

The Long Tail of Construction Defect Liability: When Does It End?

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Colorado law imposes deadlines on when defect claims may be asserted. How, when and to whom these deadlines apply has been historically less than clear. Now, the Colorado Court of Appeals has provided some clarity.

Colorado law has two mechanisms - statutes of limitation and statutes of repose - to discourage what courts call stale claims.

Statutes of limitation require parties suing construction professionals for defects to file their lawsuit within two years of when the defect is discovered.

But defects may not appear until long after construction is complete, creating what courts call the long tail of liability. That is where statutes of repose come in.

Under statutes of repose, defect claims against construction professionals are barred unless the claim is filed within six years after the substantial completion of the improvement to the real property.

For all the certainty it should provide, the statute of repose leaves numerous questions unanswered:

What constitutes an “improvement” and “substantial completion” (neither of which are defined in the statute)? How does the statute apply to multi-phase projects with multiple improvements and completion dates?

How does the statute apply to a contractor’s claim against a subcontractor? How does Colorado’s Construction Defect Action Reform Act (CDARA), which informs of deadlines during a notice of claim process, play out under the statute of repose?

On Feb. 2, the Colorado Court of Appeals provided some of the first answers to these questions.

In *Shaw Construction v. United Builder Services*, an HOA sued the general contractor of a multi-phase condominium project. The contractor sued its subcontractors, but those claims were dismissed under the statute of repose.

The contractor appealed, making two arguments: that in multi-phase projects, “improvement” means the entire project; the “substantial completion” triggering the statute did not occur until the project architect certified completion (after a certificate of occupancy was issued); and the statute of repose was tolled by the HOA’s service of a CDARA notice.

The subcontractors, in turn, argued that the “improvement” was limited to their specific work, “substantial completion” occurred when each subcontractor completed its work and a CDARA notice of claim served on other parties does not toll the statute of repose for the subcontractors,

The Court of Appeals sided with the subcontractors.

First, the court ruled that an improvement may be a discrete component of an entire project, meaning completing one phase of a multi-phase project may constitute completion of the improvement and the six-year clock may start ticking before project completion.

Whether a project component constitutes an improvement depends on whether the component is permanent and essential to the project’s function. But the court did not decide whether an improvement triggering the statute of repose can be determined on a trade-by-trade basis.

Second, the court ruled that because the project components that encompassed the subcontractors’ work were completed more than six years before the contractor filed its lawsuit, the statute of repose

barred the contractor's claims. The court didn't decide whether substantial completion occurs when a certificate of occupancy is issued or when the architect certifies completion.

Finally, the court ruled that CDARA's notice of claim process does not toll the statute of repose unless the subcontractor is served with a notice of claim. So, the contractor could not rely on the HOA's notice of claim to toll the statute of repose for the contractor's claims against the subcontractors.

An important purpose behind the statute of repose is providing certainty. Construction professionals can determine the date when they no longer face defect claims and plan accordingly. Record retention, budgeting and insurance decisions are easier when the construction professional knows the end of its liability.

For subcontractors, engineers and architects, life under the statute of repose just got a little easier. These professionals can mark the completion of the project component on which they worked as the time when the six-year clock begins to run.

For instance, a subcontractor who works on only the first building of a multi-building project can mark six years from the first building's substantial completion as the end of its potential liability for that work.

However, what constitutes a project "component" and "substantial completion" remains debatable and

legal counsel should be consulted before making decisions influenced by the statute of repose.

The statute of repose also concerns contractors looking to assert claims against their subcontractors, consultants or vendors. For these contractors, complying with the statute of repose will now require more vigilance.

Tracking claim deadlines will require attention to the completion dates for the project's discrete components. What constitutes a "discrete component" is debatable. And the CDARA notice of claim process will not toll the statute of repose unless the subcontractor is served with a notice of claim.

As much as possible, completion dates for project component; should be identified, the six-year deadline should be calendared, notices of claim should be sent to any potentially liable subcontractor, legal counsel should be consulted and any errors should be on the side of caution.



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