



A Primer on Design Professionals' Liability in Virginia

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When building a construction project in Virginia, it is essential that you understand the obligations and supporting legal principles for each of the parties involved in the Project. You cannot make an informed judgment of the risk involved unless you know the scope of liability for each party. The Owner must provide timely information and payment. The general and the subcontractors must provide sufficient manpower and skilled workmanship. The supplier must deliver equipment that meets the design criteria.

What about the architect or engineer? The design professionals must provide design information and administration that allow the project to be constructed on time and on budget, and that meet the owner's criteria for beneficial use when finished. The legal principles underlying the liability of a design professional in Virginia, whether architect or engineer, are unique and differ markedly from those of an owner or contractor. That is because of the principle of "professional liability."

Architects and engineers in Virginia are deemed to be "professionals," licensed and regulated by the Virginia Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects. Because they are professionals, their performance is judged by a "standard of care" not applicable to others involved in the project. In Virginia, that standard has been determined by the Supreme Court of Virginia to be a duty to "exercise the care of those ordinarily skilled in the business." The designer must meet this professional standard in both the design and the administration of the project's construction. *Nelson v. Commonwealth*, 238 Va. 228 (1988). This standard is determined by the expert opinion of a licensed design professional accounting for the type, size and complexity of project and its location, describing any deviation from that standard. The design professional is not held to a standard of perfection, nor does she act as a guarantor of the design.

Contractual Liability

When an issue of design professional liability arises on a project, you must know the legal theory to use to establish that there has been a breach of the professional standard of care. This begins with a determination of contract liability or tort liability. Assuming there is an enforceable contract, either written or oral, the professional standard of care is implied in the contract for design services. See *Nelson*. Should the contract provide for a higher standard of care, keep in mind that professional liability policies will exclude coverage for such additional contractual liability. The contract may also provide that the design professional has agreed to provide a warranty or guarantee of its design services. A warranty is an enforceable statement regarding the design professional's own work, such as a certification that the design meets local building codes. A guarantee is made with respect to the services of another, such as a designer's sub-consultant.

Tort Liability

A tort is a civil wrong. The most common tort is negligence. If a person or business does not exercise a reasonable degree of care, it is negligent. Applied here, the design professional must adhere to that professional standard of care, working as carefully as other design professionals under the same or similar circumstances. In Virginia, a failure to adhere to the professional standard of care constitutes negligence. There are essential elements that must be proved to prevail on a negligence theory: (i) existence of a duty; (ii) a breach of that duty; (iii) the breach was the proximate cause of the injury; and (iv) the breach resulted in damages. The law provides that the design professional owes the duty to its contractual partner that it will adhere to the professional standard of care. To establish a negligence claim, you will need expert testimony as to the professional standard of care and its breach, just as in a contract claim.

Defenses for Design Professionals

There are recognized defenses that design professionals will commonly rely on to defend a claim that their design work or administration breached the professional standard of care. These include:

- Statutes of limitations and statutes of repose: Prohibit filing a claim after a defined period. In Virginia, a claim for breach of written contract is five (5) years; for an oral contract, it is three (3) years. These time limits begin to run from the date the plans are delivered to the owner or the design-builder. If administrative obligations are in the scope of the design professionals work, the time limit begins to run from the date of the breach of the administrative duty. The statute of repose in Virginia bars ANY filing for injury to property, real or personal, or for personal injury or wrongful death arising out of THE defective or unsafe condition of an improvement to real property more than five (5) years after completion of the performance of the services and construction. This has been interpreted to apply only to claims in tort, not under contract.
- Privity and Economic Loss: A design professional cannot be sued for a claim of purely economic loss unless there is contractual privity.
- Contributory Negligence: If sued in tort, the design professional may allege that the party bringing the claim was also negligent, which negligence contributed to the damages. If proved, the defense will bar the claim.
- Betterment: The party injured by the breach of the professional standard of care cannot recover damages that would make it better off than it would have been had the breach not occurred. A design error discovered prior to construction that would not require corrective work will not obligate the designer to pay for the new work, only for the possible delay or increase in the costs of materials.
- Limitation on Liability: the written contract with the design professional may contain a provision that limits the liability of the professional to an amount certain. It can be limited to the fee earned or some other defined amount.

All parties enter contracts with the prayer that it will go smoothly and be successful. The more you know about the obligations, risks and legalities at the start, the more likely that prayer will be answered.

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