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Between *The* Lines

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Construction Defect: Be Wary of Statute of Limitations

By: Walter A. Winslow
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Residential construction in Northern Colorado is on fire again as the effects of the Great Recession fade. NoCo is expected to be one of the strongest areas in the country as real estate prices climb due to a number of factors, including limited supply.

As new construction arises, developers, builders and home buyers should know construction defects can occur in new residential construction. All parties involved should recognize statute of limitations (SOL) provisions on any potential claims in order to protect their respective rights.

A statute of limitations sets forth a specific time frame to bring a claim and bars claims from being made after such time. In construction defect cases, there are many types of potential claims including, but not limited to, breach of contract, negligence, fraud and personal injury. Each claim may have a different SOL and it is recommended to have an attorney verify any applicable SOL for any claim. However, C.R.S. § 13-80-104 provides the applicable SOL on many types of construction defect claims. It provides, in pertinent part:

> (1)(a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 [2 years] after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property, except as provided in subsection (2) of this section.
>
> (b)(I) Except as otherwise provided in subparagraph (II) of this paragraph (b), a claim for relief arises under this section at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury.
>
> (2) In case any such cause of action arises during the fifth or sixth year after substantial completion of the improvement to real property, said action shall be brought within two years after the date upon which said cause of action arises. (C.R.S. § 13-80-104 (emphasis added)).

A key element from the above statute is that the claim must be brought within two (2) years from the date the owner "discovers or in the exercise of reasonable diligence should have discovered the physical manifestation of a defect." Colorado courts have taken a narrow view of this statute, particularly when construing "physical manifestation."

A Colorado court found that a "claim accrues when a physical manifestation of a defect appears, **even though its cause is not known at that time**." Highline Vill. Ass. v. Hersh Companies, Inc., 996 P.2d 250, 253 (Colo. App. 1999), as modified on denial of reh'g (Dec. 23, 1999), aff'd in part, rev'd in part, 30 P.3d 221 (Colo. 2001)(emphasis added). This court noted this statute of limitations is in contrast with "a claim for damages to property [which] generally does not accrue until 'both the injury and its cause are known or should have been known by the exercise of reasonable diligence.' Section 13–80–108(1), C.R.S.1999." Id.

Another Colorado Supreme Court case held, it is possible a Construction Defect Action Reform Act claim for personal injury resulting from such construction defect could be barred even before the injury takes place. This harsh result intends to urge owners to take action when a defect first appears. Smith v. Executive Custom Homes, Inc., 230 P.3d 1186, 1189 (Colo.2010).

For instance, when a small crack in a wall of a new home appears, the home owner may not know the cause (e.g. framing, foundation, structural, etc.), but the statute of limitations begins to run when the crack appears. If a crack in a wall appears and the builder or owner just seals the crack and paints over it, this does not affect the running of the SOL. If the home owner discovers a couple of years later, due to other cracks appearing, the original crack was the result of structural defect, then it is too late to bring a claim since the statute of limitations would have already run. The SOL began to run when the crack appeared, even though the home owner (or even the builder) was not aware the crack was a symptom of a bigger problem. Therefore, one should know when the statute of limitations begins to run on such claims in order to take appropriate and timely action when signs of a potential construction defect first appear on a newly constructed home.

Mr. Winslow was recently appointed Chair of the Government and Regulatory Affairs Committee of the NoCo Home Builders Association and became a member of the Government and Regulatory Affairs Committee for the Colorado Home Builders Association

Super Lawyers Magazine Honors G. Brent Coan and Michael C. Payne

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CP2 is pleased to announce that managing member, G. Brent Coan, Esq., has been recognized by Super Lawyers Magazine as a 2015 Colorado Super Lawyer and founding member, Michael C. Payne, Esq., has been recognized as a 2015 Colorado Rising Star. Mr. Coan was selected for his outstanding performance in business and corporate law. Mr. Payne's recognition results from his high-caliber service in creditors' rights law.

