Construction Defect Statutes of Limitation and Repose Update

Part 2

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This article examines significant changes in and clarifications to the law since 2005 interpreting and applying Colorado's real property improvement statutes of limitation and repose. This Part 2 discusses the application of these statutes to design flaws; negligent repairs; repair warranties; and indemnity, contribution, and other reimbursement claims. It also addresses the effect of Colorado's Construction Defect Action Reform Act, Homeowner Protection Act, and tolling and estoppel doctrines on these statutes, and constitutional concerns with applying the statutes.

This article examines significant changes in and clarifications to the law since 2005 that interpret and apply CRS § 13-80-104's real property improvement statutes of limitation (RP-SOL) and repose (RP-SOR).[1] This Part 2 discusses the application of these statutes to design flaws; indemnity, contribution, and other reimbursement claims; negligent repairs; and repair warranties. It considers the effects of Colorado's Construction Defect Action Reform Act (CDARA), the Homeowner Protection Act (HPA), and tolling and estoppel doctrines on the RP-SOL and RP-SOR. Finally, it examines lingering constitutional concerns in applying the RP-SOL and RP-SOR.[2]

Design Flaws

The RP-SOR begins to run upon "substantial completion of the improvement to the real property."[3] While the RP-SOR applies to defectively designed improvements, no Colorado court has yet held that merely preparing a design constitutes part of the construction of an improvement to real property. Applying the RP-SOR to design professionals raises a peculiar concern because a design may not be implemented and tested until long after the design services were performed.

It would be practically impossible for a design deficiency to manifest until the defectively designed element was substantially completed and put to its intended use. Thus, a defective design may lie dormant for an extended time while the developer lines up financing, contractors, and permitting. For example, where a design professional provided no services beyond creating a proposed geotechnical, structural, or architectural design, the repose period might not begin to run until years after the design services were performed.

Accordingly, design professionals facing a claim may be expected to argue that the repose period begins to run upon completion of their plans, regardless of when the plans were put to use. On the other hand, property owners may argue that, had the legislature intended for the repose period to begin as to architects when the plans are completed for "work done or to be done," it would have specified that as the trigger, as it did in the mechanics' lien statute for triggering the lien's attachment.[4] They may also argue that the repose period does not begin to run, at the earliest, until some tangible construction utilizing the design is substantially completed.[5] Courts may agree with one of these positions or conclude that design activity alone does not constitute part of an improvement to real property and the RP-SOR does not apply.

Indemnity, Contribution, and Other Reimbursement Claims

The RP-SOL and RP-SOR applicable to indemnity, contribution, and similar claims provides, in pertinent part:

> (II) Notwithstanding the provisions of paragraph (a) of this subsection (1), all claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person:
>
> (A) *Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and*
>
> (B) *Shall be brought within ninety days after the claims arise, and not thereafter.*[6]

Before Colorado's legislature added this portion of the RP-SOL and RP-SOR in 2001, Colorado construed its real property improvement statute of limitations, when applicable to indemnity and contribution claims, to begin to run when the defect that gave rise to such claims first manifested.[7] This meant that a party's indemnity claim could be time-barred even before that party was served, its primary liability was determined, or it paid any part of the loss.[8]

To eliminate the potential unfairness of this rule and to reduce the growing practice of many builders who "protectively" sue all potentially liable third-party subcontractors upon commencement of a suit against the builder, CDARA amended the RP-SOL and RP-SOR to establish a separate statute of limitations for indemnity and other reimbursement claims.[9] This amendment provides that a claim against a person who is or may be liable to the claimant for all or part of the claimant's liability to another person arises at the time of the settlement of or entry of final judgment on the claimant's liability to the other person.[10] Such claims must be asserted within 90 days of the settlement or final judgment,[11] or as timely asserted cross- or third-party claims within the pending lawsuit.[12]

In the first of two Colorado Supreme Court decisions construing this provision, the Court held that the RP-SOL amendment is not a "ripeness" provision that bars cross-claims and third-party claims for indemnity and contribution in a construction defect lawsuit

before settlement or judgment.[13] In the second decision, the Court held that the phrase "notwithstanding the provisions of § 13-80-104(1)(a)" precludes application of both the RP-SOL and RP-SOR to indemnity, contribution, and other reimbursement claims.[14] Instead, such claims may be timely asserted within 90 days of settlement or a final judgment in the underlying suit.[15] CRS § 13-80-104(1)(b)(II) only applies to claims made by construction professionals.[16]

Negligent Repairs

Negligent repairs raise unique RP-SOL and RP-SOR issues. To date, the Colorado Supreme Court has not determined when or whether the RP-SOL and RP-SOR apply to claims arising from negligent repair of a real property improvement. CRS § 13-80-104 does not mention "repair,"[17] nor do the general negligence or other statutes of limitations.[18] To determine whether the RP-SOL and RP-SOR apply to negligent repair claims, courts must first answer the threshold question of whether the repairs constitute the "construction of an improvement to real property" within the meaning of CRS § 13-80-104.[19] If not, claims for defective repairs will be subject to other statutes of limitations such as for negligence, contract, or warranty claims.

"Construction of an Improvement to Real Property"

In *Highline Village Associates v. Hersh Companies*, the Colorado Court of Appeals held—in a decision later reversed on other grounds—that some repairs constitute "the construction of an improvement" to real property subject to CRS § 13-80-104.[20] There, the Court found that repainting an existing structure as part of a renovation amounted to construction of an improvement to real property.

In *Smith v. Executive Custom Homes, Inc.*, the Colorado Supreme Court indicated support for this approach in dicta.[21] The Court noted with approval that *Highline Village* "defined the phrase 'construction of an improvement to real property' to mean 'where the result of the construction is a product that is essential and integral to the function of the construction project.'"[22] This lends support to the conclusion that some repairs may constitute a real property improvement if the result of the repair is integral and essential to the property's use or function. *Smith* suggested a repair that meets this definition might "commenc[e] a new limitations period from the date the defective repair was first noticed or should have been noticed."[23]

It follows that if a repair involves a component that is not "essential and integral to the function of the construction project," the RP-SOL and RP-SOR would not apply to the work because the activity would not qualify as the construction of an improvement to real property. *Smith*, however, declined to address whether the defendant's gutter repair constituted construction of an improvement to real property, thereby commencing a new limitations period, because neither the plaintiffs nor the lower courts raised this argument in prior proceedings.[24]

Repair Work Distinguished

The repairs at issue in *Highline Village* consisted of completely repainting the exterior of two apartment complexes as part of a renovation rather than "routine" repairs or a repair attempting to rectify defective work.[25] *Highline Village* also held that CRS § 13-80-104 applied to a claim against the defendant for breach of a separate "warranty of repair" arising from the defendant's later, eventually abandoned, efforts to remedy the prematurely peeling paint.[26] The Court of Appeals tolled the RP-SOL for claims concerning these later defective repairs, under the common law repair doctrine (discussed below), through the date the defendant abandoned its repair efforts.[27]

