

**CLAIMS AGAINST ARCHITECT DISMISSED BECAUSE OF LIMITATION CLAUSE:** design consultants can manage their exposure to claims with the use of limitation clauses in their consulting contracts.

In the *Board of School Trustees et al. v. Killick Metz Bowen Rose Architects and Planners Inc. et al.*, the Court was asked to render a decision on a limitation period clause in a consulting agreement which provided that all claims arising out of the agreement ceased to exist “six years following Substantial Performance”. The Court held that the School Board’s claims against the Architect must be dismissed because the lawsuit was not commenced until at least seven years following Substantial Performance.

In arriving at its decision, the Court had to deal with the following issues:

- (a) **Discoverability:** The School Board argued that the time limitation in the consulting agreement should not commence until the potential claim against the architect was “discoverable”; meaning that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by exercise of reasonable diligence. In rejecting the application of the “discoverability” principle, the Court confirmed that it must take into account the principle of primacy of private ordering and the fact that parties to a contract allocate certain risks between them.
- (b) **Negligence:** The School Board argued that it ought to be free to pursue a claim in negligence because the applicable contractual provisions do not indicate a different intent between the parties. In rejecting this argument, the Court held that the wording of the applicable contractual provisions “for all claims...” was broad enough to include both contractual and tort claims. Also, the Court held that alleging negligence cannot be used to avoid the contractual limitation clause where the particulars of a contractual breach are the same as those of a tort allegation.
- (c) **Application to Facts:** The School Board argued that the Notice of Substantial “Completion” of August 21, 1996 did not satisfy the terms of the consulting agreement; the Architect used the term “substantial completion” in the title of the notice rather than the term “substantially performed” which was used in the body of the notice, and referred to the *Builders Lien Act* instead of the “lien legislation” as set-out in the consulting agreement. In rejecting this argument, the Court held that these examples did not disqualify the notice from being a notice of “Substantial Performance”.

**Note:** the applicability of this case may be significantly diminished in instances where the Architect was engaged to perform services not covered by the Consulting Contract, and where there are two plaintiffs, one of which has brought allegations in tort independent of any contractual obligations of the architect. For further information contact Stephen P. Coyle