

ARCHITECT AND ENGINEER LIABILITY LAWS

- Model Statute of Repose Statute
- Model Sole Source Workers Compensation Statute
- Model Certificate of Merit Statute
- Model Good Samaritan Statute

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INTRODUCTION

For many years, the American Institute of Architects (AIA), the American Council of Engineering Companies (ACEC), the American Society of Civil Engineers (ASCE), the National Society of Professional Engineers (NSPE) and their affiliated state organizations have been involved in promoting liability reform at the national and state levels. These efforts have focused on joint and several liability reform and more specific state reforms including (a) statutes of repose, (b) sole source worker's compensation statutes, (c) certificate of merit statutes and (d) good samaritan statutes. While some states have made considerable progress and been successful in enacting these legislative reforms, others have not been nearly as successful.

States successful in enacting A/E liability reform have often done so through (a) the establishment of "A/E Liability Coalitions" consisting of representatives from all state A/E organizations, (b) the development of legislative language approved and supported by all of the state A/E organizations, and (c) working through broader industry-wide coalitions (e.g., civil justice reform groups such as the American Tort Reform Association). Experience has demonstrated that state legislators are much more responsive to considering proposed legislation that has gained the support and endorsement of most if not all of the affected A/E groups in the state. Legislators often do not respond well when each individual A/E organization proposes different and sometime conflicting versions of a legislative proposal. It is important to remember that imperfect but enacted legislation is generally far better than perfect but unenacted legislation.

The purpose of this publication is to encourage architects and engineers and their state AIA, ACEC, ASCE and NSPE groups to join together in state coalitions to enact legislation to reduce the number of lawsuits brought against architects and engineers. Included in this publication are model bills and background information on statutes of repose, sole source worker's compensation statutes, certificate of merit statutes, and good samaritan statutes that will be useful in developing letters of support testimony and convincing state legislators. Certain reforms such as the elimination of joint and several liabilities remain important on the federal and state levels, and are often advocated by broader coalitions. Although the endorsing organizations urge participation in all relevant tort reform efforts, the purpose of this publication is to assist with efforts more targeted to the A/ E community.

The enclosed material has been approved and developed by the AIA, ACEC, ASCE, and NSPE to help their state and local organizations speak with a united voice on this important issue. The material contained herein has been reviewed by each organization's Board of Directors and other individuals and organizations extremely knowledgeable in the field of architect/engineer professional liability and risk management.

The endorsing organizations strongly urge your action, in conjunction with the A/E organizations in your state, to work toward the common goal of enacting or strengthening liability reform laws in your state.

SUMMARY STATUTE OF REPOSE

Architects and engineers face a substantial degree of liability exposure for property damage, economic damages, bodily injury, and wrongful death resulting from their alleged negligence in the design of improvements to real property that have long since been completed and for which the architect or engineer should not be held responsible due to reasons outside their realm of control. Once insulated from liability exposure by the concept of “privity” (derivative rights and responsibilities based on contract), a 1957 decision by a New York appeals court, *Inman v. Binghampton Housing Authority* (3 N.Y. 2d 137, 143 N.E. 2d 895), stripped architects and engineers of this protection. In *Inman*, the court found an architect and engineer liable to parties to which they were not in privity.

As a consequence of *Inman*, suits against architects and engineers proliferated. Architects and engineers found themselves owing a duty of care to a variety of parties to whom no duty had been previously owed, nor ever contemplated. Eventually, the state legislatures responded to this perilous situation by adopting laws known as statutes of repose.

Statutes of repose bar actions against architects and engineers after a certain period of time following the completion of services or the substantial completion of construction. Statutes of repose do not totally absolve the architect and engineer of any liability, but merely prevent them *from* having to defend an action brought many years after they have completed the project.

The statutes are based on the general legal principle that a potential defendant in a lawsuit should not be required to defend him/herself against "stale" claims that could easily be based upon faded memories, lost evidence, or witnesses who have since disappeared. "Stale" claims are a particular possibility in the construction industry where the real property for which services have been provided may last several decades and over which the designer has no effective control.

Statutes of repose differ from statutes of limitations in terms of the point of time from which the limitation is measured. Statutes of limitation begin at the date of injury or discovery of the deficiency. Since the discovery of an injury or a deficiency could occur at any time, the exposure to a claim could theoretically run indefinitely. Statutes of repose, on the other hand, begin at a period of time following the completion of services or the substantial completion of construction. These statutes, therefore, limit the total period of time during which the architect or engineer is exposed to liability, and thus statutes of repose are preferable to, but not in lieu of, statutes of limitation.

