



The Interplay Between Records Retention and Statutes of Repose By Jonathan C. Shoemaker, Esq. and Daniel M. Eggleston, Esq., Lee/Shoemaker PLLC

After a design firm has completed a project, how long should it hold on to the mass of documents that are invariably generated? Sketches, plans, specifications, meeting minutes, agreements, schedules, submittals, RFIs, emails – the list is extensive. Storing these records costs money but disposing of them prematurely could cost far more if faced with litigation that stems from a project. Accordingly, when a design firm contemplates its own record retention practices, it should consider the statutes of repose applicable to the projects on which they worked in order to understand the outside timeframe in which a claim is likely to be pursued against them.

Statutes Of Repose in The DMV

A statute of repose provides a complete defense to a claimant's ability to recover on a claim against a design professional. Each jurisdiction has a different statute of repose.

Virginia has a statute of repose which provides that a claimant's action arising out of the defective and unsafe condition to real property that is attributable to a design firm is barred unless the injury occurs within five (5) years from the date of the project's completion. Va. Code Ann. 8.01-250. "Completion" of a project for purposes of calculating the repose period occurs when the design professional's work on the project ends. The statutes of repose in both the District of Columbia and Maryland impose 10-year statutes of repose. D.C. Code 12-310; Md. Code Ann., Cts & Jud. Proc., 5-108.

The statutes of repose in Virginia, DC, and Maryland each establish the outside timeframe in which a claim can accrue. Once a claim accrues, a claimant must file a lawsuit within the timeframe established by the applicable statute of limitations. As such, the prudent design professional may want to consider preserving their project documents for the duration of the statute of repose, plus the duration of the statute of limitations (assuming that the injury occurred on the last day of the repose period).

Challenges with Multi-Jurisdictional Practice

Very few design professionals limit their practice to a single state or jurisdiction. Devising a record retention policy on a jurisdiction-by-jurisdiction basis may be feasible, but implementing such a policy consistently may be challenging.

Most design firms engaged in multi-jurisdictional practice adopt a "one size fits all" document retention policy, rather than a piecemeal approach. To determine the appropriate length of a firm's document retention policy, the statute of repose for each jurisdiction in which the firm practices should be reviewed and analyzed before destroying any documents on projects located outside the DMV. Understanding the statute of repose tolling period for each jurisdiction in which



your practice will help you better manage risk and plan effectively for preserving project documents.

Conclusion

A particular jurisdiction's statute of repose can help guide a design firm's record retention policy in determining both the minimum length of time to retain project records, as well as what specific documents should be retained. Even after the time for claims has lapsed, preserving a copy of the contract (including all amendments) and final plans, specifications (including all amendments) provides a "backstop" in the event stale claims are pursued.

Regardless of the basis for any potential claim, a design firm's defense against future claims may depend on its ability to produce records of what actually happened during the design and construction phase of a project. By developing a record retention policy that takes into account the applicable statute of limitations, the prudent design professional limits the risk of being exposed to a claim for which it no longer possesses project-related records.

Jonathan C. Shoemaker and Daniel M. Eggleston are lawyers at Lee/Shoemaker PLLC, a law firm devoted to the representation of design professionals with offices in Washington, DC and Charlottesville, Virginia. The content of this article was prepared to educate related to potential risks but is not intended to be a substitute for professional legal advice.