
# RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

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1. **Issue:** Applicable statute of limitations for fraudulent misrepresentation case. *Gillespie Community Unit School District No. 7 v. Wight & Company,* Supreme Court of Illinois (2014).

   **Summary:** The school district retained Wight to investigate a potential school site immediately adjacent to an existing school, and later to provide design and construction-phase professional services for the new school. Because the proposed site was in a coal mining area, Wight retained a subconsultant, Hanson Engineers, to assess the potential for coal mine subsidence. Hanson first submitted a letter to Wight, containing information about subsidence events in the immediate area, and warnings about the "relatively high risk of subsidence" in the area, and the inability to avoid subsidence risks in the area. The letter was accompanied by a few attachments, including a map of nearby historical subsidence events.

   Hanson followed up on the letter by sending Wight a formal report that stated that based on geological survey maps "the site is undermined," and that "it will not be possible to completely avoid similar risks" anywhere in the area. The report did not contain all of the same information, attachments, or warnings as the letter.

   Wight forwarded the report to the school district, but did not forward the letter or attachments. After some consideration the school district decided to proceed with design and construction.

   Construction was completed and the school opened in Fall 2002. In March 2009, an underlying coal mine collapsed and the school was badly damaged and promptly condemned as a total loss by the state. The school district sued Wight.

   Most of the school district's claims were controlled by a four-year statute of limitations for construction-related claims. Pursuant to a contract clause, the four-year limitations period commenced to run at the time of substantial completion. Thus most of the claims were dismissed as untimely. However, the four-year statute stated that its provisions "shall not apply to fraudulent misrepresentation or to fraudulent concealment…." The school district contended that Wight's failure to forward the letter and attachments was fraudulent misrepresentation.

   A second "catch-all" Illinois statute of limitations sets a five-year time limit for all civil actions that are not addressed in a more specific statute. The fraudulent misrepresentation claim would be untimely under the five-year requirement. The school district argued that this catch-all statute did not apply, and ultimately presented its position to the state supreme court.

   **Decision:** The school district urged the Illinois Supreme Court to interpret the four-year construction statute of limitations as saying that no limitation period whatsoever applied to fraudulent misrepresentation claims—that such claims could be brought at any time. The high court responded that the school district was wrongly reading exceptions and conditions into the statute that did not exist, and were in conflict with the express legislative intent of the statute. All of the school

district's claims against Wight were untimely, either under the four-year or the five-year statute.

**Comment:** The decision's wording suggests a degree of exasperation with the school district's strained arguments. There is no precedent in civil law for a claim to not be subject to any statute of limitations, though it is true that certain governmental claimants are exempted from compliance (that did not seem to be a possibility for the school district). The school district argued that certain criminal actions may be brought at any time, and that fraudulent misrepresentation should be treated the same way. The court was not willing to interpret the legislative categorization of claims and limitation periods in that fashion.

The school district was plainly desperate to advance the claim, perhaps because there was no property insurance covering the destruction of the school.

Wight could have avoided some of the troubles in this case by being more thorough about making all information from Hanson Engineers available to its client. Wight may have assumed that the formal report covered the same ground as the earlier letter, but in fact there were subtle differences.

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2. **Issue:** Right of a subsequent purchaser of a house to pursue economic loss claim against the builder of the house. *Sullivan v. Pulte Home Corporation,* Supreme Court of Arizona (2013).

   **Summary:** Pulte, a contractor, constructed a house and sold it to its initial purchaser, who later sold it to the Sullivan family. A few years later the Sullivans detected problems with the hillside house's retaining wall; an engineering firm confirmed that the wall was dangerously defective and would need to be repaired. The Sullivans sued Pulte under various negligence theories, and under implied warranty.

   The economic loss doctrine prohibits certain tort actions that seek monetary damages and do not involve an injury to a person or damage to property. The courts in most states have adopted the doctrine, but subject to varying rules. One of the prime reasons for the doctrine is to encourage parties to address their commercial expectations through contracts and contractual remedies. Thus there is a question whether the doctrine applies if the two parties (plaintiff and defendant) never had a contractual relationship, as was the case for Pulte and the Sullivans.

   **Decision:** The Arizona Supreme Court took a narrow view of the economic loss doctrine, holding that it does not apply if the two parties had not been bound by a contract. The parties did not negotiate terms that would govern risks or remedies. The court supported the argument that if the purpose of the economic loss rule is to

limit parties to the benefit of their (contractual) bargain, then it should only apply when there is a bargain to which it might be applied.

