

DIMENSIONS

HOW LONG AM I LIABLE FOR?

By: Ed Dunham, Esq.

You are a construction contractor with a number of successful projects under your belt, when you find out that you are being sued over a project you completed years ago. Your reaction is "Can I still be liable for a project I finished that long ago?" The answer is going to depend on an analysis of the circumstances of your case, the Statute of Limitations, the Discovery Rule and the Statute of Repose for the project's locale.

All states have Statutes of Limitations. The Statutes of Limitations provide a deadline for filing a lawsuit. Typically the Statute of Limitations is longer for breach of contract claims than it is for tort claims. A "tort" claim is generally a claim that someone wrongfully caused someone else damage under circumstances that were not governed by a contract. A personal injury claim is a prime example. Depending on the state, other types of claims may be subject to other specific Statutes of Limitations. In other words, the deadline for a plaintiff to file claims against you is going to be different depending on the locale and the claims being asserted.

Determining that a plaintiff filed a lawsuit against you after the Statute of Limitations deadline has passed, however, is not the end of the analysis. Statute of Limitations deadlines can be extended by what is known as the Discovery Rule. In most cases, the time period set by the Statute of Limitations on your construction projects begins when you achieve Substantial Completion of your contract. Under the Discovery Rule, the Statute of Limitations does not begin to run until the plaintiff knows, or should have known, that he has a claim.

A determination that a plaintiff has filed its claim within the Statute of Limitations, as extended by the Discovery Rule, still does not complete the analysis, however.

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Most states have a Statute of Repose in addition to a Statute of Limitations. A Statute of Repose generally places a cap on any extension to the Statute of Limitations beyond which the plaintiff is barred from bringing a claim, regardless of whether it knew or should have known of its claim. Like the Statute of Limitations, it typically (but not always) runs from Substantial Completion.

An example would be as follows: Let's say you substantially completed project "Y" 11 years ago. Let's further say that the Statute of Limitations for a contract claim in the locale where project "Y" is located is 6 years and the Statute of Repose is 10 years. You are sued for breach of contract. The claim is brought more than 6 years after you achieved Substantial Completion, so it was filed beyond the deadline set by the Statute of Limitations, but the plaintiff argues that the Statute of Limitations has been extended by 7 years because it could not reasonably discover the problem until 7 years after Substantial Completion. While the reasonable discovery of the claim 7 years after substantial completion might very well extend the Statute of Limitations, it does not extend it past the 10-year cap imposed by the Statute of Repose. Accordingly, after discovering its claim, the plaintiff should have filed its lawsuit against you within the 10-year cap. Because it did not, the case against you should be dismissed.

Something else that needs to be taken into account are repairs. While a plaintiff may be out of time to bring a claim on the project itself, it may be within time to bring a claim on the repair itself, if the claim is only that the repair was not properly done.

To give you an idea of the difference the locale of your project may have on the various statutes, the chart below compares the Statutes of Limitations and Statutes of Repose for New Jersey, Pennsylvania, New York and West Virginia for contract claims (the most popular claims against contractors).

State	Statute of Limitations	Statute of Repose
NJ	6 years - N.J.S.A. 2A:14-1	10 years - N.J.S.A. 2A:14-1.1*
PA	4 years - 42 Pa. C.S.A. 5525(2) and (3)	12 years (14 years for certain personal injury or wrongful death claims) - 42 Pa. C.S.A. 5536
NY	6 years - NY C.P.L.R. § 213	No statute of repose**
WV	10 years - W.V. Code 55-2-6	10 years - W.V. Code 55-2-6a***

* New Jersey's Statute of Repose has an extra condition. In addition to arising out of a construction project, the claim must allege an unsafe condition.

** New York is one of the few states in the country that does not have a Statute of Repose.

*** The West Virginia Statute of Repose is atypical and more along the lines of a Statute of Limitations for construction claims. It may be extended by a court pursuant to the Discovery Rule.

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A MESSAGE FROM NJBA PRESIDENT

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PILOTs and tax abatements. Several proposals have been introduced that require a percentage of PILOTs to go to a municipality's school district.

A bill introduced by Senate President Sweeney that would impose prevailing wage requirements on properties receiving tax abatements/exemptions, has been released by the Senate Labor Committee despite strong opposition by NJBA. The Association is working with a coalition of groups including NAIOP, NJAA, the NJ State League of Municipalities, the Chamber of Commerce, and NJBIA to make sure this ill-advised and damaging legislation, S-1162, does not proceed through the legislative process.

Regulatory Update

NJBA remains actively involved as an advocate on the regulatory front, both on a statewide and regional basis.

The Environmental Committee is currently preparing comments on the New Jersey Department of Environmental Protection's (DEP) Freshwater Wetlands rule proposal, which is the latest rulemaking effort of the Division of Land Use Regulation. DEP has also issued the "State Water Supply Plan," which is the long-awaited, first major revision since 1996.

Upon being notified by our members that DEP is modifying its application and interpretation of its Fill Guidance that is negatively impacting brownfield redevelopment, NJBA and its trade group partners quickly urged for and discussed with senior DEP staff concerns expressed by the regulated community. NJBA subsequently drafted a position paper outlining issues from both the regulated community and DEP's perspective, as well as proposed meaningful solutions.

The Metropolitan Builders and Contractors Association and NJBA are evaluating the best option to utilize

the NAHB grant funding to counter the problematic Highlands regulatory scheme, particularly as the Highlands Council is poised to issue the draft "Monitoring Program" report for the Region.

Legal Affairs Update

NJBA's Affordable Housing Task Force continues to vigilantly track and strategize in the ongoing affordable housing litigation and settlement discussions. NJBA has participated in the Mercer County trial, which is the focal point of the affordable housing litigation. The first phase of the trial on the 2015-2025 prospective obligation with testimony by the methodology experts concluded on May 8th, while the second phase involving the 1999-2015 obligations has recently commenced. The Mercer County judge will likely issue a comprehensive opinion on the obligation numbers during the summer, which we anticipate will then be heavily relied upon by other county trial courts. Please see NJBA Land Use Counsel Tom Carroll's article in this edition of Dimensions for an in-depth examination of the affordable housing litigation.

Once again, thank you for the opportunity to serve as this great Association's President and I look forward to working on your behalf and updating you as the year progresses.

HOW TO DEVELOP A SITE WITH AN EXISTING ENVIRONMENTAL CAP

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disturb an environmental cap requires a lot of prior knowledge. LSRPs are uniquely trained to bring regulators and developers together to achieve a gold-standard of environmentally responsible development practices. By bridging the information gap between regulators and developers, LSRPs can streamline the development process and avoid unexpected costs and delays.

AFFORDABLE HOUSING CAN HELP

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in ensuring that a project can move forward.

The affordable housing numbers can be significant, and the concerns of implementation are valid. There is no one-size-fits-all solution for the challenges presented as municipalities seek to meet their affordable home requirement. It will be critical for municipalities and developers to continue to work cooperatively in order to ensure smart mixed-income redevelopment that provides the necessary economic stimulus to sustain our communities. But satisfying these affordable-housing obligations presents an opportunity for a municipality to meet many other community goals, including building a thriving downtown.

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Finally, the parties to a construction contract generally can agree in the contract to shorten the applicable Statute of Limitation. They can also generally agree, pursuant to a forbearance agreement, to toll a Statute of Limitations, which has the effect of extending the deadlines in which a party can sue.

Knowing the Statutes of Limitation and Statutes of Repose for the areas in which you are working can help you in managing risk and to have an intelligent discussion with your defense attorney if you are sued.