Colorado Lawyer
May, 2004

Specialty Law Column

Construction Law Forum
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STATUTES OF LIMITATIONS AND REPOSE IN CONSTRUCTION DEFECT CASES--PART I

This column is sponsored by the CBA Construction Law Forum Committee. The column addresses various construction-related issues in both public and private areas. The column editor and Committee encourage the submission of substantive law articles addressing issues of interest to practitioners in the field of construction law.

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This two-part article discusses Colorado's statutes of limitations and repose in connection with construction and materials defect litigation.

Colorado has a special statute of limitations and repose for claims arising from construction of improvements to real property, CRS § 13-80-104, which contains some of the shortest limitations periods in the United States. This statute has been amended over time in response to various court decisions. However, a construction professional's assertion of a statute of limitations defense may implicate other statutes.

Which statute applies depends on: (1) who is suing or being sued; (2) the claims asserted; and (3) the nature and cause of the construction defect. In addition, tolling and estoppel doctrines may prevent the defendant from raising the limitations bar. Thus, the facts triggering tolling and estoppel doctrines must be considered and the applicable doctrines applied when necessary.

This first part of the article explores CRS § 13-80-104 and other relevant statutes of limitations and repose. It also examines factors that trigger the running of these various statutes, as well as identifying which activities and claims are subject to these disparate limitations periods. In addition, the article describes the defects and conduct that may be subject to such statutes. Finally, it reviews recent changes to the laws wrought by the Construction Defect Action Reform Acts of 2001 and 2003.

The second part of this article, which will appear in this column in June 2004, examines potentially applicable tolling and estoppel doctrines and the constitutionality of certain statutes of limitations and repose. Part II also discusses the drafting of jury instructions that logically integrate these various principles.

Construction Professionals Subject to CRS § 13-80-104

The term "construction professional" is used in this article to describe generally the persons subject to the statute of limitations and repose pertaining to the construction of real property improvements. According to CRS § 13-80-104, this refers to

> 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.[1]

Developers and subcontractors likely are subject to this statute as well when engaged in any of the listed activities.

Scope of CRS § 13-80-104

CRS § 13-80-104 provides statutes of limitations and repose for all actions in tort, contract, indemnity, contribution, or otherwise for the recovery of damages. It applies to any deficiency in the "design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property."[2] CRS § 13-80-104 applies when such a deficiency caused: (1) injury to real or personal property; or (2) injury to or wrongful death of a person.[3]

74 *Applicable Claims And Activities

CRS § 13-80-104 applies only to improvements to real property. The attachment of personal property to realty, regardless of whether such attachment results in the creation of a fixture, is an improvement subject to the statute.[4] In short, CRS § 13-80-104 applies to activities relating to the process of building a structure.[5]

The Colorado Court of Appeals found that CRS § 13-80-104 applied to concrete poured to form part of a parking garage.[6] Repainting the surface of an existing building--including preparing the surface to receive the paint, such as by sanding and caulking--may fall within the ambit of CRS § 13-80-104.[7] However, an action for breach of a warranty to repair or replace deficient work is not subject to the statute.[8]

An "activity" involves construction of an improvement to real property if it is essential and integral to the function of the construction project.[9] Another important factor in determining whether an activity constitutes an improvement to real property is the owner's intention.[10] CRS § 13-80-104 focuses on persons whose activities relate to the construction or improvement of a building or other structure, in contrast to those who design, manufacture, supply, or service particular items placed within a building or part of it through the efforts of others.[11] Thus, as noted earlier, CRS § 13-80-104 applies to activities relating to the process of building a structure.

In one case, a subcontractor's negligent operation of a sprinkler system in freezing temperatures created an icy sidewalk, invoking the limitations period of the predecessor statute.[12] However, CRS § 13-80-104 was held inapplicable to a damage claim against a contractor arising from the contractor's use of heavy equipment in constructing a roadway, when vibrations from the work allegedly damaged a nearby home.[13]

A court must not only examine the label placed on the party who was involved in the building process, but also must look to whether the party's actions fall within the protected class of activities under CRS § 13-80-104. In one case, CRS § 13-80-104 applied to a "manufacturer" of pre-cast concrete building products for the structural framework of a parking garage, because the "manufacturer" also was engaged in substantial off-site and on-site roles in constructing the parking garage, including designing the garage columns and beams.[14]

Claims and Activities Not Included

CRS § 13-80-104 is not applicable to claims against a developer or seller of unimproved lots.[15] Examples of other activities that are not subject to this limitations period include the: (1) pre-purchase inspection of a home; (2) movement of a historical monument from one location to another; (3) re-zoning and platting of property; and (4) performance of a land or boundary survey that is not part of an improvement or building project.[16]

Two-Year Statute of Limitations Under CRS § 13-80-104

A statute of limitations sets a maximum time period during which certain actions can be brought or rights enforced.[17] CRS § 13-80-104 provides that claims governed by this statute must be commenced within two years of 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 that ultimately causes the injury.[18] The limitation of actions provided in CRS § 13-80-104(1)(a) is in derogation of the common law; therefore, it will be strictly construed to limit its application to the clear intent of the General Assembly.[19]

Statutes of Repose Under CRS § 13-80-104

A statute of repose limits potential liability by limiting the time during which a cause of action arises, regardless of the time of accrual of the cause of action or of notice of an invasion of one's legal rights.[20] Unlike a statute of limitations, a statute of repose generally imposes an absolute bar to bringing suit after a prescribed period.[21] There are two periods of repose covered by CRS § 13-80-104: (1) a six-year "conditional" period; and (2) an eight-year "absolute" period.

