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LEGAL NOTE

Understanding and Limiting Liability Through an Analysis of Statutes of Limitations and Contract Rights

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Malpractice liability and limiting the risk of exposure continue to rank as the paramount issues confronting architects and other design professionals today. Statutes of limitations—laws that circumscribe the period of time within

which a legal action may be brought—play a crucial role in this risk equation.

Under most circumstances, if a legal action is not instituted within the prescribed period, the right to sue is lost forever. Unfortunately, it is not always

easy to determine which statutes of limitations govern certain activities. The purpose of this article is to allay some of the confusion by identifying those that are applicable to the types of activities routinely undertaken by design professionals,

and to suggest methods for limiting exposure through intelligent contracting decisions

The Statutes of Limitations Quagmire. The Florida Statutes articulate limitations periods governing both *general* conduct, ranging from negligence and breach of contract to fraud and other intentional torts, and *specific* conduct. The standard rule of law is that specific statutes control over general statutes. For example, a malpractice action against an attorney technically falls within the five-year statute for actions founded on a contract, the four-year statute for negligence actions, and the two-year statute for professional malpractice. Since the latter is specific to professional malpractice, it takes precedence

Unfortunately for design professionals, there are two specific Florida Statutes arguably governing their activities: §95.11(4)(a), with a two-year limitation, for "professional malpractice," and §95.11(3)(c), with a four-year limitation, "founded on the design, planning, or construction of an improvement to real property." In addition, various general statutes apply to activities falling outside of the specific statutes. This article addresses three activities routinely undertaken by design professionals, all of which can invoke different statutes of limitations: 1) design and planning of a new facility; 2) additions, remodeling or repairs; and 3) general consulting, testing and inspection services, or contract administration.

The most common service performed by architects is the design and planning of a new improvement to real property. Florida courts define an *improvement* as "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to



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more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes." Under Florida law, an improvement which falls within the above definition, including additions to existing facilities, is governed by the four-year statute.

Remodels or repairs may fall within the definition of an improvement where it is demonstrated that the services enhance the "value, beauty or utility" of the existing facility or a remodel adapts the facility to a new use. If, however, the definition of an improvement is not satisfied, a five-year statute of limitations governing contract actions may apply.

The third category of services—general consulting, testing and inspection services, or contract administration—arguably is governed by the two-year professional malpractice statute of limitations. For example, where an architect is retained to inspect a finalized construction project in which he or she had no prior involvement, it is likely that an action alleging negligent inspection would be brought under this statute since the architect made no improvements to real property. It would also likely govern an action arising from a design professional's delay in administering an agreement between an owner and a contractor.

Although this discussion may appear somewhat of an exercise in legal minutiae, the prevailing confusion can spawn undue litigation, with savvy plaintiff counsel attempting to obtain a longer limitations period (i.e., a longer open window of liability) or defense counsel seeking the converse. It is possible, however, to circumvent this confusion through intelligent contracting decisions

Potential Solutions. Many practitioners employing the standard AIA contracts or their own versions overlook that parties to a contract may choose, among other things, the applicable law. For example, while the standard AIA contract provides that the law of the state where the project is located applies, parties may instead specify the applicability of another state's law, so long as that state has a reasonable relationship to the transaction. Since there is no uniformity among states with regard to statutes of limitations, the obvious advantage is the opportunity to apply a more favorable statute. (AIA publishes a compendium of the statutes of limitations of all states.)

Unlike the paternalistic position adopted by Florida, some states also permit more freedom of contract by allowing parties to agree on the time period during which any legal action must be instituted. While Florida law disallows parties shortening limita-

tion periods in their contracts, Florida courts applying the contractually specified law of another state will follow the parties' dictate on a shorter statute of limitations. The advantage of "shopping" for more favorable law is axiomatic: A design professional may be able to shorten the period of potential liability from four years to one year.

Design professionals provided an opportunity to apply the law of another forum to their transaction should seriously consider the pros and cons of such a selection. Even though another state may have a more favorable limitations period, other aspects of its law may not be so advantageous. It is necessary to be aware, though, that Florida law has an extremely favorable period of limitations for claimants.

Absent the ability to apply a more favorable law, design professionals should still consider modifying every contract governed by Florida law to specify

the applicability of the two-year design professional malpractice statute of limitations. Although a court likely will not follow this dictate on a matter clearly governed by a longer period of limitation, it may carry some weight in a close call. Again, keep in mind that which statutes govern certain activities may not be well defined. Courts that value the principle of freedom of contract may defer to the parties' reasonable choice of law. Perhaps most important, the law is dynamic, and courts continually revisit issues where there is far less confusion than here.

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