

# Between the Lines

September 2022

Insights From a Career Claims Professional



## Why Warranties Are Not Covered by Professional Liability Coverage

Contractors warrant their work in every contract. This is appropriate because they are doing work and have agreed to do it correctly or fix it if it is incorrect. Likewise, equipment is warranted. It works or doesn't, and if it doesn't, it should be made to work. When providing work or equipment, warranties and guarantees are appropriate. The expectation is that you will provide what you've promised to deliver.

Unfortunately, too many lawyers drafting contracts either don't understand the roles on a project, that designers are providing professional services and not work, or simply don't care because they know the impact of including warranty language in a design professional's contract.

It's fascinating to me that lawyers argue that warranties are ever appropriate in a professional contract. Have you ever known a lawyer who will guarantee their work? If a lawyer tells you they have a 50% chance of success, that is generally considered an indication that they are pretty confident. How about a doctor? Those informed consent forms signed before surgery say precisely the opposite of a guarantee. Professionals practice their trades. There is no expectation of perfection, only that you will practice your profession like another professional would have performed under similar circumstances in a similar location. This is why to prove professional malpractice; it takes expert witness testimony to establish a breach in the standard of care.

Professionals don't warrant things because there are intangibles over which they have no control. An outcome of perfection is not the expectation, nor should it be. Things go wrong. Judges and juries do unexpected things, patients have unanticipated conditions, and likewise, code officials and reviewers interpret things differently than is sometimes reasonably anticipated.

Your professional liability policy excludes warranties and guarantees; it could not be clearer. The policy excludes actual or alleged liability under any oral or written contract or agreement, including but not limited to express warranties or guarantees.

So, suppose these provisions are made part of a claim or a lawsuit. In that case, a wedge is automatically driven between you and your carrier, and a problem with your professional liability coverage. They are often the most difficult counts to defend, so they create issues with your counsel and can muddy the tri-party relationship. Your carrier may even ask you to contribute additional dollars to a settlement because of the uncovered portions of the claim, which dramatically increases the risk to your firm. Owners require professional liability insurance to protect them if the design firm is negligent. It is in an owner's interest to have your policy cover their claims. Cynically, I believe that lawyers insert this into contracts to create the wedge, making all parties more prone to entertain settlement discussions, even when they are not warranted. Suppose an owner understands what your policy covers and wants to be protected by that coverage. Why would they insist on something that is clearly not covered when negotiating the contract? Doing so shifts an unfair burden to the design professional and puts the firm at risk.

My suggestion would be that before beginning contract negotiations, the most direct way to address this is to indicate up front that calling a professional a "contractor" creates insurance issues and have an appropriate professional contract with you to use as the beginning basis of discussion. If an owner or their attorney insists on the warranty language being in the contract and gives you the age-old response that all of the other design firms they work with agree to them, do your best to modify it so that you warrant that you will perform in a non-negligent manner.

*Ames & Gough, as your insurance and risk management advisor, is providing this update to assist you in your risk management efforts. While insurance is a critical component of any risk management and risk financing plan, the most important thing your organization can do is to work to prevent or minimize losses before they occur. If you have any questions or need further information about this topic and related issues, please contact your Ames & Gough client executive.*

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