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Florida passes new legislation allowing for a contractual waiver of individual liability for negligence by a design professional employed by a business entity providing professional design services or who is acting as an agent of the business entity.

On April 24, 2013, Governor Rick Scott approved Senate Bill 286 which will permit business entities providing professional design services to limit by contract the personal liability of their individual employees or agents who are design professionals. Effective July 1, 2013, newly created Florida Statute §558.0035 allows a “design professional” (defined in the statute as an “architect, interior designer, landscape architect, engineer, surveyor, or geologist”) who is employed by a business entity providing professional design services to limit by contract individual liability for negligence occurring within the course and scope of a professional services contract if:

- The contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;
- The contract does not name as a party to the contract the individual employee or agent who will perform the professional services;
- The contract includes a prominent statement, in uppercase font that is at least five point sizes larger than the rest of the text, that, pursuant to §558.0035, an individual employee or agent may not be held individually liable for negligence;
- The business entity maintains any professional liability insurance required under the contract; and
- Any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

The term “business entity” is defined in the statute to mean “any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in [the State of Florida.]”

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Florida courts have long recognized that individual professionals may be held liable to third parties for negligence in the performance of their duties under a contract entered into by their employer. *See e.g., Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). In *Moransais*, the Florida Supreme Court held that:

[T]he economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature and the aggrieved party has entered into a contract with the professional's employer. We also hold that Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party.

Id. at 983-84.

Subsequently, the Third District Court of Appeal further expanded a professional's liability by determining that a limitation of liability provision in a professional service contract is not enforceable to insulate individual professionals from liability as a matter of law. *See e.g., Witt v. La Gorce Country Club, Inc.*, 35 So.3d 1033 (Fla. 3d DCA 2010).

The newly enacted Senate Bill 286 creating Fla. Stat. §558.0035, now permits business entities providing professional design services to limit, by contract, the liability of their individual employees or agents and effectively abrogates the holding of Witt.

We recommend that our clients be cognizant of this new legislative enactment with respect to any new contracts they may consider with business entities providing professional design services and which could limit, by the terms of the contract, the liability of individual design professional employees and/or agents. Specifically, general contractors need to be aware that liability by a design professional can be contractually limited under the new Statute. Accordingly, in the event there is an assignment of contract rights between the design professional and the owner or another party contemplated, or perhaps in situations where the project is a design-build type project and the design professional partners with the general contractor or the general contractor has an in-house design professional doing the design work on the project, the new Statute should be considered.

This legislative enactment is expected to change the manner in which professional services contracts are drafted and may affect the cost of insurance because the statute requires the business entity to carry liability insurance as required under the contract in order for the individual design professional to avoid personal liability. As such, insurance requirements under a professional services contract should be reviewed carefully and drafted with the statute in mind.