On appeal, the Colorado Supreme Court affirmed *Highline Village* in part and reversed it in part, holding that CRS § 13-80-101(1)(a), not CRS § 13-80-104, governs a breach of a warranty to repair claim.[28] Because CRS § 13-80-101(1)(a) begins to run upon discovery of the breach of warranty, the Supreme Court noted that the Court of Appeals' resort to the repair doctrine was unnecessary to render the claim timely.[29] The Supreme Court overturned *Highline Village*'s second holding—that the attempt to repair the defective renovation work tolled the RP-SOL pursuant to the repair doctrine—holding instead that these attempted repairs gave rise to a distinct claim for breach of a repair warranty not subject to the RP-SOL.[30]

Similar to the analysis *Smith* and *Highline Village* suggest, courts in other jurisdictions have held that statutes of limitations that apply to defective real property "improvements" do not govern ordinary repair work.[31] Rather, to be governed by real property improvement statutes of limitations, the repairs must be substantial enough to constitute "improvements" themselves.[32] *Smith* and *Highline Village* also reasonably imply that if a repair constitutes the construction of a real property improvement, the limitations period applicable to claims arising from the work will begin when defective repairs first manifest, while the repose period will begin to run when the repair is substantially completed.[33]

In *Smith*, the Colorado Supreme Court held that the repair doctrine does not toll the limitations period for claims governed by CDARA.[34] The common law repair doctrine, discussed in detail below, tolls the limitations period where a construction professional attempted repairs

Practice Pointer: Repairs that Start the RP-SOL and RP-SOR Anew

A construction professional who is sued for allegedly faulty repairs may wish to invoke CDARA's liability and damages limitations applicable to real property improvements by arguing that the repairs themselves constitute the construction of a real property improvement. If a court accepts this argument, the repose period for the defective repair work would have begun to run when the repair work was substantially completed, rather than upon completion of the original underlying construction; and the limitations period would start anew when defects manifested in the completed repairs, rather than upon manifestation of the defects that necessitated the faulty repairs in the first place. If the court does not accept the argument, the general statute of limitations for negligence or breach of contract likely would apply to the work.

and expressly or impliedly represented that the proffered repairs would remedy a defect. In contrast, the analysis from *Smith* and *Highline Village* discussed above does not involve tolling but pertains to whether the RP-SOL and RP-SOR apply to negligent repair claims or start anew the limitations and repose periods for claims arising from repairs. The repair doctrine only becomes relevant where the RP-SOL or RP-SOR applies and the doctrine is permitted to toll the limitations and/or repose periods.

Repair Warranties

A "repair or replace" warranty, also known as a "warranty to repair," typically guarantees that a construction professional's work will be free from defects and the construction professional will repair or replace any work that became defective during the term of the guarantee.[35] In *Hersh Companies v. Highline Village Associates*, the Colorado Supreme Court explained why claims for breach of a warranty of repair did not fall within the RP-SOL's scope:

> 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.[36]

The Court concluded,

> when 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.[37]

In *Stiff v. BilDen Homes, Inc.*, the Colorado Court of Appeals followed *Hersh Companies* and held that causes of action for breach of contract and warranty accrue upon discovery of the builder's failure to remedy the defects pursuant to the contract or warranty, rather than upon discovery of the defects themselves.[38]

Continuing Negligence and Successive Breach

Colorado has adopted the "continuing negligence" doctrine in the context of medical malpractice claims, holding that the last act or omission in a course of treatment begins the limitations or repose period.[39] However, Colorado's appellate courts have not addressed whether (1) the continuing negligence doctrine applies to a related series of construction errors (e.g., a combination of original construction and later repair errors), or (2) the policies supporting this doctrine suggest applying it to negligent repair claims in a proper case.[40]

Colorado also recognizes the "successive breach" doctrine, involving "the concept of continuing contractual obligations, capable of being breached on multiple successive occasions."[41] Where a contract contains a "'continuing duty to perform, generally a new claim accrues for each separate breach' and the plaintiff 'may assert a claim for damages from the date of the first breach within the period of the limitation.'"[42] This issue might arise when a construction professional makes repairs pursuant to CDARA's notice of claim process. Some argue such repairs are or should be accompanied by an implied warranty that the repairs will perform properly or, if not, will be redone.[43] Colorado courts have not examined or applied the successive breach doctrine in the context of negligent construction or repair claims.[44] And whether the continuing negligence and successive breach doctrines can be harmonized with the reasoning underlying *Smith*'s rejection of the repair doctrine under CDARA is an open question as to negligent repair claims.[45]

Effect of CDARA and Municipal Ordinances

CDARA and various local municipal ordinances may affect the RP-SOL and RP-SOR in two ways. First, they could alter when suit on the "manifestation of a defect" is ripe depending on how they define "defect." For example, the Court in *Smith* stated: "A homeowner may file a claim under the CDARA as soon as the defect is noticed; the homeowner does not have to wait until such a defect causes collateral injury to a person or property."[46] This statement suggests that a construction defect lawsuit can be brought before any property damage, loss of use, or personal injury caused by an underlying defect has occurred.[47]

Second, CDARA and Colorado's Common Interest Ownership Act (CCIOA) contain RP-SOL and RP-SOR tolling provisions, extending the time to commence a construction defect action during efforts to resolve the claim or seek homeowners association (HOA) approval to file suit.[48] Similarly, some home rule cities have adopted local ordinances that may, if not preempted by state laws like CDARA, toll the RP-SOL and RP-SOR during their unique and parallel notice of claim and suit approval

Practice Pointer: Negligent Inspections

Inspections of varying scope accompany many repair and maintenance activities. Other inspections may stand alone, for example, as part of a prospective purchaser's due diligence or an HOA reserve study. Where an inspection fails to detect a construction defect, questions arise regarding the extent of the inspector's liability, and how and whether the RP-SOL and RP-SOR apply. Where the negligent inspection results in a catastrophic accident, such as the Minneapolis bridge or the Kansas City skyway collapses, which had accompanying loss of life, it could be argued that performance of an inspection without concomitant repair, remedial, or construction work is beyond the scope of the RP-SOL or RP-SOR because the negligent inspection involved no "construction of any improvement to real property." Or, if the RP-SOR applies, arguably the repose period for any claims for negligent inspection would begin on the inspection date rather than upon substantial completion of the construction itself.

processes.[49] These tolling issues are summarized below.[50]

Extending the RP-SOL and RP-SOR through Tolling and Estoppel

Sometimes, due to a statute or ordinance, or a party's conduct or statements, the RP-SOL, and less frequently, the RP-SOR, may be held in abeyance and effectively extended (tolled) or precluded from application (estopped).

