

Errors & Omissions Liability Exposures

Errors and Omissions (E&O) liability coverage provides compensatory damages for economic loss arising from a “*Wrongful Act*”. The compensatory damages are damages for financial loss. The “*Wrongful Act*” generally means an error, omission or *negligent act* arising out of professional services usual to the operations of the organization. It would not include property damage or bodily injury.

This article will highlight Errors & Omissions liability exposures in the following claim case examples:

Heating System in a New Home is Not Working

For municipalities, one area of concern when it comes to E&O exposures is the work performed by building officials. In this example, the plaintiffs contracted out the building of their new home. The contractor then sub-contracted the design and installation of the heating, ventilation and air conditioning (HVAC) to other parties. According to the Statement of Claim, the plaintiffs believed that this HVAC would be adequate for their home. The municipal building official did conduct inspections of the home including the HVAC system. After moving in, the plaintiffs encountered problems with heat regulation. They claimed that the municipality had negligently inspected the home and failed to detect the defects which would have been in accordance with the building code. The plaintiffs suffered financial losses to replace the boilers and pumps and remedy the deficiencies in the HVAC system. This claim is ongoing.

Home Construction Abandoned by the Contractor

In this example, a municipality and its building official were named as defendants in a Statement of Claim. The plaintiffs were building a new home and hired a designer and a contractor to build it. They alleged that the contractor abandoned the almost complete project leaving many defects and structural flaws. In order to remedy this, the plaintiffs needed to demolish the house and have it rebuilt by another contractor. They also claimed that the municipality’s building official failed to detect the deficiencies of the construction and/or the design of this home. These defects claimed to involve requirements under the applicable building code.

The extra costs incurred by the plaintiffs in correcting the deficiencies were claimed against the original contractor, the designer and the municipality. The damages claimed are approximately \$150,000. The matter is still ongoing.

Homeowner Loses Home due to Enforcement of By-Laws

This example involves the enforcement of by-laws in the purchase of a recently built home. The plaintiff in this Statement of Claim had purchased a home from the defendant sellers. Prior to the completion of the sale, the plaintiff stated that she was notified by the municipality that she would not be able to purchase or occupy the property until there was an appropriate septic field installed. The plaintiff had the requested septic field installed and then bought the home. A few years later the plaintiff was notified by the municipal building department that she would need to leave the property because it was “built illegally”. The plaintiff was not aware of this at all. A Stop Work Order letter had been sent to the sellers about a year before this purchase took place noting this issue and was never resolved by the sellers prior to the sale.

The plaintiff had to leave the home after being evicted by the municipality and eventually lost the home. The plaintiff claimed outstanding expenses of over \$40,000 (including the septic bed installation) plus other damages as a result of this misrepresentation. The matter is still ongoing.

Fire Safety Inspection Creates a Financial Problem

Municipal fire departments are also exposed to Errors & Omissions claims. In this Woodstock, Ontario example which ended up in trial (Norquay v. Kasprzyk - Court File # 182/10), a municipal fire inspector (Mr. Kasprzyk) performed a fire safety inspection at two multi-residential buildings. According to the trial decision, the fire inspector noted a couple of contraventions of the Fire Code including the fire alarm audibility. The fire inspector also demanded that the concrete fire separation in the garbage chute be broken in order to confirm that the sprinklers were installed as shown in the design drawings. The Inspection Orders were then posted around the common areas of the properties.

The plaintiff, or owner of the buildings, alleged that the municipality and their fire inspector acted unreasonably and was seeking damages including loss of rents and business income.

In the trial decision, the Court noted:

“These allegations relate primarily to four actions by the Fire Department:

1. The issuance of the Inspection Orders;
2. The requirement that the Inspection Orders to remain posted during the period in which the Inspection Orders were stayed;
3. The withdrawal of the Inspection Orders prior to judicial review; and
4. The non-approval of the Fire Safety Plan”

Under the first allegation, the Court opined that: “In summary, the defendants did not engage in misfeasance by issuing Inspection Orders.”

With the second allegation the Court determined that “...the posting of the Inspection Orders did not cause any damage to Norquay.”

The Court did not find any misfeasance or wrong doing on the part of the Inspector in the third allegation.

The failure of approving the safety plan noted in the last allegation was also not considered misfeasance. The Court dismissed this action.

In Conclusion

It is important for municipalities to manage their E&O exposures through solid risk management practices such as having policies and procedures, ongoing training and completed documentation. This will not prevent claims from being made against the municipality, but it will help in defending them.