In addition to the two-year statute of limitations, CRS § 13-80-104(1)(a) provides that no action against any construction professional performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property may be brought more than six years after the substantial completion of the improvement to real property.

The six-year period runs even if the aggrieved party, such as the owner, has no knowledge of the physical manifestation of a defect. Nevertheless, where the manifestation of the defect is first known (or should have been known) during the fifth or sixth year after substantial completion, suit may be instituted within two years of such actual or constructive knowledge. Thus, in such circumstances, it is permitted for a suit to be commenced during the seventh or eighth year following substantial completion.[22] Barring extraordinary circumstances, CRS § 13-80-104 effectively imposes an absolute eight-year deadline on time for the commencement of suits arising from the construction of real property improvements.

The six-year period of repose begins only after "substantial completion of the improvement to real property," the determination of which involves unresolved and sometimes difficult questions.[23] "Substantial completion" frequently means no later than issuance of a certificate of occupancy ("C.O.") for a newly-built structure. Such a bright-line test has much appeal. In one case, however, a district court properly noted that while the use of the date that the C.O. issued was a convenient reference point, the court could not say that in every case the home was substantially completed at the time the C.O. issued.[24]

The statute of repose contained in CRS § 13-80-104 does not deprive a court of jurisdiction. Instead, it must be pled and proven as an affirmative defense, and may be waived if not timely raised.[25]

Other Statutes of Limitations

Because some persons, some activities, and some claims do not fall within the scope of the real property improvement statutes of limitations and repose, the application of other statutes of limitations must be considered on a case-by-case basis. This is especially true when claims under Colorado's Consumer Protection Act, Product Liability Act, and Common Interest Ownership Act are asserted; when claims under federal law, such as the Interstate Land Sales Full Disclosure Act are brought; and when claims for misrepresentation, breach of warranty, and breach of fiduciary duty are alleged.

Consumer Protection Act Statute of Limitations

In *Stiff v. BilDen Homes, Inc*.[26] the Colorado Court of Appeals applied CRS § 6-1-115 (not CRS § 13-80-104) to claims brought by homeowners under the Colorado ***75** Consumer Protection Act ("CCPA")[27] for deceptive trade practices claims arising from various construction defects. Generally, where a cause of action is governed by its own, special statute of limitations, a more general statute, even if potentially applicable, does not apply.[28]

The CCPA provides for a three-year limitations period. A claim accrues for purposes of triggering the running of the limitations period under the CCPA: (1) on the date when the deceptive practice occurred; (2) when the last in a series of such deceptive practices occurred; or (3) within three years after the consumer discovered, or in the exercise of reasonable diligence should have discovered, the occurrence of the deceptive practice.[29]

The language in the CCPA has been interpreted to mean the date "when the plaintiff discovers or should have discovered the misconduct in question."[30] The limitations period may be extended by one year if the plaintiff establishes that the failure to timely commence the action was caused by the defendant's conduct calculated to induce the plaintiff to refrain from or postpone the commencement of suit.[31]

Product Liability Act Statute of Limitations

Manufacturers and sellers of materials, supplies, and products that are incorporated into an improvement to real property are not necessarily subject to CRS § 13-80-104. Such determination depends on the nature of the activity at issue. If the activity is held to involve the manufacture of a product and is not governed by CRS § 13-80-104, under CRS § 13-80-106, the limitations period is two years from the date the cause of action arises.

No Colorado case squarely addresses the applicable statute of limitations to product defect claims arising from defective building materials. Decisions addressing this issue outside Colorado turn on the precise language of the state statute of limitations at issue. For example, the North Carolina Court of Appeals held that its state real property improvement statute of limitations did not apply to claims brought against the manufacturer of a product (in this instance, exterior siding) that is incorporated into the constructed improvement.[32] The court said that the manufacturer would not be deemed a materialman who furnished materials to the job site.[33]

Where the product is not mass produced, but is specially manufactured on-site or for use with a particular real property improvement, stronger grounds exist to argue for application of the real property improvement construction statute of limitations. Resolution of the issue of which statute of limitations applies in close cases may depend on whether the construction material failure is attributable to: (1) a manufacturing or design error in a mass-produced component; or (2) some alteration in the manufacture or design due to consideration of a site-specific condition.[34]

For example, a claim arising from the failure of a window to function properly might be characterized in a number

of different ways, depending on the circumstances. Such a claim might be deemed a:

> 1) product liability claim, if the defendant was sued in its capacity as manufacturer who sold and distributed a mass-produced window product that leaked rain into wall cavities and was not reasonably suitable for use in a home;
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> 2) construction defect claim, if the defendant was sued in its capacity as a builder who selected a window with ***76** a wind- and moisture-penetration rating less than that required by the local building code or reasonable care, or who negligently permitted the installation of the windows with "reverse-lapped" flashing (where the flashing is misinstalled so as to draw moisture into the building envelope rather than to shed the moisture onto the ground); or
>
> 3) professional liability claim, if the defendant was sued in its capacity as a design professional who specified a window whose resistance to water penetration was inadequate for homes built in a particular wind zone.

