DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

This index is updated periodically by Cairncross & Hempelmann. Users should be cautioned that Cairncross & Hempelmann does not represent that this index is a complete survey of all design professional LOL cases, nor that it is necessarily current as new cases are reported. Please contact Terry Scanlan or Troy Hatfield at Cairncross & Hempelmann for any questions about using this index. Cairncross & Hempelmann would also appreciate receiving the citation to any new cases that are not included in the index. Please forward these to Terry Scanlan or Troy Hatfield via the contact information below.

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Alabama	Unclear as to design professionals.	*Saia Food Distributors & Club, Inc. v. SecurityLink from Ameritech, Inc.*, 902 So. 2d 46 (Ala. 2004). Limitation of liability clause in security system contract was enforceable in Alabama.		
Alaska	No.	*City of Dillingham v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271 (Alaska 1994). Alaska's anti-indemnity statute bars enforcement of LOL limiting liability to the greater of $50,000 or fee; legislative history indicates intent to prohibit not only indemnity clauses but also LOL clauses.	AS § 45.45.900 (prohibiting indemnity clauses).	LOL void under AS § 45.45.900 regardless of whether indemnification has been sought; term "indemnify" must be broadly construed to mean "exempt."
Arizona	Yes.	*Sprint Commc'ns Co., L.P. v. W. Innovations, Inc.*, 618 F. Supp. 2d 1101 (D. Ariz. 2009) *supplemented sub nom. Sprint Commc'ns Co. v. W. Innovations, Inc.*, 618 F. Supp. 2d 1124 (D. Ariz. 2009) and on reconsideration in part, CV-06-2064-PHX-ROS, 2009 WL 1458467 (D.		LOL enforceability may turn on whether damages were caused by "sole negligence" of one of the parties.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		Ariz. May 21, 2009). Citing to A.R.S. § 32-1159 and enforcing indemnity provision because party was not solely negligent for severing telecommunications company's fiber optic cable during excavation.		
Arizona	Yes.	*1800 Ocotillo v. WLB Group, Inc.*, 219 Ariz. 200, 196 P.3d 222 (2008). Breach of contract and negligence action for economic loss arising out of A/E failure to identify right-of-way in survey for developer. Held that LOL provisions by certain types of licensed professionals are not contrary to public policy. LOL does not operate as an "assumption of risk" as that term is used in the Arizona Constitution.	ARS § 32-1159 (prohibiting indemnity clauses). Arizona Constitution, Art. 18 § 5.	LOL only caps amount of liability; it does not exempt promise from liability. Legislative history does not reflect any consideration of LOL provisions. Absent public policy, parties are free to contract as they wish.
Arkansas	Yes.	*W. William Graham v. City of Cave City*, 709 S.W.2d 94 (1986). Breach of contract action against engineering firm that failed to meet deadline for preparing plans for wastewater treatment plant; late submittal resulted in reduced funding from government. LOL was narrowly drawn to apply to negligence, but not breach of contract. Court declined to rewrite contract to engraft onto contract an LOL for		LOL for negligent acts could not be enlarged to limit liability for breach of contract. Issue was *not* the enforceability of the LOL clause. "Clearly, if the clause limits liability, it is the duty of this Court to give effect to such clause." 709 S.W.2d at 95.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		breach of contract claims.		
California	Yes, but LOL clauses only shield party for passive negligence, not active negligence, unless specifically stated.	*Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024 (N.D. Cal. 2019). LOL enforced with respect to breach of contract and breach of confidence claims but did not bar negligence claim because LOL did not unequivocally shield against party's own negligence. General LOL clauses can protect against mere nonfeasance, such as the failure to discovery a dangerous condition, but not against an affirmative act, such as knowledge of or acquiescence in negligent conduct.		Federal court applying and discussing California LOL law.
California	Yes.	*Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 147 Cal. Rptr. 3d 634 (2012). With respect to claims for breach of contract, LOL clauses "are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy."		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
California	Yes.	*CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 48 Cal. Rptr. 3d 271 (2006). LOL in drilling agreement enforced in negligence claim against contractor. LOL was valid limitation on liability rather than improper attempt to exempt contracting party from liability for violation of law within meaning of § 1668.	Cal. Civ. Code § 1668 (codifying public policy against contracts that "exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law").	Parties had equal bargaining power. Party seeking exculpation did not provide service of practical necessity to members of public such that public interest was implicated. Contract required party to accept responsibility for damage to equipment, injury to employees and pollution. Thus, LOL did not adversely affect public or workers. LOL did not exempt party from all liability, but merely limited its responsibility with respect to economic damages. Parties failed to identify specific law or regulation purportedly violated so as to trigger application of § 1688.
California	Yes, but not as to third parties who are joint tortfeasors in context of motion	*TSI Seismic Tenant Space, Inc. v. Superior Court*, 149 Cal. App. 4th 159, 56 Cal. Rptr. 3d 751 (2007). Court reversed order granting motion for good faith settlement where	Cal. Civ. Proc. Code § 877.6 (discharging tortfeasor who settles in good faith	Goal of § 877.6 is to encourage pretrial settlements. However, the equitable policy behind this section is to encourage settlement among all

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
	for approval of good faith settlement.	settlement would have given effect to LOL in contract between a geotechnical engineer and developer of a property. Held that settlement was not in good faith because the settlement amount – $50K – was grossly disproportional to the amount of damage caused by the engineer's negligence – approximately $3.4 million – despite an LOL clause limiting potential damages to $50K.	from liability to other tortfeasors).	interested parties." That goal is not furthered when engineer's proportionate share of liability with other defendants is not considered.
California	Yes, except in cases of fraud or willful injury.*	*450 North Brand v. McLarand*, No. B156222, 2002 WL 31590523 (Cal. Ct. App. Nov. 20, 2002). In action for fraud, contractual clause exculpating individual officers and shareholders of architectural design firm from liability violated state law prohibiting parties from contracting away liability for fraudulent acts.	Cal. Civ. Code § 1668.	
California	Yes, unless unconscionable or contrary to public policy.*	*Viner, et al. v. Brockway, et al.*, No. B067736, 36 Cal. Rptr. 2d 718 (Cal. Ct. App. 1994) (ordered not published). Tort action by homeowners against engineering firm for negligence in performing slope stabilization project, where project was not adequate to prevent slope failure. Appellate court affirmed	Cal. Civ. Code § 2782.5.	Whether the releasing party has really acquiesced voluntarily in the contractual shifting of the risk; and whether the releasing party has in fact received an adequate consideration for the transfer.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		ruling that LOL clause in engineering services contract with unsophisticated homeowners is unconscionable, against public policy, and unenforceable, notwithstanding that the contract was negotiated by legal counsel.		Contract was for highly specialized services requiring technical expertise in area about which respondent had no knowledge.
California	Yes.	*Markborough California, Inc. v. Superior Court*, 227 Cal. App. 3d 705, 277 Cal. Rptr. 919 (Cal. Ct. App. 1991). LOL in a construction contract limiting engineer's liability to developer for damages caused by the engineer's professional errors and omissions is valid if the parties had an opportunity to accept, reject or modify the provision. Such LOLs do not violate California anti-indemnity statute so long as they are not against public policy and are not unconscionable.	Cal. Civ. Code § 2782.5.	Cal. Civ. Code § 2782.5 does not trump prohibition of § 1668. Legislative history showed that legislature did not intend to change common law that sanctioned use of LOLs so long as they were not against public policy and not unconscionable.
Colorado	Yes, if conduct was not willful and wanton.	*Taylor Morrison of Colorado, Inc. v. Terracon Consultants, Inc.*, 410 P.3d 767, 2017 COA 64 (Colo. App. 2017), *cert. denied*, No. 17SC441, 2017 WL 6047977 (Colo. Dec. 4, 2017). LOL upheld because Geotech's conduct was not willful and wanton.		Plaintiff's expert was not allowed to testify regarding willful and wanton because that is a legal concept, not an engineering concept.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Colorado	Yes, if contract entered prior to enactment of Homeowner Protection Act (HPA) of 2007.*	*Taylor Morrison of Colorado, Inc. v. Bemas Constr., Inc.*, No. 12CA2428, 2014 WL 323490 (Colo. Ct. App. Jan. 30, 2014). LOL in contract between developer and construction company was enforceable because it predated enactment of HPA, and HPA did not apply retroactively. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, No. 16CA0101, 2017 WL 929933, at *4 (Colo. App. Mar. 9, 2017), *reh'g denied* (Apr. 20, 2017). HPA applies to residential property owners, regardless of whether the owner is an individual or commercial entity.	Colo. Rev. Stat. § 13-20-806.	
Connecticut	Unclear as to design professionals.	*Mattegat v. Klopfenstein*, 50 Conn. App. 97, 717 A.2d 276 (1998). The parties signed a "Limited-Time Inspection" with no warranty, which included a clause limiting inspector's liability to the inspection fee paid. The inspector reported that "he found no visible evidence of past or current wood destroying insect infestation." The court viewed the LOL clause as a liquidated damages provision.		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Delaware	Yes, unless possible damages are easy to ascertain or if terms of the contract are found to be unreasonable.*	*RHA Constr., Inc. v. Scott Eng'g, Inc.*, No. CVN11C03013JRJCCLD, 2013 WL 3884937 (Del. Super. July 24, 2013) (involving contract for construction drawings and a record plan, court notes that LOL clauses that relieve a party of liability for its own negligence are generally disfavored under Delaware law but are enforceable where damages are uncertain and the amount agreed upon is reasonable).		
Florida	Yes, where sophisticated parties negotiated a contract.	*Keystone Airpark Auth. v. Pipeline Contractors, Inc.*, 266 So. 3d 1219 (Fla. Dist. Ct. App. 2019), *review denied*, SC19-314, 2019 WL 1371949 (Fla. Mar. 27, 2019). LOL provision regarding special or consequential damages in contract with professional services corporation was not void because sophisticated parties negotiated the contract.		Court considers owner a sophisticated party by virtue of being a government entity.
Florida	Not enforceable against claims seeking to hold a design professional personally liable for professional	*Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033 (Fl. Dist. Ct. App. 2010). LOL provision was invalid and unenforceable as to professional geologist in his individual capacity because "[a] cause of action in negligence against an individual professional exists irrespective, and	*But See* Fla. Stat. § 558.0035 (enacted in 2013) – A design professional is not individually liable if the contract includes	Florida law recognizes a cause of action against an individual professional geologist for professional negligence, irrespective of whether the geologist practices through a corporation. Contractual

