

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

Sabo & Zahn

Attorneys at Law

Litigation Update - Statute of Limitations

Last year, we reported on a case in the Federal Fourth Circuit Court of Appeals, *Harbor Court Associates v. Leo A. Daly Company*.¹ That case revolved around language found in the standard AIA agreement similar to that found in the 1997 version of AIA Document B141 at Paragraph 1.3.7.3:

1.3.7.3 Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.

Two recent cases follow the *Harbor* decision. In *Northridge Homes v. John W. French*,² the owner sued the architect after severe leaks were found in the roofs of the townhouses designed by the defendant. The architect provided construction administration for the project and issued a Certificate of Substantial completion effective as of February 17, 1993. Massachusetts has a three year statute of limitations. Suit was filed on April 30, 1997.

Starting in 1994, and continuing into 1995 and 1996, the architect met with the owner for the purpose of resolving the roof leak problems. After the lawsuit was filed, the architect moved for summary judgment based on the AIA language that requires that suit be filed within the applicable three year period following the date of substantial completion. The court found that, for actions that occurred before the date of substantial completion, the time had expired. The court permitted the lawsuit to proceed to give the owner a chance to demonstrate that the architect misrepresented facts, thereby misleading the owner into waiting to file suit. This is referred to as the doctrine of equitable estoppel, and places a substantial burden of proof on the owner. If the owner can prove that the architect misrepresented facts with the intent to mislead the owner, then the

This article is not legal advice. Consult with an attorney familiar with the law in your area.

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

limitations period is extended.

One argument of the owner was that the Certificate of Substantial Completion was never signed by the owner. Therefore, it should be disregarded. The court rejected this contention, based on the language found in AIA Document A201 which describes the Certificate of Substantial Completion as follows:

9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

The court held that, based on these provisions, by failing to sign the Certificate, the owner does not negate the date of Substantial Completion. This language places the responsibility for determining the date of Substantial Completion entirely on the architect, and does not require the owner's signature to set that date. At most, a failure to sign reflects the owner's refusal to accept the responsibilities assigned under the Certificate.

In another case, *College of Notre Dame of Maryland v. Morabito Consultants*,³ an owner sued the structural engineer hired by the architect for breach of contract and negligence. The engineer had been hired to inspect a building to be renovated in 1991. In 1997, significant movement in the building was detected and a subsequent engineer concluded that the first engineer had failed to properly calculate the loads. In December, 1998, the owner filed suit and the engineer moved to dismiss on the grounds that its contract contained the limitations provisions found above. In fact, both the owner-architect agreement and the architect-consultant agreement contained this language.

This article is not legal advice. Consult with an attorney familiar with the law in your area.

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

The owner argued that the accrual clause is like an exculpatory clause and should be read more stringently. The court held that this is not an exculpatory clause because it does not relieve any party from liability. Instead, it alters the time for accrual of a cause of action from what the law would otherwise impose. Such contractual modifications are generally not disfavored in law. Here, the Maryland three year statute of limitations barred the action.

These two cases make clear that the language found in AIA agreements that modifies the applicable statute of limitations will generally be upheld by the courts. Of course, this is then tied into the date of Substantial Completion as determined by the architect. It is important for the architect to issue a Certificate of Substantial Completion, whether or not the owner agrees with it. Without that Certificate, there will be no date to start from, and the advantage provided by this contractual language will be lost. Of course, it is also important to maintain the standard AIA language referred to here, and not permit modifications that will negate the intent of this provision.

Werner Sabo, FAIA, CSI
James K. Zahn, FAIA, CSI

1. 1999 U.S. App. LEXIS 11265, decided June 3, 1999.
2. 1999 Mass. Super. LEXIS 435, decided November 15, 1999.
3. 2000 Md. App. LEXIS 50, filed March 9, 2000.

This article is not legal advice. Consult with an attorney familiar with the law in your area.