In Fine v. Huggens, DiMella, Shaffer & Associates,[35] the Massachusetts Court of Appeals addressed a case involving defective exterior wall panels and window assemblies. The court held that the state real property improvement repose statute applied to the defendant architects who "render[ed] particularized services for the design and construction of particular improvements to particular pieces of real property." Further, such statute also applied to the defendant manufacturer and supplier of the panels. According to the court,

> [s]uppliers of building components have been determined to be protected actors entitled to protection by the repose provision ... only where the role of supplier was incidental and the actor's primary function was to provide individual expertise and particularized services relating to design and construction of the real property improvement at issue .... [Here, the panels were] not a fungible product designed for public sale or for general use, but [were] a component of an exterior wall system that ... [was] custom-manufactured specifically for the ... project pursuant to the specifications of architects and engineers, and [the manufacturer] collaborated in the design and erection of the panels.[36]

As to the window supplier, however, the court held that the real property improvement statute of repose did not apply. This is because the court did not agree that although the window's "sill receptors" were custom-made, these types of modifications to mass-produced products were the kinds of services the legislature intended to include within the protections of the statute.[37] Cases such as this establish that determining which statute of limitations applies to product and construction material suppliers is a fact-specific inquiry.

Colorado's Common Interest Ownership Act Statute of Limitations

The Colorado Common Interest Ownership Act ("CCIOA")[38] contains a restriction on the running of statutes of limitations that may be relevant to construction defect claims.[39] CRS § 38-33.3-311 provides that a declarant is liable to the association or to any unit owner for: (1) all tort losses not covered by insurance suffered by the association or that unit owner; and (2) all costs the association would not have incurred but for such declarant's act or omission during the period of declarant control. CRS § 38-33.3-311(1) goes on to provide, in pertinent part, "Any statute of limitations affecting the association's right of action under this section is tolled until the period of

declarant control terminates."[40]

CRS § 38-33.3-311 does not directly conflict with the limitations period provided for in CRS § 13-80-104 or elsewhere. The section appears to address the perceived unfairness arising from allowing a limitations period to run against a CCIOA homeowner association when a potential defendant in a construction defect suit controls the association's ability to timely commence an action arising from the defendant's negligence in constructing the CCIOA community.[41] Thus, association counsel may argue for application of the tolling effect of CRS § 38-33.3-311 under the proper circumstances.

Colorado courts have not addressed the question of whether knowledge of a defect in a common element by a unit owner in a common interest community will be imputed to the community association. Outside Colorado, several courts have held that no imputation of knowledge will be found, at least where the unit owner is neither an officer nor director of the association.[42]

Misrepresentation Statute of Limitations

Counsel for property owners often argue that misrepresentation, including non-disclosure, claims arising from construction defects are subject to the three-year statute of limitations provided for in CRS § 13-80-101(c). If CRS § 13-80-101(c) applies, accrual of the cause of action occurs where such "fraud, misrepresentation, concealment or deceit is discovered or should have been discovered by the exercise of reasonable diligence."[43]

Breach of Fiduciary Duty Statute of Limitations

Counsel for homeowner associations sometimes assert breach of fiduciary duty claims against developers and their principals, arising from their acts and omissions while controlling an association's board.[44] For example, this might involve failing to properly inspect and reject improperly-constructed common elements. There is a reasonable argument that such breach of fiduciary duty claims are subject to the three-year statute of limitations provided for in CRS § 13-80-101(1)(f) applicable to claims for "breach of trust or breach of fiduciary duty." In addition, the reasoning goes that, regardless of which statute of limitations applies, accrual of the cause of action occurs for such breach when the "injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of reasonable diligence."[45]

This approach is corroborated by *Frisco Motel Partnership v. H.S.M. Corporation*.[46] There, the Colorado Court of Appeals held that the statute of limitations for a breach of fiduciary duty claim by one partner against another, arising from defective construction, was not governed by the predecessor real property improvement statute of limitations. Instead, it was governed by the specific limitations period applicable to breach of fiduciary duty.[47]

Breach of Implied Warranty Statute of Limitations

Counsel for property owners sometimes argue that breach of implied warranty claims arising from construction defects are subject to the three-year statute of limitations provided for in CRS § 13-80-101 (1)(a). If this statute applies, accrual of the cause of action occurs when "the breach is discovered or should have been discovered by reasonable diligence."[48]

