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TO PRIVITY OR NOT TO PRIVITY:

PRINCIPLES TO GUIDE THE DESIGN PROFESSIONAL

E. Tyron Brown
Moderator
HAWKINS PARNELL THACKSTON & YOUNG LLP
Atlanta, Georgia
tbrown@hptylaw.com

Eileen Jenkins
National Manager: Major Claims & Construction Defect
TRISTAR INSURANCE GROUP
Philadelphia, Pennsylvania
eileen.jenkins@tristargroup.net

Melanie Brown
Manager
MARKEL CORPORATION
Chicago, Illinois
mebrown@markelcorp.com

Thomas Zawistowski
Assistant Vice President
IRONSHORE
New York, New York
thomas.zawistowski@ironshore.com

Paul Goldenberg
LORANCE & THOMPSON
Houston, Texas
pjg@lorancethompson.com

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E. Tyron Brown
Hawkins Parnell Thackston & Young LLP
Atlanta, Georgia 30308

I. INTRODUCTION

The evolving legal landscape for design professionals has increased the risks of doing business as a design professional, but also provides design professionals with opportunities to manage and control those risks. It is important for design professionals to have a systematic approach to anticipate potential risks and to take proactive measures to ameliorate those potential risks on projects in which the design professional is engaged. The proactive measures include working with counsel and carrier to understand and use balanced contractual safeguards in its contracts for services. Additionally, counsel for design professionals has a wide array of tools to assist the design professional when a claim is made against it. Those tools range from applying limiting provisions in the contract and statutes that are intended to ensure the claim has merit and that the professional's actions are fairly considered, statutes that ensure the claimant does not get a windfall, and statutes that ensure that the design professional is not open to claims for an unreasonable period of time or to unforeseeable persons. The purpose of these tools and statutes is to help level the legal landscape for design professionals so that this integral profession to society functions properly and effectively.

II. TRADITIONAL PRIVITY REQUIREMENT WITH DESIGN PROFESSIONALS AND RELAXATION OF PRIVITY

The majority rule used to be that absent intentional misrepresentation or fraud, professionals such architects and engineers owed no duty to third parties since there was no privity between the professional and such third party. Therefore, the professional could not be held liable for professional negligence to a person not in privity with the professional. This also meant that a person who did not hire the professional had no right to rely on the professional's work. *See*, e.g. *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931); and *Howard v. Dun & Bradstreet*, 136 Ga. App. 221 (1975).

The trend, however, has been to relax the rule of strict privity and most jurisdictions now recognize exceptions to the privity requirement. For example, in personal injury cases, most jurisdictions hold that independent of the contract to design a building or premises, architects and engineers owe a general duty to use reasonable care not to harm third persons who, it is reasonably foreseeable, might be harmed by a negligent design.

Most states have also relaxed the privity requirement by adopting the rule enunciated in the Restatement (Second) of Torts § 552, which allows a limited class of persons, without privity and for whom the information from the professional was intended, to bring a negligent misrepresentation claim against a professional in certain circumstances. *See e.g. Robert & Co. v. Rhodes-Haverty Partnership*, 250 Ga. 680 (1983). Section 552 of the Restatement (Second) of Torts states:

Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

There are only a few states that continue with the traditional privity requirement for cases involving professionals. *See e.g. Stephens Industries, Inc. v. Haskins & Sells,* 438 F.2d 357 (10th Cir. 1971) (privity required under Colorado law).

III. DIFFERENCE BETWEEN A PROFESSIONAL NEGLIGENCE CLAIM BY A PARTY IN PRIVITY VERSUS A NEGLIGENT MISREPRESENTATION CLAIM BY A PERSON NOT IN PRIVITY

When a third party, who is not in privity with a professional, brings a "negligent misrepresentation" claim against the professional, the claim should be carefully scrutinized to determine whether the claim calls into question the conduct of a professional in his area of expertise. If it does, then it may not truly be a negligent misrepresentation claim, but rather a professional negligence claim that cannot be asserted by the third party.

A negligent misrepresentation claim can be distinguished from a professional negligence or professional malpractice claim by analyzing the design professional's conduct involved in the claim. "[A] professional negligence or professional malpractice claim calls into question the conduct of the professional in his area of expertise." *Upson County Hosp., Inc. v. Head*, 246 Ga. App. 386, 389 (2000). Regardless of the label given to the claim, where the allegations of negligence against a professional involve the exercise of professional skill and judgment within the professional's area of expertise, the action states professional negligence. The determinative factor is whether the professional's alleged negligence required the exercise of professional knowledge and skill. *See e.g. Frieson v. South Fulton Med. Center*, 255 Ga. App. 217, 218 (2002).

A negligent misrepresentation claim, on the other hand, is a hybrid "fraud claim and the essential elements are: (1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information, and; (3) economic injury proximately resulting from such reliance. *See e.g. Holloman v. D.R. Horton, Inc.*, 241 Ga. App. 141 (1999).

If a third party brings a claim labeled negligent misrepresentation, but is really a professional malpractice claim dressed in negligent misrepresentation clothes, it may be appropriate for the professional to challenge the propriety of the claim.

