The Construction Lawyer

Journal of the Forum on the Construction Industry Volume 27, Number 3, Summer 2007

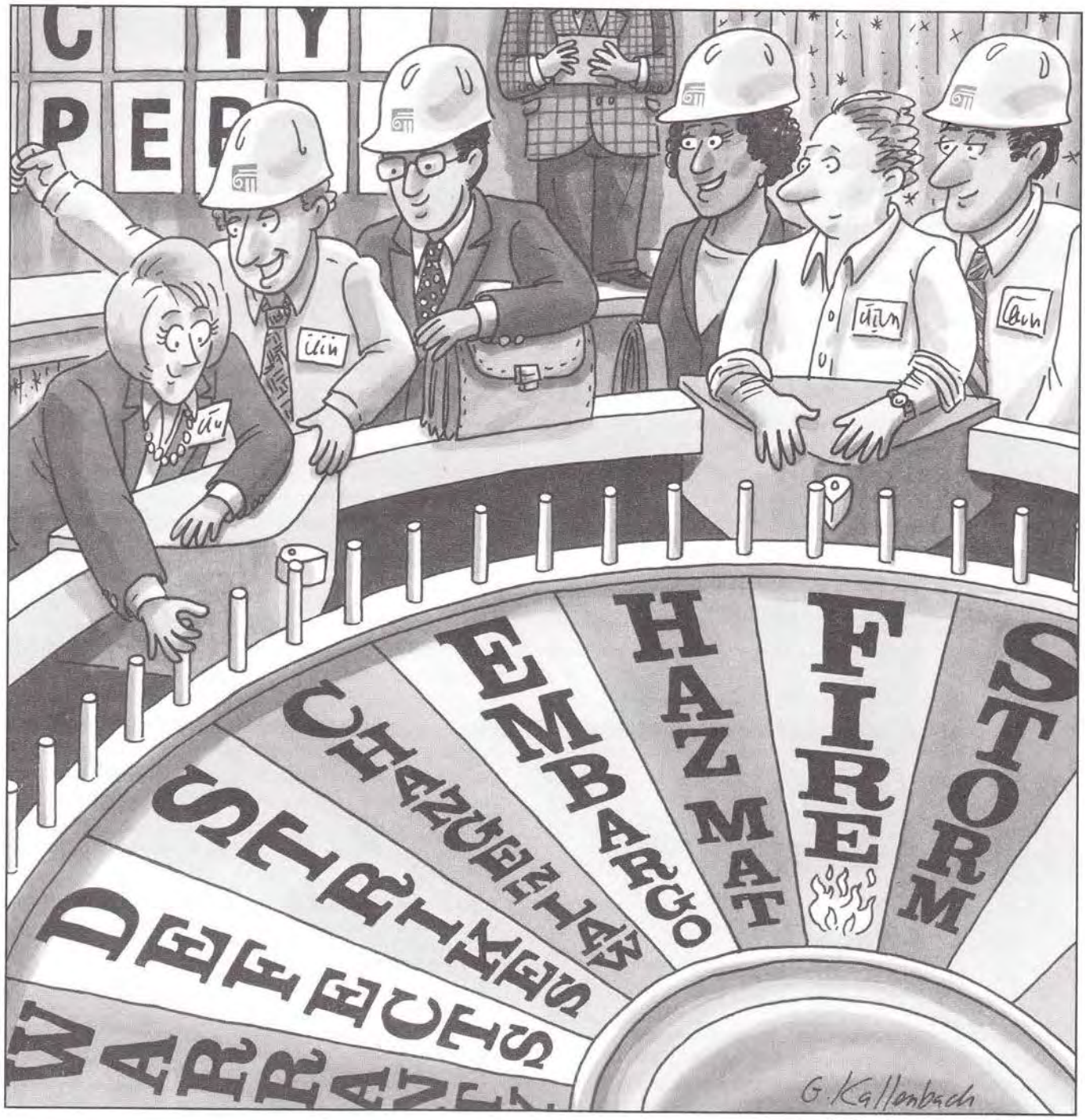

Illustration: Garrett Kallenbach

Creative Risk Allocations

Useful Life Evidence in Construction Defect Cases

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This article discusses issues concerning evidence of "useful life" that feature prominently in construction defect lawsuits. "Useful life" refers to the anticipated time during which a newly built construction element can reasonably be expected to perform its intended function subject only to routine maintenance and repairs due to ordinary wear and tear. Construction professionals often seek to rely on useful life evidence to reduce a property owner's claimed damages by arguing that any damages award should be reduced by an amount equal to the value of the property owner's previous use of and benefit from the defective construction. This article describes typical situations where useful life evidence arises; a proposed, analytic approach to determining the admissibility of such evidence; and practical problems courts and practitioners likely will face applying this analytic framework.

