

**LIMITING LIABILITY BY CONTRACT
AND BUSINESS ORGANIZATION CHOICES:**

SOME CURRENT THOUGHTS

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AND BUSINESS ORGANIZATION CHOICES:

Some Current Thoughts

I. OVERVIEW

II. BUSINESS ORGANIZATION CHOICES CAN REDUCE LIABILITIES

A. Keep in Mind the Distinction Between State Law Which Establishes Which Business Organizations Can Exist and Will be Recognized for Professional Licensing Purposes With Federal Law Which For Taxation Purposes Operates in a Different and Sometimes Parallel Dimension (e.g., subchapter S corporation).

B. Here are Examples of Business Organizations that Illinois Recognizes for the Practice of Engineering or Architecture or Both:

- 1) Business Corporations
- 2) Professional Corporations
- 3) Traditional Partnerships
- 4) Limited Liability Partnerships (LLP)
(See attached article in AIA Illinois News "Limited Liability Partnership for the Practice of Architecture in Illinois" Fall, 1994.
- 5) Limited Liability Companies (LLC)
- 6) Others: sole proprietorship, joint ventures, professional associations
- 7) Distinguish "Limited Partnerships"

C. Here are Some of the Considerations in Choosing One of These Many Forms of Business Organization.

- 1) why there are so many choices

- 2) federal taxation in the style of sole proprietorships and partnerships (including subchapter S corporations)
- 3) federal taxation in the business corporation style
- 4) federal taxation of limited liability companies
- 5) how the business organization style affects employee benefit plans
- 6) liability for contract claims and malpractice actions as contrasted for a professional practicing in these various business organizations

III. CAREFUL CONTRACTING WITH CLIENTS CAN LIMIT LIABILITIES

A. Using a Contract Clause Limiting any Liability to Clients to a Stated Sum, Fees Paid, or Other Formula

B. Ruling out Specific Damages

- 1) "non-physical damages", "consequential damages"
- 2) "no damages for delay" clauses and recent exceptions Bates & Rogers Construction Co. v. Greeley and Hansen, 109 Ill.2d 225 (1985)

J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc.
Docket No. 76070 (Ill. Sup. Ct. 10/20/94)
exceptions include delay caused by "bad faith" and delay "not within contemplation of parties"; some cases recognize delay of "unreasonable duration" and delay attributable to "inexcusable ignorance or incompetence of engineer"

C. Limiting Third Parties (Non-Clients) to Suits Solely Against Engineer's Client (leaving the client to sue the engineer)

Bates & Rogers Construction Co. v. Greeley and Hansen, 109 Ill.2d 225 (1985)

D. Requiring Contractors or Others to Indemnify, Defend and Hold Harmless the Engineer

- 1) Chapter 29, §61, Ill.Rev.Stat. indicates these are void
- 2) what about simply requiring a reimbursement for attorneys' fees, especially if the engineer is found not to be at fault?

E. Requiring Others to Buy Insurance for the Engineer

- 1) watch for exclusions in contractor's policy (see attached form CG 20 07)
- 2) what policy becomes the primary insurance?
- 3) what happens if the contractor fails to buy the insurance? waiver? uninsured breach of contract suit against contractor?

F. Requiring Mediation and/or Arbitration

- 1) requiring good faith efforts at mediation before arbitration or a law suit can be filed
- 2) if mediation fails, consider arbitration rather than litigation

G. Requiring a "Partnering" Approach to Dispute Resolution During the Job

H. Requiring the Client to Reimburse Subpoena Expenses

I. Drafting Pre-construction Duties and Especially any Duties During the Construction Phase in a Written Contract with Careful Specification

- 1) using language that has insulated design professionals from Structural Work Act liability (See AIA B 141 ¶¶2.65, 2.6.6 (1987))

- 2) conforming conduct to the contract duties and duties not undertaken

IV. EXAMPLES OF SOME LOSS PREVENTION TECHNIQUES

- A. Work with Insurance Agents and Claims Representatives Who Can Solve Liability Problems
- B. What's the Wisdom in Advising the Errors and Omissions Company of Notice of a Potential Claim
- C. Learn From the Mistakes of Colleagues
- D. See if Your Errors and Omissions Carrier has a Plan for Consulting an Attorney for Early Advice if a Claim Symptoms Appear
- E. Working with Attorneys who Concentrate on Advising and Defending Design Professionals with Contracts and Litigation

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