



Supreme Judicial Court Articulates A New Test for Determining the Enforceability of Contractual Provisions That Limit Liability for Violations of G.L. c. 93A §11

By Patricia B. Gary

On January 24, 2022, the Supreme Judicial Court issued an important decision, *H1 Lincoln, Inc. v. South Washington Street, LLC, & others*¹, which establishes a new test for determining the enforceability of contractual limitation of liability provisions for violations of G.L. c. 93A, §11. Massachusetts General Laws c. 93A is the Massachusetts Consumer Protection Act which not only protects consumers, but also makes “unfair or deceptive act[s] or practice[s]” between businesses unlawful under Section 11. The primary issue in the case was whether the trial judge erred in concluding that the Plaintiff’s claims under G.L. c. 93A, §11 sounded in tort and not contract, and therefore, that a contractual limitation of liability clause was unenforceable, and did not preclude the recovery of damages under G.L. c. 93A, §11.

The Amicus Issue

The SJC sought amicus briefs on this issue, and Donovan Hatem LLP submitted an Amici Curiae brief on behalf of ACEC/MA and AIA/MA, two nonprofit organizations that represent the interests

of engineers and architects, respectively². The case is important to design professionals who often include limitation of liability clauses in their professional services agreements³, and rely upon these provisions to limit or cap the damages recoverable for professional liability claims, including claims based on alleged violations of c. 93A, §11. The Design Professional Amici urged the Court to respect and enforce contractual risk allocation terms agreed to by business entities by adopting a test which focuses on the culpability of the conduct, including whether

²The Amici Curiae Brief of ACEC/MA and AIA/MA was submitted by David J. Hatem and Patricia B. Gary.

³In many professional services agreements, including the AIA and EJCDC Standard Form of Agreements, a limitation of liability provision is a separate provision from a waiver of consequential damages provision. Though both provisions seek to limit liability, they are not the same. See generally AIA B101-2017 Standard Form of Agreement Between Owner and Architect, Section 8.1.3 (waiver of consequential damages); AIA Document B503-2017 Guide for Amendments to AIA Owner-Architect Agreements, Section C-6 (discussing limitation of liability provisions); see also General Conditions AIA 201-2017, Section 15.1.7 (waiver of consequential damages). Compare EJCDC Document E500-2020, Agreement Between Owner and Engineer for Professional Services, Article 6.10 (waiver of consequential damages) with EJCDC Document E500-2020, Exhibit I, Para. 1.02 (limitation of liability).

the conduct is a willful or knowing violation of c. 93A, rather than a characterization of the claim as sounding in either contract or tort.

The Holding of H1 Lincoln – The SJC’s New Test

The SJC declined to adopt the “tort versus contract” test for determining the enforceability of limitation of liability provision, that was developed by the Appeals Court, and held instead that commercial parties may enter into enforceable contractual arrangements that limit a party’s liability under c. 93A, §11, but that such contractual protection does not extend to defendants who “willingly or knowingly” engaged in unfair and deceptive acts. The SJC’s new test turns upon the level of the defendant’s culpability under 93A, §11, rather than a distinction between tort and contract claims, thus defendants who commit “relatively innocent violations” of c. 93A, §11 are entitled to enforce limitation of liability clauses.

As *H1 Lincoln* recognizes, G.L. c. 93A creates two classes of defendants. Defendants who have committed “relatively innocent” violations are liable for what is known as single damages⁴. By virtue of

⁴Single damages are actual damages.

¹*H1 Lincoln, Inc. v. South Washington Street, LLC*, SJC No. 13088, 2022 WL 200807, __ N.E.3d __ (2022). The decision was written by Supreme Judicial Court Justice Scott Kafker

the SJC's decision in *H1 Lincoln*, this class of "relatively innocent" defendants may enforce limitation of liability clauses in their contracts to preclude recovery of these damages. A second class of defendants — who are adjudicated to have committed "willful or knowing" violations — are liable for multiple damages, and may not enforce limitation of liability clauses. The Legislature's determination that these latter types of c. 93A violations must be deterred and punished by doubling or tripling the actual damages "may not be overridden by private contractual arrangements."⁵