Additionally, although most jurisdictions have relaxed the privity requirement, they have not dispensed with the requirement of proving a deviation from the standard of care for professionals such as design professionals in a negligent misrepresentation claim based on professional negligence. That requirement, as stated in *Adams &*

Wofsky v. Renaissance Inv. Corp., 820 F. Supp. 1519, 1531-1532 (N.D. GA. 1993), is:

> Under Georgia law, professionals such as Peat Marwick owe a duty "to use such skill, prudence, and diligence as [professionals] of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." *Hughes v. Malone*, 146 Ga. App. 341, 344, 247 S.E.2d 107 (1978). (Citation omitted). In Georgia, a presumption exists that professional services were performed in an ordinarily skillful manner, ***and therefore the recipient of the professional services has the burden to show, through the use of expert testimony, the lack of due care, skill, and diligence***. *Grindstaff v. Coleman*, 681 F.2d 740, 742 (11th Cir. 1982); (Citations omitted). See also *Howard v. Walker*, 242 Ga. 406, 407, 249 S.E.2d 45 (1978) (requirement of expert opinion testimony); *Roberts v. Langdale*, 185 Ga. App. 122, 123, 363 S.E.2d 591 (1987) (presumption that professional services were performed in ordinarily skillful manner). ***In other words, the expert testimony must demonstrate that the professional's conduct was so unreasonable as to constitute a "significant deviation" from the applicable standards of care***. *Hughes*, 146 Ga. App. at 345. Expert testimony showing a mere difference in views between techniques or judgments exercised is insufficient to show a breach of duty "where it is shown that the procedure preferred by each, or the judgment exercised, is an acceptable and customary method of performing the [professional services]." *Hayes v. Brown*, 108 Ga. App. 360, 366 (1963).

A labeled negligent misrepresentation claim against a design professional pertaining to information the professional, in the exercise of professional judgment, gave the claimant necessarily turns on whether the professional failed to exercise the reasonable care and competence expected of such professionals under like circumstances when the professional gave the information. This question requires expert proof on the standard of care for design professionals.

IV. CONTRACTUAL SAFEGUARDS FOR DESIGN PROFESSIONALS

There are several contractual safeguards that a design professional should consider to limit his exposure on projects including limitation of liability provisions, non-consequential damages provisions and contractual limitation periods. The general

policy is most jurisdictions is unless prohibited by statute or public policy, parties to a contract are free to contract on any terms and about any subject matter in which they have an interest. A contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law. *See e.g. Piedmont Arbors Condo. Assn. v. BPI Constr. Co.*, 197 Ga. App. 141 (1990). Based on these principles, most states uphold such contractual provisions, particularly when they are carefully drafted and between sophisticated business persons.

A. LIMITATION OF LIABILITY/DAMAGES PROVISIONS

A limitation of liability (LOL) provision in a contract between a design professional and client limits the amount of damages for which the design professional might potentially be liable to the client. A LOL may have a cap proportioned to the design professional's fee, available insurance proceeds, or some other stipulated amount of money. A LOL does not apply to persons with whom the design professional is not in privity -- i.e. third parties. Most states hold that a properly written LOL, which includes being conspicuous, between sophisticated business persons, is enforceable. *See e.g. 2010-1 SFG Venture LLC v. Lee Bank & Trust Company*, 332 Ga. App. 894 (2015).

Markborough v. Superior Court, 227 Cal. App. 3d 705 (1991) is a landmark case upholding a LOL. In that case, the plaintiff developer sued the defendant engineer who designed a man-made lake for a housing project. The lake's liner failed, leading to a $5 million claim against the engineer. The engineer moved for summary adjudication

asserting that, pursuant to a LOL clause in its contract with the developer, its liability was limited to the amount of its fee – $67,640. The trial court agreed and granted the engineer's motion and the developer appealed, claiming the provision was not specifically negotiated and not expressly agreed to. The appellate court, in upholding the trial court decision, stated the letter of transmittal the engineers sent with the proposed contract gave the client a reasonable opportunity to review the agreement and negotiate any element of it.

The Third Circuit Court of Appeals, in *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195 (3d Cir. 1995), reversed a district court's denial of a design professional's motion for partial summary judgment to enforce a LOL provision in a contract between the design professional and a developer. In that case, the developer sued the design professional alleging that it did not report a height restriction that burdened the developer's property. The design professional moved for the district court to enforce the LOL provision, which limited the design professional's liability for damages to $50,000. After the district court denied that motion the case proceeded to trial and the jury returned a verdict against the design professional for $1 million. Subsequently, the design professional appealed the lower court's denial of its motion for partial summary judgment based on the LOL provision and, on appeal, the Third Circuit rejected the district court's ruling that the LOL provision was against public policy. The Third Circuit, instead, enforced the LOL provision in the parties' contract.

1800 Ocotillo, LLC v. WLB Grp., Inc., 176 P.3d 33, 36 (Ct. App. 2008) is another case enforcing a LOL provision. In that case, an engineering firm contracted with a developer to provide services for a townhouse project. The parties' contract had a LOL

provision which limited the engineering firm's liability to the total fees actually paid to it. The developer sued the engineering firm for breach of contract and professional negligence, alleging that it did not accurately show the boundaries of the project. The engineering firm counterclaimed and sought a declaratory judgment on the enforceability of the LOL provision. The appeals court upheld the trial court's decision that the LOL clause was enforceable and was not prohibited by public policy.