Statutory Tolling

In 2003, CDARA was amended to add a mandatory notice of claim process (NCP) that must be completed before a claimant can commence a construction defect action against a construction professional.[51] If a claimant sends a notice of claim (NOC) to a construction professional in accordance with the NCP within the prescribed time for filing an action under any applicable statute of limitations or repose, the statute is tolled until 60 days after completion of the NCP.[52] The statute's broad language, stating "the time prescribed for the filing of an action under *any* applicable statute of limitations or repose . . . is tolled until sixty days after the completion of the notice of claim process,"[53] suggests that tolling applies not just to CDARA claims but also to non-CDARA claims against a construction professional that may be the subject of the NOC. Limiting the tolling only to claims encompassed by CDARA might undermine CDARA's purpose in "streamlining construction defect litigation"[54] by forcing the claimant, out of an abundance of caution, to commence suit on the non-CDARA claims before the NCP is completed.

The parties may also extend the NCP by mutual agreement,[55] for example, while promised repairs are being arranged and made. Similarly, extensions may result from delays caused by forces outside the construction professional's control[56] or submission of multiple or amended NOCs.[57] Thus, the statutorily mandated tolling period may significantly augment the limitations and repose periods.[58]

In *Shaw Construction, LLC v. United Builder Services, Inc.*, an HOA sued a general contractor for defects in a multi-building residential development, and the general contractor then sued several subcontractors for indemnity.[59] On appeal regarding the timeliness of the indemnity claims, the Court held that the HOA's statutory NOC to the general contractor did not toll the repose period for the general contractor's indemnity claims against its subcontractors.[60] *Shaw Construction*'s CDARA NOC analysis strongly suggests that a claimant should not rely on transmittal of an NOC to a general contractor to toll the claimant's claims against the general contractor's subcontractors or other construction professionals. However, this conclusion may not apply where a builder or general contractor is viewed as another construction professional's agent for receipt of such notice, such as where a subcontract expressly or impliedly renders one the agent for the other.

"Sometimes, due to a statute or ordinance, or a party's conduct or statements, the RP-SOL, and less frequently, the RP-SOR, may be held in abeyance and effectively extended (tolled) or precluded from application (estopped)."

The Repair Doctrine

Pre-CDARA, courts often applied the repair doctrine where a construction professional undertook to repair a defect and expressly or impliedly represented that the repairs would remedy the defect.[61] Such assurances to homeowners tolled the limitations period until the date the construction professional abandoned repair efforts.[62] The repair doctrine is a form of promissory (or equitable) estoppel.[63]

As discussed above, the Colorado Supreme Court greatly constrained application of the repair doctrine in *Smith*.[64] The plaintiff in *Smith* sued the builder within two years of her injury but nearly three years after she first observed the manifestation of a leaking gutter that caused the ice patch she slipped on, and the Court held that the RP-SOL barred her claim.[65] Plaintiff argued that the repair doctrine tolled the RP-SOL and rendered her claims timely, but the Court held that where CDARA applies, its NCP with its related tolling provisions "provides an adequate legal remedy in the form of statutory tolling . . . under specific and defined circumstances, including during the time in which repairs are being conducted," and supplants the repair doctrine.[66]

The Court in *Smith* observed that CDARA tolls the RP-SOL during repairs, noting that "the repair doctrine could frustrate the operation of the statutory notice of claim procedure . . . because the repair doctrine could result in tolling for repairs outside of the limited circumstances and specific durations set forth . . . in the statute."[67] Further, the tolling encompasses "the time in which repairs are being conducted,"[68] plus an additional 60 days, and repairs made pursuant to the NCP "must be completed in accordance with a predetermined timetable submitted by the construction professional along with the offer to repair."[69]

Much could happen during the NCP outside the statute's basic "default" procedures that might still support tolling of the RP-SOR or RP-SOL under CDARA. *Smith* alludes to this possibility, first by noting that it may be appropriate to construe an email as commencing the NCP.[70] Second, the Court commented that it may have been appropriate to toll the RP-SOL a second time when, after the defendant completed the

initial repairs, it was later notified that the ice accumulation had recurred and injured the claimant, and these two tolling periods would have totaled approximately eight months.[71] Finally, as discussed above, the *Smith* Court noted that in some situations repairs may "commenc[e] a new limitations period from the date the defective repair was first noticed or should have been noticed."[72] Together, these comments offer a basis for a claimant to argue for expansive tolling without asking a court to operate outside CDARA for equitable reasons.

Smith's dicta raises two questions: If the parties begin an NCP by the defendant construction professional agreeing to make repairs by a specified date, and then the parties later agree to extend the original timetable, will that agreement estop the defendant from arguing that the limitations and repose periods are not tolled during the extended repair period? And must any such agreement be in writing?[73] Under these or similar circumstances, Colorado courts may have to decide whether to apply equitable estoppel (discussed below) or whether CDARA itself contemplates a tolling remedy under such circumstances.[74] One Colorado district court held that where the HOA claimant and the defendant-builder regularly exchanged emails and other informal communications regarding various construction defects over the course of seven years, and the builder attempted a number of repairs during this time, the parties "entered into the NCP in 2004 and remained within the statutory process over the next seven years."[75]

Equitable Estoppel

As noted above, the Colorado Supreme Court has limited common law equitable tolling where CDARA's statutory tolling applies.[76] The contours of this limitation remain to be determined, including whether CDARA might supplant application of equitable estoppel against an RP-SOL defense under some circumstances.

But there 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."[77] Equitable estoppel is "a defensive doctrine, which may be invoked 'to bar a party from raising a defense or objection it otherwise would have, or from instituting an action which it is entitled to institute.'"[78] Equitable estoppel applies when (1) the party to be estopped knows the facts and (2) intends (or appears to intend) for its conduct to be acted on by the party asserting the estoppel, and (3) the party asserting the estoppel is ignorant of the true facts and (4) is injured due to its reliance on the other party's conduct.[79] The party asserting the estoppel bears the burden of proof.[80]

Equitable estoppel may prevent the assertion of a statute of limitations defense.[81] One who "relies to his detriment on the affirmative promise or representation of another may invoke the doctrine of equitable estoppel if the promisor reasonably expects to induce action or forbearance of a material nature by his actions."[82] However, "one cannot rely upon mere noncommittal acts of the other party to establish an estoppel against a party who raises the statute as a defense."[83]

Some older Colorado district court decisions granted relief to homeowners from the RP-SOL defense where construction professionals provided assurances that observed problems were not serious or would stabilize before any significant damage occurred, or the builder ostensibly repaired the observed problem but it later became apparent that the repairs had failed.[84] Under these circumstances, the construction professional has actual notice of the problem within the limitations period and may investigate the problem and its cause before the limitations period has run. Accordingly, these circumstances do not implicate a main purpose of the statute of limitations: barring stale claims after witnesses and evidence have disappeared. Equitable estoppel may apply where a defendant misrepresents or fails to disclose information, or fraudulently conceals information.

