

## Have Licensed Professionals Lost Contractual Caps On Liability?

by Jeffrey Albinson

### Introduction

Limitation of Liability (LOL) clauses are used by (non-lawyer) professionals to limit liability to a pre-set amount. LOL clauses serve as a contractual raincoat for some types of exposure – not stopping the rain, just keeping some parts dry. Until recently, professional liability (PL) underwriters could rely on LOL clauses to control exposure under PL policies. LOL protection allows rate structures that reflect (in part) the control offered by LOL clauses.

Claims departments and defense counsel have also relied on LOL protection to evaluate and defend cases.

Courts have traditionally held LOL clauses enforceable provided that (1) the clause clearly and unequivocally indicated the parties' intentions (2) the limitation did not absolve any one party of all liability and still provided a deterrent to negligence and (3) the parties to the contract had equal bargaining power. *Diesel Repower Inc. v. Islander Investments LTD, Inc.*,

271 F.3d 1318, 1324 (11th Cir. 2001).

A new 3rd DCA case may bring this protection to an end and spells trouble for professional liability carriers that might get burned by this "after-the-fact" loss of exposure caps.

In *Gerhardt Witt v. La Gorce Country Club Inc. and La Gorce Country Club vs. ITT Industries*, (No 3D08-1812) consolidated with (3D08-1825) - 34 FLW D1161 (FL 3DCA 2009), the Court has issued an opinion that disturbs the legal landscape and which could change

See "Contractual Caps" page 7

## Chair's Report

by James L. Bennett

I don't know about you but it is always refreshing to year youthful perspectives on the practice of law. It is always good for us to be reminded that there are perspectives on the practice of law unfettered by years of doing what we do. Having interns in your office is a source of such refreshing perspectives. In this issue the Miami-Dade Commission on Ethics shares their intern experience.

It is great when lawyers step up to share their thoughts on emerging issues and is especially helpful with they take the time to write an article for publication in the Agenda. An emerging issue that will have an impact on contracting with licensed

professionals and any limitation of individual liability under the recent La Groce case. In this issue Geff Albinson has taken the time to author a thoughtful article and I commend it to you attention. I encourage your to contribute articles to the Agenda.

Finally the 2008-2009 budget is published in this issue and we own much to the success of the 2009 Sunshine Law, Public Records and Ethics seminar for helping the bottom line. The brochure for the 2010 seminar is in this issue. This seminar is expected to be made available through a variety of methods. Encourage your elected official to access the content in a manner that is most convenient to them.

### INSIDE:

Intern Experience – Summer 2009	
Miami-Dade Commission on Ethics .....	2
Calendar of Events .....	3
CLE Audio/Video List.....	4
Sunshine Law, Public Records and Ethics Seminar .....	5

# Intern Experience – Summer 2009

## Miami-Dade Commission on Ethics

by Robert Meyers, Executive Director and Victoria Frigo, Staff Attorney

Thanks to a grant from this section of The Florida Bar, the Miami-Dade Commission on Ethics hired Kim Salomone, a student at the University of Miami School of Law, as our summer intern. Kim had recently completed an ethics law seminar dealing specifically with the County ethics ordinances. Our independent County agency interprets, enforces, and provides training in County and municipal ethics laws as well as the County's Citizens' Bill of Rights, election campaign and public finance ordinances, and whistleblower retaliation complaints.

Two years ago, the County adopted a "strong mayor" form of government, which has led to numerous administrative changes. We asked Kim to add to her previous studies and investigate how other similarly organized jurisdictions handle mayoral conflicts of interest. We were particularly interested in the mayor's duty to take official action to approve or veto gov-

ernment contracts in spite of possible divide loyalties. Our intern also contributed to the ongoing discussion of who is the municipal attorney's client. The city attorney-client issue was especially relevant this summer because of a complicated ethics opinion related to this matter.

Over the summer, the Executive Director of the Ethics Commission met with County Commissioners to encourage the passage of several amendments to the ethics ordinance, including a provision that would compel government contractors to adopt portions of the County ethics code. Kim identified some of the legal limitations that can be imposed on entities that stand in the shoes of government.

Kim said that she appreciated seeing the synergies between public ethics laws and other bodies of law. In one case, we were required to conduct some on-the-spot research involving tax law and financial disclosure re-

quirements. Kim and a staff attorney combined efforts so that the question could be resolved quickly.

Following a series of training sessions on government procurement, Kim reflected on government service compared to work in the private sector. She concluded that the aim of the local government attorney was to contribute to the public good; she felt that her previous experience as an intern in the private sector, although very important, usually benefited only one person.

Having researched and participated in several complex areas of local government and ethics law, Kim said that she will use these findings toward completing a lengthy writing requirement for graduation. We are pleased to know that our summer intern will be able to put her own good efforts to work again for graduation from law school and possible service in government law.



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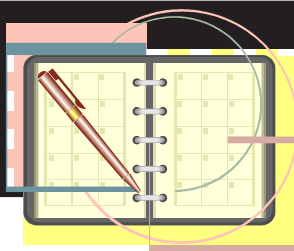
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**May 6, 2010**  
Don CeSar Hotel  
St. Pete Beach

**35th Annual Public Employment  
Labor Relations Forum**  
October 22-23, 2009  
The Peabody Hotel  
Orlando

## SEMINAR SCHEDULE

**Sunshine Law, Public Records, and Ethics Seminar**  
February 12, 2010  
University Center Club  
Tallahassee

**2010 Certification Review Course**  
May 6, 2010  
Don CeSar Beach Resort  
St. Pete Beach

**Land Use Seminar**  
May 6, 2010  
Don CeSar Beach Resort  
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**33rd Annual Local Government Law in Florida**  
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# Sunshine Law, Public Records and Ethics Seminar

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: February 12, 2010

Leon County Civic Center • 505 W. Pensacola St. • Tallahassee 32301  
850-222-0400

• Live  
• Live Webcast  
• Audio CD

Course No. 0990R

8:00 a.m. – 8:20 a.m. **Late Registration**

8:20 a.m. – 8:35 a.m.

