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STATUTES OF LIMITATIONS AND REPOSE IN CONSTRUCTION DEFECT CASES--PART II

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.

Part I of this article introduced CRS § 13-80-104, Colorado's statutes of limitations and repose relating to claims arising from the construction and sale of improvements to real property.[1] It also discussed the Construction Defect Action Reform Acts of 2001 and 2003 ("CDARA I" and "CDARA II," respectively). This second part of the article discusses various circumstances that may serve to "toll" (extend) the running of a particular statute of limitations or repose. For example, such tolling may occur if a construction professional promises to make repairs or represents that repairs will be made.[2]

This Part II discusses the "repair doctrine" and principles of waiver and equitable and promissory estoppel, as well as potential constitutional challenges to certain statutes of limitations and repose. Finally, this article offers suggestions on how to craft jury instructions that successfully integrate the affirmative defense of the statute of limitations and various doctrines that may serve to toll or estop a defendant from defeating a claim based on the running of the limitations period before suit is filed. Examples of such jury instructions appear in the Appendix.

Effect of Repairs on Statutes of Limitations And Repose

Damages arising from the negligent repair of a structure lead to difficult questions about the application of statutes of limitations and repose. In a 1999 case, *Highline Village Associates v. Hersh Cos., Inc*. ("*Highline*

Village Assocs."),[3] the Colorado Court of Appeals suggested that negligent repairs might fall within the real property improvement statute of limitations (CRS § 13-80-104).[4]

In *Hersh Cos., Inc. v. Highline Village Associates* ("*Hersh Cos., Inc*."),[5] the Colorado Supreme Court affirmed *Highline Village Assocs*. in part on other grounds, and reversed in part, holding that a breach of warranty to repair is subject to the limitations period provided by CRS § 13-80-101(1)(a), not by CRS § 13-80-104. To date, the Colorado Supreme Court has not squarely determined whether claims arising from negligent repair of a real property improvement are subject to the: (1) real property improvement statute of limitations (CRS § 13-80-104), which does not mention "repair"; or (2) general negligence statute of limitations (CRS § 13-80-102(1)(a)).[6]

In *Highline Village Assocs.*, the Court of Appeals acknowledged that it was not reaching the question whether "routine repairs to real property, although resulting in some physical alteration to that property, would ... constitute an improvement to that property within the meaning of the contractors' statute."[7] Nonetheless, the court held that

> the activity engaged in by defendant here consisted of more than routine repair [because the] defendant was required to prepare the surface to receive the new paint by removing the old paint and by sanding and caulking that surface; it then repainted the entire exterior of two large apartment complexes .... If, then, we are to focus ***68** upon defendant's activities, we must conclude that the nature of its activities here did not differ substantially from the services it would have performed had the two complexes been newly constructed.[8]

On appeal, in explaining why claims for breach of a warranty of repair did not fall within the real property improvement statute of limitations, the Supreme Court stated:

> While the breach of contract claims allege a deficiency in the original workmanship, the warranty claims seek relief for the defendant's failure to provide its "repair-or-replace" remedy for defects appearing during the term of the guarantee. Because the latter claims seek recovery for the breach of a subsequent contractual duty to repair or replace *rather than recovery for a deficiency in the original work*, they do not fall within the class of actions governed by section 13-80-104.[9] (*Emphasis added*.)

Thus, property owner counsel may reasonably argue that some claims arising from negligent repair similarly "seek recovery for the breach of a subsequent [tort] duty to repair or replace rather than recovery for a deficiency in the original work." In such a case, the owner would not be subject to the limitations period set forth in CRS § 13-80-104.

A few courts have analyzed this issue from the standpoint that a statute of limitations that applies to making "improvements" to real property does not include within its scope work performed to effect repairs.[10] Colorado has adopted the "continuing negligence" doctrine in the context of medical malpractice claims. However, Colorado courts have not addressed whether: (1) the doctrine of continuing negligence has any application to a related series of construction errors (such as a combination of original construction and later repair errors); and (2) the policies supporting adoption of this doctrine render the doctrine amenable to negligent repair claims in the proper case.[11]

Colorado recognizes a warranty of "future performance" under its commercial code.[12] The existence and effect of such a warranty in the context of construction defect disputes has not been fully explored by the courts. Adoption of such an implied warranty in light of CDARA II's statutory "notice of claim and right to offer repair" process awaits case law development.[13]

In *Hersh Cos., Inc.*,[14] the Colorado Supreme Court held that the real property improvement statute of limitations does not apply to a breach of express warranty claim to repair or replace defective work. Instead, CRS § 13-80-101, the statute of limitations for contract actions, applies.

The Court found that analogous repair warranty cases under the Uniform Commercial Code hold that a cause of action does not accrue until the "plaintiff discovers or should have discovered the defendant's refusal or inability to comply" with the warranty. Thus, there was no reason to define the breach of warranties to repair or replace differently for the sale of goods than for the performance of services.[15] The Court concluded:

> [W]hen a contract contains both an express warranty as to future performance, like the five-year warranty against defect contained in Hersh's contracts, and a repair-or-replace warranty fixing the remedy in the event of a defect, a claim for breach of warranty does not accrue until the plaintiff discovers or should have discovered the defendant's refusal or inability to comply with the warranties made.[16]

In an important 2003 Court of Appeals case, *Stiff v. BilDen Homes, Inc.*,[17] the plaintiff claimed that, in contrast to a structural flooring system,[18] a slab-on-grade flooring system was improperly used. The plaintiff in *BilDen Homes, Inc*. knew that the soils report cautioned that "alternative specifications" for a slab-on-grade floor "will not prevent movement, but would reduce damage if movement occurred," and that if a structural floor was not used, the owner must be "willing to accept the risk of slab movement."[19] The court concluded:

