Colorado Supreme Court Finally Fixes 30-Year Old Defect in Statute of Repose

By Jesse Howard Witt

This year, the Colorado Supreme Court settled a decades-old conundrum surrounding the state's statute of repose for construction defect claims.

A statute of repose is similar to a statute of limitations insofar as it restricts the time a plaintiff can bring a claim against a defendant. The difference is that a statute of repose establishes a fixed period that begins on a date when the defendant acted, while a statute of limitations establishes a period that begins on a date when the plaintiff discovered his or her injury.

Colorado's limitations and repose periods have always appeared in the same statute. Historically, this statute provided that any action against a construction professional shall be brought within two years after the claim for relief arises (the limitations period), but in no event, shall such an action be brought more than ten years after substantial completion of the improvement (the repose period).[1]

In 1986—at the height of the so-called "tort reform" movement—the Colorado General Assembly voted to shorten these time periods.[2] Instead of ten years following construction, homeowners would thereafter have six years to file suit, unless they discovered a defect in the fifth or sixth year following construction, in which case they might have up to eight years to file suit.[3] In addition, the date the claim accrued was redefined to potentially occur much earlier. The old statute had stated that a claim for relief arises "at the time the **damaged party** discovers or in the exercise of reasonable diligence should have discovered the **defect** in the improvement which ultimately causes the injury, when such defect is of a substantial or significant nature."[4] By contrast, the new statute stated that "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."[5] These changes eliminated the requirement that the plaintiff discover the existence of a defect before the limitations clock could begin to run; under the amended statute, the two-year limitations period could begin to run when another party saw the manifestation of a defect, even if that party did not recognize that a defect existed.[6]

Although these amendments were intended to benefit builders by shortening their exposure to homeowner defect claims, they had an unexpected consequence. Based on the broad wording of the 1986 statute, courts concluded that the new statute's limitations and repose deadlines applied to all construction defect claims against all construction professionals, including indemnity claims filed by developers against their subcontractors.[7] This was a change from prior law, which had recognized: "The virtually universal rule is that a claim for indemnity does not accrue, and therefore the limitations period does not begin to run, until the indemnitee's liability is fixed i.e., when he pays the underlying claim, or a judgment on it."[8]

The following timeline provides an example of how the shortened statute could restrict indemnity claims. In 1988, a developer hires a carpenter to install a window on a new home. Their subcontract requires the carpenter to indemnify the developer for the cost of repairing any defects in his work. Later that same year, the developer sells the property to a homeowner. In 1992, the homeowner discovers that the window is leaking but does not know why. In 1994, the homeowner sues the developer for water damage. In 1995, the developer determines that the leak occurred because the carpenter failed to flash the window correctly, and the developer pays to repair the homeowner's window. According to the subcontract, the developer should be able to demand

indemnity from the carpenter for those repair costs. But under the new statute, the developer's third-party claim for indemnity would be barred because more than two years have passed since the homeowner discovered the physical manifestation of the defect in 1992, and more than six years have passed since the end of construction in 1988.

This result—that a claim for indemnity could accrue and expire before a developer had paid anything on the loss, or perhaps even identified what trades were responsible—came as a shock to many in the industry, and it led to "shotgun-style" pleadings, in which a developer named in a lawsuit would immediately file a third-party complaint against every subcontractor who had worked on the job, even if many of those subcontractors had no involvement with any alleged defects.

This caused insurance premiums to rise and prompted Colorado's first Construction Defect Action Reform Act (CDARA) in 2001. CDARA amended the 1986 statute to add a new section stating that, notwithstanding the portion of the statute that establishes the two-year limitations and six-year repose periods, an indemnity claim against a third party would not arise until the underlying claim was resolved, and that the indemnitee would then have ninety days from resolution of the first-party claim to pursue indemnity. In the example above, the developer would have had ninety days after settling with the homeowner to sue the carpenter for indemnity.