Useful Life

Disputes regarding application of the useful life concept often arise in construction defect cases. The useful life defense argues that a property owner's repair or replacement cost damage claim should be prorated for the already-expired useful lives of the allegedly defective building components, because fairness requires only that the plaintiff be placed in the position he or she would have been in without the defect, so as to avoid a windfall.[1]

Typical Fact Pattern

A typical useful life defense might involve a structure with a leaking roof, failing septic system, and severely cracked foundation wall. The defendant might argue, and present evidence from expert witnesses, that a "typical" asphalt shingle roof has a useful life equal to the length of the roof shingle manufacturer's warranty (usually 25 years), that a septic system has a useful life of 15 years because that is the "usual" time frame within which such a system needs to be replaced, and that the useful life of the foundation wall equals 27.5 years, the depreciable life of residential property held for business purposes.

"Useful Life" Defined

The phrase "useful life" has no single, accepted meaning across disciplines. It is often used by scientists to describe material failure rates, by accountants to calculate asset valuation, and by courts to define recoverable damages.

Failure Science Analysis

A material failure scientist's graphical representation of the useful life of tangible property typically looks like a bathtub-shaped curve. Initially, the failure rate decreases steeply during the "wear-in" phase; the rate remains somewhat level during the "useful life" phase; and, then, the rate slowly increases during the "wear-out phase."[2] If one ever wondered why it seems that purchased goods' warranties appear to expire just before the goods fail, it is because manufacturers have a pretty good idea of what this curve looks like. Scientists acknowledge that how one defines the useful life of something dictates the shape of the curve; that this definition is subjective and often the focus of dispute; and that "useful life" analyses conducted on complex systems located outside the laboratory are rare. For example, when does the repair of exterior wood siding systems become so extensive and expensive as to suggest the system has reached the end of its useful life?[3] How does one objectively quantify the condition of a wood siding system so as to describe accurately the system's condition towards the end of its useful life?

Tax and Accounting Analysis

When accountants measure an asset's useful life, three methods are typically employed: straight-line methods (resulting in an equal amount being charged during each period of its life); accelerated methods (resulting in more being charged in the early part of the asset's useful life); and piece-rate methods (resulting in the charge being directly related to the amount the asset was used during the period). Moreover, an asset's useful life might be measured against the date it wears out, it becomes technologically obsolete, or the project for which the asset was acquired is complete and the asset is not likely to be used in other projects.[4]

The tax world engages in a useful life analysis in a very rough and sometimes arbitrary sense when addressing depreciation. "Depreciation" is defined by the Internal Revenue Code (IRC) as an annual income tax deduction that allows the taxpayer to recover the cost or other basis of certain property over the time the taxpayer uses the property.[5] "Useful

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life" is defined by the IRC as "[a]n estimate of how long an item of property can be expected to be usable in trade or business or to produce income."[6] The IRC generally only permits depreciation of property used in business or an income-producing activity that has a "determinable useful life."[7] While improvements to real property may be depreciated, land cannot because it does not wear out and become obsolete over time.[8]

Presently, Internal Revenue Service (IRS) regulations allow residential rental property a statutory useful life of 27.5 years and commercial property 39 years.[9] Obviously, lobbying efforts and changing political and policy considerations relating to encouraging investment affect statutory useful life. Moreover, under the tax code, one stops depreciating property either when one has fully recovered its cost or other basis

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or when the asset is retired from service, whichever happens first.[10] Because an asset's useful life in the accounting context is derived from statute, related case law is of little help in applying the useful life concept to civil damages claims.[11]

Legal Damages Analysis

In Colorado, where the authors practice, as in most other states, statutory and common law regarding recoverable damages, and what constitutes appropriate setoffs from such damages, combined with the applicable evidentiary rules, govern the proper analysis relating to the admissibility of useful life evidence. While the discussion below relates, in part, to Colorado's damages case law and evidentiary rules, this law and these rules are not very different from those applied in most other states with regard to commercial property injury. However, Colorado case law relating to residential property injury is more favorable to the property owner than other states' laws, primarily because Colorado generally does not recognize economic loss rule limitations on tort claims arising from residential property injury.

Common Law Damages Measure

At common law, the presumptive measure of damages for reparable defects in, and resulting injury to, residential property is the cost to repair those defects and property damage, even if that cost exceeds the value of the property, although the trial court may apply a different damages measure in its discretion if warranted by the facts.[12] As to commercial property, the usual damages measure is the cost to put the defective structure in its warranted condition, unless to do so would cause unreasonable economic waste, in which case the damages measure is the difference in market value between the structure contracted for and the imperfect structure received.[13]

Property owner counsel typically argue that useful life evidence is irrelevant, prejudicial, confusing, and a waste of time[14] because (a) consideration of useful life evidence suggests to the jury a measure of damages contrary to the proper damages measure, cost to repair; (b) the "useful life" of the particular defective construction element at issue has never been the subject of any peer-reviewed, scientific, and generally accepted study; (c) the "useful life" concept presupposes *nondefective*, new construction, and the claims concern *defective* new construction; and (d) allowing a useful-life damages setoff undermines public policy by providing construction defect defendants a powerful incentive to delay repairs and/or settlement because every day's delay allows the defendant to argue for a larger damages discount because the owner purportedly has had the "use" (albeit impaired) of the defective building component every day such delay continues. Counterarguments available to construction defect defendants are discussed below.

