Construction Defect Statutes of Limitation and Repose Update

Part 1

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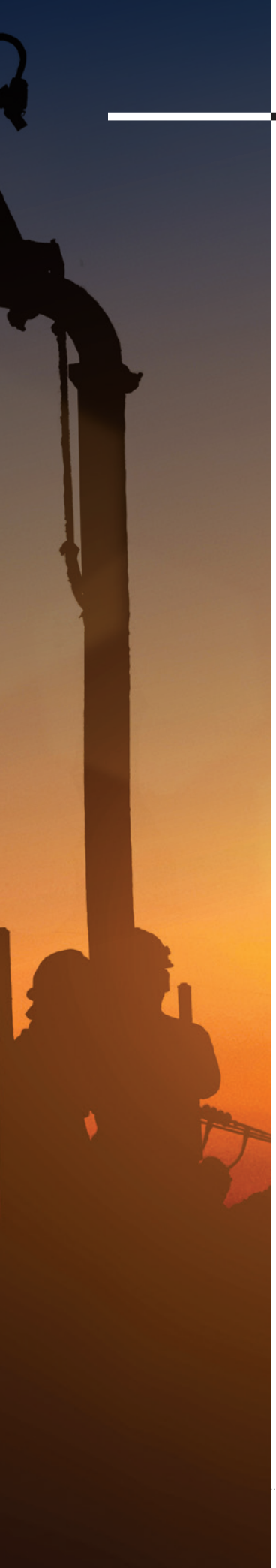

This article examines significant changes in and clarifications to the law since 2005 interpreting and applying Colorado's real property improvement statutes of limitation and repose. This Part 1 discusses the scope and application of these statutes, events that trigger the repose and limitations periods, claims and activities not subject to these statutes, and challenges in applying these statutes to multifamily construction activities.

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 1 discusses to whom the RP-SOL and RP-SOR apply; the scope of these laws; what events trigger the running of the repose and limitations periods; claims and activities not subject to these laws; and the challenges of applying these laws to multifamily construction activities.[2]

Real Property Improvement Statute of Limitations

The RP-SOL is located in CRS § 13-80-104, which provides in pertinent part:

> (1)(a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property *shall be brought within the time provided in section 13-80-102 after the claim for relief arises*, and not thereafter . . . .
>
> . . .
>
> (b)(I) Except as otherwise provided in subparagraph (II) of this paragraph (b), a *claim for relief arises* under this section *at the time the claimant* or the claimant's predecessor in interest *discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury*.
>
> . . .
>
> (c) Such actions shall include any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages for:
>
> (I) Any deficiency in the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property; or
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> (II) Injury to real or personal property caused by any such deficiency; or
>
> (III) Injury to or wrongful death of a person caused by any such deficiency. (Emphasis added.)

Actions subject to CRS § 13-80-102 "must be commenced within two years after the cause of action accrues . . . ." The RP-SOL is an affirmative defense to be pled and proven by the party asserting it.[3]

Real Property Improvement Statute of Repose

The RP-SOR is also located in CRS § 13-80-104:

> (1)(a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the *substantial completion of the improvement to the real property*, except as provided in subsection (2) of this section.
>
> . . .
>
> (2) In case any such cause of action arises during the fifth or sixth year after *substantial completion of the improvement to real property*, said action shall be brought within two years after the date upon which said cause of action arises.[4]

The RP-SOR does not deprive a court of jurisdiction. Instead, defendants must plead and prove it as an affirmative defense, and they may waive the defense if not timely raised.[5]

Construction Professionals Subject to the RP-SOL and RP-SOR

The RP-SOL and RP-SOR apply broadly to most construction professionals involved in real estate development and construction. They do not apply to a non-commercial

real property improvement seller or common interest community declarant unless that person *also* "perform[s] or furnish[es] the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property . . . ."[6]

RP-SOL and RP-SOR Scope

The RP-SOL and RP-SOR apply only to claims arising from real property improvement construction where the improvement is essential and integral to the function of the construction project.[7] A highly relevant feature of an improvement to real property is "permanence"—whether the property owner intends it to remain permanently even if it can be removed.[8] An "improvement" within the meaning of the RP SOL and RP-SOR can be "a discrete component of a larger undertaking," such as one building in a multi-building condominium project.[9] However, the RP-SOL and RP-SOR do not apply to claims against a developer or seller of unimproved lots.[10]

Statutory Exception for Persons in Actual Possession or Control

CRS § 13-80-104(3) creates an exception to the RP-SOL and RP-SOR where the party seeking to apply the RP-SOL or RP-SOR had actual possession or control of the defective real property improvement when the injury or damage occurred:

> The limitations provided by this section shall not be asserted as a defense by any person in actual possession or control, as owner or tenant or in any other capacity, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or damage for which it is proposed to bring an action.

Although Colorado's appellate courts have not yet construed this provision, the North Carolina Supreme Court construed a substantially similar statute[11] and held that the language "by its terms, plainly excludes" from the repose statute's reach "any person who is in possession or control of property at the time that person's negligent conduct proximately causes injury or damage to the claimant."[12] The Court held that the exception did not apply in that case because the damage occurred after the plaintiff had purchased the house.[13]

A later North Carolina decision similarly held that the North Carolina repose statute does not bar claims brought against a construction professional who the plaintiff alleged had "possession or control" over the subject condominium buildings and "knew or should have known of the existence of the defects upon which [the plaintiff's] claim rests."[14] The North Carolina Court of Appeals found that the trial court erred by granting summary judgment in favor of the construction professional, given disputed questions of fact regarding whether the statutory exception applied. For example, it noted that the defendant "arguably" controlled the condominium association through its appointment of board members until turnover, and the defects allegedly manifested before turnover.[15] The court therefore concluded that "the extent to which the 'possession or control' exception to the statute of repose defense applies to [the defendant] is a question for the jury."[16]

A number of Colorado district courts have applied CRS § 13-80-104(3). Several courts applied this subsection to declarant-developers who controlled a common interest community and its homeowners association (HOA) during the declarant control period, precluding or tolling application of the RP-SOL and RP-SOR during that time.[17] One district court held that the statute applied to a developer-declarant who controlled an HOA before turning its control over to its unit owners, but not to a general contractor who performed the construction work.[18] Another district court held that § 104(3) applied to a developer, its principals, and the project's general contractor, but not to the designer or concrete subcontractor.[19]

Practice Pointer: CRS § 13-80-104(3) and Insurance Coverage

CRS § 13-80-104(3) creates an exception to the RP-SOL and RP-SOR where the defendant asserting these defenses had actual possession or control of the defective property improvement when the injury or damage occurred. Note that many liability insurance policies exclude liability coverage to insured defendants for damage to property the insured owns, rents, or occupies. This policy provision does not appear, by its terms, to apply to a developer who merely retains voting control over an HOA board. Also, the policy may not exclude coverage for damage occurring after the defendant sells the property. Variations in policy exclusion language will affect the coverage analysis.

