

## Limiting Liability In Construction Contracts - Is It Possible?

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There have been many questions over the years about whether Georgia courts would enforce a limitation of liability clause within a construction contract. Many design professionals have asked these questions concerning clauses within the agreements with their clients. The answer was yes, but that answer was subject to change at any time. The answer recently changed, at least to some extent.

In 1996, the Court of Appeals upheld a limitation of liability clause in the only case addressing the issue, but there was always a question about whether the ruling would stand if the issue was considered by the Georgia Supreme Court or if such a clause was challenged under facts other than those in the 1996 case. In 2007, the Georgia Court of Appeals issued another opinion upholding a limitation of liability clause in an engineer's agreement in the case of Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc. et al, 285 Ga. App. 411, 646 S.E.2d 505 (2007). In a very thorough opinion, the Court held that the clause at issue was enforceable. Shortly thereafter, the Georgia Supreme Court accepted certiorari of the case, however, and on June 30, 2008 the Supreme Court reverse d the holding of the Court of Appeals in Lanier at McEver, L.P. v. Planners & Engineers Collaborative, Inc.,

No. S07G1424 (GA Supreme Court, June 30, 2008). The Supreme Court held that the limitation of liability clause in that case was unenforceable under Georgia law. The question is did the Supreme Court opinion spell the end for limitation of liability clauses or is there still some possibility that they could be enforceable?

In Brainard v. McKinney, 220 Ga. App. 329, 469 S.E.2d 441 (1996), the Court of Appeals held that a limitation of liability clause was enforceable. In that case, a home inspector had included a limitation of liability clause in his contract with a prospective condominium buyer. Under that agreement, the inspector's liability to the client was to be limited to the cost of the inspection. The damages at issue were relatively minor, consisting of \$23,700. Under those circumstances, the Court of Appeals held that the contract, including the limitation of liability clause, was enforceable.

The argument made by the plaintiff was that the provision was unenforceable under O.C.G.A. § 13-8-2(b). That statute provides, in relevant part, as follows:

A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages,

losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and voidand unenforceable.

Id. Essentially, that statute provides that it is against public policy for a party to enter into an agreement (related to construction, alteration or maintenance of a building) in which the party is held completely harmless from liability caused by that party's sole negligence. In Brainard, the Court disagreed with the plaintiff and held that the parties were free to agree to such a provision and that there was no public policy reason for holding the provision unenforceable. There were two other reasons for the Court's holding, however, which distinguished it from other situations. The Court noted that in addition to not being a hold harmless provision, the agreement did not relate to the construction, alteration or maintenance of a building and the plaintiff's claims were not for property damage or personal injury. Id.

Although the decision in Brainard seemed perfectly appropriate, many wondered what would happen if a court had to consider a limitation of liability clause under different circumstances. The question was not addressed again until Lanier.

Lanier involved a provision in an agreement between a civil engineering firm, Planners and Engineers Collaborative, Inc. ("PEC"), and a developer, Lanier at McEver, L.P. ("Lanier"). The provision was as follows:

In recognition of these relative risks and benefits of the project, both in Lanier and PEC, the risks have been allocated such

that Lanier agrees, to the fullest extent permitted by law, to limit the liability of PEC and its sub consultants to Lanier and to all construction contractors and subcontractors on the project or any third parties for any and all claims, losses, costs, damages of any nature whatsoever, or claims, expenses from cause or causes including attorney's fees and costs and expert witness fees and costs, so that the total aggregate liability of PEC and its sub consultants to all those named shall not exceed PEC's total fee for services rendered on this project. It is intended that this limitation applies to any and all liability or cause of action however allegedly arising, unless otherwise prohibited by law.

Id. at \_\_\_ (emphasis added). Like the plaintiff in Brainard, Lanier challenged the provision as being void as against public policy under O.C.G.A. §13-8-2(b). Again, the Court of Appeals found the provision enforceable, but the Supreme Court reversed that decision.

