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Q: How long after my services are finished may I be held liable?

A: The short answer is three years in New York but that is somewhat misleading. The statute of limitations for claims against a design professional in favor of a client is three years according to Civil Practice Law and Rules §214. It is also three years for claims for personal injuries to members of the public; however, the point in time (accrual date at which the three year period starts to run) is different. A client's claims runs from the date the design professional's services are completed. The statute of limitations for an injured person's claim runs from the date of injury.

Example 1: A design professional provides design and construction phase services on a project and the final certificate for payment is issued January 1, 2002. If the owner/client encounters a problem with the project that is believed to be a result of a design error, the owner must start the lawsuit, whether it is in malpractice or breach of contract, against the design professional no later than January 1, 2005.

Example 2: A project is completed in 1987. An adult visitor to the project trips and falls on January 1, 2010 as a result of a condition which was constructed as designed. The visitor believes the design professional should be held liable. The visitor has until January 1, 2013 to start the action against the design professional.

Q: What is a statute of repose and does New York have one?

A: A state of repose is generally a law enacted by the Legislature to provide specified individual's relief from suits arising from acts which occurred some time in the past. Statutes of repose have been enacted in some jurisdictions in favor of product manufacturers, doctors and design professionals. They are like statutes of limitations. Basically, a statute of repose bars any action for negligence arising from an act which was performed a specified period of time (usually more than seven years) in the past. New York does not have a statute of repose in favor of design professionals.

Q: Can the statute of limitations be shortened?

A: A design professional and his client may, by written agreement signed by both parties, shorten the statute of limitations for claims between them. There is no way to shorten the statute of limitations for claims in favor of non-contracting parties such as an injured person not the client.

Q: Is the date on which the statute of limitations starts to run stated in the statute and if so, what is the date or event?

A: The date on which the statute of limitations starts to run is specified by statute only generally. For claims in favor of one who has been physically injured, the date of the accident starts the statutory period running. For client's claims against design professionals, the statute is said to run from the date the services are complete. This date is often subject to some interpretation since there are projects that are never technically completed and the design professional on some projects continues to respond to client inquiries even though no construction is ongoing (continuous treatment doctrine). The continuous treatment doctrine may extend the limitations period by extending the accrual date.

It is important for the design professional to make sure that closing documents, to the extent they are in his control, are issued (i.e. certificate of substantial completion, certificate of final payment, etc.) or that there be some writing by the design professional to the client indicating the design professional's view that the services on the project are completed. Since the accrual date is subjective, there are no guarantees that any one factor or document will control the date of accrual for statute of limitations purposes but the more clearly the party's intentions are expressed, the more likely the date can be established with some certainty.

Q: How long should I save records and what records should I maintain?

A: Record retention is affected by multiple considerations including client service, internal reference, tax and accounting and legal. As far as legal considerations, the entire file should be preserved for at least three years from the date the project was completed or the relationship with the client with respect to the project was terminated. After that, at a minimum, the project drawings and specifications, the contract and the close out documents (certificate of substantial completion, certificate of final payment, etc.) should be maintained in perpetuity.

Claims

Q: What is a claim for professional liability insurance purposes?

A: A reportable claim is defined in the policy and may vary from policy to policy. An accurate definition of a claim must be determined by reference to the specific policy.

Generally, a reportable claim is one where there has been a demand for money or services arising from an alleged error or omission by the design professional. It may oral or in writing. It may be made against the design professional alone or against the design professional and others.

It may be unspecified as to amount and the alleged error or omission. Whether it is well-founded or disputed is irrelevant to whether it must be reported.

Sometimes it is difficult to decide whether a reportable claim has been made. A good rule to follow would be when in doubt, report it to your professional liability insurer. The penalty for not reporting a claim is no coverage.

Q: When must a claim be reported?

A: The professional liability policy defines when a claim must be reported. Generally, the claim must be reported as soon as it is made. The policy should be consulted to determine if there are any particular or specified time limits.

A good rule of thumb to follow with respect to the timing of reporting a claim to the professional liability carrier is to do it immediately. If the report of the claim is deemed untimely, the coverage may be avoided.