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Striking Out Before You Get to the Plate: Know Your State's Statutes of Limitations and Statutes of Repose.

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Imagine a baseball player being called out on strikes before he even steps into the batter's box. Such is the outcome for a claim that is not asserted in time.

All states have deadlines regarding when a party can assert a claim against someone else in court or in arbitration. Unfortunately, these deadlines differ from state to state and from claim type to claim type. Nevertheless, construction projects are universally impacted by these deadlines. In fact, the construction industry is perhaps most vulnerable to these impacts, as construction sites seem to be incubators for just about every type of claim. It is critical to identify the type of claim you have (e.g. breach of contract vs. fraud) and the time permitted by applicable state law to formally assert that claim in a legal proceeding. Failure to do so can quickly result in the loss of your claim before you ever have the chance to formally pursue it.

Statutes of Limitations and Statutes of Repose

Statutes of limitations are laws (i.e. statutes) that set the maximum time after an event within which legal proceedings may be initiated. Different states have different rules regarding when the statute of limitations start to run and there is often a high degree of variation regarding when they actually begin and end, but the final result is always the same: if you fail to bring a claim before the statute of limitations expires, you will likely have your claim dismissed. So do not run the risk of waiting too long to assert your claim.

Statutes of repose are laws that set an outermost date within which a claim must be brought. Although similar to statues of limitations, statutes of repose are not the same. Their main purpose is to shield individuals from long term liability by providing a hard and fast cut off point for claims that might otherwise not be barred by a potentially looser statute of limitations. An example of the interplay between statutes of limitations and statutes of repose is outlined below.

Know Your State Law

Statutes of limitations and repose can vary wildly from state to state. For example, in Georgia, you can bring a breach of contract claim up to 6 years after the date of the breach. But in Delaware, you only have 3 years to bring a breach of contract claim, unless the claim relates to a contract for the sale of goods, in which case you have 4 years. Thus, there can be a fairly broad range of end dates depending on what state's law applies to your claim.

Additionally, some states will even allow parties to contractually change the statute of limitations for a claim. For example, Delaware law allows parties to contractually extend the deadline for breach of contract claim up to 20 years for contracts worth over $100,000. The ability to privately alter statutes of limitations can provide beneficial flexibility for parties, but it can also further complicate an already complex field of law. It is also important to note that you may not always be able to contractually extend the statute of limitations, particularly when contracting with a public entity.

Overall, the state law governing your claim will be a major factor in determining the expiration deadline for your claim. However, given the lack of uniformity from state to state, things can become very complicated very quickly, especially if you are working on projects located across numerous states. So know the relevant state law that controls your contract or project!

Know Your Claim

Claim expiration dates can also vary from claim type to claim type. For example, in Georgia you have 4 years to bring a claim for negligent design, as opposed to the previously mentioned 6 year deadline for a breach of contract claim. Although it may seem simple on its face, determining the type of claim you have can be difficult. Is defective constructive work the basis for a breach of contract claim? Or a negligence (tort) claim? Or can it be both? In many states, defective construction work can form the basis of a claim for both breach of contract and for negligence, although generally these claims would be mutually exclusive. Regardless, the deadline to bring a negligence claim is likely going to be different than the deadline to bring a breach of contract claim, and the available remedies for each claim type will be different. And all of these factors will impact the amount of money you can recover.
It is important to identify the type of claim you have so that you do not inadvertently lose out by waiting too long to assert it. Again, the deadlines to bring different types of claims are going to vary state by state. So know your claim!

Know When the Clock Actually Starts to Run

To determine when the statute of limitations for your claim expires, you need to know when the clock starts to run. In most states, the starting point is generally referred to as the "date of accrual." Thus, it is important to identify the point in time when your cause of action begins to accrue.

In Georgia, the general rule is that a cause of action begins to accrue on the date when the claimant could have first maintained his or her claim to a successful result. This often means that you must have incurred damages before your claim beings to accrue. But what if it takes you a long time to discover that you have suffered any harm as a result of someone else's breach and/or negligence?