MODEL STATUTE OF REPOSE

1. Except as otherwise provided in Section 2, no action to recover damages for injury to a person or for wrongful death or for damage to property, nor any statute for contribution or indemnity for damages sustained on account of such injury or wrongful death or damage to property arising from any defect, error or omission in the structure or improvement resulting from the design, planning, supervision or observation of construction, or construction of an improvement to real property shall be brought against a registered architect or professional engineer more than seven years after the substantial completion of such improvement.
2. If by reason of such defect, an injury to the person or an injury causing wrongful death or an injury to property occurs during the seventh year after substantial completion, an action to recover damages for such injury or wrongful death or damage to property may be brought within one year after the date on which such injury occurred, but in no event may such action be brought more than eight years after the substantial completion of the improvement.
3. The limitations prescribed by this section shall not be asserted by way of defense by any owner, tenant, or other person in actual possession or control of such an improvement where the improvement constitutes the proximate cause of the injury or death.
4. For purposes of this section an improvement shall be deemed to be "substantially completed" when the construction is sufficiently complete so that an improvement may be utilized by its owners or lawful possessor for the purposes intended. In the case of a phased project with more than one substantial completion date, the seven-year period of limitations for actions involving systems designed to serve the entire project shall begin at the substantial completion of the earliest phase.

SUMMARY

SOLE SOURCE WORKERS' COMPENSATION STATUTE

State legislatures enacted workers' compensation laws in the early 1900s in response to the industrial revolution and the resulting increase in industrial accidents. Prior to the adoption of such laws, injured employees could sue their employers for damages resulting from the employer's negligence, but accepted common law defenses usually defeated the employee's claim. In exchange for the employer's assumption of the cost of an employee's occupational disabilities (through workers' compensation insurance) without the need of the employee to prove fault or negligence on the part of the employer, the workers' compensation laws prohibit employees from suing their employer for damages. Among the benefits of the laws is that a single, certain remedy is established, reducing the delays and costs involved in litigation and appeal. The laws of many states, however, do not prohibit the employee from suing a third-party, who may have been responsible for or contributed to the employee's injury, for compensation beyond that provided in the workers' compensation law.

The workers' compensation laws were crafted with the notion that the workplace has a single employer. In the construction arena, however, projects usually involve multiple employers, including the owner, architects, engineers, sub-consultants, contractors and subcontractors. Because employees are not barred from suing third parties for additional compensation, an injured employee can sue employers on the project other than his or her own. Architects and engineers, whom most presume to have malpractice insurance, are likely targets for such additional compensation. Injured employees may allege that the architect's or engineer's negligence in preparing the plans and specifications, or in observing the construction to determine that it complied with the plans and specifications, was the proximate cause of the injury or death. Although architects and engineers are routinely found by the courts to be not responsible or liable in construction worker injury or death cases, liability claims are a source of considerable cost to architects and engineers in terms of both direct legal and related expenses, business disruption, and lost productive time.

Recognizing a need to extend the immunity provided to employers under the workers' compensation laws immunity to architects and engineers when they are one of numerous parties on the construction site, some states have amended their workers' compensation statutes to provide immunity to architects and engineers on construction projects except when they are responsible under contract for the means, methods, techniques, sequences, and procedures of construction or for employee safety.

MODEL SOLE SOURCE WORKERS' COMPENSATION STATUTE

Except as provided in the workers' compensation act, no registered architect or professional engineer who is retained to perform professional services relating to a construction project, nor any employee of a registered architect or professional engineer who is assisting or representing the registered architect or professional engineer in the performance of professional services on the site of the construction project, shall be liable for any injury on the construction project for which compensation is recoverable under the workers' compensation statute, unless responsibility for safety practices is specifically assumed by contract. The immunity provided by this section shall not apply to willful misconduct or gross negligence in the preparation of design plans or specifications.

SUMMARY CERTIFICATE OF MERIT STATUTE

Architects and engineers face a substantial degree of liability exposure for breach of contract, property damage, personal injury, and wrongful death resulting from alleged negligence or malpractice in the course of their duties. Architects and engineers, whom most presume to have malpractice insurance, are also likely targets of suits from injured parties who seek relief from anyone that may be even remotely involved in the alleged death, injury, or damage. Many malpractice and negligence claims brought against architects and engineers may have no material basis or justification in fact or in law. Nevertheless, these groundless suits are a source of considerable cost to architects and engineers in terms of direct expenses, increased insurance premiums, lost productive time, and tarnished professional reputation. In addition, such meritless suits waste valuable public resources and log up the nation's civil justice system.

