

# STEMMING THE FLOW

## THE USE OF LIABILITY CAPS

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Having received a number of requests from members on this topic and following on from our Autumn bulletin which considered Professional Indemnity Insurers' attitudes to lending valuation work, we now consider by way of this additional Practice Note how your firm might be able to further help itself in managing risk from a professional perspective.

In providing services to your client, be it an individual or a lender, there are a variety of ways that your firm can take steps to reduce the impact that claims can have on the firm.

Whilst most such steps will relate to good practice and the manner in which you undertake the services, it is also worth considering if it is possible to include liability caps in your terms of engagement.

Although it is far from certain that a client will be prepared to accept them, you may be aware that the use of liability caps is recommended by RICS.

### What is a liability cap and what level should it be?

Put simply, a liability cap is a contractual limit agreed with the client that limits the possible extent of any claim against you. From a risk management perspective, this is extremely useful as it provides a clear indication of the full extent of any potential exposure the firm may face when a claim is made.

Whilst this limit will usually work in your favour, it is also easy to see why such limits may not necessarily be something that a client will view in a similar light.

As for what level should a liability cap be set at, that's a more complicated question.

From a legal perspective, a liability cap is likely to be considered acceptable if it is "reasonable". Unfortunately, there is little guidance as to how this should be interpreted but there are various factors to be considered such as:

- Client (e.g. type)
- Nature of the work being undertaken
- Value of the property
- Proportion to fees
- Purpose of the instruction (e.g. use of the sole purposes intended)

This is not an exhaustive list but highlights the major factors. However, we'd also highlight the fact it is not possible to limit your liability in respect of claims for death or bodily injury.





It is important to note that, if the court deems the liability cap to be unreasonable, then they will disregard it when dealing with a claim. However, they are less likely (although it is still possible) to take this course of action when dealing with commercial clients, given the expectation that will have been in a position to obtain legal advice.

### Liability Caps and Your Professional Indemnity Insurance

From an Insurer's perspective, a cap on any potential liability is always going to be a welcome risk management tool and may impact how they consider your firm when dealing with the renewal of your insurance arrangements.

However, it is worth noting that whilst a liability cap may be in place in the contract, this does not impact the limit of indemnity provided under your policy.

By way of example, you maintain a limit of £5,000,000 but have a cap of £1,000,000 in the terms of your Appointment. If, for whatever reason the court does not accept the £1,000,000 cap, you are still covered up to the limit of £5,000,000.

### The practical reality

Whilst RICS suggest the use of liability caps, and Insurers will wholeheartedly accept their presence, the reality of the situation is that their inclusion in your appointment may be a rare occurrence.

When preparing your terms and conditions, it is perfectly acceptable to include provisions limiting your liability, subject to such limit being reasonable.

However, it may be the case that large corporate clients will resist a liability cap as an attempt to limit the amount that they can recover in terms of their losses from you.

Whilst, it is always worth arguing for their inclusion if you can do so, a more pragmatic approach may be required when considering whether to accept the instruction and taking commercial considerations into account of course.

For example, an alternative option may then be the inclusion of a possible Net Contribution Clause, ensuring your liability is then fair and reasonable and this can be particularly useful if there might be multi-party transactions, or if insolvency issues were to arise etc.

Finally, we would of course suggest you seek suitable legal advice in looking to draft a suitable addition to your terms of business.

If you would like to discuss any of the issues raised in this article please contact:

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