Useful Life Case Law

In *Gold Rush Inv., Inc. v. G.E. Johnson Constr. Co.*,[15] the Colorado Court of Appeals affirmed a jury verdict where the trial court permitted the plaintiff to introduce "useful life" evidence to support its diminution in value damages claim to show that, even with repairs, a hotel's useful life would be shortened, and that costly continuing repairs would be necessary. The authors have located no Colorado cases allowing a defendant to present useful life evidence to reduce a damages award on a cost of repair damages claim.

Many cases outside Colorado have examined whether to allow the fact-finder to consider useful life when awarding damages for injury to real property improvements. The cases generally turn on four issues: (1) whether the property is used for commercial or residential purposes by the owner; (2) whether the claim sounds in tort or contract; (3) whether the repair involves a "betterment" of the property or concerns property that is obsolete; and (4) whether the injury is irreparable.[16] The damages principles described by these cases are consistent with Colorado law.

First, the presumption that the proper measure of damages is the cost to repair generally does not apply to injury to commercial property in Colorado.[17] Second, Colorado's economic loss rule typically precludes tort claims by an owner against a commercial property builder, limiting the owner to contractual remedies.[18] Third, where a repair constitutes a "betterment" of the original construction, a defendant is usually not liable in Colorado for the additional cost, unless the alleged betterment simply constitutes restoring the property to its warranted or a reasonably useful condition.[19] And last, if damage to a structure is irreparable, at common law the damages measure usually is the diminution in market value, not the cost of repair.[20] This question has not been addressed under Colorado's Construction Defect Action Reform Act

(CDARA),[21] Colorado's answer to what its legislature perceived as a rash of construction defect litigation. Other states have adopted similar reform measures. Discussion of application of the "useful life" defense under CDARA is useful in analyzing similar issues under other states' analogous laws.

Useful Life and Colorado Statute

CDARA defines what "actual damages" may be recovered against a construction professional due to defective construction. Under CDARA, a residential property owner claimant may recover as actual damages the *lesser* of the (1) fair market value of the real property without the alleged construction defect; (2) replacement cost of the real property; or (3) reasonable cost to repair the alleged construction defect, together with relocation costs, other direct economic costs related to loss of use, if any, interest as provided by law, reasonable attorneys' fees and suit costs awardable by law, and personal injury damages recoverable and as limited by law, except as limited by statute.[22]

Because none of CDARA's three damages measures explicitly refer to the expended "useful life" of the injured property, CDARA is silent as to whether it preempts common law setoffs from such damages.[23] Property owner counsel may argue that because CDARA does not expressly require consideration of the property's useful life, it is irrelevant to determining a property owner's actual damages. Construction professional counsel will argue that because the legislature did not expressly mention useful life, it intended to leave the common law rules as they were, and the useful life defense may be considered.[24]

Policy Considerations

Courts consider policy considerations relating to jury confusion, delaying claim resolution, and conferring a windfall on property-owner plaintiffs in analyzing the useful life defense.

Jury Confusion

In rejecting a setoff for the alleged useful life of certain construction components, the leading decision of *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Associates, Inc.*,[25] refused the useful life defense in a residential construction defect case, stating that its initial appeal in "preventing a windfall for Plaintiff . . . has the potential of giving the Defendants too much of a benefit." Noting that tort damages are intended to make a plaintiff whole,[26] the court said that applying the theory to claims involving "exterior walls, concrete, roof and interfacing" has the "potential to create significant proof problems and substantial jury confusion."[27]

Council of Unit Owners of Sea Colony East added that, if a plaintiff did not receive the benefit of his bargain and there is a need for replacement or repair of a component, and a defendant is entitled to some "mitigation" for useful life, then the plaintiff also should receive an "offset" for the diminished use of the defective component during its "not-so-useful life."[28] The court concluded: "Although qualitatively attractive as an approach, the quantification of such diminished use, along with assessment of useful lives of components such as those pertinent to this case, as a proof problem, is simply overwhelming."[29] *Council of Unit Owners of Sea Colony East* may be particularly persuasive in jurisdictions that rely on the *Restatement (Second) of Torts* in formulating their damages measures. This is because it relied, in part, on section 929 of the *Restatement* in rejecting the useful life defense, the same section adopted by the Colorado Supreme Court in *Board of County Comm'rs v. Slovek*,[30] its leading case on recoverable damages for injury to residential property.

In *Shaw v. Bridges-Gallagher, Inc.*,[31] the Illinois Court of Appeals held that instructing on a "useful life" defense would confuse the proper measure of damages—namely, cost of repair—with an improper measure of damages—diminution in value. *Shaw* noted that useful life evidence, while arguably relevant to a damages claim measured by diminution in value, was irrelevant to a damages claim measured by the cost of repair.

