability clauses will do little to limit a geotechnical professional's exposure in these circumstances and it is essential that the geotechnical professional protects itself with adequate professional liability insurance.

That said, where the claim is based on reliance on the geotechnical professional's written work product, there is a tool available to limit liability. This is the "non-reliance" clause. An example of a non-reliance clause is where the geotechnical professional expressly warns against reliance on a geotechnical report by third parties and disclaims any liability for such use. Such a clause may protect the geotechnical professional from liability in the face of unreasonable reliance.

Geotechnical reports are often included in tender document packages. A properly drafted *caveat* contractor clause which specifically excludes liability for the geotechnical reports can operate to insulate the geotechnical professional from claims brought by a contractor for unanticipated site conditions and increased costs. However, the clause must be drafted to have this effect. It is appropriate for the geotechnical professional not to simply rely upon disclaimers in its report, but to require the owner to include protection for the geotechnical professional in a broadly worded *caveat* contractor clause. Consequently, the professional services agreement should include a clause that requires the owner to extend the protection of the *caveat* contractor clause to the geotechnical professional.

A geotechnical professional's use of properly drafted limitation of liability clauses has become particularly important because of shrinking insurance coverage and because of increased exclusions from insurance policies and premium costs.

In the final analysis, especially with the shrinking role of the insurance industry in overall risk management in the engineering profession and notwithstanding ever improving risk mitigation through sound engineering practices, the fact remains that it rests with the geotechnical professional to protect itself through appropriate commercial contracting. This type of drafting often includes complex legal issues involving the availability of professional liability insurance. A simple oversight or misinterpretation of the geotechnical professional's potential liability could result in a clause that fails to provide adequate protection. These risks are becoming increasingly

important as construction projects grow larger and the potential exposure to liability is reaching unhealthy levels for geotechnical service providers.

Note: The comments provided in this article are general in nature and your potential exposure can vary substantially depending on your circumstances. Therefore, you should always seek legal advice tailored to your circumstances.

If there are other legal topics that you would like to address in future editions of Geotechnical News, please contact Andrew Wallace at awallace@jml.ca or (604) 895-3159.

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