Misrepresentation and failure to disclose. Estoppel may apply, for example, when a construction professional misrepresents a material fact to a property owner or fails to disclose a material fact where a duty to disclose exists, causing the property owner to delay suit beyond the expiration of the limitations or repose period. The duty to disclose might arise from a statute, such as Colorado's soils disclosure statute,[85] relating to homes built on potentially expansive soils, or from the common law, such as where a builder-vendor knows of a latent property or construction defect.[86]

Fraudulent concealment. Where a defendant has intentionally concealed the cause of an injury, the plaintiff may be able to maintain an action brought outside the limitations period if such plaintiff timely institutes suit after he or she discovered, or by the exercise of reasonable diligence should have discovered, the cause of the injury.[87] This "fraudulent concealment" doctrine[88] applies where

- a material existing fact is concealed that in equity and good conscience should be disclosed;
- the party against whom the claim is asserted knows that such a fact is being concealed;
- the party from whom the fact is concealed is ignorant of the fact;
- it is intended that the concealment be acted upon; and
- action on the concealment results in damages.[89]

Fraudulent concealment tolling may apply to the RP-SOR as well. The Colorado Court of Appeals has held that the RP-SOR is not a non-claim statute and thus is not jurisdictional.[90] Where a statute of repose does not constitute a non-claim statute, it may be equitably tolled due to a defendant's fraudulent concealment.[91] However, one Colorado district court concluded, in dicta, that a builder's alleged fraudulent concealment of construction defects does not estop the builder from raising the RP-SOR as a defense.[92]

The Implied Covenant of Good Faith and Fair Dealing

Suppose a builder fails or refuses to disclose to a homeowner documents that are important to the owner's understanding of what does (and does not) constitute the manifestation of a defect in or inadequate performance of a home (e.g., architectural plans, construction specifications, and engineering test results, reports, and recommendations).[93] This failure may arguably impair the homeowner's ability to timely recognize and assert a defect claim

under a purchase contract, home warranty, statute, or otherwise. The homeowner may argue that the builder's failure to disclose precludes it from raising a statute of limitations or repose defense. No published Colorado decision has yet addressed this issue.

However, Colorado recognizes an implied covenant of good faith on the part of all parties to a contract, such that one party may not act to prevent the occurrence of a condition to performance.[94] The covenant also governs a party's power after contract formation to set or control the terms of performance.[95] Property owners may argue that a promise to provide critical paperwork to the homeowner is expressed or should be implied in the purchase transaction, in the home's warranties, or by statute,[96] and a failure to supply this information that delays timely assertion of a construction defect claim should (1) estop the non-disclosing construction professional from asserting an RP-SOL or RP-SOR defense, or (2) give rise to a breach of contract claim for damages equal to the value of the now-barred defect claim.

Homeowner Protection Act

The HPA provides that "to preserve Colorado residential property owners' legal rights and remedies . . . any express waiver of, or limitation on, the legal rights, remedies, or damages provided by" CDARA[97] or the Colorado Consumer Protection Act,[98] "or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitation or repose are void as against public policy."[99]

The Colorado Court of Appeals held that the undefined term "residential" as used in the HPA is unambiguous and means "an improvement on a parcel that is used as a dwelling or for living purposes," based on consistent dictionary definitions, other statutory definitions, case law, and the zoning of the building at issue.[100] The Court found that "the term 'residential' in [the HPA] is used to describe the property owned, not to limit its applicability to any specific type of owner, whether an entity or a natural person," and held that "the receipt of income does not transform residential use of property into commercial use."[101] The Court then held that the HPA applied to a contract between a construction professional and the owner of a senior living facility and rendered void a contract provision purporting to limit the time during which construction defect claims could accrue.[102]

> "Separate from the constitutional issues, serious policy and practical concerns would arise if the RP-SOL was construed to require every homeowner to retain expensive legal, construction, and forensic engineering consultants upon noticing a hairline crack or similar seemingly typical condition to preserve potential claims."

Whether CDARA treats a particular property as "residential" is an important question, although in most instances it should not be difficult to answer. There are differences between how CDARA and some local construction defect ordinances treat residential and commercial property owners' rights, including as to tolling the RP-SOL and RP-SOR, and it is unsettled how those differences will be handled and whether they can be harmonized.

Constitutional Questions

Colorado's appellate courts have not squarely addressed any facial or as applied constitutional challenges to the current RP-SOL or RP-SOR on equal protection, due process, or vagueness grounds.[103] Previous versions survived constitutional scrutiny.[104]

However, one question of constitutional dimension looms large: Can the RP-SOL be triggered where a property owner discovered or should have discovered the physical manifestation of a construction defect, but *a reasonable person would not have recognized the condition as manifesting a defect*? This situation could arise where the condition is later shown to have inarguably been the manifestation of an underlying defect upon which the claim is based. For example, the manifestation could consist of a hairline crack in first floor drywall created solely by the interaction between a defective basement flooring system and underlying expansive soils (and no other possible cause)[105] that, more than two years later, significantly worsens and substantially damages the wall. A due process or equal protection challenge might arise under circumstances like these, where a property owner's claims would be barred where he or she arguably would have had no notice of circumstances invoking a need to assert any legal right.[106]

Typically, Colorado statutes of limitation begin to run on a claimant's personal injury or property damage claim when the claimant knows or has reason to know that a claim has arisen and, in many cases, the cause of the injury.[107] Thus far, however, Colorado courts have avoided the problematic result described above by effectively holding that the RP-SOL is only triggered when a reasonable person would have recognized the observed condition as manifesting a defect—and the Colorado Supreme Court appears to have approved this

view in dicta.[108] Separate from the constitutional issues, serious policy and practical concerns would arise if the RP-SOL was construed to require every homeowner to retain expensive legal, construction, and forensic engineering consultants upon noticing a hairline crack or similar seemingly typical condition to preserve potential claims.

Jury Instructions

There are no pattern jury instructions for RP-SOR and RP-SOL defenses. However, a checklist of pertinent issues and a few suggested forms of instructions can be found in *Practitioner's Guide to Colorado Construction Law*.[109]

Conclusion

Since 2005, Colorado appellate courts have provided some needed direction regarding discrete RP-SOL and RP-SOR issues. Practitioners must heed the limitations periods applicable to real property design and repairs and analyze how statutory provisions and equitable doctrines impact claims on these issues. CL

 

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NOTES

1. This article updates Sandgrund and Sullan, "Statutes of Limitations and Repose in Construction Defect Cases—Part I," 33 *Colo. Law.* 73 (May 2004); and Sandgrund and Sullan, "Statutes of Limitations and Repose in Construction Defect Cases—Part II," 33 *Colo. Law.* 67 (June 2004).

2. The authors will provide copies of cited district court rulings or unpublished opinions upon request.

3. *See* CRS § 13-80-104(1).

4. *See* CRS 38-22-101 (granting a lien upon property to "architects. . . . who have furnished designs . . . specifications, drawings . . . or who have rendered other professional or skilled service . . . *describing or illustrating . . . work* done or *to be done* . . . .) (emphasis added).

