

California Appellate Court Rules A Contractual Agreement Between An Owner And A Builder To Shorten The Statute Of Limitations Is Enforceable, Even If It Results In A Claim Being Time-Barred Before It Is Discovered

In a recent California Appellate Court decision, *Brisbane Lodging, L.P. v. Webcor Builders, L.P.*, 216 Cal. App. 4th 1249 (2013), the Court upheld a clause in a construction contract that shortened the statute of limitations and abrogated California's delayed discovery rule as to latent defects. This decision was a case of first impression in the state and is bound to have significant implications for contractors, owners and developers in drafting their construction contracts.

The Facts in Brisbane

Brisbane Lodging, L.P. and Webcor Builders, Inc. entered into a contract for the design and construction of a large hotel. The AIA contract¹ used by the parties modified California's applicable statute of limitations with respect to claims between Brisbane and Webcor. Article 13.7.1.1 provided that the time in which to bring any causes of action began to run at substantial completion: "any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion." The hotel was substantially completed on July 31, 2000.

In 2005, a break in an underground sewer line caused wastewater to flow under the hotel. Webcor admitted that the problem was caused by a latent plumbing defect and made some remedial repairs. When the problem reoccurred, Brisbane discovered that the plumbing contractor had constructed the sewer line with ABS pipe material rather than cast iron pipe, contrary to the requirements of the Uniform Plumbing Code.

¹ AIA A201- General Conditions – 1997 edition, Article 13.7.1.1

JOSEPH S. SESTAY
TODD N. BRESSLER
ALEX R. BAGHDASSARIAN

Please Contact

Joseph S. Sestay
jsestay@pecklaw.com
310.228.1075

Todd N. Bressler
tbressler@pecklaw.com
310.228.1075

Alex R. Baghdassarian
abaghdassarian@pecklaw.com
310.228.1075

In response to Brisbane's complaint for breach of contract, negligence, and breach of implied and express warranties, Webcor moved for summary judgment on the grounds that the suit was barred by the contractual limitations period provided for in Article 13.7.1.1 of the parties' construction contract. The trial court agreed with Webcor and granted summary judgment. Brisbane appealed.

Appellate Arguments

Although Brisbane conceded that Article 13.7.1.1 waived the statutory ten year limitations period as to latent defects (whether discovered or not) under Code of Civil Procedure 337.15, it argued that the four and three year statutes under Code of Civil Procedure 337.1 and 338 respectively were applicable and, in addition, asserted that the "delayed discovery rule" provided that these statutes did not begin to run, at the earliest, until the first manifestation or discovery of the defects by the owner in 2005. The delayed discovery rule, in the construction context, is a long standing legal doctrine recognized by California courts (as well as other jurisdictions) which holds that statutes of limitation for latent construction defects do not begin to run until the defects are or should have been discovered. Thus, the earliest that the four and three year statutes could have commenced running was in 2005, which would make Brisbane's claims timely.

Brisbane then argued that to hold that Article 13.7.1.1 abrogated the delayed discovery rule was against public policy, noting that courts only approve contractual agreements shortening statutes of limitations with great caution, if the shortened time to file suit is deemed to be "reasonable." Brisbane asserted that it would be unreasonable to abrogate the delayed discovery rule in this instance, since to do so would essentially bar Brisbane's claims before they were (or could have been) discovered.

Brisbane relied on the case of *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415 in which the court declined to enforce a contractual provision shortening the limitations period and waiving the delayed discovery rule. *Moreno* involved claims by purchasers of a home against a home inspector who failed to detect asbestos and other contaminants in the home. The inspection contract provided for a shortened one-year limitations period, commencing on the date of inspection. The *Moreno* court refused to enforce this provision, finding that it was unreasonable as a matter of law and void as against public policy.

Webcor countered that the delayed discovery rule did not apply, that all of Brisbane's claims were time-barred by the unambiguous language of Article 13.7.1.1 even though the latent defects were not discovered until after the shortened limitations time period had run, and that the strong public policy favoring freedom of contract supported upholding Article 13.7.1.1.

The Appellate Court's Reasoning

The Appellate Court agreed with Webcor and affirmed the trial court's granting of summary judgment, dismissing all of Brisbane's claims.

The Court acknowledged that this was a case of first impression in that no prior California Appellate Court had upheld a contractual provision abrogating the delayed discovery rule in a latent construction defect dispute. The Court, however, noted that courts in other states – including Kentucky, Maryland, Massachusetts, New York and Pennsylvania – had upheld similar or identical language, and that Article 13.7.1.1 was a standard provision in the industry-wide accepted AIA contract form. The Court relied on “longstanding established public policy in California which respects and promotes freedom of private parties to contract.” While acknowledging that the Moreno decision struck down a similar contractual clause, the Court reasoned that, unlike the parties in Moreno, both Brisbane and Webcor were “sophisticated parties of equal bargaining strength where there is no claim of misrepresentation or undue influence.” As such, the Court found that Article 13.7.1.1 was not unreasonable in that it allowed the parties to “structure risk-shifting as they see fit without judicial intervention.”

Implications of Brisbane

Under certain conditions, California courts may be willing to enforce contractual provisions in construction contracts that substantially alter the parties’ statutory rights, even if those modifications result in a party being barred from presenting an otherwise valid claim.

However, it is important to note that the current (2007) version of the AIA A201 General Conditions² no longer contains the language that was enforced by the Court in Brisbane, and simply defers to “applicable law but in any case not more than 10 years after the date of Substantial Completion.” In other words, the current AIA A201 language leaves California’s statutory scheme intact, including the delayed discovery rule.

For parties to construction contracts who wish to modify California’s statutory scheme with respect to the time limit within which to bring construction related claims, Brisbane stands for the proposition that the courts will likely support such modifications, but only if (a) entered into freely as a result of arms-length negotiations (b) between informed parties of arguably equal bargaining power. In order for such clauses to be enforceable, it is important for owners and contractors to communicate with their counsel, who can assist them in making informed decisions that are consistent with the holding in Brisbane. And, from a public policy standpoint, the court’s holding in Brisbane appears to be consistent with California’s statutory scheme regarding claims for latent defects, which strives for certainty and limitations on liability in barring the assertion of any such claim more than 10 years after substantial completion – no matter when they are discovered.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

² AIA A201- General Conditions – 2007 edition, Article 13.7.1.1