Delaying Claim Resolution

Property owner counsel argue that allowing the introduction of speculative useful life evidence provides construction defect defendants a powerful incentive to delay repairs and the settlement of litigation because every day's delay theoretically allows the defendant to argue for a larger damages discount because the plaintiff purportedly has had the "use" (albeit impaired) of the defective building component every day such delay continues. *Shaw v. Bridges-Gallagher, Inc.*,[32] relied on this policy argument in holding that the plaintiff-homeowners' damages award should not be reduced to reflect the alleged benefit they received from the use of a defective roof but, rather, that such damages must equal the cost to repair the roof:

> We also agree with plaintiffs that even if courts only allowed defendants to reduce damages by the value of the time plaintiffs actually used the building, this would just encourage defendants to delay repairs and to delay settlements of suits because the longer plaintiffs used their buildings, the more defendants could deduct from the damage awards.[33]

Many courts refuse to reduce damages to account for the expended useful life of damaged property.

Windfall

The most compelling argument for allowing a useful life defense is that unless a setoff is allowed, a plaintiff property owner will garner a windfall if a defendant construction professional is saddled with a damages judgment for the cost of

replacing a construction element nearing the end of its useful life. As one court phrased the argument, before rejecting the useful life defense: "fairness and equity dictate that if repair of [an] element is required, then that cost has to be pro-rated to reflect that a plaintiff would have gotten the benefit of . . . the useful life of that particular component . . . [putting the] plaintiff in the position it would have been in without the breach and in turn to avoid giving plaintiff a windfall."[34]

A closely analogous "fairness" argument has been addressed by the Colorado Supreme Court. In *Slovek*,[35] the cost of repair constituted between two and three times the preinjury value of the property. In upholding the trial court's discretion to allow the property owner to recover over twice the property's value as his cost of repair damages, the court said:

> If the damage is reparable, and the costs, although greater than original value, are not wholly unreasonable in relation to that value, and if the evidence demonstrates that *payment of market value likely will not adequately compensate the property owner for some personal or other special reason*, we conclude that the selection of the cost of restoration as the proper measure of damages would be within the limits of a trial court's discretion.[36]

Assuming useful life evidence is legally relevant in a particular case, what evidence of useful life is admissible?

Many courts refuse to reduce damages to account for the expended useful life of damaged property, even where the repair cost exceeded the property's value, because to abate damages under these circumstances is "neither fair nor equitable" when the injured party is compelled to replace the damaged property prematurely.[37] Particularly where repair or replacement of the injured property involves significant transaction costs, "practical realities" must be considered.[38] These practical realities may include the fact that a homeowner, for example, cannot buy a twelve-year-old septic system of "like kind and quality" to replace the one damaged by a defendant's negligence and that the homeowner may not be able to afford the cost of a brand-new system, yet such a system is all that is available and the homeowner cannot live in his house without a functioning system.

Other courts reason that where the useful life expectancy is "indefinite," a useful life abatement is improper.[39] Still others find that the tortfeasor is not entitled to a credit if acquiring new, replacement property or components was the "cheapest course possible."[40] Finally, where damage is to an integral part of a structure, not a separate part that through normal wear would require independent replacement during the life of the structure, then the "new-for-old"[41] replacement proscription does not apply.[42]

Evidentiary Considerations

Assuming useful life evidence is legally relevant in a particular case, what evidence of useful life is admissible? Because little, if any, scientific, peer-reviewed, published information exists regarding the useful life of particular construction elements, most construction experts turn to their own experience in defining and measuring useful life. Colorado's leading scientific evidence case, *People v. Shreck*,[43] which adopts a *Daubert*-like analysis[44] similar to that used in the federal courts and by many state courts, instructs that, depending on the nature of the evidence and the conclusions sought to be drawn from that evidence, courts may be required to exercise their "gate-keeper" function and preclude invalid or unreliable opinions. A *Shreck-Daubert* inquiry regarding the admissibility of scientific expert testimony should focus on the reliability and relevance of the proffered evidence and require a determination as to the reliability of the scientific principles, the qualifications of the witness, and the usefulness of the testimony to the jury.[45]

In *Shreck*, the Colorado Supreme Court held that a court must gauge the relevance and reliability of expert testimony as to scientific analysis, such as the results and meaning of DNA sampling. However, the court noted that "experience-based" specialized knowledge is not well suited to a similar analysis because such experience-based knowledge is "not dependent on scientific explanation."[46] Where the trial court allows the admission of "experiential" opinions over a party's objection, *Shreck* teaches that the party's concerns can be "mitigated by 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' " (citations omitted).[47] State and federal courts will continue to face challenges in gauging the admission of useful life expert testimony.

Motions in Limine: Practical Considerations

A motion in limine[48] asks the trial court to make certain evidentiary rulings before trial so as to allow for more efficient trial preparation and to streamline the trial itself. The decision whether to admit or exclude evidence typically is left to the sound discretion of the trial court, and a verdict following such rulings usually will not be set aside unless it can be shown that the ruling substantially affected a party's right to a fair trial.[49] If a trial court finds that argument or evidence regarding useful life may confuse the jury, and the court has questions regarding the evidence's admissibility, the court may consider either ruling on the issue before trial or entering an order prohibiting such argument or evidence until the record is developed further and the issue is resolved outside the presence of the jury.[50] The careful property owner counsel may wish to raise this issue by motion in limine before trial if the defense has indicated any intent to raise the issue at trial.