In Florida, the state legislature passed a bill, which the Governor of Florida signed, that allows contracting parties to have LOL provisions in their contracts. Florida Statute §558.035 which took effect on July 1, 2013, was a legislative response to the court's decision in *Witt v. La Gorce Country Club, Inc.*, 35 So.3d 1033 (Fla Ct. App. 2010), which held that a LOL provision in a contract between a design professional firm and an owner was invalid and unenforceable. Florida Statute §558.035 provides, *inter alia*, that "a design professional employed by a business entity is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract if [certain] conditions are met."

The Sixth Circuit Court of Appeals, in *Moore & Associates, Inc. v. Jones & Carter, Inc.*, USDC M.D. Tenn. (December 13, 2005), upheld a district court's decision to enforce a limitation of liability provision in a contract between a design engineering firm and a general contracting company. In that case, the design engineering firm contracted with a construction company to perform design work for construction of a large hotel. Two years after execution of the contract and completion of the project, the owner of the hotel filed an arbitration action against the construction company alleging that the design and construction caused extensive water damage to the hotel. The

construction company then sued the design engineering firm alleging it owed a duty to defend and indemnify in the arbitration. The design engineering firm responded by alleging that the LOL provision in the parties' contract limited the indemnification amount to the fees that were charged to the construction company for engineering services. The trial court agreed and enforced the LOL and the contractor appealed. On appeal, the Sixth Circuit affirmed the trial court's decision to enforce the LOL.

The court in *Fort Knox Self Storage, Inc. v. W. Techs., Inc.*, 142 P.3d 1 (N.M. Ct. App. 2006), enforced a LOL provision in a contract between a self-storage company and a geotechnical engineering firm hired to provide services for a planned self-storage facility. After completion of construction, the storage company saw damaged walls and cracks and fissures in the parking lot, and sued the engineering firm for negligence. Although the contract had a LOL provision that limited the engineering firm's liability to $50,000, the trial court awarded the self-storage company over $100,000 -- and the engineering firm appealed. On appeal, the court in *Fort Knox Self Storage, Inc.* reversed the trial court's decision and held LOL provisions are enforceable as a matter of law and do not violate public policy.

The court in *Precision Planning, Inc. v. Richmark Communities, Inc.*, 298 Ga. App. 78 (2009) addressed the enforceability of a LOL provision in a contract between a residential developer and an architect that limited the architect's liability to the developer for any professional negligence to the greater of $50,000 or the architect's fee. The developer hired the architect to design a retaining wall -- which subsequently failed and the developer sued the architect for damages. The architect moved for partial summary judgment to limit its potential liability to the $50,000 or fee cap provided in the LOL

provision. The trial court denied the motion, finding the damages limitation void as against public policy under Georgia's former anti-indemnification statute which was in effect when the contract was signed.

The architect appealed and, on appeal, the Georgia Court of Appeals reversed the trial court's denial of the architect's summary judgment motion based on the LOL provision. The appellate court in *Precision Planning, Inc.* held the LOL provision was valid and enforceable and did not violate Georgia's anti-indemnification statute. The appellate court said "no statute prohibits a professional architect from contracting with a developer to limit the architect's liability to that developer" and rejected the developer's position that Georgia's anti-indemnification statute applied to the LOL provision. The appellate court said, rather, that the anti-indemnification statute applied only to "an indemnification or hold harmless provision."

Alaska is the only state that does not enforce LOL provisions. In *City of Dillingham v. CH2M Hill N.W., Inc.*, 873 P.2d 1271 (AK. 1994), the Supreme Court of Alaska addressed a LOL provision in a contract between a city and an engineering firm that limited the engineering firm's liability to $50,000 or its total compensation for services rendered. The engineering firm was hired to prepare a U.S. Environmental Protection Agency Facility plan for the city's sewage treatment system. During construction, the city found differing site conditions and, afterwards, sued the engineering firm for damages. The engineering firm moved for partial summary judgment based on the LOL provision and the lower courts denied the motion. On appeal, the Alaska Supreme Court affirmed the lower courts and held that Alaska

Statute 45.45.900 governs LOL clauses and renders them void and unenforceable as against public policy.

Unlike Alaska, most if not all other jurisdictions generally enforce properly written LOL provisions between sophisticated parties. Attachment A to this paper is a 50-state survey that lists, among other information, states that enforce LOL provisions.

i. Anti-indemnification statutes

A contractual indemnification provision, also called a "hold harmless" provision, is a provision whereby one party to the contract agrees to hold the other party harmless against claims made by third parties. The difference between a standard LOL provision and an indemnification provision is that the LOL limits the amount of damages that one party to the contract may possibly seek against another party to the contract, whereas an indemnification provision requires one contracting party to protect another contracting party against claims made by third parties. Forty-one states have enacted anti-indemnification statutes which, to varying extents, restrict or invalidate indemnification agreements in construction contracts. Some of these states limit the statute's application, for example, only to public projects. Twenty-seven of those states prohibit a contracting party from indemnifying another party for its sole or partial fault, and fourteen of the states with an anti-indemnity statute only prohibit a contracting party from indemnifying another party for its sole fault. Additionally, many states with an indemnification statute provide that the statute does not apply when the indemnification is coupled with an insurance requirement. Only six of the states prohibit a party from requiring another party. to name it as an additional insured under a policy of insurance.

B. NON-CONSEQUENTIAL DAMAGES PROVISIONS

Consequential damages, which may include profits which might accrue collaterally as a result of the contract's performance, are a separate concept from direct damages, which may include profits necessarily inherent in the contract. Thus there are two types of lost profits: (1) lost profits which are direct damages and represent the benefit of the bargain (such as a general contractor suing for the remainder of the contract price less his saved expenses), and (2) lost profits which are indirect or consequential damages.

