

December, 2005
No. 3

Professional Errors and Omissions

In This Issue

Mr. Cohen is a senior litigation principal at Porzio, Bromberg & Newman, P.C. in Morristown, New Jersey and New York City with a broad-based professional liability, product liability and toxic tort, and environmental tort trial practice.

Mr. Meisner is an attorney of the firm.

The IADC

The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Mirror, Mirror On The Wall, The Statute of Repose Defense Could Be The Fairest of All – Reflecting on a Critical Defense for Design Professionals

By Roy Alan Cohen and Jason A. Meisner

One of the primary insurance-related concerns for design professionals is the length of time during which potential liability can attach to work performed. While better known statutes of limitation serve to preclude certain stale suits, many states have enacted statutes of repose to protect design professionals from litigation arising from long-since completed building projects. Construction-based litigation is an economic reality for any design professional involved in a project where an owner or contractor incurs unbudgeted, unexpected costs, even years later, and is in search for a source of funding. However, a critical time-oriented complete defense can be based on the statute of repose, and this article reviews its evolution and how the design professional can preserve and effectively use the defense.

Understanding how the statute of repose operates is essential to its effective use in defense of certain claims. For the purpose of illustration, the New Jersey statute of repose is somewhat typical and recited at N.J.S.A §2A:14-1.1:

No action, whether in contract, in tort, or otherwise to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal...arising out of the defective and unsafe condition of an improvement to real property...shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction

of such improvement to real property more than 10 years after the performance or furnishing of such services and construction.

The primary consideration underlying a statute of repose is fairness. Following through on the New Jersey example, our Supreme Court explained that the Legislature's purpose in enacting N.J.S.A. 2A:14-1.1 was to counteract an expanding application of legal mechanisms that created potential liability for injuries occurring long after design and construction professionals complete a project. The statute of repose does not operate as a conventional statute of limitations, which typically provides an injured person with a certain time to institute suit after accrual of a cause of action. Instead, an injury that occurs more than ten years after the completion of services simply forms no basis for recovery. *See generally, Cytar v. Aspen Manor Condominium Association*, 359 N.J. Super. 459, 470 (App. Div. 2003). *Newark Beth Israel Medical Center v. Gruzen*, 124 N.J. 357, 362-63 (1991). *See also Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199 (1972). *E.A. Williams, Inc., v. Russo Dev. Co.*, 82, N.J. 160, 167 (1980).

As it has evolved, the application of repose greatly differs depending upon the nature of the work performed by the design professional and the ongoing relationship to the project. The key issue in calculating repose is when to start counting the time. Historically, for the practitioner, the repose date was a moving target, only refined in recent years by case law recognizing distinctions between the types of design services provided. For example, in *Welch v. Engineers, Inc.*, 202 N.J. Super. 387, 395 (App. Div. 1985), the court was asked to calculate the repose period based on the engineering function at issue, that is if the injury was based on a design flaw, then the repose period would be calculated from the date the designs were tendered, and if related to a deficiency in construction, then the period would toll from the conclusion of that particular job

(i.e. the completion of a work). The court, however, refused to do so, holding:

The functions of design, planning, supervision or construction of improvements to reality could be treated either separately or unitarily when a single defendant performs to or more or indeed all of this functions...We do not think that the Legislature intended to let repose turn on serial cut off dates accruing through various stages of the work, turning on fact-sensitive determinations and various analytic approaches to construction staging.

Id. at 397.

The concept of piece-meal repose where a contractor is involved in various phases of a project made no practical sense. Instead, the court held that repose would be measured from "the final date the person claiming repose and immunity from suit furnishes any and all services or construction which it has undertaken at the job site." *Id.* at 396. The *Welch* decision in New Jersey paved the way for repose to evolve further, specifically in its application to the design professional who performs only design work. The cases after *Welch* created two different methods for calculating repose based on the extent of the design services performed. A review of the cases will assist design professionals and their lawyers in the analysis of whether repose is an effective tool to bar suit.

A. Design Only Services Versus Design and Project Oversight Work

New Jersey case law identifies two roles which a design professional can play in a project - "design-only" and "design-oversight." A "design-only" professional provides no services or supervision following the acceptance of the plans by the developer-contractor. By contrast, a "design-oversight" professional provides

continuing post-design phase services such as inspection and supervision. As illustrated below, where construction phases of projects can last years, the design professional who fails to demarcate his or her role will be subjected to an extended period of liability exposure on a project.