If a trial court decides to admit useful life evidence, the jury generally is instructed that, by utilizing all the evidence and the reasonable inferences to be drawn from the evidence, it may

devise a fair method of assessing damages. Difficulty or uncertainty in determining the precise amount of any damages does not prevent the jury from deciding those damages, and the jury should use its best judgment based on the evidence.[51] Alternatively, if the trial court instructs the jury to award the full repair cost and does not allow useful life evidence, the court still preserves to itself the opportunity to reconsider its decision after the verdict and order a remittitur.[52]

The careful practitioner also should consider alternate grounds the record may afford for rebutting useful life evidence if it is admitted. Thus, in the hypothetical roof, septic system, and failed foundation case described above, the record may establish the following:

a. *Roof Shingles*. In the case of the shingles, if only the shingles themselves have been physically damaged, but in order to repair the problem with the overall "roof system" that is damaging the shingles, other significant parts of the system with a much longer useful life must be removed and replaced, such as defective flashings, underlayment, or decking or other structural members, property owner counsel may argue that the shingles cannot be considered to have a useful life separate from the system as a whole, and that the roof system as a whole should last the life of the structure, not just the life of the shingles.
b. *Septic System*. In the case of the septic system, property owner counsel may argue that the useful life of any particular septic system is unknown or highly variable, depending on the size and ages of the family using the system, and that some persons continue to use a less than fully efficient system because they do not want to, or cannot afford to, replace the system. In addition, a homeowner cannot buy a "used" septic system, and the homeowner simply may not be able to afford or finance the cost of a new system, yet a new system is all that is available so as to make the home habitable.
c. *Foundation Wall*. While the IRC may recognize a maximum useful life of 27.5 years for residential property for depreciation purposes, property-owner counsel should be able to show that there is near-universal agreement that foundation systems are expected to last the entire life of a home.

Does Useful Life Analysis Undermine Results?

If the goal of damages is to provide sufficient money to repair a defective or damaged construction element to a condition that reasonably serves its intended purpose, then employing a useful life analysis to limit a residential property owner's damages may undermine this result. Such evidence may cause a jury to apply an incorrect measure of damages, may confuse the jury due to complexity of the defendant's proposed useful life analysis along with the plaintiff's "less-than-useful life" rebuttal, and may encourage delay in resolving construction defect lawsuits. The useful life defense is least likely to apply to residential property owner tort and implied warranty claims and is most likely to apply to commercial property owner contract and express warranty claims. Because the measure of damages ultimately is one of judicial discretion given the particular facts and circumstances of a case, there may be unique cases where useful life evidence is relevant and might be allowed in a residential construction defect case.

Endnotes

1. Council of Unit Owners of Sea Colony E. v. Carl M. Freeman Assocs., Inc., 564 A.2d 357, 362–63 (Del. Super. Ct. 1989) (analyzing, then rejecting, the useful life defense).

2. *See Engineering Statistics Handbook*, § 8.1.2.4, *at* www.itl.nist.gov/div898/handbook/apr/section1/apr124.htm (last visited Mar. 22, 2007); *The Bathtub Curve and Product Failure Behavior Part One—The Bathtub Curve, Infant Mortality and Burn-in*, 21 RELIABILITY HOTWIRE (Nov. 2001), *at* www.weibull.com/hotwire/issue21/hottopics21.htm (last visited Oct. 17, 2005).

3. The National Association of Home Builders (NAHB) published an August 1993 report estimating what it considered to be the useful life of various residential home components. *See* www.enterprisefoundation.org/model%20documents/e529.htm (last visited Oct. 17, 2005). This report contains many qualifiers, such as "Depends on quality of materials and climate"; "Depends on amount of maintenance and climate"; "Useful life depends on quality of material, usage and regularity of cleaning"; "Becomes increasingly inefficient with age and may have to be replaced before it actually breaks down"; "Maintenance free if baked-on finish. But can dent and become unsightly"; "Where ranges are given, lower numbers should be used for structures in harsh climates and subject to intensive use, such as common areas in multifamily structures, structures subject to low maintenance, or dwelling units regularly occupied by children." The "useful life" of wood siding is described as "life." The report states that, "If a useful life is stated as 'life,' this indicates that the component should last for the life of the structure." However, no information is given as to what the "life" of any particular structure is.

A February 2007 NAHB report update, sponsored by Bank of America Home Equity, substantively parallels the 1993 report and notes that due to "new technologies," some component life expectancies have increased, while others have declined; that "consumer preferences" affect a component's replacement date; and that the report was based on a telephone survey. *See* www.nahb.org/fileUpload_details.aspx?contentID=72475 (last visited Mar. 22, 2007). This 2007 report contains many disclaimers and limitations on its use.

4. National Institute of Standards and Technology Administrative Manual, Subchapter 7.01, Appendix B (May 10, 2000).

5. IRS Publication 946 (2006).

6. *Id.* at 109.

7. *Id.* at 4, 6.

8. *Id.* at 6.

9. *Id.* at 37.

10. *Id.* at 7.