A non-consequential damages provision in a contract between a design professional and client precludes the client from seeking consequential damages against the design professional. Most jurisdictions enforce these provisions. For example, the court in *Phillips Machinery Company v. LeBlond, Inc.*, 494 F. Supp. 318 (N.D. Okla. 1980), held that a non-consequential damages provision precluded plaintiff's claim for lost profits and punitive damages against a defendant that breached the contract.

The court in *Stanley A. Klopp, Inc. v. John Deere, Co.*, 510 F. Supp. 807, 812 (E.D. Penn 1981), also held that a contractual provision precluding consequential damages precluded claims for such damages even when the defendant wrongfully terminated the contract.

The court in *Imaging Systems International, Inc. v. Magnetic Resonance Plus, Inc.*, 227 Ga. App. 641 (1997), held that a contractual non-consequential damages provisions was enforceable and barred the plaintiff's alleged consequential damages, even when the other party wrongfully terminated or breached the contract.

The Eleventh Circuit in *Silverpop Systems, Inc. v. Leading Market Technologies, Inc.*, 2016 U.S. App. LEXIS 196 (11th Cir. January 5, 2016) enforced a non-consequential damages provision. In *Silverpop*, the party to whom the non-consequential damages provision was being applied, argued that the provision did not apply because it terminated the contract. The Eleventh Circuit disagreed and held that the provision still applied.

The Seventh Circuit in *CogniTest Corporation v. Riverside Publishing Company*, 107 F.3d 493 (7th Cir. 1997) also held that a non-consequential damages provision barred the plaintiff from recovering consequential damages, even if the defendant wrongfully terminated the contract.

C. CONTRACTUAL LIMITATION PERIODS

Every state has statutes of limitations and statutes of repose. The statutes of limitations that may apply to design professionals can vary from 1 to 10 years, and statutes of repose can vary from 8 to 12 years, or longer. A design professional may not be able to change the statutes of limitations and/or of repose that may apply to third party claims, but a design professional and its client can contract to a shorter period of limitations, than what is otherwise provided by a statute of limitation, to bring any claim against one another. Contractual time limitations on bringing a claim are generally valid and enforceable so long as they are not so unreasonable as to raise a presumption of undue advantage. *See e.g. Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 300 P.3d 124 (Nev. 2013).

In *Holtby v. Zane*, 220 Pa. 178 (Pa. 1908), the plaintiff owner sued the defendant contractor for breach of contract for construction of a dwelling. The contract allowed the owner to terminate the contractor if it failed to proceed with the contract work. The

contract also allowed the owner to sue the contractor to recover damages for the difference in the cost of the original contract and the owner's new cost to complete the dwelling after the contractor's termination, provided that the owner brought suit within 6 months of the contractor's first breach of contract. The owner sued the defendant contractor before the applicable Pennsylvania statute of limitations expired, but more than 6 months after the contractor breached the contract. The trial court dismissed the owner's claim, and the owner appealed. On appeal, the court in *Holtby* affirmed the trial court's dismissal of the owner's claim and, in doing so, said to hold otherwise would render the 6-month limitation of liability provision in the contract valueless.

In *Western Filter Corp. v. Argan, Inc*., 540 F.3d 947 (9th Cir. Cal. 2008), Plaintiff buyer sued the defendant seller for breach of contract arising from the buyer's acquisition of the seller's subsidiary. The defendant seller moved for summary judgment based on the suit being time barred pursuant to a 1 year contractual limitation period. The district court granted defendant seller's motion for summary judgment and the plaintiff buyer appealed. On appeal, the Ninth Circuit Court of Appeals said: "It is a well settled proposition of law [in California] that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way." *Id.* at 952. [1]

[1] The Court, however, reversed and remanded to the district court to determine the reasonable interpretation of the limitation clause.

The Supreme Court of Nevada in *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 300 P.3d 124 (Nev. 2013), addressed contractual limitation periods in residential unit purchase agreements. In that case, plaintiff homeowner's association sued the defendant developer for breach of express and implied warranties before the applicable Nevada statute of limitations expired, but more than 2 years after a contractual limitation period expired. The developer moved to dismiss the lawsuit based on the HOA's claims being time barred pursuant to a pursuant to the 2-year contractual limitation period. The trial court granted the developer's motion to dismiss, and the HOA appealed. On appeal, the Nevada Supreme Court in *Holcomb* held that parties may contractually agree to shorter limitations period than the otherwise applicable statute of limitations.[2]

In *Rabey Elec. Co. v. Hous. Auth. of Savannah*, 190 Ga. App. 89, 90 (1989), the court upheld a contractual limitation period that barred any claim between the owner and electrical contractor between the lesser of 120 days after receipt of final payment or six months of a written request by the owner that for a final voucher and release. The plaintiff electrical contractor sued the owner to recover payment after the owner penalized it allegedly for tardiness and using materials that did not conform to the contract. The court in *Rabey Elec. Co.* granted the defendant's/owner's motion for directed verdict pursuant to the contractual limitation period. The court said that although the statute of limitations for breach of contract claims is six years, "Georgia courts have permitted parties to contract as to a lesser time limit within which an action may be brought so long as the period fixed be not so unreasonable as to raise a

[2] The Court, however, reversed and remanded to the trial court to determine if the limitation provision was reasonable. *Holcomb* at 129.

presumption of imposition or undue advantage in some way." *Id. See also Holt & Holt, Inc. v. Choate Const. Co,* 271 Ga. App. 292, 295 (2004) (upholding dismissal of claim as untimely after plaintiff failed to act within 30-day period established by contract).

