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DIFFERENT WORKS



**RLI DESIGN PROFESSIONALS**  
Design Professionals Learning Event

# You Said What?!

What you say in a representation or warranty  
is what you get

DPLE 193  
August 15, 2018

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An Interview With

# Rebecca Kim

Subject Matter Expert

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# Course Description

“...one who undertook to design and oversee a construction project for another **impliedly warranted the design and quality of construction** despite the lack of privity between the parties.”

*Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 56, 463 S.E.2d 85, 89 (1995)

This course will review the types of representations and warranties written in contracts, the risk they pose, and the actions that design professionals could take to reduce liability.

# Learning Objectives

## **Participants in this session will:**

1. Identify the various types of representations, and warranties as relevant to design professionals;
2. Study case law to understand how the nuanced rules of representations and warranties may apply to design professionals;
3. Discover the liabilities created by a breach and how damages are calculated in such an event; and
4. Learn how design professionals can manage and mitigate their liability when drafting representations and warranties.

# Policy Exclusion

This Policy does not apply to any Claim(s):

h. Express Warranties or Guarantees

based upon or arising out of any express warranties or guarantees. However, **this Exclusion does not apply to a warranty or guarantee** by the Insured that the Insured's Professional Services are **in conformity with the standard of care applicable to that Professional Service.**

# Breach in the Standard of Care

Duty

Reasonable judgment  
and skill

Breach

Failure to meet  
standard of care

Causation

Damages

# Breach of Warranty

Duty

Warranty made

v. "Reasonable judgment and skill"

Breach

Warranty breached

v. Failure to meet standard of care

Causation

Damages

# Negligence v. Breach of Warranty

Two additional reasons a claimant may prefer a breach of warranty claim:

- 1 Statute of Limitations**  
Statute of limitation period may bar negligence claims.
- 2 Economic Loss Doctrine**  
Economic loss doctrine prohibits the recovery of purely economic losses in a negligence action.

# Definition



## Representation

Statement of fact given to induce another party to act.

## Warranty

A promise of indemnity if the statement is false.

# Types of Representation

## 1 Flat Representation

Absolute representation. Liable for any and all deviations.

## 2 Qualified Representation

Moderated representation. Only liable for major deviations.

## 3 Misrepresentation

Inaccurate representation.

## Statement posited as an absolute.

No wiggle room [i.e.: “Design professional assumes the entire responsibility and liability for any and all damages or injury to employees of the design professional occurring in connection with the performance of the services under this Agreement. “].

**1**  
Flat  
Representation

2  
Qualified  
Representation

3  
Misrepresentation

## Statement that moderates a flat statement.

Two types of qualifiers – materiality qualifier [ie: “Design professional represents and warrants that there is no material default under contract to which design professional is a party.”] and knowledge qualifier [OR “To the design professional’s knowledge, the financial statements fairly present the financial condition of the project.”].



