Understanding the Statute of Limitations Can Help Mitigate Legal Risks

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As the economy continues to improve, construction projects once again dot the landscape and contractors and craft professionals find themselves as busy as ever.

But before jumping into that next project, one should have a basic understanding of the statute of limitations and the importance of recordkeeping and prompt payment. Statutes of limitations are statutes enacted in each state that govern when an action is "time-barred." The statute of limitation varies by state and by the type of action that is being brought. For example, a slip and fall accident may be four years from the date of the accident, while a claim for medical malpractice may be two years. In determining what the applicable statute of limitation is in a particular state, it is best to consult with a lawyer because the statute of limitation may be more complicated than initially thought.

For instance, in Florida, the statute of limitation is found in Section 95.11(3)(c), *Fla. Stat.*, which can be divided into three sections. The first section holds that an action founded on the design, planning or construction of an improvement to real property must be commenced within four years of the most recent of the following events:

- the date of actual possession by the owner;
- the date of the issuance of the certificate of occupancy;
- the date of abandonment of construction if not completed; or
- the date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor and his or her employer.

Therefore, if a contractor installed a roof on a high-rise building and the certificate of occupancy was issued Feb. 1, 2010, but the owner did not take possession of the building until June 1, 2010, the statute of limitations would begin June 1, 2010, as that is the later of the two events (with the statute of limitations expiring June 1, 2014).

The second part of Section 95.11(3)(c), *Fla. Stat.,* widens the four-year limitation period for latent defects (i.e. defects that are not readily identifiable). Under this section, the four-year period commences when "the defect is discovered or should have been discovered with the exercise of due diligence." Contractors often find themselves trapped in this section, as many owners will claim that the defect did not manifest itself until years after the work was performed. Additionally, the third section of the Florida Statute of limitations provides a "time cap" on parts one and two, and holds that an action must be commenced within 10 years from the most recent of the following events:

- the date of actual possession by the owner;
- the date of the issuance of the certificate of occupancy;
- the date of abandonment of construction if not completed; or
- the date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor and his or her employer.

For example, in a recent Florida case, a condominium association filed suit against a subcontractor for construction defects. The subcontractor moved to dismiss the claim on the basis that it fell outside the 10-year statutory period, arguing that the period began when final application

for payment was made. However, the association argued that the 10-year period did not begin until payment was actually made and therefore the contract was completed. On appeal, the court agreed with the association and reversed the lower court's dismissal, finding that "completion of contract" meant "completion of performance by both sides of the contract, not merely performance by the contractor."

What can construction professionals do to mitigate risks in the event of a future lawsuit? The easiest step is to review company file retention policies. While many companies maintain their records for five or seven years, it is a best practice to keep those records for at least 10 years. Documentation is generally more persuasive than an individual's testimony years after a project was completed.

For example, an email from a roofer written at the time of the project is considered more credible than his testimony years later. Furthermore, as is common in the construction industry, many of the onsite workers move away or simply can't be found. When this happens, the job of the attorney and client becomes more difficult, as it is hard to prove exactly what the original scope of work was and what work was actually performed. By maintaining files for 10 years, contractors and tradesmen will have the appropriate documentation to help them defend against any lawsuits that may arise. Additionally, with the advancement of technology, many companies can reduce their overhead storage cost by storing their files electronically. Not only does this save storage costs in the long term, but it enables the client to maintain the records for many more years.

Finally, in order to protect and shorten the period of time one's work may be subject to litigation, contractors and tradesmen should require payment to be made within a specified time. As noted above, Section 95.11(3)(c), *Fla. Stat.* requires that all actions be commenced within 10 years from the later of four events, one being the "completion…of the contract." While a contractor may think that a construction contract is "completed" once the work is performed, Florida courts have held that completion is when both the work and payment have been made. If payment is not made promptly, the contractor or tradesman simply opens the door to additional time that he or she may be sued under the statute of limitations. Therefore, while "time is money," it is also additional exposure.

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