11. *See* C.I.R. v. Idaho Power Co., 418 U.S. 1, 94 S. Ct. 2757, 41 L. Ed. 2d 535 (1974) (discussing useful life of a building only as related to permissible depreciation of equipment used in constructing the building and pursuant to IRC provisions that call for the taxpayer to estimate such life); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) (Stevens, J., dissenting) (discussing useful life of property only as related to evaluating regulatory, as opposed to physical, taking, where courts must determine diminution in value of property by analyzing duration of restriction

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would have extended the deduction through 2010; Clean EDGE Act of 2006, S. 2829 (introduced by Sen. Maria Cantwell and twenty-four other senators on May 17, 2006), which would have extended the deduction through 2014; Strategic Energy Fund Act of 2006, S. 2993 (introduced by Sen. Hillary Clinton on May 23, 2006), which would have extended the deduction through 2014; EXTEND the Energy Efficiency Incentives Act of 2006, S. 3628 (introduced by Sens. Olympia Snow, Dianne Feinstein, and John Kerry on June 29, 2006), which would have extended the deduction for energy plans certified through 2011 and property placed in service through 2013; Energy Efficient Buildings Act of 2006, H.R. 5809 (introduced by Reps. Melissa Hart and Brian Baird on July 17, 2006), which would have extended the deduction through 2010; Empowering America Act of 2006, H.R. 5985 (introduced by Rep. Dennis Cardoza on July 28, 2006), which would have extended the deduction through 2015; and Renewable Energy and Energy Efficiency Stimulus Act of 2006, H.R. 6291 (introduced by Rep. Nita Lowey on Sept. 29, 2006), which would have extended the deduction through 2010. Some of these bills also would have increased the $1.80 per square foot limitation. To date, the following bills have been introduced in the 110th Congress to extend the sunset date of section 179D: Buildings for the 21st Century Act, H.R. 539 (introduced by Reps. Allyson Schwartz and Brian Baird on Jan. 17, 2007), which would extend the deduction through 2013; and EXTEND the Energy Efficiency Incentives Act of 2007, S. 822 (introduced by Sens. Olympia Snow, Dianne Feinstein, John Kerry, and six other senators on Mar. 8, 2007), which would extend the deduction to property that is certified on or before December 31, 2012, or placed in service on or before December 31, 2014. Both of these bills also would increase the $1.80 per square foot limitation. *See supra* note 12 for a list of bills introduced in Congress in 2006 and 2007 to increase the $1.80 per square foot limitation.

24. Tax Relief and Health Care Act of 2006, § 204, *supra* note 3.

25. I.R.C. § 179D(d)(4).

26. The JOINT COMMITTEE BLUEBOOK specifically mentions "(i) Natural ventilation (ii) Evaporative cooling (iii) Automatic lighting controls such as occupancy sensors, photocells, and timeclocks (iv) Daylighting (v) Designs utilizing semi-conditioned spaces which maintain adequate comfort conditions without air conditioning or without heating (vi) Improved fan system efficiency, including reductions in static pressure (vii) Advanced unloading mechanisms for mechanical cooling, such as multiple or variable speed compressors (viii) On-site generation of electricity, including combined heat and power systems, fuel cells, and renewable energy generation such as solar energy (ix) Wiring with lower energy losses than wiring satisfying Standard 90.1-2001 requirements for building power distribution systems. The calculation methods may take into account the extent of commissioning in the building, and allow the taxpayer to take into account measured performance which exceeds typical performance." JOINT COMMITTEE BLUEBOOK, *supra* note 9, at 79.

27. A consortium of state energy departments, the American Institute of Architects, manufacturers associations, and other energy-efficiency groups has urged the Treasury to include in regulations appropriate guidance on how to include these features in determining energy savings. *See* Letter from Andrew Goldberg et al. to Eric Solomon, Acting Deputy Asst. Sec. (Tax Policy), Treasury Dep't, and Donald Korb, Chief Counsel, Internal Revenue Serv. (August 16, 2006) (*available at* 2006 TNT 107-13).

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compared to property's useful life); and Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 106 S. Ct. 1890, 1896, 90 L. Ed. 2d 369 (1986) (defining depreciation in the context of public utility accounting and regulation as a "process of charging the cost of depreciable property, adjusted for net salvage, to operating expense accounts over the useful life of the asset").

12. *See* Bd. of County Comm'rs v. Slovek, 723 P.2d 1309, 1317 (Colo. 1986), *affirming* Slovek v. Bd. of County Comm'rs, 697 P.2d 781, 783 (Colo. App. 1984), *followed in* Heritage Vill. Owners Ass'n, Inc. v. Golden Heritage Investors, Ltd., 89 P.3d 513, 516–17 (Colo. App. 2004).

13. Sanford v. Kobey Bros. Constr. Corp., 689 P.2d 724 (Colo. App. 1984); Summit Constr. Co. v. Yeager Garden Acres Inc., 470 P.2d 870 (Colo. App. 1970).

14. *See* COLO. R. EVID. 402 (barring irrelevant evidence); COLO. R. EVID. 403 (barring evidence that is prejudicial, confusing, or a waste of time).