Interstate Land Sales Statute of Limitations

Actions under the Interstate Land Sales Full Disclosure Act ("ILSFDA") are subject to the time limitations provided for in that statute. This includes: (1) a three-year limitations period from the "date of signing of the

contract of sale or lease" for claims relating to a failure to comply with the ILSFDA's registration and mandatory disclosure requirements; and (2) a three-year limitations period relating to violations of the ILSFDA's anti-fraud provisions, which limitations period begins to ***77** run on the date of "discovery of the violation or after discovery should have been made by the exercise of reasonable diligence."[49] Under some circumstances, principles of equitable estoppel may extend these time limitations, such as where a developer conceals materials facts from a lot purchaser.[50]

The cautious practitioner will want to analyze every construction defect case where a statute of limitations is implicated to determine whether the persons, activities, or claims involved in the dispute fall within the scope of the real property improvement statutes of limitations and repose or whether other statutes of limitations may apply and control.

Effects of CDARA on Statutes of Limitations And Repose

In 2001, the legislature passed a series of laws known as the Construction Defect Action Reform Act ("CDARA I"). In 2003, those laws were significantly altered with a series of amendments and additions ("CDARA II").[51] These sweeping changes in the laws affecting construction defect actions included some changes affecting application of various statutes of limitations and repose.

Notice of Claim Process And Resultant Tolling of Limitations Period

CDARA II adopted a mandatory "notice of claim process" ("NCP").[52] If a notice of claim is sent to a construction professional in accordance with the NCP within the prescribed time for filing an action under any applicable statute of limitations or repose, the statute is tolled until sixty days after the completion of the NCP.[53] For example, the NCP may be extended while promised repairs are being arranged and made. Similarly, extensions of the limitations period may result from: (1) delays caused by forces outside the construction professional's control; (2) submission of multiple or amended notices of claim; or (3) the parties' agreement to extend the process. Thus, the statutorily-mandated tolling period may significantly augment both the statutes of limitations and repose.

As discussed more fully in Part II of this article, Colorado expressly approves the tolling of limitations periods when a builder, contractor, or other construction professional gives assurances to homeowners regarding remedying alleged construction defects.[54] These common law tolling doctrines may overlap with the statutory tolling provision of CDARA II.

E-mails and other forms of delivery may satisfy initiation of the CDARA II NCP requirements sufficient to toll the statute of limitations.[55] However, there must be proof of actual receipt of such notice by the construction professional.[56]

A construction defect claim often may involve an owner-claimant, developers, builders/general contractors, various subcontractors, and each of their respective liability insurers. To further the legislative intent of limiting premature, cumulative, and otherwise unnecessary litigation, courts may interpret the CDARA II tolling provisions to toll *all* claims until all aspects of the NCP have run their course. Thus, all claims may be tolled, whether the NCP was instituted by the claimant, construction professional, or others in the construction defect chain. By providing the statutory NCP notice to third parties such as subcontractors, a construction professional can take advantage of the statute of limitations and repose tolling provisions of CRS § 13-20-805 as to any third-party claims.

Indemnity and Contribution Claims Under CDARA

Colorado courts have construed Colorado's real property improvement statute of limitations when applicable to indemnity and contribution claims to be triggered at the time the defect that gives rise to such claims manifested. This application of the statute may bar a party's indemnity claim even before that party's liability is finally determined and before that party makes any payment for the loss.[57]

Due in part to the potential unfairness of this rule, and the growing practice of many builders to "protectively" join potentially liable third-party subcontractors, this aspect of the statute of limitations was amended by CDARA I in 2001. The amendment provides that a claim against a person who is or may be liable to the claimant for all or part of the claimant's liability to another person arises at the time of the settlement of or entry of a final judgment on the claimant's liability to the other person. Further, such claim must be brought on or before ninety days after the settlement or final judgment.[58] It is unlikely this change was intended to prevent a construction professional from joining a potentially liable party under C.R.C.P. 14 before such settlement or judgment.

*78 Defects: Definition and Manifestation

"Defect" has been broadly defined in some contexts as an irregularity in the surface of a structure that spoils the appearance or causes weakness or failure. It is an inherent fault or flaw, or a want or absence of something necessary for completeness, perfection, or adequacy in form or function.[59]

Although all contours of the term "defect" have not been addressed under CRS § 13-80-104, analogous questions have been addressed under the Governmental Immunity Act.[60] That law requires the provision of advance, written notice of a claim to a governmental entity within 180 days of an injury as a condition to bringing suit.

The proper inquiry under this law is whether evidence exists to cause a reasonable person to know, for example, that a toilet overflow is not merely an "isolated" household occurrence, but resulted from an "abnormal" plumbing problem, so as to trigger the 180-day notice requirement.[61] As discussed below, similar issues relating to whether the condition observed is transitory or permanent, and whether the condition is evidence of an inherent defect or an isolated and idiosyncratic event, arise in determining whether the real property improvement limitations period has been triggered.