> "The RP-SOL and RP-SOR apply only to claims arising from real property improvement construction where the improvement is essential and integral to the function of the construction project."

Relationship between RP-SOL and Other Statutes of Limitations

The RP-SOL is written quite broadly and is intended to cast a wide net. Yet Colorado courts have, on occasion and under unique facts, found that the RP-SOL did not apply, and that a different, more specific, or later-enacted, statute of limitations controlled. For example, in *Hersh Companies v. Highline Village Associates*, the Colorado Supreme Court held that the specific breach of warranty statute of limitations rather than the RP-SOL applied to a breach of a "warranty to repair" defects because the claim is beyond the RP-SOL's scope.[20] The Court also noted, "[w]hen more than one statute of limitations could apply to a particular action, the most specific statute controls over more general, catch-all statutes of limitations."[21]

In *Stiff v. BilDen Homes, Inc.*, the Colorado Court of Appeals applied CRS § 6-1-115, rather than CRS § 13-80-104, to homeowners' Colorado Consumer Protection Act[22] deceptive trade practices claims arising from alleged misrepresentations regarding various construction defects.[23] And in *Frisco Motel Partnership v. H.S.M. Corp.*, the Colorado Court of Appeals held that the specific limitations statute applicable to breaches of fiduciary duty, rather than the RP-SOL, governed a breach of fiduciary duty claim arising from defective construction.[24]

Property owners often argue that CRS § 13-80-101(1)(c)'s three-year statute of limitations rather than CRS § 13-80-10's two-year statute of limitations applies to misrepresentation claims (including for nondisclosure) arising from construction defects. Several Colorado district courts have embraced this view.[25] This argument is based, in part, on the fact that a misrepresentation claim is founded on a defendant's material misrepresentation or omission, not its participation in defective construction, and thus is arguably beyond the scope of the RP-SOL.[26]

This distinction is underscored by the difficulty of applying the triggering event for the RP-SOL—that the homeowner knew or should have known of the manifestation of a construction defect—to claims for misrepresentations or nondisclosures. A cause of action for these latter claims accrues when the "fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by the exercise of reasonable diligence."[27] Thus, a cause of action for negligent construction (e.g., discovery of a defect's manifestation) might accrue either before or after a cause of action for misrepresentation accrues (e.g., knowledge that a material fact was misrepresented during the sale).

> "A common problem in applying the RP-SOL and RP-SOR is determining when a homeowner 'discovered or should have discovered' the manifestation of the defect at issue. This is often a fact question for the jury."

For example, a builder might commit fraud by concealing from a homeowner the presence of adverse soil conditions beneath a home in violation of its common law duty to disclose latent defects, or in violation of Colorado's soils disclosure statute, CRS § 6-6.5-101.[28] However, the mere presence of such adverse soil conditions alone probably would not give rise to a claim for defective construction[29] until the defectively constructed improvement's interaction with the soils damages the improvement.[30]

Triggering the Statute of Limitations: Defect Manifestation

A common problem in applying the RP-SOL and RP-SOR is determining when a homeowner "discovered or should have discovered" the manifestation of the defect at issue. This is often a fact question for the jury.[31] The issue can become especially thorny when a reasonable person would consider the observed condition "normal" and not the manifestation of a "defect," or when multiple, similar defects manifest over time but may not share the same cause.

Defect versus Typical Condition within Construction Tolerances

Properly poured interior concrete slabs and foundation walls typically develop hairline cracks and exhibit some spalling (surface chipping) over time as the concrete fully cures. Such slabs may also evidence cracking or movement due to normal settlement over the underlying fill. Nevertheless, years after the home is sold, these cracks may materially expand, and the concrete may begin to move differentially, due to pressures exerted by water buildup in underlying or adjacent soils. This situation raises the question whether the legislature intended to require homeowners to sue their homebuilder whenever minor concrete cracks first appear simply to protect against the RP-SOL or RP-SOR expiring, even if the observed condition is still within reasonably normal limits or construction tolerances.[32]

In *Stiff*, the Colorado Court of Appeals held that minor cracks or movement should not be deemed the "manifestations of a defect" sufficient to trigger the RP-SOL's running if they are within construction tolerances or a normal range of movement.[33] While *Stiff* mentions that the statute is triggered when the plaintiff knew or should have known of the damage *and its cause*, *Stiff*'s analysis focused on the "damage" at issue—that is, when did the crack cease being routine or expected and become what

a reasonable person would recognize as the physical manifestation of a defect? This "cause" language may be considered dicta.

This view of *Stiff* is supported by *United Fire Group ex rel. Metamorphosis Salon v. Powers Electric, Inc.*, where the Colorado Court of Appeals held that an electrical fire was the manifestation of an electrical defect that triggered the RP-SOL, despite the fact that the claimant was unaware that the fire was caused by an electrical defect until it received the fire investigator's report weeks later.[34] The Court distinguished *Stiff*, reasoning that its holding "focused on the amount of damage necessary to trigger the two-year statute of limitations. There was no discussion of whether it was also necessary for the cause of that damage to be known to begin the limitations period."[35] The Court thus viewed as dictum "*Stiff*'s reference to learning the cause of the damage as being necessary to activate the statute of limitations."[36]

The Colorado Supreme Court's later opinion in *Smith v. Executive Custom Homes, Inc.* also does not appear to affect *Stiff*'s holding that a property condition is not the manifestation of a defect unless it reflects the existence of a defect, as opposed to a non-defective condition within normal construction tolerances.[37] *Smith* expressly noted that the limitations period began to run when the property owner noticed the "*obvious* physical manifestations of what appear[ed] to be a construction *defect* . . . ."[38] Thus, in combination, *Stiff* and *Smith* strongly imply that to begin the limitations period, the manifested condition should alert a reasonable property owner that the condition is the outward expression of a construction defect, not simply an expression of a range of typical or normal non-defective conditions. If the limitations period could be triggered under circumstances where a reasonable person would not have recognized the condition as manifesting a defect, constitutional concerns might arise, which will be discussed more fully in part 2 of this article.

