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Can a Professional Limit Liability Contractually Under Florida Law?

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NOTE

CAN A PROFESSIONAL LIMIT LIABILITY CONTRACTUALLY
UNDER FLORIDA LAW?

*John Terwilleger**

Abstract

Florida law is currently unclear on the issue of whether a professional may rely upon a limitation of liability clause in a professional services contract. Limitation of liability clauses are common in business contracts, especially in construction, a field that includes many professionals such as engineers and architects. While Florida has historically enforced limitation of liability clauses in professional services contracts, recent cases have cast doubt on whether the clauses are enforceable. If the Florida Supreme Court establishes that professionals cannot rely upon these clauses, it will be taking a position contrary to the majority of states, including New York, California, and Texas, all of which enforce limitation of liability clauses with varying degrees of restriction. This Note argues that Florida should not prohibit professionals from using limitation of liability clauses. These clauses do not violate public policy when, as already required by Florida law, the clauses are stated clearly, ensuring that both parties to the contract are aware of their existence. Permitting professionals to continue to rely upon limitation of liability clauses honors the contracting parties' freedom of contract. Additionally, limitation of liability clauses provide an efficient method for parties to allocate risk.

INTRODUCTION	1352
I. CLAUSES THAT LIMIT LIABILITY GENERALLY	1354
A. <i>Limitation of Liability in Contracts That Are Not for Professionals' Services</i>	1354
B. <i>Exculpatory Clauses</i>	1356
II. WHO QUALIFIES AS A PROFESSIONAL?	1357
III. PRIMARY FLORIDA CASES	1358

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IV.	HOW OTHER STATES HAVE DEALT WITH LIMITATION OF LIABILITY CLAUSES AND PROFESSIONALS.....	1363
V.	THE NATURE OF A PROFESSIONAL MALPRACTICE CLAIM AND LIMITING LIABILITY.....	1367
VI.	PUBLIC POLICY ISSUES BEHIND ALLOWING PROFESSIONALS TO INCLUDE LIMITATION OF LIABILITY CLAUSES.....	1369
	A. <i>Public Policy Considerations</i>	1371
	B. <i>The Florida Supreme Court Has Not Established an Absolute Public Policy Prohibition of Limitation of Liability Clauses</i>	1372
VII.	FLORIDA SHOULD ENFORCE LIMITATION OF LIABILITY CLAUSES IN PROFESSIONAL SERVICES CONTRACTS.....	1374

INTRODUCTION

May a professional contractually limit his liability under Florida law? For most professionals, the answer is unsettling: it is unclear. When an engineer designs a small portion of a multimillion-dollar bridge and is paid a few thousand dollars for his services, is he liable for millions of dollars in damages if there is a problem with the design? If a professional chooses to negotiate for a limitation of liability clause in the contract, and the other party accepts that clause, should the law respect the decisions of the parties freely entering into the contract? This Note addresses these questions and suggest a resolution that is consistent with Florida law.

In 2000, Gerhardt Witt, a geologist, began advising La Gorce Country Club on a water treatment project for the irrigation system of its golf course.¹ Witt was a professional geologist, licensed in Florida.² “Many problems arose” during the design and construction of the water treatment system, but it was ultimately completed in 2003.³ “During the fourteen-month period the system was in use, its performance deteriorated and ultimately, the system failed completely.”⁴ La Gorce inevitably filed suit for, among other claims, “professional malpractice by Witt.”⁵ The contract between La Gorce and Witt’s professional association included a limitation of liability clause that covered

1. Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033, 1036 (Fla. 3d Dist. Ct. App. 2010).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1037.

“negligence, professional errors or omissions.”⁶ However, the court found that “the limitation of liability provision was, as a matter of law, invalid and unenforceable as to Witt.”⁷

In contrast, in 1985, the United States Court of Appeals for the Eleventh Circuit, relying on Florida law, reached a different conclusion when dealing with a professional’s limitation of liability clause. In *Florida Power & Light Co. v. Mid-Valley, Inc.*, the Eleventh Circuit dealt with the issue of “[w]hether under Florida law the limitation of liability clause exculpated the Engineer from damages caused by its own negligence.”⁸ Florida Power & Light Company (FPL) contracted with Mid-Valley, Inc., to perform engineering design and work for a cooling water reservoir.⁹ The lawsuit arose when an embankment associated with the cooling water reservoir suddenly collapsed.¹⁰ FPL brought a claim against Mid-Valley, its parent company, and the project engineer alleging “negligence in the design, engineering, surveying and construction surveillance work on the reservoir.”¹¹ The district court granted summary judgment for both the engineer and the companies based on the limitation of liability clause in the contract with FPL.¹² The limitation of liability clause stated that any liability on the part of Mid-Valley, even for the negligence of its own engineers, was limited to the insurance coverage purchased for the project.¹³ The clause included an option to increase the insurance coverage, if FPL was willing to pay the additional cost.¹⁴ On appeal, after discussing the Florida requirement

6. *Id.* at 1036. The court reproduced the limitation of liability clause between La Gorce and GMWA, Witt’s engineering firm, in full:

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.

Id.

7. *Id.* at 1039.

8. *Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316, 1317 (11th Cir. 1985).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1318.

14. *Id.*

that the limitation of liability clause must be clear and unequivocal, the Eleventh Circuit concluded that “the limitation of liability clause exculpated the Engineer from its own negligence.”¹⁵ It concluded that the clause limited the liability for both the engineer and the company to the limits of the insurance policy.¹⁶

The question for professionals now is: What is the current state of the law in Florida as it relates to limitation of liability clauses? In 1985, a limitation of liability clause needed to be clear and unequivocal, but a professional was free to include it in a contract.¹⁷ As of 2010, it is no longer certain whether a professional can limit his liability, especially in the Third District Court of Appeal.¹⁸ This Note addresses the question of whether professionals can rely upon limitation of liability clauses under Florida law. Part I describes Florida’s general rule for limitation of liability clauses outside of the context of professionals. Part II briefly describes who qualifies as a professional under Florida law. Part III addresses the three primary Florida cases that have considered professionals using limitation of liability clauses, reaching contradictory results. Part IV presents a brief survey of the ways that other states have addressed this issue. Part V addresses whether the unique nature of professional malpractice claims prohibits the enforcement of these clauses entirely. Part VI explains the public policy issues behind the debate over whether courts should enforce limitation of liability clauses in professional services contracts. Finally, Part VII explains the reasons why courts should enforce limitation of liability clauses when used by professionals.

I. CLAUSES THAT LIMIT LIABILITY GENERALLY

A. *Limitation of Liability Clauses in Contracts That Are Not for Professionals’ Services*

A limitation of liability clause is “a contractual agreement that serves to apportion exposure by having a party agree to assume the risk of a limited, defined quantum or predetermined amount of liability.”¹⁹ These clauses have become “a fact of everyday business and commercial life.”²⁰ Limitation of liability clauses play a practical role in contractual relations.²¹ A limitation of liability clause can allow a party to reduce

15. *Id.* at 1320.

16. *Id.* at 1320, 1322.

17. *Id.* at 1319–20.

18. *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1039 (Fla. 3d Dist. Ct. App. 2010).

19. Jesse B. Grove, III, *Risk Allocation from the Contractor’s Perspective*, 467 PLI/REAL 41, 99 (2001).

20. *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995).

