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SOMETIMES THE SHOT CLOCK YOUR BEST DEFENSE!

Understand Statutes of Limitations and Reduce Risk

If you are a Design Professional in the State of New York you have available to you a powerful tool for the reduction of risk. A special Statute of Limitations exists which can extinguish even valid claims like the shot clock in a basketball game nullifies a perfect shot that was taken after the buzzer. However, in order to maximize your potential to benefit from this law you must first understand how it operates and, most importantly, how to start the clock running.

A Statute of Limitations is a law which prescribes the time period within which a particular type of claim can be brought. Once the specified time period has passed all claims are extinguished or, as judges often say, "time-barred." Typically, Design Professionals with whom I speak about the Statute of Limitations are skeptical and believe that no one with a valid claim would ever allow it to be extinguished in this manner. Nonetheless, hundreds of cases have been declared "time-barred" and I personally have had many cases against clients dismissed on that basis.

In order to determine whether a particular claim is time barred you need the answers to two questions; 1) What is the time period specified in the applicable Statute of Limitations, and 2) When did that time period begin to run?

Here is a simple example. Suppose your parked car is damaged when it is struck by a vehicle operated by a person distracted by a cell phone conversation. How much time do you have to bring a claim against the negligent driver to recover the cost of repairing your vehicle? First, you need to know the time period specified in the Statute of Limitations for this type of claim, which is three years. Second, you need to know when the time period begins to run, which in this example would be on the date the accident occurred. So, you could commence a suit any time up through the third anniversary of the accident. If you wait a day longer, you are too late and your claim will be dismissed *despite the fact that it was clearly valid.*

It is the combination of simplicity and finality that makes a Statute of Limitations such a powerful tool of risk reduction.

In New York, a claim by an Owner against a Design Professional is subject to a *three year* Statute of Limitations. This law is quite favorable as it *cuts in half* the six year time limit which

formerly applied to such claims. However, the law's powerful potential to reduce your risk stems from the fact that *you can exercise control over when the three year period begins to run* by including appropriate language in your Owner-Architect contracts. Doing so can substantially reduce the period of time during which you are exposed to claims arising from a project and, thereby, substantially reduce your risk. For this reason, AIA Owner-Architect agreements include language similar to the following:

"..Causes of action between the parties to this Agreement shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than the date of Substantial Completion..."

If you've used an AIA contract that contains this language or inserted similar language in your non-AIA contract for a project, the Owner must bring any claims relating to the project within three years of the date of Substantial Completion. This is critical since if there is no such language in your contract the three-year Statute of Limitations period does not *begin* to run until you have *completed* performing *all* of your services on the project. Typically in the latter circumstance, that date is determined to be the date the Final Certificate for Payment was issued which, in my experience, can be many months, if not years, after the date of Substantial Completion.

A case I handled successfully some years ago illustrates the importance of 1) inserting language in your contracts accelerating the start date of the running of the Statute of Limitations, and 2) documenting Substantial Completion in a timely manner so that you have solid evidence to establish when the clock began to run. My client designed a new roof for a school gymnasium. His contract with the Owner was an AIA form which contained the above-quoted language. No Certificate of Substantial Completion was issued but a Certificate of Suitability for Occupancy was, as required by the State Education Department. The roof design was defective and resulted in serious problems with the roof. Suit was commenced on a date which was four years after the date of Substantial Completion, but less than three years after the date a Final Certificate for Payment was issued. The court ruled that the Certificate of Suitability was the equivalent of a Substantial Completion certificate and dismissed the suit since it was commenced more than three years after the date of Substantial Completion. In other words, the shot clock ran out!

The Sugarman Law Firm, founded in 1909, provides a full range of legal service to professionals, business owners and individuals, through its offices in Syracuse, Auburn and Buffalo. For more information on issues related to practice as a design professional or construction law, please visit our website at www.sugarmanlaw.com or contact us:

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