In *Wayne Drilling & Blasting, Inc. v. Felix Industries, Inc.*, 129 A.D.2d 633 (N.Y. App. Div. 2d 1987), the plaintiff subcontractor sued the defendant general contractor for breach of contract in the construction of a chapel. The subcontractor sued before the New York statute of limitations lapsed, but more than 90 days after the completion of its work on the chapel. The contractor moved for dismissal asserting that the subcontractor's claim was time barred, pursuant to a clause in its contract with the subcontractor that required the subcontractor to commence any lawsuit arising from the agreement within 90 days of the completion of its work. The trial court denied the contractor's motion to dismiss. The appellate court, in reversing the trial court's decision and granting the contractor's motion to dismiss based on the 90-day contractual period of limitation, cited a state statute, which allows parties to contract for a shorter time to bring an action than the time provided by statute. *Id.* at 634.[3]

V. STATUTORY SAFEGUARDS FOR DESIGN PROFESSIONALS

In most state courts an affidavit, or Certificate of Merit, from a professional practicing in the same area as the defendant professional architect or engineer is needed for a plaintiff to begin its case, but not in Federal Court. Federal Courts do not require the initial affidavit/Certificate of Merit with the filing of a complaint. This is because such affidavit/Certificate of Merit is a procedural requirement and in Federal

[3] NYCPLR § 201 (2016): "An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this **article unless a different time is prescribed by law or a shorter time is prescribed by written agreement."** (Emphasis added).

Court state substantive law applies while federal procedural law applies. Federal cases, however, provide that a plaintiff asserting a claim against a design professional in Federal Court must have expert evidence that the professional deviated from the applicable standard of care by the end of the discovery period – or else the defendant design professional is entitled to summary judgment. *See e.g. Botes v. Weintraub*, 2012 U.S. App. LEXIS 6436.

A. Statutes of Limitations and Statutes of Repose

A statute of limitation defines the period of time that a person has to file a lawsuit. The time periods vary depending on the type of injury and from state to state. The policy for statutes of limitations is to provide persons with certainty as to how long they can be at risk for being sued for an event that happened in the past. Another purpose for statutes of limitations is to diminish the prospect that a case's resolution will be impaired by loss of evidence, death or disappearance of witnesses, fading memories or disappearance of documents. *See e.g. Murray v. San Jacinto Agency, Inc.*, 800 S.W. 2d 826, 828 (Tex. 1990); and *Missouri, Kansas & Texas R. Co. v. Harriman*, 227 U.S. 657, 672 (1913).

A statute of repose provides an outside strict limit on any claim any person may otherwise have that is not barred by the statutes of limitations. The Supreme Court of Georgia, in *Simmons v. Sonyika*, 279 Ga. 378, 380 (2005) explained the difference between a statute of limitation and a statute of repose as follows:

> A statute of limitation is a procedural rule limiting the time in which a party may bring an action for a right which has already accrued. A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable. A statute of repose stands as an unyielding barrier to a plaintiff's right of action. The statute of repose is absolute; the bar of the statute of limitation is

> contingent. The statute of repose destroys the previously existing rights so that, on the expiration of the statutory period, the cause of action no longer exists. . . . [Thus, unlike] statutes of limitation, statutes of repose may not be "tolled" for any reason, as "tolling" would deprive the defendant of the certainty of the repose deadline and thereby defeat the purpose of a statute of repose.

Therefore, a statute of repose does not create a new or longer statute of limitation.

B. Affidavits/Certificates of Merit

Most states have a statute requiring a plaintiff, who brings an action for professional negligence against a design professional in state court, to file an Affidavit/Certificate of Merit with the complaint. The Affidavit/Certificate of Merit must be executed by a professional practicing in the same area as the defendant design professional opining, within a reasonable degree of architectural or engineering probability, an act and/or non-action of the defendant design professional fell below the standard of care for other design professionals under like and similar circumstances. The public policy behind these statutes is to limit frivolous lawsuits against professionals. These statutes provide a modicum of filter against frivolous claims against design professionals.

An issue here is whether this requirement applies in a negligent misrepresentation action based on professional judgment exercised by the design professional. If the negligent misrepresentation claim is not based on professional judgment exercised by the design professional, then the plaintiff may not need to file an affidavit/Certificate of Merit with its complaint. If, on the other hand, the negligent misrepresentation claim is based on professional judgment exercised by the design professional, then at a minimum the plaintiff should be required to file an

affidavit/Certificate of Merit with the filing of the complaint. This issue typically comes up in negligent misrepresentation actions brought by third parties against design professionals.

i. State Court versus Federal Court

Although most state courts require an affidavit/Certificate of Merit with the filing of a professional negligence action against a design professional, Federal Courts may not have this requirement for the same actions filed in Federal Court. That is because the affidavit/Certificate of Merit requirement is a procedural requirement. In Federal Court state substantive law applies while federal procedural law applies. Federal cases, however, provide that a plaintiff asserting a claim against a design professional in Federal Court must have expert evidence that the professional deviated from the applicable standard of care by the end of the discovery period – or else the defendant design professional is entitled to summary judgment. *See e.g. Botes v. Weintraub*, 2012 U.S. App. LEXIS 6436.

