

*Houston Construction News*  
**Legal Column**

***“Limitations – When Can You Sue or Be Sued?”***

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Any party has a specified time limitation for bringing a lawsuit. This time period is governed by the statutes of limitations and repose which are used as defenses to a plaintiff's claims. Construction contracts typically include a date which begins the period either party can bring suit. This date is very often the date of substantial completion, as evidenced by a signed certificate of substantial completion. Otherwise, it may be concluded by a court that limitations begins to run on the date the complaining party knew or reasonably should have known that a defect exists. If not contractually agreed upon, a cause of action generally accrues when a wrongful act causes damages, regardless of when the plaintiff learns of the injury. A party need only be aware of enough facts to apprise the damaged party of its right to seek a judicial remedy. There are, however, exceptions to this rule.

The “discovery rule” is a judicially-conceived exception to the statute of limitations used to determine when a cause of action accrues, where the plaintiff is unable to know of its injury at the time it occurs. When applicable, the discovery rule tolls the running of the statute of limitations until the plaintiff discovers, or through the exercise of reasonable care and diligence, should have discovered, the nature of any alleged construction defects or damages. The discovery rule imposes a duty on the plaintiff to exercise reasonable diligence to discover acts of negligence or omissions by another party allegedly causing the plaintiff harm.

Fraudulent concealment also stops a defendant from using limitations as an affirmative defense. Because fraudulent concealment of a defect by a party is an affirmative defense to limitations, the burden will be on the plaintiff to raise the issue. To show that a plaintiff is entitled to the estoppel effect of fraudulent concealment under Texas law, the plaintiff must show that (1) the defendant had actual knowledge of the wrongful conduct; (2) a duty existed to disclose the wrongful conduct; and (3) there was a fixed purpose to intentionally conceal the wrong. Unlike the discovery rule, which determines when the limitations period begins to run, the doctrine of fraudulent concealment suspends the running of the limitations period after it has begun, because the defendant concealed facts necessary for the plaintiff to know that a claim existed. However, the estoppel effect of fraudulent concealment is not permanent. Knowledge of facts that would make a reasonable person inquire and discover a concealed cause of action is the equivalent to having knowledge of the cause of action for limitations purposes.

The statutes of repose provide that no action may be brought against architects, engineers, surveyors or persons constructing, repairing or making improvements to real property more than ten (10) years after substantial completion of the construction or improvement. The statutes of repose begin to run when the improvement is substantially completed, not when the damage or injury occurs or is discovered. Simply put, a statute of repose fixes “. . .an outer limit beyond which no action can be maintained.”

The nature of the ten (10) year period of repose under Texas Civil Practice & Remedies Code §16.009 is absolute; to extend the period of repose beyond ten (10) years for any purpose other than the specific express exceptions found within this statute would be contrary to our legislature’s intent. Under a statute of limitations, which usually cuts off rights of an action after they accrue; a statute of repose may cut off rights of action before they accrue. The statutes of

repose are applicable to persons furnishing repairs or construction and protects against claims brought for defects in design and construction that may not become manifest for many years. An exception, however, is that if there was a conscious intent to willfully and knowingly conduct or engage in efforts to fraudulently conceal defects in construction from the owner, the owner can potentially still bring a cause of action after ten (10) years.

The statutes of limitations vary for the specific type of cause of action. For example, a cause of action for negligently constructing a project may be two years. A cause of action for fraud will generally be governed by the four (4) year statute of limitations and breach of contract actions are governed by one of two four (4) year statutes of limitations. Then there are the statutes of repose. The end result is that causes of action for breach of contract, breach of warranty, negligence, fraud and others can be brought after memories have failed and documents have been lost, misplaced or destroyed. These time periods are important to know and understand whether you are pursuing damages as a plaintiff or defending against a claim for faulty construction.

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