> Here, the builder installed slab-on-grade flooring and took action to accommodate a certain amount of movement. As a result, a certain amount of movement of the slab-on-grade floor was to be expected. It was not until the movement became greater than expected that any damage that was caused by the allegedly negligent act would permit plaintiff to maintain a cause of action. Accordingly, under the facts here, damage would arise to permit a successful cause of action only when the movement of the slab-on-grade flooring became excessive and the accommodations were no longer sufficient to control the damage.[20]

As to the breach of contract and warranty claims, the *BilDen Homes, Inc*. court held that a cause of action accrues under the real property improvement statute of limitations on the builder's failure to remedy the defect pursuant to the contract or warranty, not when the discovery of the defect occurs.[21]

Tolling, Estoppel, and Repair Doctrines

Courts may ameliorate harsh results dictated by statutes of limitations by tolling the limitation period when warranted by the facts and where the legislative purpose of the statute will not be undermined.[22] Tolling principles have been adopted by statute as well.[23] In general, courts resort to two doctrines for this purpose: (1) equitable tolling; and (2) equitable or promissory estoppel. In addition, the proposition that repair efforts and assurances may toll the statute of limitations likely would be recognized in Colorado ("repair doctrine").[24] The law will not allow a party to lull an opponent to sleep on its rights and then raise the passage of time as a defense,[25] and construction professionals may be equitably estopped from asserting the statute of limitations as a defense under proper circumstances.[26]

Similarly, although a statute of repose often serves as an "absolute bar" to the initiation of litigation after the specified time period, the effects of such a limitation may be tempered in unusual circumstances by application of the doctrines of equitable tolling, equitable estoppel, and waiver.[27] Moreover, it is well accepted that the filing of a class action may serve to automatically toll all of the proposed class members' claims arising from the subject matter of the original complaint.[28]

The burden of proving application of a tolling doctrine or estoppel rests with the party asserting application of the doctrine.[29] The courts have not held that such doctrines must be specifically pled in response to the assertion of a statute of limitations or repose as an affirmative defense in an answer. C.R.C.P. 7(a) similarly does not specifically require that this be done.[30]

Practitioners may choose to generally aver in the complaint a statement in anticipation of an argument that a special doctrine mitigating a statute of limitations defense must be specially pled. The authors have used language such as the following:

> All conditions precedent, including timely commencement of suit, to asserting all claims in this complaint against all defendants have been met; alternatively, these conditions have been waived or have been tolled, or defendants are estopped to assert these conditions as a bar to plaintiffs' claims.

***69** Given Colorado's broad notice pleading requirements, this kind of statement should serve to put a defendant on fair notice of the potential assertion of such doctrines in response to any statute of limitations defense.

Equitable and Promissory Estoppel

The limitations period will be tolled until the date the defendant abandoned its repair efforts if an owner can establish the following:

1. The defendant undertook to repair a defect.

2. The defendant either expressly or impliedly promised or represented that such repairs would remedy the defect.

3. The owner reasonably relied on such promise or representation.

4. As a result, the owner did not institute legal action against the defendant.[31]

The defendant also may be equitably estopped from raising the bar of the statute of limitations that otherwise might attach during the tolling period.[32] The party asserting the estoppel doctrine bears the burden of proof.[33]

In accord with the reasoning underlying the repair doctrine and equitable estoppel, Colorado district courts have granted relief to homeowners from the bar of the statute of limitations where: (1) assurances are given by construction professionals that observed problems are not serious or will stabilize before any significant damage occurs; or (2) the builder ostensibly has repaired the observed problem.[34] In these situations, the construction professional has actual notice of the problem within the limitations period and, thus, may investigate the problem and its cause before the limitations period has run. Thus, one of the purposes of the statute of limitations, barring the assertion of stale claims after witnesses and evidence have disappeared, is satisfied under these circumstances.

Often, information solely in control of a builder--such as architectural plans, construction specifications, and engineering test results, reports, and recommendations--is not provided by the builder to the homeowner after a construction defect dispute arises. Colorado recognizes an implied covenant of good faith on the part of all parties to a contract, such that one party will not act to prevent the occurrence of a condition to performance. The covenant includes a party's power after contract formation to set or control the terms of performance.[35]

It is possible that a court may find that a promise to provide such critical paperwork to the homeowner is expressed or implied in the purchase transaction, in the home's warranties, or by statute.[36] If so, suppose a builder fails or refuses to turn over to a homeowner documents important to the owner's understanding of what does (and does not) constitute a defect in or inadequate performance of the home. This failure may arguably impair the homeowner's ability to timely recognize and assert a defect claim under a purchase contract, home warranty, or

statute. Thus, the homeowner may argue that the builder is equitably estopped from raising a statute of limitations defense under the circumstances. No Colorado court has addressed these issues to date.

Misrepresentation, Fraud, And Failure to Disclose

To allow a party to benefit from its own wrongdoing by its failure to comply with a statutory duty of disclosure would be highly inequitable.[37] Thus, a failure to ***70** make a statutorily-required disclosure has been held to toll the statute of limitations.[38] Colorado has not resolved whether and under what circumstances a party may raise certain statutes of limitations applicable to construction defect claims as a bar if that party: (1) fails to comply with its disclosure obligations under the Soils Disclosure Statute;[39] or (2) violates the Colorado Consumer Protection Act ("CCPA"),[40] particularly the CCPA's recognition of a duty to disclose material information about property where a non-disclosure is intended to induce a consumer to buy the property.[41]

Although a plaintiff's ignorance of the wrong committed often is not considered in determining when a statute of limitations begins to run, an exception to this rule is made in cases of the active concealment of the plaintiff's cause of action.[42] Under these circumstances, the bar of the statute may not operate until discovery, and "this proposition is so fundamental that no authorities need be cited."[43]