**Comment:** Most construction projects involve a set of interrelated contracts. In the construction project context, it may make sense to apply the economic loss doctrine broadly, to all claims between and among the various participating parties, even those that do not have a direct contract between them. The Pulte case does not involve a project context, but its holding appears to unambiguously take a narrow position that would apply in a project context.

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3. **Issue:** Differing site condition claim; contractor's knowledge of condition from prior work at the site. *Miron Construction Company, Inc., v. City of Oshkosh,* Court of Appeals of Wisconsin (2013).

   **Summary:** Miron Construction was the successful bidder on a $6 million water treatment plant project. Based on quoted excerpts, the construction contract included a version of EJCDC C-700, Standard General Conditions, and an EJCDC-based Agreement form; in addition, it appears that the City had used EJCDC-based instructions to bidders.

   During construction, Miron encountered a subsurface concrete retaining wall that thwarted the installation of a new supply pipe. Miron was forced to demolish the wall, and contended that because of the site disruption resulting from the demolition, the ground stabilization plan that Miron had intended to implement had to be abandoned in favor of a more costly plan.

   The subsurface retaining wall had not been shown in the contract construction drawings. However, it was shown in as-built drawings from a project ten years earlier. The City had made these as-built drawings available to bidders; moreover, it was Miron itself that had performed the previous work and produced the as-built drawings.

   Miron sought additional compensation of $340,000 under the differing site conditions clause. The City successfully moved for summary judgment, and Miron appealed.

   **Decision:** The Wisconsin Court of Appeals confirmed the lower court's ruling against the contractor. The court cited the duty to examine available information, Miron's representations in the contract that it had carefully studied any data and reference items identified in the contract (see C-520, Para. 8.01.A), and the express provision that a DSC claim will fail if the Contractor knew of the condition in question (currently C-700, Para. 5.04.D.2.a).

Miron suggested that although it perhaps was on notice of the wall as of ten years prior, it should be entitled to assume that the wall had since disintegrated, or had been demolished or removed, because the wall was not shown on the new project drawings. The court held that as a legal matter the contractor was required to make the opposite assumption: "Conditions once proved [known] to exist are presumed to continue in the absence of evidence to the contrary."

**Comment:** In general this case was a validation of the EJCDC standard provisions—they were interpreted and enforced as we intend them to be.

The issue would have been more difficult if the retaining wall had not been included in the as-builts made available to the contractors. The contract representations state that "Contractor has considered the information known to Contractor itself…" (C-520, Para. 8.01.E). How long should institutional knowledge be considered to be "known" to an organization? A contractor could argue that the current bidding/project team should not be held accountable for knowledge held by a project team of a decade or more earlier. But isn't it fair to expect internal investigation of past work at the site, even if there has been a complete turnover of contractor's personnel?

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4. **Issue:** Enforceability of clause that contractually shortens the statute of limitations for a latent defect claim. *Brisbane Lodging, L.P. v. Webcor Builders, Inc.* Court of Appeals of California, First District (2013).

   **Summary:** Design-build contract for an eight-story hotel. Approximately eight years after substantial completion, the owner discovered that a project subcontractor had used ABS pipe material for sewer line from the kitchen area, rather than the cast iron pipe required by the plumbing code, and that leaks were occurring. A lawsuit commenced. The applicable statute of limitations was four years.

   In the absence of an agreement to the contrary, the four-year limitation period would be subject to an exception called the discovery rule. Under the discovery rule, the statutory limitation period will not commence to run until the owner discovers or should have discovered the injury (defect) and its cause. The justification for the discovery rule is that without it, a claimant's rights may be extinguished before it even knows it has incurred an injury (defect). However, from the perspective of contractors and design professionals, the discovery rule can also prolong exposure to liability for an unreasonably long time after the project is over.

   On the hotel project, the contract included a clause whose basic purpose was to eliminate the discovery rule exception. Such clauses were standard under the 1997

AIA A201. They provided that for any claims arising from events prior to substantial completion (a design error, or a construction defect), the applicable statute of limitations would commence to run, and any cause of action would be deemed to have accrued, no later than the date of substantial completion. Thus the four-year limitations period would start promptly after the project was completed, rather than starting when the owner discovered a defect.

The question posed to the appellate court was whether the contract clause negating the discovery rule was enforceable in California. No prior published case in California had ruled on that issue.