## Introduction

*James L. Bennett, Chair, City, County and Local Government  
Law Section*

## Opening Remarks

*Robert L. Teitler, Program Chair, Ft. Lauderdale*

8:35 a.m. – 9:25 a.m.

## Sunshine Law Overview

*Barbara Petersen, President, First Amendment Foundation,  
Tallahassee*

9:25 a.m. – 10:15 a.m.

## Public Records Law Overview

*Patricia Gleason, Executive Office of the Governor, Tallahassee*

10:15 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:20 a.m.

## Honest Services Fraud

*Herbert W.A. Thiele, County Attorney, Leon County, Tallahassee*

11:20 a.m. – 12:10 p.m.

## Ethics: Abuses Exposed, Filings Disclosed and Procedures Imposed

*Philip Claypool, Executive Director, Florida Commission on  
Ethics, Tallahassee*

12:10 p.m. – 1:10 p.m. **Lunch (included in registration fee)**

1:10 p.m. – 2:00 p.m.

## Ethics: Thinking Ahead - The Use of Information and Post- Employment Restrictions

*Julia Cobb Costas, Florida Commission on Ethics, Tallahassee*

2:00 p.m. – 2:50 p.m.

## Ethics: Recognizing a Voting Conflict and What to Do If You Have One

*Virlindia Doss, Deputy Executive Director, Florida Commission  
on Ethics, Tallahassee*

2:50 p.m. – 3:05 p.m. **Break**

3:05 p.m. – 3:55 p.m.

## Ethics: Conflict of Interest Standards

*Dan Carlton, Florida Commission on Ethics, Tallahassee*

3:55 p.m. – 4:45 p.m.

## Ethics: Harmful Hospitality and Corrupting Cups of Coffee - A Review of Gift Laws

*Charles "Chris" Anderson, Florida Commission on Ethics,  
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## CONTRACTUAL CAPS

from page 1

the face of professional E&O coverage into the foreseeable future.

### The La Gorce Case

La Gorce Country Club (La Gorce) wanted to irrigate its golf course through a water treatment system instead of using municipal water. La Gorce contracted with ITT to design and build the system. Gerhardt Witt (Witt), a professional geologist licensed in Florida, owned Gerhardt M. Witt and Associates (GMWA). GMWA ultimately contracted with La Gorce for consulting services on the project. The contract had an LOL clause that limited liability for some claims to the greater of the amount of the contract or the total dollar amount of the “approved portions for the scope of the project.” GMWA was specifically named in the LOL clause but not Witt.

The system was used for fourteen months before complete failure. La Gorce brought suit against GMWA, Witt and ITT. The suit claimed, *inter alia*, professional malpractice against Witt and GMWA. The trial court found Witt and GMWA liable and found the LOL clause applied to GMWA but not Witt. The trial court found Witt personally liable because he provided services but found the LOL clause did not protect him because he was not a party to the written agreement.

Even if he had been a party to the contract, the court indicated it would have rejected the LOL clause, relying upon *Moransais v. Heathman*, 744 So. 2d 973, 983 (FL 1999) which opinion held that “it is questionable whether a professional ... [can] legally or ethically limit a client’s remedies by contract in the same way that a manufacturer [can] with a purchaser in a purely commercial setting.” (Note: Edited for clarity and brevity). The Court held even if Witt had been covered by the limitation of liability clause, the *Moransais* decision deems the clause unenforceable.

*Moransais* is not an LOL case. It does feature another old friend, the “economic loss rule” (ELR). The ELR generally restricts a plaintiff to the

recovery of only economic losses when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract; or when a defect in a product causes damage to the product but no personal injury or damage to other property. The *Moransais* court wrote:

[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 professional based in their acts if negligence despite the lack of direct contract between the professional and the aggrieved party.

*La Gorce* concedes that *Moransais* does not discuss the insulation of a professional by an LOL clause; however it indicates that the Supreme Court’s analysis “highlights the extra-contractual” nature of a claim against a professional. *La Gorce* found that since *Moransais* concludes that a negligence claim operates outside of a professional services contract, it is inconsistent to limit liability to an amount specified in the contract.

### The Impact of La Gorce Moving Forward


While the case involved a licensed geologist, the language is

broad enough to cover any licensed “professional.” On its face, it means professionals in the 3rd DCA likely cannot limit liability through an LOL clause. If other jurisdictions pick up the decision or it is appealed to the Florida Supreme Court and upheld, the opinion will have statewide impact.

Carriers and lawyers setting premiums, evaluating risk and evaluating exposure must now be done assuming no LOL protection. In the present economic climate where commercial entities (developers, investors, etc.) are examining failed projects with an eye toward placing blame on professionals involved, LOL clauses no longer offer the protection they once did. All concerned should expect an increase in exposure and claims.


by Jeffrey Albinson  
Daniels, Kashtan, Downs, Robertson  
and McGirney  
PO Box 5047  
Clearwater, FL 33758  
813-222-0400 or jalbinson@dkdr.com

*Jeff Albinson is an attorney with Daniels, Kashtan, Downs, Robertson & McGirney, P.A. in Tampa. Mr. Albinson focuses his practice on the defense of professionals (including lawyers, architects, engineers, real estate agents, insurance agents and others) in negligence cases as well as Florida Bar, DBPR and other licensing bodies. NOTE: This article was originally published in the August/September Issue of Res Ipsa Loquitor.*



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