Where a plaintiff is ignorant of the cause of an injury, and where the defendant has concealed that cause, the plaintiff may be allowed to maintain an action brought beyond a limitations period, provided that the suit is timely instituted after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the cause of the injury.[44] This exception to the bar of the statute of limitations sometimes is called "fraudulent concealment."[45]

CDARA I and II

Part I discussed the situation where a notice of claim is sent to a construction professional in accordance with the notice of claim process ("NCP") under CDARA II, within the prescribed time for filing an action under any applicable statute of limitations or repose.[46] In such circumstances, the statute is tolled until sixty days after the completion of the NCP.[47]

Common Interest Ownership Act Claims

The Colorado Common Interest Ownership Act ("CCIOA")[48] addresses the perceived unfairness arising from allowing the limitations period to run against a CCIOA homeowner association. CRS § 38-33.3-311(1) provides that a statute of limitations is tolled against a declarant during the period of time the declarant controls the association's ability to timely commence an action. That provision presumably includes claims arising from the declarant's negligence in constructing the CCIOA community.[49] Courts have not yet determined whether this statutory tolling extends to claims against persons other than the declarant, such as its contractors and agents.

Constitutional Issues

An earlier version of CRS § 13-80-104 survived a 1984 constitutional attack.[50] However, the Colorado Supreme Court has not yet addressed a number of constitutional issues concerning the current, greatly amended, version of the statute, including whether it: (1) violates equal protection; (2) deprives an aggrieved party of due process of law; (3) is unconstitutionally vague; or (4) constitutes special legislation or contains "multiple subjects" in violation of the Colorado Constitution. Nonetheless, the statute is presumed constitutional and must be shown to be unconstitutional beyond a reasonable doubt resolving all ambiguities in favor of its constitutionality.[51]

BilDen Homes, Inc.[52] considered CRS § 13-80-104 in conjunction with CRS § 13-80-108. That case adopted a construction of the real property improvement statute of limitations that resolves most of the weightiest constitutional challenges. *BilDen Homes, Inc*. held that manifestation of a defect alone cannot trigger the real property improvement statute of limitations. Instead, a claim does not accrue until the property owner also "knows or should know the cause" of the defect.[53]

Equal Protection

CRS § 13-80-104 is modeled on a Uniform Act that has been adopted in forty-four states. The states are divided on the constitutionality of the act.[54] In Colorado, the former version of the statute, CRS § 13-80-127, was ruled constitutional in *Criswell v. MJ Brock and Sons, Inc*.[55] However, the statute was amended in 1986. At that time, the language stating that a ***71** cause of action was deemed to arise on discovery of "the physical manifestation" of a defect was added.[56] This change was apparently in response to the comments in *Criswell* that "discovery of the physical manifestations of a defect is not necessarily concurrent in time with the discovery of the defect itself."[57]

A majority of courts in other states have struck down statutes as unconstitutional when the model act was modified in some peculiar fashion so as to create arbitrarily different results for similarly-situated victims of wrongful conduct.[58] CRS § 13-80-108, which defines when a cause of action accrues, provides that every Colorado citizen sustaining injury to person or property must first discover, or in the exercise of reasonable diligence should have discovered, his or her injury *and* the cause thereof before the applicable statute of limitations begins to run. The current language in CRS § 13-80-104, which arguably may trigger the statute of limitations on discovery of the "manifestation" of the defect, regardless of whether the owner knows of either the injury or its cause, is unique to Colorado. This aspect of the statute raises equal protection concerns.

Equal protection guarantees that all similarly-situated parties receive like treatment.[59] No court has resolved whether this distinction serves a legitimate government purpose by imposing an arguably disparate burden on those harmed by negligent construction. The limitations period in CRS § 13-80-104 can be read to be triggered without regard to the owner's knowledge of the injury or its cause. Thus, the statute may increase arbitrary differences in litigated results between similarly-situated victims, thus increasing the chances of the statute eventually being found to be unconstitutional.

Due Process

Colorado has not resolved whether CRS § 13-80-104 is unconstitutional if it is triggered when a "physical manifestation of a defect" is observed without the owner's knowledge of the cause. This would be particularly relevant where the defendant's concealments and misrepresentations prevent discovery of the cause. Arguably, this result violates the owner's due process rights because, without the plaintiff's fault, the defendant concealed from the plaintiff his or her right until a statute deprived the plaintiff of a remedy.[60]

Vagueness

A statute is "void for vagueness" when it proscribes conduct in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application.[61] It is not clear if CRS § 13-80-104 requires the cause of action to accrue on discovery of, literally, the slightest physical manifestation of the defect or whether the statute should be interpreted as requiring the occurrence of both the discovery of the injury (the defect) *and* its cause for the cause of action to accrue. The recent Court of Appeals decision in *BilDen Homes, Inc*.[62] adopts the latter interpretation.

CRS § 13-80-104 expressly cross-references CRS § 13-80-102. The latter statute provides for two years from the date of accrual of the cause of action within which to bring suit. Moreover, CRS § 13-80-108 expressly defines the date of accrual of all actions involving injury to "person or property" as being two years from the date of discovery of the injury *and* its cause. If both of these constructions are reasonable, CRS § 13-80-104 may be found to be unconstitutionally vague, because the statute proscribes conduct in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application.[63]

However, the interpretation in *BilDen Homes, Inc*.[64] of what constitutes the appropriate triggering event for the running of the real property improvement statute of limitations is sensible and logically harmonizes all these statutory provisions. *BilDen Homes, Inc.*, therefore, renders moot any constitutional concerns.