**Decision:** The Court of Appeals held that the clause is enforceable. It noted that all courts in other states that had examined the AIA clause had held it to be enforceable, at least when freely entered into by parties represented by counsel on commercial projects. The court concluded that:

> Sophisticated parties should be allowed to strike their own bargains and knowingly and voluntarily contract in a manner in which certain risks are eliminated and, concomitantly, rights are relinquished.

In addition to the bedrock principle of freedom of contract, the court observed that by eliminating the discovery rule, the parties establish a "date certain" for bringing claims, thus avoiding litigation over when the owner discovered or should have discovered the defect—such litigation can be prolonged and costly. The court cited a reluctance to interfere with contract terms on public policy grounds, but in any event held that no public right was harmed and the clause was consistent with other cases in which contracting parties had been allowed to shorten limitations periods.

**Comment:** EJCDC professional services agreements contain clauses similar to the AIA clause; C-700 does not. As of 2007, AIA replaced the A201 clause with a "no more than" 10-year contractual limitation period, similar to a statute of repose.

The case includes a quote from a law review article lauding the role of the AIA standard documents in the construction industry.

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5. **Issue:** Effect of architect's concealment of cause of defect on the statute of limitations. *J.S. Riemer, Inc. v. Village of Orland Hills,* Appellate Court of Illinois, First District (2013).

   **Summary:** The architect's design of a community center called for removal of 6 feet of unsuitable peat soil. The contractor did not excavate to that depth, but the architect agreed that the excavation was adequate and authorized the deviation.

The hole was then backfilled. After the project was completed the building's concrete floor, which was floating on the soils and backfill below, began to settle. The Village delayed paying the contractor, which eventually sued the Village for full payment. During the lawsuit, some five years after completion, the Village named the architect as a third-party defendant, based on the architect's approval of the deviation from the design requirements for excavation.

The applicable statute of limitations was four years. A standard AIA clause indicated that by mutual agreement the statute of limitations would start running no later than the date of substantial completion. This clause effectively eliminated any discovery rule from being applied to extend the statute of limitations. The architect moved for summary judgment based on the expiration of the four-year limitations period.

The Village countered that the architect had concealed and misrepresented the cause of the building defect, which resulted in the Village not asserting its rights until the facts finally became known; therefore the architect should not be allowed to be dismissed from the case. The architect had repeatedly told the Village that the problem was the contractor's failure to compact the backfill, and the contractor's related failure to conduct sub-grade soil compaction testing during construction.

The trial court ruled in favor of the architect, and the Village appealed.

**Decision:** The appellate court agreed that a contract clause can eliminate the discovery rule from a statute of limitations. Thus, the applicable statute of limitations was four years from substantial completion. However, the court ruled that equitable estoppel based on concealment could affect the viability of a late claim. The critical question was whether the Village had sufficient information to pursue a claim within the four-year period. The appellate court held that it did.

The Village knew that the architect had authorized the deviation from the excavation design. The Village knew that the floor problem was a direct result of poor underlying soils (as opposed to the backfill), based on an expert report two years after completion. The court held that the Village should have been able to put these facts together to reach the conclusion that the architect (via its approval of the deviation) might be partly to blame for the problem. As to the architect's repeated attempts to shift blame to the contractor, the court held that the Village could not turn a "blind eye" to the facts.

The Village also contended that the architect should be liable because of a fiduciary relationship to the Village—a position of trust, confidence, influence, and superiority. The court held that the two parties were operating at arm's length pursuant to a formal contractual agreement. This would not suggest a fiduciary relationship.

**Comment:** EJCDC's professional services agreements contain clauses that start the relevant limitation period at no later than substantial completion; this case expands the list of cases that have supported the enforceability of such clauses.

The situation described here between architect and owner is very common. The design professional often has a close working relationship with the owner, and may have earned the owner's respect and approval over a period of years. Nonetheless, when a serious problem occurs the prudent owner will need to be objective and explore the possibility that the design or other A/E services are at least partly involved—and will do so well before the right to take action lapses.

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6. **Issue:** Performance and payment bond surety's rights against the defaulting contractor and indemnitors. *Argonaut Insurance Company v. Wolverine Construction, Inc.,* United States District Court for the District of Maryland (2013).

   **Summary:** Argonaut, as surety, issued performance and payment bonds to Wolverine Construction for a church construction project. As is typical in surety bonding, Argonaut required Wolverine and various related entities to enter into a general indemnity agreement, agreeing to reimburse the surety for any losses incurred by the surety under the bonds.