Multiple, Similar Defects Occurring Over Time

Another common problem arises when multiple defects manifest at different times, especially when the cause of the separate defects may be unrelated. Under these circumstances, the defendant bears the burden of establishing that the cause of the wrongful construction claim is the *same cause* underlying the manifestation on which the defendant relies to trigger the limitations period.[39] Thus, in *Wildridge Venture v. Ranco Roofing, Inc.*, the Colorado Court of Appeals held that the manifestation of one defect does not trigger the RP-SOL for unrelated defects that have not yet manifested.[40]

The Court reversed the trial court's entry of summary judgment for the defendant because, while the plaintiff knew of leaks in eight of its 41 buildings more than two years before filing suit, there was a material factual dispute regarding whether those leaks resulted from the same defects that formed the basis of the suit.[41] The Court stated: "Here, although the leaks may have been the physical manifestations of some defect, there is a genuine factual dispute as to whether the leaks that were known to plaintiff in May 1994 resulted from the same defects that formed the basis of this suit."[42] Because the party asserting the statute of limitations as an affirmative defense bears the burden of establishing that defense, a defendant asserting the RP-SOL must establish that any defect manifestations that occurred outside the statutory limitations period were caused by the same defects that form the basis of the suit.[43]

In *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, the Colorado Court of Appeals followed *Wildridge Venture*'s reasoning and reversed a trial court's entry of summary judgment in favor of a defendant-builder on construction defect claims.[44] The Court found that the trial court improperly disregarded evidence that "different phases of excavation . . . revealed different construction defects over a lengthy period of time," and a reasonable jury could find that several of these defects remained latent until within two years of the claims being filed.[45] Therefore, factual disputes remained regarding the discovery date of each defect and whether and on what dates any repairs were completed.[46]

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Triggering the RP-SOR: "Substantial Completion of the Improvement"

The RP-SOR's triggering event is the "substantial completion of the improvement to real property" that is the subject of a construction defect claim.[47] The RP-SOR does not define substantial completion.[48] Interpretation of the statutory term "substantial completion" is a question of law, but whether a particular improvement to real property is substantially complete is a mixed question of law and fact.[49]

The RP-SOR generally prohibits claimants from bringing certain claims against construction professionals more than six years after "the substantial completion of the improvement to

real property." Determining the "substantial completion" date can sometimes be difficult. In cases brought by individual homeowners against developers or builders of single-family, detached homes, this analysis is relatively straightforward and courts often begin by assuming that the Certificate of Occupancy (C.O.) supplies the relevant "substantial completion" date.[50] However, substantial completion may occur sooner or later than the C.O. date depending on the facts.[51] In cases involving multifamily dwellings integrated within a community, the question of when "substantial completion of the improvement" occurred is more complex.

Multifamily Projects

Where multifamily dwellings contain several buildings constructed over time, courts must determine when "substantial completion" occurred for claims against a particular construction professional regarding a particular defect.[52] Unsurprisingly, property owners would prefer the RP-SOR to begin running upon substantial completion of the last of several buildings comprising the project, or the common elements, if completed later. Construction professionals, on the other hand, typically argue that the repose period began to run upon a particular unit's or building's substantial completion, or the date they substantially completed their scope of work if it involved more than one unit, or when a particular building was substantially completed, whichever would afford them the greatest protection from suit. Situations involving exterior common areas or construction elements serving multiple buildings, such as grading or drainage, can be especially confusing because they may be put into use temporarily, but then expanded, modified, or interconnected as additional buildings are completed.

Further complicating this issue, it is often impossible to analyze how a particular construction component will perform and whether it is defective until an entire construction project is substantially complete. Property owners argue that applying one repose period for all claims and damages asserted within a construction defect *action* is consistent with CRS § 13-80-104(1)(a)'s use of the word "action," and this eliminates the difficulty of applying different repose periods to each defect, claim, or scope of work. Construction professionals, especially subcontractors, counter that this approach effectively extends the repose period for work performed and/or structures substantially completed long before a multi-building, multi-phase project is completed.

In *Shaw Construction, LLC v. United Builder Services, Inc.* and *Sierra Pacific Industries v. Bradbury*, discussed immediately below, the Colorado Court of Appeals had the opportunity to declare a firm rule for applying the RP-SOR to defects manifesting over time in several buildings in the same multifamily development. Instead, the Court issued narrow rulings in these cases and avoided any such broad pronouncement. Although the Colorado Supreme Court, in *Goodman v. Heritage Builders, Inc.*, later overruled the main holdings of these two cases on other grounds,[53] these cases illustrate the questions pertinent to determining when substantial completion occurred for defect claims arising from multifamily housing developments.

In *Shaw Construction, LLC*, an HOA sued a general contractor for defects in a multi-building residential development. The general contractor then sued several subcontractors for indemnity.[54] On appeal regarding the timeliness of the indemnity claims, the Court held that a discrete component of a larger project could itself be an "improvement" to real property for purposes of applying the RP-SOR.[55] The Court held, on the facts before it, that the repose period commenced on a builder's indemnity claims against subcontractors who worked on the last completed building in the project when that building's C.O. issued.[56] Although the larger project included "exterior court yards, sidewalks, alleys, landscape features, and benches" completed after the final C.O. issued, the Court found the date these common elements were completed irrelevant to the claims against the subcontractors who did not work on them.[57]

Shaw Construction, LLC did not reach the question whether, for claims against a particular construction professional, the RP-SOR begins to run upon substantial completion of that construction professional's work or of the improvement to real property to which such work contributed, expressly declining to address whether a trade-by-trade approach would be appropriate.[58] Since *Shaw Construction, LLC*, trial courts have continued to be split regarding whether to employ a trade-specific, building-by-building, or phase-by-phase approach for subcontractors and other construction professionals who—like the subcontractors in *Shaw Construction, LLC*—only worked on some facets of a larger construction project.[59]

In *Sierra Pacific Industries*, the Colorado Court of Appeals held that the RP-SOR barred a

Practice Pointer: CRS § 38-33.3-201(2)

CRS § 38-33.3-201(2) provides: "In a common interest community with horizontal unit boundaries, a declaration . . . creating . . . units shall include a *certificate of completion* executed by an independent licensed or registered engineer, surveyor, or architect stating that all structural components of all buildings containing or comprising any units thereby created are *substantially completed*." (Emphasis added). No reported cases have construed this statute. Relying on this provision, HOAs may argue that the legislature has defined "substantial completion" in the context of condominium developments to mean substantial completion of all of a development's buildings following execution of a certificate of completion. While *Shaw* involved the issuance of an architect's certification of completion, the Court did not "resolve whether substantial completion of an entire construction project occurs only when the architect certifies the project as complete." (*Shaw Constr., LLC*, 296 P.3d at 155.) Moreover, *Shaw* does not explain whether the architect's completion certification there was the type described by § 201(2).

contractor's indemnity claims against a subcontractor where the subcontractor undisputedly completed its work in 2002, last made repairs relating to its work in 2004, and was first sued for indemnity in 2014, despite the fact that others attempted repairs as late as 2011. The Court rejected the suggestion that "substantial completion" as to claims against the defendant subcontractor occurred when *others beside the defendant* ended their later repair attempts on the same building improvement, stating "a subcontractor has substantially completed its role in the improvement at issue when it finishes working on the improvement."[60] The Court did not explain precisely what it meant by this statement,[61] and the Colorado Supreme Court later overruled the case on other grounds.[62] *Sierra Pacific Industries* did not decide whether the substantial completion date should be measured from completion of the *last building* on which the subcontractor worked or from completion of the *last discrete component* on which it worked because, like in *Shaw Construction, LLC*, under the Court's later-overturned analysis the claims would have been barred even if the Court had used the C.O. date of the last building the defendant worked on.[63]

Per Project, Per Phase, Per Building, Per Unit, Per Construction Professional, Per Scope of Work, or Something Else?