At least that was the intent. In the 2008 case of *Thermo Development, Inc. v. Central Masonry Corp.*, the Colorado Court of Appeals ruled that CDARA had only altered the two-year limitations period, not the six-year repose period.[9] The case arose after a group of condominium owners sued their developer over water intrusion. The developer settled with the owners and, less than ninety days later, sued a subcontractor for indemnity. The trial court dismissed the case after concluding that more than six years had passed since the subcontractor finished work, and the court of appeals affirmed.

The court based its conclusion on the fact that the 2001 amendments had changed the date that "a claim for relief arises" while leaving intact the language stating that "in no case shall such an action be brought more than six years after the substantial completion of the improvement to real property…."[10] The court thus concluded that the legislature had only intended for CDARA to toll the statute of limitations, not the statute of repose.[11] The court further noted that, while CDARA sought to curb "shotgun-style" pleadings, it also sought to encourage timely resolution of construction disputes by providing only short tolling periods.[12]

Although the *Thermo* opinion considered and rejected the argument that this interpretation lead to an absurd result, its holding was difficult to reconcile with CDARA. The plain language of the 2001 text seemed to comprise both the limitations and repose periods, and the court's strained interpretation was at odds with the act's legislative history. The *Thermo* interpretation gave developers a modicum of extra time in cases where a defect had manifested early in the repose period, but it provided little relief in situations where a homeowner filed suit near the six-year mark. Indeed, even if developer did not have a statute of repose problem at the outset of a case, the slow pace of litigation could cause the six-year period to expire during the pendency of the lawsuit. Thus, the *Thermo* decision encouraged a return to the era of shotgun pleadings that CDARA had sought to curtail.

The developer in *Thermo* declined to seek certiorari, despite the urging of some CTLA members.[13] Many hoped that the appellate courts would revisit the issue soon and reverse this holding, but that did not occur. To the contrary, the court of appeals would reaffirm and expand *Thermo* in two rulings over the following eight years.

In 2012, the court announced *Shaw Construction, LLC v. United Builder Services, Inc.*, wherein another division held that CDARA "implicates only the statute of limitations" and does not allow developers more than six years to bring indemnity claims.[14] The court cited *Thermo* with approval and ruled that the legislature's "failure

to include the statute of repose … with regard to third-party claims reflects the legislature's intent not to extend it."[15] The court then gave the statute of repose even broader effect by holding that the six-year period could begin as soon as work finished on a discrete component of a multi-stage project, even if the overall project was not yet complete.[16]

In 2016, the court of appeals considered the issue again when a window supplier appealed entry of summary judgment on an indemnity claim against a subcontractor in *Sierra Pacific Industries, Inc. v. Bradbury*.[17] The supplier argued that the court in *Thermo* had ignored a key passage of the legislative history of CDARA, wherein one of the drafters had specifically discussed the legislators' intent to extend the six-year period.[18] The court chose to disregard this history, however, by concluding that this remark must have been a mistake because the speaker had said that "the statute of limitations was six years, when, in reality, it was two years and a six-year period applied to the statute of **repose**."[19]

This statement illustrates the flaw in the reasoning of *Thermo*, *Shaw*, and *Sierra Pacific*. The phrase "statute of repose" does not appear anywhere in the statutory text. Practitioners typically refer to the six-year period as the statute of repose and the two-year period as the statute of limitations for convenience, but they are not two different statutes; both deadlines appear in the same sentence of the same statute under the heading of "Limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others."[20] Obviously, referring to one deadline as the statute of limitations and the other deadline as the statute of repose will often be expedient, but this expedience should never be confused with a substantive difference in the law, as occurred in these three cases. In other words, the legislator who referred to a six-year statute of limitations was not mistaken; the court was mistaken in its decision to ignore this important legislative history.

