

Recent Case Limits Protection of Statute of Repose

Despite typical 4 year statute of limitations periods for contract or warranty claims, courts have ruled that concealed construction

deficiencies, or latent design defects operate to extend the statute of limitations until the defect was “discovered”. Such claims can be serious. For example, suits brought on behalf of multi-family buildings or homeowners’ associations against developers, designers, and contractors can allege significant damages resulting from conditions which are claimed to have been concealed or dormant for many years.

Because of the passage of time between the design and construction activity and the alleged damage, it can be difficult to defend these claims. Relevant records can be lost or misplaced, personnel involved in the construction may no longer be available, and the passage of time can result in memory loss of potentially key facts.

Developers and contractors understandably complain about legal claims commenced many years after completion of their projects.

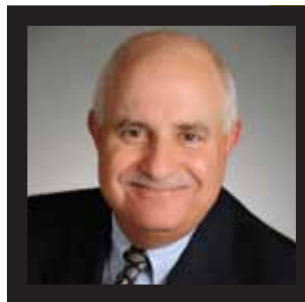
Statutes of Repose to the Rescue

In recognition of such difficulties, many states have passed statutes of repose, which bar actions for design or construction deficiencies, whether based in contract or negligence, if the claim is asserted beyond a defined time period after completion of the construction work. The Pennsylvania statute of repose period is 12 years; in New Jersey it is 10 years and it is 6 years in Delaware. As applied, these laws absolutely prohibit claims for defective construction or design after the applicable period, even if the underlying condition was undiscoverable because of a latent or concealed condition.

However, a very recent NJ case limits the protection of the statute of repose available there. In *State of NJ v Perini Corp et al*, the New Jersey appellate division (in 2012) reversed a trial judge’s holding that the statute of repose barred a claim by the State of New Jersey against multiple contractors for damages and costs related to a defective underground centralized hot water system installed in a state prison in the mid 1990s.

The appellate court determined that the statute of repose did not protect the contractors because the 10 year repose period began to run from the date on which the entire prison project had been completed, not from the date on which the allegedly defective hot water system had been completed. This was so because the court determined that the centralized hot water system was an integrated component of the entire prison development, not a separate component. Under this theory, the repose period ran from the date on which the entire prison was substantially complete, not an earlier date on which the hot water system had become operational.

Notwithstanding the holding in the *Perini* case, statutes of repose can be a powerful defense to claims for bodily injury or property damage based on defective design and construction years after a project is completed. Developers, contractors, and design professionals can document the substantial completion dates of their projects with certificates of occupancy, evidence of the timing of use of the improvement, and other indicia of completion or acceptance of the project. This evidence may be extremely beneficial to a statute of repose defense years later if an arguably untimely claim is commenced. When faced with a stale claim for bodily injury or damage to property alleged to arise from deficient construction or design, look to the applicable statute of repose for relief.



Andrew B. Cohn

Andrew B. Cohn is a principal in the Construction Law and Business & Commercial Litigation groups. His practice focuses on construction claims and the litigation and arbitration of construction disputes. Mr. Cohn’s practice also includes the negotiation and drafting of construction contracts and other construction-related agreements. You can reach Mr. Cohn at 610.941.2549 or by email to acohn@kaplaw.com.

KS News

We are proud to announce that Kaplin Stewart has been ranked in US News and Best Lawyers 2013® in their National and Philadelphia rankings as a Best Law Firm in Land Use & Zoning Law, Construction Law, Real Estate Law and Litigation – Land Use & Zoning.

☛ **William J. Levant**, a principal in the Business & Commercial Litigation group, will be a presenter of “Judgment Enforcement in Pennsylvania,” a continuing education program for Lorman Education Services. The seminar will be held in Philadelphia, Pennsylvania on December 6, 2012. Mr. Levant’s presentation topics are: Judgment Debtor Remedies, Judgment Liens, Execution Generally, Ethics in Collection, Real Estate Executions and Bankruptcy Overview.

☛ **Joshua C. Quinter**, a principal in the Construction Law group, presented a seminar on October 2, 2012 to the Mid Atlantic Division of the Metal Building Contractors and Erectors Association. Mr. Quinter discussed the legal issues facing those in the metal building industry, including legal strategies to collect money owed, building a strong foundation with strong contract clauses and OSHA’s growing role on jobsites.

☛ **Lisa LaPenna**, Litigation paralegal, continues to push her pedals for charity. Lisa rode the City to Shore Bike Ride for MS again this year, riding a total of 160 miles in two days. In addition to the money Lisa raises for the bike ride, she raises money for MS from candy sales in our office. We applaud Lisa’s dedication to her charitable endeavors. Not to be outdone, principal **Robert Korn** also rode the MS City to Shore Bike Ride this year, making it his 23rd year. Way to go Bob!

KUDOS...

☛ On October 17, 2012, the Kaplin Stewart team of **Andrew Cohn**, **Pamela Tobin** and **Eric Rosenfeld**, participated in the Montgomery County Literacy Network’s 18th Annual Corporate Spelling Bee. The funds raised by this event help the Literacy Network put adult learners in touch with literacy providers, recruit literacy volunteers, and award scholarships to eligible adult students in Montgomery County. Although the Kaplin Stewart team did not win the Spelling Bee, they made a good run for the title. They have vowed to study for next year’s event in order to redeem themselves. As usual, Kaplin Stewart cheerleaders were there to boost our team’s confidence.



