

How Long Is Too Long? What Statutes of Repose Mean for Your Liability Exposure

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How long are you on the hook for defects in a completed construction project? It's a question that keeps many contractors and design professionals up at night—and for good reason. No project is flawless, and the duration of responsibility for construction or design defects depends on numerous factors, including the contract language, the type of harm or injury that is the subject of concern, and statutes of repose.

Typically, construction and design work are performed under written contracts. As an initial starting point, if a design or construction defect arose and was identified during the project itself, most construction contracts have specific clauses that require the claims to be noticed, raised and submitted timely, often within a short time period of days or weeks. Thus, if an issue is discovered during the project itself, the accrual date might be immediately at that time, and, under the contract, prompt notice and submission of the claim are often required.

For incidents that occur after the project is completed, the written contract may contain clauses that identify the “accrual” or starting point for claims that occur or are discovered after the project is completed. For example, some versions of AIA contracts identify Substantial Completion as the date when claims “accrue,” meaning that Substantial Completion is the triggering start date for when the clock on a statute of limitations (deadlines) begins to run. B143-2004, Section 3.6.3. Thus, for latent, unknown defects in construction or design, the contract might identify a specific milestone (e.g. Substantial Completion) as the accrual date, with a deadline that runs from there.

The contractual clauses identified and discussed so far typically pertain to construction or design defects that are pursued as claims between the parties on the project, who typically have a contract where the cause of action would likely be a breach of contract or perhaps negligent design/construction.

Statutes of Repose and Contractual Repose

Additionally, if a contract clause does not govern the issue, deadlines for claims are typically found in statutes of limitation and statutes of repose. These are state specific statutes; thus, different states will likely have different rules, deadlines and interpretations.

A statute of limitations is a deadline to file claims from the date the claim accrues, typically the date of the injury. Thus, under a statute of limitations, once the injury occurs, a claimant has a specific period of time (going forward) to file the lawsuit. It is a deadline that looks forward from the date of loss. Sometimes, the statute of limitations can be extended if the defect was unknown, or if the injury did not occur until a much later date. Depending on the circumstances, the deadline might be extended further than anticipated if the loss was hidden, concealed, or the injury is delayed.

On the other hand, a statute of repose is a backward-looking deadline. Instead of looking from the date of injury, it pegs a milestone date and imposes a hard cutoff looking backwards. Once the repose period expires, no legal action can be brought, regardless of when the defect was discovered or the injury occurred. Statutes of repose create a deadline with an absolute bar on claims brought outside the set time limit.

Repose periods vary by jurisdiction, and construction professionals working across state lines must be aware of those differences. Some notable examples in the Mid-Atlantic include:

- Pennsylvania: 12 years
- Maryland: 10 years
- Virginia: 5 years
- District of Columbia: 10 years
- Delaware: 6 years

Thus, for example, in Virginia, five years after the date of performance of the work, no matter what the circumstances, all claims are barred. To be clear, the statute of limitations might run sooner than five years, depending on the type of claim, but with a statute of repose, there is no availability for an extension if the defect was concealed, latent, or unknown. Thus, it acts as a final cutoff, regardless of when the injury occurred, and regardless of who the claimant is.

Understanding these timelines is essential when assessing long-term liability and risk on completed projects—especially during the negotiation and drafting of contract provisions. In some cases, parties may choose to establish a contractual clause of repose that is shorter than the statutory period provided under state law. These contract clauses should be drafted carefully to define clearly:

- **The types of claims covered** (e.g., contract, tort, breach of warranty, contribution, etc.)
- **The event that triggers the limitations period** (such as substantial completion or final payment)
- **The duration of the contractual repose period** (e.g., one year or longer duration).

When drafted with precision, time limitation clauses can offer powerful protection by limiting claims to a shorter period. To further reduce exposure, contractors and design professionals should take proactive measures throughout the project, such as detailed recordkeeping to establish the scope of work performed and decisions on the project, along with establishment of the actual dates of substantial and final completion.

Understanding statutes of repose and contractual clauses of repose is essential to limiting long-tail liability and thus protecting your business. These strategies won't just help you sleep better at night—they'll significantly strengthen your position against claims that arise long after you've completed a project. When drafting contract clauses and implementing risk management strategies, consulting with experienced construction lawyers, accountants, and insurance experts is best.