Colorado's district courts have taken varying approaches to applying the RP-SOR to multi-phase, multi-building, multifamily developments. These courts have struggled with whether the "improvement" to real property should be deemed substantially complete when the building containing the defect is substantially complete, when the development as a whole is substantially complete, when the particular defendant's scope of work is completed, or on some other date.[64] Even when applying a building-by-building analysis, these courts have distinguished between developers, builder-vendors, and general contractors, who typically have responsibilities relating to the multi-building project as a whole, and subcontractors and tradesmen, who frequently have responsibilities on a building-by-building basis. These courts often find that the RP-SOR does not begin to run against the former (development) group until the project as a whole is substantially completed, and sometimes hold the repose period begins to run as to the latter (subcontractor) group upon completion of their entire scope of work if it spans several buildings.

In one case, a district court held that the repose period began to run on claims asserted against a developer and general contractor regarding a common-interest development when the 26-building, 71-unit project as a whole was completed, following issuance of the last unit's C.O.[65] The court noted that the defendants' interpretation of the statute, which would result in 71 different substantial completion dates triggering 71 different repose periods (one for each unit), would "frustrate the purpose for resolving the defects through the [notice of] claim process and completely disrupt judicial proceedings."[66] The court held that "the language of the statute contemplates a singular, distinct point in time when the improvement is substantially completed."[67]

Some argue the repose period begins to run as to a particular construction professional on the date that construction professional completed its scope of work on the allegedly defective improvement. Property owners often respond that the RP-SOR refers only to "substantial completion of the improvement to real property," rather than separate completion of each of several discrete activities leading up to substantial completion. Some courts outside Colorado have used the completion date for a project, rather than its constituent parts, as the trigger date for the commencement of the applicable repose period,[68] while other courts have used completion of the particular defendant's work, usually when the state statute expressly ties the repose period trigger to a particular subcontractor's work.[69]

Common Areas

The "substantial completion" issue becomes more complicated if the defective element is a common area that serves more than one building and whose construction continues throughout the project's construction as a whole. Examples include surface grading or drainage; community roads; and exterior plumbing, sewage, or irrigation systems. At least two district courts have concluded that the repose period for exterior grading and drainage work does not run on a building-by-building basis but should be treated as an integrated whole property improvement upon completion of the entire project's grading and drainage.[70]

Conclusion

Since 2005, Colorado's appellate courts have provided some needed direction regarding discrete RP-SOL and RP-SOR issues, such as the scope and application of these time periods. However, many important issues remain undecided.

Part 2 of this article will discuss application of the RP-SOL and the RP-SOR to design flaws, negligent repairs, and repair warranties, and to indemnity, contribution, and other reimbursement claims. It also will discuss the effect of Colorado's Construction Defect Action Reform Act (CDARA), the Homeowner Protection Act, and tolling and estoppel doctrines on the RP-SOL and the RP-SOR. Lastly, it will examine lingering constitutional concerns regarding application of the RP-SOL and RP-SOR. 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. CRCP 8(c) ("statute of limitations" is an affirmative defense that must be pled affirmatively); *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1057 (Colo. 1992) ("The burden of proving an affirmative defense rests upon the defendant asserting the defense.").

4. CRS § 13-80-104(1)(a), (2) (emphasis added).

5. *Dunton v. Whitewater W. Recreation, Ltd.*, 942 P.2d 1348, 1351 (Colo.App. 1997).

6. CRS § 13-80-104(1)(a) (describing persons whose activities are subject to RP-SOL and RP-SOR). CDARA probably also does not apply to residential property sellers and common interest community declarants unless they are similarly involved in development or construction. CDARA only applies to actions against construction professionals, and its definition of a "construction professional" does not include non-commercial property owners and declarants. CRS § 13-20-802.5(1), (4).

7. *See Stanske v. Wazee Elec. Co.*, 722 P.2d 402, 407 (Colo. 1986) (finding grain elevator's electrical system was a real property improvement because it was "an integral and essential part of the improvement to real property at issue"); *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 640–41 (Colo. 1988) (finding a brick plant's conveyor belt connecting two buildings was a real property improvement).

8. *Shaw Constr., LLC v. United Builder Servs., Inc.*, 296 P.3d 145, 154 (Colo.App. 2012), *overruled on other grounds by Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, 402 (Colo. 2017) (overruling *Shaw Constr., LLC*'s holding that CRS § 13-80-104(1)(a)'s RP-SOR applies to general contractors' indemnity claims against subcontractors); *Two Denver Highlands Ltd. P'ship v. Dillingham Constr. N.A.*, 932 P.2d 827, 829 (Colo.App. 1996). *See also Enright v. City of Colo. Springs*, 716 P.2d 148, 150 (Colo. App. 1986) (finding that a vestibule attached to an airport terminal is a real property improvement because the owner intended for the vestibule to provide permanent relief from high winds); *Warembourg v. Excel Electric, Inc.*, 471 P.3d 1213, 1234 (Colo.App. 2020) (because defendant intended to remove electrical box at construction's end, it was temporary and not an "improvement to real property."). *But see Barron v. Kerr-McGee Rocky Mtn. Corp.*, 181 P.3d 348, 350 (Colo.App. 2007) ("An improvement to real property is commonly understood as '[a]n addition to real property, whether permanent or not; esp[ecially] one that increases its value or utility or that enhances its appearance.'" (quoting *Black's Law Dictionary* 773 (8th ed. 2004)); *Walker v. Warbonnet Constr.*, No. 15CA0960, slip op. at 9 (Colo.App. June 16, 2016) (not selected for official publication) (finding temporary stairway servicing tanks to be real property improvement; noting, "[al]though permanence is a relevant consideration, it is not dispositive").

9. *Shaw Constr. LLC*, 296 P.3d at 155.

10. *Calvaresi v. Nat'l Dev. Co., Inc.*, 772 P.2d 640, 643 (Colo.App. 1988) (analyzing CRS § 13-80-127, predecessor to current RP-SOL and RP-SOR). For a comprehensive discussion of whether specific activities fall within the RP-SOL and RP-SOR's scope, *see* Sandgrund and Sullan, *supra* note 1, and Benson et al., *The Practitioner's Guide to Colorado Construction Law* § 14.9.1.b (2d ed. CLE in Colo., Inc. Supp. 2020) (hereinafter *Practitioner's Guide*).

11. *See* N.C. Gen. Stat. § 1-50(5)(d).