Summary Of The Decision

Background

H1 Lincoln arose out of a bitter and protracted dispute over a commercial lease. The commercial tenant, Plaintiff H1 Lincoln, Inc. (d/b/a Majestic Honda) is a car dealership, and sued Defendants South Washington Street, LLC, another LLC (the "LLCs"), and four realty trusts (collectively, "Defendants") after the LLCs, for pretextual reasons, terminated Plaintiff's lease on August 9, 2017. The Plaintiff asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of c. 93A, §11. A limitation of liability provision in the lease provided for a waiver of consequential damages.

A jury found that the LLCs breached the lease and the implied covenant. In a subsequent bench trial of the c. 93A claim, the judge found that the principal of the LLCs used the lease termination as a lever to coerce concessions and knowingly "string Majestic along." The judge ordered specific performance to

enforce the lease and awarded \$4,462,500 of "actual" delay damages (\$175,000 per month of delay in municipal permitting). Finding the c. 93A §11 violations to be "willful or knowing," he then doubled the damages, bringing total recovery to \$8,925,000⁶.

Prior Appeals Court Precedent

The trial judge ruled that the waiver of consequential damages provision was unenforceable because the c. 93A §11 violations "sound[ed] in tort" rather than in breach of contract. In reaching this conclusion, the judge relied upon two Appeals Court cases, *Standard Register Co. v. Bolton-Emerson, Inc.*⁷ and *Exhibit Source, Inc. v. Wells Avenue Business Center, LLC*,⁸ which hold that "[A] chapter 93A claim analogous to a tort-based recovery overrides any contractual defenses, whereas a §11 claim founded on a contract theory is subject to a contractual limitation of remedies provision."⁹ The judge's rulings were appealed, and the Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

The Supreme Judicial Court's Reasoning

Reviewing the trial judge's legal conclusions de novo, the SJC concluded that the LLCs' conduct fell squarely within an established category of unfair conduct under

c. 93A, §11, namely, the "stringing along" paradigm of commercial extortion. Since the LLCs engaged in this unlawful conduct "willfully" for purposes of the multiple damages provisions of c. 93A, §11, the SJC also affirmed the award of double damages. The Court found that the delay damages awarded by the trial judge for the Plaintiff's lost profits in getting its dealership operational are "properly understood to be consequential damages," and were covered by the terms of the limitation of liability provision; thus, the final question was whether the provision precluded recovery by Majestic. The Court agreed with the trial judge that the limitation of liability clause was unenforceable, but declined to adopt the Appeals Court's "tort versus contract" test for enforceability.

Many of the SJC's prior c. 93A decisions reiterate that "a breach of contract alone does not amount to an unfair act of practice" for c. 93A, §11 purposes. In light of these decisions, *H1 Lincoln* notes that "the enforceability of waivers of c. 93A, §11 liability for conduct that involves nothing more than traditional breach of contract is no longer a live question, given that such conduct does not even give rise to a claim under G.L. c. 93A, §11."¹⁰ Of note, the Court emphasized that an intentional or knowing breach of contract, standing alone, is insufficient for a c. 93A, §11 violation, and therefore, the trial judge's ruling that the Defendants' "intentional breaches of the lease alone were enough to constitute unfair conduct for the purposes of c. 93A, §11," was incorrect.¹¹

H1 Lincoln establishes a new test for the enforceability of contractual waivers of c. 93A, §11 liability that focuses on the policies underlying

⁵H1 Lincoln, 2022 WL 200807, *15.

⁶After the Defendants engaged in further obstructive behavior, the judge opened the trial again and awarded additional delay damages, which he again doubled for "willful or knowing" violations.

⁷Standard Register Co. v. Bolton-Emerson, Inc., 38 Mass. App. Ct. 545 (1995).

⁸Exhibit Source, Inc. v. Wells Avenue Business Center, LLC, 94 Mass. App. Ct. 497 (2018).

⁹Id. at 502 (quoting Standard Register, supra, at 549).

¹⁰H1 Lincoln, 2022 WL 200807, *14.

