

CLIENT ALERT

OWNERS TIME LIMITATIONS IN OREGON FOR CONSTRUCTION DEFECT CLAIMS

It is not generally known that the standard AIA contract clauses in owner's contracts with its general contractor and architect greatly limit the time to bring construction defect claims against either party. Other standard contract forms may also contain what is known as a "claim accrual" clause. These "claim accrual" contract clauses establish the substantial completion date as the trigger for filing claims even if construction defects are latent and unknown at the time. Since latent construction defects normally take many years to develop into "known" property damages, "claims accrual" clauses in these contracts can be fatal to filing a claim.

I. Owner/General Contractor Contracts

Between the owner and contractor, the standard AIA form A101-1997 (Standard Form of Agreement Between Owner and Contractor) incorporates A201-1997 (the General Conditions of the Contract for Construction) which contains Section 13.7.1.1 entitled, "Commencement of Statutory Limitation Period."¹ It states:

"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;"

This AIA clause has recently been interpreted by the Oregon Court of Appeals to require an owner to file a negligence claim for construction defects against its general contractor within two (2) years of substantial completion, a much shorter period of time than allowed by Oregon statutes of limitations. In *Wood Park Terrace Apartments Limited Partnership v. Tri-Vest, LLC*, 254 Or. App. 690 (2013), the court held that the words in Section 13.7.1.1, "any applicable statute of limitations" and "any alleged cause of action," meant that all the owner's claims against the general contractor for construction defects were deemed to have "accrued," or ripened, at substantial completion. The court upheld the time limits of Section 13.7.1.1 that a breach of contract claim must be filed within six (6) years of substantial completion, and even more importantly, a negligence claim must be brought within two (2) years of substantial completion.²

The construction defect claim accrual clause in Section 13.7.1.1 greatly shortens the normal time an owner has to file a negligence claim against its general contractor as it deprives the owner of what is known as the discovery rule. The discovery rule is included in many Oregon statutes of limitation. It allows an owner to bring a negligence claim against a general contractor within two years of the actual discovery (or within two years of when an owner "should have" discovered) that such a claim exists. The discovery rule requires three elements for a claim to be "discovered" and as a result for the two year period in which to sue to commence: 1) the injury or harm to the owner's property, i.e. the "property damage"; 2) the cause of the harm; and 3) the identification of

¹ The most recent standard AIA form of General Conditions (A201-2007) also includes this "claim accrual" clause.

² In another recent case, the Supreme Court decided that substantial completion under Section 13.7.1.1 means the date the architect issues the certificate of substantial completion, and not when the project is able to be occupied and used. *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 355 Or. 286 (2014).

the party causing the harm. The discovery rule often extends the two year statute of limitations for negligence claims well past the six year statute of limitations for breach of contract claims since latent defects may not be “discovered” for many years after construction.³ A claim accrual clause like Section 13.7.1.1 eliminates the benefit of the discovery rule and shortens the statute of limitations for negligence claims to a two year period.

The owner in *Wood Park Terrace* argued that Section 13.4 of standard AIA form A201-1997 known as the “remedy-reservation clause” required that the claim accrual clause should only apply to a breach of contract, and not to a negligence, claim. The “remedy-reservation clause” states:

“Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.”

The owner had argued that this AIA contract clause meant only breach of contract claims were subject to the claim accrual as negligence claims are outside the contract as they are based on the professional standard of care involved. The Oregon Court of Appeals held that since the parties were free to contractually modify the statute of limitations in their contract as to any type of claim (and shorten the timeframe in which to bring the claim), the construction defects claim accrual clause applied to all types of claims of the owner against its general contractor. The Court of Appeals held that the claim accrual clause did not amount to a complete waiver by the owner of its entitlement to damages for contractor negligence; it simply required the owner to bring a negligence claim against its general contractor within two years of substantial completion, or else it was barred.

As stated, normally tort claims such as negligence “accrue” (or ripen) when the plaintiff actually knows or “should know” that an injury has occurred, the cause of the injury, and the identification of the party causing the injury. Only when all three elements exist, is there “discovery” of the claim. If the parties agree to a contract provision like Section 13.7.1.1 to shorten the period of time when plaintiff’s claims “accrue” to the agreed substantial completion date, they eliminate the discovery rule and its benefits.

II. Owner/Architect Contracts

The owner architect agreement, that is, standard AIA forms B141 and B151 (1997), each contain Article 9.3 which is a claim “accrual” clause very similar to the owner/contractor claim accrual provision.⁴ Article 9.3 in form B141 states:

“Causes of actions between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of

³ Under Oregon statutes of limitations, an owner’s breach of a written contract claim must normally be filed within six years of the breach. The accrual clause in Section 13.7.1.1 makes this six year period commence at substantial completion, even if the owner is not aware of construction defects causing a breach. Recently in 2014, a number of Oregon appellate courts have also applied the “discovery rule” to an owner’s construction defects claim against its general contractor and a subcontractor for claims of injury to real property, or breach of contract, thereby extending the six (6) year statute of limitations for these type of claims. However, if there is a claim accrual clause in the contract, the discovery rule will not apply.

⁴ B-101 is the 2007 standard AIA form of Agreement Between Owner and Architect.

limitations shall commence to run not later than either the date of Substantial Completion, or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion.”

Article 9.3 in form B151 states:

“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.”

Article 9.3 is a claim “accrual” clause which greatly limits the otherwise standard two (2) years plus “discovery” period under the Oregon statute of limitations for filing all claims against an architect. The Oregon statute of limitations, ORS 12.135(3), requires that all claims against an architect (both breach of contract and negligence), are to be filed within two (2) years, but this time period does not commence until the injury or damage is “discovered,” meaning the three elements are satisfied: there is injury to owner’s property; the cause of the injury is known; and the party liable for causing the harm is identified. Only when all three elements are known (or should have been known), does the two year period commence in which to sue an architect.

The “claim accrual” clause in Section 9.3 of the standard AIA owner/architect agreements, has the same effect as the standard AIA owner/architect agreements – it collapses the time for an owner to sue an architect for negligence, as well as breach of contract, to within two years of substantial completion. This contract clause deprives the owner of the “discovery” rule and the longer time under Oregon statutes of limitations to file all claims against its architect.

Owners need to carefully review and strike out these provisions in both construction and design contracts or their rights may be easily lost.

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