In the time between *Shaw* and *Sierra Pacific*, the General Assembly had the opportunity to correct this problem by passing a further CDARA amendment in 2013, but the bill died in committee due to concerns that other sections of the bill would have weakened consumer protections for homeowners.[21] Subsequent attempts to amend CDARA did not address the courts' incorrect interpretation of the statute of repose.[22]

Then, just when it appeared that no change would ever occur, surprise relief came in the form of an original proceeding before the Colorado Supreme Court in the 2017 case of *Goodman v. Heritage Builders, Inc.*[23]

Goodman arose after a homeowner discovered defects in his home roughly five years and nine months after the developer, Heritage Builders, had finished construction. Two years later, the homeowner sued Heritage Builders for damages. The trial court deemed the homeowner's claims to be timely because the homeowner had discovered the manifestation of the defects in the sixth year following construction and filed suit within two years of discovery.[24] Heritage Builders then filed a third-party complaint for indemnity against the responsible subcontractors, but the district court entered summary judgment in the subcontractors' favor because the developer had not initiated its third-party action within six years of completion.[25]

Although a summary judgment order would typically be appealed to the Colorado Court of Appeals, the Colorado Supreme Court granted Heritage Builder's petition for an original proceeding based on the novel issues presented, and the court ordered the subcontractors to show cause why summary judgment should not be set aside.[26]

During oral argument, Heritage Builders argued that the six-year repose period should be extended to eight years for all parties, not just the homeowner, based on the date that the

physical manifestation of the defect was first discovered. Justices Gabriel and Márquez interrupted to ask, however, why they should not simply overrule the court of appeals and hold that CDARA permits developers to assert third-party indemnity claims outside the six-year repose period?[27]

In a succinct opinion that followed, the supreme court did just that. Writing for a unanimous court, Chief Justice Rice reviewed the statutory language of CDARA and its statement that indemnity claims could be brought within ninety days of resolution "notwithstanding" the paragraph of the statute that establishes both the two-year limitations and the six-year repose period.[28] The court concluded that this language indicated the drafters' intent to allow developers to pursue third-party claims within ninety days of resolution with a homeowner, even if this occurs more than six years after the end of construction. The court therefore made its rule absolute, vacated entry of summary judgment, and overruled *Thermo*, *Shaw*, and *Sierra Pacific*.[29]

Goodman will provide immediate relief to developers, but its holding should also benefit homeowners, a core group that CTLA's members must often act to protect. By giving developers a greater opportunity to recover indemnity from responsible subcontractors, more resources will become available to repair property damage and settle homeowner construction defect claims. This serves an important public policy implicit in CDARA.

Critics may argue that a shorter statute of repose is needed "to relieve those involved in the construction business of the prospect of potentially indefinite liability for their acts or omissions."[30] Such concerns may be exaggerated, however, given that most subcontractors' liability insurance policies provide coverage for occurrences triggered by the date of loss, not the date a claim is made.[31] In that context, the *Goodman* case should not expose subcontractors to significant liability beyond the existing statute of repose period. Even if an indemnity lawsuit were filed decades after work was completed, the claimant would still need to prove that the property damage occurred during the first six to eight years following construction, or else the underlying claim would be untimely. So long as subcontractors have paid their premiums during the statute of repose period, their policies should cover their liability, regardless of when the claim was actually asserted; they need not fear perpetual exposure to indemnity claims.

In sum, CDARA's drafters recognized in 2001 that the 1986 legislation had tipped the scales out of balance, and they acted to solve the problem. It is unfortunate that it would take sixteen more years for their solution to be upheld, but practitioners can take relief in the fact that the courts finally got it right in the end. ▲▲▲

Jesse Howard Witt is the principal of The Witt Law Firm and a member of CTLA's amicus curiae committee. He focuses his practice on appeals, construction law, and civil litigation.

Endnotes:

[1] Colo. Rev. Stat. § 13-80-127 (1973). This statute did not initially apply to construction defect claims but was amended in 1979 to expand its scope. *See Homestake Enters., Inc. v. Oliver*, 817 P.2d 979, 982 (Colo. 1991).

[2] Colo. Rev. Stat. § 13-80-104 (1986).