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
	malpractice.	essentially, independent of a professional services agreement."	a clause specifically limiting individual liability in the manner described under the rule.	LOL provision does not trump statute and cannot as a matter of law limit individual liability for professional negligence.
Florida	Yes.	*Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316 (11th Cir. 1985). LOL and indemnity clause in engineering firm's contract enforceable under Florida law where unequivocal terms of contract specifically identified "negligence" as one cause of damage covered by indemnity provision. LOL further limited liability for indemnity to insurance coverage limits. Contract provided means for owner to increase that insurance coverage at additional cost. Court referred to LOL as exculpatory clause.		Florida law allows limitation of liability clauses that exculpate engineer from own negligence and provide indemnification for the indemnitee's own negligence. Parent company was entitled to the benefit of the exculpatory (LOL) and indemnity provisions as an implied third-party beneficiary of contract between the wholly-owned subsidiary and plaintiff.
Georgia	No, if LOL not explicit and prominent.	*Monitronics Int'l, Inc. v. Veasley*, 323 Ga. App. 126, 746 S.E.2d 793 (2013). $250 LOL in home security system contract not enforceable. Plurality opinion: three judges found that the LOL was not enforceable because it was not explicit and prominent in the contract; one judge		The lead opinion focuses on the fact that the LOL was not explicit and prominent in the contract, and cites numerous Georgia cases that focus their analysis on this issue, *see* fn. 23. The concurring opinions suggest

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		found that it was not applicable because it applied only to property damage and not personal injury (plaintiff had been attacked in her home); one judge found that the LOL was not enforceable because the breach related to extra-contractual duties, which LOL did not reach; one judge concurred in the result but did not expressly address the LOL.		that an LOL must clearly delineate which claims it reaches: "[A]n exculpatory clause must be clear and unambiguous and is construed against the drafter"; "a clause purporting to relieve a defendant of negligence liability with respect to every legal duty requires clear, explicit language expressing such an intent").
Georgia	Yes.	*RSN Properties, Inc. v. Eng'g Consulting Servs., Ltd.*, 301 Ga. App. 52, 686 S.E.2d 853 (2009). LOL did not violate public policy in contract between developer and professional engineering firm.		LOL did not violate public policy because: (1) parties had relatively equal bargaining positions; (2) parties' executed business judgment in agreeing to limitation of liability clause; (3) provision reflected an arms-length bargain to perform the service at the agreed-upon fee in return for the liability cap; (4) limitation of liability provision did not release firm from liability for its engineering errors; (5) firm remained liable for its errors up to $50,000;

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
				and (6) nothing in the contract limited firm's liability for the safety, health and welfare of third parties.
Georgia	Yes.	*Precision Planning, Inc. v. Richmark Communities, Inc.*, 298 Ga. App. 78, 679 S.E.2d 43 (2009). Holding former statute (Ga. Code Ann. § 13-8-2(b)) barring total indemnity provisions in construction contracts did not bar the limitation of liability provision in claim arising out of the failure of a retaining wall designed by an architect.		"No statute prohibits a professional architect from contracting with a developer to limit the architect's liability to that developer. . . . [LOL] did not purport to indemnify or hold the architect harmless from damages but simply established a bargained-for cap on the liability of the architect to the developer for the architect's breach or negligence. Accordingly, we hold that the architect and the developer were free to limit the architect's liability to the developer . . . ." 298 Ga. App. at 80, 679 S.E.2d at 46.
Georgia	No.	*Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc.*, 284 Ga. 204, 663 S.E.2d 240 (2008). Economic loss claim by project owner against civil engineering firm for	Ga. Code Ann. § 13-8-2(b) (anti-indemnity statute).	Whether LOL operated as indemnity as to damages that potentially could be sustained by third parties, even though case involved no third-party

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		negligent design of storm water drainage system. Broad LOL clause purporting to limit liability to owner and any third party violates public policy.		claims. As members of a regulated profession, engineers must practice in a manner that is protective of public safety, health and welfare.
Georgia (U.S. Court of Appeals, Fourth Circuit)	Yes.*	*Potter-Shackelford Constr. Co., Inc. v. Law Eng'g, Inc.*, 104 F.3d 359 (4th Cir. 1996) (unpublished). Applying Georgia law in breach of contract action. Scope of services subject to LOL in engineering contract included pre-contract engineering recommendation as well as subsequent implementation of recommendation action.		Contracting party could not divide engineer's work into two parts (recommendation and performance) and then argue that LOL covered only one of the parts. Circumstances surrounding contract formation indicate parties intended for all work to be part of single contract. Hence, LOL in that contract should apply.
Georgia (U.S. Court of Appeals, Fourth Circuit)	Yes.*	*Gibbes, Inc., II, v. Law Eng'g, Inc.*, 960 F.2d 146 (4th Cir. 1992) (unpublished). LOL capping liability at $50,000 and disclaiming implied warranties was enforceable under Georgia law. Plaintiff automobile dealership was sophisticated entity. LOL applied to all		Plaintiff identified no Georgia statute that prohibits engineers from limiting their liability or disclaiming implied warranties. Existence of LOL clause was adequately called to attention of