Some state's employ what is known as the "discovery rule," which states that your cause of action only starts to accrue when you first knew, or should have known, that you suffered some harm. This is a fairly forgiving rule, as it can sometimes take years from the date of a harmful act before anyone realizes that there has been some harm incurred.

However, other states have determined that the clock starts to run from the date on which the harmful act occurred, regardless of whether or not you knew that you were harmed. This can be a less forgiving rule, but is sometimes easier to apply because it does not require any inquiry into what you knew and when you knew it.

Differing state rules regarding the running of the clock are already complicated enough, but statues of repose often present an added wrinkle to the analysis. As outline above, statutes of repose provide an outermost time in which a claim can be brought. Thus, a statute of repose can bar a claim even if the statute of limitations has not yet run out. For example, someone in a discovery rule state could learn that he or she was harmed by a negligent act that occurred 10 years ago. So the clock for the statute of limitations would begin to run at the time the individual learned of this harm. However, a statue of repose could set the outermost limit on negligence claims at 8 years after the date on which the negligent act occurred. Thus, because the act occurred over 8 years ago, the individual's claim would be barred by the statute of repose, despite the fact that the statute of limitations had not even begun to run.

It is no easy task to determine when the clock starts to run on your claim. But it is nonetheless critical to pinpoint this crucial moment in time, or else you run the very real risk of losing your claim before it is fully pursued.

Closing Thoughts

There is no one rule that can be universally applied to determine when a claim will expire. The simple fact is that states have more or less developed their own unique and varying tests to determine when the clock starts to run. As such, it is vitally important to familiarize yourself with the state rules governing your project, or else you will run the risk of striking out before you ever come to the plate.

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Use ConsensusDocs 703 to Balance the Playing Field for Purchases of Noncommodity Goods

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Purchases of noncommodity goods, especially those specified as single source, often places the general contractor in the position of dealing with a much larger company that has limited experience with the day-to-day challenges of building a project. It is a challenge to get a manufacturer to commit to supporting the schedule of a single construction project, particularly a large, complex project. Contractors faced with this challenge should strive to use ConsensusDocs 703, Standard Purchase Agreement for Noncommodity Goods by a Contractor, for all noncommodity purchases. CD 703 is extremely well balanced in protecting the interests of both the buyer and seller. No reasonable manufacturer should object to using CD 703, but some will. If that happens, the contractor should still attempt to negotiate use of terms from CD 703 that tie the manufacturer to the project schedule.

Manufacturers who supply noncommodity goods are concerned about maximizing the efficiency of their manufacturing process and meeting the often competing interests of their various customers. Persuading a manufacturer to support a specific project's schedule is one of a contractor's major challenges. The following articles from CD 703 can be particularly useful to maintaining a project's schedule—Article 8. Submittals, Article 9. Schedule, and Article 13. Inspection.

Article 8. Submittals contains the following crucial requirement: "The Seller shall prepare and deliver it submittals to the Buyer . . . . in a manner consistent with the Progress Schedule and in such time and sequence so as not to delay the Buyer or Owner in the performance of the Contract." Timely submittals are the key to timely deliveries. If the contractor can require the seller to produce timely submittals, the schedule battle is halfway won. In addition to requiring schedule support, Article 8 also provides for instances where, for whatever reason, the contractor's contract with the owner does not contain submittal requirements. In such cases the seller is required to submit in a timely fashion any submittals as may be reasonably required by the Buyer, Owner, or Design Professional. While useful, this language is not as strong as that quoted at the beginning of this paragraph. Contractors who plan to use CD 703 or to incorporate language from CD 703 are well advised to persuade the Owner to include submittal requirements, including schedule requirements, in the prime contract.

Article 9. Schedule is short and to the point. First it specifies that time is of the essence. This is a stock phrase and easily overlooked, but it provides the basis for a breach of contract claim if the seller fails to perform in a timely manner. Next, the clause allows the seller to provide the contractor with any scheduling information proposed by seller. Assuming that the prime contract schedule specifies submittal and equipment delivery dates, the import of the provision is not entirely clear, but it is plainly intended to give the seller input into the coordinated progress schedule that is to be prepared in consultation with the seller. Most importantly, once the coordinated progress schedule is furnished to the seller, the seller is obligated to furnish and deliver materials and equipment in strict accordance with the progress schedule. Sellers who want the flexibility to maximize the efficiency of their manufacturing process will balk at such a rigid scheduling clause. It is well worth fighting for.