[3] One could argue that the legislature could have simplified matters by adopting a fixed eight-year statute of repose period with no possibility of extension. Because the statute of limitations already bars suits filed more than two years after discovery, a fixed eight-year repose period would provide the same protections for builders in most cases. The 1986 amendments may have adopted a variable period to retain the same format as the older statute, which had allowed the repose period to be extended up to one year if a claim arose in the tenth year after construction. *See* Colo. Rev. Stat. § 13-80-127 (1984 Supp.). This format perpetuates complication and confusion, however, with little substantive benefit. The existing law establishes two separate timelines that may apply, but they only diverge from a fixed eight-year rule in limited circumstances. For example, a defect suit filed seven years and eleven months after construction would be timely if the homeowner had noticed the defect two years earlier and waited until the last minute to sue, but a defect suit filed seven years and eleven months

after construction would not be timely if the homeowner acted promptly and sued immediately after discovering the defect. There is little reason to penalize the homeowner in the latter scenario or, conversely, to assume that the claim is any less stale relative to the defendant.

[4] Colo. Rev. Stat. § 13-80-127(1)(b) (1984 Supp.) (emphasis added).

[5] Colo. Rev. Stat. § 13-80-104(1)(b)(I) (1986) (emphasis added).

[6] That a construction defect claim can accrue before the claimant has discovered the defendant's wrongful act departs from the general rule that a "statute of limitations begins to run when the claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another." *Mastro v. Brodie*, 682 P.2d 1162, 1168 (Colo. 1984) (discussing statute of limitations for medical malpractice actions).

[7] *Nelson, Haley, Patterson & Quirk, Inc. v. Garney Cos., Inc.*, 781 P.2d 153, 155 (Colo. App. 1989).

[8] *Duncan v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 447, 578 P.2d 637, 641 (1978).

[9] *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166, 1167 (Colo. App. 2008).

[10] *Id.* at 1167, *quoting* Colo. Rev. Stat. § 13-80-104 (2007).

[11] *Id.* at 1170.

[12] *Id.*

[13] Emails between the author and plaintiff's counsel, on file (Sept. 24, 2008).

[14] *Shaw Constr., LLC v. United Builder Serv., Inc.*, 296 P.3d 145, 153 (Colo. App. 2012).

[15] *Id.*

[16] *Id.* at 154–155.

[17] *Sierra Pac. Indus., Inc. v. Bradbury*, ___ P.3d ___, 2016 COA 132.

[18] *Id.* ¶ 16 n.4.

[19] *Id.*

[20] Colo. Rev. Stat. § 13-80-104 (2007).

[21] Colo. 69th Gen Ass. S.B. 52 "Transit-oriented Development Claims Act of 2013," (2013).

[22] A compromise CDARA amendment bill finally passed in 2017 with the support of CTLA. It made no changes to the statute of repose. *See* Colo. 71st Gen Ass. H.B. 1279 (2017), *codified at* Colo. Rev. Stat. § 38-33.3-303.5 (2017).

[23] *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398 (Colo. 2017).

[24] Oral arg., No. 16SA193 (Dec. 6, 2016), https://www.courts.state.co.us/Courts/live/.

[25] *Goodman*, 390 P.3d at 400–401.

[26] *Id.* at 401.

[27] Oral arg., No. 16SA193 (Dec. 6, 2016), https://www.courts.state.co.us/Courts/live/.

[28] *Id.*

[29] *Id.* at 402. Though not mentioned by the supreme court, its holding also arguably overrules *Sopris Lodging, LLC v. Schofield Excavation, Inc.*, ___ P.3d ___, 2016 COA 158 (Nov. 23, 2016), wherein the court of appeals had held that a third-party indemnity claim asserted within existing lawsuit after the expiration of the statute of limitations period but before resolution of the first-party claims was untimely.

[30] *Sierra Pacific*, 2016 COA 132 ¶ 26.

[31] *See* Jesse Howard Witt & Marci M. Achenbach, *Insuring the Risk of Construction Defects in Colorado: The Tenth Circuit's Greystone Decision*, 90 Den. U. L. Rev. 622 (2013).