21. Grove, *supra* note 19, at 100.

his or her overall price for a project.²² However, “[i]f a contractor is unable to limit liability for certain losses through such a clause, he will likely price the job higher to insure against these losses.”²³ If the clause is later determined to be unenforceable, the party who included it “may find himself in the position of obtaining a low price for his work and liability for losses far in excess of what he contemplated.”²⁴ Because of this potential harm, it is important that professionals, like any other contracting party, know whether a limitation of liability clause will be enforced by the courts.

Florida law requires the enforcement of limitation of liability clauses generally if the clause is clear and unequivocal.²⁵ In *Mt. Hawley Insurance Co. v. Pallet Consultants Corp.*, the court stated that limitation of liability clauses do not violate public policy.²⁶ In *Mt. Hawley*, the Pallet Consultants Corporation (Pallet) rented property whose fire sprinkler system was damaged by Hurricane Wilma.²⁷ Pallet contracted with SimplexGrinnell LP to repair the sprinkler system.²⁸ The contract included several clauses that limited SimplexGrinnell’s liability for various risks and a clause limiting any liability for any damages not listed in other provisions to the contract price, which was \$875.²⁹ Through a series of misunderstandings by its own employees, SimplexGrinnell failed to turn the water for the system back on after completing repairs.³⁰ Shortly after the completion of the work, a fire at the property caused catastrophic damage to Pallet.³¹ Investigators from multiple Florida agencies determined that the lack of a functioning sprinkler system contributed to the spread of the fire.³² An expert for Pallet’s insurance company, Mt. Hawley, concluded that the sprinkler system did not operate in part of the building, which violated the insurance policy.³³ As a result, Mt. Hawley denied Pallet’s claim.³⁴ In its third-party breach-of-contract claim against SimplexGrinnell, Pallet alleged “that a fire caused extensive damage to Pallet’s property as a

22. *Id.*

23. *Id.*

24. *Id.*

25. *Mt. Hawley Ins. Co. v. Pallet Consultants Corp.*, No. 06-61763-Civ, 2009 WL 1911722, at *7 (S.D. Fla. July 1, 2009).

26. “[Plaintiff] argues that this limitation of liability provision is unenforceable because it . . . violates Florida public policy The Court rejects both arguments.” *Id.*

27. *Id.* at *1.

28. *Id.* at *1–2.

29. *Id.* at *2–3.

30. *Id.* at *3–4. There were also questions as to whether the repairs were completed correctly. *Id.*

31. *Id.* at *4.

32. *Id.* at *5.

33. *Id.*

34. *Id.*

result of SimplexGrinnell's failure to restore service to Pallet's sprinkler system."³⁵ However, the court held that the limitation of liability clause in the contract was enforceable under Florida law, limiting SimplexGrinnell's liability to the contract price, \$875.³⁶ The court explained that the clause was clear and unequivocal as to the limit on SimplexGrinnell's liability.³⁷ In addition, the contract included a provision permitting Pallet to purchase a rider, increasing SimplexGrinnell's liability.³⁸ The court concluded that "[b]ecause the law is clear that limitation-of-liability clauses are enforceable and there is no reason why it should not be enforced in this case, the aggregate of compensatory damages recoverable by Pallet for any claim it has against SimplexGrinnell is limited to \$875.00."³⁹

Other courts have reached similar conclusions when addressing limitation of liability clauses. In *DHL Express (USA) Inc. v. Express Save Industries, Inc.*, the court upheld a limitation of liability clause because the clause was clear and unequivocal.⁴⁰ However, "clear and unequivocal" is not the only test that courts have applied. In *Underwriters at Lloyds v. FedEx Freight System, Inc.*, the court upheld a limitation of liability clause that was "clear and unambiguous."⁴¹ And in *Barnes v. Diamond Aircraft Industries, Inc.*, the court validated a limitation of liability clause because it was "mutual, unequivocal, and reasonable."⁴² These cases demonstrate that a limitation of liability clause is not, by itself, invalid. While the courts use different terminology to describe an acceptable limitation of liability clause, the most restrictive test applied has been "clear and unequivocal."

B. Exculpatory Clauses

In contrast to a clause limiting liability to a set amount, an exculpatory clause is a contractual provision that "purports to deny an injured party the right to recover damages from a person negligently causing his injury."⁴³ In *Cain v. Banka*, the Fifth District Court of Appeal explained that "[e]xculpatory clauses are disfavored and are enforceable only where and to the extent that the intention to be relieved

35. *Id.* at *6.

36. *Id.* at *9.

37. *Id.*

38. *Id.*

39. *Id.*

40. *DHL Express (USA) Inc. v. Express Save Indus., Inc.*, No. 09-60276-CIV, 2009 WL 4110810, at *1 (S.D. Fla. Nov. 24, 2009).

41. *Underwriters at Lloyds v. FedEx Freight Sys., Inc.*, No. 8:07-CV-212-T-EAJ, 2008 WL 2901049, at *8 (M.D. Fla. July 23, 2008).

42. *Barnes v. Diamond Aircraft Indus., Inc.*, 499 F. Supp. 2d 1311, 1318 (S.D. Fla. 2007).

43. *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th Dist. Ct. App. 2006).

from liability was made clear and unequivocal.”⁴⁴ In *Greater Orlando Aviation Authority v. Bulldog Airlines, Inc.*, the court stated that “[e]xculpatory clauses generally are not looked upon with favor, but such clauses are valid and enforceable if the intention to relieve a party of its own negligence is made clear and unequivocal in the contract.”⁴⁵ Thus, despite the fact that exculpatory clauses are disfavored under Florida law, they are enforceable as long as the clause is clear and unequivocal.⁴⁶

The judicial disfavor of exculpatory clauses has not been transferred to limitation of liability clauses. In *Mt. Hawley*, the court rejected the argument that because exculpatory clauses are disfavored, limitation of liability clauses should also be disfavored.⁴⁷ Instead, the court explained that, despite the defendant’s argument that exculpatory clauses are disfavored in Florida, “the law is clear that limitation-of-liability clauses are enforceable.”⁴⁸ Because exculpatory clauses are allowed, even though disfavored, and limitation of liability clauses are not disfavored, limitation of liability clauses should be enforceable under Florida law.

These cases demonstrate that Florida courts generally enforce limitation of liability clauses.⁴⁹ Additionally, exculpatory clauses—which are a method of eliminating rather than merely limiting liability—are also enforced if they are clear and unequivocal.⁵⁰ Thus, under Florida law, a limitation of liability clause is generally allowed outside of the context of professional services contracts.

II. WHO QUALIFIES AS A PROFESSIONAL?

Having determined that limitation of liability clauses are generally permissible under Florida law, the next issue is whether the clauses may be enforced when used by professionals. Professional vocations are those “requiring at a minimum a four-year college degree before licensing is possible in Florida.”⁵¹ This Note does not consider attorneys and physicians. Attorneys are governed by the Rules Regulating the Florida Bar, which expressly forbid limitation of liability clauses except under limited circumstances.⁵² The use of limitation of liability clauses

44. *Id.*

45. *Greater Orlando Aviation Auth. v. Bulldog Airlines, Inc.*, 705 So. 2d 120, 121 (Fla. 5th Dist. Ct. App. 1998).

46. *See Cain*, 932 So. 2d at 578; *Greater Orlando Aviation Auth.*, 705 So. 2d at 121.