1. The Design-Only Professional -

The applicability of N.J.S.A. 2A:14-1.1 to a design professional commissioned solely for the purpose of design work was carefully addressed in *Hopkins v. Fox & Lazo Realtors*, 242 N.J.Super. 320 (App. Div. 1990). In *Hopkins*, the defendant architect was retained to perform only design work on a prototype house that the developer intended to use in the construction of a residential development. The architect completed the plans for the developer on January 12, 1977. Construction on the home was completed in 1978 and a certificate of occupancy was issued on November 28, 1978. On April 26, 1987, during an "open house," the plaintiff suffered a fall in the house and filed a lawsuit against a number of parties, including the architect, for negligent design of the home. The trial court denied the architect's motion for summary judgment based upon N.J.S.A. 2A:14-1.1, and the architect was granted leave to appeal by the Appellate Division.

The Appellate Division reversed the trial court, holding that the claims against the architect expired by operation of N.J.S.A. 2A:14-1.1. The court explained the substantive and public policy basis for the statute of repose:

In view of these considerations, we believe that when an architect, such as defendant Davis here, completes the work for which he was commissioned, he should be able to look back ten years and one day after the completed performance of his work and know there is repose from liability.

We conclude that the

Legislature's intent in enacting N.J.S.A. 2A:14-1.1 was to grant architects and contractors repose from liability based upon alleged acts of negligence in the distant past. We think that the statute's purpose is best served by finding that the ten-year statutory period begins when the architect or contractor completed its task with respect to the property involved in the claim.

Id. at 327-328.

The ten-year statutory period begins when the architect or contractor completes his or her contracted design plans with respect to the property involved in a claim. *Id.* at 328. The work performed by the architect in *Hopkins* was for a design used to construct multiple individual units in a development project. Hence, the protection afforded under *Hopkins* is particularly useful to designers of prototype units later used to create large-scale developments where it may take years before the final unit is complete. While claims may arise on houses more recently built, assuming those claims are made ten years and a day after the designer tendered his plans, the designer will be protected by repose.

2. The Design and Oversight Design Professional -

Where the designer provides oversight services beyond the date the plans are tendered, the professional assumes a design-oversight role for purposes of repose. The applicability of repose for the design-oversight designer was resolved in *Russo Farms v. Vineland Board of Education*, 144 N.J. 84, (1996), and differs greatly from the design-only professional. In *Russo Farms*, an architect was hired to act as the general contractor and supervise construction of a school in May of 1978. Construction commenced thereafter, and the Certificate of Occupancy was issued September 5, 1979. Final payment was made to the architect on April 11, 1980, and all punch list items were complete by February 19, 1981.

The school subsequently alleged property damage as a result of improperly designed drainage basins. On July 18, 1990, the school sued a number of entities, including the architect. The Court analyzed the application of repose to the architect and determined that the repose period started upon "substantial completion," of the structure, defined by the AIA Contracts as "sufficiently complete so the owner can occupy or utilize the building." The Court determined that substantial completion occurred at the time the certificate of occupancy was issued for the building, thereby barring the claims. Nearly twelve years had passed between the time the architect was first retained in 1978, and claims were barred in late 1989.

B. Setting the Stage For The Repose-Related Defense

In the world of construction litigation, the design professional is frequently the target of a construction project which is over budget or has encountered unforeseen problems. This big target status is engendered by a combination of factors, but mostly the central role usually played in project design and planning as well as the likely existence of professional liability coverage. This insurance policy is viewed by plaintiff as a guaranteed source of funds not shared by claims made against the contractors involved in the project.

From a risk and claims management standpoint, the design professional must recognize the facts of litigation life in its daily business operations. A design only professional will have a ten-year tail for litigation up to 10 years following delivery of the final plans; whereas providing additional services arguably adds at least another 10 years to the tail. Consequently, the design professional, his or her insurance carrier and defense counsel are in the unenviable position of having to defend extraordinarily stale claims to which repose is the first and most critical defense. Several practice tips for design professionals and their lawyers will be helpful.

