ASCE | MEMBER ADVANTAGES

QUARTERLY RISK MANAGEMENT UPDATE

**January 2016**

## Claims Retrospective: Retroactive Dates & the Perils of Letting Your Coverage Lapse

There are typically two initial timing requirements that must be met in order for there to be a potential for coverage under your professional liability (PL) insurance policy.[1] The first requirement is that the claim must be first made (i.e., received by the insured) during the coverage period. The second requirement is that the actual or alleged wrongful act, error, or omission from which the claim arises must have occurred after your policy's retroactive date. While the claims-made nature of the policy limits the time period in which the claim must be made, the retroactive date limits the time period in which the wrongful act must have occurred. Thus, these requirements serve as figurative bookends, temporally limiting the coverage available to insureds.

"The retroactive date is the date after which your actual or alleged wrongful act, error, or omission must have occurred in order for there to be a potential for coverage."

As such, the retroactive date on your PL policy is an important component of your coverage. The retroactive date is the date after which your actual or alleged wrongful act, error, or omission must have occurred in order for there to be a potential for coverage. In other words, claims arising from any actual or alleged wrongful act, error, or omission occurring prior to the retroactive date are not covered under the policy.

The retroactive date for your policy can be found in the schedule or on the declarations page. Sometimes, a policy will indicate that there is full prior acts coverage or no retroactive date, meaning there is a potential for coverage under the policy no matter when the wrongful act, error, or omission occurred. However, more often, there is an actual date listed. When an insured lets their coverage lapse, meaning they fail to purchase continuous coverage, their new policy will be written with a retroactive date that is the same as the inception date of the policy. Thus, the insured loses all of their prior acts coverage, and any claim arising from a wrongful act, error, or omission that occurred prior to inception of the policy will not be covered.

For example, if Engineering Firm A is created on January 1, 2005 and buys continuous annual coverage from that date until the present, it will be covered under its January 1, 2015 to January 1, 2016 policy for any claims arising within that time period. However, if Engineering Firm B is created on January 1, 2005, lets its coverage lapse on January 1, 2014, and does not purchase new coverage until June 1, 2014, its retroactive date will be June 1, 2014. In this instance, there will be no potential for coverage under its June 1, 2014 to June 1, 2015 policy for claims arising from any acts, errors, or omissions occurring prior to June 1, 2014.

Professional engineers should make every effort to maintain continuous coverage. Any lapse in coverage could result in a significant loss of coverage for prior acts, leaving the engineer exposed to uncovered claims.



The ASCE Quarterly Risk Manager Update is authored by Underwriters' coverage and monitoring counsel, Karbal, Cohen, Economou, Silk & Dunne, LLC, 150 S. Wacker Dr., Suite 1700, Chicago, IL 60606.

## Spoliation Sanctions for Failure to Preserve Evidence

By Terri Stough, Esq.

A professional's inability to produce important evidence during a lawsuit alleging negligence may result in sanctions.[1] State law determines whether spoliation of evidence may result in sanctions, and the nature of any sanctions imposed against a party who fails to preserve important evidence can vary greatly by state.

In Illinois, if a party breaches the duty to preserve evidence, the court can award monetary damages to the non-breaching party. The non-breaching party will be required to prove the likelihood of prevailing without the missing evidence, and the amount that could have been recovered if the missing evidence were available.[2]

Under California law, the duty to preserve evidence generally arises from a contract. If the contract does not contain an agreed liquidated damages amount, the non-breaching party must prove the amount of damages caused by the failure to preserve evidence.[3]

New York courts have imposed a wider range of sanctions on parties who dispose of crucial evidence. Under New York law, the jury is allowed to infer that the missing evidence would have been unfavorable to the party who lost or destroyed it.[4] In more serious instances of lost or destroyed evidence, the court can strike the defendant's answer,[5] which has the effect of stating that the defendant does not contest the allegations in the complaint and can result in an automatic win for the plaintiff. New York courts can also impose monetary sanctions in the form of attorneys' fees and costs incurred by the non-breaching party in connection with successfully arguing a spoliation of evidence claim.[6]

In Ohio, disputes over lost or destroyed evidence can result in sanctions to a party by excluding expert testimony, which can be devastating to the breaching party's position.[7] Texas courts have the ability to enter a default judgment against a party as the most severe sanction for destruction of evidence.[8]

To avoid sanctions for spoliation of evidence, prior to destroying any documents, architects and engineers are strongly advised to consult a local attorney specializing in construction litigation for counsel on the nature of documents that should be preserved and the recommended duration of document retention.



[1] The most common evidence types of evidence are proposals, manufacturer's data, construction photos, project correspondence, as-built drawings, construction documents, and project accounting. In some instances, defective parts or other objects in the professional's possession will be important evidence.

[2] *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 624 (2d Dist. 2007).

[3] *Coprich v. Superior Court of Los Angeles County*, 95 Cal. Rptr. 2d 884,891 (Cal. Ct. App. 2000).

[4] *Lowe v. Fairmont Manor Co., LLC*, No. 153214/12, 2014 N.Y. Misc. LEXIS 5646, at *4 (Sup. Ct. Dec. 14, 2014).

[5] *Lentini v. Weschler*, 120 A.D.3d 1200, 1201 (N.Y. App. Div. 2014).

[6] *Zacharius v. Kensington Publishing Corp.*, No. 652460/2012, 2015 2015 N. Y. Misc. LEXIS 3251, at *17 (Sup. Ct. Sept. 1, 2015).

[7] *See Hetzer-Young v Elano Corp.*, No. 2013 Ohio App. LEXIS 1017, at *29 (Ct. App. March 21, 2014) (Although the trial court barred Plaintiffs' expert testimony, the appellate court found it error to do so.).

[8] *Trevino v. Ortega*, 969 S.W.2d 950, 959 (Texas 1998).

152882-04



The ASCE Quarterly Risk Manager Update is authored by Underwriters' coverage and monitoring counsel, Karbal, Cohen, Economou, Silk & Dunne, LLC, 150 S. Wacker Dr., Suite 1700, Chicago, IL 60606.