Manifestation of a Defect

A common problem in applying CRS § 13-80-104 is determining when a homeowner "knew or should have known" of the manifestation of the defect at issue. This question usually is one of fact for the jury.[62] The issue can become especially thorny when the condition observed would be deemed a "normal" condition by most persons, and not necessarily the manifestation of a "defect."

For example, perfectly poured concrete slabs and foundation walls typically develop hairline cracks and some spalling over time. Such slabs may evidence later cracking due to normal settlement of the structure. Nevertheless, years after the home is sold, these cracks may materially expand, and the concrete may begin to move differentially, due to the pressures exerted by water that builds up in adjacent clay soils. The legislature likely did not intend to require homeowners to sue the builder whenever minor concrete cracks appear, just to protect against the running of the statute of limitations. Thus, such cracks should not be deemed to reflect the "manifestation of a defect" and trigger the running of the statute of limitations.

Where the condition of an improvement to real property may be the result of several causes occurring at different times, the defendant bears the burden of establishing that the cause of the wrongful construction claim is based on the same cause as the manifestation of the defect on which the defendant relies to apply the statute of limitations.[63]

In *Wildridge Venture v. Ranco Roofing, Inc.*,[64] a question of fact precluding summary judgment arose as to whether knowledge of roof leaks in eight of thirty-two apartment buildings should have led to the investigation and discovery of similar problems in the other buildings.[65]

In *BilDen Homes, Inc.*,[66] the Colorado Court of Appeals construed both CRS §§ 13-80-104(1)(b)(I) and -108(1) to require that "the limitations period begins when the plaintiff knew or should have known of the damage *and its cause*."[67] (*Emphasis added*.) In *BilDen Homes, Inc.*, the Colorado Court of Appeals held that movement of a concrete slab-on-grade flooring system did not trigger the real property statute of limitations until such movement became "excessive and [construction] accommodations were no longer sufficient to control the damage."[68]

Conclusion

Application of Colorado's statutes of limitations and repose to construction defect claims is a difficult and exacting task. Proper application of such statutes requires a clear determination of: (1) the nature of the claim asserted; (2) the triggering event for the limitations period for that particular claim; (3) the specific defect that is the subject of the claim; (4) the proper characterization of the defendant's activities and the relationship of those activities to the creation of the defect; (5) the cause of the defect; and (6) whether an earlier-occurring manifested defect has the same cause as the defect that is the subject of the lawsuit.

As will be discussed in Part II of this article, to be published in this column in June 2004, it also is necessary to know whether: (1) facts are present implicating tolling or estoppel doctrines; (2) if so, the effect of such tolling period or estoppel, and whether application of the particular doctrine to the facts is an issue of law for the court or an issue of fact for the jury to decide; and (3) whether the specific statute of limitations applicable to the claim is constitutional. Finally. Part II will address considerations in drafting proper jury instructions in light of these and other issues.

Footnotes

a1 *This month's article was written by Ronald M. Sandgrund and Scott F. Sullan, Greenwood Village, principals with Vanatta, Sullan, Sandgrund & Sullan, P.C.--(303) 779-0077. The firm often represents property owners in construction, development, and building materials defect litigation. The authors thank attorney Joseph F. Smith and legal assistant Dinae Hoem for their help on this article, and column editor Jim Bain for his expert editing.*

1 CRS § 13-80-104. As used in the Construction Defect Action Reform Act of 2003 ("CDARA II"), in CRS § 13-20-802.5(4), the term "construction professional" is statutorily defined to mean "an architect, contractor, *subcontractor, developer*, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property." (*Emphasis added*.) CRS § 13-80-104 does not expressly include the words "subcontractor" or "developer," the significance of which omission is uncertain.

2 CRS § 13-80-104(1)(a).

3 CRS § 13-80-104(1)(c).

4 *Highline Vill. Assocs. v. Hersh Cos., Inc.*, 996 P.2d 250, 254 (Colo.App. 1999), *citing to Anderson v. M.W. Kellogg Co.*, 766 P.2d 637 (Colo. 1988) and *Stanske v. Wazee Elec. Co.*, 722 P.2d 402 (Colo. 1986), *aff'd in part, rev'd in part, Hersh Cos., Inc. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001).

[5] *Id*.

[6] *Embree v. Am. Cont'l Corp.*, 684 P.2d 951 (Colo.App. 1984) (lot grading is improvement to real property).

[7] *Highline Vill. Assocs. v. Hersh Cos., Inc.*, *supra*, note 4.

[8] *Hersh Cos., Inc. v. Highline Vill. Assocs.*, *supra*, note 4.

[9] *Stanske*, *supra*, note 4 (construing predecessor statute and finding that electrical system in grain elevator was improvement to real property); *Anderson*, *supra*, note 4 (C-7 conveyor is an improvement to real property).