47. *Mt. Hawley Ins. Co. v. Pallet Consultants Corp.*, No. 06-61763-Civ, 2009 WL 1911722, at *9 (S.D. Fla. 2009).

48. *Id.*

49. *Id.*

50. *See Cain*, 932 So. 2d at 578; *Greater Orlando Aviation Auth.*, 705 So. 2d at 121.

51. *Moransais v. Heathman*, 744 So. 2d 973, 976 (Fla. 1999).

52. R. REGULATING FLA. BAR 4-1.8(h) (“Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for

by physicians creates public policy issues relating to the medical profession that are beyond the scope of this Note. Additionally, both attorneys and physicians have a higher fiduciary standard than other professionals.⁵³ However, the fact that the Rules Regulating the Florida Bar place explicit limitations on contracting for limited liability suggests that, without the rule, attorneys could contract for limited liability, and thus professionals as a whole are not restricted from contracting for limited liability. If attorneys, as professionals, were prohibited by law from using limitation of liability clauses, there would be no need to place the prohibition within the Rules Regulating the Florida Bar. Under Florida law, many other vocations are legally considered professions. The Florida Statutes dedicate a full title to the regulation of various professionals,⁵⁴ including engineers,⁵⁵ architects,⁵⁶ and geologists,⁵⁷ among others.

III. PRIMARY FLORIDA CASES

Three cases have dealt with the issue of professionals using limitation of liability clauses in Florida. In *Florida Power & Light*, the Eleventh Circuit, interpreting Florida law, held that limitation of liability clauses in professional services contracts are enforceable, even when the clause limits liability for the professional's own negligence.⁵⁸ In *Moransais v. Heathman*, the Florida Supreme Court suggested that a professional may not be able to limit his liability contractually, but prefaced its statement by explaining that "provisions of a contract may impact a legal dispute, including an action for professional services," although the contract could not bar a malpractice suit entirely.⁵⁹ Finally, in *Witt*, the Third District Court of Appeal took the reasoning in *Moransais* a step further, determining that a limitation of liability clause

malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith."). The Florida Rule is nearly the same as Rule 1.8(h) of the Model Rules of Professional Conduct.

53. *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 205 (3d Cir. 1995).

54. FLA. STAT. tit. XXXII.

55. FLA. STAT. § 471.003 (2012); *see Trikon Sunrise Assocs., LLC v. Brice Bldg. Co.*, 41 So. 3d 315, 319 (Fla. 4th Dist. Ct. App. 2010) (defining engineers as professionals).

56. FLA. STAT. § 481.209(1) (2012); *see Trikon Sunrise Assocs.*, 41 So. 3d at 318 (defining architects as professionals).

57. FLA. STAT. § 492.105 (2012); *see Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1037 (Fla. 3d Dist. Ct. App. 2010) (describing a geologist as a professional).

58. *Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316, 1319 (11th Cir. 1985).

59. *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999).

is “unenforceable as a matter of law.”⁶⁰ Each of these cases will be examined in detail below.

In *Florida Power & Light*, the Eleventh Circuit determined that professionals may contractually limit their liability, even for their own negligence.⁶¹ In that case, the trial court granted summary judgment for the defendant because the contract contained a limitation of liability clause.⁶² One of the issues the court addressed was “[w]hether under Florida law the limitation of liability clause exculpated the Engineer from damages caused by its own negligence.”⁶³ In explaining the law of Florida on limitation of liability clauses, the court stated that when “language specifically alerts the indemnitor that the indemnitee’s own negligence is part of the agreement, Florida law will allow the agreement to be enforced.”⁶⁴ The court applied the rule to the contract by noting that the contract used “clear and unequivocal terms” and “specifically listed the ‘negligence of the Engineer’ as one cause of damage that was to be the subject of the exculpatory clause and the indemnity provision.”⁶⁵ An additional factor that the court found relevant (although it did not state that it was a requirement) was that the contract provided “a means for FPL to increase that insurance coverage, albeit at additional cost to FPL. FPL expressly declined to do so.”⁶⁶ Based on the contract, the court concluded “that under Florida law the limitation of liability clause exculpated the Engineer from its own negligence and provided indemnification for the indemnitee’s own negligence.”⁶⁷

The Florida Supreme Court addressed professionals specifically in *Moransais v. Heathman*. The plaintiff, Philippe Moransais, contracted to purchase a home from the defendant, Paul Heathman.⁶⁸ In preparing to purchase the home, Moransais contracted with an engineering firm, Bromwell & Carrier, Inc. (BCI) “to perform a detailed inspection of the home and to advise him of the condition of the home.”⁶⁹ The contract between Moransais and BCI did not include the names of the engineers who actually performed the inspection.⁷⁰ After purchasing the home, Moransais alleged that the home was uninhabitable due to defects that

60. *Witt*, 35 So. 3d at 1038.

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

62. *Id.* at 1317.

63. *Id.*

64. *Id.* at 1319.

65. *Id.*

66. *Id.* at 1320.

67. *Id.*

68. *Moransais v. Heathman*, 744 So. 2d 973, 974 (Fla. 1999).

69. *Id.*

70. *Id.*

the engineers did not discover.⁷¹ As a result, Moransais filed suit for professional negligence against BCI and the two engineers individually.⁷² The trial court dismissed the claims against the engineers based on the economic loss rule.⁷³ The economic loss rule applied to the engineers because Moransais's complaint only alleged financial injury; it did not allege any bodily injury or property damage.⁷⁴ The Second District Court of Appeal affirmed the trial court's decision, but certified a question to the Florida Supreme Court because its decision was in conflict with the Fifth District Court of Appeal.⁷⁵ The Florida Supreme Court divided the certified question into two issues: (1) Does a plaintiff have a cause of action for professional malpractice against the individual engineers who work for an engineering firm?⁷⁶ (2) Does the economic loss rule bar claims for professional malpractice against the individual engineer when the complaint does not allege any bodily injury or property damage?⁷⁷

First, the Florida Supreme Court explained the heightened duty of care that is imposed on professionals. It explained that professionals have a higher standard of care in performing their work than nonprofessionals.⁷⁸ It defined a profession as "any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida."⁷⁹ The court explained that the duty of care for professionals is "to perform the requested services in accordance with the standard of care used by similar professionals in the community under similar circumstances."⁸⁰ That duty applies when a professional is performing a contract, imposing a greater duty on professionals than that imposed on a nonprofessional performing the same contract.⁸¹ With a contract for a delivery or manual labor, the duty "is to conform to the quality or quantity specified in the express contract," or to perform "in a good and

71. *Id.* at 974–75.

72. *Id.* at 975.

73. *See id.* at 975. "The "economic loss" rule is a court-created doctrine which prohibits the extension of tort recovery for cases in which a product has damaged only itself and there is no personal injury or damage to "other property," and the losses or damage are economic in nature." *Id.* at 979 (quoting *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 7 (Fla. 5th Dist. Ct. App. 1994)). The objective of the rule is to prohibit tort claims in cases where contract law appropriately addresses the injury. *See id.* at 980. In a recent opinion, the Florida Supreme Court limited the economic loss rule exclusively to products liability cases. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 400 (Fla. 2013).

74. *See Moransais v. Heathman*, 744 So. 2d 973, 975 (Fla. 1999)..

75. *Id.*

76. *See id.* at 974.