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		claims advanced by plaintiff.		plaintiff in contract.
Hawaii	Unclear.	*Leis Family Ltd. P'ship v. Silversword Eng'g*, 126 Haw. 532, 273 P.3d 1218 (Ct. App. 2012) (while case focuses on ELD, the limitation of liability provision between the mechanical engineering company and design subcontractor was quoted but not discussed by Court).	Haw. Rev. Stat. § 431:10-222 (party to a construction contract cannot exempt itself from liability for personal injury or property damage caused by its sole negligence or misconduct).	
Idaho	Unclear.*	*Mountain View Hosp., L.L.C. v. Sahara, Inc.*, No. 4:07-CV-464-BLW, 2011 WL 4962183 (D. Id. Oct. 17, 2011), *reconsideration denied*, No. 4:07-CV-464-BLW, 2012 WL 397704 (D. Id. Feb. 7, 2012). General contractor hired mechanical engineer for hospital construction project. Engineer proposed LOL equal to greater of $50,000 or fee for engineering services. General contractor returned fully		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		executed copy of the proposal raising the limitation of liability to $1,000,000. Engineer challenged the validity of GC's unilateral change of the liability limitation provision. Summary judgment denied on the ground that issues of fact remained regarding the validity of either party's proposed limitation of liability clause.		
Illinois	Yes.*	*Halloran & Yauch, Inc. v. Roughneck Concrete Drilling & Sawing Co.*, No. 1-13-1059, 2013 WL 5226268 (Ill. Ct. App. Sept. 13, 2013). LOL limiting recovery to amount paid under contract enforceable. Plaintiff subcontractor hired defendant sub-subcontractor to drill holes in parking garage; defendant drilled through structural support cables, and plaintiff never paid defendant for work performed. Court found that LOL was neither ambiguous nor unconscionable, and thus plaintiff's recovery was limited to the amount paid under the contract (*i.e.*, zero dollars).		The court noted that "the limitation of damages provision was not unconscionable when both parties were sophisticated business entities and the provision itself was not inordinately one-sided." 2013 WL 5226268, at *14.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Illinois	Yes.*	*BB Syndication Servs., Inc. v. LM Consultants, Inc.*, No. 09-CV-1268, 2011 WL 856646 (N.D. Ill. Mar. 7, 2011). LOL – also described as either a partial exculpatory clause or a stipulated damages clause – that limited damages to the fees paid under the contract was enforceable under both Illinois and Wisconsin law.		Illinois law is similar to Wisconsin law: LOL clauses are not favored and are to be construed strictly against the party they benefit.
Illinois	Yes.*	*Illinois Power Co. v. Duke Eng'g and Servs. Inc.*, No. 99 C 5384, 2002 WL 35232810 (N.D. Ill. Mar. 29, 2002). Action by owner against engineer after engineer missed deadline for completing project. Owner sought to recover fee paid to engineer and consequential damages that reflected owner's disappointed business expectations. LOL limited engineer's liability to fee paid.	740 Ill. Comp. Stat. Ann. 35/1 ("Illinois Construction Contract Indemnification for Negligence Act").	Because plaintiff sought damages only for economic loss, it could not proceed on negligence theory. Inability to state claim for negligence removed case from Act's sphere of influence because Act applies only to agreements that indemnify or hold harmless a person from person's own negligence. Breach of contract and breach of warranty claims do not sound in negligence. Anti-indemnity act is therefore not applicable to those claims. LOL is not contrary to public policy.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
				Purpose of statute is to protect public from regulated entity's exculpatory clause, not to protect the regulated entity. If exculpatory agreements were unenforceable, contractors would demand higher compensation before subjecting themselves to unlimited liability. No public policy prevents engineers from contractually limiting liability to another party to the contract, and weight of authority from other jurisdictions suggests engineers can do so.
Illinois (U.S. Court of Appeals, Seventh Circuit)	Yes.	*Pratt Central Park Ltd. P'ship v. Dames & Moore, Inc.*, 60 F.3d 350 (7th Cir. 1995). Upholding the dismissal of a diversity case for lack of jurisdiction because LOL in geotechnical engineering contract made it unlikely that plaintiff would recover more than $5,000. Based on analysis of facts surrounding contract formation, it appeared that LOL clause would cap damages at less than the jurisdictional		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		amount.		
Indiana (U.S. Court of Appeals, Seventh Circuit)	Yes.	*SAMS Hotel Group, LLC v. Environs, Inc.*, 716 F.3d 432 (7th Cir. 2013). On summary judgment, trial court held that unambiguous LOL in contract between architect and hotel developer limiting liability to the total lump sum fee of contract was enforceable. Court of Appeals affirmed. Architect failed to design hotel structure to adequately resist lateral loads, hotel was off center and had to be demolished. Architect's liability was limited to the amount of its fee, $70,000.		Degree of sophistication of contracting parties was a key factor, as was the fact that the parties had contracted with each other once before and both contracts contained an LOL provision limiting the architect's total liability for negligence, errors, omissions, strict liability, breach of contract or breach of warranty to the lump sum of the contract. The Court noted that "two commercial entities, well aware of the risks involved, freely and knowingly negotiated a limitation of liability clause so as to allocate those

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
				risks in advance." 716 F.3d at 436.
Iowa	Yes.*	*Optimal Interiors, LLC v. HON Co.*, 774 F. Supp. 2d 993 (S.D. Iowa 2011). LOL clause enforceable; prohibition on the recovery of consequential damages necessarily precludes ability to recover any lost profits.	Iowa Code § 554.2719.	Under Iowa law, parties may contract to limit consequential damages. However, a contract provision that limits the recovery of consequential damages will not be enforced in two circumstances: (1) "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter;" or (2) where the limitation of liability clause is unconscionable. 774 F. Supp. 2d at 1013.
Iowa	Yes.	*Aetna Cas. & Sur. Co. v. Leo A. Daly Co.*, 870 F. Supp. 925 (S.D. Iowa 1994). Trial on cross-claim by contractor against architect to determine comparative fault in action for breach of contract, breach of warranty, and negligence where fire sprinkler pipe at racehouse froze and burst. Engineer was responsible for reviewing and approving design substitutions during the		LOL did not violate public policy, as it ran only to the party in privity and did not in this case exempt the parties from liability for personal injury or death of a third party.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		construction phase. LOL in architect's and contractor's contracts with owner enforceable.		
Kansas	Yes.*	*Hilsinger Bldg. & Dev. Corp. v. Terracon Consultants, Inc.*, 1:18-CV-900, 2019 WL 4601774 (S.D. Ohio Sept. 23, 2019)(unpub.). Ohio federal district court, applying Kansas law pursuant to choice of law provision, entered summary judgment in favor of design professional defendant where defendant's remediation work exceeded liability limitation.		The court first determined, under Ohio procedural law, that plaintiff failed to identify a duty independent of defendant's contractual duties, so plaintiff had no cognizable tort claim.
Kansas	Yes.	*Wood River Pipeline Co. v. Willbros Energy Servs. Co.*, 241 Kan. 580, 738 P.2d 866 (1987). Owner of pipeline brought suit against contractor which had built pipeline for damages resulting from rupture of pipeline and holding that handwritten addition to contract limiting contractor's liability to owner for consequential damages controlled and modified printed provision of contract under which contractor agreed to pay owner for damages to owner's property.	Kan. Stat. Ann. § 16-121 (construction anti-indemnity statute). Note that the definition of "construction contract" includes "design." The statutory provision voids contractual requirements in public and private projects to	

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
			indemnify or provide liability coverage to another person as an additional insured for that person's own negligence, acts or omissions – to which there are six exceptions.	
Kentucky**	Likely yes, short of wanton or willful negligence.	*Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644 (Ky. 2007). In a contract for mine engineering and mine planning, exculpatory clause shifting liability for preparing mine maps was enforceable because it was part of an arm's-length transaction between sophisticated parties with equal bargaining power.	KRS 371.180 (provisions in construction services contracts that would indemnify or hold harmless a contractor from that contractor's own negligence are void and wholly unenforceable).	The court noted recent Kentucky case law disallowing a party to contract away liability for violation of safety statutes, but concluded that the parties in this case shared the duty of preparing accurate maps to comply with those statutes. The court also noted that there was no published state case law in which such a clause was invalidated absent personal injury. And where clauses have been invalidated, there was a

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
				major disparity in bargaining power.
Louisiana	Yes.	*City of Shreveport v. SGB Architects, L.L.P.*, 47 So. 3d 1105 (La. Ct. App. 2010). LOL in subcontract for soil testing was enforceable.		Party opposing enforcement of the LOL did not argue the provision was invalid, but rather alleged that it had never agreed to the liability limitation provision in the contract.
Maine	Yes, if clear and unequivocal.	*Burns & Roe, Inc. v. Central Maine Power Co.*, 659 F. Supp. 141 (D. Me. 1987). Declaratory judgment action seeking determination of rights in connection with attempt to use LOL as shield against third party claim for contribution. Held that previous payment by engineer exhausted its liability to owner but did not limit right of third party to seek contribution in the event that both engineer and third party are found to be joint tortfeasors.		Agreement to limit engineer's liability was not an agreement to indemnify engineer against liability imposed upon it in third-party actions. Court declined to read into LOL provision "an indemnification obligation that is nowhere hinted at by the terms of the contract."
Maine	Yes, against breach of contract claims.	*Lincoln Pulp & Paper Co., Inc. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977). Pennsylvania law applied pursuant to choice of law provision in contract. No authority indicates that substantive law of Pennsylvania differs from that of Maine, or that Pennsylvania law offends		Separate analyses were required to determine whether enforceability of LOL as to breach of contract and negligence claims. Stricter standard applies where party seeks to apply LOL as shield against negligence

