

Contract Clauses to Know and Love

By Robert V. Dell'Osa

Getting sued for negligence years after a project has been completed, and for many times over what the project paid, is probably at the top of the list of worst nightmares for construction professionals. Memories have faded, witnesses are often unavailable and documents have been misplaced, all making defense of such a lawsuit especially difficult. But understanding and utilizing some simple and common contract clauses should help you sleep easier.

Consider this: A designer is hired to perform services for construction of a shopping center. Design and construction work moves along nicely, and the project is completed on time. Eight years later, however, floor slabs in the stores buckle and significant cracks develop in walls, sidewalks, and parking lots throughout the shopping center as a result of subsurface earth movement that has been going on for years. The owner makes extensive repairs to virtually every structure in the shopping center, and must give substantial concessions (monetary and otherwise) to every one of its tenants. The owner then presents the design professional with a bill for millions of dollars, claiming that their work failed to sufficiently account for the possibility of such movement. When the designer declines to hand over a blank check, the owner files a lawsuit.

The designer is now faced with a multi-million dollar lawsuit, years after the work was done, for a project which paid a grand total of \$75,000. As trial approaches, the dispute settles, with the designer paying an amount many times greater than the fee earned on the project.

These lawsuits happen everyday, but two contract clauses have proven useful in limiting exposure. One such contract provision specifies the date on which any applicable statute of limitations begins to run. A statute of limitations sets the amount of time a person has to initiate a legal claim, which will be lost if it is not filed before the statute of limitations expires.

Different limitations periods apply to different types of claims, and statutes of limitations vary from state to state. Typical statutes of limitations are two years for professional negligence claims and four years for breach of contract claims. While the date on which the statute begins to run also varies from state to state and

type of claim to type of claim, a typical starting point for a claim against a design professional is the date on which the damaged person knows, or in the exercise of reasonable diligence should have known, of the design professional's allegedly negligent or improper work. In the example above, the owner is likely to argue that it did not know, and reasonably could not have known, of the design professional's purported negligence until the cracks and other problems actually appeared.



To limit the chances of being faced with a claim after years have passed, the contract for design services could include a provision to the effect that "any applicable statute of limitations shall begin to run not later than the date of final completion." Courts generally will enforce a provision like this, particularly if it is in a commercial contract

between reasonably sophisticated business people. If the design contract had such a provision in the scenario above, the owner's claim against the design professional would be barred, regardless of the owner's argument that the problems were latent and could not reasonably have been discovered earlier.

Another valuable contract provision is a limitation of liability clause. On the typical project, the design professional's fee is miniscule in comparison to the damages claim that could be asserted in a lawsuit alleging design negligence. Since the design professional usually does not have an equity interest in the project and is not a guarantor of a perfect result, he should not have to put his entire business at risk on each project. A limitation of liability clause reduces this risk.

In the shopping center scenario described above, the design contract could have included a clause providing that the design professional's liability "is limited to, and shall not under any circumstances exceed, the amount of the fee paid to the design professional for work on the project."

Such a clause would have limited the design professional's liability to \$75,000. Under the law of most states, such a limitation of liability will be enforced so long as it is reasonable under the circumstances and not so drastic as to remove the design professional's incentive to perform with due care.

Whatever the scenario, taking steps at the contract negotiation stage to specify the date on which the statute of limitations begins to run, and to limit the design professional's potential liability can go a long way toward avoiding what might otherwise become a financial calamity. ■

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