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Safeco Field case means public contractors can't use statute of limitations to defend construction defects

- *The lawsuit involved a claimed defect where the fireproofing material didn't properly adhere to exposed structural beams and columns.*

By RICH SKALBANIA
Ashbaugh Beal

Two weeks ago, the Washington Supreme Court decided the case of *Washington State Major League Baseball Stadium v. Huber, Hunt & Nichols-Kiewit Construction Company*.

The case arose out of construction defects discovered at Safeco Field. The Mariners and a municipal corporation that owns the stadium sued the contractor that built the stadium. The contractor in turn sued two subcontractors.

The claimed defect was the failure of fireproofing material to adhere to exposed structural beams and columns at the stadium.



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The Mariners and the stadium owner claimed that the primer and the fireproofing coating chosen by the contractors were incompatible with each other and resulted in the need to make millions of dollars of repairs.

The main legal issue in the case was whether the contractor and its subcontractors could escape liability by claiming defenses based on the statute of limitations and a related concept known as the statute of repose. The contractor had previously attempted to avoid liability by arguing a statute of limitations defense. In a prior opinion, the Washington Supreme Court held that the statute of limitations did not apply to claims being brought by public entities for the public benefit.

The contractor then took a second bite at the apple and argued that the statute of repose barred any claim against it. The statute of repose is a concept that requires “accrual” (which is akin to but not exactly the same as discovery) of the claim within a certain period of time. A statute of repose is designed to put a time limitation on claims for defective construction.

Although the Washington Legislature has made clear that statutes of repose (unlike the statute of limitations) do apply to public entities, the Washington Supreme Court still found that neither the contractor nor its subcontractors had a valid statute of repose defense. The court's decision turned completely on the language in the contracts at issue.

The court first focused on language in the contract between the owner and the contractor that said any claim by the owner against the general contractor “accrued” at the latest on the date of substantial completion, which was in 1999. The court rejected the contractor's argument that the court should have found the claim to have accrued in 2005 when the problem was actually discovered.

The court went on to rule that both statutes of limitation and statutes of repose can be altered by contract and that the owner/contractor agreement in this case provided that accrual happened at substantial completion, rather than at the time the problem was discovered.

The subcontractors attempted to avoid liability based both on the statute of repose and the statute of limitations.

The court rejected the subcontractors' attempted defenses by saying in effect what is bad for the contractor (no defense available) is also bad for the subcontractors. It reached this result by relying on language in the subcontracts that made terms of the owner/contractor contract (including the provision that mandated accrual of claims at substantial completion) part of the subcontracts.

The decision is significant for the following reasons:

- 1.** Contractors who perform work on public projects do not have a valid statute of limitations defense to a public owner's claim for construction defects.
- 2.** Contractors who perform work on public projects likely will never have a defense under the statute of repose if their contract with the public owner fixes the date for "accrual" of the owner's claim at substantial completion.
- 3.** Subcontractors on public projects, who sign subcontracts that make the owner/contractor contract part of the subcontract, are likely also without a statute of limitations or statute of repose defense.
- 4.** The decision generally only applies to public projects. If the case had involved a private construction project, both the general contractor and the subcontractors would have likely avoided liability based on a statute of limitations defense.

Rich Skalbania is a partner at Ashbaugh Beal where he has practiced construction law for over 25 years.