

Risk Management Advisory

ARCHITECTS AND ENGINEERS PROFESSIONAL LIABILITY INSURANCE

Express warranties and professional services

An express warranty is an assurance by one party of the existence of a fact on which another party can rely. Thus, an express warranty is intended to relieve the relying party of any duty to ascertain the facts—this amounts to a promise to indemnify the relying party for any loss if the fact warranted proves untrue. While in certain circumstances such a promise will be presumed based on the law, it is rare that such “implied” warranties are applicable to the services, or instruments of service, of a design consultant. However, design consultants who are unaware of the business context in which they practise, can find themselves providing express warranties or agreeing to “absolute” responsibility. They can also subject themselves to the similar problem of guaranteeing the actions of others.

Express warranties and guarantees are promises that are ancillary to the basic agreement between a design consultant and a client that the design consultant will provide knowledge-based services in exchange for compensation. Therefore, an express warranty presents a different set of problems for design consultants from the normal contractual obligations negotiated for the performance or furnishing of professional services. For one, it is almost impossible for the design consultant to have the power or control over the factors that would lead to an express warranty. Accordingly, no professional liability insurance policy includes coverage for breach of express warranty claims or breach of contract actions based on express warranty or guarantee provisions because such independent

promises are impossible to ascertain when insurance premiums are determined.

Design consultants may intentionally provide by contract an uninsurable warranty of their services or the instruments of their service. However, they may also unintentionally establish a similar expectation that may be relied upon as a warranty through proposals or other communication incorporated by reference into a contract, through misstated language in studies or reports, or through contract language. Even statements separate from the professional services agreement may be construed to be express warranties.

Express warranties, although inappropriate for the services



provided by design consultants, are attractive to clients since the breach of a warranty is much easier to establish than negligence in the performance of design services; proof of negligence is not required to prove a breach of a warranty. The elements of a breach of warranty action are simple and involve the following:

- **Representation**—Was a statement made describing the performance of services or a result of the professional services?
- **Falsity**—Was the performance or result as stated?
- **Reliance**—Did the aggrieved party actually rely on the statement that is the basis of the express warranty as being true?

- **Causation**—Was the false representation—the breach of the express warranty—the actual cause of harm to the party relying on the statement?
- **Damage**—What damages are a direct result of the breach of warranty?

Design consultants, as all professionals, are required to provide their services in a non-negligent manner. Design consultants can provide the extensive protection of an express warranty of services, or even a guarantee of the actions of others. However, design consultants and their clients should be aware that such

independent promises usually are not in the capability or control of the design consultant, and are definitely not within the scope of coverage of professional liability insurance coverage. Design consultants should carefully examine contracts for any express warranty obligations.

Visit us at victorinsurance.ca to learn more.

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