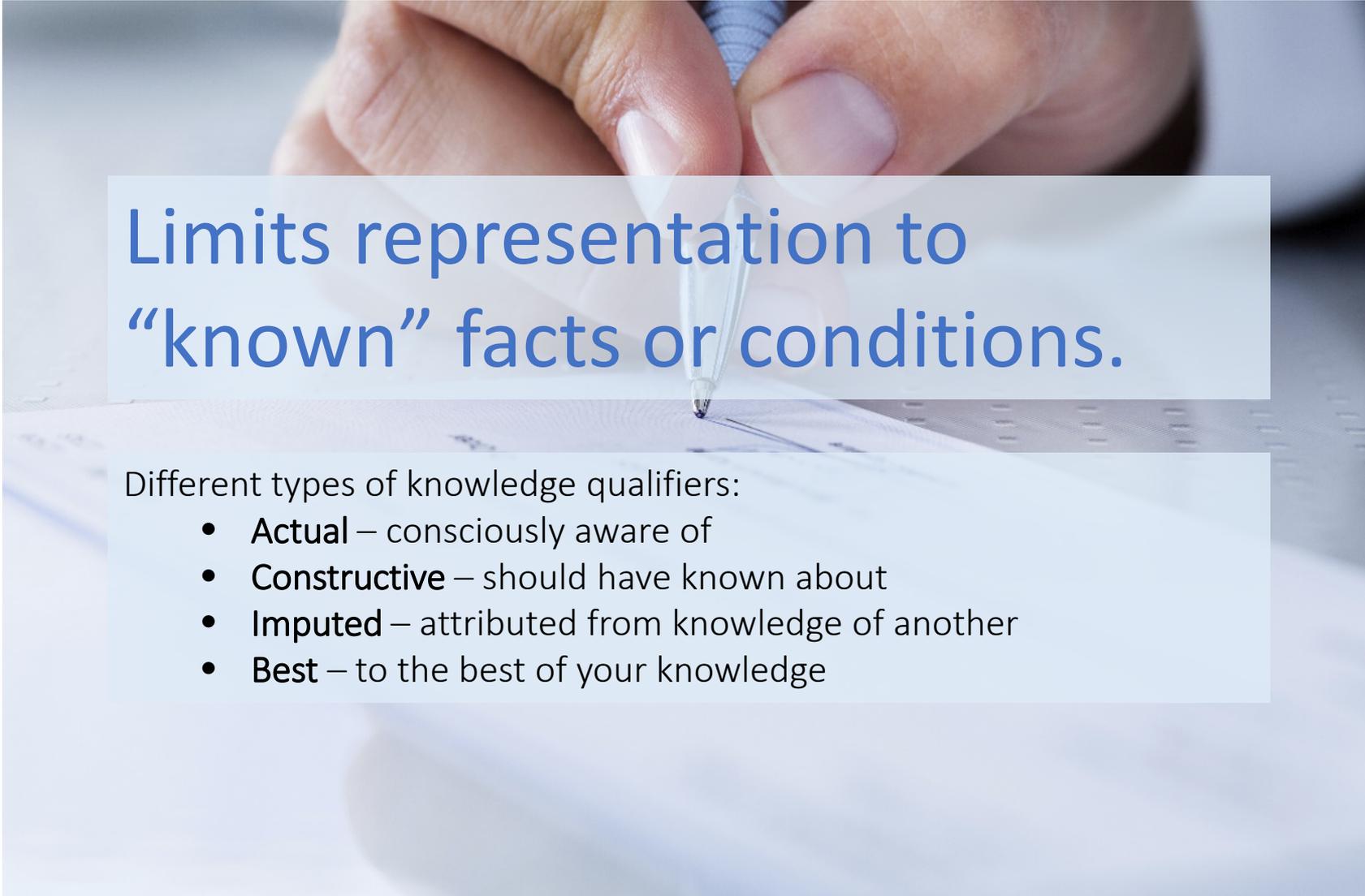
# Materiality Qualifier

Limits representation to  
“material” or most important  
facts.

“Material” if it would affect a person’s decision

[i.e.: “For purposes of this Contract, ‘material’ means any noncompliance or basis for liability which could reasonably be likely to subject the Company or any of its Subsidiaries to liability, individually or in the aggregate, in excess of \$20,000,000.”]

# Knowledge Qualifier



Limits representation to  
“known” facts or conditions.

Different types of knowledge qualifiers:

- **Actual** – consciously aware of
- **Constructive** – should have known about
- **Imputed** – attributed from knowledge of another
- **Best** – to the best of your knowledge

# Actual v. Constructive Knowledge



## Hypothetical

You're hired to design a single-family home for your client who has no experience in building or designing a home. She requests you visit the construction site to ensure everything goes smoothly. Years later, a severe foundation issue is discovered. Are you liable?

## Representation was faulty

3 types of misrepresentations:

- (1) Fraudulent;
- (2) Innocent; and
- (3) Negligent.