[10] *Two Denver Highlands Ltd. P'ship v. Dillingham Constr. N.A., Inc.*, 932 P.2d 827 (Colo. App. 1996), *cert. denied*. *See also Enright v. Colorado Springs*, 716 P.2d 148 (Colo.App. 1985) (vestibule attached to airport terminal is improvement to real property because owner intended to provide permanent relief from high winds).

[11] *See Dillingham Constr. N.A., Inc.*, *supra*, note 10 (activities of subcontractor who prepared and installed concrete for use in a building subject to CRS § 13-80-104).

[12] *Irwin v. Elam Constr., Inc.*, 793 P.2d 609 (Colo.App. 1990).

[13] *Homestake Enter., Inc. v. Oliver*, 817 P.2d 979 (Colo. 1991).

[14] *Two Denver Highlands Ltd. Liab. P'ship v. Stanley Structures, Inc.*, 12 P.3d 819 (Colo. App. 2000).

[15] *Calvaresi v. Nat'l Dev. Co., Inc.*, 772 P.2d 640 (Colo.App. 1988).

[16] *Gleason v. Becker-Johnson Assoc., Inc.*, 916 P.2d 662 (Colo.App. 1996); *Flatiron Paving Co. v. Great Southwest Fire Ins. Co.*, 812 P.2d 668 (Colo.App. 1990); *Calvaresi*, *supra*, note 15; *Ciancio v. Serafini*, 574 P.2d 876 (Colo.App. 1977) (applying predecessor version of real property improvement statute of limitations to engineer's boundary survey).

[17] *Black's Law Dictionary,* abridged 6th ed. (St. Paul, MN: West Pub. Co., 1991) at 639.

[18] Before enactment of the current statute of limitations, builders and contractors theoretically could be liable for a potentially indefinite period, perhaps subject only to the doctrine of *laches*.

[19] *Gleason*, *supra*, note 16.

[20] *Black's Law Dictionary, supra*, note 17 at 982.

[21] *Gleason, supra*, note 16.

[22] CRS § 13-80-104(2).

[23] CRS § 24-91-102(5) (defining "substantial completion" for purposes of public entity construction contracts). *See also* Rhody, "Defining 'Substantial Completion' in Construction Defect Actions," 27 *The Colorado Lawyer* 73 (Oct. 1998) (discussing difficulties in determining substantial completion date for rehabilitated and renovated structures and "superpads"). The El Paso County District Court recently addressed whether "substantial completion" should be construed to mean substantial completion of the construction element at issue, as opposed to the improvement to real property as a whole, in the context of a third-party claim brought by a general contractor against a grading subcontractor. The court found that the reference in CRS § 13-80-104 to substantial completion of the improvement to real property as it pertains to the statute of repose refers to completion of construction of the entire home. Order, *Messier v. Heartview Co. et al.*, Case No. 01 CV 2837 (El Paso Cty. Dist.Ct. Oct. 17, 2003).

[24] Order, *Peterson et al. v. Mission Viejo Co.*, Case No. 92 CV 568 (Douglas Cty. Dist.Ct. Sept. 8, 1995).

[25] *Dunton v. Whitewater West Recreation, Ltd.*, 942 P.2d 1348 (Colo.App. 1997).

[26] *BilDen Homes, Inc.*, 32 Colo.Law. 262 (Oct. 2003) (App. No. 02CA1838, *annc'd* 8/28/03), not yet released for official publication (NYRFOP).

[27] Colorado Consumer Protection Act ("CCPA"), CRS §§ 6-1-101 *et seq*.

[28] *Hersh Cos., Inc. v. Highline Vill. Assocs., supra*, note 4 at 225 (specific statute of limitations for breach of warranty prevailed over real property improvement statute of limitations as to breach of warranty to repair defectively painted structure).

[29] CRS § 6-1-115.

[30] *Robinson v. Lynmar Racquet Club, Inc.*, 851 P.2d 274, 281 (Colo.App. 1993).

[31] CRS § 6-1-115.

[32] *Henderson v. Park Homes Inc.*, 555 S.E.2d 926, 928 (N.C.App. 2001) ("The EIFS [Exterior Insulation and Finish System] made its way to plaintiffs' home through the commerce stream, thus implicating the products liability statute of repose.").

[33] The court held that because the ultimate and intended use of the EIFS is to provide a weather-resistant barrier to protect the house interior from exposure to the weather, and the EIFS barrier begins to perform this function at the moment of application, the EIFS was first "purchased for use or consumption" by the subcontractor who applied the EIFS to the plaintiffs' residence for purposes of applying North Carolina's product liability statute of repose. *Id*. at 929. *Contra, Mitchell v. Contractors Specialty Supply, Inc.*, 544 S.E.2d 533 (Ga.App. 2001) (Georgia real property improvement statute of limitations applied to synthetic siding product defect claim because damage arose from construction of real property improvement), *superseded by statute*, OCGA § 9-3-30(b)(1). *Cf. Mills v. Forestex Co.*, 134 Cal.Rptr. 2d 273 (Cal.App. 5 Dist. 2003) (applying real property statute of limitations because statute

