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# Repair Efforts May Extend Contractor's Statute of Limitations

## Repair Efforts May Extend Contractor's Statute of Limitations

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The Colorado Court of Appeals recently issued a decision which, although perhaps not unexpected, potentially has significant implications to the so-called contractors' statute of limitations. In a nutshell, in *Highline Village Associates v. Hersh Companies, Inc.*, No. 98CA1886, 1999 WL 976682 (Colo. App. 1999), the Colorado Court of Appeals held that a contractor who undertakes to repair a defect may, by doing so, toll, or extend, the applicable statute of limitations during the period in which repairs are performed or attempted.

### Background

Colorado has a special statute of limitations that applies to architects, contractors, builders, engineers and certain others in construction related professions, C.R.S. § 13-80-102 (the "Contractors' Statute of Limitations"). The Contractors' Statute of Limitations requires that all claims against a builder or contractor relating to construction of improvements be brought within two years after 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 Contractors' Statute of Limitations further provides that no such action may be brought more than six years after substantial completion of the improvement (unless the claim arises in the fifth or sixth year after substantial completion, in which case the two-year limitation applies from the time the defect manifests itself). In other words, if the defect does not manifest itself or is not discovered for many years, a claim based on the defect may be barred.

The Contractors' Statute of Limitations is significantly less generous to claimants, and more protective of builders and contractors, than are other statutes of limitation, particularly in that it is triggered by the "physical manifestations of a defect in the improvement" rather than actual knowledge and understanding of the injury.

### The Issue

Often, when a problem is discovered on a project, a Contractor will make efforts to repair any defects or correct any deficiencies. A typical scenario might be as follows: On January 1, 1998, the owner identifies a structural defect in his newly completed building. Throughout 1998 and into 1999 the

contractor makes efforts to repair the problem, but is unable to satisfy the owner. Thereafter, on July 1, 1999, the contractor tells the owner that he has done all that he is going to do in terms of remedial work and ceases further repair efforts. On February 10, 2000, the owner files a lawsuit against the contractor. If the contractor had not undertaken any repair efforts, the owner's claim would be late and barred by the Contractors' Statute of Limitations, since it was filed more than two years after the "physical manifestations of the defect were discovered. Does it make a difference that the contractor made efforts to satisfy the owner and make repairs?

**The Answer, According to the Court of Appeals**

The Contractors' Statute of Limitations does not address the question of whether the limitations period continues to run during the period of attempted repairs. The *Highline Village* case resolves that issue, at least until the Colorado Supreme Court speaks. This decision held that under such circumstances, at least where the owner can show that he reasonably relied upon an express or implied promise that the attempted repairs would remedy the defect, the limitations period of the Contractors' Statute of Limitations will be tolled, or stop running, until the date the contractor abandons its repair efforts. In other words, if repairs are attempted over a six-month period and then abandoned or terminated, the Contractors' Statute of Limitations will be extended an equal period.

Briefly, the *Highline Village* case involved a painting contractor who was hired to repaint an existing structure. The painting was completed in August 1992, but beginning in June 1994 the paint began to peel (the physical manifestation of the defect). The owner apparently notified the contractor of the defect and insisted that the structure be repainted. Repainting was completed by November of 1994, but the peeling began again in March 1995. In the Spring of 1995, the contractor refused to repaint any other surfaces where paint was peeling. The owner commenced a lawsuit in October 1996, or approximately two years and three months after the problem initially manifested itself.

The trial court dismissed the owner's claims based on the Contractors' Statute of Limitations. However, the Court of Appeals reversed and adopted the "Repair Doctrine." "[The] Repair Doctrine requires proof of a promise that the repairs will cure the defect and that plaintiff reasonably relied upon that promise. . . . Such a promise need not be express; it may be one that is reasonably implied from all of the circumstances." The Court of Appeals noted that "such an approach makes good sense and is consistent with public policy. So long as the . . . contractor is undertaking repairs to remedy the defect (irrespective of any disclaimers of liability for that defect) and those repairs appear to accomplish their purpose, requiring the . . . owner to institute suit against the . . . contractor while those repairs are being made would be inconsistent with the policy that favors voluntary settlement of disputes. Indeed, a rejection of the doctrine might well lead to wholly unnecessary litigation."

The Court of Appeals held that if an owner "can establish that, after there was a manifestation of a defect under the statute, [the contractor] undertook to repair that defect; that, in doing so, [the contractor] either expressly or impliedly promised or represented that such repairs would remedy such defect; and that [the owner] reasonably relied upon such promise or representation and, as a result, did not institute legal action against [the contractor], the limitations period of the contractors' statute will be tolled until the date that [the contractor] abandoned its repair efforts."

**Practical Tips**

Repairing real or perceived defects should always be the first and best means of avoiding claims of defective work. Where, however, a contractor intends to do no further remedial work and wants the two-year Statute of Limitations to begin running, the contractor should avoid actions that might be perceived as ongoing repairs or promises of repairs, or promises that the repairs will remedy the defect. The contractor must make sure that the evidence is clear at that time, preferably in the form of a letter or some other written communication to the owner, that no further repairs will be attempted. Owners, on the other hand, should not rely on the absence of such written communication to protect themselves. Where provable assurances of repair are not forthcoming from the contractor, or where it appears that the contractor may have abandoned the repair process, owners should assume that the statute of limitations period is running and take appropriate action to protect themselves.

(This article was prepared December 1999)

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*seek the advice of your legal counsel.*