1  
Flat  
Representation

2  
Qualified  
Representation

3  
Misrepresentation

## Misstatement made with knowledge of its falsity (scienter).

The elements of fraudulent misrepresentation are:

1. A false representation of material fact;
2. Made with knowledge or belief as to its falsity, or with reckless disregard as to its truth or falsity;
3. With **an intent to induce the plaintiff to rely on the misrepresentation**;
4. Justifiable reliance on the misrepresentation; and
5. Damage or injury caused to plaintiff by that reliance.



## Case Law

“The causes of action at issue here, intentional and fraudulent misrepresentation, required plaintiffs to show a **knowing misrepresentation** on the part of defendant.”

Are you  
properly  
licensed?

## Hypothetical

You enter into a contract with a client based in Virginia. The contract represents that you are capable of providing adequate services for the client. Your client wants you to design something in Maryland. You are only licensed in Virginia. **Is this a fraudulent misrepresentation?**

## Measure of damages depends of state law.

### Majority rule

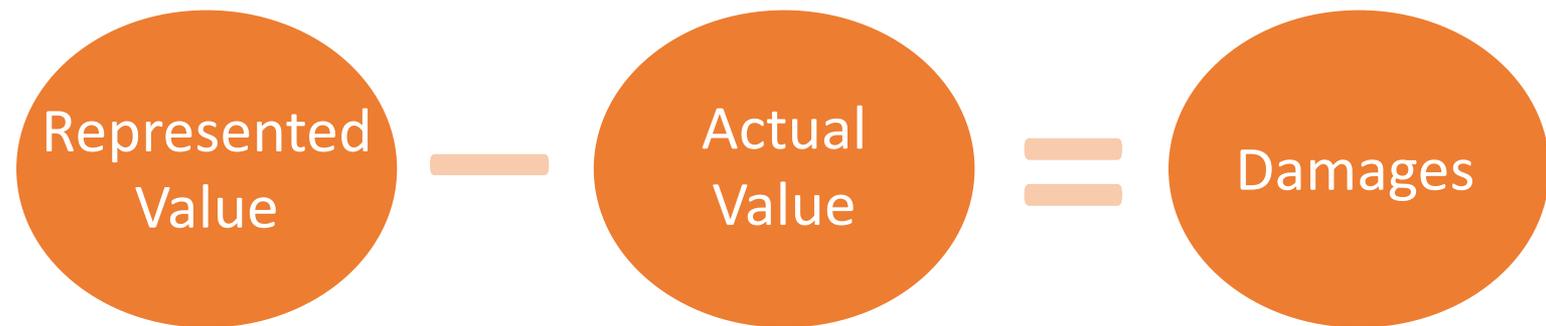
Benefit of the bargain (expectation damages)

### Minority rule

Out-of-pocket

# Benefit of the Bargain

Put aggrieved party in the **position it would have been in if the representation was not a fraud.**



Difference between represented value and value actually received.

# Out-of-Pocket

Compensate aggrieved party by the exact amount lost due to the fraud.



Difference between amount paid and value actually received.

# Calculation of Damages

## Benefit of the bargain:

Difference between amount paid and value actually received.



## Out-of-pocket:

Difference between amount paid and value actually received.



# Innocent Misrepresentation (IM)

Misstatement made with **reasonable** belief that the statement was true.

The elements of innocent misrepresentation are:

1. A false representation of material fact;
2. Substantial reliance on the misrepresentation by plaintiff;
3. Damages proximately caused to plaintiff by that reliance; and
4. No benefit to the party who made the misrepresentation.

# Negligent Misrepresentation (NM)

## Misstatement made with **unreasonable** belief as to its truth.

“In order to recover for negligent misrepresentation a plaintiff must prove that the defendant

- (1) in the course of his business,
- (2) supplies false information for the guidance of others
- (3) in their business transactions,
- (4) causing and resulting in pecuniary loss to those others
- (5) by their justifiable reliance upon the information, and
- (6) with **failure to exercise reasonable care or competence** in obtaining or communicating the information.