Article 13. Inspection does not at first glance appear directly related to timely performance, but it is crucial if the noncommodity goods are being specially manufactured for a particular project. Article 13 covers two separate types of inspection. First Article 13 deals with inspection of goods after delivery to the project. The seller is obligated to provide detailed delivery tickets to aid the contractor in its inspection. This provision is extremely important if the goods to be delivered include numerous separate parts. If the delivery is expected to be sufficiently complex, the contractor, if it can, should consider requiring the seller to provide a knowledgeable representative to assist with the delivery inspection. Following inspection, the contractor is obligated to promptly report any damage or shortfalls and has the right to refuse acceptance of any materials and equipment not in accordance with the specifications and drawings. Materials or equipment not accepted can be returned to the seller at the seller's expense, held by the contractor for an equitable reduction in price, or repaired at the seller's expense. These are useful remedies, but none of them will do the contractor any good in terms of maintaining a tight project schedule.

The second part of Article 13 provides the contractor with ability to avoid surprises when materials and equipment are delivered to the project site. The contractor, the owner, and the owner's representative are all given the right to inspect all materials and equipment during any stage of manufacture or production by the seller or the seller's supplier. Exercising this right of inspection may be both time consuming and expensive. Properly exercised, however, it should eliminate schedule disruption caused by unexpected delivery of nonconforming goods.

The foregoing discussion of three clauses directly related to timely delivery is not meant in any way to minimize the worth of the remaining parts of CD 703. As stated at the outset, this is an extremely well balanced contract that will serve the needs of both seller and buyer. Large equipment manufacturers who are used to using their size to impose contract terms might be surprised to find that CD 703, through its focus on fairness, will ultimately protect their interests better than a one-sided contract that may become difficult to enforce.

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Upcoming Webinar: Lean Contracting Practices without an IPD Contract and the New ConsensusDocs Lean Addendum

Friday, September 28th | 1:00PM - 2:00 PM EDT

Lean design and construction methods have emerged as one of the most significant developments to improve value, efficiency, and relationships in the design and construction industry. Design and construction contracts provide both a potential obstacle and opportunity to incorporating lean tools and developing a lean culture for your next construction project. Learn how you can use the new ConsensusDocs 305 Lean Addendum to facilitate a lean project without an integrated project delivery (IPD) contract. Getting your contracts right to encourage lean is difficult. Now there is an industry contract standard form to help.

Learning Objectives

Gain an overview of the new ConsensusDocs 305 Lean Addendum
Learn lean project fundamentals that you can incorporate in your project's contracts
Understand how to implement lean practices and lean culture when an Owner's constraints preclude use of an IPD contract.

Click here to register!

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Not My Payroll, Not My Problem? Think Again.

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Most general contractors in the private sector would never expect that they could be liable for the payroll of one of their subcontractors. (In fact, this is one of the many reasons general contractors use subcontractors instead of hiring tons of laborers directly). As a GC, this assumption and logic may be sound— "My subcontractor's employees are not my employees so how could I be held liable if my subcontractor doesn't make payroll? It doesn't make sense."

California and Maryland disagree. Under new laws, general contractors in these states may be liable for employee salary and benefits for individuals who are not their employees, and even employees of companies they did not contract with.

What are these laws and why should I care?

In October 2017, California passed Assembly Bill 1701 ("AB 1701") which, in short, makes general contractors directly liable for their subcontractors' unpaid wages and benefit payments, and interest owed on those amounts. This is for subcontractors of any tier. AB 1701 went into effect January 1, 2018. Specifically, AB 1701 provides that a general contractor "shall assume, and is liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the [GC] for the wage claimant's performance of labor included in the subject of the contract between the [GC] and the owner." AB 1701 includes an important restriction that a general contractor cannot "evade, or commit any act that negates, the requirements of this" law. However, AB 1701 does allow the general contractor to contractually shift liability to its direct subcontractors for these unpaid wages, likely in the form of an indemnification agreement.