5. *Cf. James H. Stewart & Assocs. v. Naredel of Colo., Inc.*, 571 P.2d 738, 740 (Colo.App. 1977) (holding architect could properly claim a mechanic's lien for preparing plans, even though no improvement was ever erected, because the mechanic's lien statute's application did not depend on actual construction of an improvement).

6. CRS § 13-80-104(1)(b)(II) (emphasis added).

7. *See, e.g., Nelson, Haley, Patterson & Quirk, Inc. v. Ganey Cos.*, 781 P.2d 153, 156 (Colo.App. 1989) (indemnification claim accrued on same date as underlying construction defect claim).

8. *See id.* (recognizing that "the two-year statute of limitations may bar an indemnitee's cause of action even before the indemnitee's liability for compensation is finally determined and before the indemnitee makes any payment for the loss.").

9. *See generally CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 664–65 (Colo. 2005) (discussing legislative history of CDARA's amendment to CRS § 13-80-104); Sandgrund et al., "The Construction Defect Action Reform Act," 30 *Colo. Law.* 121, 122 (Oct. 2001) (explaining purpose of amendment was to avoid the result in *Nelson, Haley, Patterson & Quirk, Inc.*, 781 P.2d 153).

10. CRS § 13-80-104(1)(b)(II)(A).

11. CRS § 13-80-104(1)(b)(II)(B).

12. *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, 402 (Colo. 2017).

13. *CLPF-Parkridge One, L.P.*, 105 P.3d at 663–64 (holding "section 13-80-104(1)(b)(II) . . . operate[s] as a statute of limitations tolling provision, not a ripeness requirement that would preclude carefully tailored indemnity or contribution cross-claims or third-party claims").

14. *Goodman*, 390 P.3d at 402 (overruling three Colorado Court of Appeals' decisions to the extent they conflict with this holding: *Sierra Pac. Indus., Inc. v. Bradbury*, 409 P.3d 551 (Colo.App. 2016); *Shaw Constr., LLC v. United Builder Servs., Inc.*, 296 P.3d 145 (Colo.App. 2012); and *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo.App. 2008)).

15. *Id.*

16. *See Fire Ins. Exch. v. Monty's Heating & Air Conditioning*, 179 P.3d 43, 45–47 (Colo.App. 2007) (holding claims brought by a subrogated fire insurer against various construction professionals were subject to the two-year RP-SOL, and not the exception in CRS § 13-80-104(1)(b)(II) for indemnity claims brought by construction professionals against indemnitees within 90-days of a settlement or judgment).

17. *Compare* CRS § 13-80-104 (no express reference to "repairs") *with* Tex. Civ. Prac. & Rem. Code Ann. § 16.009(a) and N.C. Gen. Stat. § 1-50(5)(a) and (b) (both Texas and North Carolina real property improvement statutes of limitations expressly reference and include "repair" claims).

18. *See, e.g.*, CRS § 13-80-102(1)(a) ("General limitations of actions—two years.").

19. *See* CRS § 13-80-104(1)(a) (providing RP-SOL and RP-SOR apply to any action against enumerated construction professionals "performing or furnishing the design, planning, supervision, inspection, construction, or observation of *construction of any improvement to real property* . . . ." (emphasis added)).

20. *Highline Vill. Assocs. v. Hersh Cos.*, 996 P.2d 250, 254 (Colo.App. 1999) (rejecting argument that "repair or maintenance" does "not result in any 'improvement to real property' within the meaning of the contractor's statute"), *rev'd in part on other grounds, Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001).

21. *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1191 n.6 (Colo. 2010).

22. *Id.*

23. *Id.* (citing CRS § 13-80-104(1)(a)). Some courts in other jurisdictions 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, 388–89 (N.J. 1994). *See also Ajax Lofts Condo. Ass'n v. Ajax Lofts, LLC*, No. 11CV7763, slip op. at 5–6 (Denver Cty. Dist. Ct. Nov. 16, 2012). At least two district courts have denied summary judgment on negligent repair claims because disputed factual issues existed as to whether the repairs constituted an "improvement to real property." *See Sutliff v. Standard Pac. of Colo., Inc.*, No. 2010CV371, slip op. at 5–6 (Arapahoe Cty. Dist. Ct. Jan. 6, 2011) (denying summary judgment on negligent repair claims because a "repair independently triggers a new statute of limitations if the repair itself constitutes a 'construction of an improvement to real property,'" and disputed facts existed whether the work was "routine maintenance" or something "more substantial"); *Fairways at Buffalo Run Homeowners Ass'n v. Fairways Builders, Inc.*, No. 2016CV30393, slip op. at 17–18 (Adams Cty. Dist. Ct. Apr. 17, 2017) (denying summary judgment because court could not determine as a matter of law whether the repairs constituted improvements to real property, nor when each repair occurred).

24. *Smith*, 230 P.3d at 1191 n.6.

25. *Highline Village* did not endorse the idea that all repair or maintenance activities necessarily constitute an improvement to real property but found that "the activity engaged in by defendant here consisted of more than routine repair. . . . [D]efendant 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." *Id.* at 254. The Court concluded that "the nature of [the defendant's] activities here did not differ substantially from the services it would have performed had the two complexes been newly constructed." *Id. See*

also Hersh Cos., 30 P.3d at 224 n.4 ("The court of appeals held that under the circumstances of this case the work performed . . . constituted an improvement to real property . . . . Because that issue has not been presented to this court on certiorari, we accept it without comment . . . .").

26. *Highline Vill. Assocs.*, 996 P.2d at 255–57.

27. *Id.* at 257.

28. *Hersh Cos.*, 30 P.3d at 226; *accord Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d 219, 226–27 (Colo. App. 2017) (following *Hersh Cos.*' holding that the general statute of limitations for contracts and warranties governs a breach of warranty of repair).

29. *Hersh Cos.*, 30 P.3d at 226.

30. *Id.*

31. *See, e.g.*, *Adcock v. Montgomery Elev. Co.*, 654 N.E.2d 631, 633 (Ill.App.Ct. 1995) ("An 'improvement' is an addition to real property amounting to more than mere repair or replacement, and which substantially enhances the value of the property."); *Hartford Fire Ins. Co. v. Westinghouse Elec. Corp.*, 450 N.W.2d 183, 186 (Minn.Ct.App. 1990) (holding "ordinary repairs" that do not add to the value or usefulness of the property are not improvements to real property).

32. *Id.*

33. For a detailed discussion of cases involving extensive renovations and condominium conversions, *see* Sandgrund et al., "Mitigating Potential Condo Conversion and Renovation Construction Defect Liabilities—Part 2," 48 *Colo. Law.* 40, 44 (May 2019).

34. *Smith*, 230 P.3d at 1192.

35. *See generally Hersh Cos.*, 30 P.3d at 224.

36. *Id.* at 225 (emphasis added).

37. *Id.* at 226.