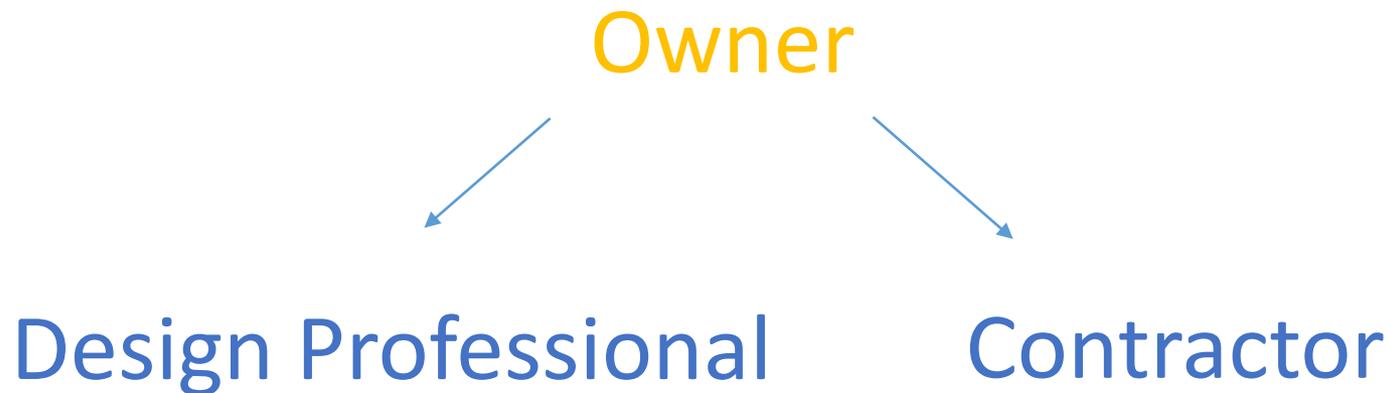


## Case Law

Court allowed a contractor to seek recovery for purely economic damages suffered by Architect's negligent misrepresentations, despite the absence of a contractual relationship between the parties.

# Economic Loss Doctrine

Bars claims for purely economic losses by entities whom you have no contractual privity.



No contractual relationship between Contractor and Design Professional (DP) means Contractor's claims against DP for purely monetary damages is barred.

# Exception to Economic Loss Rule

Negligent misrepresentation claims may be permitted despite Economic Loss Rule...

“

where information is **negligently supplied** by one in the business of supplying information, such as an architect or design professional, and where it is **foreseeable** that the information will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of information”

”

depending on your jurisdiction.

## Has your state adopted the doctrine?

### If YES

Be sure to ask about exceptions (ie: negligent misrepresentations).

### If NO

You have potential exposure from your direct client AND anyone who could experience an adverse economic impact from your failure to meet the accepted standard of care.

Misrepresentations must be “material” to support a remedy.

## Avoidance/Rescission

Cancel the contract and return the parties to their position before the contract.

## Restitution

Prevent unjust enrichment.

## Analysis

- 1) Does the state statute apply?
- 2) If yes, did design professional engage in a deceptive act or practice as defined by the state statute?

## Case Law

Finding that the Kansas Consumer Protection Act applies to an engineer who sells his/her engineering services to a consumer.

# Kansas Consumer Protection Act (KCPA)

## Article 6, Section 50-623 Kansas consumer protection act; purpose; construction

This act shall be construed liberally to promote the following policies:

- (a) To simplify, clarify and modernize the law governing consumer transactions;
- (b) To protect consumers from suppliers who commit deceptive and unconscionable practices;
- (c) To protect consumers from unbargained for warranty disclaimers; and
- (d) To provide consumers with a three-day cancellation period for door-to-door sales.

# Kansas Consumer Protection Act (KCPA)

## Article 6, Section 50-626 Deceptive acts and practices

(a) No supplier shall engage in any deceptive act or practice in connections with a consumer transaction.