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		any Maine public policy. LOL clause protects engineer from liability for consequential damages, including loss of profits and products, arising from breach of contract or breach of warranty. However, LOL does not limit liability of engineering firm for consequential damages caused by its own negligence. At evidentiary hearing, expert testified that LOL clauses are customary in the trade. LOL clauses became standard in the industry by the late 1960s, resulting from both the rise in litigation and the inclusion of limiting clauses in the equipment contracts of suppliers.		claim. Pennsylvania law requires "clear and unequivocal" expression of intent to limit liability for negligence. LOL relieved engineer of liability on breach of contract and breach of warranty claims where LOL was drafted by experienced counsel.
Maryland	Yes, except for gross negligence, and so long as it is not against public policy.	*Baker v. Roy H. Haas Assocs., Inc.*, 97 Md. App. 371, 629 A.2d 1317 (1993) *abrogated on other grounds by Wolf v. Ford*, 335 Md. 525, 644 A.2d 522 (1994). Limitation of liability and limitation of damages clauses found enforceable in-home inspection contract because inspection company's failure to discover defects in roof constituted ordinary negligence, not gross negligence, and the services did not fall under the realm of a public duty or concern the public		Maryland has not considered LOL in DP contracts, but LOL case law notes that in the absence of legislation to the contrary, Maryland generally allows parties to contract as they see fit. In discussing public policy, the court considered whether LOL clause was a product of unfair bargaining power.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		interest.		
Massachusetts	Yes.	*Mistry Prabhudas Manji Eng. Pvt. Ltd. v. Raytheon Eng'rs & Constructors, Inc.*, 213 F. Supp. 2d 20 (D. Mass. 2002). Liquidated damages provision in engineering services contract enforceable under Pennsylvania law. LOL provision was not an exculpatory clause; it capped damages at 10 percent of fee paid.		Although contracting party was small Indian company that precipitously entered into contracts without adequate legal representation, these facts did not show that contracting party lacked meaningful choice or suffered unfair surprise where LOL was not hidden boilerplate. But "the one point which gives this Court pause is whether a ten percent cap creates an adequate incentive to perform." 213 F. Supp. 2d at 27. However, plaintiff did not demonstrate unconscionability as there was no indication that its profit margin was higher than 10 percent.
Massachusetts	Yes.*	*G. Conway, Inc. v. Tocci Bldg. Corp.*, No. 012261, 2004 WL 3120559 (Mass. Super. Dec.22, 2004). In action involving collapse of retaining wall, LOL in contract between geotechnical engineering subcontractor and		Contracting party "agreed to accept the allocation of risk set forth in Contract and cannot now argue the unenforceability of the limitation of liability provision simply because it

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		construction manager was enforceable. Court rejected construction manager's argument that certificate of insurance provided by engineer governed the amount of engineer's liability.		is unfavorable to [party's] position." 2004 WL 3120559, at *3. Certificate of insurance does not modify or replace LOL in contract. It is customary for design firm to provide client with certificate of insurance; such certificate is merely an informational document evidencing existence of insurance policy.
Massachusetts	Yes.	*R-1 Associates, Inc. v. Goldberg-Zoino & Assocs., Inc.*, No. 91-7417, 4 Mass. L. Rptr. 219 (Mass. Super. 1995). Action by developer against environmental consultant for breach of contract and negligence where consultant's site assessment failed to identify presence of contamination at property. LOL in engineering contract enforceable in contract that arose out of a private, voluntary transaction in which one party, for consideration, agreed to shoulder a risk which the law would otherwise have placed upon the other party.		Developer that authorized design/build contractor to hire engineering firm could not argue that it did not authorize agent to bind principal to LOL clause in contract. The existence of an offer to negotiate the limits of liability in the preprinted contract was fatal to plaintiff's claim.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Michigan	Yes.*	*Rogers v. Parish Corp. and Prof. Serv. Indus., Inc.*, No. 5:92:CV:101, 1993 WL 13654533 (W.D. Mich. Aug. 30, 1993). Developer of Wal-Mart store contracted with geotechnical engineering firm to do soil boring and geotechnical report. Parties entered second contract for construction oversight services. Both contracts contained LOL and indemnification clauses. LOL clause contained option to increase liability cap for additional fee. LOL enforceable because it does not remove liability completely. LOLs could be aggregated since engineer performed work under separate contracts, each with its own limitations clause.	Mich. Comp. Laws § 691.991 (anti-indemnity statute for construction contracts).	Reasonableness is a primary consideration in determining whether to enforce a damage limitation clause. Potential problems with enforceability of indemnity clause in light of anti-indemnity statute do not alter the enforceability of LOL clause. LOLs do not limit liability for intentional representation or wanton misconduct.
Minnesota**	Unclear.	*Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 922 (Minn. 1982). In enforcing the exculpatory clause in a spa membership contract, the court noted that Minnesota generally disfavors exculpatory clauses. They will not be enforced if ambiguous, to release a party from liability for intentional or wanton acts, or where against public policy.	Minn. Stat. Ann. § 337.02 (indemnification agreements in, or in connection with, construction contracts are unenforceable except where injury	There is no Minnesota case law regarding enforceability of exculpatory or LOL clauses in the design professional context. However, Minnesota's statute regarding the unenforceability of indemnification agreements in construction contracts indicates an intent that parties be liable for their

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
			is attributable to promisor or where a responsible party, owner or government entity agrees to indemnify contractor regarding environmental laws).	own actions. Further, state LOL case law shows that Minnesota strictly construes such clauses against the benefited party.
Mississippi	Yes.	*Thrash Commercial Contractors, Inc. v. Terracon Consultants, Inc.*, 889 F. Supp. 2d 868 (S.D. Miss. June 25, 2012). Court enforced LOL in contract between contractor and geotechnical engineer where LOL was negotiated and provided damages in excess of fees earned by engineer.		General contractor failed to show that limitation of liability provision that subcontractor included, in bold-faced lettering, in proposed subcontract was unenforceable under Mississippi law as one that it did not understand, or that was not fairly and honestly negotiated between parties.
Mississippi	Only if fairly and honestly negotiated and understood by both parties.	*Lyndon Prop. Ins. Co. v. Duke Levy and Assoc.*, 475 F.3d 268 (5th Cir. 2007). Exculpatory clause in contract between owner and engineer was not enforceable because not sufficiently clear to act as limitation of liability under Mississippi law. Owner agreeing to exculpatory clause could not bargain away engineer's		LOL not inconsistent with waiver of consequential damages. LOL provision simply limits recovery for the damages which are not subject to the consequential damages waiver.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		potential duty to surety that would step into owner's shoes under doctrine of equitable subrogation.		
Missouri	Maybe.	*Village of Big Lake v. BNSF R.R. Co., Inc.*, 433 S.W.3d 460 (Mo. App. 2014). "[A] different standard applies to determine whether general exculpatory clauses or indemnity clauses can cover claims of future negligence depending upon whether the parties to the contract are 'sophisticated businesses, experienced in this type of transaction.'"		
Missouri	Yes.	*Sports Capital Holdings, LLC v. Schindler Elevator Corp.*, No. 4:12CV1108 SNLJ, 2014 WL 1400159 (E.D. Mo. Apr. 10, 2014). LOL in contract between owner of facility and designer/manufacturer of elevator upheld because provision was clear, unambiguous, unmistakable, and conspicuous, and thus did not violate public policy.		
Montana	Yes, so long as LOL provision does not violate public	*Zirkelbach Construction, Inc. v. DOWL, LLC*, 2017 MT 238, 402 P.3d 1244 (Mont. 2017) (holding that limitation of liability clause	Mont. Code Ann. § 28-2-702 (general anti-indemnity	Contract terms that violate Mont. Code Ann. § 28-2-702, prohibiting contracts whose object is to exempt

