

Watch Your Language: Express Warranties

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SUMMARY

Express warranties are inappropriate for professional services contracts between architects and clients because they place an undue burden on the architect and prevent the client from assuming a reasonable level of risk. Architects with a solid understanding of express, implied, and back-door warranties can avoid the assumption of unnecessary risk and obligation.

EXPRESS WARRANTY

As a general rule, an express warranty is an assurance by one party of the existence of a fact on which another party can rely. An express warranty is intended to relieve the relying party of any duty to ascertain the facts. This amounts to a promise by the party providing the warranty to indemnify the relying party for any loss if the fact warranted proves untrue.

IMPLIED WARRANTY

In certain circumstances, an assurance by one party of the existence of a fact on which another party can rely may be presumed to exist by law. Such an obligation is known as an "implied warranty." Implied warranties are a common element of consumer law. Their purpose is to assure buyers of receiving a product or service of reasonable quality or to provide a means of obtaining equitable relief if they do not. A common enforcement provision is the seller's obligation to accept the return of a product and refund some or all of the buyer's purchase price if a product is found defective within the warranty period. Implied warranties exert a powerful influence on the economy. They give manufacturers and sellers a strong incentive to produce and sell goods of reasonable quality.

WARRANTIES AND PROFESSIONAL SERVICES

Implied warranties rarely apply to professional design services or to the design professional's instruments of service. Architects who are unaware of the business context in which they practice, however, may find themselves assuming an unnecessary risk and obligation by providing an express warranty for their services or agreeing to guarantee the actions of others. Be particularly alert to any request by another party to include absolute language in a professional services agreement, such as "design in accordance with *all* applicable laws." The incorporation of such language into a written agreement is an intentional act. An architect who signs an agreement that includes an express warranty or other absolute language may not be able to later claim a misunderstanding of the terms or that the terms did not reflect the architect's intent.

Express warranties and guarantees are promises that are ancillary to (i.e., above and beyond) the typical basic agreement between an architect and a client that the architect will provide knowledge-based services in exchange for compensation by the client.

An express warranty presents a different set of risks for architects from the normal contractual obligations of providing professional services. It may be almost impossible for an architect to have the necessary power or control over those things that might enable the architect to satisfy the requirements of a rational express warranty. In addition, because an express warranty may relieve the client of the burden to act responsibly and assume a reasonable level of risk, the architect may not be able to rely on the client's rational participation in the design process. For these reasons, professional liability insurance policies typically do not cover breach of express warranty claims or breach of contract actions based on express warranty or guarantee provisions. It is impossible for an insurer to evaluate the risk of insuring such promises and to determine a reasonable premium for them.

BACK-DOOR WARRANTIES

Knowledge and awareness of express warranties may help architects avoid intentional inclusion of an express warranty—or any absolute language that could be construed as an express warranty—in an owner-architect agreement. In addition, it is important for architects to guard against *unintentionally* providing an express warranty.

Written proposals, feasibility studies, reports, or other written communication that may be incorporated by reference into a contract should be carefully reviewed for language that might be construed as express warranties.

THE BURDEN OF PROOF

Express warranties, although inappropriate for the services provided by architects, are attractive to clients because the breach of a warranty is almost always much easier to establish than the much higher standard of negligence in the performance of design services. Proof of negligence is ordinarily not required to show breach of a warranty. A breach of warranty action typically involves the following simple elements:

- Representation—Was a statement made that described the performance of services or a result of the professional services?
- Falsity—Was the performance or result as stated?
- Reliance—Did the aggrieved party 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 must be rectified?

Architects, like all professionals, must provide their services in a non-negligent manner. The U.S. legal system offers this protection to clients of professionals. Architects may freely choose to provide the collateral and more extensive protection of an express warranty for their services—or even to guarantee the actions of others. Architects and their clients should be mindful, however, that architects usually do not have the capacity or control to deliver on such promises and that they are not within the typical scope of professional liability insurance coverage.

RESOURCES

More Best Practices

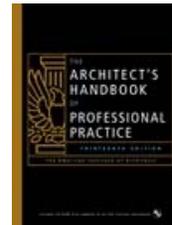
The following AIA Best Practices provide additional information related to this topic:

- 17.01.01 Reviewing Owner-supplied Agreements
- 18.02.01 Forms of Agreement: Which Should You Choose?
- 17.01.02 Watch Your Language: “Absolute Compliance”

For More Information on This Topic

See also “Agreements with Clients,” by Edward T.M. Tsoi, FAIA, *The Architect’s Handbook of Professional Practice*, 13th edition, Chapter 11, page 275.

See also the 14th edition of the *Handbook*, which can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by email at bookstore@aia.org.



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