

Date Of “Substantial Completion” Now Different For Each Subcontractor

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By **Tim Gordon**

According to a new opinion by a division of the Colorado Court of Appeals, with respect to the statute of repose, the phrase “substantial completion of the improvement to the real property” really should be read as “substantial completion of the defendant’s own work.”

Pursuant to Colorado’s statute of repose, “in no case shall” “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 . . . be brought more than six years after the substantial completion of the improvement to the real property” Section 13-80-104, C.R.S. 2015. In *Sierra Pacific Industries, Inc. v. Jason Bradbury, d/b/a Bradbury Construction, Inc.*, 2016COA132, a division of the Colorado Court of Appeals held that the “substantial completion” date under this statute is different for each contractor. Specifically, “a subcontractor has substantially completed its role in the improvement at issue when it finishes working on the improvement.” *Id.* at ¶ 28.

In *Bradbury*, the certificate of occupancy was issued in 2004, and Bradbury Construction, a sub-subcontractor, last performed work in 2004. But the general contractor continued working on the project through March of 2011 in an attempt to repair defects. Thus, in theory, the improvement to real property was not substantially complete until March of 2011.

Notwithstanding the possibility that the improvement to real property might not have been substantially completed until 2011, the Court of Appeals held that “substantial completion” occurred with respect to Bradbury Construction when it last performed work in 2004. In so holding, the Court of Appeals adopted the following rationale from the Texas Court of Appeals:

[W]here different subcontractors were responsible for the construction of different parts of a larger project, the statute of repose should be applied to each of those individual subcontractors when they have completed their respective improvements. . . .

. . . Starting the statute of repose when each subcontractor finishes its improvement conforms with the legislative intent of preventing indefinite liability for those who construct or repair improvements to real property.

Id. at ¶ 27, quoting *Gordon v. Western Steel Co.*, 950 S.W.2d 743, 748-49 (Tex. App. 1997).

Having the statute of repose begin to run at different times causes obvious problems for general contractors and developers. For example, the statute of repose for claims related to alleged defective utility backfill will begin to run against the grading subcontractor once the grading subcontractor's backfill work is completed. But the statute of repose against the general contractor for the very same claims will not begin to run until the entire project is completed. In essence, the general contractor can remain "on the hook" for defects caused by the grading subcontractor long after the grading subcontractor is shielded by the statute of repose.

The Texas Court of Appeals actually addressed this possibility in *Western Steel*, acknowledging the argument that "general contractors or the intended beneficiaries of the services may be penalized by the compartmentalization of the improvements and the imposition of successive periods of repose" *Western Steel Co.*, 950 S.W.2d at 748.

The problem faced by general contractors and developers is made worse by the fact that the related statute allowing the maintenance of an indemnification action within 90 days of settling an underlying construction defects lawsuit does not toll the six-year statute of repose. See *Bradbury* at ¶ 16. Thus, general contractors can be stuck with litigating or settling defects claims without recourse against the subcontractors who performed the work.

Contact [Sean Hanlon](#) or [Tim Gordon](#) if you'd like to discuss possible contract provisions intended to protect general contractors and developers against situations like this.