38. *Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 642 (Colo.App. 2003) (applying CRS §§ 13-80-101 and -108 (2002) to warranty and contract claims).

39. *See Comstock v. Collier*, 737 P.2d 845, 849–50 (Colo. 1987) (recognizing "continuing negligence" doctrine in medical malpractice case). *But see Ami Mech., Inc. v. Hadji & Assoc., Inc.*, No. 16CV33051, 2017 Colo.Dist. LEXIS 1131 at *6 (Denver Cty. Dist. Ct. May 24, 2017) (declining to apply continuing negligence doctrine to defective construction claims because "[u]nlike in *Comstock*, it is possible in this case to determine the dates of the acts or omissions that caused the 'injury.'").

40. *Cf. Bd. of Managers of the Ocean Club at Long Beach Condominium v. Mandel*, 235 A.D.2d 382, 383 (N.Y.App.Div. 1997) (holding that the "continuous treatment" doctrine applies to architects); *Greater Johnstown City Sch. Dist. v. Cataldo & Waters, Architects, P.C.*, 159 A.D.2d 784, 786 (N.Y.App.Div. 1990) (accord).

41. *Neuromonitoring Assocs. v. Centura Health Corp.*, 351 P.3d 486, 492 (Colo.App. 2012).

42. *Id.* (quoting *Noonan v. Nw. Mut. Life Ins. Co.*, 687 N.W.2d 254, 262 (Wis.Ct.App. 2004)). It would seem to follow from this holding that the plaintiff may assert a claim for damages from the date of the first and each successive breach within the corresponding limitation period.

43. *See* Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *Colo. Law.* 89, 92 (July 2003).

44. *Ami Mech., Inc.*, No. 16CV33051, 2017 Colo. Dist. LEXIS 1131 at *6–7, considered whether the "successive breach" doctrine described in *Neuromonitoring Assocs.* might apply to a construction defect claim, but did not reach the question because none of the alleged breaches occurred within the limitations period.

45. The Colorado Supreme Court has held that the repair doctrine provides no equitable tolling for breach of warranty claims, at least when there is an express warranty. *See Hersh Cos.*, 30 P.3d at 226.

46. *Smith*, 230 P.3d at 1190.

47. This statement may need to be harmonized with CRS § 13-20-804, which precludes negligent construction claims grounded solely on a failure to comply with an applicable code or industry standard unless the failure results in actual property damage, loss of use of property, or a risk or threat to the life, health, or safety of a home's occupants.

48. *See* CRS § 13-20-805 (CDARA tolling); CRS § 38-33.3-303.5(1)(d)(II)(A)–(C) (CCIOA tolling).

49. While these numerous and varied ordinances, and the question whether CDARA preempts them in whole or in part, are too complicated to address here, a three-part 2017 *Colorado Lawyer* article contains a comprehensive discussion of these issues and a link to a chart summarizing 17 home rule city construction defect ordinances. *See* Sandgrund et al., "Construction Defect Municipal Ordinances: The Balkanization of Tort and Contract Law (Part 1)," 46 *Colo. Law.* 33 (Feb. 2017); Sandgrund et al., "Construction Defect Municipal Ordinances: The Balkanization of Tort and Contract Law (Part 2)," 46 *Colo. Law.* 31 (Mar. 2017); and Sandgrund et al. "Construction Defect Municipal Ordinances: The Balkanization of Tort and Contract Law (Part 3)," 46 *Colo. Law.* 27 (Apr. 2017). *See also* Benson et al., *The Practitioner's Guide to Colorado Construction Law* § 14.2.8 (2d ed. CLE in Colo., Inc. Supp. 2020) (hereinafter *Practitioner's Guide*).

50. *Practitioner's Guide* §§ 14.9.1.d, 14.9.1.f, and 14.9.1.g discuss these issues more comprehensively.

51. *See generally* CRS § 13-20-803.5.

52. CRS § 13-20-805.

53. *Id.* (emphasis added).

54. *See CLPF-Parkridge One, L.P.*, 105 P.3d at 664 (Colo. 2005) (discussing CDARA's purposes).

55. CRS § 13-20-803.5(8).

56. While *Smith* held that the repair doctrine's equitable tolling (discussed below) is not available to claims governed by CDARA, the Court did not address whether a party's conduct or statements while participating in the NCP may themselves estop that party from relying on the limitations period in some circumstances. *See generally Smith*, 230 P.3d 1186. If, for example, a construction professional orally requests and obtains a several month extension of time to complete an exterior inspection due to heavy snow, would that construction professional be estopped from raising the limitations defense if the limitations period expired as a result of the NCP inspections being extended, even if the extension did not strictly comply with CDARA's NCP requirements?

57. *See id.* at 1193 (noting, in dicta, that it may be appropriate for a court to apply multiple statutory tolling periods to the same claims in some circumstances).

58. *See id.* (noting, in dicta, that over eight months of statutory tolling might have applied to the plaintiff's claims but finding that the claims would have been barred regardless).

59. *Shaw Constr.*, 296 P.3d at 145, 148.

60. *Id.* at 151–52 (noting that if they did not receive an NOC, the subcontractors "would not take the steps set forth in" CDARA's NCP, *id.* at 152), *overruled in part by Goodman*, 390 P.3d at 402 (overruling *Shaw Construction*'s application of the RP-SOR to indemnity claims brought by a general contractor against its subcontractors).

61. *See, e.g.*, *Curragh Queensland Min. Ltd. v. Dresser Indus., Inc.*, 55 P.3d 235, 239–40 (Colo. App. 2002) (applying repair doctrine). *Cf. Hersh Cos.*, 30 P.3d at 225 (reversing lower court's application of the repair doctrine to warranty claims, but endorsing application of the repair doctrine to non-warranty claims because requiring a party to initiate suit during repairs "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"), *rev'g in part Highline Vill. Assocs.*, 996 P.2d 250. *But see Smith*, 230 P.3d at 1192 (holding that "equitable tolling pursuant to the repair doctrine is inconsistent with the CDARA because the CDARA already provides an adequate legal remedy in the form of statutory tolling of the limitations period under specific and defined circumstances.").

62. *See Curragh*, 55 P.3d at 239 ("[U]nder the repair doctrine, the limitations period . . . is tolled from the time a seller undertakes efforts to repair the defect[s] . . . until the time it abandons those efforts where: (1) the seller . . . represents that such repairs will remedy such defect; and (2) the buyer reasonably relies upon such promise . . . and, as a result, does not institute legal action . . . ."); *Peterson v. Mission Viejo Co.*, No. 92CV568, slip op. at 2–3 (Douglas Cty. Dist. Ct. Nov. 30, 1993) (finding "a question of fact whether the repeated efforts and representations by Defendant provided a reasonable basis that the basement floor would be repaired under Defendant's warranty program, thus tolling the statute of limitation until there had been a denial of liability or refusal to make further repairs").

