

THE STATUTE OF REPOSE AND THE CONSTRUCTION DEFECT CLAIM

IS THE BRIGHT LIGHT MARKED BY A BRIGHT LINE?



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Construction defect claims are time consuming, expensive and often daunting to defend. The Statute of Repose is a draconian doctrine unique to construction claims. It is not a statute of limitations. By its definition, it provides a date upon which an action no longer exists. It is generally impervious to the discovery rule, the favored savior of sleeping claimants. Most states provide exceptions for latent defects or fraudulent concealment. It may be the light at the end of tunnel for design and construction professionals involved in large scale projects with damages occurring over years. Often the design and construction defendants responsible for the actual construction are gone, and key witnesses such as

project managers are missing. Piecing together a time-line of who completed the work and when, can be a challenge. The purpose of the Statute of Repose is to limit the expanding liability of contractors, builders, planners, and designers of a property improvement. Recently, several jurisdictions have expanded their analysis as to who may seek its refuge, and when the doctrine begins to run.

The Statute of Repose is codified, or if permitted, defined by the construction contract, and provides a "bright line" for determining whether or not there is an action available to recover damages against a construction or design professional. It is an affirmative defense and provides a complete

bar to recovery. It may not be applied equally to all defendants and is often not available to product manufacturers. It is unlike a statute of limitation. Many jurisdictions apply different trigger dates for the Statute of Repose to defendants who provided services on the same project.

Some states provide remarkably short periods for claims involving improvements to real property. For example, Arkansas provides that a tort or contract action for personal injury or wrongful death involving an improvement to real property may be brought within four years from substantial completion of the improvement, or within five years for a claim involving property damage. A.C.A. § 16-56-112. Some states

allow for much longer periods. Maryland provides a 20-year period for actions for damages involving improvements to real property, but shortens the period to 10 years for actions against architects, professional engineers or contractors. Md. Code Ann. § 5-108. The 10 year period is far more typical of the period allowed by most states for actions for damages involving improvements to real property.

At first glance, it would seem easy to determine whether or not the Statute of Repose precludes a claim. Where the construction project is relatively simple with only a few design and construction professionals, subject to one certificate of substantial completion and one certificate of occupancy, determining when the Statute or Repose is triggered is generally straight forward. However, where the claim involves a complex project, the million dollar question becomes what is “substantial completion” and when is it triggered?

Generally, substantial completion does not mean that the design professional or construction contractor has completed every last task under the contract. Owners typically occupy the project when the project is substantially complete and punch list items are pending. Many states allow separate trigger dates to apply to subcontractors that have substantially completed their work, even if the project as a whole is not substantially complete and there is not certificate of occupancy. Tennessee’s statute defines substantial completion to mean that point in the construction project at which the owner can use it for which it was intended, or as it is defined in the contract. *TCA 28-3-201*.

The State of Washington, similar to Tennessee, also allows contractual accrual provisions to define the Statute of Repose. In the case of *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wash. 2d 502 (2013), the Washington Supreme Court upheld a contract between a general contractor and a municipal corporation for the construction of a baseball stadium, which provided that the Statute of Repose accrued at the time of substantial completion. The Court held it did not violate public policy, despite an express construction statute which applied the Statute of Repose to the State and permitted the parties to set the time of accrual and alter the statutory allocation of risks.

Years ago, I inherited a large scale New Jersey construction file which, to date, remains my case study on the Statute of Repose. The file was assigned to me passing with the famous last words of “don’t worry,

its dead, we’re out on the Statute of Repose. It’s pending a Motion for Reconsideration, but we are out.” This was of some comfort to my assistant given the file had its own wing. How could we know that a slow faint pulse remained under five feet of pleadings and damage reports? My client’s project file was thin. The business was no longer a viable concern and the project foreman was unavailable.

The litigation concerned a large scale multimillion dollar County facility which was a favorite political topic and garnered regular media coverage. The multi-building facility was contracted and constructed as a “phased project,” which means it involved multiple buildings, which were ready for use at different times and subject to separate certificates of substantial completion. Each building was required to be completed by a certain date and occupied, or the general contractor would be penalized. One certificate of occupancy was issued for the entire project months after the last building was complete.

In what is more often the rule, rather than the exception, the plaintiff waited to file the action, despite years of notice concerning the alleged defects which were the basis of the complaint. The litigation was filed more than a decade from the last certificate of substantial completion, but just prior to the 10-year anniversary of the issuance of the certificate of occupancy. The New Jersey Statute of Repose is loosely defined, and as expected, the definitions and terms are the subject of constant interpretation. It precludes an action for damages for injuries to property, real or personal, related to the design or construction of an improvement to real property brought more than 10 years “after the performance or furnishing of such services and construction.” N.J.S.A. 2A:14-1.1(a). The statute itself does not provide a “bright line” trigger date. In some instances the certificate of occupancy is the trigger date for purposes of the Statute of Repose, and in other actions involving phased projects, it has been interpreted to commence one day after issuance of the certificate of substantial completion for each phase.

The design and construction defendants immediately raised the Statute as an affirmative defense, asserting that each building was subject to a separate certificate of substantial completion and those certificates were the “bright line” which triggered the Statute of Repose. The plaintiff asserted that the certificate of occupancy was the “bright line” trigger date. The Court initially agreed with defendants but ultimately granted reconsideration and ordered addi-

tional discovery on the issue, which remains ongoing and staves the judiciary from the political quagmire.

The lack of a “bright line” within the Statute has resulted in ongoing litigation concerning a project that was completed nearly 22 years ago. The recent New Jersey Supreme Court case of *State v. Perini Corp.*, 221 N.J. 412 (2015), which involved a defective heating system servicing a multi-unit facility, promised to clarify the question of substantial completion for a phased project. The plaintiff filed an action 10 years after the first certificate of substantial completion was issued for the first building serviced by the heating system, but within 10 years of the last certificate of substantial completion. The Court determined that because the heating system serviced all the buildings, the action was timely. This has done little to brighten the line for phased projects in New Jersey.

Not all Statutes of Repose are vague. Florida’s statute provides more guidance as to the trigger date. It provides that an action concerning the design, planning, or construction of an improvement to real property must be filed within 10 years from the owners actual possession, the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between design professional or licensed contractor, whichever date is latest.

When a construct defect claim is filed is it important to gather as much information as possible to determine the time-line of the project and the client’s scope of work. The Statute of Repose is an affirmative defense, available equally to a roofer who provided services on a single family home in Alabama in 2002, or an architect who designed 500 condominium units for a developer in California in 2005. Practitioners must be well versed in the nuances of their home state’s statute and evolving case law to see when it is a viable defense.



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