



Architect and Engineer Liability Handbook

A synopsis of law governing claims and liability issues involving architects, engineers and land surveyors.

Westminster, Colorado
888-989-1777

STATUTE OF LIMITATIONS AND OF REPOSE

All actions against any architect, surveyor or engineer performing design, planning, supervision, inspection or observation obligations must be brought within two years after the claim for relief arises. A claim for relief arises when the claimant 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. The statute of repose is generally six years, but an additional year is provided for in the event discovery of the problem occurs in the fifth year after completion.

INDEMNITY

All claims (including, but not limited to indemnity or contribution) by a claimant against a person who is or may be liable for all or part of the claimant's liability to a third person arise at the time the third person's claim against the claimant is settled/reduced to judgment and shall be brought within ninety days.

ANTI-INDEMNITY STATUTE

With some limited exceptions, Colorado's anti-indemnity statute construction voids contract language which seeks to impose broad indemnity obligations—i.e., obligations requiring a party to a construction agreement to cover losses associated with another party's own negligence. Colorado statutes do provide for allocation of liability between tortfeasors. Thus, a party can be indemnified to the extent some other party was found to be the cause of a plaintiff's damages. However, it is only in very rare circumstances that a party to a construction contract can be indemnified for its own negligence. This statute does not affect the ability of a party to require that they be added as additional insureds on liability policies purchased by another.

CERTIFICATE OF REVIEW

To pursue a claim against a licensed design professional, a claimant must file a certificate of review confirming that the claimant has conferred with a person having expertise in the area and, upon reviewing available information, has been informed that the action against the licensed design professional does not lack substantial justification. This must be done within sixty days after service of the complaint or the suit may be subject to dismissal.

CONSTRUCTION DEFECT ACTION REFORM ACT [CDARA]

Actions against design professionals for personal and property injury are also governed by CDARA. See § 13-20-802.5(1) and (4), C.R.S. (stating that CDARA applies to claims of negligent construction against design professionals).

CDARA is a complex, pro-claimant statute which governs claims for construction defects. However, it does not define what a construction defect is. It seemingly defines a defect as the construction of an improvement which is not in substantial compliance with an applicable building code or industry standard. This, of course, puts a premium on the use of 'construction experts' who will testify as to whether the construction failure resulted in 'actual damages', actual loss or bodily injury. "Actual damages" is defined, however, as the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less, together with relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law. "Actual damages" as to personal

injury means those damages recoverable by law, except as limited by the provisions of section 13-20-806 (4).

A claim under CDARA starts with the serving of a "Notice of claim," a written notice sent by a claimant asserting a construction defect claim that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect. Failure to follow the notice of claim process is grounds for stay or other relief.

A significant amendment to CDARA was a provision which prohibits any express waiver of, or limitation on, the legal rights, remedies, or damages provided by CDARA, finding them void as against public policy.

ECONOMIC LOSS RULE

Tort and contract law are distinct, each imposing different obligations. Tort duties are imposed by law to protect against physical harm or damage to personal property which arise out of societal relationships. Contract duties, however, arise out of the voluntary promises and agreement made by parties. To maintain this distinction, the Colorado Supreme Court adopted its version of the economic loss rule. The economic loss rule provides that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law. If there is an independent duty owed, then the economic loss rule does not apply, and both tort and breach of contract may be asserted.

Colorado courts have as a matter of public policy, imposed an independent duty on construction professionals constructing residences to exercise reasonable care and skill. This effectively negates the parties' efforts to define their role, to limit their liability or to control costs via contract.

The duty currently imposed on construction professionals is an evolution of the duty found in common law since the 1960's. The duty owed by contractors requires that a construction professional perform to a standard of reasonable care in the conduct of its duties to the foreseeable users of the property. The 'foreseeable user' must demonstrate that the defect is latent or hidden, and must also show that the defect was caused by the builder. The duty is generally considered to be limited to residential property, and not commercial projects.

REGULATORY REPORTING

The Department of Regulatory Agencies oversees the Board of Licensure for Architects, Professional Engineers and Professional Land Surveyors. This Board serves to regulate the licensing and discipline of those professions. Professional liability carriers are obligated to report any claim against an architect which they settle or any judgment which the carrier satisfies. There is no similar requirement placed on carriers for claims against professional engineers and professional land surveyors, but licensed professional engineers and land surveyors are statutorily required to self-report malpractice claims within 60 days after settlement or entry of judgment.

LIMITATION OF LIABILITY CLAUSES

In response to construction defect claims by homeowner's associations, developers began inserting clauses in their sales contracts to limit their potential liability for various types of damages. In response, HOAs sought legislative relief which resulted in a provision which voids any express waiver of, or limitation on, the legal rights, remedies, or damages provided to residential homeowners under CDARA. However, the limitation specifically applies only to the legal rights, remedies, or damages of claimants asserting claims arising out of residential property. Thus, residential property owners are not bound by limitation of liability clauses in contracts they sign with developers, contractors or design professionals. It remains an open question whether a limitation of liability clause contained in a design professional contract is valid as to claims of the developer against the design professional. Of course, such clauses are not valid when the claim is for gross negligence.

LITIGATION PROCEDURE

Rules of Procedure Deadlines

Deadlines generally: Colorado has adopted a "rule of seven" to apply to most procedural rules. This attempts to simplify the calculation of deadlines by making deadlines fall in multiples of seven, such that, for example, if a motion is filed on a Monday, the responsive pleading is due on a following Monday.

Time for filing of answer: The defendant's answer must be filed within 21 days after service of the summons and complaint if the defendant is a Colorado resident or 35 days if the defendant is an out of state company.

Time within which to bring in a third party, join parties, and amend pleadings: A defendant may bring in a third party at any time, if he or she obtains leave from the court to do so.

Setting for trial: No later than 42 days after case is at issue, the Responsible attorney must set the case for trial.

Initial disclosures: Initial disclosures are due no later than 35 days after the at issue date. These must contain lists of individuals likely to have discoverable information; list and copies of relevant, non-privileged documents; a description of categories of damages sought and computation of economic

damages that are being claimed, if applicable; and any insurance agreement under which an insurer may be liable for part of a judgment.

Expert disclosures: Disclosures of expert testimony are due from plaintiff's counsel at least 18 weeks before trial. Generally, defense counsel must make expert disclosures within 28 days after service of plaintiff's disclosures (regardless of when plaintiff files disclosures, however, defense counsel is not required to file disclosures more than 14 weeks before trial). Expert disclosures for retained experts must include, among other things, any expert report and a complete statement of all opinions to be expressed and the basis therefor.

Discovery limits: The presumptive limitation on discovery is that each party may take one deposition of each adverse party and of two other people, except experts. A party may depose any expert identified as such whose opinions may be presented at trial. A party may serve 30 written interrogatories on each adverse party. A party may serve 20 requests for production of documents and 20 requests for admission on each adverse party.

Trial management order: A proposed trial management order must be filed at least 28 days before trial.

Motions for post-trial relief: Within 2 weeks after judgment is entered, unless the court grants an extension. The court must rule on the motion within 9 weeks after it was filed.

When judgment becomes final: Generally, judgment becomes final when the court grants or denies motions for post-trial relief.

Timing for filing of appeal: Generally, a notice of appeal must be filed 49 days after entry of judgment.