   As the project wound down, the church declared Wolverine in default for failing to complete the work and failing to pay subs and suppliers, and made a claim on the performance bond. The unpaid subs and suppliers made claims against the payment bond. The surety investigated and made payments to subs and suppliers totaling $758,000. This amount was not contested; the reported facts suggest that Wolverine had billed the church for most or all of the amount, and had received payment but failed to pay the lower-tier parties (overall, payments to Wolverine had exceeded the amounts paid to the subs and suppliers by over $1.1 million).

   The surety negotiated a final payment of $237,000 from the church; this amount was less than the nominal contract balance because of deductions for late completion (liquidated damages). The surety sought reimbursement from Wolverine and the related indemnitors for its loss ($758 – 237=$521,000), plus $150,000 in attorneys' fees and investigative expenses.

   Wolverine raised two defenses. The first was that the bonding company had not adequately pursued potential claims for additional compensation from the church, and had settled for too small a final payment. The second defense was that the legal and investigative charges were "totally unjustified" in light of Wolverine's cooperative conduct during the default and subsequent proceedings.

   **Decision:** The federal court decided in the surety's favor on a summary judgment motion. The basic standard is that a general indemnity in favor of the surety will be enforced absent fraud or lack of good faith. A surety must merely act in a

"reasonable manner" in handling or paying claims. Here, Wolverine raised no facts that would support the notion of any impropriety on the surety's part. Wolverine filed an affidavit with the court asserting that the appropriate net amount for close-out was $200,000, but the court deemed this "unsupported speculation" that was not sufficient to defeat a summary judgment motion.

As to the fees and charges, the surety provided detailed billing information, and the rates charged by attorneys and investigators were not excessive. Wolverine failed to make any specific challenge of the billings, relying instead on a "blanket objection" that the totals were extraordinary and unnecessary; the court ruled this was not sufficient to reduce the award.

**Comment:** The typical indemnity agreement and case law in most jurisdictions support the surety's ability to recover its losses. In most cases the good faith standard is relatively easy to meet, and the courts generally will not second-guess the surety's settlement of claims. This case was noteworthy because the grant of summary judgment stemmed a trend in Maryland, where a 2004 case had required sureties to proceed to a trial to establish the reasonableness of their losses.

As we have observed previously, surety bonds are based on a business model that differs significantly from that of most insurance policies. Through use of sturdy indemnity agreements with their contractor customers, sureties typically have a reasonable expectation that they will ultimately recover any amounts paid out to claimants. In essence the bond is merely an intermediate source of liquid collateral. By contrast, insurance companies rarely have any recourse against their insureds, and only occasionally are able to obtain any recovery from any third party. Many of their losses must be absorbed, which is made tolerable by spreading the risk through large numbers of premium-paying customers, and income from investment of premiums.

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7. **Issue:** Effect of statute of repose on project owner's claim against general contractor. *Washington State Major League Baseball Stadium Public Facilities District v. Huber, Hunt, & Nichols—Kiewit Construction Company,* Supreme Court of Washington (2013).

   **Summary:** The public facilities district for the construction of Safeco Field in Seattle ("PFD") entered into a construction contract with a joint venture, Hunt Kiewit. Substantial Completion occurred on July 1, 1999. In 2005 the PFD detected alleged defects in fireproofing of exposed structural beams and columns, and in August 2006 the PFD filed a breach of contract lawsuit against Hunt Kiewit based on those alleged defects. The claim appeared to be subject to a six-year contract statute of limitations, and the Washington construction statute of repose. In a prior case, the courts determined that there was a "for the benefit of the state" exemption

(exception) to the statute of limitations defense. The 2013 case concerns the application of the Washington statute of repose.

The statute of repose awkwardly states that "any cause of action which has not **accrued** within six years after such substantial completion of construction…shall be barred." More typical wording would be that any action that is not **commenced** will be barred.

The contract contained a clause stating that as to acts or omissions occurring before substantial completion, "any alleged cause of action shall be deemed to have accrued …not later than such date of substantial completion." This clause was intended to eliminate discovery rule exceptions to statutes of limitations by starting the clock running no later than substantial completion, instead of at the date of eventual discovery of the problem.

Hunt Kiewit argued that the statute of repose's six-year period began to run at substantial completion in 1999, making the PFD's 2006 lawsuit untimely. The statute of repose issue eventually made its way to the state supreme court.