First and foremost, the architect or engineer's contract for services, regardless of whether it is based on an AIA form or otherwise, should carefully identify the design professional's scope of work or services. In any proposal for design-only services, the professional should be specific in identifying the design only work scope, must carefully document any oral or agreed-upon changes in the scope of work. Likewise, they should carefully differentiate additional design services by a contract addenda which delineates the additional design only work back to the initial contract and also the delivery of fully completed design plans.

If supplemental design plans are issued, then carefully delineate the extent to which the design changes effect the design work already delivered. Remember that subsequently issued plans can effect the repose date, and the only way to counter that argument years later is self explanatory documentation issued during or at the completion of the project or phases of the project. This is of particular importance in projects involving large buildings or housing developments which take 5-10 years to complete and often are completed in phases with modifications made throughout the period. Even though the period may be extended by these additional services, there is still the possibility of staging the work such that the repose defense may be available for a portion of the project work.

When design documents are tendered to the owner, the design professional should verify the completion of all design services under the contract. Anything that remains outstanding to conclude the professional relationship, such as extra copies of plans or unpaid invoices, should be enumerated at the time the designs are tendered to the owner. At all times, any design documents including subsequent revisions should reflect the date of tender to the owner. Any design services provided after the contract is terminated or after the initial design scope of work is completed should carefully memorialize the limited nature of the additional engagement.

These efforts should record the design professional's limited role in the owner's project file, so a file purge by the design professional does not impact its right to seek repose on an untimely claim. Such documentation potentially can be used by defense lawyers to limit potential liability and application of the repose defense.

If, however, the design professional provides additional design services, such as revisions or modifications to its designs, the date the revisions are tendered will likely be considered the date of "completed performance" for purposes of calculating repose. *Hopkins v. Fox & Lazo Realtors*, 242 N.J.Super. 320 (App. Div. 1990). See also *Horosz v. Alps Estates*, 266 N.J.Super 382, (App. Div. 1993) (holding that subsequent revisions by a contractor served to extend the period of repose). Accordingly, subsequent revisions will extend the *Hopkins* design professional's exposure to claims, and such revisions should be treated as the new date of tender for file-retention purposes.

Second, the passage of time is a friend and an enemy, a double-edged sword in defense of the case. Information and evidence lost will make it more difficult for a plaintiff to establish the necessary proofs, but it likewise also means that defense proofs in documentary and testimonial form will be lost or fade with time, particularly if the designer is in a position where the negative must be proven to exit the case. The design professional's own witnesses, contractors, municipal officials, inspectors, consultants and their documents can be lost forever. Often, it is these documents which can carry the day, particularly in jurisdictions with short ancient document rules or where experts can rely on these documents in conjunction with testimony from the remaining witnesses to tell the story.

Third, since the key is documentation, the defense lawyer and design professional should locate and preserve the relevant documents, particularly the design plans which relate specifically to the alleged design flaws.

From those documents, the defense team can fashion an argument that the time which elapsed between final design and filing is outside the repose period.

From a risk management and claims avoidance standpoint, design professionals should be preserving the historical records necessary to implement this defense at the appropriate time. Going forward, the design professional should be creating these critical documents and preserving them so that current and future projects can be protected by the repose defense. In addition, designers should implement practices and procedures to educate its personnel about the necessary documentation to provide its defense lawyers with the tools to utilize the repose defense in subsequent litigation. Documentation of the architect or engineer's role in the design and construction process can avoid changing the repose analysis from one under *Hopkins* to one under *Russo Farms*. If the intent to proceed beyond design only is expressed in the context of post-contract services, then all involved should understand that the period of repose is duly extended.

Conclusion

Statutes of repose for design professionals were enacted to protect against unending exposure to liability. Over time, repose evolved to create two distinct calculations for design professionals which are dramatically different in scope and potential exposure for design-only professionals and those whose work extends beyond design. While the defense requires capable coordination between lawyer and client alike, insurance carriers should make document retention and defense planning part of its underwriting function. On the front end, the properly informed design professional can preserve the defense and protect against litigation through awareness of potential exposure, preparation of effective and self-explanatory documents, and retention of the evidence for an adequate period of time. On the back end, the defense team must recognize that the potential

defense is available, locate the preserved evidence necessary to show that more than ten and perhaps more than 20 years has passed, and fashion a successful summary judgment motion based on the available evidence. At either end, repose is a critical weapon in the defense lawyer's arsenal and should be utilized as early in the litigation as possible.