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
	policy codified under Mont. Code Ann. § 28-2-702.	between contractor and designer, limiting designer's liability for certain damages at $50,000, was enforceable because it did not violate public policy codified under Mont. Code Ann. § 28-2-702).	statute).	anyone from all responsibility for the person's own fraud, willful injury, or violation of law are unenforceable. The statute is not specific to construction contracts.
Nebraska	No with respect to beneficiary's own negligence; yes as to all other causes of action.*	*Omaha Cold Storage Terminals, Inc. v. Hartford Ins. Co.*, No. 8:03 CV 445, 2006 WL 695456 (D. Neb. Mar. 17, 2006). Engineering subcontractor assisted with foundation repair at cold storage warehouse. After repairs had commenced, the main support structure of warehouse collapsed. Contract contained a broad LOL that limited liability from any cause or causes, "including but not limited to [engineer's] negligence, errors, omissions, strict liability, breach of contract, or breach of warranty." Held: clause "clearly contains language which operates to insulate or limit [engineer's] liability for its negligent acts, thus, under Neb. Rev. Stat. § 25-21, 187(1), that language violates public policy and is invalid. . . . However, this does not mean that the entire indemnification clause is rendered invalid and	Neb. Rev. Stat. § 25-21, 187(1).	LOL is construed as an indemnification provision because it "operates to insulate or limit" liability for negligence. Severance. Under Nebraska law, only the portion prohibited by public policy is stricken from the contract. Thus, a party may limit its liability under causes of action other than negligence.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		unenforceable. . . . [T]he contract's risk allocation clause is invalid with respect to any claims arising out of [engineer's] negligence, but remains enforceable in all other respects."		
Nevada**	Likely yes.	*Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. Adv. Op. 26, 255 P.3d 268 (2011). The court noted that since Nevada has not adopted an anti-indemnity statute, "parties have great freedom in allocating indemnification responsibilities between one another."		LOL clauses would not be hindered by anti-indemnity statutes and would likely be enforced in keeping with indemnity authority.
New Hampshire	Yes, except in cases of wanton and willful conduct.	*PK's Landscaping v. New Eng. Tel. & Tel. Co.*, 128 N.H. 753, 519 A2d 285 (1986). LOL clause in contract between telephone company and landscaping company held valid.		
New Jersey	Yes.*	*Atlantic City Associates, LLC, v. Carter & Burgess Consultants, Inc.*, 453 Fed. Appx. 174 (3d Cir. May 04, 2011) (unpub.). LOL enforced to the extent damages, including attorney fees, exceeded total fees paid.	N.J. Stat. Ann. § 2A:40A-2 (anti-indemnity statute for architects and engineers).	
New Jersey	Yes, if clear and	*Marbro, Inc. v. Borough of Tinton Falls*, 297	N.J. Stat. Ann.	LOL clause limiting liability to

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
	unambiguous.	N.J. Super. 411, 688 A.2d 159 (N.J. Super. Law Div. 1996). LOL in engineering contract enforceable under New Jersey law. Anti-indemnity statute not relevant because statute applies only to indemnity and hold-harmless provisions, not to LOLs.	§ 2A:40A-2 (anti-indemnity statute for architects and engineers).	amount of fee was reasonable cap because it provided adequate incentive to perform. Reasonableness of LOL is not a jury question. Anti-indemnity statute does not express a blanket public policy against engineers contractually limiting their liability. Adopted rationale of *Valhal Corp. v. Sullivan Assoc., Inc.*, 44 F.3d 195 (3d Cir. 1995).
New Mexico	Yes.	*Fort Knox Self Storage, Inc. v. W. Techs., Inc.*, 140 N.M. 233, 142 P.3d 1 (N.M. Ct. App. 2006). Negligence and breach of contract action for involving geotechnical engineering services to evaluate subsurface condition of building site. LOL clause was enforceable because LOL is not the same as provision to indemnify or hold harmless and is not prohibited by New Mexico's anti-indemnity statute for construction contracts. LOL capping liability at $50K provided that	N.M. Stat. Ann. § 56-7-1 (anti-indemnity statute).	There is a significant difference between contracts that insulate a party from any and all liability and those that simply limit liability. Court relied on Third Circuit's analysis in *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195 (3d Cir. 1995). Correct measure of whether LOL is so small as to render clause

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		engineer could be liable for damages 28 times higher than the contract amount of $1,750. LOL is not an unenforceable liquidated damages clause because it pertains to actions resulting in damages, not default.		unenforceable is *not* the difference between the damages suffered and the cap. Rather, "[t]he relevant inquiry is whether the cap is so minimal compared to the expected compensation as to negate or drastically minimize concern for liability for one's own actions." 140 N.M. at 238; 142 P.3d at 6. Absence of additional terms inviting contracting party to negotiate LOL was immaterial. Nothing in statute or *Valhal* precludes enforcement of LOL clauses in cases involving property damage.
New York	Yes, unless conduct is grossly negligent.	*S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 104 A.D.3d 613, 614, 962 N.Y.S.2d 118, 119 (N.Y. App. Div. 2013). The Court stated that "[p]ublic policy 'forbids a party's attempt to escape liability, through a contractual clause, for damages occasioned by		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		grossly negligent conduct,'" and thus the trial court "properly declined to enforce Impact's contractual limitation on liability, since an issue of fact exists as to whether Impact's conduct was "grossly negligent," given plaintiffs' expert affidavit stating that Impact failed to disclose to Southern Wine the presence of 38 drywells, containing potential contaminants, on plaintiffs' property, despite the availability of this information in the public records."		
New York	Yes.	*Soja v. Keystone Trozze, LLC*, 106 A.D.3d 1168 (N.Y. App. Div. 2013). Plaintiff homeowners hired defendants to design their residence. Plaintiffs alleged gross negligence in defendants' failure to use a flood elevation report in designing the home. The court disagreed, and upheld the trial court's granting of partial summary judgment on this issue.		The court stated that "the conduct alleged does not evince the necessary reckless indifference to the rights of others that would render the limitation of liability clause unenforceable."

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
New York	Yes, absent a showing of gross negligence.	*Princetel, LLC v. Buckley*, 95 A.D.3d 855, 944 N.Y.S.2d 191 (2012) leave to appeal dismissed, 20 N.Y.3d 994, 982 N.E.2d 1256 (2013). In a lawsuit involving a claim for breach of contract and negligence in connection with a land survey, holding LOL provisions enforceable.		Summary judgment was proper because complaint did not allege that work was performed in gross negligence or any conduct that would support such a claim.
New York	No as to beneficiary's own negligence, Yes as to damages for economic loss only.*	*Cibellis Contracting, Inc. v. Hamilton Gardens Owners, Inc.*, 34 Misc. 3d 1224(A), 946 N.Y.S.2d 65 (Sup. Ct. 2012). Subcontractor's motion for summary judgment limiting liability denied because subcontractor was not free from negligence.	N.Y. Gen. Oblig. Law §§ 5-322.1 and 5-324.	
New York	No as to beneficiary's own negligence, Yes as to damages for economic loss only.	*Fiorenza v. A & A Consulting Engineers, P.C.*, 77 A.D.3d 569, 909 N.Y.S.2d 356 (N.Y. App. Div. 2010). A limitation-of-liability clause is ordinarily enforced unless it expresses an intention to relieve a party of its own grossly negligent conduct.	N.Y. Gen. Oblig. Law §§ 5-322.1 and 5-324.	A party seeking to enforce a hold harmless clause must prove itself free of negligence. Citing *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992).
New York	No as to claims for gross negligence and intentional	*Sear-Brown Group v. Jay Builders, Inc.*, 244 A.D.2d 966, 665 N.Y.S.2d 162 (N.Y. App. Div. 1997). Engineer sought to enforce LOL against		LOL not void and unenforceable pursuant to N.Y. Gen. Oblig. Law §§ 5-322.1 and 5-324. These