C. Apportionment

Since the mid-1980s, many jurisdictions have either abolished joint and several liability or significantly limited its application. In the place of joint and several liability, many state legislatures have enacted apportionment statutes. The purpose of an apportionment statute is to ensure that each person responsible for the plaintiff's harm, regardless of whether a party in the case, and including the plaintiff himself, is to be responsible only for such person's respective share of the harm. After the apportionment, each defendant's liability is limited to his or her apportioned percentage. *See e.g. Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012).

Apportionment statutes apply to professional negligence and negligent misrepresentation claims as both are tort claims. *See e.g. Alston & Bird LLP v. Hatcher Management Holdings*, LLC, 336 Ga. App. 527 (2016). Attachment A to this paper is a 50-state survey that lists, among other information, states that have apportionment statutes.

D. Set-off

Under the set-off doctrine, a defendant is entitled to a set-off from a jury verdict for amounts awarded by the jury for which the plaintiff has previously obtained pursuant to a settlement with another person for the same claim. *See e.g. Seaboard Construction Company v. The Weitz Company, LLC et al.*, 2009 U.S. Dist. LEXIS 106999 (S.D. GA. 2009); and *Mathis v. Melaver, Inc.*, 206 Ga. App. 392 (1992). The public policy for the doctrine of set-off is that a plaintiff should not be allowed to collect from two persons for the same claim of damages, because that would be a double recovery which is prohibited under fundamental equitable principles. *See e.g. Carter v. Banks*, 254 Ga. 550, 552(1) (1985). Simply put, a plaintiff is entitled to only one recovery.

This law on set-off is separate and distinct from the collateral source rule. The collateral source rule provides that evidence of payment from a collateral source is not admissible to the jury and the plaintiff is entitled to present evidence to the jury of the total contended damages. This makes sense because it may prejudice a jury if it is presented evidence of payments by claimant's insurance company. The law on set-off, however, provides if a verdict for the plaintiff is returned, the court has to reduce the verdict, set-off, by any amount which paid by the plaintiff's insurer or obtained by the plaintiff through a settlement with another person for the same claim. Set-off, however,

may not apply when apportionment applies. *See e.g. McReynolds v. Krebs*, 290 Ga. 850 (2012).

VI. WHICH SAFEGUARDS THAT APPLY TO CLAIMS BY PERSONS IN PRIVITY, ALSO APPLY TO CLAIMS BY PERSONS WHO ARE NOT IN PRIVITY

Not all of the safeguards that apply to persons in privity apply to persons who are not in privity with the design professional. Third parties are not subject to any damage limitation or shortened period or limitation provision in the contract between the design professional and its client. Additionally, a third party who brings a negligent misrepresentation claim against a design professional (that is not based on professional judgment) does not have to file an Affidavit/Certificate of Merit with the filing of the complaint. The design professional, however, should closely scrutinize claims labeled as "negligent misrepresentation" to determine whether the claim is really a professional negligence claim.

Additionally, the statutes of limitations that may apply to a person in privity may be different from those that apply to a person who is not in privity because the claims may be different.

Laws on apportionment and set-off, however, may apply to persons in privity and those who are not in privity.

VII. CONCLUSION

Although the legal landscape for design professionals has increased the risks of doing business as a design professional, there is reason for optimism in the industry. American jurisprudence strives diligently to provide a level approach to addressing business risks -- and that diligence benefits all, including design professionals. For the

design professional and its counsel and carrier, knowledge of and experience with the wide variety of tools to control risks is the key to maintaining a healthy and successful practice. Additionally, continuing education is important. The design professional and its counsel and carrier should continuously train and learn about best practices to anticipate and manage risks in the design profession.

Attachment A

States that enforce Limitation of Liability Provisions; States with Anti-Indemnification Statutes; and States with Apportionment Statutes