**Decision:** Putting the statutory wording and the contract clause together, the The Washington Supreme Court reasoned that:

> A cause of action that accrues no later than substantial completion will not be barred by the statute of repose because it will always accrue before [or at] substantial completion. Therefore, because of the parties' unambiguous agreement that accrual occurs no later than substantial completion, the statute of repose *cannot* have run on PFD's claims arising out of the construction contract.

Hunt Kiewit had raised various arguments pointing out that such an interpretation ran contrary to the intent of the statute of repose. The court gave these arguments short shrift, asserting that Hunt Kiewit and the PFD had agreed to the contractual accrual provision and must live with its enforcement.

**Comment:** Under the court's logic, as expressed in the holding quoted above, no lawsuit, even one brought a thousand years after the stadium was completed, could ever be deemed untimely. As the court saw it, only claims that accrue more than six years after substantial completion will be barred, and by contractual agreement all claims accrued no later than substantial completion, thus within the six years.

The fundamental problem here appears to be a disconnect between the use of the term "accrual" in the statute of repose—it should have been interpreted as "commencement of the lawsuit"—and in the contract, where it meant "commencement of the claim period." The decision does not acknowledge or grapple with what seems to be an obvious divergence of intent. As a result, we have

the rare case in which the owner is advocating for the application of a contractual clause that is meant to shorten the time in which to bring a claim.

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8. **Issue:** Determining when "substantial completion" occurred for purposes of ten-year statute of repose based on substantial completion, and two-year statute of limitations. *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.,* Court of Appeals of Oregon (2012).

   **Summary:** Just over ten years after the first religious services were held in a new church, the church filed a lawsuit against the general contractor and some of the subs, based on allegations of defective construction. The sole claim was negligence, presumably because the statute of limitation pertaining to contract claims had clearly expired. The negligence statute of limitations was two years, but apparently did not start to run until discovery of the defects.

   The general contractor pointed out that its construction contract with the church had included a clause that stipulated that all statutes of limitations would begin to run from "the date of substantial completion" of the facility. If enforceable, the applicable negligence statute of limitations would have expired some eight years before the claim against the general contractor was filed in court.

   The evidence before the court indicated the date of the first religious services, but also showed that various construction activities continued after that date. The evidence did not show if the architect had formally established a date of substantial completion.

   The subcontractors did not claim the benefit of any contract clause that imposed a starting point on the running of the statute of limitations. They argued that the Oregon statute of repose cut off any possible claims ten years after substantial completion, and that more than ten years had passed since the first religious service.

   The trial court agreed with the general contractor and the subs, and granted summary judgment in their favor. The church appealed.

   **Decision:** The Oregon Court of Appeals reversed the trial court decision, holding in favor of the church. With respect to the general contractor, the appellate court held that the accrual clause was expressly pegged to "the date of substantial completion," which was the product of the process of applying to the architect for a certificate of substantial completion. The contractual definition of substantial completion ("sufficiently complete so Owner can occupy and utilize the Work for its

intended use") established the criterion for the architect's determination, but in the court's view could not serve as a substitute for the architect's formal "date of substantial completion."

As to the subcontractors, the statute of repose referred to a ten-year period after substantial completion. However, the appellate court examined the definition of substantial completion in the statute. It provided that substantial completion was either the date when the owner accepts the construction in writing as being suitable for use or occupancy, or in absence of a written document that actual date of acceptance by the owner. The court then delved into the legislative history of the statute of repose to conclude that the intent in the absence of a written substantial completion date was when did the owner accept the Work and take responsibility from the contractor, which would "invariably" be a later point, "at which little or no work remains to be done by the contractor." The evidence before the court did not establish when that point actually occurred, so the court refused to give the subcontractors the benefit of the statute of repose.

**Comments:** It appears that the church recognized the possibility that the ten-year statute of repose would apply, but somehow missed the deadline by two days.

It is not clear why the general contractor did not pursue the statute of repose defense, or why none of the parties established a clear record as to any formal date of substantial completion. It also seems that it might have been possible for the general contractor to show through affidavits when final payment and other relevant acts occurred, to show when the last possible "date of substantial completion" could have occurred, even if the architect never actually established such a date.

Similar to the contract clause in this case, EJCDC E-500 provides at Para. 6.13.E that statutory limitations periods commence no later than "the date of Substantial Completion." (EJCDC C-700 does not include a similar clause.) Under EJCDC the "date of substantial completion" is not defined as rigidly as in the case, though there is a similar certificate of substantial completion process. The Oregon court appeared to be very motivated to reverse the lower court decision; perhaps no arguments or clauses would have survived appellate scrutiny.