

38-SUM Construction Law. 36

Construction Lawyer

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Asha A. Echeverria, Brian R. Zimmerman^{al}

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CONSTRUCTION BILLS: RECENT CHANGES TO CONSTRUCTION LAWS

Revisions and Interpretation of State Statutes of Repose

All but two states, New York and Vermont, have enacted statutes of repose applicable to improvement to real property. Recently, several states have either modified their statutes of repose or had them interpreted.

Iowa Reduces Fifteen-Year Repose Period

Effective July 2017, Iowa adopted changes to its statute of repose¹ for improvements to real property, i.e., construction. The changes reduce the fifteen-year repose period by creating separate statute of repose periods of ten years for residential properties and eight years for all other properties. The repose period begins to run on the date the act or omission occurred that is alleged to have caused the injury.

The repose period is extended one year for defective conditions discovered within one year after expiration of the statute of repose. Claims related to fraudulent concealment of an unsafe or defective condition, or actions related to either nuclear power plants or interstate pipelines, are excluded from the changes and remain subject to the fifteen-year period of repose.

The statute of repose covers noncontractual tort and implied warranty claims and specifically includes contribution and indemnity claims. The statute does not resolve whether the specific inclusion of indemnity claims in the repose period applies to bar contractual indemnity claims.

Iowa's statute of limitation² period was not changed and remains at two years following the occurrence. As a result, an action must be commenced within two years of the date of the occurrence of the injury, but not more than ten years for residential or eight years for other construction, following the act or omission resulting in the unsafe or defective condition.

Wisconsin Reduces Ten-Year Repose Period

On April 3, 2018, Wisconsin adopted³ changes shortening its statute of repose⁴ from ten to seven years. The statute begins to run on the date of substantial completion of the improvement to real property. The period of repose is extended for three years from the date damages are sustained if occurring between the fifth and seventh years following substantial completion, and corresponding claims for contribution are likewise extended.

Wisconsin's statute of repose precludes commencement of any cause of action against either the owner or any person involved in the improvement to real property after expiration of the period to recover damages for any injury to property, for any injury to a person, or for wrongful death arising out of any deficiency or defect in the design or construction of the improvement. The types of precluded causes of action expansively include virtually all types of work for construction and specifically include any defects or deficiencies from "design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property."⁵

Much like the Iowa statute, the types of causes of action precluded under the Wisconsin statute specifically include indemnity and contribution, without specifying whether this includes contractual indemnity provisions. Wisconsin's repose period excludes and does not apply to express warranties or guarantees, fraud, concealment, or misrepresentations related to a deficiency or defect.

The statute does not protect an owner from damages resulting from negligence in the maintenance, operation, or inspection of an improvement to property and does not affect the rights of a person injured as the result of any defect in material used in an improvement to real property to commence an action against the manufacturer or producer of the material.

The statute of repose does not extend the period of limitation under any other statute of limitation but acts as a bar to claims beyond the repose period.

Florida Clarifies Commencement of Repose Period

On June 14, 2017, changes to Florida's statute of repose were signed into law, clarifying whether the statute of ***37** repose begins to run when the construction is completed or when the contract is completed. Previously, [Florida Statute Section 95.11\(3\)\(c\)](#) set a ten-year period of repose for any action founded on the "design planning, or construction of an improvement to real property." The period of repose begins to run the later of actual possession by the owner, issuance of a certificate of occupancy, abandonment of construction, the date of completion, or termination of the contract.

The issue of when "contract completion" occurred was interpreted in *Cypress Fairway Condo v. Bergeron Construction Co. Inc.*,⁶ which held that a contract was not complete until both parties completed their obligations, including the owner's obligation of payment to the contractor. The results were seen as problematic by many in the construction industry because this interpretation could allow an owner to artificially extend the period of repose by delaying final payment, even if such delay were in breach of the contract.

The recent changes to [section 95.11\(3\)\(c\)](#) prevent this scenario by defining completion of the contract to be "the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made."⁷

Colorado Court Interprets Contribution Claims

The Colorado Construction Defect Action Reform Act,⁸ adopted in 2001, set a six-year statute of repose for suits 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, commencing from the date of substantial completion of the improvement. In addition, a two-year statute of limitations applies, commencing on the date the cause of action arises.⁹

The statute of repose specifically addresses contribution and indemnity claims, confirming that claims against a person who is, or may be, liable to the claimant for all or part of the claimant's liability

1. Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and

2. Shall be brought within ninety days after the claims arise, and not thereafter.¹⁰

Interpreting both the statute of limitation and statute of repose, the Colorado Supreme Court held in *In re Goodman v. Heritage Builders*¹¹ that the provision allowing a construction professional to bring claims against third parties within ninety days of final judgment, or settlement, applies to both the two-year statute of limitations and the six-year statute of repose. The result is that a general contractor, or other contractor, may sue its subcontractors or others responsible for a defect claim well after the six-year statute of repose would have expired. This greatly extends the period of liability for a subcontractor beyond the six-year statute of repose. It also allows general contractors to wait until after verdict to pursue subcontractor claims for contribution, rather than including all potential contributing parties, e.g., subcontractors, in the principal action.

Nevada Court Interprets Issuance of Notice of Completion

[Nevada Revised Statute Section 11.2055\(1\)](#) sets a six-year statute of repose from the date of substantial completion of the project, with substantial completion defined as the latest of the following:

3. The final building inspection of the improvement is conducted;
4. A notice of completion is issued for the improvement; or
5. A certificate of occupancy is issued for the improvement[.¹²

This language created a question of whether a notice of completion is “issued” on the date that it is signed and notarized or when it is first recorded.¹³ In December 2016, the Nevada Supreme Court resolved this question with its decision in *Dykema v. Del Webb Communities, Inc.*¹⁴ The Nevada Supreme Court clarified that notice of completion is issued on the date it is recorded, regardless of when it is signed.

Footnotes

^{a1} *Asha A. Echeverria is a shareholder at Bernstein Shur in Portland, Maine. Brian R. Zimmerman is a shareholder at Hurtado Zimmerman S. C. in Milwaukee, Wisconsin.*

¹ [IOWA CODE § 614.1\(11\) \(2017\)](#).

² *Id.* § 614.1(2).

³ A.B. 773, 2017-2018 Wis. Leg. (Wis. 2018).

⁴ [WIS. STAT. § 893.89 \(2018\)](#).

⁵ *Id.* § 893.89(2).

⁶ 164 So. 3d 706 (Fla. 5th Dist. Ct. App. 2015).

⁷ FLA. STAT. § 95.11(3)(c) (2018).

⁸ COLO. REV. STAT. § 13-80-104 (2001).

⁹ *Id.* § 13-80-102.

¹⁰ *Id.* § 13-80-104.

¹¹ 390 P.3d 398 (Colo. 2017).

¹² Nev. Rev. Stat. § 11.2055(1) (2015).

¹³ Recording of a notice of completion sets a deadline of forty days for the filing of lien claims.

¹⁴ 385 P.3d 977 (Nev. 2016).

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