Not to be outdone, Maryland passed Senate Bill 853 ("SB 853"), which goes into effect October 1, 2018. Unlike its Californian counterpart, SB 853 makes a general contractor "joint and severally liable for a violation" of the unpaid wages law, which allows an employee to recover "an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs." (Emphasis added). However, SB 853 also provides an immediate obligation by the offending subcontractor to indemnify the general contractor "for any wages, damages, interest, penalties, or attorney's fees owed as a result of the subcontractor's violation." An important exception to this indemnification, however, is if the wage violation arises because of the general contractor's failure to make prompt payment to the subcontractor.

If you are a general contractor in California or Maryland, the reason you should care about these laws is self-explanatory. But, general contractors outside these states should also pay close attention to these laws and specifically to the ways in which they may (or may not) be able to protect themselves from these additional liabilities, as it is also unlikely that California and Maryland will remain the only jurisdictions to enact such legislation forever. Moreover, implementing the protective actions discussed in this article may help any contractor to evaluate and strengthen their own risk management regimes.

OK, these laws impose potentially large liability—what can I do?

There are three primary ways in which a GC can take actions to help protect themselves from these liabilities and/or mitigate the potential costs: (1) robust indemnification provisions; (2)

more vigorous screening of subcontractors and lower-tier subcontractors and suppliers; and, (3) requiring appropriate payment bonds.

Indemnification

While the Maryland law does create a non-contractual indemnification obligation on subcontractors, Maryland GCs should not rely on this alone. Though the California law does not have its own indemnification obligations, it expressly permits reasonable liability allocation through contract. Accordingly, general contractors should revisit the indemnification provisions in their subcontracts to ensure they are covered.

This may not be a simple task, however. Many contractors already require indemnification for claims being made by a subcontractor's employees or someone under a subcontractor's control, but that may not be broad enough to address the potential liabilities for unpaid wages here. Importantly, both California and Maryland laws impose liability on the general contractor regardless of how many tiers down the subcontractor may be. In other words, a sub-sub-sub-sub-subcontractor's unpaid laborer could file suit directly against the general contractor for his or her unpaid wages. This is a lot of potential risk to try to manage in one contract's indemnification clause, especially since indemnification clauses are likely one of the areas of most focus by subcontractors in the negotiation phase.

All of that said, there are potential contractual solutions. A GC and its direct subcontractor may be able to reach agreement on an indemnification provision that covers that direct subcontractor's wage violations while requiring similar indemnification language to flow down through the various lower tiers. While not a blanket indemnification in the first subcontract, it may create a solid net of indemnification throughout the various subcontracting levels to hopefully afford the GC adequate protection. Of course, indemnification provisions are only as strong as the bank account of the indemnitor. Which is why indemnification provisions alone are likely not the full solution.

Subcontractor Screening

Outside the confines of the public sector, private contractors can evaluate a lot of criteria about their subcontractors and suppliers. Given the potential risk of contracting with someone who cannot make their payroll, GCs should consider ways they may be able to evaluate the finances and creditworthiness of their subcontractors. While many general contractors, particularly larger GCs, already employ this practice, it is important to consider expanding the process to go below the first and second tier of subcontractors given the breadth of liability under these new laws.

While this is a prudent and necessary reaction by general contractors to these new laws, it is likely to create an unfortunate adverse impact to the subcontractor community. Specifically, smaller subcontractors are going to be less likely to land larger contracts for fear by the GCs of being held liable for the sub's wages. Alternatively, a smaller GC may now be in greater risk by accepting broader liability for its subcontractors, especially when the GC does not have the resources to undertake these necessary protective steps. As a result, bid prices may increase and it may be harder for smaller GCs to break into the marketplace.