63. *Smith*, 209 P.3d at 1180 (Colo.App. 2009). Promissory estoppel applies when (1) the promisor makes a promise to another person that the promisor reasonably should have expected would induce action or forbearance by the other person or a third party; (2) the other person or third party reasonably and detrimentally relies on the promise; and (3) the promise must be enforced to prevent injustice. *Pinnacol Assurance v. Hoff*, 375 P.3d 1214,

1220–21 (Colo. 2016).

64. *Smith*, 230 P.3d at 1187.

65. *Id.*

66. *Id.* at 1192. *Cf. Hickerson v. Vessels*, 316 P.3d 620 (Colo. 2014) (holding that separation of powers does not bar application of a laches defense to a debt collection action filed within the original or restarted limitations period because laches does not conflict with the limitations statute; common law could not extend, but could shorten the limitations period; and case law has long recognized the application of equitable remedies to legal claims (distinguishing *Smith*, 230 P.3d 1186)).

67. *Smith*, 230 P.3d at 1192.

68. *Id.*

69. *Id.* at 1192 n.7.

70. *Id.* at 1193 (noting that one of the plaintiffs notified the property manager by email when he first observed the manifestation of the gutter defect and the manager in turn notified the defendant, explaining: "If we were to construe that email as commencing the notice of claim procedure," the plaintiff's claims would be tolled until the attempted repairs were completed, plus an additional 60 days).

71. *Id.* The Court noted that the claims would have been untimely even with these tolling periods.

72. *Id.* at 1191 n.6.

73. *See* CRS § 13-20-803.5(8) ("[A] claimant and a construction professional may, by written mutual agreement, alter the procedure for the notice of claim process . . . .").

74. A property owner might argue that the legislature intended CDARA's statutory tolling to include informal agreements to extend the NCP because otherwise a construction professional could run out the limitations and repose periods by merely failing to complete the promised repairs in a timely manner after the property owner provided a timely NOC and acceded to an offer to remedy the defect. A court's analysis of such a situation would be highly fact-dependent. A court might find that an enforceable settlement-repair contract had been formed, or that promissory estoppel applies and claims based on these theories are subject to their own statutes of limitations. *But see Landmark Towers Condo. Ass'n v. GV Holdings, LLC*, No. 2010CV2485, 2018 Colo. Dist. LEXIS 1585 at *10 (Arapahoe Cty. Dist. Ct. Aug. 13, 2018) (dismissing promissory estoppel claim alleging that developer orally promised to repair/replace construction defects in exchange for an assignment of construction defect claims, because promissory estoppel "is incompatible with the existence of an enforceable contract") (quoting *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC*, 176 P.3d 737, 741 (Colo. 2007)).

75. *Ajax Lofts Condo. Ass'n, Inc. v. Ajax Lofts, LLC*, No. 11CV7763, slip op. at 3–4 (Denver Cty. Dist. Ct. Nov. 16, 2012). This same court held, in the alternative, that CDARA's RP-SOR may be equitably tolled pursuant to CDARA's NCP "even if the parties were not officially within the NCP" where they were "ostensibly conforming with the [NCP] and serving its intended purpose" by reporting perceived defects, conducting inspections, and attempting repairs. *Id.* at 4–5. The court explained that the failure to send a "formal" NOC should not deprive the claimant of CDARA's equitable tolling protections because "refusing to apply equitable tolling in cases in which construction professionals received actual notice of defects would create perverse incentives that clearly contravene CDARA's legislative intent." *Id.* at 5.

76. *See Smith*, 230 P.3d at 1192 ("[E]quitable tolling pursuant to the repair doctrine is inconsistent with the CDARA because the CDARA already provides an adequate legal remedy in the form of statutory tolling of the limitations period under specific and defined circumstances, including during the time in which repairs are being conducted"). One commentator has advocated that the Colorado Supreme Court revisit and overrule its holding in *Smith* to "avoid negative policy consequences" and because the holding was based on an incomplete understanding of CDARA's notice of claim process due to a lack of adversarial briefing on the issue. *See* Lutz, "Restore Colorado's Repair Doctrine for Construction-Defect Claims," 83 *U. Colo. L. Rev.* 875 (Spr. 2012).

77. *Highline Vill. Assocs.*, 996 P.2d at 255. *Cf. Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo.App. 2007) ("Equitable tolling, an application of the concept of equitable estoppel, is generally applied to prevent a defendant from asserting a statute of limitations defense where the defendant's wrongful actions have prevented the plaintiff from asserting a timely claim, or when extraordinary circumstances render filing a claim within the statutory period impossible.").

78. *Wheat Ridge Urban Renewal Auth.*, 176 P.3d at 741 (quoting *Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981)); *accord Tarco, Inc. v. Conifer Metro. Dist.*, 316 P.3d 82, 90 (Colo.App. 2013).

79. *Cork v. Sentry Ins.*, 194 P.3d 422, 427 (Colo. App. 2008).

80. *Black v. S.W. Water Conservation Dist.*, 74 P.3d 462, 467 (Colo.App. 2003).

81. *Mountainwood Condo. Homeowners Ass'n v. Cal-Colorado*, 765 P.2d 1066, 1069 (Colo.App. 1988) (citing *Klamm Shell v. Berg*, 441 P.2d 10 (Colo. 1968)).

82. *Id.* at 1069.

83. *Id.*

84. *See, e.g., Vill. Point Townhomes at*

Breckenridge v. Wooden Ski Corp., No. 99CV188, slip op. at 3, 6 (Summit Cty. Dist. Ct. Apr. 23, 2002) (where developer's agents allegedly told homeowners that "the ventilation for the roof was acceptable" and ice accumulation was "a natural occurrence and a maintenance issue," finding that "material issues of fact exist" regarding applicability of the "equitable estoppel doctrine"); *Thompson v. Writer Homes, Inc.*, No. 00CV348, slip op. at 5 (Douglas Cty. Dist. Ct. Jan. 28, 2001) (applying the repair doctrine and also noting "the estoppel doctrine may apply to the statute of repose as well as to the statute of limitations") (citing *First Interstate Bank, N.A. v. Central Bank & Trust Co.*, 937 P.2d 855 (Colo.App. 1997)).

85. Soils and Hazard Analyses of Residential Construction Act, CRS § 6-6.5-101 (requiring every developer or builder to provide new home purchasers a copy of a summary report of the relevant geotechnical "analysis" and "site recommendations" no later than 14 days before closing).

86. *See Cohen v. Vivian*, 349 P.2d 366, 367–68 (Colo. 1960) (holding seller has duty to disclose latent defects not known by purchaser); *Estate of Gattis v. McNutt*, 318 P.3d 549, 557 (Colo. App. 2013) (holding that the economic loss rule does not bar claims against home sellers for nondisclosure of known latent defects and disclosure terms in the form contract did not subsume the home seller's common law duty to disclose such defects).