Special Legislation

Article 2, § 11 of the Colorado Constitution states that no law "making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly." Property owner counsel make the argument that the special limitation in CRS § 13-80-104 is allowed no other tortfeasor and, therefore, may constitute an unconstitutional grant of an irrevocable privilege to the building industry, in violation of the Colorado Constitution, Article 2, § 11. The courts have not addressed whether CRS § 13-80-104 constitutes "special legislation" favoring the construction industry and trades.

Multiple Subjects

According to Article 5, § 21 of the Colorado Constitution:

> No bill ... shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act ***72** which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

CRS § 13-80-104 is entitled "Limitation of actions against architects, contractors, builders, or builder-vendors, engineers, inspectors, and others." CRS § 13-80-108 is entitled "When a cause of action accrues."

No court has resolved whether CRS § 13-80-104 impermissibly contains two subjects: (1) as described in the title, a limitation of actions in the form of a statute of limitations and a statute of repose; and (2) a definition of when a cause of action against those mentioned in the statute accrues. It is possible the title to CRS § 13-80-104 is misleading because CRS § 13-80-108 is entitled "When a cause of action accrues" and, thus, CRS § 13-80-104 may improperly contain multiple subjects. No Colorado court has examined this issue to date.

Crafting Jury Instructions

As shown in Part I of this article, and expanded in this Part II, different statutes of limitations may apply to different construction defect claims, depending on such factors as the nature of the claim and the nature of the defendant's construction activities. For example, it is difficult to square application of the real property improvement statute of limitations triggering event[65] with a misrepresentation claim premised not on the "physical manifestations of a defect" but, instead, on the discovery of a material misrepresentation or non-disclosure preceding sale of the property.[66]

Moreover, various common law doctrines and statutory provisions may serve to toll the applicable limitations

period, and application of these doctrines is highly fact specific. The only pattern jury instruction currently available and arguably relevant, Colo. Jury Instr.-Civ. 4th 30:24, does not adequately address these myriad issues, as it simply provides:

> The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the plaintiff's claim of breach of contract if the affirmative defense of the expiration of the statute of limitation is proved. This defense is proved if you find *(describe the events that would cause the applicable statute to run)* occurred before *(insert the appropriate date)*.

This instruction is of limited utility in a construction defect case because it addresses only one cause of action (breach of contract). Moreover, it is not designed to address the issues raised by the real property improvement statute of limitations and related case law interpreting that statute. Furthermore, in the *Notes on Use* to Instruction 30:24, the authors caution, "If an event is claimed to have occurred that would toll the applicable statute and the facts are disputed, this instruction should be appropriately modified."[67]

The Appendix to this Part II contains examples of jury instructions crafted by the authors that deal with the varied factual determinations a jury may be required to make in resolving a statute of limitations defense in a typical construction defect case. In analyzing what jury instructions may be needed to address a statute of limitations defense in a construction defect case, the following questions should be considered:

> 1. What is the nature of the claim (negligent construction, negligent repair, breach of implied warranty of good and workmanlike construction, breach of express warranty of repair, violation of the Colorado Consumer Protection Act, violation of the Colorado Soils Disclosure Statute, intentional misrepresentation, or negligent misrepresentation)?
>
> 2. Against whom is the claim being asserted (the original builder-vendor, one of the builder-vendor's engineers, one of the builder-vendor's non-engineering subcontractors, or a product supplier)?
>
> 3. Were any assurances or promises made that repairs would be made? If so, by whom and when? Can the promise or assurance properly be imputed to other defendants?
>
> 4. Were repairs made? If so, were they done improperly? Were the repairs done as specified, yet were they still inadequate to remedy the problem?
>
> 5. If the promised repairs were not made, at what point should the homeowner have realized that the builder-vendor was not going to follow through on making the promised repairs?
>
> 6. When did a particular condition in the home reach a level constituting the manifestation of a "defect"?

7. When did the homeowner know, or when should he or she reasonably have known, of: (1) the manifestation of the particular defect; and (2) the cause of the particular manifested defect?

8. Was any particular condition that was observed early in time, and that constituted the manifestation of a particular defect, a manifestation of the same condition that precipitated the filing of the lawsuit and that is the subject of the complaint?

9. When did the homeowner know, or when should he or she reasonably have known: (1) whether any representations communicated to him or her by the builder-vendor were false; and (2) that adverse material facts relating to the construction of the home were not properly disclosed?

For each of these questions where the issue is not disposed of as a matter of law by the court either on summary judgment or directed verdict, an instruction must be crafted so that the jury may consider and decide the factual disputes the questions raise that are relevant to the construction professional's statute of limitations defense. Whether special interrogatories are necessary is a matter directed to the trial court's discretion. The simpler approach may be to instruct the jury that certain claims in their entirety, or certain damages, are barred if all elements of the limitations defense are proven as to that claim or specified damages.

Great care should be taken to ensure that the instructions provide that only those claims or damages properly the subject of the statute of limitations defense are barred. The California case of *Winston Square Homeowners' Association v. Centex West, Inc*.[68] involved multiple, distinct, construction defects within a single project. The case dealt with construction activities that occurred at different times and were performed by different subcontractors. The California Court of Appeals held that separate areas of damage resulting from construction defects gave rise to separate claims. Thus, repairs of structural defects did not toll the statute of limitations as to drainage problems.

In Colorado, the mere presence of expansive soils beneath a home does not, alone, constitute either a "defect"[69] or notice of a patent problem to a prospective purchaser.[70] Instead, an alleged "defect" typically involves: (1) an inadequately designed or constructed construction element (such as improperly installed piers); or (2) the failure to employ a recommended mitigation measure (such as a perimeter drain), usually coupled with some quantum of resulting damage.