focuses on nature and source of damage alleged, not defendant's capacity in causing damage). California law, however, offers little guidance to Colorado practitioners, because California considers production homes subject to strict product liability for construction defects: "In the context of products liability, Colorado law draws a sharp distinction between improvements to real property and 'products.'" *Hidalgo v. Fagen, Inc.*, 206 F.3d 1013, 1018 (10th Cir. 2000). *See Enright, supra*, note 10 (strict product liability would not apply to construction of airport plate glass vestibule); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982) (tort rationale for product liability not easily extended to cover provision of services); *Wright v. Creative Corp.*, 498 P.2d 1179 (Colo.App. 1972) (strict product liability not applicable to construction of sliding glass door in home); *McClanahan v. Am. Gilsonite Co.*, 494 F.Supp. 1334 (D.Colo. 1980) (strict product liability not applicable to construction of refinery), *abrogation on other grounds recognized by* *Estate of Stevenson v. Hollywood Bar and Cafe, Inc.*, 832 P.2d 718 (Colo. 1992).

[34] *Dillingham Constr. N.A., Inc., supra*, note 10 at 830 (subcontractor who prepared and installed concrete for use in building considered contractor under CRS § 13-80-104; statute applies to roles and activities that relate to the process of *building* a structure.) *See also Enright, supra*, note 10 at 150 (a glass manufacturer is "a contractor erecting an improvement to real property"); *Anderson, supra*, note 4 at 641 (conveyor "manufacturer" involved in construction of improvement to real property because of role as contractor and design engineer for construction of project that included conveyor); *Stanske, supra*, note 4 (manufacturer of defective electrical system indicator light in elevator protected by real property statute of repose because also served as contractor for installation of indicator light).

[35] *Fine*, 783 N.E.2d 842 (Mass.App. 2003).

[36] *Id*. at 846 and 847.

[37] *Id*. at 848.

[38] Colorado Common Interest Ownership Act ("CCIOA"), CRS §§ 38-33.3-101 *et seq*.

[39] CRS § 38-33.3-311(1) provides that if the act or omission occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable for all tort losses not covered by insurance and all costs that would not have incurred but for such act or omission. The declarant also is liable under this section for all expenses of litigation, including reasonable attorney fees, incurred. CCIOA contains two limitations-period related sections. The other provision concerns enforcement of building restrictions. *See* CRS § 38-33.3-123(2).

[40] CCIOA is based on a Uniform Act. Comment 2 to the parallel § 3-111 of the Uniform Act states that: "In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control ... subsection (a) provides that ... the association or any unit owner has a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control." Comment 5 to § 3-111 of the Uniform Act further expands on this provision, stating: "The 1994 amendment ... makes clear that *no period of limitations regarding an association's claim against the declarant*, including a limit appearing in this or any other section of this Act, *begins to run against the association until the period of declarant control terminates*." (*Emphasis added*.)

[41] *See generally* Sandgrund and Smith, "When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?" 31 *The Colorado Lawyer* 91 (Jan. 2002).

[42] *See* *Celotex Corp., Inc. v. Gracy Meadow Owners Ass'n, Inc.*, 847 S.W.2d 384 (Tex.App. 1993); *Menna v. Sun Country Homeowners Ass'n, Inc.*, 604 So.2d 897 (Fla.App. 2 Dist. 1992); *Unit Owners Ass'n of Plaza Vill. Townhouses v. Younger*, 1992 WL 884963 (Va.Cir.Ct. Oct. 13, 1992).

[43] *See* CRS § 13-80-108(3). *But see* *Ebrahimi v. E.F. Hutton & Co., Inc.*, 794 P.2d 1015 (Colo. App. 1989) (claim for negligent misrepresentation subject to statute of limitations for negligence, not fraud).

[44] *See* CRS § 38-33.3-303(2)(a) ("If appointed by the declarant, in the performance of their duties, the officers and members of the executive board are required to exercise the care required of fiduciaries of the unit owners."). *See also* *Woodmoor Imp. Ass'n v. Brenner*, 919 P.2d 928 (Colo.App. 1996) (directors of corporation occupy fiduciary relationship and owe fiduciary duty to corporation).

[45] Case law pegs the accrual of the cause of action to when "the breach is discovered or should have been discovered by the exercise of reasonable diligence." *Anderson v. Somatogen, Inc.*, 940 P.2d 1079, 1083 (Colo.App. 1996).

[46] *Frisco Motel P'ship*, 791 P.2d 1195 (Colo. App. 1990), *cert. granted, cert. dismissed* (1990).

[47] The court also held that while the real property improvement statute of limitations governed claims for consequential damages arising from construction delays, it did not govern breach of contract claims arising from unpaid heating costs. *Id*. at 1197.

[48] *See* CRS § 13-80-108(6). *Cf. Hersh Cos., Inc. v. Highline Vill. Assocs., supra*, note 4 (claim for breach of warranty of repair not subject to real property improvement statute of limitations); *BilDen Homes, Inc., supra*, note 26 (cause of action for negligent construction accrues when plaintiff knew or should have known of damage and its cause).

