

# No Turning Back

## Getting Ready for Your Community's Statute of Repose to Expire

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**T**he statute of repose is a Colorado law that prevents a homeowner or community association from filing a lawsuit for construction defects after a certain number of years have passed. Once the time has expired, the Association has no claims against a builder. A statute of repose is different from a statute of limitations in that it begins to run upon the date of a particular occurrence rather than upon the date of an injury. Colorado's construction-related statute of limitations begins to run on the date a person discovers, or in the exercise of reasonable diligence should have discovered, the physical manifestations of a defect which ultimately causes an injury. In contrast, the statute of repose begins to run upon "substantial completion" of an improvement to real property. Because the statute of repose begins to run without regard to an injury, the statute of repose can expire before a homeowner even knows they have an injury. That is, a home could have significant construction defects and if those defects are not discovered before the statute of repose expires then the homeowner will never have any recourse against the builder.

### When does the statute of repose begin to run and when does it expire?

In Colorado, the statute of repose begins to run on the date of "substantial completion" of an improvement to real property. The term "substantial completion" is a legal term of art that generally means the date upon which the improvement could be put to its intended use. For homes, courts have held that the date of substantial completion is typically the date a certificate of occupancy is issued. This makes sense because when a certificate of occupancy is issued the house could potentially be put to its intended use (somebody could live in it). Although there are ways in which the statute of repose can expire as long as eight years following substantial completion, the statute of repose generally expires after six years.

While determining the date upon which the statute of repose expires for a single-family detached home is relatively simple,

determining the date upon which the statute of repose expires in a multifamily community can be challenging. This is for two reasons: (1) multifamily communities contain common elements such as streets and retaining walls that do not have certificates of occupancy, and (2) multifamily communities contain numerous buildings and each unit may have a certificate of occupancy.

The problem with having multiple certificates of occupancy is that some Colorado trial courts have determined that the statute of repose begins to run on a building-by-building basis rather than the date the final building is substantially complete. Under this theory, communities that are built over many years may have units where the statute of repose could expire shortly after the developer transitions the community to homeowner control. Although this legal issue is still contested, community association managers should, in an abundance of caution, be aware of the date the first building was substantially complete and plan according to that date. When builders take many years to construct a community, the statute of repose could expire shortly, or even immediately, after the developer transitions control to the homeowners. Community association managers who are managing communities that have

recently transitioned from declarant control should keep these implications in mind.

### What should a community association manager do in the final year of repose?

The final year of the statute of repose is a community's last opportunity to obtain recourse for defectively constructed work. Once the statute of repose expires, the community association can no longer pursue claims for construction defects. To protect community associations, managers should conduct an investigation to determine whether construction defects exist before the statute of repose expires. Some things to look for include evidence of water intrusion around windows and doors such as mold, deterioration,



or cracking; deteriorating concrete flatwork or asphalt; leaking roofs, balconies, or decks; ponding water; and unreasonably loud noise between or among units. Other things to keep in mind are complaints by homeowners. When numerous homeowners complain about similar construction-related problems, this may indicate that a construction defect is pervasive. If the Association has the funds to hire an expert such as a forensic engineer or architect, that would be the best course of action. Conducting such an investigation will ensure that the community association was built correctly and is ready to withstand years and years of abuse from the elements such as wind, hail, snow, and rain.

Determining whether construction defects are afflicting a community association is always of great importance but in the year prior to the expiration of the statute of repose the issue should be of paramount concern. Once the statute of repose expires, there is no turning back. ⬆

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