87. *See, e.g.*, *First Interstate Bank v. Piper Aircraft Corp.*, 744 P.2d 1197, 1200 (Colo. 1987) (holding the wrongful death claim subject to tolling for defendant's fraudulent concealment of facts until plaintiffs discovered, or reasonably should have discovered, the existence of facts forming the basis for their claims); *Davis v. Bonebrake*, 313 P.2d 982, 987–88 (Colo. 1957) (holding defendants' fraudulent concealment of cause of injury could bar a statute of limitations defense).

Fraudulent concealment might also be asserted as a stand-alone claim, subject to its own three-year statute of limitation under CRS §§ 13-80-101(1)(c) and -108(3). *See, e.g.*, *J.A. Balistreri Greenhouses v. Roper Corp.*, 767 P.2d 736, 739 (Colo.App. 1988) (jury question existed whether fraudulent concealment claim accrued three years before suit filing, despite evidence that plaintiffs were aware of problems with greenhouse fiberglass panels before that date, because this awareness did "not equate to knowledge which would enable them to discover that the defendants knew the panels were defective and fraudulently concealed those problems from them").

88. *See, e.g.*, *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944) (applying "fraudulent concealment" doctrine to toll the statute of limitations applicable to a medical malpractice claim).

89. *First Interstate Bank, N.A.*, 744 P.2d at 1200. *But see Allison v. Elliott*, No. 04 CA 0851, slip op. at 4–5 (Colo.App. Nov. 3, 2005) (not selected for official publication) (affirming judgment that defendant's fraudulent concealment did not equitably toll statute of limitations where trial court did not find that the "defendants concealed a material existing fact that should have been disclosed, or that plaintiffs were ignorant of those material facts").

90. *Dunton v. Whitewater W. Rec. Ltd.*, 942 P.2d 1348, 1350 (Colo.App. 1997) ("This statute [CRS § 13-80-104(1)(a)] does not employ language, as some non-claim statutes do, providing that failure to comply with the limiting provision specifically bars the claim or deprives the court of jurisdiction over such claim.").

91. *See First Interstate Bank, N.A.*, 937 P.2d at 1199–1200 (explaining that the statute of limitations for wrongful death actions did not constitute a "non-claim" statute; this meant that it was not a self-contained statute the terms of which prohibited absolutely the initiation of litigation beyond a prescribed time-period, and may therefore be subject to equitable tolling or estoppel doctrines because of a defendant's fraudulent concealment). *Cf. Windham v. Latco of Miss., Inc.*, 972 So.2d 608, 614 (Miss. 2008) (reversing lower court's ruling that equitable tolling for fraudulent concealment did not apply to the statute of repose for actions against construction professionals and noting that this holding "still allows architects, contractors, and engineers who do not fraudulently conceal the cause of action to 'close their books' at the conclusion of the repose period."). Mississippi has codified its fraudulent concealment tolling doctrine. *See* Miss. Code Ann. § 15-1-67.

92. *Ajax Lofts Condo. Ass'n, Inc. v. Ajax Lofts, LLC*, No. 11CV7763, slip op. at 6–7 (Denver Cty. Dist. Ct. Nov. 16, 2012) (holding, however, that the claims were nevertheless brought within the repose period).

93. The nondisclosure might occur during CDARA's NCP, which requires production of an inspection report following a construction professional's property inspection. *See* CRS § 13-20-803.5(3) ("A written offer to remedy the construction defect shall include a report of the scope of the inspection, the findings and results of the inspection . . . .").

94. *See, e.g.*, *New Design Constr. Co., Inc. v. Hamon Contractors, Inc.*, 215 P.3d 1172 (Colo.App. 2008) (implied covenant of good faith and fair dealing applied to paving subcontract).

95. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498–99 (Colo. 1995).

96. *See, e.g.*, *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024 (Colo.App. 2002) (holding that a disputed fact question existed whether insurer breached the implied covenant of good faith and fair dealing by withholding a complete copy of the insured's policy, which may have interfered with her ability to timely file suit); CRS § 6-6.5-101 (mandating disclosure of a home's underlying soil conditions).

97. CDARA, as originally passed in 2001 (CDARA I), included the adoption of CRS §§ 13-20-801 through -807, and amendments to Colorado's Real Property Improvement Statute of Limitations (CRS § 13-80-104) and CCIOA (CRS § 38-33.3-303.5). CDARA II (2003) and the HPA (2007) revised and expanded Title 13, Article 20. The Construction Professional Liability Insurance Act (2010) again expanded Article 20 and also revised the Colorado Insurance Code (CRS § 10-4-110.4). Therefore, references to CDARA may include all of these interrelated statutory sections.

98. CRS §§ 6-1-101 et seq.

99. CRS § 13-20-806(7)(a).

100. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d at 225. The concurrence found support for the same result after examining the HPA's legislative history. *Id.* at 231 (Davidson, J., concurring).

101. *Id.* at 225.

102. *Id.* at 226.

103. In an unpublished case, the Colorado Court of Appeals held that CRS § 13-80-104(1)(a)'s RP-SOR does not, on its face, deny a developer-claimant due process, relying on an earlier Colorado Supreme Court case construing a nearly identical statute of repose. *See Michael B. Enterprises, Inc. v. KB Home Colo., Inc.*, No. 17CA1339, slip op. ¶¶ 40–41 (Colo.App. June 7, 2018) (not selected for official publication) (citing *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 826 (Colo. 1982) (holding CRS § 13-80-127 (1973) "does not violate due process")). *KB Home* also rejected the developer's "as-applied" challenge, finding that the developer failed to establish that "the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act." *Id.* at ¶¶ 41–46.

104. *See, e.g.*, *Criswell v. M.J. Brock & Sons, Inc.*, 681 P.2d 495 (Colo. 1984) (addressing an equal protection challenge to a two-year limitations period against a builder-vendor).

105. Often, these kinds of hairline cracks may be attributable to routine soil settlement beneath the home; ordinary thermal expansion and contraction of joists, beams, and other construction elements; commonplace drying and shrinkage of wood construction elements; and many other typical and normal events not indicative of a construction defect.

106. Property owners may argue it is fundamental that citizens are provided fair notice and due process before their legal rights are extinguished. *Cf. Lewis v. Taylor*, 375 P.3d 1205, 1211 (Colo. 2016) ("the prerogative to establish limitations periods for state statutes belongs to the state legislature, subject to state and federal due process guarantees.").

107. *See, e.g.*, CRS § 13-80-108(1) ("a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.").

108. *See Stiff*, 88 P.3d at 641 (holding that cracks or minor movement should not be deemed the "manifestation of a defect" sufficient to trigger the RP-SOL if they are within construction tolerances or a normal range of movement); *Smith*, 230 P.3d at 1189 n.3 (noting that the RP-SOL began to run when the property owner noticed the "*obvious* physical manifestations of *what appear[ed] to be a construction defect* . . . ." (emphasis added)).

109. *Practitioner's Guide* § 14.9.1.i (Practice Pointer: Statute of Limitations Jury Instructions).