77. *See id.*

78. *See id.* at 975–76.

79. *Id.* at 976 (quoting *Garden v. Frier*, 602 So. 2d 1273, 1275 (Fla. 1992)).

80. *Id.* at 975–76.

81. *See id.* at 976.

workmanlike manner.”⁸² In contrast, the duty of a professional “rendering professional services is to perform such services in accordance with the standard of care used by similar professionals in the community under similar circumstances.”⁸³

Having explained the heightened duty of professionals, the court addressed the first question: did the plaintiff have a cause of action against the engineers who were not named in the contract? The court reviewed the statutes that applied to professionals and permitted professionals to form professional associations, and explained that one of the conditions imposed by the statutes was that the professionals would still maintain individual liability for their negligent acts, even if there was no contractual privity.⁸⁴ The court explained that Florida statutes “indicate an intent to hold professionals personally liable for their negligent acts by expressly stating that the formation of a corporation or partnership shall not relieve the individual members of their personal professional liability.”⁸⁵ Because of the language of the statutes, the court held that the engineers could be sued for professional malpractice despite the fact that they did not sign the contract and were not mentioned individually in the contract.⁸⁶

Having determined that the engineers could be personally liable even though they were not named in the contract, the court moved to the issue of the contract itself. First, the court explained that the economic loss rule did not apply to professional malpractice claims.⁸⁷ If applied to contracts with professionals, the economic loss rule would frequently eliminate malpractice claims entirely, because damages resulting from professional malpractice are normally purely financial.⁸⁸ The court explained that “[w]hile provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve per se to bar an action for professional malpractice.”⁸⁹ Having concluded that the economic loss rule did not automatically bar the claim against the engineers, the court continued to speculate that “[i]ndeed, 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.”⁹⁰ After engaging in the

82. *Id.* (quoting *Lochrane Eng’g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 232 (Fla. 5th Dist. Ct. App. 1989)).

83. *Id.* at 976 (quoting *Lochrane Eng’g*, 552 So. 2d at 232).

84. *Id.* at 978–79 (citing FLA. STAT. §§ 621.07, 471.023(3) (West 2003)).

85. *Id.* at 978.

86. *See id.* at 984.

87. *See id.* at 982–83.

88. *See id.* at 983.

89. *Id.* at 983.

90. *Id.*

speculation that led to the Third District Court of Appeal's decision in *Witt*, the court concluded that neither the economic loss rule, nor the fact that the engineers were not specifically named in the contract "preclude[d] an action for professional malpractice."⁹¹

The Third District Court of Appeal took the *Moransais* reasoning a step further when it held that a limitation of liability clause was insufficient to protect a professional from a malpractice claim.⁹² In *Witt*, the district court addressed the issue of whether a limitation of liability clause, which limited liability even when the professional was negligent, could be enforced.⁹³ The court concluded that the professional geologist was not protected by the limitation of liability clause because he was not a party to the contract and because of the Florida Supreme Court's statement at the end of *Moransais* questioning whether a professional could contractually limit a client's remedies.⁹⁴ The court chose to follow the "instructive" statement in *Moransais*, concluding that "[e]ven assuming, for argument's sake, that Witt, in his individual capacity, was covered by the limitation of liability provisions, such a limitation would be unenforceable as a matter of law."⁹⁵ The court stated that a cause of action for negligence by a professional was independent of the contract.⁹⁶ Thus, the contract, including a limitation of liability clause, could not limit the independent cause of action for professional malpractice.⁹⁷ The court held that "[u]nder the facts of this case, a cause of action in negligence exists irrespective, and essentially, independent of a professional services agreement."⁹⁸

The court in *Witt* established a rule that was directly in conflict with the decision in *Florida Power & Light*. In *Florida Power & Light*, the court held that a limitation of liability clause protected an engineer from his own negligence if it met the rules for limitation of liability clauses.⁹⁹ An engineer is clearly a professional, as explicitly stated in *Moransais*: "an engineer is considered a professional."¹⁰⁰ However, in *Witt* the court held that a professional was completely barred from contractually

91. *Id.*

92. *See Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1038 (Fla. 3d Dist. Ct. App. 2010).

93. *See id.* at 1037–38.

94. *Id.* at 1037, 1039 (quoting *Moransais*, 744 So. 2d at 983).

95. *Witt*, 35 So. 3d at 1038.

96. *See id.* at 1039.

97. *Id.*

98. *Id.*

99. *See Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316, 1319–20 (11th Cir. 1985).

100. *Moransais v. Heathman*, 744 So. 2d 973, 976 (Fla. 1999).

limiting liability.¹⁰¹ This conclusion was reached based on a statement in *Moransais* that was not the holding, but rather raised a question about an issue not before the court.¹⁰² This conflict leaves the current state of Florida law in doubt.¹⁰³

IV. HOW OTHER STATES HAVE DEALT WITH LIMITATION OF LIABILITY CLAUSES AND PROFESSIONALS

Most other states that have dealt with the issue of whether professionals can contractually limit their liability through limitation of liability clauses have determined that the clauses are enforceable. A brief review of some of those decisions will help to frame the discussion as it relates to Florida law.

In New York, the law is clear that professionals may contractually limit liability. In *Peluso v. Tauscher Cronacher Professional Engineers, P.C.*, the court determined that a limitation of liability clause in a contract for a home inspection was enforceable.¹⁰⁴ In a factual situation similar to *Witt*, the plaintiffs in *Peluso* hired an engineering company to perform a prepurchase inspection of a house.¹⁰⁵ The contract between the engineering company and the plaintiffs included a clause limiting the engineering company's liability to the fee the plaintiffs paid for the inspection.¹⁰⁶ The plaintiffs eventually brought suit because the engineering company failed to tell them that the roof of the house needed to be replaced.¹⁰⁷ In a brief opinion, the New York appellate court affirmed the trial court's grant of summary judgment in favor of the engineering company based on the limitation of liability clause.¹⁰⁸ It explained that "[a] contractual provision which limits damages is enforceable unless the special relationship between the parties, a statute, or public policy imposes liability."¹⁰⁹ It added the caveat that a limitation of liability cannot apply to gross negligence, but found that none had occurred in the case.¹¹⁰ Similarly, in *Rector v. Calamus Group, Inc.*, another case involving the prepurchase inspection of a

101. See *Witt*, 35 So. 3d at 1039.

102. *Moransais*, 744 So. 2d at 983.

103. This fact is compounded because there is no binding authority for the majority of Florida courts. The Eleventh Circuit's decision in *Florida Power & Light* is not binding on Florida state courts, and the Third District Court of Appeal's decision in *Witt* is only binding on state courts within that district.

