APPLICATION OF COLORADO’S CONSTRUCTION DEFECT ACTION REFORM ACT

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INTRODUCTION

As new construction boomed across the United States over the last two decades, so did the number of construction defect lawsuits filed against homebuilders and their subcontractors. In 1989, Texas passed the Residential Construction Liability Act that placed time and notice requirements on the homeowner as a prerequisite to filing suit. By 2004, fifteen other states had passed similar statutes.¹

Although the statutes vary from state to state, there is at least one common theme – before filing suit, the property owner must give contractors written notice describing the specific defect, then allow contractors a fair opportunity to inspect the property and remedy the alleged problem. Texas created a commission to assess the legitimacy of each claim and render a finding of what repairs must be made. Colorado extended its statute to cover commercial construction, and most states expanded the notice requirements to include design professionals, subcontractors and material suppliers – notice to the general contractor alone was not enough. In most states, a lawsuit may be dismissed without prejudice or stayed until the property owner has complied with the notice provisions of the applicable statute. Texas’ subsequent statute, the Texas Residential Construction Commission Act, bars the filing of a lawsuit if all the steps of the statute are not followed.

¹ For more information regarding the construction defect statutes passed in those states, please visit our website. To view Cozen O’Connor’s Jurisdiction Comparative Chart entitled When the Dream Home Becomes a Nightmare: A Survey of the Recent Spread of “Builder Friendly Construction Acts” in the U.S., you will need your Cozen O’Connor username and password. If you do not have a password you will be able to register for one through the link above.
These construction defect statutes often impact property subrogation claims. Cozen O’Connor recently successfully challenged a Colorado trial court’s dismissal of a subrogating insurer’s construction defect lawsuit. The defendants had argued that under the Colorado Construction Defect Action Reform Act, the subrogating insurer’s lawsuit was barred because it was not filed within ninety days of final payment on the underlying property claim. The Colorado Court of Appeals agreed with Cozen O’Connor’s position that the 90-day requirement was a tolling provision for contribution claims and not a statute of limitation.

**SPECIFIC FACTS OF THE COLORADO LOSS**

On June 3, 2001, a fire severely damaged a home in Ft. Collins, Colorado. The homeowner submitted a claim to his property insurer. The insurer adjusted the claim and made a final payment to the homeowner approximately two months after the fire.

The origin and cause investigation revealed that the fire started at a central air-conditioning system installed in the home in June of 1999. The insurer filed a subrogation lawsuit on February 20, 2003, one and a half years after the fire, alleging that the fire originated at and was caused by the air-conditioning system. The developer/general contractor, electrical subcontractor, and air-conditioning subcontractor were all named as defendants (the “construction defendants”). The manufacturers of electrical equipment installed as part of the air-conditioning system were also named as defendants.

After the lawsuit was filed, the construction defendants moved for summary judgment, claiming that the homeowner’s insurer was required to file a subrogation lawsuit within ninety days of the final payment to its insured. The summary judgment motion was based on the defendants’ interpretation of Colorado’s Construction Defect Action Reform Act (“CDARA”), codified at C.R.S. § 13-80-104(1)(b)(II). The trial court granted the defendants’ summary judgment motion and dismissed the construction defendants from the lawsuit. Cozen O’Connor was retained to pursue an appeal of the trial court’s ruling.

*Water damage and rotting caused by improper installation of window.*
Defendants’ argument was based on Section 13-80-104 of the CDARA which states, in relevant part:

(1)(a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector . . . shall be brought within the time provided in section 13-80-102 [“General limitation of actions – two years”] after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property . .

(b)(II) Notwithstanding the provision of paragraph (a) of this section (1), all claims, including but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant’s liability to a third person:

(A) Arise at the time the third person’s claim against the claimant is settled or at the time final judgment is entered on the third person’s claim against the claimant, whichever comes first: and

(B) Shall be brought within ninety days after the claims arise, and not thereafter.