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Coming Soon to a Neighborhood Near You

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In the beginning of Star Wars, Princess Leia programs R2-D2 with secret plans and sends him to deliver them to Ben Kenobi. R2-D2 crosses in front of a blaster battle and goes straight to the escape pod to complete his mission. As a kid, I watched and wondered why he would do that, rather than wait for the shooting to stop. Our world has changed since 1977 and the subject of airborne robots is now a heated topic for aviators, hobbyists and the Federal Aviation Administration. A computerized automaton obeys its programming without concern for itself or others. This is evidenced by the debate and recent lawmaking efforts regarding Unmanned Aircraft Systems, called UAS or drones.

In the near future, an Amazon book order or mail may arrive at your doorstep by UAS. This is the future that Amazon envisions, and the FAA provided approval for Amazon to begin testing such a delivery method on March 19, 2015. Under the current FAA testing guidelines, Amazon is permitted to fly drones only during the day, within 400 feet of the ground, and within sight of an operator who has a traditional pilot's license. Amazon's vision for the future, first announced in 2013, includes delivering packages weighing up to 5 pounds within a 10-mile radius in an automated fashion. This would mean that Amazon could deliver packages over an area greater than 300 square miles using automated drones controlled from one central location.

The FAA's approval with limitations is in keeping with a proposed rulemaking that was released by the FAA on February 15, 2015. However, the FAA's rulemaking applies only to small UAS (less than 55 pounds) engaged in non-recreational activities. There are not state laws in Colorado to fill in any gaps left open by the FAA's proposed rulemaking. Colorado's laws related to aircraft, found in the Aeronautics Act of 1937 at Title 41 of the Colorado Revised Statutes, defer almost entirely to "the lawful rules and regulations of the United States government then in force."

These technologies and laws applicable to them may become a practical concern over the next few years for many businesses. If commercial uses are approved, many uses could be applicable to agriculture. A local farmer flying a UAS carrying a camera with infrared capabilities could observe crops, determine whether disease is present, or tell how effective the farm's irrigation systems are. There are, however, several obvious hurdles to overcome before commercial use of UAS can become part of everyday life. The FAA's main concern is the safety of the air traveling community and of those of us on the ground. Absent improvements in collision-avoidance technology, an autonomous drone would proceed directly from point A to point B regardless of what crosses its path. A drone striking an airplane or helicopter could mean disaster for the

Mr. Garcia, was recognized by the Greeley-Weld County Airport Authority for 8 years of service on the Authority Board from January 2007 to December 2014, including two years as Chairman.

passengers involved. President Obama found out on the morning of January 26 that a UAS can lose control, go off course and crash on the White House lawn.

The danger to the public the FAA is not addressing is the threatened erosion of privacy rights by autonomous eyes in the sky. These questions are for other segments of our government to answer. Do Peeping Tom laws apply to UAS operators? Do police need a warrant to conduct UAS surveillance? Can a private person or company conduct surveillance? The current proposed FAA rules will apply to governmental, commercial and research usage but not to a hobbyist.

The hobbyist, like the one who crashed a drone on the White House lawn, need not have any training or demonstrate any skill in safely handling a UAS before piloting it around the park or the neighborhood. Operator certification, flight ceiling limits and aircraft registration and marking are also addressed in the proposed rulemaking. The comment period ended April 24, 2015. The proposed rulemaking can be found at www.faa.gov/uas/nprm/

Technological advancements bring significant benefits to our lives but can have negative impacts not immediately recognized. The rise of commercial drone use could potentially become a part of everyday life over the coming years. We should all consider the benefits Unmanned Aircraft Systems can provide and how to best integrate them into our lives.

Amber Wyatt
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CP2 promotes Amber Wyatt to paralegal. Ms. Wyatt will specialize in real estate, business and creditors' rights. She will assist attorneys, Michael C. Payne and Walter A. Winslow.

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Founding member Brett Payton Received an AV Preeminent Peer Review Rating™ from Martindale-Hubbell®

Exiting U.S. Distribution Agreements: More Difficult Than You May Think

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Foreign companies often enter into agreements with US distributors or dealers to better penetrate the US market and facilitate sales to US customers. Typically, such agreements are in writing and have standard terms such as term, termination and the grounds for termination of the agreement. Foreign companies (and usually out-of-state companies) often assume that nothing outside the terms of the distribution agreement governs the severing or altering of the relationship with the distributor. Unfortunately, many state laws severely restrict termination of distribution agreements, and may require the manufacturer to repurchase unsold inventory maintained by the distributor or dealer.

