



**MCLENNAN ROSS**

# Are You Really Protected? Disclaimers in Reports and Service Agreements

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# Outline

- Forms of Liability
  - Civil
  - Regulatory
  - Professional/administrative
- Limitation on use and reliance
- Limitation on damages
- Reliance letters
- Wrap up

# Civil Liability

- Common areas of civil liability:
  - Breach of contract
  - Negligence
  - Negligent misrepresentation
  - Failure to warn
- Potential for concurrent liability in contract and tort

# Regulatory Liability

- Contravention of legislation
- Enforced by governmental authorities
- Cannot disclaim or contract out of regulatory obligations and liability

# Professional/Administrative Liability

- Breach of code of conduct, practice standards, unprofessional conduct, etc.
- Enforced by professional regulatory/licencing body
- Cannot disclaim or contract out of professional/administrative liability

# Disclaimer on Use and Reliance

- Can disclaim reliance by unknown third parties – non “Client” parties
  - Prevents “indeterminant liability”
- *Edgewood Construction Limited v. N.D. Lee Associates* (Supreme Court of Canada, 1993)
  - Pronouncement that use and reliance disclaimers are valid

# Disclaimer on Use and Reliance, cont'd

- *Wolverine Tube (Canada) Inc. v. Noranda Metal Industries*
  - A specific disclaimer contained within the report itself was sufficient to absolve the consultant of third party liability.
  - Environmental consulting context where it was accepted that:
    - sellers will often share reports with purchasers
    - BUT disclaimers in reports are common practice

# Disclaimer on Use and Reliance, cont'd

- *Capital Direct Lending Corp. v. Howard & Co. Real Estate Appraisers and Consultants Inc.*
  - Appraisal report prepared for a specific “Client” only
  - Related plaintiff corporation could not reasonably rely on appraisal report



# Disclaimer on Use and Reliance, cont'd

- BUT may not provide protection where:
  - There are no readily available alternatives to get the information, and
  - The defendant is aware of the reliance by the party in question
    - *Nussbaum v Hall*

OR

- Seeks to disclaim very purpose of the retainer
  - *Simons v. Diagnostic Engineering Inc*

# Limitation on Damages

- Term of service agreement
- Cap on amount available
- Exclude certain types of damages

# Limitation on Damages, cont'd

- *Trigg v. M1 Movers International Transport Services Ltd.*
  - “The general rule is that a limitation or exemption clause is not imported into a contract unless it is brought home to the other party so prominently that he or she must be taken to have known it and agreed to it.”
  - Including in report only will not suffice

# State Assumptions and Qualifications

- Taking information/data collected by others at face value, no warranty as to its accuracy
- Involves an element of professional judgment, no warranty of complete delineation of all features and conditions (e.g. between boreholes)
- Further investigations required

# Reliance Letters

- *Niagara Regional Housing v. Trustees of Carleton United Church, et al.*
  - Lack of a reliance letter was fatal to purchaser's claim against vendor's consultant
- Can be subject to conditions, such as limitation on damages, but make them clearly known.

# Takeaways

- Limitation on use and reliance disclaimers in reports are *generally* upheld.
- Limitation on damages clauses must be part of a contract. Will not be binding on non-contracting parties.
- State all qualifications and assumptions.
- Include qualifications and disclaimers in presentations, reliance letters and other non-report documents.

# Questions?

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