Thus, for example, limitation issues may arise when a crack appears in drywall. The cause of that particular crack may involve a construction error, which arguably relates to a crack in some other wall that manifested itself three years earlier. Under ***73** such circumstances, defense counsel might broadly urge that all the claims involve the "same" construction "defect": a failure to properly construct the home to adequately mitigate the effects of expansive soils. Therefore, according to the defense, if suit was not timely commenced with regard to the earliest crack, the entire suit would be barred by the statute of limitations.

Conversely, plaintiff's counsel might urge that the two cracks involve discrete or unrelated defects, with separate consequences flowing from each such defect (for example, a crack in a basement foundation wall is logically distinct from a crack in the kitchen drywall, as each arguably involves the failure of a different component of the home). Thus, plaintiff's counsel may narrowly argue that a jury may properly isolate the manifestation of the particular "defects" that are the subject of the lawsuit from earlier "defects" that may be barred by the statute of limitations, without affecting the plaintiff's damages claims.

Because a defendant bears the burden of proving a statute of limitations defense, Colorado courts hold the defendant strictly to its burden of proof, which makes sense, given the safe harbor ultimately afforded by Colorado's statute of repose.[71] Thus, property owners were provided with a favorable construction of the statute of limitations in *Wildridge Venture v. Ranco Roofing, Inc*.[72]

In *Wildridge*, the Colorado Court of Appeals held that where the condition of an improvement to real property may be the result of several causes occurring at different points in time, the defendant must establish that the cause underlying the plaintiff's wrongful construction claim created the manifestation of the defect on which the defendant seeks to apply the statute of limitations.[73] The *Wildridge* court found that material fact questions precluding summary judgment existed as to whether the property owner's discovery of similar problems and knowledge of one defect should have led to an investigation into and the discovery of other defects.

Conclusion

After selecting and applying the appropriate statute of limitations to a claim asserted against a particular defendant in a construction defect case, it also is necessary to evaluate whether facts are present implicating tolling or estoppel doctrines. Application of these doctrines may arise under statute or the common law. If applicable, counsel will need to assess the effect of such tolling period or estoppel, and whether application of the particular doctrine to the facts and its resolution is an issue of law for the court, an issue of fact for the jury to decide, or a mixture of the two.

Adequate pattern jury instructions addressing these tolling and estoppel doctrines are not presently available. Thus, court and counsel face serious challenges in crafting understandable instructions in light of the varying and often complicated fact patterns present in construction defect cases. Sample jury instructions addressing some of these issues are included in the Appendix to this Part II. In addition, counsel must determine whether application of the specific statute of limitations applicable to the claim is constitutional. The recent *BilDen Homes, Inc*. decision may have effectively resolved most of these constitutional concerns.

***76 Appendix: Sample Jury Instructions**

The authors drafted the following sample jury instructions as a start for others to tailor and improve on, according to the circumstances of their own cases. Sample Instructions Nos. 2 and 3 include an effort to explain to the jury the effect of a defendant's repairs on statutes of limitations other than CRS § 13-80-104.

Sample Instruction No. 1
Defendants assert the statute of limitations as an affirmative defense to Plaintiff's negligent construction claim. Plaintiff asserts that this statute of limitations was extended due to Defendants' conduct and statements. If a Defendant proves its affirmative defense of the statute of limitations as to a particular defect that is the subject of this claim, that Defendant is not legally responsible to Plaintiff for that defect unless you find that the Defendant's statute of limitations defense is barred due to its conduct and statements as more fully described below.

A Defendant is not legally responsible to Plaintiff on its negligent construction claim as to a particular defect if that Defendant proves Plaintiff discovered or, in the exercise of reasonable diligence should have discovered, the manifestation of the defect and its cause two years or more before *[date suit filed]*. If you find that the affirmative defense of the statute of limitations has been proved as to a particular defect, you must consider Plaintiff's claim that this affirmative defense is barred as to the Defendant asserting this defense.

A Defendant's statute of limitations defense is barred as to a particular defect if:

(1) Plaintiff proves that the Defendant made repairs to the defect accompanied by an express or implied representation to Plaintiff that those repairs would remedy the defect and Plaintiff relied on this express or implied representation in not filing suit; and

(2) The Defendant fails to prove that Plaintiff discovered, or should have discovered in the exercise of reasonable diligence, two years or more before *[date suit filed]*, the renewed manifestation of the defect and its cause after the Defendant's repair of the defect failed.

Sample Instruction No. 2

Defendants assert the statute of limitations as an affirmative defense to Plaintiff's negligent misrepresentation claim, which claim includes Plaintiff's claim of negligent nondisclosure. Plaintiff asserts that this statute of limitations was extended due to Defendants' conduct and statements. If a particular Defendant proves its affirmative defense of the statute of limitations as to a particular misrepresentation, that Defendant is not legally responsible to Plaintiff for that misrepresentation unless you find that Defendant's statute of limitations defense is barred due to its conduct and statements as more fully described below.

A Defendant is not legally responsible to Plaintiff as to a particular misrepresentation if that Defendant proves Plaintiff knew or should have known by the exercise of reasonable diligence of the Defendant's misrepresentation three years or more before *[date suit filed]*. If you find that the affirmative defense of the statute of limitations has been proved, you must consider Plaintiff's claim that this affirmative defense is barred as to the Defendant asserting this defense.

A Defendant's statute of limitations defense is barred as to a particular misrepresentation if:

(1) Plaintiff proves that the Defendant made repairs to a defect that is the subject of the misrepresentation accompanied by an express or implied representation to Plaintiff that those repairs would remedy the defect and Plaintiff relied on this express or implied representation in not filing suit; and

(2) The Defendant fails to prove that Plaintiff discovered, or should have discovered in the exercise of reasonable diligence, three years or more before *[date suit filed]*, the renewed manifestation of the defect that was the subject of the misrepresentation, and the defect's cause, after the Defendant's repair of the defect failed.

