

Defeating the Ten Year Statute of Repose For Latent Construction Defects

It is an all-too-common scenario in California construction: Nine and a half years after completion of a major California construction project, immediately before the 10 year “statute of repose” for suing on “latent” construction defects expires, a lawsuit claiming damages for “recently discovered” latent construction defects is filed. The property owner sues the contractor for the alleged defects. The direct contractor sues all its subcontractors for indemnity and defense. The attorneys spontaneously generate. Experts proliferate. Claimed defects are extrapolated. Four or five years later, after a few dozen attorneys earn a small fortune in fees, the insurance companies make payments. Attorneys collect more fees. The owners take what remains. They repair nothing . . . and buy vacation homes.

Perhaps a cynical view. But there are many in the construction defect world who would reach a similar conclusion. The question is: How can you defeat this seemingly inevitable chain of events? Under a case known as *Brisbane Lodging L.P. v. Webcor Builders, Inc.* 216 Cal. App. 4th 1249 (2013) there may be hope. California Code of Civil Procedure sections 337.1 and 337.15 grant a 10 year “statute of repose” for bringing claims for “latent” construction defects. These statutes allow a lawsuit for such claimed defects to be filed in court up until ten years after the project has been completed. Latent defects are generally defined as those which are “not apparent by reasonable inspection” (CCP §337.15(b)). It is extremely common for such claims to be filed immediately before this 10 year deadline expires. When the lawsuit is brought, the cash register begins to ring.

In *Brisbane v. Webcor* the California Court of Appeal determined that sophisticated parties (e.g. represented by counsel, negotiations took place, etc.) may contractually limit the time periods for filing a lawsuit to less than 10 years. In that case, the court held that a clause in the AIA form A201 construction contract, Art. 13.7.1.1, which provided that all causes of action relating to the work would accrue from the date of substantial completion of the project, was enforceable. This effectively limited the statute of limitations to four years for breach of contract (CCP 337), rather than ten years under the statute of repose (CCP 337.15). The useful contract language is as follows:

“As to acts or failures to act occurring prior to [substantial completion], any applicable statute of limitations shall commence and run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of [substantial completion]”

The project in the case was the construction of a hotel. The hotel owner discovered previously unknown underground plumbing problems 5 years after the project was completed. The owner filed a lawsuit relying on the fact that because the defect was underground, “not apparent by reasonable inspection” and therefore “latent”, it had 10 years to bring suit. The Court of Appeal disagreed, ruling that because the owner and contractor negotiated their contract freely in an arms-length transaction, even utilizing the assistance of counsel to do so and because the parties were sufficiently sophisticated, the above contractual language meant that the 10 year statute of repose for the delayed discovery of latent defects would not apply. Instead, the 4 year statute of limitations for written contracts would apply. The action was therefore time barred because it was brought more than 4 years after completion.

The message from the case is clear. In California, the 10 year statute of repose for the discovery of latent construction defects can be defeated. First, include a clause in the contract like that found in AIA A201 Art. 13.7.1.1. Next, make sure that the parties engage in negotiation of the contractual terms, even to the extent of both sides having their legal counsel review the contract and negotiate changes. Finally, make sure that the quality of the construction is sufficient to keep you out of court for 4 years following completion of the work. After these 4 years the contractor might just be home free.

Article Written by William L. Porter of *Porter Law Group, Inc.* in Sacramento, CA in 2015. Website: www.porterlaw.com . Mr. Porter can be reached at (916) 381-7868 or at bporter@porterlaw.com