The Maryland Department of Legislative Services acknowledged this impact to small businesses in their analysis of the SB 853. However, Maryland's legislative analysis dismissed these concerns by pointing to the indemnification provisions within the bill. This is short-sighted and, as discussed above, should not be where general contractors rest their hopes. Smaller contractors are less likely to have the capital in reserve to pay the penalties under these laws upfront and pay attorneys on top of that chasing down indemnity. Also, even when a general contractor is able to receive an order in its favor providing for indemnification from its sub, that order is meaningless if the subcontractor cannot pay the GC's damages. This is why third parties, such as sureties, will likely be necessary to protect the GC's interests.

Payment Bonds

Relying on payment bonds as a backstop in the event of unforeseen liability is nothing new in construction. Requiring a subcontractor to post a bond provides two layers of protection for GCs. First, the bond itself, underwritten by an appropriately-rated surety, ensures that sufficient resources will be available to cover these kinds of losses. Second, a surety typically will not write bonds for subcontractors unless it has convinced itself of the financial health of the subcontractor. While not as good as performing an independent screening, a GC can feel more confident if a reputable bonding company has given their subcontractor the green light.

Of course, the devil is in the details and it is important that the bond will provide the necessary coverage for these expanding liabilities. ConsensusDocs© 707 – Subcontract Payment Bond form is a good start and is a vehicle relied on by many contractors and sureties. But, while these bonds will provide protection for many claims, they are typically limited to claims made by first and second tier subcontractors. This is where the breadth of these new laws gets messy. By imposing liability on contractors all the way down the various subcontracting tiers, a general contractor cannot necessarily rely on a payment bond that only covers the first tier or two. Conversely, if general contractors start requiring bonds that cover every tier, bonding premiums will likely go up tremendously as sureties try to cover these risks.

Is there actually a solution?

Yes and no. There is no one solution to completely cover the potential liabilities created by these laws. Instead, general contractors must employ several of these actions as part of a cohesive risk management plan. And, higher level subcontractors need to be careful about what indemnification agreements they are signing onto. As part of any risk management plan, contractors should consult with their attorneys—sooner rather than later—about best steps they can take to get ahead of these risks.

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Careful! Your Attorney-Client Privilege May Not Travel Well

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In the United States, the attorney-client privilege exists to "encourage clients to make full disclosures to their attorneys." American companies are considered "clients," whose confidential communications with their attorneys, including both inside and outside counsel, are privileged. The privilege protects not only communications related to litigation, but applies more broadly to communications conveying any legal advice — for example, on such matters as potential workforce reductions, tax consequences, internal investigations and patent applications. It also protects communications made to and from attorneys' "agents," such as clerks and paralegals.

Internationally, most jurisdictions recognize the attorney-client privilege in some form, but the privilege protects a much narrower range of communications. Many jurisdictions, including the European Union, do not apply the privilege to communications between a company and its inside counsel, reasoning that inside attorneys are not sufficiently "independent" from their clients to entitle them to privilege protection.

Under European law, even communications between a company and its outside counsel may be vulnerable to discovery if the communication serves a purpose other than the defense of a company. For example, in July 2018, the German Constitutional Court ruled[i] that German prosecutors may use materials seized in a raid of the Munich office of international law firm Jones Day, which had been assisting Volkswagen in conducting an internal investigation.

Similarly, in late 2017, the English High Court ruled[ii] that the UK Serious Fraud Office could obtain the Eurasian Natural Resources Corporation's outside counsel's notes on witness interviews it had conducted in connection with an internal investigation. The corporation's appeal of the High Court's decision is currently pending.

The differences in protection across jurisdictions means that multinational and transnational companies — particularly those that employ legal professionals in multiple jurisdictions — must take special precautions to protect sensitive communications.

Companies should first seek to understand which jurisdiction's law is likely to apply to which of their communications. An American court is likely to apply a "touch base" test, in which the court applies the law of the country that "has the most compelling or predominant interest in whether the communications should remain confidential." Typically, that is either "the place where the allegedly privileged relationship was entered into" or "the place in which that relationship was centered at the time the communication was sent."