The construction defendants argued that the insurer’s final payment to its insured under the homeowner’s insurance policy was a “settlement” under the terms of the CDARA and that the insurer was required to initiate its subrogation lawsuit against the defendants within ninety days of that final payment. The trial court accepted this interpretation and dismissed the insurer’s lawsuit against the construction defendants because it was filed more than ninety days after final payment to the insured.

On appeal, Cozen O’Connor successfully argued that the CDARA’s 90-day provision was not intended to apply to a subrogating insurer, but rather to general contractors pursuing contribution and indemnity claims. In a decision involving the CDARA published after the trial court granted the construction defendants’ summary judgment motion, the Colorado Supreme Court ruled that the 90-day provision was a tolling provision, not a statute of limitation. The purpose of the 90-day provision was to streamline construction defect litigation by allowing subcontractors alleged to be responsible for construction defects to be joined as third parties in pending lawsuits. Indemnity and contribution claims could be brought by filing a separate lawsuit, but if a separate lawsuit was filed, the Colorado Supreme Court held that it must be commenced within ninety days after settlement or judgment in the original construction defect litigation.

Armed with the Colorado Supreme Court’s ruling, Cozen O’Connor argued that the term “settlement” as used in the CDARA referred to the conclusion of a construction defect lawsuit against a general contractor, not the payment of an insurance claim pursuant to a homeowner’s insurance contract.
We pointed out that the trial court’s interpretation of the statute might encourage insurers to delay final payment to their insureds in order to fully investigate all potential subrogation claims. Lastly, Cozen O’Connor argued that the 90-day provision, as interpreted by the trial court, was inconsistent with Colorado’s two year statute of limitations applicable to claims arising from construction of improvements to real property. We referred extensively to the legislative history to support our analysis of the CDARA’s 90-day provision.

In response to Cozen O’Connor’s arguments, the construction defendants alleged that the CDARA was unambiguous, and therefore, it was inappropriate for the Court of Appeals to refer to the legislative history. The construction defendants also disagreed with Cozen O’Connor’s contention that many specific terms used in the statute were susceptible to multiple definitions.

In an opinion announced on February 8, 2007, a panel of the Colorado Court of Appeals rejected the construction defendants’ interpretation of the CDARA’s 90-day provision. The Court of Appeals concluded that the phrase “all claims” in C.R.S. § 13-80-104(1)(b)(II) did not include the subrogating insurer’s lawsuit, and therefore, the 90-day tolling provision was inapplicable. The Court stated that the phrase “all claims,” read in context and in a manner that gives effect to the entire statute, refers to claims brought by a claimant against a person who may be liable to the claimant for all or part of the claimant’s liability to a third person, exactly as Cozen O’Connor had argued the statute should be interpreted.

The Court of Appeals, reviewing the legislative history, determined that the 90-day tolling provision did not concern construction defect plaintiffs, but applied to construction professionals who are defendants in construction defect lawsuits and who may have contribution or indemnification claims against third parties. Accordingly, the 90-day time period relates to an underlying construction defect lawsuit. The construction professional, as a defendant in the underlying lawsuit and the “claimant” referred to in C.R.S. § 13-80-104(1)(b)(II), has only ninety days after a settlement or judgment to file a separate lawsuit seeking indemnification or contribution.

Lastly, the Court of Appeals found that the property insurer was not a construction professional defendant and could not be a “claimant” as that term was used in the CDARA. The subrogation claim was therefore subject to the two-year statute of limitations, not the 90-day tolling provision. The Court of Appeals reversed the trial court’s summary judgment ruling and remanded the case to the trial court with directions to reinstate the property insurer’s claims against the construction defendants.

**CONCLUSION**

This successful appeal is significant because defendants in several other Colorado subrogation lawsuits involving construction defect claims had filed similar motions based on the CDARA’s 90-day provision. The Court of Appeals’ decision interpreting the statute favorably for subrogating insurers should terminate further attempts to impose the 90-day provision as a statute of limitation on subrogation lawsuits filed in Colorado. Although the decision is limited to the interpretation and application of the CDARA, the arguments and underlying principles may be useful in other jurisdictions.