(b) **Deceptive acts and practices include**, but are not limited to, the following, each of which is hereby declared to be a violation of this act, whether or not any consumer has in fact been misled:

- (1) **Representations made knowingly or with reason to know that:**
  - (A) Property or **services have...characteristics...uses, benefits or qualities that they do not have;**
  - (D) Property or **services are of a particular standard, quality, grade, style or model, it they are of another which differs materially from the representation.**

# Warranty

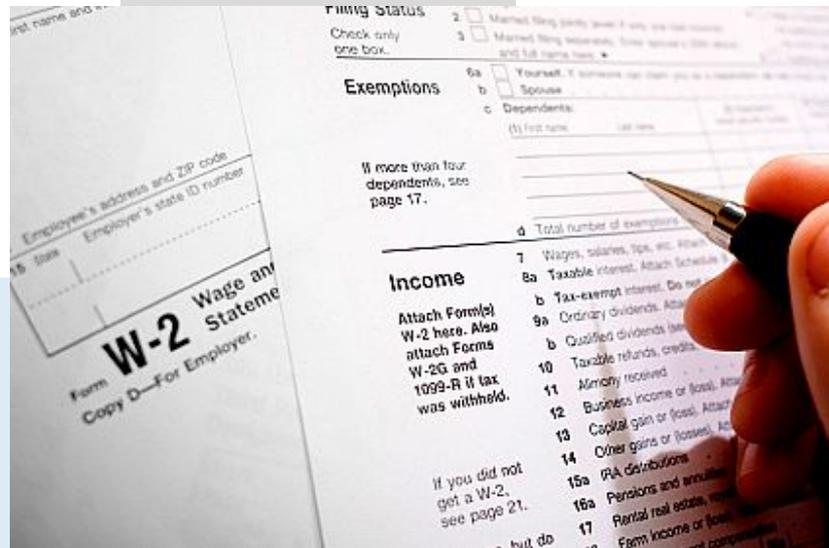
## Warranty

A promise of indemnity if the statement is false.

## Reliance

Reliance on the truth of the statement depends on jurisdiction.

# Case Law – Reliance



## Case Law

Finding that the lack of reasonable reliance on Defendant's claims does not absolve Defendant of its warranty obligations under the contract.

# Reliance Requirement

“ The critical question is not whether the buyer believed in the truth of the warranted information, as Ziff-Davis would have it, but ‘whether [buyer] believed [it] was purchasing the [seller’s] promise [as to its truth].’ ”

# Types of Warranty

## 1 Express Warranty

Oral or written promise.

## 2 Implied Warranty

An obligation imposed by law apart from any contractual provision existing between the parties.

# Case Law – Implied Warranty



## Case Law

Holding that where a contractor is bound to build according to plans and specifications prepared by the **owner**, that contract contains an **implied warranty** that the specifications are sufficient for their intended purpose.

# Case Law – Implied Warranty

## Case Law

Holding that where a **design professional** prepares plans and specifications to be followed, there exists an **implied warranty** that the specifications are sufficient for their intended purpose.



*Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 56, 463 S.E.2d 85, 89 (1995)

Measure of damages  
depends of state law.

## Benefit of the Bargain

Represented value – Actual value = Damages

# Summary of Remedies

## Innocent and Negligent Misrepresentations

Avoidance (rescission) and restitutionary recovery

## Fraudulent Misrepresentations

Avoidance and restitutionary recovery

OR

Damages:

- Out-of-pocket damages
- or
- Benefit of the bargain damages
- Punitive damages (possibly)

## Warranties

Benefit of the bargain damages

# Drafting Tips: Representations

Maker v. Receiver

Currently or Presently

Tense

Passive v. Active

# Drafting Tips: Warranties

Risk Allocation

Time Periods

Survival of Contract Signing

The Effect of Qualifiers

No Representation Statements?

Implied Warranty Disclaimers?

# AIA Sample Language

“

the Architect **cannot and does not warrant or represent** that bids or negotiated prices will not vary from the Owner's budget for the Cost of Work or from any estimate of the Cost of Work or evaluation prepared or agreed to by the Architect.

”

Thank you for your time!

# QUESTIONS?

**This concludes The American Institute of Architects  
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