104. *Peluso v. Tauscher Cronacher Prof'l Eng'rs, P.C.*, 270 A.D.2d 325, 325 (N.Y. App. Div. 2000).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 325–26.

house, the court ruled that a limitation of liability clause for an inspection by an engineer was enforceable, applying the same standard.¹¹¹ The court also explained that third-party beneficiaries to the contract were limited by the clause, even though they did not sign the contract themselves.¹¹²

New York courts have also enforced limitation of liability clauses for professionals outside of the context of home inspections. In *Perotto Development Corp. v. Sear-Brown Group*, the court addressed a limitation of liability clause in a contract for “architectural and engineering services concerning the design and construction of a funeral home facility.”¹¹³ The court held that the limitation was enforceable unless “plaintiffs can establish that defendant was grossly negligent in the performance of its contractual duties.”¹¹⁴

Kentucky also enforces limitation of liability clauses in professional services contracts. In *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek & Co.*, the Kentucky Court of Appeals explained that Kentucky courts enforce limitation of liability clauses.¹¹⁵ Crowe Chizek, an accounting firm, was sued for negligence, among other charges, in auditing the Peoples Bank of Northern Kentucky.¹¹⁶ In the original contract, Crowe Chizek and the bank included a clause limiting liability to the fees paid.¹¹⁷ The court explained that the “limitation of liability provision is subject to enforcement according to its plain terms.”¹¹⁸ The court interpreted the limitation narrowly, determining that it did not protect Crowe Chizek from its own negligence.¹¹⁹ It also determined that the provision applied only to damages occurring after it was signed.¹²⁰ However, the limitation was enforceable after it had been signed and within its plain terms.¹²¹

Under Pennsylvania law, limitation of liability clauses are not disfavored, even when used by professionals.¹²² In *Valhal Corp. v. Sullivan Associates, Inc.*, the court addressed a contract between a real estate development and management company, Valhal, and an

111. *Rector v. Calamus Grp., Inc.*, 17 A.D.3d 960, 961–62 (N.Y. App. Div. 2005).

112. *Id.* at 962.

113. *Perotto Dev. Corp. v. Sear-Brown Grp.*, 269 A.D.2d 749, 749 (N.Y. App. Div. 2000).

114. *Id.*

115. *See Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co.*, 277 S.W.3d 255, 266 (Ky. Ct. App. 2008).

116. *Id.* at 259.

117. *See id.* at 266.

118. *Id.*

119. *See id.*

120. *See id.* at 267.

121. *See id.* at 266–67.

122. *See Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 202–03 (3d Cir. 1995).

architectural and engineering firm.¹²³ The architectural and engineering firm provided incorrect information about height restrictions on property where Valhal planned to build a high-rise residential tower.¹²⁴ Valhal argued that “limitation of liability provisions are disfavored in Pennsylvania and that this particular clause violates a specific public policy against an architect limiting his/her liability for damages caused by his/her own negligence.”¹²⁵ The court explained that there is a key difference between exculpatory clauses and limitation of liability clauses, because an exculpatory clause “insulates a party from liability,” while a limitation of liability clause “merely places a limit upon that liability.”¹²⁶ The court pointed out that no Pennsylvania cases indicated that limitation of liability clauses were disfavored, or tested the clauses under the stringent standards of exculpatory clauses.¹²⁷ As it related to professionals, the court stated that “[w]e are . . . unpersuaded by Valhal’s argument that public policy precludes licensed professionals from limiting their liability for their own negligence.”¹²⁸ The court noted the fact that both parties were sophisticated, which weighed against the public policy argument.¹²⁹ It also distinguished between attorneys and physicians who attempt to limit liability and the architects and engineers working for Sullivan, because attorney and physician contracts “involve fiduciary relationships . . . given special protection.”¹³⁰ The court concluded that the limitation of liability was “a reasonable allocation of risk between two sophisticated parties and does not run afoul of the policy disfavoring clauses which effectively immunize parties from liability.”¹³¹

California also enforces limitation of liability clauses by professionals in construction contracts, as long as the limitation was “specifically negotiated and expressly agreed to.”¹³² In *Markborough California, Inc. v. Superior Court*, the court enforced a limitation of liability clause in a contract between a professional engineer and a property developer.¹³³ The court’s primary focus was on the California statute that permitted the enforcement of limitation of liability clauses

123. *Id.* at 198.

124. *See id.* at 198–99.

125. *Id.* at 201.

126. *Id.* at 202.

127. *See id.* at 202–03.

128. *Id.* at 205.

129. *See id.*

130. *Id.*

131. *Id.* at 204.

132. *Markborough Cal., Inc. v. Superior Court*, 277 Cal. Rptr. 919, 921 (Cal. Ct. App. 1991).

133. *Id.*

when the clauses were “negotiate[ed] and expressly agree[d to].”¹³⁴ The court held that a provision in a construction contract limiting a party’s liability to the developer of the property to “damages caused by the engineer’s professional errors and omissions [was] valid under [California] Civil Code section 2782.5, if the parties had an opportunity to accept, reject or modify the provision.”¹³⁵

Other states enforce limitation of liability clauses for professional services contracts. For instance, a New Jersey court held that a “limitation of liability clause contained within the contract between [the parties] is enforceable” where the clause limits the liability of an engineer.¹³⁶ Georgia has a specific statutory provision restricting certain limitation of liability clauses in construction contracts, but outside of the statutory restrictions, enforces limitation of liability clauses when used by professionals.¹³⁷ In *Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc.*, the Georgia Supreme Court overturned an engineer’s limitation of liability clause because it violated a specific Georgia statute.¹³⁸ However, in *RSN Properties, Inc. v. Engineering Consulting Services, Ltd.*, the court upheld a limitation of liability clause because the parties were “in relatively equal bargaining positions in a commercial setting.”¹³⁹ Texas courts determine whether to enforce a professional’s limitation of liability clause primarily by “look[ing] to the relationship of the parties and their bargaining power.”¹⁴⁰ Other states, including Arizona,¹⁴¹ Illinois,¹⁴² New Mexico,¹⁴³ and North Carolina,¹⁴⁴ have enforced limitation of liability clauses in professional services contracts.

134. CAL. CIV. CODE § 2782.5 (West 1980); see also *Markborough*, 277 Cal. Rptr. at 922.

135. *Markborough*, 277 Cal. Rptr. at 921.

136. *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159, 164 (N.J. Super. Ct. App. Div. 1996).

137. See *RSN Props., Inc. v. Eng’g Consulting Servs.*, 686 S.E.2d 853, 854–55 (Ga. Ct. App. 2009) (citing GA. CODE ANN. §§ 43-15-1 to -30 (1982)).

138. See *Lanier at McEver, L.P. v. Planners & Eng’rs Collaborative, Inc.*, 663 S.E.2d 240, 243–44 (Ga. 2008).

139. *RSN Props., Inc.*, 686 S.E.2d at 855.

140. *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748 (Tex. Ct. App. 2005).

141. *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 196 P.3d 222, 223, 228–29 (Ariz. 2008) (holding that a surveying service’s limitation of liability clause was enforceable).

142. *BB Syndication Servs., Inc. v. LM Consultants Inc.*, No. 09-cv-1268, 2011 WL 856646, at *5–7 (N.D. Ill. Mar. 7, 2011) (holding that under either Illinois or Wisconsin law, an engineering and construction service’s limitation of liability clause was valid and enforceable).

143. *Fort Knox Self Storage, Inc. v. Western Techs., Inc.*, 142 P.3d 1, 11 (N.M. Ct. App. 2006) (holding that an engineering service’s limitation of liability clause was enforceable).

144. *Mosteller Mansion, LLC v. Mactec Eng’g & Consulting of Ga., Inc.*, No. COA07-664, 2008 WL 2096769, at *8 (N.C. Ct. App. May 20, 2008) (holding that an engineering firm’s limitation of liability clause did not violate North Carolina public policy or statutes).

