

To: New Jersey Law Revision Commission
From: Jennifer Weitz
Re: Imputing Negligence to a Public Entity – Update Memorandum
Date: February 11, 2019

MEMORANDUM

In *City of Perth Amboy v. Interstate Industrial Corp.*, 2017 WL 2152738, the Appellate Division considered whether an agent or independent contractor's negligence could be imputed to a contracting unit, i.e., a public entity, when an exculpatory clause limited damages against the public entity to an extension of time for performance.

The Court in that case found that “the Legislature did not intend to broaden a public entity’s liability by permitting the negligence of its agents or independent contractors to be imputed to the public entity,” and in the absence of negligence on the part of the public entity, the exculpatory clause was enforceable. Wendy Llewellyn first identified this topic in a Memorandum that was presented to the Commission at the September 2018 meeting. The Commission authorized outreach and additional research which resulted in the endorsement of statutory revision.

City of Perth Amboy considered imputed negligence in the context of the Local Public Contracts Law (“LPCL”), N.J.S. 40A:11-19, as follows:

40A: 11-19 Liquidated damages; void provisions as to contractor's remedies

19. Any contract made pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.) may include liquidated damages for the violation of any of the terms and conditions thereof or the failure to perform said contract in accordance with its terms and conditions, or the terms and conditions of P.L.1971, c.198 (C.40A:11-1 et seq.). Notwithstanding any other provision of law to the contrary, it shall be void, unenforceable and against public policy for a provision in a contract entered into under P.L.1971, c.198 (C.40A:11-1 et seq.) to limit a contractor's remedy for the contracting unit's negligence, bad faith, active interference, tortious conduct, or other reasons un contemplated by the parties that delay the contractor's performance, to giving the contractor an extension of time for performance under the contract. For the purposes of this section, "contractor" means a person, his assignees or legal representatives with whom a contract with a contracting unit is made.

L.1971, c.198, s.19; amended 1999, c.440, s.28; 2001, c.206, s.1.

Initially, the LPCL allowed publicly bid, local government contracts to include exculpatory clauses that denied delay damages and limited a contractor’s remedy to an extension of time.¹ However, a 2001 amendment voided such clauses in most cases, finding them repugnant to public

¹ L.1971, c. 198, § 19, eff. July 1, 1971.

policy.² At the time of this case, the amended provision had yet to be construed. Thus, the Appellate Division considered the plain wording of the statute, as well as legislative intent, before finding that the exculpatory clause was valid because there was no evidence that Perth Amboy was itself negligent. Additionally, the court noted that the Legislature did not intend for a contractor's negligence to be imputed to the public entity, thus allowing for a form of relief that otherwise would not exist.

The amendment was modeled on a 1994 amendment to N.J.S. 2A:58B-3, which also forbids exculpatory clauses against a public entity that exhibits "negligence, bad faith, active interference, or other tortious conduct."³ However, N.J.S. 2A:58B-3 specifically prohibits imputing the negligence of an agent to the public entity:

2A :58B-3. Definitions

1. a. As used in this act:

"Public entity" means this State or any department, public authority, public agency, public commission or any instrumentality of this State authorized by law to make contracts for the making of any public work, but shall not include any county, municipality or instrumentality thereof.

"Contractor" means a person, his assignees or legal representatives, with whom a contract with a public entity is made.

b. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, to which a public entity is a party, relative to the construction, alteration, repair, maintenance, servicing or security of a building, structure, highway, roadway, railroad, appurtenance and appliance, including moving, demolition, excavating, grading, clearing, site preparation or development of real property connected therewith, purporting to limit a contractor's remedy for delayed performance caused by the public entity's negligence, bad faith, active interference, or other tortious conduct to an extension of time for performance under the contract, is against public policy and is void and unenforceable.

c. Nothing in this section shall be deemed to void any provisions in a contract, agreement or purchase order which limits a contractor's remedy for delayed performance caused by reasons contemplated by the parties nor shall the negligence of others be imputed to the State. [emphasis added]

d. Nothing in this section shall be deemed to void any provision in a contract, agreement or purchase order which requires notice of delays, provides for arbitration or other procedures for settlement or provides for liquidated damages.

L.1994, c.80.

In addition to harmonizing the two statutory provisions, above, outreach to Ed Buzak, a past Chairman of the Legislative Committee of the Association of Environmental Authorities, resulted in his strongly suggesting that the education law contracting statute be similarly amended.

² NJ Assem. Comm. State., A.B. 2913, 1/18/2001

³ *Id.*

Mr. Buzak noted that a companion amendment to that statute, specifically N.J.S. 18A:18A-41, was enacted to achieve the same objective as the 2001 amendment to the LPCL. (The Senate Committee Statement also indicates that the bill prohibiting most “no damage for delay” clauses was intended to apply both to the LPCL and to the Public School Contracts Law.⁴ In addition, several other sections of the amendment applied to both statutes.⁵) Therefore, he felt that any revision to the LPCL should be extended to the Boards of Education.

Modifying both N.J.S. 40A:11-19 and 18A:18A-41 to reflect the wording of 2A:58B-3c will allow for consistency in interpreting all contracts governed by these statutes, thus potentially alleviating the type of sprawling and costly litigation that gave rise to this case.

⁴ NJ S. Comm. State., A.B. 2913, 6/14/2001

⁵ NJ Assem. Floor State., A.B. 3519, 12/9/1999