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## COLORADO LAW UPDATE

### CONSTRUCTION DEFECT SUBROGATION CLAIM ACCRUES WHEN THE PHYSICAL MANIFESTATION OF THE DEFECT APPEARS, NOT WHEN INSURER PAYS THE CLAIM

#### **HOLDING**

In cases governed by Colorado's Construction Defect Action Reform Act ("CDARA"), subrogation claims arising from construction defects accrue – and the two year statute of limitations for such claims begins to run – when the physical manifestation of the defect appears, even though the cause of the defect is not known at that time, and even though the insurer may not have paid the claim until much later. See CRS §13-80-104.

#### **WHY THIS CASE IS IMPORTANT**

This case is important because it resolves the issue in Colorado as to whether a subrogation claim arising out of a construction defect is subject to the two-year statute of limitations set forth in CDARA. It is also another in a line of cases coming out of the Colorado courts recently to clarify that the cause of a defect does not need to be known in order for the statute of limitations to begin running. Moreover, this case reinforces recent case law that holds that an ineq-

uitable result regarding the running of the statute of limitations will be tolerated under the plain language of CDARA.

#### **FACTS**

This case originated with a fire at the Metamorphosis Salon on March 6, 2006. The salon was insured by plaintiff United Fire Group (the "insurer"). At the time of the fire, neither the insurer nor the salon knew what had caused the fire. Three weeks later, however, the insurer received a report from the fire investigator finding that the fire was caused by faulty electrical wiring in an exit sign. The insurer made a series of payments to the salon for its losses, which were cashed between April 24 and August 7, 2006. On March 11, 2008, the insurer filed a subrogation lawsuit against the electrician claiming that the electrician had negligently installed the exit sign, and that this negligence caused the fire (and thus the insurer's damages). The electrician moved for summary judgment, claiming that the statute of limitations had run on the

claim. The trial court granted summary judgment in favor of the electrician; the insurer appealed. In a recent ruling, the Colorado Court of Appeals upheld the ruling in favor of the electrician. United Fire Group v. Powers Electric, Inc., \_\_ P.3d \_\_, 2010 WL 2521752 (Colo.App.) (slip op., 6/24/10).

## **DISCUSSION**

In a construction defect action, the statute of limitations is triggered when 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."

Here, the insurer argued that the payment of the claim is what triggered the statute of limitations. The Court rejected this argument, holding that the insurer stands in the shoes of the insured and has rights no greater than the insured; as a result, it was not the payment of the claim that triggered the statute of limitations.

The insurer next argued that it could not know that there was a construction defect until the cause of the fire was determined; thus, the insurer argued that the statute of limitations started to run on the date when the insurer received the fire investigator's report identifying a construction defect as the cause of the fire. The Court rejected this argument as well, finding that the language of CDARA is clear: the statute of limitations begins to run with the physical manifestations of the defect. Here, the Court found that the physical manifestation of the defect was the fire, even though the cause of the fire – or even the existence of a construction defect –

was not yet known. The court was not persuaded by the insurer's argument that this interpretation could lead to a subrogation claim being barred before it had even been paid by the insurer, depending on how long the insurer's investigation were to take. The Court noted that the legislative intent of CDARA was to "streamline construction litigation, with the purpose of encouraging the timely resolution of construction disputes." Allowing for an open ended time period for investigation into the cause of damage would not at all promote the timely resolution of construction disputes.

The court thus concluded that the summary judgment motion was properly granted and the insurer's claim was time barred. As a result, it would be wise for subrogating insurers to (i) initiate investigations promptly; and (ii) rigorously ensure that the statute-deadline is calendared from the date of loss, rather than from any subsequent claims-handling date.



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