In contrast to the majority of states, Alaska does not enforce limitation of liability clauses when used by professionals.¹⁴⁵ In *Dillingham v. CH2M Hill Northwest, Inc.*, the Supreme Court of Alaska addressed a limitation of liability clause in a contract between an engineer and a city.¹⁴⁶ The court focused on whether limitation of liability clauses were indemnity clauses, which were prohibited by Alaskan statute.¹⁴⁷ The court concluded that limitation of liability clauses were also forbidden by the statute, even though the statute only forbade indemnity clauses.¹⁴⁸ Because it considered limitation of liability clauses to be the same as indemnity clauses, the limitation of liability clause was void under Alaskan statute.¹⁴⁹

These cases indicate that generally courts allow professionals to limit their liability contractually in professional services contracts. Some states restrict the ability to limit liability more than others, but only the extreme minority of jurisdictions prohibit limitation of liability clauses entirely. If Florida is moving toward a policy that forbids professionals to limit their liability entirely, it will be restricting professionals in a way that the vast majority of states do not.

V. THE NATURE OF A PROFESSIONAL MALPRACTICE CLAIM AND LIMITING LIABILITY

One of the primary questions in determining the status of Florida law is whether professional malpractice is independent of the contract. If malpractice is independent of the contract, then the existence of a valid limitation of liability clause is irrelevant, because a party can simply sue for malpractice outside of the contract, and ignore any provisions in the contract. This is the view espoused in *Witt*, where the court stated that “a cause of action in negligence exists irrespective, and essentially, independent of a professional services agreement.”¹⁵⁰ This suggests that the cause of action was available both through the contract (“irrespective”) and outside of the contract (“essentially independent of”), which fits with the court’s conclusion: “we find that the limitation of liability provision was, as a matter of law, invalid and unenforceable as to Witt.”¹⁵¹ However, the court’s reasoning up to that conclusion suggested that the cause of action was independent of the contract, not

145. *Dillingham v. CH2M Hill Nw., Inc.*, 873 P.2d 1271, 1277–78 (Alaska 1994).

146. *Id.* at 1272.

147. *Id.* at 1275–77.

148. *Id.* at 1278.

149. *Id.*

150. *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1039 (Fla. 3d Dist. Ct. App. 2010).

151. *Id.*

that it invalidated the provision in the contract.¹⁵² The court had explained that “the Florida Supreme Court implicitly acknowledged that claims of professional negligence operate outside of the contract.”¹⁵³ It had also reasoned that “the Florida Supreme Court tacitly acknowledged that an extra-contractual remedy against a negligent professional is necessary because the contractual remedies in such a situation may be inadequate.”¹⁵⁴ Taken as a whole, the *Witt* court’s interpretation of *Moransais* was that a cause of action for professional malpractice exists outside of the contract, not that it invalidates the limitation of liability provision of the contract. The court’s holding that the limitation of liability clause in *Witt* was invalid was an independent conclusion based neither “implicitly” nor “tacit[ly]” in *Moransais*.¹⁵⁵

The Florida Supreme Court has effectively ruled that professionals cannot completely eliminate malpractice liability by contract. In *Moransais*, the court explained that “[w]hile provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve per se to bar an action for professional malpractice.”¹⁵⁶ In dicta in *Indemnity Insurance Co. of North America v. American Aviation, Inc.*, the court explained the statement in *Moransais* further: “public policy dictates that liability not be limited to the terms of the contract.”¹⁵⁷ These two decisions by the Florida Supreme Court indicate that while a contract can have an impact on a legal dispute, the contract cannot eliminate professional malpractice entirely.¹⁵⁸ The *Indemnity Insurance* dicta would appear to bar professionals from using exculpatory clauses to eliminate malpractice liability. However, a limitation of liability clause does not bar malpractice liability, it merely limits the maximum award.¹⁵⁹

In addressing the issue of professional malpractice, the court in *Moransais* did not forbid the enforcement of limitation of liability clauses in professional services contracts. In *Moransais*, the court addressed whether the economic loss doctrine prevented a claim of professional malpractice brought in tort.¹⁶⁰ However, the contract in question in that case did not contain a limitation of liability clause. The court’s holding was that “the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999).

157. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 537 (Fla. 2004).

158. *Id.*; *Moransais*, 744 So. 2d at 983.

159. Grove, *supra* note 19, at 99.

160. *Moransais*, 744 So. 2d at 974.

damages are purely economic in nature and the aggrieved party has entered into a contract with the professional's employer."¹⁶¹ This ruling prevented a professional from attempting to avoid liability when a limitation of liability clause was not used. It also prevented a professional from avoiding liability because he was an employee of a professional organization.¹⁶² It did not, however, forbid the enforcement of limitation of liability clauses within the contract. The court explicitly stated that "provisions of a contract may impact a legal dispute, including an action for professional services."¹⁶³ Additionally, the language relied upon by the court in *Witt* is not conclusive. The court stated that "it is questionable whether a professional, such as 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 commercial setting."¹⁶⁴ However, the professional specifically addressed in the statement, a lawyer, is under a special rule limiting his ability to limit liability contractually.¹⁶⁵ Even if the statement was meant to apply to all professionals, it still does not state that professionals *cannot* limit their liability. In fact, the statement intentionally avoids making that statement by prefacing the statement with "it is questionable."¹⁶⁶ Thus, the Florida Supreme Court in *Moransais* did not forbid the enforcement of limitation of liability clauses in professional services contracts. It also did not authorize a cause of action for professional malpractice completely independent of the contract, because "provisions of a contract may impact a legal dispute, including an action for professional services."¹⁶⁷

VI. PUBLIC POLICY ISSUES BEHIND ALLOWING PROFESSIONALS TO INCLUDE LIMITATION OF LIABILITY CLAUSES

Because the Florida Supreme Court has explicitly stated that contractual provisions may impact a legal dispute relating to professional services,¹⁶⁸ the question becomes whether public policy considerations should bar the limitation of liability provision. Most of the restrictions that are placed on limitation of liability clauses relate to public policy.¹⁶⁹

161. *Id.* at 983–84.

162. *Id.* at 984.

163. *Id.* at 983.

164. *Id.*

165. R. REGULATING FLA. BAR 4-1.8(h).

166. *Moransais*, 744 So. 2d at 983.

167. *Id.*

168. *Id.*

169. Grove, *supra* note 19, at 99.

Generally, when parties freely enter into a contract, the court will favor supporting the agreement.¹⁷⁰ “The principle of freedom of contract is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises.”¹⁷¹

The Florida Supreme Court has stated that limits on the freedom of contract must be supported by strong reasons. “Freedom of contract is the general rule; restraint is the exception and when it is exercised to place limitations upon the right to contract the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances.”¹⁷² In *Florida Department of Financial Services v. Freeman*, the court explained that “[w]e have long recognized that ‘while there is no such thing as an absolute freedom of contract, nevertheless, freedom is the general rule and restraint is the exception.’”¹⁷³ To overcome the general rule of freedom of contract due to public policy considerations, courts look at whether the “interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”¹⁷⁴

Public policy is not an easily defined term.¹⁷⁵ “In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like.”¹⁷⁶ Public policy can be determined by statute or by judicial decision.¹⁷⁷ Public policy motivations are not restricted to not enforcing or voiding a term or clause in a contract; in fact, the motivations can exist in favor of enforcing a term or clause.¹⁷⁸ However, with limitation of liability clauses, the public policy discussion has primarily focused on whether the clauses should be unenforceable.¹⁷⁹ A contract must injure some public or societal interest if it is to be voided as against public policy.¹⁸⁰ The same reasoning can also be applied to a clause within a contract.

170. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (1981) [hereinafter RESTATEMENT].

171. *Id.*

172. *Miami Laundry Co. v. Fla. Dry Cleaning & Laundry Bd.*, 183 So. 759, 770 (Fla. 1938).

173. *Fla. Dep’t of Fin. Servs. v. Freeman*, 921 So. 2d 598, 607 (Fla. 2006) (quoting *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958)).

174. RESTATEMENT, *supra* note 170, § 178(1).

175. *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th Dist. Ct. App. 2001).

176. *Leesburg v. Ware*, 153 So. 87, 89 (Fla. 1934), *quoted in Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th Dist. Ct. App. 2001).

177. *Leesburg*, 153 So. at 89; RESTATEMENT, *supra* note 1700, § 178(1).

178. RESTATEMENT, *supra* note 1700, § 178(2), (3).

179. *See Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1039 (Fla. 3d Dist. Ct. App. 2010).

180. *Neiman v. Galloway*, 704 So. 2d 1131, 1132 (Fla. 4th Dist. Ct. App. 1998).

Additionally, “[t]he court should not strike down a contract, or a portion of a contract, on the basis of public policy grounds except in very limited circumstances.”¹⁸¹ Public policy should not be used to strike down a contract (or contract provision) “unless it is ‘clearly injurious to the public good’ or ‘contravene[s] some established interest of society.’”¹⁸² Thus, if a limitation of liability clause used by a professional is void as against public policy, it must violate either statute or judicial decision,¹⁸³ or it must injure some public or societal interest.¹⁸⁴

A. Public Policy Considerations

Almost all states, including Florida, require limitation of liability clauses to be clear.¹⁸⁵ The language used varies from state to state and from court to court, but the essential ingredient in all of the requirements is that the party signing the contract should easily be able to determine that the limitation of liability is in the contract.¹⁸⁶ California’s statute is explicit that the limitation must be “expressly” agreed to.¹⁸⁷ Because the limitation of liability clause plays a major role in risk allocation between the parties, it is important that both parties are aware of its presence in the contract. A professional may be willing to receive less money for a project if the contract ensures that there will be a limited amount of liability.¹⁸⁸ Conversely, the party contracting for a professional’s services may be willing to pay an additional amount for the ability to hold the professional liable without a limitation.¹⁸⁹ Clarity regarding the limitation of liability clause also reduces the possibility of misunderstanding if a liability arises during the performance of the contract.

Some courts consider the relationship of the parties involved. This can relate to the sophistication of the parties as well as bargaining strength. When parties freely enter a contract with a limitation of liability clause, it should be enforced.¹⁹⁰ However, this general rule

181. Fla. Windstorm Underwriting v. Gajwani, 934 So. 2d 501, 506 (Fla. 3d Dist. Ct. App. 2009).

182. Banfield v. Louis, 589 So. 2d 441, 446 (Fla. 4th Dist. Ct. App. 1991) (quoting Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101 (Fla. 1944)).

183. Leesburg v. Ware, 153 So. 87, 89 (Fla. 1934); RESTATEMENT, *supra* note 1700, § 178(1).

184. *Neiman*, 704 So. 2d at 1132.

185. Florida Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316, 1319 (11th Cir. 1985).

186. Barnes v. Diamond Aircraft Indus., Inc., 499 F. Supp. 2d 1311, 1318 (S.D. Fla. 2007).

187. CAL. CIVIL CODE § 2782.5 (West 2012).

188. Grove, *supra* note 19, at 100.

189. See Florida Power & Light Co., 763 F.2d at 1319–20.

190. See Peluso v. Tauscher Cronacher Prof’l Eng’rs P.C., 270 A.D.2d 325, 325 (N.Y. App. Div. 2000).

assumes that the parties have relatively equal bargaining power.¹⁹¹ When the parties are both sophisticated, any disparity in bargaining power is greatly reduced. Another factor that some courts have found relevant is whether the negotiations are at arm's length.¹⁹² Arm's-length transactions, while they do not necessarily equalize the bargaining power of the parties, at least avoid the possibility of undue influence by one party. When a sophisticated party enters into a contract in an arm's-length transaction, the limitation of liability clause is a "reasonable allocation of risk" that should be respected by the courts.¹⁹³

These additional public policy considerations do not require the prohibition of limitation of liability clauses in contracts with professionals; rather, they act as checks when the clauses are used. The requirement that limitation of liability clauses must be clear ensures that parties are aware of the clause when they contract with a professional. The clarity requirement also addresses the concerns of some courts about disparity in bargaining power.¹⁹⁴ When a party is aware of the limitation of liability clause, that party can decide whether to attempt to bargain for the removal of the clause, or whether to agree to the contract at all. This public policy requirement that a limitation of liability clause must be clear is already a part of Florida law, both for professionals as well as any other party to a contract.¹⁹⁵

B. *The Florida Supreme Court Has Not Established an Absolute Public Policy Prohibition of Limitation of Liability Clauses*

Limitation of liability clauses do not completely protect a professional from his own negligence; instead, they place a cap on the liability. The key difference between a limitation of liability clause and an exculpatory clause is that there is still some liability present with the limitation of liability clause.¹⁹⁶ Florida law disfavors exculpatory clauses.¹⁹⁷ Exculpatory clauses are strictly limited to situations where the language is clear and unequivocal.¹⁹⁸ The reason for the limitation is that when an exculpatory clause is enforced, the potential plaintiff is left without any recovery at all, a harsh result. In contrast, limitation of liability clauses still provide for some recovery by the plaintiff. Some

191. See Thomas G. Norsworthy, *Prima Facie Tort and the Employment-at-Will Doctrine in Florida*, 46 FLA. L. REV. 635, 639 (1994) ("The freedom of contract theory presupposed that parties to the contract possessed equal bargaining power.").

192. *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 203–04 (3d Cir. 1995).

193. *Id.* at 204.

194. See *id.* at 203–04.

195. *Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316, 1319 (11th Cir. 1985).

196. *Grove*, *supra* note 19, at 99.

197. *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th Dist. Ct. App. 2006).

198. *Id.*

courts have found that this difference is extremely important. In *Valhal*, the contrast between no recovery and a limited recovery seemed to be the primary motivation for the disfavored status of exculpatory clauses as opposed to limitation of liability clauses.¹⁹⁹ In that case, even though the final verdict was seven times the cap on liability in the contract, the court determined that the limit was valid.²⁰⁰ It explained that the way to determine if the cap on liability was too low was to determine whether the cap was “so minimal compared to [the defendant’s] expected compensation as to negate or drastically minimize [the defendant’s] concern for the consequences of a breach of its contractual obligations.”²⁰¹ If a limitation of liability is so low that the professional can perform negligently without any concern for liability, public policy may encourage the court to find the limit void.²⁰² Liability is frequently capped at the contract price,²⁰³ although sometimes there is a set dollar amount,²⁰⁴ and sometimes the cap is either the set dollar amount or the contract price.²⁰⁵ When the cap is the contract price, the professional will lose any payment from the performance of the contract. This should normally be sufficient so that the professional is not immunized “from the consequences for its own actions.”²⁰⁶ When a set dollar amount is used that is less than the contract price, the court may need to look more closely at the cap to ensure that the limit is a legitimate cap, and not an attempt to use an exculpatory clause under the guise of a limitation of liability clause.