12. *Cage v. Colonial Bldg. Co., Inc. of Raleigh*, 448 S.E.2d 115, 117 (N.C. 1994) (also noting the "purpose of the exclusion" is to impose a continuing duty "to inspect and maintain" on persons who maintain possession and control over an improvement after constructing it). *See also Salesian Soc'y v. Formigli Corp.*, 295 A.2d 19, 23–24 (N.J. Sup. Ct. Law Div. 1972) (holding that while the repose statute's purpose is to preclude an owner in possession and control from asserting a repose defense against third-party claims, the legislature intended to "exclude from liability persons, such as architects and contractors, who have been long out of possession of the property and long without the right or duty to make inspections and repairs of conditions that may be discovered during the [repose] period"). *Cf. Chenot v. A.P. Green Servs., Inc.*, 895 A.2d 55, 67–68 (Pa.Super. 2006) (holding that a statute virtually identical to CRS § 13-80-104(3) precluded the defendant, who owned a "portion" of facility where plaintiff was exposed to asbestos fibers in 1951, from asserting the statute of repose as a defense when the plaintiff developed mesothelioma and sued nearly 50 years later).

13. *Cage*, 448 S.E.2d at 117.

14. *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 764 S.E.2d 203, 215-16 (N.C.App. 2014).

15. *Id.*

16. *Id.* at 216. Unlike North Carolina's statutory exception, Colorado's statutory exception does not require the claimant to establish that the construction professional knew of these alleged defects during the possession or control period. *Compare* N.C. Gen. Stat. § 1-50(a)(5)(d) *with* CRS § 13-80-104(3).

17. *See, e.g.*, *Muirfield at Lone Tree Homeowners Ass'n v. Summit Invs., Inc.*, No. 07CV1607, slip op. at 3–5 (Douglas Cty. May 15, 2008); *Muirfield at Lone Tree Homeowners Ass'n v. Summit Invs., Inc.*, No. 11CV1178, 2012 Colo.Dist. LEXIS 604 at *3 (Douglas Cty. Dist. Ct. Jan. 26, 2012), *rev'd on other grounds, Muirfield at Lone Tree Homeowners Ass'n v. Summit Invs., Inc.*, No. 12CA2396 (Colo.App. Jan. 23, 2014) (not selected for official publication); *Dakota Ridge Vill. Condo. Ass'n v. Dakota Ridge Vill., LLC*, No. 09CV615, slip op. at 6–7 (Boulder Cty. Dist. Ct. July 8, 2011) (holding "the plain language of subsection three bars Defendants from using the statute of repose until such time as the Project was formally turned over to the Plaintiff HOA" and that the plaintiff's claims were timely because they were brought less than six years from the date the defendant relinquished control of the HOA); *Counts v. Ironbridge Homes, LLC*, No. 10CV142, 2015 Colo.Dist. LEXIS 2425 at *3 (Garfield Cty. Dist. Ct. Apr. 22, 2015) ("Since the complaint was filed within six years after [the defendant] relinquished ownership . . . Plaintiffs' claims are not time barred."); *Terraces at Siena Owners Ass'n. v. Mojo Props., LLC*, No.2018CV32683 (Denver Cty. Dist. Ct. Sept. 4, 2019) (holding the "repose period does not begin to run as to [HOA] claims against the [developer/declarant defendants] during the Declarant control period.").

Some jurisdictions bar or limit the statute of limitations defense under an "adverse domination" doctrine where culpable directors and officers "dominated" an aggrieved corporation because these persons "can hardly be expected to sue themselves or to initiate any action contrary to their own interests." *See, e.g.*, *Wing v. Buchanan*, 533 Fed.Appx. 807, 811 (10th Cir. 2013) (quoting *FDIC v. Appling*, 992 F.2d 1109, 1115 (10th Cir. 1993)); *Alexander v. Sanford*, 325 P.3d 341, 359 (Wash.App. 2014) (applying adverse domination doctrine to homeowners' concealment claims against former board members for failing to advise homeowners of "consistently reported construction problems" and related investigation).

18. *Fairways at Buffalo Run Homeowners Ass'n v. Fairways Builders, Inc.*, No. 2016CV30393, slip op. at 14–16 (Adams Cty. Dist. Ct. Apr. 17, 2017).

19. *Victoria Owners' Ass'n v. Wescoin, LLLP*, No. 16CV30125, slip op. at 4–9 (Routt Cty. Dist. Ct. Jan. 24, 2019 4:53 p.m.) (order regarding developer's and subcontractors' motions for summary judgment); *Victoria Owners' Ass'n v. Wescoin, LLLP*, No. 16CV30125, slip op. at 6–7 (Routt Cty. Dist. Ct. Jan. 24, 2019 4:50 p.m.) (order regarding general contractor's motion for summary judgment and joinders). For a fuller discussion of these district court cases, other out-of-state cases discussing this or similar statutory language, and other bases upon which the RP-SOL and RP-SOR might be tolled during the declarant control period, *see Practitioner's Guide*, *supra* note 10 at §§ 14.9.1.b and g.

20. *Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221, 223, 226 (Colo. 2001) (RP-SOL "was not intended to apply to claims for breach of warranties to repair and replace, even when the party against whom the claim is asserted is within the class of individuals protected by that statute.").

21. *Id.* at 223 (citing *City & Cty. of Denver v. Gonzales*, 17 P.3d 137, 140 (Colo. 2001)). *See also Reg'l Transp. Dist. v. Voss*, 890 P.2d 663, 668 (Colo. 1995) (discussing statutory construction rules for statutes of limitation).

22. CRS §§ 6-1-101 et seq.

23. *Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 642 (Colo.App. 2003). The *Stiff* Court did not explicitly analyze whether CRS § 13-80-104 rather than CRS § 6-1-115 applied.

24. *Frisco Motel P'ship v. H.S.M. Corp.*, 791 P.2d 1195, 1197–98 (Colo.App. 1990) (holding the RP-SOL did not govern breach of contract claims arising from unpaid heating costs nor partner's breach of fiduciary duty claim against other partner; however, RP-SOL governed interest cost claim caused by motel construction delays). *See also Vill. W. at Centennial Owners Ass'n v. KB Home Colo., Inc.*, No. 2013CV31232, slip op. at 7–8 (Arapahoe Cty. Dist. Ct. Sept. 14,

2015) (rejecting argument that RP-SOL applies to breach of fiduciary duty claims arising from condominium's development, noting that courts apply statutes of limitations for particular claims to such claims, instead of the RP-SOL, when asserted against construction professionals).

25. *See Counts v. Ironbridge Homes, LLC*, No. 10CV142, slip op. at 2 (Garfield Cty. Dist. Ct. July 3, 2015) (because an element of a fraud claim is "reliance on a misrepresentation or concealment," it is outside the RP-SOL's scope); *Fairways at Buffalo Run Homeowners Ass'n v. Fairways Builders, Inc.*, No. 2016CV30393, slip op. at 7–8 (Adams Cty. Dist. Ct. Apr. 17, 2017) (claims based on alleged misrepresentations or failures to disclose pertinent information before, during, and after units' construction, marketing, and sale are not subject to the RP-SOL because these claims do not assert injury to a person or property caused by a construction defect); *Riverview Condo. Ass'n v. Cypress Ventures, Inc.*, 339 P.3d 447, 466 (Or.Ct.App. 2014) (applying a different statute of limitations to negligence claims involving construction defects versus misrepresentation claims involving construction defects because "the Association's misrepresentation claims are more accurately characterized as alleging an injury to the Association's pocketbook, not to real property").