¹¹Id. at n. 11, n. 12.

the statute, and not on the difference between tort and contract. The new test respects the right of contractual risk allocation in commercial transactions between businesses, but the right does not extend to unfair or deceptive conduct that is done willfully or knowingly, as this would frustrate the public policy purposes of the statute.¹²

Why The Decision Is Important For Design Professionals

For design professionals, *H1 Lincoln* confirms the importance of contractual limitation of liability provisions as effective means to contain and allocate professional liability risk exposures. Moreover, the *H1 Lincoln* Decision applies to all types of limitation of liability provisions.

- **Standard Limitation of Liability Provisions**

In many professional services agreements, including the EJCDC and AIA Standard Form of Agreements, a limitation of liability provision is a separate and distinct provision from a waiver of consequential damages provision.¹³ Standard limitation of liability provisions set an upper limit on the amount of recoverable damages. The purpose is to allocate risk in proportion to the benefit which the design professional receives (its fee), in the event something goes wrong on the project; in essence, balancing risk with reward. By their terms, limitation of liability provisions typically do not apply to willful or intentional wrongdoing.¹⁴

¹²For similar public policy reasons, exculpatory clauses exempting a party from liability for harm caused by intentional and reckless misconduct are unenforceable under Massachusetts law. See Restatement (Second) of Contracts § 195(1) (1981).

¹³See note 3.

¹⁴ See generally AIA Document B503-2017 Guide for Amendments to AIA Owner-

Thus, *H1 Lincoln* is consistent with standard contractual practices for design professionals, and represents a sensible basis for contractual risk allocation.

- **Waiver of Consequential Damages Provisions**

Another classic type of limitation of liability provision is a waiver of consequential damages provision, a variety of which was at play in *H1 Lincoln*. Consequential damages are damages that are not direct and are less traceable to the breach of duty than direct damages. Consequential damages can be recovered under G.L. c. 93A. *H1 Lincoln* explains that “[i]n the context of a c. 93A action, consequential damages encompass ‘all losses which were the foreseeable consequences of the defendant’s unfair or deceptive act or practice.’”¹⁵ In addressing the specific language in the limitation of liability provision at issue in *H1 Lincoln*, the SJC noted that, due to the restrictive language used in the clause, it did not cover all of the consequential damages which the defendants sought to avoid.

An adjudication of liability under c.

Architect Agreements, Section C-6; see generally EJCDC E 500-2020, Exhibit I, Article 1.02 (Limitation of Engineer’s Liability). Below is an example of a limitation of liability clause:

To the fullest extent permitted by law, the total liability of the Engineer and Engineer’s officers, directors, partners, employees, agents, and subconsultants to Owner and anyone claiming through or under Owner, for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from, or in any way related to this Project or Agreement, from any cause or causes, including but not limited to tort (including negligence and professional errors and omissions), strict liability, indemnity obligations, breach of contract, breach of warranty, or other common law or statutory theory of recovery, shall not exceed \$ __, or the Engineer’s total fee for services rendered on the Project, whichever is greater.

¹⁵*H1 Lincoln*, 2022 WL 200807, *12.

93A, §11, even for the type of relatively innocent conduct carved out by *H1 Lincoln*, can include consequential damages that are severe and far exceed direct damages. As applied to design professionals, depending upon the project, some examples of an owner’s consequential damages might be lost profits, loss of use, loss of rental, overhead, and increased financing costs. Design professionals should carefully review their professional services agreements to confirm that they include a waiver of consequential damages clause, and that it captures the appropriate risks.

Conclusion

H1 Lincoln is an important clarification of Massachusetts law, and reinforces the principle of freedom of contract between sophisticated business entities. Limitation of liability provisions are essential risk management tools in the design professional’s contractual toolbox. Design professionals who include well-drafted limitation of liability clauses in their professional services agreements will substantially limit risk on their projects.

Patricia B. Gary is Of Counsel to the firm where she focuses her practice on the defense of professional liability actions against architects and engineers. She regularly handles complex commercial disputes for individuals and businesses across a broad range of industries.

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