

New Illinois Ruling Enforces Cause of Action Accrual Provisions and Holds that Express Indemnity Claims In A Construction Contract Are Subject to a 10 Year Statute of Limitations

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The Appellate Court for First District of Illinois recently issued a decision with two important holdings for construction lawyers. First, the court held that a third-party express indemnity claim seeking to impose downstream liability for alleged construction defects was subject to the 10-year statute of limitations for breach of written contract claims, and not the four year statute of limitations that applies to construction defect claims. *15th Place Condominium Association v. South Campus Development Team LLC*, 2014 IL App (1st) 122292. Second, the court confirmed that cause of action accrual provisions contained in construction contracts are enforceable under Illinois law, which can dramatically reduce the applicable statute of limitations for implied indemnity and/or breach of contract actions by, for example, requiring the statute of limitations to commence at substantial completion.

The facts in *15th Place Condominium Association* present a typical construction defect claim. South Campus Development Team (the “Developer”) contracted with Linn-Mathes, Inc. (the “General Contractor”) to build two condominium towers (the “Project”), which resulted in the creation of the 15th Place Condominium Association (the “Association”). The two condominium towers were substantially completed in 2003 and 2004, and the Developer turnover to the Association occurred in 2005. The Association discovered alleged latent design and construction defects in the buildings, and filed suit against the Developer in September 2008. The lawsuit alleged claims for breach of the implied warranty of fitness and habitability, breach of fiduciary duty and negligence. In March 2009, the Developer and General Contractor entered into a tolling agreement, and in June 2011, the Developer filed its third-party complaint against the General Contractor based on implied indemnity, breach of the construction contract and breach of the express indemnity provisions contained in the construction contract.

Importantly, the construction contract between the Developer and General Contractor included a cause of action accrual provision under which all causes of action against the General Contractor accrued when substantial completion of the project was achieved. The trial court enforced this contract provision and held that the third-party breach of contract and express indemnity claims were both barred by the Illinois construction statute of limitations. That statute requires claims based on

“an act or omission ... in the design, planning, supervision, observation or management of construction, or of an improvement to real property” to be filed “within four years from the time the person bringing an action, or his privity, knew or should reasonably have known of such act or omission.” 735 ILCS 5/13-214(a). The trial court also dismissed the third-party implied indemnity claim based on 735 ILCS 5/13-204(b). That statute requires indemnity claims to be filed within two years from being served with process in the underlying action or two years from the date the party knew or reasonably should have known of an act or omission giving rise to the action for indemnity, whichever period expires later. According to the trial court, because all causes of action accrued at substantial completion, all of the third-party claims were time barred.

The First District of the Illinois Appellate Court agreed with the trial court with respect to the breach of contract and implied indemnity claims. The Appellate Court held that the breach of contract cause of action commenced at substantial completion in October of 2004, and the claim was therefore time barred in October of 2008 (before the Developer and General Contractor entered into their tolling agreement). Similarly, the two year statute of limitations period for the implied indemnity claim accrued at substantial completion, and expired two years later.

But the Appellate Court did not agree with the trial court regarding the express indemnity claim. The court held that the 10-year statute of limitations for claims based on breach of a written contract applied to this claim. 735 ILCS 5/13-206. This part of the decision relies heavily on the Illinois Supreme Court’s holding in *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill.2d 461 (2008), which found that a written agreement to indemnify was not one of the activities protected under the four year construction statute of limitations (e.g., design, planning, supervision, observation or management of construction), and was instead subject to the 10-year statute of limitations applicable to written contracts. 229 Ill. 2d at 469-70 (“Here, the liability at issue emanates not from construction-related activity but, rather, from the breach of a contractual obligation to indemnify.”)

Based on the *Bowman* analysis, the Appellate Court determined that the nature of the express indemnity claim at issue was a contractual obligation. According to the Appellate Court: “[A]ny potential liability arises out of [the General Contractor’s] failure to indemnify [the Developer] rather than any acts or omissions relating to construction-related activity.” The Appellate Court therefore held that the express indemnity claim was subject to a 10-year statute of limitations, and was not time barred because it was filed less than ten years after substantial completion. In reaching this conclusion, the Appellate Court extended *Bowman* for the first time to claims that are based on express indemnity provisions contained in a construction contract between the litigating parties.

There are a couple of lessons here for contracting parties and their attorneys. First, cause of action accrual provisions are enforceable in Illinois, and that they can severely limit the ability of a developer to pursue breach of contract or implied indemnity claims against its general contractor in the event the developer is later sued for construction defect claims. Second, a claim based on express indemnity, however, can be brought for up to ten years after the cause of action accrues even if the indemnity obligation is contained in a construction contract.

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