



A Professional Corporation

## Construction Group E-Alert

***A Victory for the Freedom of Contract, At Least for Sophisticated Parties***

**June 18, 2013**

The California Court of Appeal recently handed down an important decision for the design and construction industry, *Brisbane Lodging, L.P. v. Webcor Builders, Inc.*

(<http://www.courts.ca.gov/opinions/documents/A132555.PDF>). The Court ruled that sophisticated parties are able to negotiate a specific start to the 4-year statute of limitations for construction defect claims as opposed to being bound by the “delayed discovery rule,” whereby such a cause of action accrues up to 10 years following completion of the project when the plaintiff discovers or could with reasonable diligence discover the injury and cause.

Webcor had contracted with the developer, Brisbane, to perform the design and construction of a new hotel. Construction was substantially completed in the Summer of 2000. In 2005, there was a kitchen sewer line break which caused waste to flow under the hotel. Within a couple of years, Brisbane discovered that Webcor’s plumbing contractor had used ABS pipe material rather than cast iron pipe for the sewer line, in violation of the Uniform Plumbing Code.

In 2008, Brisbane sued Webcor for breach of contract, negligence, and breach of implied and express warranties. Webcor successfully moved the trial court to dismiss the case based on a clause in the parties’ contract

providing that Brisbane’s causes of action for defects accrued (thus commencing the 4-year statute of limitations for construction defects) on the date of substantial completion in 2000, meaning that its case was filed four years too late.

Brisbane opposed Dismissal with a variety of arguments, including that clauses purporting to abrogate the discovery rule are against public policy. However, the Court of Appeal affirmed the Dismissal, noting that Brisbane and Webcor “occupied positions of equal bargaining strength and both parties had the commercial and technical expertise to appreciate fully the ramifications of agreeing to a defined limitations period.”

The sophistication of the contracting parties was the key to the Court’s ruling. For example, it distinguished the case of *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, which held that a homeowner’s cause of action against a home inspector runs from the date when the homeowner discovers, or with the exercise of reasonable diligence should have discovered, the inspector’s error or omission. The Court in *Brisbane* held that the homeowner plaintiffs in *Moreno*, unlike Brisbane and Webcor, were “persons unsophisticated in construction matters.”

The main takeaway from *Brisbane* for design and construction professionals, as we see it, is that they are able to provide by contract that causes of action in

connection with their projects accrue at the time of substantial completion (or some other specific agreed-upon date). By including such a clause in their agreements, design and construction professionals should be able to substantially curb their potential exposure for defect claims, effectively shortening the normal 10-year statute of repose, at least where they are contracting with parties of comparable sophistication.

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