

Standard Of Care

Design Professionals, Don't Overcommit!

The standard of care for design professionals is a common law concept from early court cases that evolved over time to become the adopted standard of performance for architects and engineers. The common law standard of care for design professionals is defined as the ordinary and reasonable care usually exercised by a member of that profession, in the same place and at the same time, on the same type of project, under similar circumstances and conditions. The common law standard of care does not require perfect performance.

There are four elements that a claimant must assert in order to state a claim for professional negligence against a design professional:

- **Duty** – there must be a duty owed by the design professional to the party bringing a claim;
- **Breach** – there must be a breach of the applicable standard of care by the design professional;
- **Damages** – there must be actual damages; and
- **Causation** – there must be a causal connection between the design professional's failure to perform in accordance with the standard of care and the actual damages sustained. In other words, the damages must have occurred as a result of the design professional's breach of the standard of care.

Professional liability insurance policies presume that the insured's professional services will be judged based upon the common law standard of care. The common law standard of care exists by operation of law, independently from any contract, based upon the relationship between a design professional and their client. Most professional liability policies exclude from coverage any liability that an insured assumes under a contract that would not exist in the absence of such contract (contractual liability exclusion). Also, most professional liability policies exclude any liability arising from any express warranty or guarantee unless the insured's liability arises as a result of a breach of professional duty and would have existed absent such express warranty or guarantee (express warranty/guarantee exclusion).

Given the above, design professionals should be careful when negotiating professional services agreements to ensure that they are not agreeing, by contract, to perform to a higher level than the common law standard of care. Examples of a higher standard of care include the following: 1) committing to exercise the "highest" level of care, 2) acquiescing to deliver instruments of service "free of defects or errors", or 3) stating that, during construction administration, the design professional will ensure that the contractor meets all details of the plans and specifications.

Agreeing to an elevated standard of care may result in your professional liability insurance carrier denying coverage based on the contractual liability exclusion and the express warranty/guarantee exclusion. Moreover, a heightened standard of care could make you more susceptible to an uninsurable breach of contract claim. Courts have held that a design professional who binds by contract to a higher standard of care will be held to such elevated standard. In *CH2M Hill Southeast, Inc. v. Pinellas County*, 698 So.2d 1238, 1240 (Fla. 2d DCA 1997), the court held that if a design professional agrees by contract “to perform duties beyond those required by ordinary standards of care, the quality of that performance must comport with the contractual terms.”

By agreeing to a “highest” standard of care in a professional services contract, you may subject yourself to liability for breach of contract (an uninsurable loss) even though you were not negligent. For example, if, in a lawsuit brought by your client, you prevail on a negligence count but lose on a breach of contract count, the professional liability insurer may not cover the loss on the grounds that it was specifically excluded from coverage.



When presented with an owner-drafted professional services contract, you should strike any express warranties or guarantees of performance. If an owner-drafted contract contains requirements potentially exceeding the common law standard of care or possibly creating uninsurable warranties or guarantees, and the owner refuses to revise or delete, you will want to include disclaimer language such as:

- Notwithstanding any provision in this Agreement to the contrary, Design Professional expressly disclaims all express or implied warranties and guarantees with respect to its performance of professional services, and Owner agrees that no provision herein shall be interpreted to require a standard of performance by Design Professional that is greater than the applicable common law standard of care.
- Design Professional warrants that it shall perform the services in accordance with the applicable professional standard of care. No other express or implied warranties or guarantees are created related to this Agreement or the professional services to be provided.

Owner-drafted professional services agreements often include a provision that the design professional “shall comply with all laws, regulations, codes and ordinances.” Such a clause is problematic because it could be interpreted as the design professional agreeing to comply with laws, regulations, codes and ordinances that the design professional reasonably believed did not apply to the services being provided. If you agree to absolute compliance with “all laws, regulations, codes and ordinances”, and are later found liable to the owner for breach of contract, professional liability insurers could disclaim coverage due to the contractual liability and warranty/guarantee exclusions. You should tie any obligation to “comply with laws” to the standard of care. Recommended examples are as follows:

- Design Professional shall exercise its professional skill and care consistent with the standard of care to provide a design that complies with applicable laws, regulations, codes and ordinances.
- The Design Professional shall make reasonable professional efforts, consistent with the standard of care, to comply with applicable laws, regulations, codes and ordinances.
- Subject to the generally accepted professional standard of care, Design Professional’s designs shall comply with applicable laws, regulations, codes and ordinances.

Conclusion

Great care should be taken when reviewing and negotiating professional services agreements to ensure that there is no guarantee or warranty of performance beyond the common law standard of care that could jeopardize your professional liability coverage. Greyling is available to assist in reviewing and revising proposed agreements so that the standard of care conforms to that which is insurable under a professional liability policy and there are no uninsurable express warranties or guarantees.

Author: Sarah (“Sally”) L. Bright, JD, *Senior Client Advisor/Attorney at Greyling*

Let’s Talk

Greyling Insurance Brokerage & Risk Consulting, a division of EPIC, is a specialty national brokerage and risk management consultant representing professional services firms in the construction and legal industries.



SALLY BRIGHT, JD

SENIOR CLIENT ADVISOR/ATTORNEY

Greyling Insurance Brokerage, a division of EPIC

sally.bright@greyling.com

Direct (470) 305-1384