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
	torts, Yes as to claims for negligence.	counterclaim alleging negligence and gross negligence in performance of engineering services on residential development projects. LOL is not applicable to gross negligence and intentional tort claims under New York law.		sections prohibit LOLs that seek to limit liability for personal injury or physical damage to property. Counterclaim sought damages only for economic loss. However, LOL clause could not insulate party from damages caused by negligent misrepresentation or gross negligence.
New York	Yes.	*Bennett v. Bank of Montreal*, 161 A.D. 2d 158, 554 N.Y.S. 2d 869 (N.Y. App. Div. 1990). Cross-claim by engineer for contractual indemnification by client, following settlement of main action in personal injury case. LOL provided for indemnification from liability only "to the extent permitted by law."	N.Y. Gen. Oblig. Law §§ 5-322.1 (anti-indemnity statute for bodily injury or property damage from negligence) and § 5-324 (anti-indemnity statute for bodily injury or property damage from defects in plans, specs, maps).	Extent to which LOL is enforceable turns on allocation of liability between joint tortfeasors. Under anti-indemnity statute, LOL could not create right to indemnity from liability for party's own negligence. However, statute did not prohibit indemnification from liability by reason of acts of others. To the extent that the LOL violates the anti-indemnity statute, it is unenforceable. However, the LOL is not rendered unenforceable in toto.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
New York	Yes.	*Long Island Lighting Co. v. IMO Delaval, Inc.*, 668 F. Supp. 237 (S.D.N.Y. 1987). LOL in engineering contract enforceable under New York law. LOL limited liability to proceeds from insurance. Court rejected argument that recovery was limited only as to claims that fell within the specific insurance coverage identified in the contract. Although contract did not specify coverage for malpractice or breach of warranty, LOL clause would nonetheless apply to these claims. The plain language of the limitations clause suggests that the parties intended to include malpractice among the risks for which recovery was limited.	N.Y. Gen. Oblig. Law § 5-323 (anti-indemnity statute for contractor negligence).	Exemptions from liability for economic losses are not rendered void or unenforceable under anti-indemnity statute. Statute prohibits exemptions from liability for injury to persons or property. LOL merely limits liability in this regard and thus is not an exemption.
New York	Yes.*	*Central Hudson Gas and Elec. Corp. v. Combustion Eng'g, Inc.*, No. 86 Civ. 3061, 1987 WL 10030 (S.D.N.Y. July 26, 1989). Defendant entered into a series of service contracts to inspect and repair boiler components. Each contract contained an LOL clause. LOL clauses were clear and unequivocal and therefore enforceable.		Where plaintiff claimed breach of two contracts with separate LOL clauses, plaintiff could recover up to limit under each contract.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
North Carolina	Yes.	*Blaylock Grading Co. v. Smith*, 658 S.E.2d 680 (N.C. Ct. App. 2008). Action by grading company against engineering firm alleging breach of contract and negligence where engineer's surveying error caused grading company to incur excess costs. Appellate court reversed trial court's finding that LOL was unenforceable. Contract limiting damages to $50K did not elicit a profound sense of injustice. LOL was not unconscionable or contrary to public policy.	N.C.G.S. § 22B-1 (prohibiting construction indemnity agreements).	Distinguished engineers and surveyors from providers of public utilities. Although surveyors and engineers must be licensed, that fact alone does not automatically convert profession into public service. Where breach of contract involves only economic loss, public health and safety are not implicated. Anti-indemnity statute does not apply because LOL is materially different from indemnity provision. Unlike indemnity, LOL does not require another party to agree to be liable for negligence of another.
North Carolina	Yes.*	*Mosteller Mansion LLC, et al. v. Mactec Eng'g and Consulting of Georgia, Inc.*, 190 N.C.App. 674, 661 S.E.2d 788 (N.C. Ct. App. May 20, 2008) (unpub.). LOL in engineering contract was enforceable under both states' laws. LOL does not violate Georgia public policy because it only relieves engineer from liability for		Choice of law – North Carolina law governs tort claim; Georgia law governs breach of contract claim. Construction anti-indemnity statutes of North Carolina and Georgia are "essentially identical."

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		economic damages not personal injury or property damage.		
North Dakota**	Likely yes.	*Praus ex rel. Praus v. Mack*, 2001 ND 80, 626 N.W.2d 239 (2001). An indemnity agreement will not be interpreted to indemnify a party against the consequences of his own negligence unless that construction is very clearly intended, noting that such an indemnification provision has contained language requiring the indemnitor to carry liability insurance with specified minimum limits and to name the other party as an additional insured. Court held that refusal to sever indemnity claims from negligence claims was not abuse of discretion. *See also Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co.*, 825 N.W.2d 872 (N.D. 2012) (discussing N.D.C.C. § 22-02-07).	No anti-indemnity statute. *But see* N.D.C.C. § 22-02-07.	LOL likely enforced in keeping with indemnity authority.
Ohio	Probably.	*Fertec, L.L.C. v. BBC & M Eng'g, Inc.*, No. 08AP-998, 2009 WL 3164752 (Ohio Ct. App. Oct. 1, 2009). Trial court entered summary		Appears to be the first case involving enforcement of LOL clause in design professional setting in Ohio; no

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		judgment order enforcing LOL provision in contract between residential construction contractor and geotechnical and engineering subcontractor; appellate court held the order was not a final appealable judgment so it would not consider the issue.		appellate ruling.
Oklahoma	Yes.	*Arnold Oil Properties LLC v. Schlumberger Tech. Corp.*, 672 F.3d 1202 (10th Cir. 2012). Owner of deep-zone gas well brought action alleging breach of contract and negligence against contractor hired to perform specialized cement job on well. The court denied the summary judgment motion asserting that the parties' contract indemnified and held contractor harmless from all claims. The court stated that "[u]nder Oklahoma law, courts may enforce contractual provisions limiting a party's liability for ordinary negligence if the parties have equal bargaining power."	Okla. Stat. tit. 15, § 221 (construction anti-indemnity statute with exception that it is not applicable to the requirement that entities purchase project-specific insurance policy).	
Oregon	Yes, where LOL clearly and unequivocally expresses intent to	*Estey v. MacKenzie Eng'g Inc.*, 324 Or. 372, 927 P.2d 86 (1996) refusing to enforce LOL clause in contract between prospective home		Court disregarded LOL clause because actual language of the clause was not clear and the parties were not in equal bargaining positions (". .

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
	limit liability.	purchaser and inspection firm.		. plaintiff, a lay consumer, should [not] bear the risk of the alleged negligence of a licensed professional engineer.").
Pennsylvania	Yes, where limitation of liability is reasonable and gross negligence or intentional torts not involved.*	*Flatrock Ptnrs., L.P. v. Kasco-Chip Constr., J.V.*, 2007 Phila. Ct. Com. Pl. LEXIS 123 (Pa. C.P. 2007). Third-party action by general contractor against geotechnical engineering firm for breach of contract and negligent misrepresentation in performance of foundation construction monitoring services. LOL was valid enforceable as to breach of contract claim. LOL did not apply to negligent misrepresentation claim, however, because that claim was based on plaintiff's purported reliance on investigation engineer performed for another party under a different contract. Although that contract also contained an identical LOL clause that limited liability to the "client," plaintiff was not the client in that contract.		Court would not disregard LOL clause that was clear and unambiguous. LOL clause was subject of private contract between sophisticated business entities dealing at arm's length who were at liberty to fashion the terms of their bargain as they wish. LOL provision that limited liability to "client" did not operate to limit liability to any other party.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Pennsylvania	Yes.	*Mistry Prabhudas Manji Eng. Pvt. Ltd. V. Raytheon Engineers & Constructors, Inc.*, 213 F.Supp.2d 20 (D. Mass. 2002). Liquidated damages provision in engineering services contract enforceable under Pennsylvania law. LOL provision was not an exculpatory clause; it capped damages at 10 percent of fee paid.		Although contracting party was small Indian company that precipitously entered contracts without adequate legal representation, these facts did not show that contracting party lacked meaningful choice or suffered unfair surprise where LOL was not hidden boilerplate. But "the one point which gives this Court pause is whether a ten percent cap creates an adequate incentive to perform." However, plaintiff did not demonstrate unconscionability as there was no indication that its profit margin was higher than 10 percent.
Pennsylvania	Yes.	*Lincoln Pulp & Paper Co., Inc. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977). Pennsylvania law applied pursuant to choice of law provision in contract. No authority indicates that substantive law of Pennsylvania differs from that of Maine, or that Pennsylvania law offends any Maine public policy. LOL clause protects		Separate analyses were required to determine whether enforceability of LOL as to breach of contract and negligence claims. Stricter standard applies where party seeks to apply LOL as shield against negligence claim. Pennsylvania law requires