Sample Instruction No. 3

Defendants assert the statute of limitations as an affirmative defense to Plaintiff's Colorado Consumer Protection Act ("CCPA") claim. Plaintiff asserts that this statute of limitations was extended due to the Defendants' conduct and statements. If a particular Defendant proves its affirmative defense of the statute of limitations as to a particular CCPA violation, that Defendant is not legally responsible to Plaintiff for that violation unless you find that the Defendant's statute of limitations defense is barred due to its conduct and statements as more fully described below in paragraphs (A) or (B).

A Defendant is not legally responsible to Plaintiff as to a particular CCPA violation if that Defendant proves Plaintiff discovered or, in the exercise of reasonable diligence should have discovered, the CCPA violation three years or more before *[date suit filed]*. If you find that the false, misleading, or deceptive act or practice that constitutes a CCPA violation consisted of a series of acts or practices, then the date Plaintiff discovered or, in the exercise of reasonable diligence should have discovered, the Defendant's CCPA violation does not begin to run until the last of the series of acts or practices.

If you find that the affirmative defense of the statute of limitations has been proved, you must consider Plaintiff's claim that this affirmative defense is barred. A Defendant's statute of limitations defense is barred as to a particular CCPA violation if either (A) or (B) is proven:

(A) (1) Plaintiff proves that the Defendant made repairs to a defect that is the subject of the CCPA violation, accompanied by an express or implied representation to Plaintiff that those repairs would remedy the defect, and Plaintiff relied on this express or implied representation in not filing suit; and (2) The Defendant fails to prove that Plaintiff discovered, or should have discovered in the exercise of reasonable diligence, three years or more before *[date suit filed]*, the renewed manifestation of the defect that was the subject of the CCPA violation, and the defect's cause, after the Defendant's repair of the defect failed.

(B) (1) Plaintiff proves that its failure to timely file suit for the CCPA violation was caused by the Defendant engaging in conduct calculated to induce Plaintiff to refrain from or postpone the filing of suit; and (2) The Defendant fails to prove that Plaintiff discovered or in the exercise of reasonable diligence should have discovered the Defendant's CCPA violation four years or more before *[date suit filed]*.

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 Sandgrund and Sullan, "Statutes of Limitations and Repose in Construction Defect Cases--Part I," 33 *The Colorado Lawyer* 73 (May 2004).

2 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.*) However, CRS § 13-80-104 does not expressly include the words "subcontractor" or "developer." The significance of that omission in applying this statute of limitations to subcontractors and developers is uncertain.

3 *Highline Vill. Assocs.*, 996 P.2d 250, 253 (Colo.App. 1999), *reversed in part, affirmed in part*, *Hersh Cos., Inc. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001).

4 *Highline Vill. Assocs., supra*, note 3 at 253-55.

5 *Hersh Cos., Inc., supra*, note 3.

6 *Compare* CRS § 13-80-104 (no express reference to "repairs") *with* Tex. Civ. Prac. & Rem. Code § 16.009(a) and N.C.G.S. § 50(5)(a)-(b) (both real property improvement statutes of limitations expressly reference and include "repair"). Some courts have held that the performance of negligent repairs starts "anew" the statute of limitations as to damages arising from the repair. *See, e.g.,* *Horosz v. Alps Estates, Inc.*, 642 A.2d 384 (N.J. 1994).

[7] *Highline Vill. Assocs.*, *supra*, note 3 at 254.

[8] *Id*.

[9] *Hersh Cos., Inc.*, *supra*, note 3 at 225.

[10] *See Adcock v. Montgomery Elev. Co.*, 654 N.E.2d 631 (Ill.App. 1995) ("improvement" to real property within meaning of statute of limitations amounts to more than an "addition" due to mere repair or replacement; it must substantially enhance value of property); *Hartford Fire Ins. Co. v. Westinghouse Elec. Corp.*, 450 N.W.2d 183 (Minn.App. 1990) (for purposes of statute of limitations, construction of improvements that increase usefulness or capital value of real property to be distinguished from "ordinary repairs").

[11] *Cf. Comstock v. Collier*, 737 P.2d 845 (Colo. 1987) (recognizing "continuing negligence" doctrine in medical malpractice context and holding that last act or omission in course of treatment triggers limitation or repose period). *See also Bd. of Managers of the Ocean Club at Long Beach Condo. v. Mandel*, 652 N.Y.S.2d 301 (N.Y.App.Div. 1997) ("continuous treatment" doctrine may apply to architects in a proper case); *Greater Johnstown City Sch. Dist. v. Cataldo & Waters, Architects, P.C.*, 551 N.Y.S.2d 1003 (N.Y.App.Div. 1990) (same).

[12] *See* CRS § 4-2-725(2). *Cf. Smith v. Union Supply Co.*, 675 P.2d 333 (Colo.App. 1993) (where contract for sale of goods provides for warranty of future performance, discovery of breach must await time of such performance).

[13] *See* Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *The Colorado Lawyer* 89, 92 (July 2003) (discussing possible recognition of implied warranty of repair under CDARA II).

[14] *Hersh Cos., Inc.*, *supra*, note 3.

[15] *Id*. at 225.

[16] *Id*. at 226.

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

[18] A structural floor leaves a "void" space between the bottom of the floor and the expansive soils below to prevent the pressures exerted by the water build-up in the soils from damaging the floor.

[19] *BilDen Homes, Inc.*, *supra*, note 17 at 262.

[20] *Id*. at 263.

[21] *Id*.

[22] *See* *Colorado-Ute Elec. Ass'n v. Enviro Tech. Corp.*, 524 F.Supp. 1152, 1155-56 (D.Colo. 1981) ("repair doctrine" applied to obviate alleged failure to file timely suit for defects in air pollution control equipment), *relying on* *Kniffin v. Colorado W. Dev. Co.*, 622 P.2d 586 (Colo. App. 1980), *cert. denied*.

