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Risk Management Tools for the Design Professional

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Mr. Holland publishes an online construction risk management library ([ConstructionRisk.com](http://ConstructionRisk.com)) and a risk management/legal newsletter ([ConstructionRisk Report](http://ConstructionRisk.com)). He is a frequent speaker for groups such as the American Bar Association and the International Risk Management Institute. He has also written several books, including two published with a/e ProNet: *Risk Management for Design Professionals in a World of Change* (2010) and *Risk Management & Contract Guide for Design Professionals* (2006).

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## Malpractice Statute of Limitations Applied to Breach of Contract Claims Asserting Negligent Supervision but Indemnification Obligations Extend Time for Filing Suit

By J. Kent Holland, Jr., *ConstructionRisk, LLC*

Statute of Limitations for causes of action for negligent supervision and breach of engineering contract are both deemed professional malpractice claims subject to a three-year statute of limitations for negligence actions, and began to run when firm completed its services. A separate cause of action on a contractual indemnification claim, however, was governed by the six-year statute of limitations that didn't begin to run until the plaintiff had made payment to third parties to which it was entitled to recover from the engineer under the indemnification clause. *WSA Group, P.E. v. DKI Engineering & Consulting, USA PC, 178 A.D. 3d 1320 (NY 2019)*.

This case demonstrates several problems arising out of indemnification clauses including, extending the time for filing suit beyond what would otherwise exist; creating broad indemnity that applies to first party claims as well as third party claims; and incurring an obligation to defend or pay defense costs that would not otherwise exist. It also explains that, at least in New York, where the underlying allegations concern malpractice, the statute of limitations for malpractice will be applied regardless of whether a breach of contract claim can also be asserted.

An engineering firm (WAS Group, P.E., P.C., the plaintiff) on a Department of Transportation project subcontracted certain inspection services to a subconsultant inspection firm (DKI). An employee of the inspection firm was convicted of falsifying an inspection report of one of the bridges covered by the subcontract. As a result, the plaintiff incurred various costs including the cost of reimbursement to DOT for sums paid to the inspection firm. DKI declined the plaintiff's demand for indemnification of these costs, and this litigation ensued.

Plaintiff's action against the inspection firm stated causes of action for negligent supervision and breach of contract, and seeking to recover damages pursuant to the indemnification clause of the contract. Summary judgment was granted for the inspection firm dismissing the negligent supervision claim because it was filed more than three years after the three-year malpractice statute of limitations began to run. That part of the summary judgment was affirmed on appeal.

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## ANNOUNCEMENT



### **Lynda Colucci Appointed as Next Executive Director of a/e ProNet**

We are pleased to announce that the Board of Directors of a/e ProNet has selected Lynda Colucci as our next executive director. She will be assuming the position effective December 1 after her retirement from current employment. Lynda has more than 40 years of experience in professional liability insurance for the design profession. [Read More](#)

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There are two types of design professionals: those who have been stiffed by clients and those who will be. This pithy leads to another: obtaining payment for your work is your professional responsibility. [Read More](#)



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The trial judge, however, also dismissed the indemnification claim based on the same malpractice statutes. That aspect of the summary judgment was reversed on appeal, with the court holding that the indemnification article created a separate contractual obligation completely distinct from any duty owed with regard to the quality of professional services.

### **When does Malpractice Statute of Limitations Apply?**

"A three-year statute of limitations governs action[s] to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort.... In determining whether a cause of action denominated in tort or contract should be so construed, "[t]he pertinent inquiry is thus whether the claim is essentially a malpractice claim."

The plaintiff argued that its malpractice claims were timely because they couldn't be pleaded until the damages resulting from the falsified report were in fact incurred. In rejecting that argument, the court reiterated the rule that "a claim for professional malpractice against an engineer or architect accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship."

### **When does the Statute of Limitation for the Indemnification Accrue?**

"Turning to plaintiff's contractual indemnification claim, the subcontract required defendant to "indemnify and save harmless and defend [DOT and plaintiff] ... from and against any claim, demand or cause of action of every name or nature arising out of the error, omission or negligent act of [defendant]" or its employees. Plaintiff alleged that defendant breached this provision by refusing to reimburse and indemnify plaintiff for the costs it incurred as a result of Ahmad's misconduct. With regard to plaintiff's claim for the reimbursement it paid to DOT for Ahmad's work, Supreme Court determined that defendant's voluntary contractual agreement to indemnify plaintiff was not an "ordinary professional obligation" of an engineer (citations omitted) and that this claim was thus governed by a six-year limitations period that accrued upon that payment and was not time-barred (citations omitted). We agree. The cause of action for indemnification is not "a disguised professional malpractice claim subject to a three-year statute of limitations, as it does not allege that [defendant's] professional services were negligently performed, but instead alleges a breach of the [subcontract]" consisting of defendant's separate failure to comply with its indemnification obligation."

### **Indemnification was for First Party Claims and not only for Damages from Third Party Claims**

The court stated that the indemnification article in the contract was written so broadly that it applied not only to damages from third party claims but also to first party damages. In other words, the plaintiff could recover under the indemnification clause for its own damages even if those damages didn't result from a third-party claim against the plaintiff. The court explained that, "It is a familiar principle that a cause of action for common-law indemnification must be based upon a defendant's breach of duty to a third party," but that the instant matter didn't involve common-law indemnification. "Instead, the scope of

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defendant's obligation is governed by the parties' intent as revealed by the plain language of the indemnification provision that they agreed upon."

## No Claims Excluded from the Indemnification Obligations

The court stated:

"Nothing in the provision's broad language, which requires defendant to indemnify plaintiff "against any claim, demand or cause of action of every name or nature," reveals that the parties intended to exclude claims such as this from its coverage or to limit its scope to breaches of duty to third parties. Instead, the parties "chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required."

## Indemnification clause also Covered Plaintiff's Attorneys Fees

The court found that nothing in the indemnification provision expressly excluded counsel fees or other direct expenditures on plaintiff's part.

"On the contrary, the provision requires defendant to "indemnify and save harmless and defend" plaintiff (emphasis added), revealing that the parties contemplated legal costs arising from defendant's errors, omissions or negligence as part of the provision's scope.<sup>1</sup> Accordingly, this aspect of plaintiff's indemnification claim should not have been dismissed."

**Comment:** Several lessons are learned from this decision. Note the importance of carefully drafting the indemnification clause of a design professional contract to apply only to damages from third party tort claims. The indemnity should not be so broad as to cover first party damages in the absence of third-party claims. The second point is that an indemnity clause can extend the statute of limitations for filing suit against the Indemnitor (in this case a design subconsultant). When negotiating the terms of a contract, the parties should carefully consider the consequences of extending time periods for filing suit. This could even potentially extend the time for filing suit beyond the periods otherwise set in stone by state statutes of repose.



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