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		engineer from liability for consequential damages, including loss of profits and products, arising from breach of contract or breach of warranty. However, LOL does not limit liability of engineering firm for consequential damages caused by its own negligence. At evidentiary hearing, expert testified that LOL clauses are customary in the trade. LOL clauses became standard in the industry by the late 1960s, resulting from both the rise in litigation and the inclusion of limiting clauses in the equipment contracts of suppliers.		"clear and unequivocal" expression of intent to limit liability for negligence. LOL relieved engineer of liability on breach of contract and breach of warranty claims where LOL was drafted by experienced counsel.
Pennsylvania (3rd Circuit)	Yes.	*Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195 (3d Cir. 1995). LOL enforceable under Pennsylvania law in suit arising from architect's failure to apprise high-rise developer of height restriction on property in pre-purchase study for developer. Developer later purchased property in reliance upon architect's report. LOL does not shield architect from all potential liability. Although indemnity provisions are exculpatory and disfavored under Pennsylvania law, LOL clauses are subject to the same strict	68 Pa. Stat. §491 (anti-indemnity provision).	Anti-indemnity statute is strictly limited to indemnity and hold harmless agreements, which are distinct from LOL clauses. Anti-indemnity statute applies only to contracts between owners and architects. Developer did not own the property at the time it entered into the contract with architect. In determining reasonableness of

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		construction. LOL clauses are routinely upheld so long as reasonable, parties had equal bargaining power, and no willful or malicious omission occurred.		LOL, appropriate inquiry is whether cap is so minimal compared with expected compensation that the concern for consequences of a breach is drastically minimized. Maximum recovery under any action was $50,000 by operation of LOL. Owner could not meet jurisdictional minimum of $75,000. Third Circuit remanded to district court with instructions to dismiss for lack of subject matter jurisdiction.
Rhode Island**	Likely yes.	*Sangermano v. Roger Williams Realty Corp.*, 22 A.3d 376 (R.I. 2011). Court provides that Rhode Island law is well settled regarding indemnity provisions – "indemnity provisions are valid if sufficiently specific, but are to be strictly construed against the party alleging a contractual right of indemnification." *See also A.F. Lusi Const., Inc. v. Peerless Ins. Co.*, 847 A.2d 254 (R.I. 2004). The court discusses R.I. Gen. Laws § 6-34-1, which it has	R.I. Gen. Laws § 6-34-1 (construction anti-indemnity statute). Includes contracts that relate to "design [and] planning" but does not prohibit purchase of insurance or construction bond.	Indemnification authority reflects desire for parties to be liable for their own negligence. LOL likely enforced in keeping with indemnity authority.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		interpreted to invalidate agreements between contractors in which a subcontractor has agreed to indemnify a general contractor for the latter's own negligence, but permits agreements in which the subcontractor indemnifies the general contractor for claims arising from the subcontractor's own negligence.		
South Carolina	Yes.	*Georgetown Steel Corp. v. Union Carbide Corp.*, 806 F. Supp. 74 (D.S.C. 1992), *overruled on other grounds* 7 F.3d 223 (4th Cir. Sept. 14, 1993). LOL enforceable under South Carolina law. LOL was product of arm's length negotiations between two commercially sophisticated entities. LOL allowed parties to negotiate waiver of limitation for additional consideration. Engineer had no liability to another contractor on project where no contractual relationship existed; court denied cross-claim by other contractor claiming to be third-party beneficiary of contract between engineer and owner.		LOL enforceable based on evidence that owner was made aware of it during contract formation, even though LOL may not have been specifically or expressly negotiated. Clause provided a simplistic way for owner to shift full liability to engineer. If owner had wanted to negotiate that term differently, option to do so was provided right in the language of the limiting provision.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
South Dakota**	Likely yes, for ordinary negligence.	*Domson, Inc. v. Kadrmas Lee & Jackson, Inc.*, 918 N.W.2d 396 (S.D. 2018), *reh'g denied* (Oct. 26, 2018). Exculpatory clause between construction contractor and tribe for a road reconstruction project that insulated project's designers from liability to contractor arising out of good-faith acts was not against policy and is not invalid under SDCL 20-9-1.	S.D. Codified Laws § 20-9-1 (every person is responsible for injury caused by his willful acts or want of ordinary care or skill).	LOL would likely be treated similarly to the exculpatory clause in this context.
South Dakota**	Unclear as to design professionals.	*PCL Const. Servs., Inc. v. B & H Contractors of S. Dakota, Inc.*, No. 10-4076, 2013 WL 1866922 (D.S.D. May 2, 2013). "Contracts of indemnity are strictly construed in favor of a subcontractor as against the contractor. An indemnity contract is to be construed according to the clear and unequivocal expression of the parties' intent embodied in the ordinary meaning of the words used."	S.D. Codified Laws § 56-3-18 (construction anti-indemnity statute).	LOL Likely enforced in keeping with indemnity authority.
Tennessee	Yes.	*Moore & Assocs. v. Jones & Carter, Inc.*, No. 3:05-0167 (M.D. Tenn. Dec. 13, 2005), *aff'd*, 217 Fed. Appx. 430 (6th Cir. 2007). General contractor sought indemnification from civil engineering firm for damages in connection with construction of hotel in Texas. Hotel filed		Indemnity clause in contract did not require engineering firm to defend claim; clause was narrowly drawn to require indemnification against from damage, liability or cost to the extent caused by negligence of engineering

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		arbitration proceeding against general contractor in Texas. Contract provided that Texas law would govern. LOL valid and enforceable.		firm, which negligence had yet to be determined. Contract was to be read as a whole. Focusing only on indemnity clause would make LOL superfluous. General contractor was charged a lower fee in exchange for agreeing to limit engineer's total aggregate liability to fee paid for services.
Texas	Yes.*	*Great Hans, LLC v. Liberty Bankers Life Ins. Co.*, 05-17-01144-CV, 2019 WL 1219110 (Tex. App. Mar. 15, 2019) LOL clause in purchase contract negotiated over several months between sophisticated parties was enforceable despite seller's intentional breach and the unavailability of specific performance.		Court noted that the Texas Supreme Court has never held "that fraud vitiates a limitation-of-liability clause."
Texas	Yes.	*CBI NA-CON, Inc. v. UOP, Inc.*, 961 S.W.2d 336 (Tex. Ct. App. 1997). LOL limits remedies of plaintiff in third-party contribution action against engineering firm. Owner entered into separate contracts with engineering firm and product manufacturer. Contract with engineer	Tex. Civ. Code § 33.015(a) (contribution).	A contribution claim is derivative of plaintiff's right to recover from joint defendant against whom contribution is sought. Any claim owner could have against engineer would be for economic loss arising out of