State	Enforceable	Leading Case	Anti-indemnification Statute	Application	Apportionment of Fault
AL	Yes	Robinson v. Sovran Acquisition Limited Partnership, 70 So. 3d 390 (Ala. 2011)		Construction Contracts	No
AK	No	City of Dillingham v. CH2M Hill N.W., Inc., 873 P.2d 1271 (Ak. 1994)	Ak. Stat. § 45.45.900	Construction Contracts	Yes Ak. Stat. § 09.17.080
AZ	Yes	1800 Ocotillo, LCC v. WLB Group, Inc., 219 Ariz. 200 (Az. Banc 2008)	A.R.S. §§ 32-1159, 34-226, 41-2586	Construction and A/E Contracts	Yes A.R.S. § 12-2506
AR	Yes	W. William Graham, Inc. v. City of Cave City, 709 S.W.2d 94 (Ark. 1986)	Ark. Code §§ 4-56-104, 22-9-214	Construction Contracts	No
CA	Yes	Markborough California, Inc. v. Superior Court, 227 Cal. App. 3d 705 (Cal. App. 1991)	Cal. Civil Code §§ 2782 New § 2782.5 also prevents indemnity of GC, CM, or other subcontractor for "active negligence." § 2782(a)	Construction Contracts	Yes Cal. Civ. Code §§ 1431-1431.2
CO	Yes	U.S. Fire Ins. Co. v. Sonitrol Management Corp., 192 P.3d 543 (Colo. App. 2008)	Colo. Rev. Stat. §§ 13-50.5-102, 13-21-111.5	Construction Contracts	Yes Colo. Rev. Stat. § 13-21-111.5
CT	Yes	Shawmut Bank Conn v. Connecticut Limousine Serv., Inc., 670 A.2d 880 (Conn. App. 1995)	Conn. Gen Stat. § 52-572k	Construction Contracts	Yes Conn. Gen Stat. §§ 52-672h(c), 52-572o
DE	Yes	J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540 (Del. Super. 1977)	Del. Code, Title 6, § 2704	Construction Contracts	No
FL	Yes Fla. Stat. § 558.0035	Witt v. La Gorce Country Club, Inc., 35 So.3d 1033 (Fla Ct. App. 2010)	Fla. Stat. § 725.06	Construction and A/E Contracts	Yes Fla. Stat. 768.81(3)
GA	Yes	Precision Planning, Inc. v. Richmark Communities, Inc., 298 Ga. App. 78 (2009)	O.C.G.A. 13-8-2(b) 2016 HB 953 amended the statute to include A/E Contracts	Construction and now A/E Contracts	Yes O.C.G.A. 51-12-33
HI	Yes	City Express, Inc., v. Express Partners, 959 P 2d 836 (Hi. 1998)	Hawaii Rev. Stat. § 431:10-222	Construction Contracts	Yes Hawaii Rev. Stat. § 663-10.9
ID	Yes	Idaho State University v. Mitchell, 552 P.2d 776 (Idaho 1976)	Idaho Rev. Stat. § 29-114	Construction Contracts	Yes Idaho Rev. Stat. § 6-803
IL	Yes	Scott & Fetzer v. Montgomery Ward & Co., 493 N.E.2d 1022	Ill. Compiled Stat., 740 ILCS 35/1-3	Construction Contracts	No

State	Enforceable	Leading Case	Anti-indemnification Statute	Application	Apportionment of Fault
		(Ill. 1986)			
IN	Yes	Orkin Extermination Co. v. Walters, 466 N.E.2d 55 (Ind. Ct. App. 1984)	Ind. Code §§ 26-2-5, 26-2-5-2	Construction Contracts	Yes Ind. Code § 34-4-33-5(b)
IA	Yes Iowa Code § 554.2719	Advanced Elevator Co., Inc. v. Four State Supply Co., 572 N.W.2d 186 (Ia. Ct. App. 1997)	Iowa Code § 537 A.5	Construction Contracts	Yes Iowa Code § 668.4
KS	Yes	Wood River Pipeline Co. v. Willbros Energy Servs. Co., 738 P.2d	Kansas Stat. § 16-121	Construction Contracts	Yes Kansas Stat. § 60-258a(d)
KY	Yes	Cumberland Valley Contractors, Inc. v. Bell County Coal Corp., 238 S.W.3d 644 (Ky. 2007)	Kentucky Rev. Stat. § 371.180	Construction Contracts	Yes Kentucky Rev. Stat. § 411.182(3)
LA	Yes	Isadore v. Interface Sec. Systems, 58 So.3d 1071 (La. App. 2011), and	LSA § 38:2216(G) LSA § 9:2780(A)(G) (Louisiana Oilfield Indemnity Act)	Construction Contracts	Yes La. Civ. Code art. 2324
ME	Yes 11 M.R.S. § 2-718 and 2-719	Lloyd v. Sugarloaf Mountain Corp, 833 A.2d 1 (Maine 2003);		Construction Contracts	No
MD	Yes	Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254 (Md. Ct. App. 1996)	Md. Code Ann., Cts. & Jud. Proc. 5-401	Construction Contracts	No
MA	Yes	Zavras v. Capeway Rovers Motorcycle Club, Inc. 687 N.E.2d 1263 (Mass. Ct. App. 1997)	Mass. Gen. Laws, ch. 149 § 29C	Construction Contracts	No
MI	Yes	Ohio Cas. Ins. Co. v. Oakland Plumbing Co., 2005 WL 544185 (Mi. Ct. App. 2005)	Mich. Comp. Laws § 691.991	Construction Contracts	Yes Mich. Comp. Laws § 600.6304
MN	Yes	Independent School District No. 877 v. Loberg Plumbing and Heating Co., 123 N.W. 2d 793 (Minn 1963).	Minn. Stat. §§ 337.01; 337.02	Indemnification Agreements	No
MS	Yes	Turnbough v. Ladner, 754 So. 2d 467 (Miss. 1999)	Miss. Code § 31-5-41	Construction Contracts	No
MO	Yes	Purcell Tire and Rubber Company, Inc. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. 2001)	Mo. Rev. Stat. § 434.100	Construction Contracts	No
MT	Yes	State ex rel. Mountain States Tel. & Tel. Co. v. District Court In and For Silver Bow, 160 Mont. 443 (Mont. 1972)	Mont. Rev. Code § 28-2-2111	Construction Contracts	No
NE	Yes	Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp., 571 N.W.2d 64 (Neb. 1997)	Neb. Rev. Stat. § 25-21:187	Construction Contracts	Yes Neb. Rev. Stat. § 25-21:185.10
NV	Likely	American Fire & Safety v. City of North Las Vegas, 109 Nev. 357 (Nev. 1993)	N.R.S. § AB 125, § 2 (2015).	Residential Construction Contracts	Yes N.R.S. § 41.141(4)-(5)
NH	Yes	PK's Landscaping v. New Eng. Tel. & Tel. Co., 128 N.H. 753 (N.H. 1986)	N.H. Rev. Stat. §§ 338-A:1, 338-A:2	Indemnification Agreements	Yes N.H. Rev. Stat. § 507:7-e(I)
NJ	Yes	Moreira Constr. Co. v. Moretrench Corp., 97 N.J. Super.	N.J. Stat. § 2A:40A-1	Any Covenant, Promise, Agreement or	Yes N.J. Stat. §

