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A TALE OF TWO CAROLINAS

Most people are familiar with the term “Statute of Limitation.” In general, a statute of limitation provides the period within which a lawsuit must be commenced, and after the expiration of which period, the right to sue is time-barred. Although there are exceptions, generally the statute of limitation will be three years for **construction** claims, such as breach of contract, breach of warranty, or **construction** defects.

The important issue then becomes: *when* does the statute of limitation begin to run? In many cases the three-year period only begins to run when the owner *knows or should have known* about the breach or defect. Accordingly, a builder may find itself being sued more than three years after completion of its project, and after expiration of its warranty period. If the owner discovers a hidden defect four years after completion of the project, the owner still has three years from the date of that discovery to bring its claims.

So when does a builder’s potential liability to an owner finally end? That is where the “Statute of Repose” comes into play. The statute of repose provides the period within which all claims must be initiated, no matter when discovered by the owner. In North Carolina, the statute of repose is six years, and the period generally begins to run upon substantial completion of the project. So in the example above, a North Carolina owner would have to bring its claim by the end of the sixth year after substantial completion, without regard to the three year period provided by the statute of limitation. In other words, the statute of repose cuts off the statute of limitation in this case.

What about South Carolina? South Carolina has an eight-year statute of repose. So in a similar example to the above, a South Carolina owner first discovering a defect four years after completion still would have the full benefit of the three-year statute of limitation (from and after the date of discovery) within which to bring its claims for that defect.

So builders can rest easy after six years in North Carolina, and eight years in South Carolina, right? Not so fast in South Carolina. South Carolina has an additional statutory law providing that the statute of repose may not be asserted as a defense by a builder *guilty of fraud, gross negligence, or recklessness* in connection with the project. And this South Carolina statutory provision arguably extends to builders, material suppliers, developers, design professionals, land surveyors, supervisors and managers of construction.

Although the South Carolina statute requires a builder to be “*guilty*” in order to be applicable, it is common to see owners bringing lawsuits that merely allege fraudulent or gross negligent conduct. South Carolina case law does not provide guidance as to whether an actual determination

of, or mere allegation of, guilt is necessary to maintain a lawsuit. As a result, lawsuits for construction defects often are filed well past the eight-year statute of repose in South Carolina.

A builder will still have its host of defenses available in any such South Carolina lawsuits. Such defenses could include that the alleged construction could not have been grossly negligent if the owner took fifteen years to file its lawsuit, or that the owner must have known of the construction defect many years earlier, such that the statute of limitation time-bars the law suit.

As a result, both builders and owners should be cognizant that liability for construction defects can extend well beyond three years from project completion, and in the case of South Carolina, well beyond the eight-year statute of repose.

If you are in need of legal advice, **contact** a member of our **Construction Litigation Group**.

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