In deciding Lanier, the Supreme Court received briefs from the parties, amicus briefs from the design industry, and it heard oral argument. At issue again was the debate between the freedom of parties to contract and the public policy in favor of maintaining the incentive to act responsibly in the design, construction and maintenance of buildings. The public policy concern is that if a party has no potential legal liability the party will not act responsibly. The Supreme Court held that because the provision in Lanier acted as a complete limit or cap on the engineer's liability to any party, it was unenforceable under O.C.G.A. § 13-8-2(b).

The Supreme Court had particular difficulty with the clause in Lanier because, as the court saw it, the limitation on the engineer's liability extended beyond the owner of the project. The Court read the provision as potentially holding the civil engineer harmless for its sole negligence in causing injuries to anyone, including third parties (i.e., members of the public). Id. at \_\_\_. The Court noted that: "The clause applies to 'any and all claims' by third parties and shifts all liability above the fee for services to Lanier no matter the origin of the claim or who is at fault." Id. at \_\_\_. The Court continued, saying: "Thus, while a third party is not

precluded from suing PEC for any negligent actions in constructing the storm-water drainage system, the clause at issue here allows PEC to recover any amount entered against it from Lanier once the \$80,514 threshold has been surpassed, including judgment amounts on third-party claims for which PEC is solely negligent." Id. at \_\_\_. The Court concluded: "The complete avoidance of liability to third parties for sole negligence in a building contract is exactly what O.C.G.A. §13-8-2(b) prohibits." Id. at \_\_\_.

In a dissenting opinion, Justice Melton was joined by Justice Hines in disagreeing with the analysis and the conclusion reached by the majority of the Court. Justice Melton pointed out that the provision was not a "hold harmless" agreement pursuant to which the engineer would be completely exculpated from all liability. Justice Melton pointed out that the provision merely limited the liability to pay damages. Lanier would not have been required to completely indemnify PEC for liability to third parties. Instead, PEC would always have had to pay up to the amount of its fee. The provision was not a true "hold harmless" clause. He stated that: "The majority overlooks the differences between indemnity and hold harmless provisions on the one hand and limitation of liability clauses on the other hand." Id. at \_\_\_. Justice Melton's comments could some day lead to a reanalysis of the opinion. They also shed light on the problems he saw with the way the majority of the Court looked at the issue. Judges at the trial court level are going to have the same issues in analyzing the attempt by a party to limit or eliminate potential exposure.

While the Supreme Court struck down the limitation of liability clause in Lanier, the opinion leaves open the ability to argue that other clauses, those that do not extend as far as the one in Lanier, could be enforceable. If the clause only governs the limit of liability between the parties to the contract, it should be enforceable under the Court's analysis. In fact, the Court referenced opinions in other jurisdictions upholding clauses where the limitation did not extend to the claims of third parties. For example, the Court distinguished the clause in Lanier from a clause that had been upheld by the Third

Circuit Court of Appeals in Valhal Corp. v. Sullivan Associates, Inc., 44 F3d 195 (3rd Cir. 1995). The clause in Valhal was as follows:

The OWNER agrees to limit the Design Professional's liability to the OWNER and to all construction Contractors and Subcontractors on the project, due to the Design Professional's professional negligent acts, errors or omissions, such that the total aggregate liability of each Design Professional shall not exceed \$50,000 or the Design Professional's total fee for services rendered on this project.

Id. It was distinguished from the Lanier clause because it did not limit liability to "any third parties for any and all claims" or "apply to any and all liability or cause of action however alleged or arising." Lanier, \_\_\_ Ga. at \_\_\_\_\_. The Supreme Court did not say that it would necessarily find the Valhal clause enforceable under Georgia law, but it gave that indication. At the very least, the Valhal provision would have a better chance of being enforced. As long as the party benefiting from the limitation of liability still has unlimited exposure to someone, such as members of the public, the provision should be enforceable.

Following Lanier, parties seeking to limit their exposure in relation to a contract for construction or maintenance of a building should be cognizant of the breadth of the language used in the agreement. The goal should be to clearly allocate the risk for liability between the parties to the contract, and possibly some others (contractors, etc.), but to leave open the possibility of exposure to those who are not parties to the construction contract or construction provision (members of the general public). If the clause achieves that balance, there is every indication that it should be upheld, even after Lanier. But if the language even appears to extend too far, judges are going to have a hard time enforcing those clauses ■



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