15. 807 P.2d 1169, 1174 (Colo. App. 1990).

16. *See, e.g.*, Cmty. Television Servs., Inc. v. Dresser Indus., Inc., 435 F. Supp. 214 (D.S.D. 1977): Where jury returned a verdict on purchaser's *breach of express warranty claim* against seller for broadcasting tower collapse but refused to find seller liable on the negligence and strict liability claims, the court concluded that the applicable state common law recognized replacement cost minus depreciation as the proper measure of damages, meaning the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.

525 Mainstreet Corp. v. Eagle Roofing Co., 168 A.2d 33 (N.J. 1961): Where a defendant repaired industrial building roof and gave a *five-year guarantee*, and roof failed, court found that the parties had simply bargained for a five-year result—a roof that would serve as a roof for that period with the aid of such repairs as might occasionally be required, and that the property owner should at least receive a portion of the contract price paid to defendant, prorated for the balance of the five-year period, but that if the owner wished to pursue the cost of redoing the roof on remand, it was entitled to that opportunity.

Bloomsbury Mills, Inc. v. Sordoni Constr. Co., 164 A.2d 201 (Pa. 1960): In building owner's action against architect for damages arising out of improper design of a roof that had to be replaced eight and one-half years after construction was first completed, court held that the jury's consideration of useful life evidence was proper because of special circumstances surrounding installation of an *improved roof design* for the purpose of repair.

17. *See* Razi v. Schmitt, 36 P.3d 102 (Colo. App. 2001), *as modified on denial of rehearing, certiorari granted* (Dec. 3, 2001) (assuming that proper measure of damages for commercial building was diminution of market value barring "special reason" to deviate from rule). *But see Sanford*, 689 P.2d at 726 (damages for defective construction measured by cost to place the defective structure in its intended condition, unless to do so would cause unreasonable economic waste); *Summit Constr. Co.*, 470 P.2d at 875 (where part of the deficiencies can be repaired at reasonable cost and part cannot, the cost of repair can be assessed as the measure of damages to the former and the difference in market value can be used as to the latter).

18. *Compare* Town of Alma v. Azco Constr., 10 P.3d 1256 (Colo. 2000), and BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 73 (Colo. 2004) (both holding that economic loss rule bars negligence claims against commercial contractors) *with* Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating, 114 P.3d 862 (Colo. 2005), *aff'g* 94 P.3d 1177 (Colo. App. 2003) (holding that economic loss rule does not bar negligence claims against residential contractors).

19. *Compare* Fleming v. Scott, 348 P.2d 701 (Colo. 1960) (in a breach of contract action, where there was no claim that the type of furnaces originally installed were inadequate for their intended purpose, but only that the two installed furnaces did not perform as desired, recovery was limited to the replacement cost of the original furnaces) *with* Worthen Bank & Trust Co. v. Silvercool Serv. Co., 687 P.2d 464, 466–67 (Colo. App. 1984) (recovery was permitted

for the cost of replacing a defective roof with a roof required to serve its intended purpose, even though the replacement roof was more costly).

20. *See* Fed. Ins. Co. v. Ferrellgas, 961 P.2d 511 (Colo. App. 1997).

21. COLO. REV. STAT. §§ 13-20-801 *et seq.* (2007).

22. *Id.* § 13-20-802.5(2). As to the limit on personal injury damages, *see id.* § 13-20-806(4).

23. Colorado courts have yet to consider the ramifications of the fact that "CDARA II represents a grand compromise of the long-standing rights and remedies of property owners and construction professionals." Ronald M. Sandgrund & Scott F. Sullan, *The Construction Defect Action Reform Act of 2003*, 32:7 COLO. LAW. 89–100 (2003). *Cf.* Vigil Hill v. Franklin, 103 P.3d 322 (Colo. 2004) (legislature, having chosen to exclusively set forth the nature and extent of duties owed by landowners to those injured on their property in Landowner Liability Act, COLO. REV. STAT. § 13-21-115, pre-empted common law defenses to premises liability claims).

24. *See* Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating, 114 P.3d 862 (Colo. 2005) (where legislature presumably knows of existing law but does not act to change it, court may assume legislature did not intend to change law).

25. Council of Unit Owners of Sea Colony E. v. Carl M. Freeman Assocs., Inc., 564 A.2d 357, 362–63 (Del. Super. Ct. 1989). *See also* Beychok v. Norton, 449 So. 2d 32, 36–37 (La. App. 1984) (affirming trial court award of damages based on replacement value of more expensive duct work rather than repair costs to flexible duct of air conditioning system despite fact duct work was near the end of its useful life and would have had to have been replaced soon even without the alleged defects).

26. The same goal has been adopted in Colorado. *See* Lira v. Shelter Ins. Co., 913 P.2d 514, 521 (Colo. 1996) (traditional tort measure of compensatory damages for injuries actually suffered is "aimed simply 'to make the injured party whole' ").

27. *Council of Unit Owners of Sea Colony E.*, 564 A.2d at 363–64.

