



# CLAIMS EXAMPLES

## A FOCUS ON PROFESSIONAL LIABILITY CLAIMS

In recent years, there has been substantial growth in the demand for professional liability (errors and omissions) insurance. This increase in demand has been attributed to a number of factors, the major one being the spread of a more litigious attitude within society that has led to a greater number of lawsuits against professionals. Additionally, the tendency of U.S. courts to award higher judgments against professionals has spilled over to Canadian courts, which have a propensity to follow U.S. trends.

The need for professional liability insurance arises from the legal duties that are owed by professionals to their clients and other third parties. These legal duties may be based on contract law, tort law (negligence) or statutory law.

A professional is someone who:

- has or shows great skill
- is an expert
- is a skilled practitioner
- conforms to the standards of a profession

Professional liability insurance offers protection from claims arising from alleged negligent acts, errors or omissions on the part of a professional in the performance of a service to a third party. For an action to succeed, there must be a duty of care owed to the claimant by the professional. It is the breach of this duty that can expose the professional to financial liability and hence trigger the policy.

The following claims examples demonstrate the importance of professional liability insurance coverage as a key component of effective risk management practices.

### Management Accountant's Services Lead to Tax Reassessment

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A management accountant acted for a client who operated two small construction businesses. He prepared the financial statements for the businesses and all income tax returns. The client also employed bookkeepers.

Revenue Canada seized the client's records and reassessed the preceding five years, resulting in the client being liable for additional taxes and interest charges. A large part of the tax reassessments derived from incorrect source entries made by the bookkeepers.

The client retained a new accountant who appealed the reassessments. Despite the appeals, the client still owed a substantial sum of money. As a result, the client sued the original accountant, alleging that he should have identified the errors which caused the reassessments. It was also alleged that, with proper tax planning, some of the additional taxes could have been avoided. Damages claimed included the additional tax, interest, and professional fees paid.

The action was defended under the accountant's professional liability policy. After a thorough review of the documentation, it was determined that the accountant may have made errors in his tax treatment of some items, but the majority of the errors were committed by the bookkeepers. The case against the management accountant was settled before trial for a fraction of the claim. There was no publicity and no adverse impact on the reputation or business of the management accountant.

### Placement Agency Neglects Background Check

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A placement agency provided a group of potential candidates to a client. The client interviewed the potential candidates and ended up hiring one of them. The hired candidate was fired 2 years later and, in turn, sued for wrongful dismissal. In preparing its defence for the wrongful dismissal case, the client investigated the background of the candidate, only to discover that most of the resume was a fabrication.

The client then sued the placement agency stating that it had not provided the service it agreed to perform in a satisfactory manner—the client felt that part of the agency's service included background checks on potential candidates.



However, it was not the placement agency's usual business practice to do background checks on any potential candidates it forwarded to its clients. Unfortunately, the agency did not disclose this in writing to the client, and the case became the professional's word against that of their client. The professional liability insurer worked with both parties to come to an amicable resolution.

## Property Appraiser Provides Inaccurate Report

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A property appraiser was retained by a third party to provide status and completion reports to a lender on a new home being constructed. When the appraiser reported that the construction was substantially complete, the lender advanced the balance of the building loan. Subsequently, the owner defaulted and the lender foreclosed, selling the property for a loss. The lender then claimed against the appraiser, based upon the report of substantial completion being erroneous. The amount of the claim was \$95,000.

Upon investigation, the appraiser admitted that his substantial completion report was erroneous insofar as the basement and garage were concerned. In reporting substantial completion, the appraiser neglected to note that the plans called for a finished basement and garage. As it turned out, they were both unfinished.

The insurance company that issued the professional liability insurance policy was faced with an obvious error on the part of their insured. The insurer placed a value on the uncompleted work and presented what they felt was an appropriate offer to settle the claim with the lender.

Included in the lender's claim were costs associated with the completion of both the basement and garage. The insurance company held the position that some of the costs were not related to the uncompleted work. The insurance company presented a counter offer to settle and advised the lender that they were prepared to litigate the issue. In the end, the claim was settled for a much lower amount than originally claimed, and both the insured and the insurance company were satisfied with the outcome.

## Fulfillment Company Doesn't Follow Standard Procedures

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A fulfillment company sent out mailings for one of its clients as part of the services it provided. It was the client's responsibility to provide the material to be mailed, the mailing lists and any other information the fulfillment company would require to complete the required services. The client also provided the weight of each letter for postage cost purposes.

The fulfillment company normally checked the weight of the mail to be sent out in order to confirm the postage costs. However, due to time constraints, this was not possible and it relied on the information provided by the client.

Unfortunately the client's information was inaccurate which resulted in an incorrect amount of postage being applied. Consequently, the client suffered financial loss due to the extra postage costs being applied. Because the contract between the fulfillment company and the client did not identify whose responsibility the postage was, the issue became an Errors and Omissions Liability claims matter. This was a very large client for the company and they could not afford to lose the client due to this error, regardless of who was actually responsible for the correct information. The total loss was in the amount of \$275,000.

The fulfillment company notified their insurance carrier who brought both parties together to resolve this situation. A settlement was reached with the insurance carrier paying a substantial amount of the loss and the fulfillment company ended up retaining their client. A "win-win" situation for all involved.

## About Trisura

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