A HUGE Win for Our Client

In November, 2012, our litigation attorneys Barbara Anisko and Pamela Tobin obtained a \$420,000 settlement for a residential developer whose development project was delayed because of the wrongful actions of Township public officials, the Township Engineer and the Township Code Enforcement Officer.

On behalf of the developer of a 34 lot residential development in Schuylkill Township, this firm sued each of the five members of the Township Board of Supervisors, the Township Engineer and the Township Code Enforcement Officer, in their individual capacities, alleging that they were personally liable for the damages the developer sustained as a result of their tortious actions and the resultant delay which disrupted the completion of the development.

Although the Court of Common Pleas

initially dismissed the case on the basis that defendants, as public officials, were immune from personal liability under the Pennsylvania Political Subdivision and Tort Claims Act (“Act”), which decision the Commonwealth Court affirmed, the Pennsylvania Supreme Court reversed and ordered the case reinstated. The



“The Supreme Court ruled that the actions as alleged in the Complaint rose to the level of willful misconduct.”

Barbara Anisko is a principal in the Commercial Litigation and Land Use, Zoning & Development groups. She can be reached at 610.941.2457 or by email to banisko@kaplaw.com.

Supreme Court ruled that the actions as alleged in the Complaint rose to the level of willful misconduct. Under the Act, officials who commit willful misconduct cannot hide behind the shield of immunity. After reinstatement, the parties engaged in discovery and thereafter agreed to mediate the case, resulting in the settlement.

Meet Our Litigation Professionals

This month, Kaplin Stewart shines the spotlight on Sandhya M. Feltes, a partner in the Commercial Litigation and Construction Law groups. Sandy was born in India and moved to the United States when she was five. Sandy grew up in the Philadelphia area where she attended North Penn High School. After years in the Philadelphia suburbs, Sandy escaped for a short period of time to attend college at George Washington University in Washington, D.C. The bustle of Washington, D.C. allowed Sandy to meet Presidents, Congressmen, Senators, many presidential candidates and the heads of federal agencies. Once, Sandy (literally) ran into the Speaker of the House which turned into a lengthy conversation on the steps of the Capitol and a job offer.

As exciting as Washington, D.C. proved to be, the unique charm of the Philadelphia area drew Sandy back. She attended Villanova University Law School and then worked at Margolis Edelstein and at Buchanan Ingersoll before joining Kaplin Stewart.

Sandy hails from a long line of lawyers and judges in her extended family. Although

Sandy toyed with becoming a marine biologist, zoologist and the head of a multinational corporation as a child, Sandy's family proclaimed her a lawyer-to-be early on when she challenged every decision with alternate positions and detailed arguments.



Sandhya M. Feltes

Sandy's practice over the last twenty-two years has been focused on financial services litigation, construction litigation and commercial litigation. She assists banks in lender liability, regulatory and creditor's rights issues, which is particularly interesting in the current and ever-changing financial climate. Sandy also represents surety companies and contractors in construction disputes, bond claims and project default

and completion.

Sandy was bitten by the travel bug when she was a child. She has since spread her love for travel to her husband Arthur and her two children, Jordan and Jenna. Over the years, they have traveled to Europe, Asia, Central America, the Caribbean and throughout the United States. She often serves as an amateur travel agent for family and friends, helping them plan great trips around the world. The next big trip is always on the horizon.

Do You Know About... Forgiveness of Debt Income

DO YOU KNOW THAT, depending on several factors, there could be tax consequences resulting from a foreclosure, a deed-in-lieu of foreclosure or a short sale (in which a lender agrees to decrease the amount owed in order to facilitate a sale of property). The tax results depend on whether the loan is a recourse loan (in which the borrower is personally liable for the debt) or a non-recourse loan (in which

the borrower is not personally liable for the debt). Subject to certain exceptions, if the debt is a recourse loan, the borrower may be deemed to have received taxable income in the amount of debt that is forgiven by the lender (otherwise known as cancellation of debt income) and may be subject to capital gains taxation. If the debt is a nonrecourse loan, there is no taxable income from the cancellation of the debt, but the owner may still be subject to capital gains taxation. It is important to evaluate these potential tax consequences prior to entering into any such disposition.

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Legal Perspectives

Pennsylvania Adopts New Rules for Producing Electronic Information

Stories abound about the difficulties inherent in producing electronic information in the discovery phase of litigation. Federal courts have meted out stiff penalties for failure to produce all relevant email communications and defendants have settled to avoid the expense of producing voluminous electronic information.

In general, federal courts have taken the lead in establishing guidelines on the production of electronic information, but the Pennsylvania Supreme Court recently entered the fray with its new rules of civil procedure on discovery of electronic information.



For information on implementing a document retention policy for your organization, contact Pamela M. Tobin at 610.941.2543, ptobin@kaplaw.com.

Pennsylvania, borrowing the concept of proportionality from federal rules, has authorized trial courts to reduce the scope of discovery depending on the complexity of issues and the amount of damages at stake. This suggests that if the damages are minimal, the scope of discovery should be reduced accordingly, or the costs for producing the electronic information should be shifted to the requesting party. The rule is as yet untested, but based on its plain language, it affords a tool for reducing the scope of electronic discovery.

It is recommended that a comprehensive document retention policy be implemented to avoid invasive subpoenas. The policy should specify the types of information essential to be saved (including signed correspondence and agreements). It should also provide procedures for the suspension of deleting documents if litigation becomes anticipated. A business which implements such a policy can retrieve its electronic data in an efficient and organized fashion, and will be well positioned for meeting the burdens of complying with electronic discovery requests.

