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Defining Substantial Completion in Construction Defect Actions

In general, Colorado law imposes a six-year statute of repose for bringing an action against various parties involved in the construction process, for defects related to their work. The statute is triggered when the project (whether initial construction or subsequent improvement) is *substantially completed*. This article will explore the definition of substantial completion, including potential trouble spots arising from unique construction circumstances.

CRS Section 13-80-104

Colorado's six-year statute of repose is contained in CRS section 13-80-104. According to this section,

...all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing 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 such case shall an action be brought *more than six years after substantial completion of the improvement to the real property*, except as provided in subsection (2) of this sectionⁱ...

(2) In case any such cause of action arises during the fifth or sixth year after substantial completion ... said action shall be brought within two years of [that] dateⁱⁱ.

CRS section 13-80-102 imposes a two-year statute of limitations for construction defect actions from the time the claimant knows, or reasonably should know of the existence of the defect. When read in conjunction with 13-80-102, CRS section 13-80-104 imposes the outside time limit (six years) for bringing a construction defect action.

Note that section 13-80-104(2) extends the time for bringing the action when the



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defect is discovered during the fifth or sixth year after substantial completion. In this circumstance, the claimant has an additional two years from discovery to file the lawsuit. This extends the potential outside filing limit to eight years from substantial completion.

Defining Substantial Completion

It is impossible to accurately measure the statute of repose without first defining substantial completion for the project in question. Because the term is not statutorily defined, reviewing case law is the next step in the analysis.

A. Evidence of Substantial Completion

May Dept. Stores Co. v. University Hills, Inc.ⁱⁱⁱ, involved a dispute between a property owner and numerous parties who performed construction services related to the property. The defendants successfully argued (via summary judgment motion) that the property owner failed to bring its action within the time limit imposed by the then ten-year statute of repose^{iv}. Affirming that judgment, the Court of Appeals held that the defendants had met the standard for determining substantial completion.

The Court of Appeals determined that evidence of substantial completion required, "... no greater state of completion than is required by [CRS section] 38-22-109(4) ^v." While it is unclear from the case specifically how the court applied CRS 38-22-109(4) in this context, in general this code section describes the procedure for filing and recording a lien statement in advance of securing a lien for work performed on a construction project. In essence, the claimant must file and record a statement describing the property, the work performed, and the amount outstanding. Prior to filing the statement, the claimant must also serve a "notice of intent to file lien statement" on the owner at least ten days prior to filing.

The court's reference to CRS section 38-22-109(4) is unclear because there are numerous situations where filing a lien (or notice of intent to so file) may occur well in advance of a project's actual completion. But while the Court did not specifically define what evidence would support a showing of substantial completion, it appears that documents filed with the appropriate municipal authority, indicating the party's completion of work, will suffice. In addition to lien statements (in certain circumstances), these documents may include notices of completion, final inspection reports and certificates of occupancy.

Proof of substantial completion may also occur in the absence of documentary



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evidence. As the May court noted, plaintiff held a grand opening for the property more than ten years before filing its action. This indicated to the Court that the project was substantially completed as of that time^{vi}.

In an earlier case, Jim Arnott, Inc., v. L & E, Inc.^{vii}, the court accepted both notices of completion and a city-issued occupancy permit as evidence of substantial completion of a construction contract. In that case, the defendant disputed that construction had been completed, in an effort to delay final payment on the project. According to the court,

Our review of the record does not indicate that failure to cure some of the defects until after certificates of substantial completion were issued materially interfered with L & E's use of the premises. In fact, the county building department issued an occupancy permit for all buildings on September 16, 1972, and L & E rented the first room upon issuance of the permit. Hence, we find no error in the trial court's ruling [that the project was substantially completed]^{viii}.

B. A Look at Another Jurisdiction

California's Code of Civil Procedure (CCP) provides additional examples of documents and events evidencing substantial completion. Like CRS section 13-80-104, CCP section 337.15 establishes a statute of repose (ten years) for construction defect actions. The statute goes on, however, to define instances constituting substantial completion. According to CCP section 337.15 (g),

[The ten-year statute of repose] shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever comes first:

- The date of final inspection by the applicable public agency.
- The date of recordation of a valid notice of completion.
- The date of use or occupation of the improvement.
- One year after termination or cessation of the work on the improvement.

While these examples are in no way exhaustive, they provide additional insight into what constitutes substantial completion.

Potential Trouble Spots



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There are a number of situations in which defining substantial completion becomes more complex. One of those areas is remodeling (or rehabilitating) older structures.

Remodeling

A quick drive around Coors Field in Denver reveals the popularity of loft construction. Most of these projects result from the “remodeling” of much older structures. And while there may be something to be said for construction in the “good old days,” these projects raise interesting questions when defects occur. For construction defect litigators on both sides, a threshold question is determining when substantial completion occurred at the project.

If the building is a rehabilitated, older structure, it is likely that much (if not all) of the original foundation and structural framing remains. As such, these systems are usually well outside the present six-year statute of repose. However, modifications to these systems could be construed as “new” construction such that the statute will not begin to run until substantial completion of the “new” components and/or project. In addition, modifications to adjacent components (for example a new roof system added to original framing) could trigger a new six-year period.

Staying with the loft example, while its envelope may be outside the statute of repose, interior modifications (including common area modifications to parking garages, etc.) are most likely not. Even assuming structural modifications do not trigger a new statute, such interior modifications will certainly trigger a new statute of repose (as to these elements) running from substantial completion of the new components. To further complicate matters, damage resulting from these new components can affect older components outside the statute. An example of this would be water damage to original framing, caused by the improper installation of new windows. In this situation, the resulting damage from the new construction, including the damage to the original construction, would be within the statute.

Conclusion

The time limit for bringing a construction defect action in Colorado is six years from substantial completion (extended to as much as eight years in certain circumstances). Therefore, it is crucial to define substantial completion as a threshold question in both bringing and defending this type of litigation. While there is no concrete



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definition, substantial completion may be established through documentary evidence, or through the actions of the parties. There are numerous situations, however, where the analysis becomes complex. In these situations, counsel must carefully review both the nature of construction and the source of the damages involved.

i..... CRS section 13-80-104(1)(a) (emphasis added).

ii..... CRS section 13-80-104(2).

iii..... 789 P. 2d 434 (Colo.App. 1989)

iv..... *Id.* As the Court explained, that statute (CRS section 13-80-127) has been revised into the present CRS section 13-80-104.

v..... 789 P.2d at 439.

vi..... *Id.*

vii.. 539 P. 2d 1333.

viii.. *Id.* at 1336.