Several states are successfully curbing the number of baseless claims brought against design professionals by placing the onus of responsibility for screening out groundless suits on the plaintiff. A few states have adopted "certificate of merit" laws, which require the plaintiff to consult with a third-party design professional to review the facts of the claim before moving it forward. The plaintiff must then file with the court a certificate from the third-party design professional declaring that, based upon their review of the allegations, the third-party design professional believes that there is a sufficient basis in contract or in law for commencement of the action.

MODEL CERTIFICATE OF MERIT STATUTE

1. In any action for damages alleging professional negligence by a registered architect or professional engineer, the plaintiff shall be required to file with the complaint an affidavit of a third-party registered architect or professional engineer competent to testify and practicing in the same profession as defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer or registered architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.
2. The contemporaneous filing requirement of Section 1 shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party registered architect or professional engineer could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.
3. The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.
4. The plaintiff's failure to file the affidavit in accordance with Sections 1 and 2 may result in dismissal with prejudice of the complaint against the defendant.
5. This Statute shall not be construed to extend any applicable period of limitation repose.

SUMMARY GOOD SAMARITAN STATUTE

Architects and engineers are obligated under their respective licensure board rules of professional conduct to protect public health, safety, and welfare. In times of natural disasters or other catastrophic events, architectural and engineering expertise and skills are needed to provide structural, mechanical, electrical, or other architectural or engineering services to determine the integrity of structures, buildings, piping, or other systems. Architects and professional engineers are often called upon to voluntarily assist their communities, states, and the nation in these times of crisis.

Architects and engineers, however, may face substantial liability exposure when performing voluntary services. Many states have recognized this liability threat and have enacted laws, which provide immunity to some professionals for their voluntary performance of services. Only a handful of states have extended this type of protection, known as "Good Samaritan" protection, to registered architects and professional engineers.

Architects and engineers are encouraged to advocate the enactment of state laws which provide immunity from liability for any personal injury, wrongful death, property damage, or other loss of any nature caused by the architect's or engineer's acts, errors, or omissions in the performance of voluntary architectural or engineering services.

MODEL GOOD SAMARITAN STATUTE

1. As used in this Section:
 - a. "Professional Engineer" shall mean a person duly licensed under the state engineering licensure law as a professional engineer;
 - b. "Registered Architect" shall mean a person duly licensed under state architectural licensure laws as a registered architect;
 - c. "Public Official" means any federal, state, or locally elected official with executive responsibility in the jurisdiction in which the emergency or event has occurred;
 - d. "Public Safety Official" means any appointed or elected federal, state, or local official with executive responsibility to coordinate public safety in the jurisdiction in which the emergency or event has occurred;
 - e. "Law Enforcement Official" means any appointed or elected federal, state, or local official with executive responsibility to coordinate law enforcement in the jurisdiction in which the emergency or event has occurred; and,
 - f. "Building Inspection Official" means any appointed or elected federal, state, or local official with executive responsibility to coordinate building inspection in the jurisdiction in which the emergency or event has occurred.
2. A registered architect or professional engineer who voluntarily, without compensation (other than expense reimbursement), provides architectural, structural, electrical, mechanical, or other design professional services related to a declared national, state, or local emergency caused by an earthquake, hurricane, tornado, fire, explosion, collapse, or other similar disaster or catastrophic event, at the request of or with the approval of a national, state, or local public official, law enforcement official, public safety official, or building inspection official believed by the registered architect or professional engineer to be acting in an official capacity, shall not be liable for any personal injury, wrongful death, property damage, or other loss of any nature related to the registered architect's or professional engineer's acts, errors, or omissions in the performance of any architectural or engineering services for any structure, building, facility, project utility, equipment, machine, process, piping, or other system, either publicly or privately owned.
 - a. The immunity provided in this Section shall apply only to a voluntary architectural or engineering service(s) that occurs during the emergency or within 90 days following the end of the period for an emergency, disaster, or catastrophic event, unless extended by an executive order issued by the Governor under the Governor's emergency executive powers.
 - b. Nothing in this Section shall provide immunity for wanton, willful, or intentional misconduct.

Endorsing Organizations:



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