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Setting the Start of the Statute of Limitations

Section 13.7 of the AIA A201, General Conditions of the Contract for Construction, sets a time at which the local statute of limitations starts to run. All states have statutes of limitations that define when lawsuits must be commenced. Knowledge of these statutes is important for parties involved in construction because important rights can be cut off if the party waits too long to initiate a lawsuit or arbitration.¹

Because each state's law is different and often confusing, consultation with an attorney familiar with the laws of the appropriate state is essential to determine the applicable time limits. Often, different time limits apply to different matters. One time limit might apply to written contracts, while another applies to oral contracts, torts or other matters.

As an example, in Illinois a party must initiate a construction-related action within four years from the time the party knows or should know that a wrong was committed.² In other words, the statute of limitations starts to run when the party first learns that it has a claim. To make matters more confusing, that party would first have ten years in which to discover the problem. This additional discovery period is sometimes called a statute of repose³ and works to extend the time before the statute of limitations period begins. This repose, or discovery, period is a period of time for a latent problem to show up, after which the statute of limitations period begins. If the problem does not surface within the repose period, the action is usually barred altogether. Thus, in Illinois, a party has up to ten years in which to discover a defect and four years (from the date of discovery) in which to file a claim. Once again, note that this is the current law in Illinois. Other states' laws are different and subject to change.

One of the issues that frequently arises is the determination of exactly when a party first learned of a problem. Take, for example, a roof leak. Several years after construction, the roof starts leaking. Perhaps a few ceiling tiles get wet. Perhaps there is a major flood inside the building. Perhaps the owner had an inspection of the roof the year before that indicated that there might be a problem. Usually, a court will determine the date that the owner had actual knowledge, or

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should have had knowledge had that owner exercised reasonable care. That date marks the start of the statute of limitations period.

In A201, however, there is a mechanism that simplifies the determination of when the statute of limitations period starts.

13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

13.7.1 As between the Owner and Contractor:

.1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;

.2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and

.3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

Under these provisions, one must determine just what act caused the problem. In the roof leak example, if the owner determines that the leak is caused by improper installation of the roof membrane, and that membrane was installed before Substantial Completion, then the statute of limitations starts to run as of the date of Substantial Completion. This date is found on the Certificate of Substantial Completion issued by the architect. If, on the other hand, the problem was caused by improper installation of a punch list item, the statute starts to run no later than the date of issuance of the final Certificate for Payment.

The effect of the AIA language is to start the running of the statute of limitations as of a certain point in time, usually as of the date of Substantial Completion. This is so whether or not the parties even know that anything is wrong. This AIA language also nullifies any additional time which a state's statute of repose might allow. In our roof

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leak example, under Illinois law, any suit or arbitration by the owner against the contractor related to that leak would have to be filed within four years of the date of Substantial Completion, assuming the contractor did no further punch list work on that roof. Thus, in Illinois at least, as much as ten years is cut off of the owner's rights against the contractor.

It is still important to know when the problem occurred. Good record keeping is a must, as is an immediate and thorough investigation of any problem that might result in litigation or arbitration.

In general, these provisions do more to protect the contractor than the owner. This is so because the owner is more likely than the contractor to discover a claim some years after construction is completed. The owner's main obligation to the contractor is to make payments. If these are not timely made, the contractor will know in plenty of time to avoid any statute of limitations problems it may encounter in a claim against the owner. Owners should also be aware that AIA Document B141, the Owner-Architect Agreement, includes a similar provision at ¶ 1.3.7.3 of that document. There, the statute of limitations starts to run no later than the time that the architect's services are substantially complete, without any discovery or statute of repose period. Again, this usually will favor the architect and cut off claims earlier than would be the case without this provision.

Owners could extend the time limits by either amending Section 13.7 of A201 or by deleting it entirely. The effect of deleting this language is to accept the local statutes of limitation and repose, which usually allow for a lengthy discovery period. On the other hand, the supplementary general conditions could permit a five or ten year or longer period of time in which to file a claim. This increases the contractor's risk and, possibly, the cost of the project to the owner.

Both the A201 and B141 modify the way the statutes of limitations and repose are treated for a particular project. The parties should examine these provisions to determine if these, or other, modifications are in their best interests.

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1. ¶ 4.6.3 of A201 makes arbitration filings subject to the ¶ 13.7 time limits.
2. 735 ILCS 5/13-214.
3. For an interesting case that examined the history of statutes of limitations and repose as applied to architects and builders, see *Horton v. Goldminer's Daughter*, 785 P.2d 1987 (Utah 1989).

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