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PRONETWORK NEWS

Risk Management Tools for the Design Professional

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Richard Davies

Rich's practice is focused on the representation of engineers, architects, and other design professionals, as well as scientists and designers/manufacturers of complex products. He regularly acts as their consultant and advocate, particularly in respect to risk management, by negotiating their contracts, addressing potential claims on projects, and regularly defending them in actions and proceedings initiated against them. Rich regularly handles cases involving errors and omissions affecting facade, structural, mechanical, plumbing, and fire protection systems, as well as accessibility (claimed violations of ADA, FHA, state, or local accessibility requirements) in industrial, commercial, and residential buildings. He also handles schedule impact (such as delay, acceleration, and inefficiency) and extras claims, licensing prosecutions, and serious personal injury/wrongful death claims arising from construction projects.

Rich is a frequent lecturer on professional liability issues for engineers and architects and other design professionals addressing issues relating to licensing, contract negotiations, code requirements and design standards, copyright, and litigation avoidance. Rich is also a Contributing Author to the Pennsylvania section of the Cumulative Supplement of the State-By-State Guide to Design and Construction Contracts and Claims (Second Edition) published by Wolters Kluwer.

He serves as Counsel to the Philadelphia Chapter of the American Institute of Architects ("AIA") and Counsel to the Carpenters' Company of the City and County of Philadelphia, which cares for the site of the First Continental Congress in 1774. He served for 5 years as the Chairman of the Board of The Philadelphia Center for Architecture & Design, where he remains a Board Member. He also serves as a member of the Legal Reform Task Force for the Government Affairs Committee of AIA's Pennsylvania Chapter working on legislative changes to positively affect the design community. And in 2017, AIA National recognized Rich's contributions to architectural profession by conferring upon him Honorary membership.

Finally, Rich is a member of the Legal Counsel Forum of American Council of Engineering Companies ("ACEC"), a member of the Claims and Litigation Management Alliance ("CLM"), an Associate Member of a/e ProNet, and a Charter Fellow of the Construction Lawyers Society of America ("CLSA").

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Tolling agreements: For whom does that claim toll; does it toll for thee?

By Richard Davies, Esq., Hon. AIA-Managing Partner PA Office

Your client receives a letter from an owner about a project.

There has been a loss at the property, a building system is inadequately performing, or they have discovered systemic defects in one of the building's systems.

The owner does not know the extent or cause of the loss or defects.

The owner thinks your client may be responsible. But they do not want to initiate litigation now. Instead, they want your client to enter into a tolling agreement applicable to any claims it might otherwise assert now.

Do you recommend a tolling agreement, or not…and if so, what must it provide to adequately protect the client's interests?

For many clients the initial instinct is to reject the request: Why give them more time; I might have a limitations defense? Why ask me, I did not do anything wrong? Did others get one of these letters?

Why Toll?

1. The owner has asked for a tolling agreement because it know that the statutes of limitations (SOL) or of repose (SOR) to the claims he might assert is about to expire. So, if you do not agree the owner is going to file suit now. In Pennsylvania the owner could file a single page document called a *praecipe* that would toll any SOL/SOR that could apply to any cause of action he might possess without allegations of fact or causes of action set forth in it. So, saying "No" to the tolling agreement would be saying "Yes" to the suit.
2. The owner's investigation may reveal there are no facts supporting a cause of action against you, with the result that you are not in litigation that costs you a deductible, disrupts your office, or must be identified to an underwriter or potential client.
3. The time given to the owner not only helps him prepare, but it helps you. You have time to learn more about the loss before suit. You can identify documents and witnesses with relevant information to preserve, and use counsel to prepare – an advantage that, typically, only plaintiff enjoys. This is particularly important if the project is on-going as counsel can also keep you from making inadvertent harmful admissions.
4. Finally, if this is a client with whom you have a relationship likely to lead to other work, saying "Yes" may preserve that relationship.

Why Not Toll?

1. You are in a state in which the owner does not have a device, like a praecipe, to toll the SOL/SOR without making specific factual allegations and asserting specific causes of action to preserve those causes of action, and the SOL/SOR is about to expire—imminently—and you think the owner will not be able to draft and file a complaint to preserve all the currently available causes of action.
2. You and the owner cannot secure the same tolling agreement from other potentially responsible parties, and the causes of action that might be asserted against them will be barred by the SOL/SOR by the time your proposed tolling agreement ends.
3. Some of those potentially responsible parties "may not be around" by the time the tolling agreement ends.
4. There are other potential plaintiffs, and you cannot secure the same tolling agreements with them, and so you will not secure all the principal benefits of the tolling agreement with the owner.
5. Your access to relevant documents and witnesses over time may diminish.
6. You cannot agree on the terms and conditions of the agreement.

How to Toll: Essential Terms and Conditions

1. All time-based defenses that existed prior to the effective date of the agreement are preserved, as are defenses unrelated to time.
2. No party can initiate legal proceedings against a non-party without the consent of the others.
3. The agreement is not an admission of liability or the facts upon which it could be based.
4. It is for a definite period that can be renewed only in a writing signed by all parties.
5. Tolling is mutual and applies to all claims and counterclaims either party could otherwise assert.
6. Tolling is mutually rescindable, with adequate written notice to prepare for what is next.
7. It is confidential.
8. Tolling has an appropriate Effective Date---it does not re-invigorate previously expired causes of action.

This is not an exhaustive treatment, so go ahead and "talk amongst yourselves."

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