[49] 15 U.S.C. § 1711.

[50] *See* *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978) (if grounds for equitable estoppel shown, doctrine will bar application of Interstate Land Sales Full Disclosure Act ("ILSFDA") limitations of action provision), *followed in* *Aldrich v. McCullogh Props., Inc.*, 627 F.2d 1036 (10th Cir. 1980), *cited with authority in* *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co.*, 937 P.2d 855 (Colo. App. 1996), *cert. denied* (1997) *Melhorn v. AMREP Corp.*, 373 F.Supp. 1378 (M.D.Pa. 1974). *See also* *Happy Inv. Group v. Lakeworld Props., Inc.*, 396 F.Supp. 175, 188 (N.D.Cal. 1975) (questions of fact existed as to whether defendants had engaged in concealing activities, thus precluding summary judgment against the plaintiffs' ILSFDA claim; defendants' continuing program of false representations by newsletters, brochures, and the like, indicating that the community was prosperous, active, and growing, and that plaintiffs' investments therein were appreciating in value, could serve to prevent application of statute of limitations).

[51] *See* H.B. 01-1166 (Colo. 2001), codified at CRS §§ 13-20-801 to - 804, 13-80-104, and 38-33.3-303.5; H.B. 03-1161 (Colo. 2003), codified at CRS §§ 13-20-802, -802.5, -803. -803.5, -804, -805, -806, and -807. *See generally* Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *The Colorado Lawyer* 89 (July 2003); Sandgrund, Sullan and Achenbach, "The Construction Defect Action Reform Act," 30 *The Colorado Lawyer*

121 (Oct. 2001).

[52] CRS § 13-20-803.5.

[53] CRS § 13-20-805.

[54] If an owner establishes that a defendant undertook to repair a defect and, either expressly or impliedly, promised or represented that such repairs would remedy the defect, and the owner reasonably relied on the same and did not file suit, the limitations period of the statute is tolled until the date the defendant abandoned its repair efforts. *See Highline Village Assocs. v. Hersh Cos., Inc.*, *supra*, note 4. *See also Hersh Cos., Inc. v. Highline Vill. Assocs.*, *supra*, note 4 (rationale underlying repair doctrine espoused by *Highline Village Assocs*. endorsed because requiring a party to initiate suit while repairs are being made "would promote unnecessary litigation, in turn compromising business relationships and burdening the courts with unripe claims filed by parties seeking to comply with the contractors' statute of limitations"). *Cf. Curragh Queensland Mining Ltd. v. Dresser Indus., Inc.*, 55 P.3d 235 (Colo. App. 2002) (no rejection of repair doctrine in *Highline Village Assocs.*; rather, case endorsed its underlying purposes). *See also Kniffin v. Colorado W. Dev. Co.*, 622 P.2d 586 (Colo.App. 1980), *cert. denied* (where developer promised to perform obligations within reasonable time, statute of limitations did not run until efforts abandoned). For a detailed and thoughtful discussion of the many doctrines (*e.g.*, equitable estoppel, equitable tolling, repair doctrine, and extended repair doctrine) that may serve to extend the limitations period in Colorado, *see Village Point Townhomes at Breckenridge v. Wooden Ski Corp.*, No. 99-CV-188 (Summit Cty. Dist. Ct. April 23, 2002), Order.

[55] CRS § 13-20-803.5(11).

[56] *Id*.

[57] *Nelson, Haley, Patterson & Quiirk, Inc. v. Ganey Cos., Inc.*, 781 P.2d 153, 156 (Colo.App. 1989).

[58] H.B. 01-1166, codified at CRS § 13-80-104 (1)(b). *See also Messier*, *supra*, note 23, Order (Nov. 21, 2003) (2001 CDARA I amendment to CRS § 13-80-104 intended only to modify statute of limitations, not statute of repose). *Cf. Duncan v. Schuster-Graham, Inc.*, 578 P.2d 637 (Colo. 1978), *superseded by statute*, the former CRS § 13-80-127 (claim for indemnity does not accrue, therefore limitations period does not run, until indemnitee's liability is fixed, *i.e.*, when pays the underlying claim or a judgment on it).

[59] *Elam Constr., Inc.*, *supra*, note 12 at 611.

[60] CRS §§ 24-10-101 *et seq.*

[61] *See Grossman v. City and Cty. of Denver*, 878 P.2d 125 (Colo.App. 1994).

[62] *See McKinley v. Willow Constr. Co., Inc.*, 693 P.2d 1023 (Colo.App. 1984).

[63] *Wildridge Venture v. Ranco Roofing, Inc.*, 971 P.2d 282 (Colo.App. 1998), *cert. denied*.

[64] *Id*.

[65] *Id*.

[66] *BilDen Homes, Inc*., *supra*, note 26.

[67] *Id*. at 262.

[68] *Id*. at 263.