28. The "not-so-useful-life" concept appears to apply only to a defective component that provides an impaired performance, not one that fails suddenly due to the defect but works fine up to that point.

29. *Council of Unit Owners of Sea Colony E.*, 564 A.2d at 363–64.

30. 723 P.2d 1309 (Colo. 1986).

31. Shaw v. Bridges-Gallagher, Inc., 528 N.E.2d 1349 (Ill. App. 1988).

32. *Id.*

33. *Id.* at 1353.

34. Council of Unit Owners of Sea Colony E. v. Carl M. Freeman Assocs., Inc., 564 A.2d 357, 362–63 (Del. Super. Ct. 1989) (analyzing, then rejecting, the useful life defense).

35. Bd. of County Comm'rs v. Slovek, 723 P.2d 1309 (Colo. 1986).

36. *Id.* at 1317 (emphasis added).

37. Crounse Corp. v. Vulcan Materials Co., 956 F. Supp. 1377 (W.D. Tenn. 1996) (court would defer ruling until trial on effect of useful life on damages claim arising from barge striking bridge support with 65-year history of previous accidents, damage, and deterioration).

38. *See* Carl W. Herstein, *The Two Holmes and the Curious Incident of the Dog in the Nighttime*, 44 WAYNE L. REV. 1019, 1093–94 (1998).

39. *Crounse Corp.*, 956 F. Supp. at 1382.

40. *Id.*

41. The "new-for-old" rule "seeks to avoid giving the injured person the windfall of providing him with a new replacement for that which was old and depreciated and would in normal course have to be replaced in any event," *id.* at 1381, quoting State of Oregon v. Tug Go-Getter, 468 F.2d 1270, 1273 (9th Cir.1972). *See also* BP Exploration and Oil, Inc. v. Moran Mid-Atl. Corp., 147 F. Supp. 2d 333, 339–40 (D.N.J. 2001) (collecting "new-for-old" cases and numerous exceptions to the rule).

42. *Crounse Corp.*, 956 F. Supp. at 1382–83 (citing cases).

43. *See* 22 P.3d 68 (Colo. 2001).

44. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and its progeny.

45. *Shreck*, 22 P.3d at 70.

46. *Id.* at 75.

47. *Id.* at 78.

48. *See* COLO. R. EVID. 104 and 105. *See also* A.B. Good v. Chance, 565 P.2d 217 (Colo. App. 1977) (court has inherent power to pass on admissibility). While a party may be required to renew its objection to evidence that is the subject of a motion in limine during the course of trial, where "a specific evidentiary issue is presented to the trial court in advance of trial, the primary purposes of the contemporaneous objection rule—to permit the trial court to accurately evaluate the legal issues and to enable the appellate court to apprehend the basis of the objection—are satisfied" and requiring "an additional formal objection and ruling in all cases would undermine the benefits provided by the motion in limine procedure." Uptain v. Huntington Lab, Inc., 723 P.2d 1322, 1330 (Colo. 1986).

49. *See* LEONARD P. PLANK & ANN WHALEN GILL, COLORADO APPELLATE LAW §§ 18.8 & 18.9 (1999).

50. In one case, a court deferred a summary judgment ruling on a useful life issue until trial because of the "fact-intensive analysis" the issue raised. Crounse Corp. v. Vulcan Materials Co., 956 F. Supp. 1377, 1384 (W.D. Tenn. 1996).

51. *See, e.g.*, COLO. JURY INSTR.-CIV. 5:5 (4th ed. 2006). *See also* Logixx Automation, Inc. v. Lawrence Michels Family Trust, 56 P.3d 1224, 1227–28 (Colo. App. 2002) (fact of damage must be proven; fact-finder to consider all the evidence); W. Conference Resorts, Inc. v. Pease, 668 P.2d 973, 977 (Colo. App. 1983) (law permits approximation of the amount of damages); Margenau v. Bowling, 12 P.3d 1214, 1218 (Colo. App. 2002) (amount of damages need not be determined by mathematical formula).

52. Where a damages award is manifestly excessive in light of the evidence presented, a court has the power under COLO. R. CIV. PROC. 59 to grant a new trial or, in the alternative, to deny a new trial on the condition that the plaintiff agree to a remittitur of (i.e., a reduction in) the amount of damages. *See* Burns v. McGraw-Hill Broad. Co., 659 P.2d 1351, 1356 (Colo.1983). In Heritage Vill. Owners Ass'n, Inc. v. Golden Heritage Investors, Ltd., 89 P.3d 513, 517 (Colo. App. 2004), the trial court relied on its power to order remittitur to mitigate the danger that a jury might award excessive damages in a construction defect case due to the court's evidentiary rulings. "The court told defendants that should the jury return a verdict that defendants felt was excessive, the court would address the issue as a matter of law." *Id.*

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3. 248 U.S. 132 (1918).

4. *Id.* ("insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate"). A third type of specifications called "reference specifications" is also commonly used in construction contracts. Reference specifications are those that require the work to be performed in accordance with certain reference standards, such as the AWS D1.1 (the Structural Welding Code). These specifications are not specifically discussed in this article.