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		contained LOL clause limiting liability to reperformance of the work. Owner sued manufacturer after product failed. Manufacturer brought third-party claim against engineer for contribution. Held: LOL in engineer's contract applied to derivative claim.		negligent performance of contract. Accordingly, such claim would be for breach of contract, not negligence. A breach of contract claim is not a basis for contribution under Texas law. If plaintiff could bring a negligence action against engineer, its recovery would be limited to reperformance of the negligent work pursuant to LOL; plaintiff could not sue for damages. In light of the derivative nature of third-party plaintiff's claim, third-party plaintiff's remedy is limited to that of plaintiff.
Texas	Yes.	*AGIP Petroleum Co., Inc. v. Gulf Island Fabrication, Inc.*, 920 F. Supp. 1330 (S.D.Tex 1996 *aff'd*, 56 F. Supp. 2d 776 (S.D. Tex. 1999). LOL that specifically excluded liability for consequential damages was enforceable under Louisiana and maritime law. Plaintiff was barred from recovering under either a contract		Subcontractor was indemnitee under contractor's LOL agreement with owner. Thus, as third-party beneficiary, subcontractor was entitled to assert LOL against plaintiff's claims.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		or breach of warranty theory. However, direct damages were recoverable because not within scope of LOL.		
Utah	Yes.*	*Salt Lake City Corp. v. ERM-W., Inc.*, No. 2:11-CV-1174 TS, 2015 WL 4347610 (D. Utah July 14, 2015). Relying on *Russ v. Woodside*, the court held that limitations of liability in a professional services contract to remove contaminated sediment were clear and unequivocal, and valid, regardless of whether the risk of loss is in tort or in contract.		
Utah	Yes, if clear and unequivocal, and absent willful, gross, or wanton negligence.	*Russ v. Woodside Homes, Inc.*, 905 P.2d 901 (Utah Ct. App. 1995). Utah courts apply the same tests to contracts that release, shift, or avoid potential liability. Where that intent is clearly and unequivocally expressed in a contractual provision, it will be enforced. Further, clear and unequivocal does not require specific language, but can be inferred by the language and purpose of the entire agreement, together with surrounding facts and		The *Russ* court noted that these rules do not apply to those engaged in public service. Here, as a matter of law, the contractor was not a public servant because it was not duty bound to contract with all comers.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		circumstances.		
Utah.	Yes, though a party cannot be indemnified against its sole negligence.	*Jacobsen Const. Co. v. Blaine Const. Co., Inc.*, 863 P.2d 1329 (Utah Ct. App. 1993). Finding that because indemnity agreement between parties mandated Blaine indemnify Jacobsen for Jacobsen's *sole* and passive negligence, the agreement violated public policy.	Utah Code. Ann. § 13-8-1 (construction anti-indemnity statute).	
Vermont	Yes, so long as unambiguous and part of an arm's-length deal.	*Colgan v. Agway, Inc.*, 150 Vt. 373, 553 A.2d 143 (1988). Court discusses limitation of liability clauses generally, noting that, in this case, "apart from the relative bargaining power of the parties, . . . and in light of the relevant contract language discussed above, the plaintiff would have been unfairly surprised were he to be informed that, by virtue of the contract, the defendant was protected from any liability flowing from negligent design of the facility."		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Virginia	Yes.	*Dewberry & Davis, Inc. v. C3NS, Inc.*, 81 Va. Cir. 122 (2010). In a case of first impression, the court analyzed Va. Code Ann. § 54.1-411, noting that the drafters specifically added "Engineers shall not . . . be prohibited from . . . limiting liability through contract." The court also noted that the statute's amendment would have been unnecessary if design professionals were already permitted to limit liability through contract.	Va. Code Ann. § 11-4.1 (construction anti-indemnity statute). Va. Code Ann. § 54.1-411(A) (permitting design professionals to limit liability for damages arising from their acts).	
Washington	Yes.*	*REI v. GeoEngineers, Inc.*, Washington State Superior Court, King County, No. 95-2-30163-1 (1996). LOL in geotechnical engineering contract enforceable under Washington law.		
Washington	Yes.*	*O'Keefe Development Co. v. Hart Crowser, Inc.*, Washington State Superior Court, King County, No. 91-2-13519-3 (1995). LOL in geotechnical engineering contract enforceable under Washington law.		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Washington	Yes.*	*Coventry Assoc. v. Golder Assoc., Inc.*, Washington State Superior Court, King County, No. 93-2-27092-5 (1995). LOL in geotechnical engineering contract enforceable under Washington law.		
Washington	Yes.*	*Lear Capital, LLC, et al. v. Albany Insur. Co., et al.*, Washington State Superior Court, King County, No. 99-2-03743-0 (2001). Trial court finds LOL enforceable as to engineering firm but not firm's individual employees.		
Washington	Yes.*	*Les Schwab Tire Centers of Oregon v. GeoTech Consultants, Inc.*, Washington State Superior Court, King County, No. 95-2-16358-1 (Mar. 1996). LOL in geotechnical contract enforceable under Washington law.		
Washington	Yes.	*McCain Foods USA v. CH2M Hill, Inc., et al.*, United States District Court for the Eastern District of Washington, at Spokane, No. CS-99-084-RHW. Factual issue regarding whether LOL was incorporated into subsequent amendments to contract precludes summary judgment.		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
Washington	Yes.	*Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 54 P.3d 161 (2002). LOL clause enforced in contract between health care club and patron.		The general rule in Washington is that such exculpatory clauses are enforceable unless (1) they violate public policy, (2) the negligent act falls greatly below the standard established by law for protection of others, or (3) they are inconspicuous.
Washington (9th Circuit)	Yes.*	*Charles L. Kelly, Jr. et al. v. AGRA Earth & Environmental, Inc., et al.*, 16 Fed. Appx. 695, 2001 WL 873828 (9th Cir. 2001). LOL in geotechnical engineering contract enforceable under Washington law.	RCW 4.24.115 (anti-indemnity statute).	Anti-indemnity statute could not be extended to void limitations of liability. Economic loss doctrine bars gross negligence claim. Disclaimer of warranties in LOL bars breach of implied warranty claim.
West Virginia	Unclear as to design professionals.	*Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Virginia*, 186 W. Va. 613, 413 S.E.2d 670 (1991). While dealing with a limitation of liability provision in a contract for an ad in the Yellow Pages, the Court found the contract provision limiting liability to the cost of the omitted ad unconscionable and noted		

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		that there must be a reasonable basis for measuring the loss and damages must be proved to a reasonable certainty.		
Wisconsin	Yes.	*Wausau Paper Mills Co. v. Charles T. Main, Inc.*, 789 F. Supp. 968 (W.D. Wis. 1992). Action for economic loss under negligence and breach of warranty causes of action. LOL clause in contract for design engineering services prohibiting recovery of consequential damages was enforceable under breach of warranty claim. LOL was immaterial under negligence claim.		"No economic loss" doctrine barred owner's claim against engineer for professional negligence. LOL clause therefore had no effect on that claim. However, action was allowed to proceed under breach of warranty claim based on same factual allegations. Recovery was allowed to extent of LOL provision.
Wyoming**	Unclear as to design professionals.	*Wyoming Johnson, Inc. v. Stag Indus., Inc.*, 662 P.2d 96 (Wyo. 1983). The court noted that contracts for indemnity are to be construed strictly against the indemnitee, and that the test is whether the contract language specifically focuses attention on the fact that by the agreement the indemnitor was assuming liability for indemnitee's own negligence. The court held that the subcontract was insufficient to impose the same liability for indemnification on		LOL likely enforced in keeping with indemnity authority.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Jurisdiction	Are LOL Clauses Enforceable?	Case Citation	Statute	Notable Enforcement Issues
		Stag as the prime contract imposed on Wyoming Johnson to the owner.		

* Designates unpublished case with limited precedential effect. Rules may limit citation to unpublished opinions.

** Designates states where LOL authority is limited or nonexistent. Entries therein reflect possible treatment based on similar concepts.

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com

DESIGN PROFESSIONAL
LIMITATION OF LIABILITY CASE INDEX
Updated January 2020

Related Law Review Materials

Circo, Carl, *Selected Construction Contract Clauses: From the Routine to the Cutting Edge*, 2015 Ark. L. Notes 1800 (2015).
S. Harrison Williams, *Consumers and Remedies: Do Limitation of Liability Clauses Do More Harm Than Good?*, 65 S.C. L. Rev. 663 (2014).
Mead II, Leon F., *Unintended Consequences of over-Protecting Non-Residential Design Professionals*, Nev. Law. (Jan. 2014).
Terwilleger, John, *Can A Professional Limit Liability Contractually Under Florida Law?*, 65 Fla. L. Rev. 1351 (2013).
Prum, Darren A. & Del Percio, Stephen, *Green Building Contracts: Considering the Roles of Consequential Damages & Limitation of Liability Provisions*, 23 Loy. Consumer L. Rev. 113 (2010).
Quilling, Thomas F., *Limiting the Liability of Design Professionals in Public Contracts, L.A. Law*. (Jan. 2007).
Circo, Carl J., *Contract Theory and Contract Practice: Allocating Design Responsibility in the Construction Industry*, 58 Fla. L. Rev. 561 (2006).
Kubes, Jeffrey T. & Mulcahy, Thomas W., *Perils of Third Party Practice in Construction Litigation Avoiding Substantive and Procedural Pitfalls to Preserve and Assert Your Rights*, 72 Def. Couns. J. 170 (2005).
Fox, Reeder R. & Wolff, Lisa, *Enforcing Limitation of Liability Provisions in Owner/architect/engineer Contracts*, 62 Def. Couns. J. 407 (1995).

Terence J. Scanlan
Troy Hatfield
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, WA 98104
tscanlan@cairncross.com
thatfield@cairncross.com