

"I've Been Sued On What Project?"

Statute of Limitations vs. Contract Warranties

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The typical construction contract, including AIA forms, obligate the contractor to correct any work not in accordance with the requirements of the contract documents "within one-year after the date of substantial completion of the work..." This is known as the warranty period. The purpose of the contractual warranty is to obligate the contractor to return to the project within an agreed upon period of time after substantial completion to correct problems noted by the owner. The length of the contractual period can vary depending upon the agreement of the parties. The contractor will often assume, however, that upon substantial completion the contractor's obligations to remedy any defects are limited by the agreed upon warranty period. An issue that often haunts a contractor, however, is the appearance of a latent defect in the work that is not discovered until years after the project is complete.

The issue becomes—does the expiration of the warranty period serve to also bar claims asserted beyond the contractual warranty period? While the precise answer would obviously require a detailed legal analysis of the entire construction contract, the general answer is usually "NO." Courts for the most part have been unwilling to view a contractual warranty period as a statute of limitations. The majority of courts analyzing the issue have concluded that the warranty period is an added guarantee under the contract obligating the contractor to rectify any defects within the warranty period and imposing a corresponding duty of the owner to allow the contractor to correct the defects before instituting alternative remedies. Most courts refuse to construe the warranty guarantee as an exclusive remedy, thus permitting the owner the ability to pursue a breach of contract action for work found to be in contravention of the contract specifications years after expiration of the warranty period. Unfortunately, the legal effects can prove devastating to the unsuspecting contractor. Let us count the ways!

Depending on the type of claim involved, the contractor could face a claim by an unsatisfied owner alleging faulty construction more than a decade after completing the project. For example, in Kentucky, the statute of limitations for breach of a written contract is 15 years. See KRS 413.090. The limitations period for breach of an oral contract is 5 years. See KRS 413.120. To complicate matters further many states, including Kentucky, apply the "discovery rule" meaning that the limitations period does not even begin to run until the party "discovered" or "should have discovered" the breach. Hence, a contractor may find itself defending its work on a

project that has been long forgotten about. Defending a claim under this scenario can pose tremendous problems. The company may no longer employ the personnel most knowledgeable of the project. Records may be lost or destroyed. Memories fade.

That is not to say, however, that the contractor is powerless to protect itself against the ability of an owner to institute legal action years after a project is complete. Like all construction related issues, a party's ability to protect itself starts with a document rarely read until a dispute arises—the construction contract! The courts will typically uphold the right of parties to agree upon a contractual limitations period that is shorter than the statutory period provided by statute. Accordingly, parties are free to contract around the lengthy statute of limitations provided under Kentucky law. However, any contractual limitations period must be expressly and clearly provided in the agreement. In other words, to obtain the benefit of a contractual limitations period, the courts will require that the intent to limit be unambiguously stated in the agreement.

The practical ability of the contractor to negotiate a shorter contractual limitations period may very well be impeded by an owner unwilling to consent to such terms. The interest of the owner naturally lies on the side of a longer rather than shorter limitations period. For instance, the tension between the owner's interest and the contractor's interest on this issue can be seen in the new AIA forms adopted in 2007. Prior AIA forms imposed a contractual limitation on the "discovery rule" which provided for the statute to commence upon one of three events: substantial completion, final completion, or the date of warranty work corrected. See AIA form A207-1997, Section 13.7. This had the effect of imposing a duty upon the owner to discover any claimed defect during this period or risk being barred if dilatory. The A201-2007 has done away with the contractual limitation on the owner's right and instead provides that the statute of limitations will be established by applicable state law. In Kentucky that is 15 years from the date the alleged defect was discovered or should have been discovered.

Obviously, the rights, duties and obligations of the parties stem from the construction contract. A contractor would be well advised to consider negotiating a provision in the contract limiting the time in which an owner may sue for an alleged defect in the work. Otherwise, a contractor may find itself defending a project long forgotten.

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