Florida’s statutory requirements for professional licensing demonstrate the existence of the public policy interest in ensuring that professionals meet minimal standards to practice.²⁰⁷ Florida also has a public policy interest in allowing malpractice claims against

199. *Valhal Corp.*, 44 F.3d at 204.

200. *Id.*

201. *Id.*

202. *Id.*

203. *See, e.g.*, *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1036 (Fla. 3d Dist. Ct. App. 2010); *Lanier at McEver, L.P. v. Planners & Eng’rs Collaborative, Inc.*, 663 S.E.2d 240, 243–44 (Ga. 2008); *Rector v. Calamus Group, Inc.*, 17 A.D.3d 960, 961 (N.Y. App. Div. 2005); *Peluso v. Tauscher Cronacher Prof’l Eng’rs, P.C.*, 270 A.D.2d 325, 325 (N.Y. App. Div. 2000).

204. *See, e.g.*, *Underwriters at Lloyds v. FedEx Freight Sys., Inc.*, No. 8:07-CV-212-T-EAJ, 2008 WL 2901049, at *6 (M.D. Fla. July 23, 2008); *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159, 162 (N.J. Super. Ct. App. Div. 1996).

205. *See, e.g.*, *Valhal Corp.*, 44 F.3d at 198; *RSN Props., Inc. v. Eng’g Consulting Servs., Ltd.*, 686 S.E.2d 853, 854 (Ga. Ct. App. 2009); *Perotto Dev. Corp. v. Sear-Brown Grp.*, 269 A.D.2d 749, 749 (N.Y. App. Div. 2000); *Markborough Cal., Inc. v. Superior Court*, 277 Cal. Rptr. 919, 921 (Cal. Ct. App. 1991).

206. *Valhal Corp.*, 44 F.3d at 204.

207. *See* FLA. STAT. § 471.003 (West 2012); FLA. STAT. § 481.209 (West 2012); FLA. STAT. § 492.105 (West 2012).

professionals.²⁰⁸ The closest the Florida Supreme Court has come to stating that public policy prevents limitation of liability clauses was in *Indemnity Insurance*, where the court stated that “public policy dictates that liability not be limited to the terms of the contract.”²⁰⁹ However, that statement was dicta in a case that did not involve professional malpractice.²¹⁰ Additionally, read in conjunction with *Moransais*, which the court in *Indemnity Insurance* explained was the source of its statement, the court’s concern was the potential use of a contractual provision as a “per se to bar an action for professional malpractice.”²¹¹ However, a limitation of liability clause does not eliminate malpractice claims; instead, it places a ceiling on the maximum award available if a plaintiff wins a malpractice claim against the professional.²¹² Thus, the Florida Supreme Court has not stated a public policy rule that absolutely prohibits professionals from using limitation of liability clauses.

VII. FLORIDA SHOULD ENFORCE LIMITATION OF LIABILITY CLAUSES IN PROFESSIONAL SERVICES CONTRACTS

Florida should enforce limitation of liability clauses in professional services contracts. The majority of states, including the three most populous states, enforce the clauses, with varying degrees of restriction.²¹³ Historically, Florida has also enforced limitation of liability clauses when used in professional services contracts.²¹⁴ It is only in recent years that there has been a gradual move away from permitting their enforcement when used by professionals.²¹⁵ *Moransais* began the move away from, but did not prohibit, enforcement.²¹⁶ In *Witt*, the Third District Court of Appeal took the reasoning in *Moransais* a step further, determining that a limitation of liability clause is “unenforceable as a matter of law.”²¹⁷ This represented the next step

208. *Witt*, 35 So. 3d at 1039 (citing *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004)).

209. *Indem. Ins. Co. of N. Am.*, 891 So. 2d at 537.

210. *Id.* at 534.

211. *Id.* at 537 (quoting *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999)).

212. Grove, *supra* note 19, at 99.

213. See, e.g., *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995); *RSN Props., Inc. v. Eng’g Consulting Servs., Ltd.*, 686 S.E.2d 853, 855 (Ga. Ct. App. 2009); *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co.*, 277 S.W.3d 255, 266 (Ky. Ct. App. 2008); *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748–49 (Tex. Ct. App. 2005); *Perotto Dev. Corp. v. Sear-Brown Grp.*, 269 A.D.2d 749, 749 (N.Y. App. Div. 2000); *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159, 164 (N.J. Super. Ct. App. Div. 1996); *Markborough Cal., Inc. v. Superior Court*, 277 Cal. Rptr. 919, 927 (Cal. Ct. App. 1991).

214. *Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316, 1320 (11th Cir. 1985).

215. *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1038 (Fla. 3d Dist. Ct. App. 2010).

216. *Moransais*, 744 So. 2d at 983.

217. *Witt*, 35 So. 3d at 1038.

in the general trend toward prohibiting limitation of liability clauses entirely,²¹⁸ but it does not represent the ruling of Florida Supreme Court.²¹⁸

If Florida courts continue the trend toward refusing to enforce professionals' limitation of liability clauses, the outcome of many cases will depend, not upon the merits of the case, but on whether the plaintiff can bring and keep the case in Florida. This will encourage forum shopping. Consider the hypothetical plaintiff who wants to bring a malpractice claim against a professional when the contract between the plaintiff and the professional contains a limitation of liability clause. The case may have only tenuous connections to Florida, but the plaintiff will do everything possible to ensure that the claim goes forward in Florida so that the limitation of liability clause will not be enforced. Much of the litigation will have nothing to do with the merits of the case, but will focus rather on whether the plaintiff can obtain jurisdiction in Florida. This will prolong the case, causing additional time, money, and judicial resources to be spent on a procedural issue. This also creates an additional burden on the Florida courts, as they are forced to address cases that should be brought in another state, but are brought in Florida to ensure that a limitation of liability clause is not enforceable.

The benefits of limitation of liability clauses outweigh the weaknesses of the clauses. Limitation of liability clauses are common in business relationships.²¹⁹ The clauses act as one of the methods of risk allocation between parties and is often a factor in determining the total price of the contract.²²⁰ When a limitation of liability clause is used by a party other than a professional, it does not violate public policy.²²¹ Only when the clause is used by a professional has it become questionable whether it is permissible.²²² However, the public policy considerations found in *Moransais* only require that the contract with a professional cannot completely eliminate liability.²²³ Merely capping liability, rather than eliminating it entirely, allows parties to allocate risk by agreement without eliminating professional liability entirely.²²⁴ This combination of risk allocation, without the elimination of liability, allows limitation

218. *See Pardo v. State*, 596 So. 2d 665, 666–67 (Fla. 1992) (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)) (explaining the hierarchy of authority in Florida courts).

219. *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995).

220. *Grove*, *supra* note 19, at 99–100.

221. *See Mt. Hawley Ins. Co. v. Pallet Consultants Corp.*, No. 06-61763-Civ, 2009 WL 1911722, at *7 (S.D. Fla. July 1, 2009).

222. *Witt*, 35 So. 3d at 1038.

223. *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999).

224. *Valhal Corp.*, 44 F.3d at 202–04.

of liability clauses to meet both the public policy considerations as well as the practical business needs of professionals.