

Construction Defect: Be Wary of Statute of Limitations

By: Walter A. Winslow, Esq.

Residential construction in Northern Colorado is on fire again as the effects of the Great Recession fade away. Northern Colorado is one 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.

While new construction is on the rise, developers, builders and home buyers alike should be aware that sometimes construction defects occurs in new residential construction. It is in the best interest for all parties involved to become aware of statute of limitations 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 from after such time. In construction defect cases, there are often many types of potential claims, including, but not limited to, breach of contract, negligence, fraud and personal injury. Each claim may have a different statute of limitations and it is recommended to check with an attorney to verify any applicable statute of limitations for any claim. However, C.R.S. § 13-80-104 provides the applicable statute of limitations 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.

(I) (b) 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. Associates 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.

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

In other words, for instance, when a small crack in a wall of a new home appears, the home owner may not know the cause of such a crack (such as whether it is a framing, foundation, structural or other problem), but the statute of limitations begins to run at the time the crack appears. For instance, 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 statute of limitations. If the home owner discovers a couple of years later, say due to other cracks appearing, that 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 statute of limitations began to run when the crack appeared, even though the home owner (or even the builder) was not aware that the crack was just a physical manifestation of a problem that was much greater in scope. Therefore, it is important that one knows when the statute of limitations begins to run on such claims in order to take appropriate and timely action when the first signs of a potential construction defect appear on a newly constructed home.

Walter A. Winslow, Esq.

Coan, Payton, & Payne, LLC