26. *Cf. Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221, 225 (Colo. 2001) (breach of repair warranty did "not fall within the class of actions governed by section 13-80-104").

27. CRS § 13-80-108(3). *See also* CRS § 13-80-101(1)(c) (three-year limitation period for "actions for fraud, misrepresentation, concealment, or deceit"). *But see Ebrahimi v. E.F. Hutton & Co.*, 794 P.2d 1015, 1016–17 (Colo. App. 1989) (holding that claims for negligent misrepresentation are subject to statute of limitations for negligence, not fraud).

28. *See Cohen v. Vivian*, 349 P.2d 366, 367 (Colo. 1960) (holding that failure to disclose a known latent soil defect amounts to concealment, exposing the seller to a fraud claim). It is not clear from the opinion whether concealment of the poor fill alone gave rise to a cause of action for fraud, or the defendants' alleged knowledge that they had failed "'to take adequate steps to treat the soil and reinforce the foundation.'" *Id.*

29. *See Shiffers v. Cunningham Shepherd Builders Co.*, 470 P.2d 593, 595 (Colo.App. 1970) (finding that the mere presence of expansive soils beneath a home was not a defect).

30. *See Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1188 (Colo. 2010) (a claim accrues under CRS § 13-80-104 when the claimant discovers "the *physical manifestations* of a defect in the improvement which ultimately causes the injury" (emphasis added)).

31. *See McKinley v. Willow Constr. Co.*, 693 P.2d 1023, 1026–27 (Colo.App. 1984).

32. Commentary contemporaneous with the passage of the current version of the RP-SOL and RP-SOR in 1986 demonstrates that some uncertainty resulted from the legislature's failure to define the phrase "physical manifestations," but these commentators predicted courts would apply a common sense interpretation of the phrase. *See* Bain and Cohen, "Let the Builder-Vendor Beware: Defenses and Damages in Home Builder Litigation—Part II," 16 *Colo. Law.* 629, 629–30 (Apr. 1987). The authors of that article posited that the new RP-SOL was adopted in response to a then-recent decision interpreting the previous RP-SOL to be triggered when the plaintiff discovers both an injury *and that a construction or design deficiency proximately caused the injury*. *Id.* The current RP-SOL is triggered when the claimant "discovers or . . . should have discovered the *physical manifestations* of a defect," instead of discovering the defect itself (which Colorado courts had interpreted to include the *cause* of the defect). *See id.* The authors noted that under the new statute, a "claim . . . would now be deemed triggered when [] cracks first appeared, *assuming that the cracks were of a sufficient magnitude to indicate the existence of a 'defect'*" and that "[p]resumably, the appearance of small or hairline cracks, which are neither unusual nor indicative of a defect, would not trigger the statute until the cracks worsened to the point where the defect was patent." *Id.* at 630 (emphasis added).

33. *Stiff*, 88 P.3d at 641. *See also Hall v. Infinity Builders, Inc.*, No. 08CV480, slip op. at 5 (Mesa Cty. Dist. Ct. Aug. 12, 2010) ("[T]he 'physical manifestation of a defect' required for accrual of a claim under the CDARA must constitute 'a perceptible, outward, or visible expression' of the defect. A minor crack, even the 'many small cracks' [here] may not be sufficient to put a plaintiff on notice that there may be a defect in the improvement." (quoting, in part, *United Fire Group v. Powers Elec., Inc.*, 240 P.3d 569, 571 (Colo.App. 2010)); *Carroll v. Hughes*, No. 11CV4022, slip op. at 6 (Mesa Cty. Dist. Ct. July 12, 2012) ("[O]nly cracking or door-jamb sticking that is significant and persistent is sufficient as a matter of law to reveal or convey to a homeowner the presence of an underlying defect . . . . To conclude otherwise could force homeowners who notice even the most insignificant cracks to pursue litigation to avoid the risk of their claims being time-barred.") (citing *Stiff*, 88 P.3d at 640–41).

34. *See United Fire Group v. Powers Elec., Inc.*, 240 P.3d 569, 571–73 (Colo.App. 2010).

35. *Id.* at 572.

36. *Id.*

37. *Smith*, 230 P.3d 1186.

38. *Id.* at 1189 n.3 (emphasis added).

39. *Wildridge Venture v. Ranco Roofing, Inc.*, 971 P.2d 282, 283 (Colo.App. 1998).

40. *Id.* at 282–83.

41. *Id. See also Chadwick Place at Steamboat Homeowners Ass'n v. Chadwick Place, LLC*, No. 2008CV254, 2010 Colo.Dist. LEXIS 1094 at *8–9 (Routt Cty. Dist. Ct. Dec. 8, 2010) (rejecting the argument that plaintiff was legally obligated to conduct a comprehensive investigation to uncover any latent defects when it discovered "pervasive"—but unrelated—defects several years earlier; whether plaintiff exercised reasonable diligence was a question of fact for the jury to decide). *But cf. Sopris Lodging, LLC v. Colo. Land Consultants, Inc.*, No. 15CA1716, slip op. at ¶¶ 34–35 (Colo.App. Sept. 15, 2016) (not selected for official publication) (holding that the trial court properly relied on an expert report to determine that damage plaintiffs' employees observed over six years before they filed the case was related to the defects at issue—despite plaintiffs' assertion that their lay employees did not recognize that the damage they observed was the manifestation of defects—because (1) such knowledge was not required for the claims to accrue, and (2) unlike in *Wildridge Venture*, the plaintiffs "failed to put forth any competent evidence that the physical damage they observed in 2010 was not related to the defects at issue in this lawsuit").

42. *Wildridge Venture*, 971 P.2d at 283.

43. *See Tisch v. Tisch*, 439 P.3d 89, 101 (Colo. App. 2019) (holding that the defendant has the burden of establishing that a plaintiff's claim is barred by the statute of limitations).

44. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d 219, 228–29 (Colo.App. 2017).

