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## Litigation Update: Court Decision Provides Relief From Limitation of Liability Clauses

By Douglas C. Northup and Christopher L. Callahan

A recent Arizona Court of Appeals ruling means significant changes potentially are in store for businesses seeking to recover damages from professional service providers. Contracts with professional service providers, such as accountants, environmental consultants, architects and engineers, often include a clause limiting the service providers' liability only to "fees paid" and or a set amount. Under the Court's recent ruling, it seems clear that such clauses cannot be used to prevent a party injured by the negligence of a professional service provider from presenting its claims to a jury.

The Arizona Court of Appeals recently ruled in a case involving the enforceability of a clause that limited an engineering professional's liability for professional negligence to the "total fees actually paid." Although the Court declined to rule that these clauses are void as a matter of public policy, it held that this type of provision is an express assumption of the risk, the enforceability of which, under the Arizona Constitution, is a matter reserved for a jury to decide, thereby eliminating the opportunity for summary judgment.

The case, *1800 Ocotillo, LLC v. The WLB Group, Inc.*, 1 CA-CV 07-0037 (1/29/2008), addressed a situation in which a developer, Ocotillo, hired the defendant, WLB, to provide survey, engineering and design services for a townhouse project. In performing its survey, WLB erred by failing to identify an existing right of way. As a result, Ocotillo was unable to acquire necessary construction permits.

Ocotillo, the developer, sued to recover damages and WLB sought summary judgment on the basis of the contractual provision that limited its liability to "total fees actually paid." The trial court granted summary judgment in favor of WLB. Ocotillo appealed on the grounds that public policy prohibited the enforcement of the provision relating to design professionals. Although the Court of Appeals rejected the public policy argument, it did characterize the provision as an express assumption of the risk. ***The Arizona Constitution requires any defense based upon the plaintiff's assumption of the risk to be determined by the jury.*** Accordingly, the Court of Appeals reversed the grant of summary judgment and remanded the case to the trial court.

Limitation of liability clauses of the sort addressed in *1800 Ocotillo* are increasingly common in professional services contracts. The decision by the Arizona Court of Appeals means that, under Arizona law, it will be difficult, if not impossible, for a defendant to obtain summary judgment on the basis of this type of liability limitation. It will be challenging for defendants, seeking to rely upon such provisions, to persuade juries to apply them in situations where the injured party's damages greatly exceed the limit in the contract.

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If you have this type of provision in any of your contracts or are involved in matters that may require the consideration of such provisions, please give us a call.

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