State	Enforceable	Leading Case	Anti-indemnification Statute	Application	Apportionment of Fault
		391 (App.Div. 1967)		NEW JERSEY X Understanding In Connection With Construction Contract	2A:15-5.3
NM	Yes	Fort Knox Self Storage, Inc. v. Western Technologies, Inc., 142 P.3d 1 (N.M. Ct. App. 2006)	N.M. Stat. § 56-7-1	Construction Contracts	Yes N.M. Stat. § 41-3A-1
NY	Yes	Long Island Lighting Co. v. Imo Deleval, Inc. 668 F. Supp 237 (S.D.N.Y. 1987)	N.Y. Gen. Oblig. Laws § 5-322.1	Construction Contracts	No
NC	Yes	Billings v. Joseph Harris Co., 290 N.C. 502 (N.C. 1976)	N.C. Gen. Stat. § 22B-1	Construction Contracts	No
ND	Yes N.D. Cent. Code, § 41-02-98	Reed v. Univ. of N.D., 589 N.W.2d 880 (N.D. 1999)		Construction Contracts	Yes N.D. Cent. Code § 32-03.2-02
OH	Yes	Motorists Mut. Ins. Co. v. ADT Sec. Systems, 1995 WL 461316 (Oh. Ct. App. 1995)	Ohio Rev. Stat. § 2305.31	Construction Contracts	Yes Ohio Rev. Stat. § 2315.19(D)(1)
OK	Yes	Elsken v. Network Multi-Family Sec. Corp., 838 P.2d 1007 (Ok. 1992)	15 Okla. Stat. § 221	Construction Contracts	No
OR	Yes	Estey v. MacKenzie Eng'g Inc., 927 P.2d 86 (Or. 1996)	Or. Rev. Stat. § 30.140	Construction Contracts	Yes Or. Rev. Stat. § 18.485
PA	Yes	Chepkevich v. Hidden Valley Resort, L.P. 2 A.3d 1174 (Pa. 2010)		Construction Contracts	No
RI	Yes	Star-Shadow Prods., Inc. v. Super 8 Sync Sound Sys., 730 A.2d 1081 (R.I. 1999)	R.I. Gen. Law § 6-34-1	Construction Contracts	No
SC	Yes	Georgetown Steel Corp. v. Union Carbide Corp., 806 F. Supp. 74 (D.S.C. 1992)	S.C. Code § 32-2-10	Construction Contracts	No
SD	Yes	Rozeboom v. Northwestern Bell Telephone Co., 358 N.W.2d 241 (S.D. 1984)	S.D. Codified Laws § 56-3-18	Construction Contracts	No
TN	Yes	Houghland v. Security Alarms & Services, Inc., 755 S.W.2d 769 (Ten. 1988)	Tenn. Code § 62-6-123	Construction Contracts	Yes McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).
TX	Yes	Mickens v. Longhorn DFW Moving, Inc., 264 S.W.3d 875 (Tex. Ap. 2008)	Tex. Ins. Code §§ 151.102, 151.103, and Tex. Civ. Prac. & Rem. Code §130.002	Construction Contracts	Yes Tex. Civ. Prac. & Rem. Code § 33.013
UT	Yes	Russ v. Woodside Homes, Inc., 905 P.2d 901 (Utah Ct. App. 1995)	Utah Code § 13-8-1	Construction Contracts	Yes Utah Code § 78-27-38,-40
VT	Yes	Hamelin v. Simpson Paper Co., 702 A.2d 86 (Vt. 1978)		Construction Contracts	Yes V.S.A. tit. 12, § 1036
VA	Yes	Pettit v. Chesapeake & Potomac Tel. Co. of VA 1992 WL 884663 (Va. Cir. Ct. 1992)	Va. Code § 11-4.1	Construction Contracts	No
WA	Yes	Markel American Ins. Co. v.	Wash. Rev. Code §	Construction	Yes

State	Enforceable	Leading Case	Anti-indemnification Statute	Application	Apportionment of Fault
		Dagmar's Marina, L.L.C., 161 P.3d 1029 (Wa. Ct. App. 2007)	4.24.115	Contracts	Wash. Rev. Code § 4.22.070
WV	Yes	Arts' Flower Shop, Inc. v. Chesapeake & Potomac Telephone Co. of West Virginia, Inc., 413 S.E.2d 670 (W. Va. 1991)	W. Va. Code § 55-8-14	Construction Contracts	No
WI	Yes	Atkins v. Swimfest Family Fitness Ctr., 691 N.W.2d 334 (Wis. 2005)	Wis. Stat. § 895.447	Construction Contracts	No
WY	Yes	Massengill v. S.M.A.R.T. Sports Med. Clinic, 996 P.2d 1132 (Wyo. 2000)		Construction Contracts	Yes Wyo. Stat. § 1-1-109(e)