[23] *See, e.g.*, CRS §§ 6-1-115 and 38-33.3-311(1).

[24] *See* *Richard O'Brien Co. v. Challenge-Cook Bros., Inc.*, 672 F.Supp. 466, 470-71 (D.Colo. 1987) (repair doctrine creates questions of fact that prevent entry of summary judgment on issue of statute of limitations).

[25] *See* *Strader v. Beneficial Fin. Co.*, 551 P.2d 720, 724 (Colo. 1976).

[26] *See* *Colorado-Ute Elec. Ass'n, supra*, note 22 (continual verbal and written assurances, reinforced by repeated studies and efforts to correct the problem, supported equitable estoppel). *See also* *Winston Square Homeowner's Ass'n v. Centex W., Inc.*, 261 Cal.Rptr. 605 (Cal. App. 1989) (discussing complex statute of limitations and estoppel issues that arise when dealing with multiple defects affecting disparate building systems in various structures comprising single townhome project).

[27] *See* *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver*, 937 P.2d 855 (Colo.App. 1996), *cert. denied*.

[28] *See* *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522 (Colo.App. 1994) (commencement of class action tolls statute of limitations for all members of putative class; *following* *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-52 (1974)), *aff'd in part, rev'd in part*, 908 P.2d 1095 (Colo. 1995).

[29] *See* *Terry v. Sullivan*, 58 P.3d 1098, 1101 (Colo.App. 2002).

[30] C.R.C.P. 7(a) provides, in pertinent part: "Pleadings. There shall be a complaint and answer ...; *and there may be a reply to an affirmative defense*. No other pleading shall be allowed, except upon order of court." (*Emphasis added*.). *Cf.* *Davis v. Bonebrake*, 313 P.2d 982 (Colo. 1957) (plaintiff need not anticipate assertion of defense of limitations and negate its effect in complaint, and such defense is not ground for motion to dismiss for failure to state claim on which relief can be granted); *N.* *Poudre Irr. Co. v. Hinderlider*, 150 P.2d 304 (Colo. 1944) (where neither pleadings of defendants nor answers of interveners advanced counterclaim, plaintiff had no primary duty to reply to either).

[31] Property owners should be able to satisfy this equitable estoppel element by testifying that they elected not to consult an attorney about their legal rights and the possible commencement of a lawsuit because of the defendant's express or implied promises or representations concerning repair.

[32] *See Highline Vill. Assocs., supra*, note 3 at 255 ("[T]here is an analytical difference between the tolling of a statute of limitations and equity's imposition of an estoppel upon a defendant to prevent the assertion of the statute as a defense."). In *Hersh Cos., Inc., supra*, note 3 at 225, the Colorado Supreme Court endorsed the rationale underlying the repair doctrine as expressed by the Court of Appeals. The Court stated that 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." *Id*. at 225. *Cf.* *Curragh Queensland Mining Ltd. v. Dresser Indus., Inc.*, 55 P.3d 235 (Colo.App. 2002) (Supreme Court not only did not reject repair doctrine in *Hersh Cos., Inc., supra*, note 3, it endorsed its underlying purposes.). *Hersh Cos., Inc*. specifically held that the repair doctrine had no application where repairs are made pursuant to an express warranty to repair or replace, and that consideration of the equitable tolling doctrine was irrelevant as no cause of action accrued that required tolling until the defendant refused to perform repairs. *Hersh Cos., Inc., supra*, note 3 at 226-27. *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 were abandoned).

[33] *Black v. S. W. Water Conservation Dist.*, 74 P.3d 462 (Colo.App. 2003) (equitable estoppel); *Sharp Bros. Contracting Co. v. Westvaco Corp.*, 878 P.2d 38 (Colo.App. 1994) (equitable tolling).

[34] *See, e.g., Vill. Point Townhomes at Breckenridge v. Wooden Ski Corp.*, No. 99-CV-188 (Summit Cty. Dist.Ct. April 23, 2002), Order; *Thompson v. Writer Homes, Inc.*, No. 00-CV-348 (Douglas Cty. Dist.Ct. Jan. 28, 2001), Order; *Ater v. Merit Dev.*, No. 95-CV-1417-5 (Boulder Cty. Dist.Ct. Aug. 23, 1998), Order; *Peterson v. Mission Viejo Co.*, No. 92-CV-568 (Douglas Cty. Dist.Ct. Sept. 30, 1994), Order.

[35] *See* *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498-99 (Colo. 1995). *See also* *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024 (Colo.App. 2002).

[36] *E.g.*, Soils Disclosure Statute, CRS § 6-6.5-101.

[37] *Cf. Strader, supra*, note 25 at 724 (defendant's failure to comply with statutory disclosure requirement under Uniform Consumer Credit Code barred application of statute of limitations). *But see* *Chasteen v. UNISIA JECS Corp.*, 216 F.3d 1212, 1222 n.5 (10th Cir. 2000) (noting that in *FIB v. Piper*, 744 P.2d 1197, 1200 (Colo. 1987), Colorado Supreme Court adopted more lenient tolling standard than *Strader*).

[38] *See* *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 855 (Colo. 1992) ("Unswerving, 'mechanistic' application of statute of limitations would at times inflict obvious and unnecessary harm upon individual plaintiffs without advancing ... legislative purposes," *quoting* *Henson v. Hoth*, 258 F.Supp. 33, 35 (D.Colo. 1966)).

[39] CRS § 6-6.5-101.

[40] CRS §§ 6-1-101 *et seq*.

[41] *See, e.g.*, CRS § 6-1-105(u).

