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Time-Out

Calculating the timeliness of a cause of action requires knowing when each trade completed its work on the project.

BY GARY L. BARR

Using a case due to the expiration of the statute of limitations is a frightening prospect for litigators. But which statute of limitations applies? When should the plaintiff have discovered the claim? When did discovery actually take place? When did the cause of action accrue to start the running of the statute of limitations? While these issues plague all fields of litigation, the complexity of statute of limitations issues is even more pronounced in construction defect litigation. A common perception in the field is that the statute of limitations analysis is limited to whether the defect is latent or patent, and that once that determination is made, the statute of limitations is easy to calculate. At best, however, this is only partly true, and at worst, it is overly simplistic.

Generally, Code of Civil Procedure sec. 337.1 (section 337.1) provides that an action for a patent construction defect must be brought within four years after substantial completion of the improvement. The code defines a patent deficiency as one which is "apparent by reasonable inspection." (section 337.1(e)) The statute of limitations for latent defects is covered in Code of Civil Procedure sec. 337.15. A latent defect is one which is "not apparent by reasonable inspection." (section 337.15(b)) In the case of a latent defect, the claim must be filed no more than 10 years after substantial completion of the development or improvement.

This sounds easy: merely identify the latent or patent characteristic of the defect, and the statute of limitations becomes clear. However, it is not this simple. There are myriad additional rules and issues affecting this analysis. The determination is usually a question of fact to be decided by the trier of fact; however, some courts have concluded that it can be a question of law. (See, *Mattingly v. Anthony Industries*, 109 CA3d 506 (1980)) Additionally, the definition of the term "latent" is unfortunately vague.

In *ACME Galvanizing v. Fireman's Fund Ins.*, 221 CA3d 170, 178 (1990), the court relied on the "clear" language of section 337.15 in determining whether the defect was latent or patent. The court stated that:

[W]here defective construction, design, or fabrication of property results in the property's failure or deterioration before its normal life, and the defect is not apparent upon reasonable inspection but only after a post-failure examination by an expert, then the resulting loss is caused by a "latent defect."

The determination of whether an inspection is reasonable is based upon the totality of the circumstances. Therefore, a litigator's analysis should be whether facts demonstrate that the defect could not have been discovered by a reasonably careful inspection.

A little known aspect to these statutes is the extension for certain patent defects provided in the code. Section 337.1(b) provides that if the injury to the person or property caused by the patent defect occurs during the fourth year after substantial completion, then the action may be brought within one year after such injury, but in no event, later than five years after substantial completion. Thus, in analyzing the statute of limitation elements of a claim, it is important to determine exactly when the injury occurred, as well as determining if the defect is latent or patent.

Code of Civil Procedure section 337.15(g) also furnishes guidance as to when the 10 years begins to run. This section provides that the 10 years commences upon substantial completion of the improvement, but not later than the date when the first of the following occurs: (1) final inspection by the applicable public agency; (2) the date of recordation of a valid notice of completion; (3) the date of use or occupancy of the improvement; or (4) one year after termination or cessation of the work.

It is important to remember that both sections 337.1 and 337.15 were designed to place outside limits on claims for construction defects. Rather than barring a claim a certain time period after accrual, these statutes prescribe a period of time within which a cause of action may arise. Therefore, they work in conjunction with other statutes of limitations.

The court in *North Coast Business Park v. Nielsen Construction Co.*, 17 CA4th 22 (1993), explained this interplay. The court found that when a defect is latent, section 337's four-year statute of limitations and section 338's three-year statute of limitations do not begin to run until the damage is sufficiently appreciable to give a reasonable person notice of a duty to pursue a remedy. However, section 337.15 prescribes an absolute 10-year limit no matter when a reasonable person discovers the claim. Therefore, in analyzing a potential claim, it is imperative to be cognizant of the various statutes of limitations governing the individual causes of action, such as strict liability, breach of contract, negligence, and fraud. Otherwise, the claim may be barred even if the 10-year statute of limitations has not expired.

There are additional intricacies of which a prudent litigator should be aware in analyzing statute of limitations issues in construction defect litigation. In *Shaffer v. Debbas*, 17 CA4th 33 (1993), the court held that builders continually making promises that houses would be fixed are estopped from asserting the statute of limitations as a defense to claims for property damage to the house. Section 337.15(c) provides an exception to the 10-year bar for certain indemnity claims. If an original lawsuit is brought within the 10-year period, a cross-complaint for indemnity may be filed after the expiration of the 10 years. However, the claim for indemnity must be in the form of a cross-complaint. A separate lawsuit for indemnity filed after the 10 years will be time-barred. This exception allows a general contractor, who is usually the defendant in a construction defect case, to cross-complain against subcontractors for indemnity, even if it has been more than 10 years after substantial completion.

The four-year statute of limitations for patent defects applies equally to defects that exist at the time of completion and defects that arise after completion. In *Tomoko Woll Group Architects, Inc. v. Superior Court*, 46 CA4th 1326, 1336 (1996), the court held that section 337.1 applies "not only to actions involving patent deficiencies existing at substantial completion, but also to actions involving patent deficiencies arising after substantial completion of construction." Subsection (b) of section 337.1 also provides an extension to the four years for late discovered patent defects. Finally, one court of appeal decision has concluded that the statute of limitations for latent defects commences as to each profession or trade on the date at such service or improvement is substantially complete, even if the project is not complete (*Industrial Risk Insurers v. Rust Engineering Co.*, 232 CA3d 1038 (1991)).

Statute of limitations issues in construction defect litigation are hotly contested and are an important issue for plaintiffs' attorneys and a tool for the defense. Prudent construction defect litigators must spend time reviewing the facts as they relate to the applicable statute of limitations, and must be prepared to separately litigate these issues.



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