Courts have found that communications "touch base" with the United States and are protected by its privilege laws when they relate to legal proceedings in the United States or reflect advice on American law, even when they involve foreign attorneys. Communications that relate to foreign legal proceedings or foreign law are generally found to "touch base" with the foreign jurisdiction.

To increase the chance that American privilege law will apply to a company's communications, the company should (1) direct the communications (or at least copy) to an American attorney; (2) limit distribution outside the legal department; (3) keep communications relating to American legal proceedings separate from those relating to foreign legal proceedings; and (4) clearly label the separate categories. In light of the recent German and UK rulings, companies should exercise caution in retaining records of internal legal advice in jurisdictions where the advice may not be deemed privileged. Inside counsel may be best advised to pick up the phone instead.

If American privilege law applies, the privilege protects communications between attorneys and their clients. Communications of foreign legal professionals whose jurisdictions do not license them as attorneys, or whose roles are not functionally equivalent to attorneys, are not protected unless they are acting as "agents" for licensed attorneys.

For example, in 2015, a federal judge in the Southern District of New York forced Bank of China Ltd. to produce documents[iii] related to an internal investigation conducted by its inside counsel and chief compliance officer, both of whom were based in China and neither of whom were licensed attorneys. In an earlier ruling, the judge explained[iv] that China does not require inside counsel to be members of the bar or hold a license that allows them to appear in court. The judge ruled that inside counsel are thus not "attorneys" and the attorney-client privilege does not apply to their communications.

In a 2010 case, however, the same court ruled[v] that communications made by inside counsel for Gucci's Italian affiliate were privileged to the extent they were made under the supervision of an attorney who was a member of the bar in New York, Italy and Belgium. For this reason, companies should consider structuring their legal departments with a bar-admitted attorney at the head. To the extent that a foreign legal professional is assisting or collaborating with American counsel, his or her communication should clearly indicate that fact.

When American law does not apply, attorney-client privilege law in the business context varies significantly. Spain specifically recognizes the attorney-client privilege for inside counsel. Romania and Denmark do not distinguish between inside and outside counsel. Portugal, Sweden and the Netherlands recognize a limited privilege for inside counsel. Italy, Austria, Belgium, Finland and France do not recognize privilege for inside counsel.

Some courts, including Chinese courts and the European Court of Justice, have implied that they do not recognize privilege for *any* counsel outside of their respective jurisdictions. Companies are thus well-advised to limit international access to electronic records of American counsel's legal advice.

The variety in privilege law raises serious concerns for multinational and transnational companies. Companies that are forced to disclose documents in one jurisdiction may waive privilege protections in another. Sending communications in jurisdictions with limited privilege protection may cause a court to doubt whether a company intended the communication to be kept confidential.

Companies can protect themselves before the threat of legal action arises by making privilege protection the subject of contract negotiations. Companies can seek agreement from counterparties to any contract that, in the event of conflict between the parties, in-house counsel communications will not be subject to discovery. Or they can state that, in the event of any dispute, persons acting in the capacity of counsel will be accorded the highest form of privilege otherwise available to any party in the transaction.

Companies can approach the issue more indirectly by including language in contracts that specifies choice of law, referencing jurisdictions that offer the appropriate privilege protection to meet the company's needs. They can also consider specifying the use of alternate dispute resolution, as ADR neutrals may have more flexibility than courts in applying privilege protection.

Once the threat of legal action arises, companies are well-advised to hire experienced outside counsel as early as possible to maximize the chances that American privilege law will apply to communications made in connection with that threat.

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[i] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 6, 2018, Az. 2 BvR 1405/17, Az. 2 BvR 1287/17, and Az. 2 BvR 1583/17 (Ger.).
[ii] *SFO v. Eurasian Nat'l Res. Corp.*, [2017] EWHC 1017 (QB).
[iii] *Wultz v. Bank of China*, No. 11 Civ. 1266 (SAS) (GWG) (S.D.N.Y. Jan. 21, 2015).
[iv] *Wultz v. Bank of China*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013).
[v] *Gucci Am. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. 2010).