[42] *See* *Rosane v. Senger*, 149 P.2d 372 (Colo. 1944), *superceded by statute on other grounds*, *Russell v. Pediatric Neurosurgery, P.C.*, 15 P.3d 288 (Colo.App. 2000), *aff'd*, 44 P.3d 1063 (Colo. 2002).

[43] *Rosane, supra*, note 42 at 375.

[44] *See Murphy v. Dyer*, 260 F.Supp. 822, 823 (D.Colo. 1966) (applying Colorado law).

[45] *See, e.g., Rosane, supra*, note 42; *Murphy, supra*, note 44; *Davis, supra*, note 30. *See also* *J.A. Balistreri Greenhouses v. Roper Corp.*, 767 P.2d 736, 739 (Colo.App. 1988), *appeal dismissed*, *Roper Corp. v. J.A. Balistreri Greenhouses*, 773 P.2d 1074 (Colo. 1989) (question of fraudulent concealment properly submitted to jury because question whether a statute bars a particular claim is question of fact for jury).

[46] Sandgrund and Sullan, *supra*, note 1 at 77 ("Notice of Claim Process and Resultant Tolling of Limitations Period").

[47] CRS § 13-20-805.

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

[49] *Cf.* *Terrace Condominium Assoc. v. Midatlantic Nat'l Bank*, 633 A.2d 1060, 1067 (N.J.Super. 1993) (*dicta*, right to assert claims against declarant should be tolled or deferred until unit owners control the association).

[50] *Criswell v. M.J. Brock and Sons, Inc.*, 681 P.2d 495 (Colo. 1984).

[51] *See* *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996).

[52] *BilDen Homes, Inc., supra*, note 17.

[53] *Id*. at 262 ("Although the statutes use slightly different language, as relevant here under both statutes, the limitations period begins when the plaintiff knew or should have known of the damage *and its cause*." (*Emphasis added*.)). *Compare* CRS § 13-80-108(1) *with* CRS § 13-80-104(1)(b)(I). *But see Highline Village Assocs., supra*, note 3 ("[U]nder the contractors' statute, a claim accrues when a physical manifestation of a defect appears, *even though its cause is not known at that time*." (*Emphasis added*.)).

[54] *See* Draper, Annot., "Validity and Construction, as to Claim Alleging Design Defects, of Statute Imposing Time Limitations Upon Action Against Architect or Engineer ...," 93 A.L.R.3d 1242 (1979), *superceded in part by* Fleisher, *Annot.*, "Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, or Builder ...," 2002 A.L.R.5th 21 (annotation not yet released for publication in A.L.R. and subject to revision or withdrawal).

[55] *Criswell, supra*, note 50.

[56] *Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 930 (Colo. 1993)

[57] *Criswell, supra*, note 50 at 498-99.

[58] *See, e.g.*, *Fujioka v. Kam*, 514 P.2d 568 (Haw. 1973); *State Farm Fire & Cas. Co. v. All Electric, Inc.*, 660 P.2d 995 (Nev. 1983) (statute violates both federal and state equal protection guarantees), *overruling on other grounds recognized by Lotter v. Clark Cty. By and Through Bd. of Comm'rs*, 793 P.2d 1320 (Nev. 1990); *Loyal Order of*

Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); *Henderson Clay Products, Inc. v. Edgar Wood & Assoc., Inc.*, 451 A.2d 174 (N.H. 1982) (statute violates both federal and state equal protection guarantees); *Kallas Millwork Corp. v. Square D Co.*, 225 N.W.2d 454 (Wis. 1975) (statute violates federal equal protection as well as provisions of state constitution guaranteeing every person a remedy).

[59] *See Bd. of Cty. Comm'rs of Saguache Cty. v. Flickinger*, 687 P.2d 975 (Colo. 1984); *Dunbar v. Hoffman*, 468 P.2d 742 (Colo. 1970); U.S. Const. Amend. XIV; Colo. Const. Art. 2, § 25.

[60] *Rosane, supra*, note 42 at 375.

[61] *See Palmer v. A.H. Robins Co.*, 684 P.2d 187, 214 (Colo. 1984).

[62] *BilDen Homes, Inc., supra*, note 17.

[63] *Id*.

[64] *Id*.

[65] CRS § 13-80-104(1)(b)(I) ("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").

[66] It is important to remember that some negligent misrepresentations are actionable only on proof of physical injury or property damage resulting from the misrepresentation. *Bloskas v. Murray*, 646 P.2d 907 (Colo. 1982). However, others are actionable on proof of mere financial loss. *Robinson v. Poudre Valley Fed. Credit Union*, 654 P.2d 861 (Colo.App. 1982). *See also* C.J.I.-Civ. 4th 9:3 and 9:4 (2003) (discussing elements of proof of these two types of negligent misrepresentation).

[67] *Citing First Interstate Bank of Denver, N.A. v. Berenbaum*, 872 P.2d 1297 (Colo.App. 1993) (burden on plaintiff to show that statute had been tolled).

[68] *Winston Square Homeowners' Ass'n, supra*, note 26.

[69] *See Shiffers v. Cunningham Shepherd Builders Co.*, 470 P.2d 593, 595 (Colo.App. 1970). *Cf*. Gulbis, Annot., "Statute of Limitations: Actions by Purchasers or Contractees Against Vendors or Contractors Involving Defects in Houses or Other Buildings Caused by Soil Instability," 12 A.L.R.4th 866 (1982).

[70] *See Glisan v. Smolenske*, 387 P.2d 260 (Colo. 1963).

[71] CRS § 13-80-104.

[72] *Wildridge Venture*, 971 P.2d 282 (Colo. App. 1998), *cert. denied*.

[73] *Id*.

33-JUN COLAW 67 -- – Copyright Westlaw (Thomson-Reuters) ©