



Another policy goes further, and reads as follows:

*This policy does not apply to, and no coverage will be available under this Policy for, any Damages or Claim Expenses from any Claim based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any **express or implied warranty or guarantee**, including, but not limited to, any **warranty or guarantee** regarding project costs, costs estimates or securing project funding; that this EXCLUSION shall not apply to any guarantee that the Insured's Professional Services comply with the generally accepted professional standard applicable to the Insured's Professional Services.*

Professional liability insurance is intended to cover only those damages that arise out of your negligent performance of your services. If you agreed to provide a warranty or guaranty for your professional design services, and you are sued by anyone alleging that you breached your warranty or guaranty, your insurance carrier will send a letter to you stating that they will not cover such damages as a result. That being said, here are a few things to be on the lookout and consider.

1.) Types of Warranties & Guarantees

Express warranties and guarantees are easy to detect. "A/E warrants and guarantees that services provided on the Project will conform to the highest professional standards." Express warranties and guarantees are a promise of the existence of a fact upon which your client may rely. However, implied warranties are wolves in sheep clothing, because they are also unfair provisions towards the A/E, disguised through an outward show of innocence. Be aware of contract language drafted by your client stating something similar to "A/E's services shall conform to a standard of merchantability, and must be fit for their intended purpose." These words are applicable for tangible items (products), and should never be associated with professional design services. The danger is that you inadvertently agree to these subtle words when your risk management antenna was lowered.

2.) Warranties & Guarantees in a Claim Against A/E

It is common that a lawsuit filed against your firm will claim that you at least did the following: a) you were negligent in performance of your professional services, b) that you breached your agreement with your client, and c) that you breached the warranty that you provided in your agreement with your client, either express or implied. Lawsuits may contain even more claims, but these three are common. Thus, if your client's lawyer cannot prove that you were negligent or breached your contract, but can show that you breached a warranty or guaranty, you still may be liable for the alleged damages that you caused. If you did not agree to provide an express or implied warranty guaranty in your agreement with your client, hopefully the judge should streamline the case and dismiss the warranty or guaranty allegations.

3.) Warranties are close cousins to concepts such as certifications, and should be scrutinized when they occur in your client's proposed contract language. Regardless of which terms, agreeing to any of them would raise your standard of care.

Lawyers representing your clients requiring you to agree to owner-driven contract clauses with express or implied warranties or guarantees should consider that they would never provide a warranty or guaranty for their legal services. Therefore, since your client's lawyer would not provide a warranty or guaranty for any particular result for their client, why should you have to agree to such a contract clause? It may be that your client's lawyer is unfamiliar with professional service contracts, and may be carrying over such language into your agreement with your client. As always, state law differs on the interpretation and application of warranties, guarantees and certifications, and professional liability insurance policies differ as well, so consult with your legal counsel, as facts also differ from every project and agreement.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB, ORSA has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

Disclaimer: *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

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Webinars:

Cleveland Engineering Society

December 12, 2018 – 11:30 a.m. to 12:30 p.m. 1 Credit Hour
Topic: Ethics in the Practice of Engineering, Part II

Programs:

Engineering Foundation of Ohio

Ohio Society of Professional Engineers

Bridgewater Banquet & Conference Center
10561 Sawmill Pkwy., Powel, OH 43065

November 1, 2018; 4:00 – 5:00 pm; 1.0 Hour CPD
"Ethics in the Practice of Engineering"

AIA Cleveland

2059 E. 14th Street, Cleveland, OH 44115

December 11, 2018; 12 noon – 1:00 pm; 1.0 HSW Pending

"2018 AIA Code of Ethics' Rules on Sexual Harassment, Equity & Sustainability"

THE FINISHED PROJECT

PICTURES AND STORIES OF OUR CUSTOMER'S PROJECTS

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If you would like your project highlighted in our newsletter, please submit a brief summary and several photos to:

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FUN FACT:

The City of Cincinnati, Ohio Has an Abandoned Subway System, Which Was Never Used.

Hidden [beneath the streets of Cincinnati](#) is the largest abandoned tangle of tunnels and stations in the United States. Proposed in the 1910s as an upgrade of the city's streetcar system, the project was interrupted by World War I and later abandoned because of inflation and political infighting.



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