## Lenders' Undertakings (aka "Bank" or "Funder" Letter)

---

Since 2020, Pro-Demnity continues to receive increased calls from architects who are faced with an unfamiliar but seemingly harmless request from their client: to sign a form of undertaking addressed to a third party – most often to a lending institution or financial partner – that is providing funding for the project.

Architects seeking advice about such undertakings may be conflicted. They want to assist their client or facilitate the flow of funds so the project can proceed, but they still wonder what the liability and insurance considerations might be. They may also be looking for reasons to say "no" to the request from their client.

But these undertakings can be very dangerous. The wordings are intended to establish that, by signing, the architect has accepted a "special" Duty of Care to the lender that would not otherwise apply at law. This may make it easier for the lender to sue the architect, and may trigger an exclusion from professional liability coverage: Exclusions 1.(e) and 1.(f).

**Lenders' undertakings display the following characteristics:**

- They are invariably addressed to the lender – a bank, financial institution or other funder for the project.

- They may also be addressed to a lawyer who is acting as a broker or intermediary, is advising the lender, and/or has written the undertaking on behalf of the lender.

- The actual wordings vary, most requiring the architect to "guarantee" or "warrant" an outcome, for instance:
    - providing assurances outside an architect's professional expertise, such as adherence to all laws and regulations applicable to the project – more properly addressed by a lawyer;

    - requiring the architect to assure the lender that the client's budget and funding are adequate to complete the project;

    - requiring assurance that the provisions of the relevant building codes have been met, or assurance that the authorities having jurisdiction will issue any required permits.

    - They invariably include a provision that, in signing the undertaking, the architect acknowledges that **the lender will be relying upon the contents** when making decisions about advances of funds to the borrower (the architect's client).

    - They require the architect's signature.

Pro-Demnity's advice is consistent: **Regardless of content, do not sign any undertaking addressed to a lender – or almost any other third party.** There are many reasons for this:

- There are implicit conflicts of interest between the client-borrower's interests (to obtain a draw-down of funds) and the lender's interests (to protect itself).

- There are further conflicts of interest where the client's ability (or willingness) to pay the architect's outstanding account is conditional on receipt of the lender's next advance – a conflict of interest that could qualify as professional misconduct.

- Under these circumstances, the architect cannot serve two clients. In addition, the lender has ample access to independent consultants to review the progress of the work, architect's certificates, etc.

If saying "no" to the client's request remains a problem, architects are advised to obtain legal advice to amend the wording, since, apart from any other consideration, an architect who signs the undertaking would be assuming unnecessary additional responsibility/ liability/ transfer of the lender's business risks onto itself – without compensation commensurate with the risk.

---

PRODEMNITY

2024 © ProDemnity All Rights Reserved

---

***Disclaimer:***

The contents of this PDF are derived from a website and offer information for general purposes

only. The material presented does not establish, report or create the standard of care for Ontario architects. The information is by necessity generalized and an abridged account of the matters described. It should in no way be construed as legal or insurance advice and should not be relied on as such. Readers are cautioned to refer specific questions to their own lawyer or professional advisors. Efforts have been made to assure accuracy of any referenced material at time of publication; however, no reliance may be placed on such references. Readers must carry out their own due diligence. Professional Liability Insurance provides valuable coverages and benefits however does not cover everything. Please refer to the Policy wordings for specific coverages, benefits, exclusions and limitations. This PDF should not be reproduced in whole or in part in any form or by any means without written permission of Pro-Demnity Insurance Company. Please contact mail@prodemnity.com.