These types of laws which exist in many states generally fall within two categories: (1) industry-specific laws and (2) franchise laws.

The first category refers to statutes and regulations that regulate distribution relationships in certain industries and protect distributors. Such industries include, among others: agricultural equipment; machinery; and industrial, forestry, construction and lawn and garden equipment. Many statutes provide that manufacturers cannot terminate, fail to renew or substantially alter the competitive circumstances of a distribution agreement without good cause and prior written notice. "Good cause" usually does not mean a change in business strategy, such as a desire to replace a distributor or withdraw from the market, or even the distributor's failure to sufficiently penetrate the market without prior written notice of such expectations which must be reasonable. Instead, good cause means detrimental conduct, the failure to operate the business, a material performance failure, or other misconduct by the distributor. Required notice periods vary from state to state. Louisiana, for example, requires 90 days' notice prior to termination with a built-in 60-day period in which the distributor may cure the deficiency and avoid the termination. *See* LSA-R.S. 51:482 (2012). In Ohio, on the other hand, a distributor is not afforded a cure period, although the manufacturer must consider corrective actions taken by the distributor and provide 180 days' notice. *See* Ohio R.C. § 1353.06 (2012).

The above examples illustrate potential problems for a manufacturer desiring to terminate a distribution agreement where industry-specific statutes and regulations protect local dealers and distributors. The terms of the agreement may permit termination because the manufacturer desires to withdraw from the relevant market. Nevertheless, in many states where the specific industry is regulated, the manufacturer cannot terminate the agreement without statutory good cause and prior written notice.

Many statutes require that manufacturers repurchase the inventory and related items from the distributor within a certain period following the termination of the distribution agreement at specified prices. Many states (and federal law) also have applicable franchise laws. Manufacturers often assume that these onerous franchise laws do not apply to distribution relationships because neither party intended their arrangement to constitute a franchise. However, franchise laws apply if the particular arrangement fits within the applicable statutory definitions. Further, the definition of a franchise varies from state to state.

Generally, however, a franchise exists when: (1) franchisor grants franchisee the right to use its trademark or service mark in connection with the sale or distribution of related goods or services; (2) the parties have either a "community of interest" (some expectation of mutual economic benefit) or some related marketing plan or system prescribed and controlled by franchisor and (3) the franchisee pays an initial or recurring fee (i.e., a franchise fee). The definition of a franchise under federal law is conceptually similar but not identical. The rule promulgated by the Federal Trade Commission (the "FTC Rule") generally provides that the franchisor must: (1) promise to provide a trademark or other commercial symbol; (2) promise to exercise significant control or provide significant assistance in the operation of the business; and (3) require a minimum payment of at least $500 during the first six months of operations. 16 C.F.R. Part 436. Each jurisdiction generally also has a variety of definitional exclusions and exemptions.

Because distribution agreements generally do not require payment of franchise fees, it would seem that franchise laws should not apply. However, sometimes fees and other charges in an agreement, other than amounts paid for a reasonable quantity of goods sold at a bona fide wholesale price, can be deemed payment of indirect franchise fees. These include license fees, marketing contributions, or charges for training personnel or providing manuals. Moreover, some states do not require payment of franchise fees for a commercial arrangement to constitute a franchise. If a state's franchise law applies to a distribution agreement, it will restrict the manufacturer's right to terminate, non-renew, or substantially change the competitive circumstances of the distributor relationship. This means that the manufacturer may need good cause, prior written notice and sometimes allow a cure period before attempting to terminate the agreement. If a cure period is mandated, the distributor may avoid the termination if it cures the deficiency. Because there generally is no private cause of action under the FTC Rule, noncompliance with the rule usually will not affect distribution agreement terms. However, an action brought by the FTC for noncompliance may result in injunctions, civil penalties, fines or consumer redress.

To protect itself, a manufacturer should always consider these laws which may apply to, or supersede, the terms of its US distribution agreement. This will avoid a rude awakening if there later is a change in business strategy that requires the manufacturer to exit the distribution agreement.

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