45. *Id.*

46. *Id.*

47. CRS § 13-80-104(2).

48. The predecessor real property statute of repose defined substantial completion as "the degree of completion of an improvement to real property at which the owner can conveniently utilize the improvement for the purpose it was intended." *Shaw Constr., LLC*, 296 P.3d at 150 (quoting CRS § 13-80-127 (1973)). However, the 1986 amendments to the statute removed this definition and the legislative history does not explain why. *Id.*

49. *Id.*

50. *See, e.g.*, *Latitude at Vista Ridge Homeowners Ass'n, Inc. v. Vista Ridge Dev., LLC*, No. 2016CV30918 (Weld Cty. Dist. Ct. Nov. 1, 2018) (applying RP-SOR to 124 detached single-family homes in one development separately on the date each home's C.O. issued). Establishing the substantial completion date based on the C.O. becomes problematic where a temporary C.O. issues conditioned on the completion of additional work and inspections, or where a C.O. fails to issue for technical reasons unrelated to completion of the structure. Moreover, as discussed more fully below, subcontractors whose work is completed long before the C.O. issues may argue that an earlier substantial completion date applies to their work. *But see, e.g.*, *Messier v. Heartview Co.*, No. 01CV2837 (El Paso Cty. Dist. Ct. Oct. 17, 2003) (finding that the repose period for claims brought against a grading contractor began to run upon substantial completion of the entire home, not just the grading); *Brewer v. Gordon*, No. 2007CV215, slip op. at ¶¶ 36–37 (Garfield Cty. Dist. Ct. Mar. 25, 2009) (finding that the repose period for claims against a soils engineer began to run upon substantial completion of the entire home, not just completion of the soil engineer's soils report and foundation recommendation).

51. For example, in *Sierra Pacific Indus. v. Bradbury*, 409 P.3d 551, 553, 557–58 (Colo. App. 2016), the defendant and other parties continued to make repairs to the improvement after the C.O. issued. The plaintiff argued that the repose period began to run upon completion of the repairs rather than on the C.O. date. However, because other contractors largely performed the repairs, the Court found the repose period began to run as to a particular defendant when the defendant itself ceased its repair work, even though others finished their own repair work later.

52. Remodeling, super-pad construction, delays in declarant control turnover to the HOA, phased developments, and infrastructure completion all may affect the RP-SOR trigger date. And, in some cases where the RP-SOR may have expired for original construction, the RP-SOR may not apply to fraud, misrepresentation, or nondisclosure claims arising upon the sale of rental units converted to condominiums. For further discussion of this topic, *see* Sandgrund et al., "Mitigating Potential Condo Conversion and Renovation Construction Defect Liabilities—Part 2," 48 *Colo. Law.* 40 (May 2019); and Rhody, "Defining 'Substantial Completion' in Construction Defect Actions," 27 *Colo. Law.* 73 (Oct. 1998).

53. *See Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, 402 (Colo. 2017) (holding that a construction professional may timely commence indemnity, contribution, and other reimbursement claims against third-party defendants "irrespective of both the two-year statute of limitations and the six-year statute of repose so long as the claims are brought during the construction defect litigation or within ninety days following the date of judgment or settlement.").

54. *Shaw Constr., LLC*, 296 P.3d at 153.

55. *Id.* at 154–55.

56. *Id.*

57. *Id.* at 155.

58. *Id.* at 154 ("Here, we conclude that an improvement may be a discrete component of an entire project, such as the last of multiple residential buildings. Therefore, we need not resolve subcontractors' argument that an improvement should be determined even more narrowly on a trade-by-trade basis.").

59. *See* cases collected in note 64. *Cf. Liptak v. Diane Apartments, Inc.*, 109 Cal.App.3d 762, 771 (1980) (holding that California's repose law distinguishes between developers who exercise total control over a "myriad of improvements to the land which eventually complete the development" and contractors or design professionals who work on only portions of a development; therefore, the repose period does not commence as to a developer until substantial completion of the development).

60. *Sierra Pac. Indus.*, 409 P.3d at 557, *overruled by Goodman*, 390 P.3d 398. *But see May Dep't Stores Co. v. Univ. Hills, Inc.*, 789 P.2d 434, 439 (Colo.App. 1989) (construing "substantial completion" within the meaning of the RP-SOR as the date of a shopping mall's completion as a whole). As will be discussed more fully in part 2, the indemnity claims might not have been barred applying *Goodman*'s construction of the RP-SOL's indemnity claim subsection. *See supra* note 53 (discussing *Goodman*).

61. *Sierra Pac. Indus.* relied on a Texas case that assumed "it is not overly burdensome to decipher when respective contractors substantially complete their improvements (*e.g.* when they submit their final bills and/or walk away from the project)." *See Sierra Pac. Indus.*, 409 P.3d at 557 (quoting *Gordon v. W. Steel Co.*, 950 S.W.2d 743, 749 (Tex.App. 1997)). However, while such information might be available to a developer or general contractor, the same is likely not true for a residential property owner. More likely, the C.O. would be the only publicly available information regarding the improvement's substantial completion date.

62. *Goodman*, 390 P.3d 398.

63. Because *Sierra Pac. Indus.* involved a contractor who kept working after the C.O. issued, it is unclear how the Court interpreted the term "improvement." Was it referring to the entire building or each individual component that the defendant worked on in the building? *Sierra Pac. Indus.* acknowledged the *May Dep't Stores Co.* decision, which suggested that, in some circumstances, the substantial completion date could be properly considered the completion of the entire building, structure, or construction project. *See May Dep't Stores Co.*, 789 P.2d at 439 (construing "substantial completion" as the completion of a shopping mall as a whole).

64. Completion of Project: *Brooktree Vill. Homeowners Ass'n, Inc. v. Brooktree Vill., LLC*, No. 17CV31301, slip op. at 8 (El Paso Cty. Dist. Ct. Oct. 1, 2018) ("[A]s the developer/general contractor, Defendants were responsible for development of the entire . . . Project . . . . Accordingly, the Court finds a question of fact exists as to whether the 'improvement' to real property here under the statute of repose was the entirety of the project, including all of the units, buildings, and common elements."); *Sierra Ridge Townhome Ass'n, Inc. v. Centex Homes*, No. 2013CV605, slip op. at 8 (Arapahoe Cty. Dist. Ct. Sept. 2, 2014) (holding "that the statute of repose began on the date that the last CO was issued"); *Villas at the Boulders Ass'n v. Lennar Corp.*, No. 11CV249, slip op. at 3 (Broomfield Cty. Dist. Ct. June 13, 2013) ("[P]artial summary judgment is inappropriate because *Shaw* held substantial completion of the last building . . . triggers the six-year [SOR]. Furthermore, a building-by-building analysis impermissibly undermines the legislative intent of the CDARA of streamlining construction defect litigation . . . ."); *Heritage Greens at Legacy Ridge Homeowners Ass'n v. Heritage Greens at Legacy Ridge, LLP*, No. 06CV713, slip op. at 9, 2008 WL 8626940 (Adams Cty. Dist. Ct. May 29, 2008) ("The Statute of Repose begins to run in this case from the date of the issuance of the last certificate of occupancy . . . ."); *Weitz Co., LLC v. RK Mech., Inc.*, No. 04CV6871, slip op. at 5, 2008 WL 8003943 (Denver Cty. Dist. Ct. Jan. 25, 2008) ("Requiring the period to run at the time of the completion of the construction project . . . serves the purpose of providing a reasonable end-date for potential liability . . . .").

