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## **Knowing when a claim accrues under a construction contract could make or break recovery - by Matthew Minero**

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The accrual date for claims on a construction project is a critical occurrence on projects which is too overlooked. An owner of a project should take care to know exactly when its claims against its contractor accrue and, just as importantly, when its contractor's claims against the owner accrue. Equally as important for an owner to know is the amount of time (i.e. the statute of limitations, statutory and contractual notice of claim deadlines) that the owner and its contractor have from the date of accrual to assert claims against the other. The failure to comply with statutory or contractual deadlines is in most cases fatal to a claim no matter how meritorious it may be.

An owner's claims against a contractor, generally, accrue on the date of the completion of the work being performed. What constitutes the "completion of work" can differ dramatically depending on whether the matter is addressed in the construction agreement between the parties. New York courts generally interpret "completion of work" to mean "actual physical completion of the work". When "actual physical completion of the work" actually occurs can be difficult to determine because owners may require contractors to perform what owners believe to be corrective and/or punch list work which contractors believe is additional work. To avoid confusion and inevitably litigation over when work is deemed completed, owners often use their agreements with contractors to define when the work has reached "substantial completion" and then use that date as the date of the accrual of its claim. For example, the standard definition used in AIA contracts is that "substantial completion" of a project is reached when "the Owner can occupy or utilize the Work for its intended use." In other agreements, "substantial completion" is reached when the project's architect issues a Certificate of Substantial Completion or simply declares the project to be substantially completed. Other agreements provide that "substantial completion" is reached when a certain percentage of the work to be performed at the project is completed (i.e. 95%).

The definition of "substantial completion" ultimately chosen is not as important as ensuring that the term is defined in a way that makes it clear to both the owner and contractor that the standard has been reached and that all claims running in favor of owner have begun to accrue.

Contractor's claims, on the other hand, often have different accrual dates depending on the type of claim. For example, claims for unpaid work generally accrue as of the first date on which the damages (i.e. the failure to pay) become ascertainable. Courts generally recognize damages to be ascertainable once the work at a project is substantially completed or when a detailed invoice of the work performed is submitted by the contractor to the project owner. Courts also generally recognize that delay damage claims accrue when the contract is substantially completed, when the contract is terminated or when work ceases, whichever occurs first. As with the accrual of its own claims, an owner should ensure that the dates on which a contractor's claims accrue are explicitly identified in the agreement between the parties.

Importantly, while courts will enforce definitions and time limitations set forth in contracts, they are often hesitant to strip parties of rights when there is any ambiguity in a provision of an agreement. Thus, owners should ensure that all definitions and time limitations set forth in their agreements with contractors are explicit and well defined, and leave no room for alternate interpretations. Also, owners should include a "no interpretation against drafter" provision to bar the use the application of

the general rule of contract interpretation which provides that all ambiguities in agreement are interpreted against the drafter thereof.

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