

The Design Professional Roundtable

Standard of Care and Professional Liability Claims

Presented by:
Carey E. Fillmann, Esq.
Donovan Hatem LLP
Design Professional Roundtable
May 1, 2007

Items for discussion

- What is the standard of care and why is it important for Design Professionals to understand?
- How do you establish standard of care?
- Professional Liability Claims Examples

What is the Standard of Care, and how do you establish it?

- The standard of care for a Design Professional is how you measure the Design Professional's performance.
- The common measure that has been established, but can be changed by contract is “the reasonable Design Professional.”

The Fundamental Standard of Care Rule

- “Unless (a Design Professional) represents that he or she has a greater or lesser skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”

RESTATEMENT (Second) of Torts.

The Fundamental Standard of Care Rule

- Meaning: This statement assures the Design Professional that a mistake will not be judged in a vacuum, but by how other professionals would have performed in similar circumstances.
- Which means a Design Professional is not liable for mere mistakes or miscalculations because the Design Professional is selling a service, not insurance.
 - Work can be imperfect or inaccurate without being an actionable deviation from the standard of care (i.e. not negligent)

What is the Standard of Care, and how do you establish it?

The Design Professional's services shall be performed in a manner consistent with ***that degree of skill and care ordinarily exercised by practicing design professionals performing similar services in the same locality, at the same site and under the same or similar circumstances and conditions.***

The Design Professional makes no other warranties, express or implied, with respect to the services rendered hereunder.

The Legal Concern

- In the contract, has the Design Professional agreed his/her performance will be in accordance with “a reasonable standard of care”, or has the Design Professional given an “implied warranty”, meaning guaranteed a perfect plan without errors.
 - Highest or First-Class
 - Fit for intended purpose or technical accuracy

Art versus Science

- Reasonable standard of care is insurable.
- An implied warranty is not insurable.

Marketing Concerns

- Client Expectations
 - You told me you were the best!
 - Marketing Material
 - Fair Risk Allocation
 - Educate Owners

When is an “implied warranty” acceptable?

- An implied warranty is accepted practice in the design of cars, or other “products” that are manufactured from one design.
- It is reasonable to expect a “perfect set of plans” for the design of a “product”. Given the multiple nature of the process, any errors or omissions in the plans are eliminated in the redundant nature of the manufacturing process.

Service vs. Insurance

- The majority of courts have held that a Design Professional is not liable for mere mistakes or miscalculations because Design Professionals provide a service and as such those undertakings do not imply or warrant a satisfactory result.
- A Design Professional does not guarantee or imply a perfect plan.
 - Excused from perfection because of uncertainties and factors outside the control of the Design Professional

Cost Overruns, and its effects on the Standard of Care

- Should a Design Professional be shielded from liability for design errors and omissions that are insubstantial, or within a certain percentage of the total cost of construction, or should the standard of care for each design error or omission be examined?

Cost Overruns, and its effect on the Standard of Care

- Some commentators involved in design and construction process consider a successful project to include changes of not more than 3 to 5 % of the value of the original construction budget for new projects and 6 to 10% for renovation projects.
- If above is accepted by the court, will *strict liability* be imposed when errors exceed any acceptable margin, regardless of whether the standard of care was met?

Cost Overruns, and its effect on the Standard of Care

- OWNER agrees not to sue and otherwise to make no claim directly or indirectly against Design Professional on the basis of professional negligence, breach of contract, or otherwise with respect to the costs of approved Covered Change Orders unless the costs of such approved Covered Change Orders exceed _____% of Construction Cost, and then only for an amount in excess of such percentage. Any responsibility of the Design Professional for the costs of Covered Change Orders in excess of such percentage **will be determined on the basis of applicable contractual obligations and professional liability standards.**

Professional Liability Claims: Scenario #1

- Owner contracted with Architect to design large corporate headquarters.
- Owner alleged approximately 150,000 square feet of carpet was defectively designed and installed causing buckling and discoloration.
- Owner filed suit against the Architect, GC, the carpet manufacturers, the installers, and concrete subcontractor alleging breach of contract, negligence and indemnification.
- Owner demanded \$9.5 million in damages which included cost to fix the concrete, carpet, rental costs while the property was being repaired, and attorney's fees.

Professional Liability Claims: Scenario #1

- Architect argued the Owner selected the carpet and selection of the defective products was beyond the Architect's control.
- Contract clauses in Architect's Agreement with the Owner:

“...perform its services consistent with the highest level of care and skill exercised by such professionals engaged in the same profession...”

Professional Liability Claims: Scenario #1

- Problematic Issues.
 - The Architect warranted its services because it agreed to perform to the “highest” level of care and skill. This is a problem, “reasonable” is the standard. Highest will preclude expert testimony.
 - Any defect is considered negligent

Professional Liability Claims: Scenario #1

- Owner settled for \$3.95 million and Architect contributed \$395,000.

Professional Liability Claims: Scenario #2

- Architect retained by Owner to provide A/E services for County building
- At the end of the project, the Owner sued Architect claiming negligence and breach of warranty arising out of miscellaneous errors and omissions
- At the close of discovery, the Owner had failed to retain an expert to testify as to a breach of the standard of care
- Architect moved for summary judgment on the basis that the claims are not sustainable absent expert testimony

Professional Liability Claims: Scenario #2

- Architect shall be responsible for the professional and **technical accuracy** and the coordination of designs, drawings, specification and other work product furnished under this Agreement

Professional Liability Claims: Scenario #2

- Court denied summary judgment on the basis that contract provision constituted a warranty which need not be supported by expert testimony

Professional Liability Claims: Scenario #3

- Architect was retained to design a 104 unit motel
- Owner claimed a design defect when the Architect omitted water softeners from the design

Professional Liability Claims: Scenario #3

- Court ruled that the cost of the water softeners was insubstantial compared to the total cost of the project
 - \$8,000 versus \$1.4M construction cost
- Architect held liable despite insubstantial errors
 - Slippery slope to strict liability
 - Measure of damages vs. professional competence

Professional Liability Claims: Scenario #4

- Engineer was contracted to provide plans for the drainage system of an industrial Park
- Owner claimed the design did not meet the county's required standards
 - Pipes were too small to handle storm water flow
 - An additional upstream pond needed to be added to accommodate future runoff

Professional Liability Claims: Scenario #4

- Contract did not contain Standard of Care language.
- Contract stated design must be “in accordance with applicable zoning Ordinances”.

Professional Liability Claims: Scenario #4

- Court ruled that contract language requiring the design to conform to applicable law established the standard of care and that expert testimony was not necessary as it was clear the engineer did not meet this standard.
- Stresses the importance of having the standard of care language in agreements.

Conclusion

- The majority of courts have held that professionals are held to a standard of care and that status is beneficial to the professional.
- The standard of care criterion assures the professional that a mistake will not be judged in a vacuum but rather how other professionals would have performed in similar circumstances.
- Contracts should explicitly contain Standard of Care language

Conclusion

Questions

Donovan Hatem LLP
© 2007