Completion of Particular Phase: *Fairways at Buffalo Run Homeowners Ass'n, Inc. v. Fairways Builders, Inc.*, No. 2016CV30393, slip op. at 13 (Adams Cty. Dist. Ct. Apr. 17, 2017) ("[T]he Court finds it appropriate to treat the five completed buildings and any common elements associated therewith as one 'phase' of this Project, which was substantially complete when the last constructed unit obtained its Certificate of Occupancy."); *Maroon Neighborhood Townhome Ass'n v. Aspen Highlands Skiing Corp.*, No. 09CV182, slip op. at 3 (Pitkin Cty. Dist. Ct. July 5, 2012) ("[B]uildings in Phase I were a distinct improvement or improvements from the buildings in Phase II").

Completion of Particular Building: *Lennar Colo., LLC v. A-1 Truss Sys., Inc.*, No. 12CV6736, slip op. at 9 (Denver Cty. Dist. Ct. Nov. 17, 2014) (applying "a building-by-building approach," beginning "when the certificate of occupancy is issued for a given building"); *Ranch Creek Villas Homeowners Ass'n v. Ranch Creek Villas, LLC*, No. 11CV985, slip op. at 4 (Adams Cty. Dist. Ct. Nov. 21, 2012) (using "each building's CO date for the commencement of the repose period" for each building in a "[l]arge project[] . . . designed to be built-out over several decades"); *Park Ave. Homeowners Ass'n v. D.R. Horton, Inc.*, No. 01CV2276, slip op. at 3, 2006 WL 6130227 (Arapahoe Cty. Dist. Ct. June 5, 2006) (finding "substantial completion occurred when construction was sufficiently complete on the entire building or structure and the project was ready for occupancy, here when the Certificate of Occupancy was issued"); *Brookhaven Condos. HOA, Inc. v. Dunkirk Ventures, LLC*, No. 2012CV1439, slip op. at 12 (Arapahoe Cty. Dist. Ct. Sept. 30, 2014) ("This Court finds the buildings and garages to be discrete improvements, the substantial completion of which occurred no later than the date the certificate was issued for each individual structure.").

Completion of Scope of Work: *Landmark Towers Condo. Ass'n, Inc. v. Schindler Elevator Corp.*, No. 2017CV31762, 2018 Colo.Dist. LEXIS 2360 at *7 (Arapahoe Cty. Dist. Ct. Sept. 18, 2018) (finding SOR for claims against elevator subcontractor commenced when "the elevators were completed"); *Paradise Villas Owners Ass'n v. Vision Dev. Grp. Inc.*, No. 2015CV32393, slip op. at 4 (El Paso Cty. Dist. Ct. Dec. 2, 2016) (holding "the repose period begins to run as to any such subcontractor once that subcontractor has finished its work on that unit," even if the certificates of occupancy for those units were not issued until after the subcontractor completed its work); *Hartman v. Hiett Constr., Inc.*, No. 2009CV651, 2012 Colo.Dist. LEXIS 3012 at *6–7 (Larimer Cty. Dist. Ct. June 28, 2012) (finding, in regard to claims brought against grading contractors and soils engineers, "substantial completion of the improvement to real party occurred no later than the last day of work by Third-Party Defendants . . . , October 14, 2003," even though the home's construction was not completed until fall 2005); *Riverwalk Diamond Bldg. Ass'n v. Eagle II Devs., Inc.*, No. 07CV27, slip op. at 4 (Eagle Cty. Dist. Ct. Apr.

22, 2009) (interpreting the phrase "substantial completion of the improvement" as "referring to the date upon which an individual, such as a subcontractor, substantially completed its improvement to real property, not to substantial completion of the entire project"); *Riverwalk Emerald Bldg. Ass'n v. Eagle II Devs., Inc.*, No. 07CV25, slip op. at 3–4 (Eagle Cty. Dist. Ct. Nov. 10, 2008) (holding the SOR commenced for claims against the subcontractor who installed the doors and windows on the date of the subcontractor's final invoice); *Thermo Dev., Inc. v. Cent. Masonry Corp.*, No. 06CV6821, ¶¶ 5-6 (Denver Cty. Dist. Ct. Apr. 20, 2007) (holding SOR's substantial completion refers to the "substantial completion of the improvement by an individual such as a subcontractor, not to substantial completion of the entire project"), *aff'd on other grounds, Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo.App. 2008).

65. *Heritage Greens at Legacy Ridge Homeowners Ass'n*, No. 06CV713, slip op. at 5–6, 2008 WL 8626940.

66. *Id.*

67. *Id.*

68. *See, e.g.*, *Patraka v. Armco Steel Co.*, 495 F.Supp. 1013, 1019–20 (M.D. Pa. 1980); *Rosenthal v. Kurtz*, 213 N.W.2d 741, 746 (Wis. 1974), *superseded by statute*, *Hartland-Richmond Town Ins. Co. v. Wudtke*, 429 N.W.2d 496, 500 (Wis.Ct.App. 1988), *overruled by Funk v. Wollin Silo & Equip., Inc.*, 435 N.W.2d 244 (Wis. 1989); *Smith v. Showalter*, 734 P.2d 928, 930 (Wash.App. 1987) (single-family home). *But see Bordak Bros. v. Pac. Coast Stucco, LLC*, No. 65833-6-I, 2012 WL 2510956, 2012 Wash. App. LEXIS 1545 at *18–19 (Wash.App. July 2, 2012) (rejecting "whole project" approach in favor of a building-by-building approach for mixed-use condominium project).

69. *See, e.g.*, *Welch v. Engineers, Inc.*, 495 A.2d 160, 165 (N.J. App.Div. 1985); *Nelson v. Gorian & Assocs., Inc.*, 61 Cal.App.4th 93, 96–98 (Cal. Ct.App. 1998); *Indus. Risk Insurers v. Rust Eng'g Co.*, 232 Cal.App.3d 1038, 1041 (Cal.Ct.App. 1991). Each of these cases interpreted statutes that expressly treat the completion of each subcontractor's work as a separate event for purposes of triggering the statute of repose.

70. *Shadow Canyon Condo. Ass'n v. Shadow Canyon Dev. Co., LLC*, No. 2012CV811, slip op. at 9–11 (Douglas Cty. Dist. Ct. Feb. 24, 2015); *9300 E. Fla. Ave. Homeowners Ass'n v. Beeler Props. LLC*, No. 14CV31119, slip op. at 4 (Arapahoe Cty. Dist. Ct. Jan. 7, 2016) ("Defendant agreed to do one improvement . . . the grading for the entire Project. Applying the statute of repose on a building-by-building basis is not the holding of *Shaw* and, in addition, would work to add contract terms where none exist."), *rev'd on other grounds*, No. 16CA1759 (Colo.App. Nov. 16, 2017) (not selected for official publication).