

So When Does The 10 Year Statute Of Repose For Construction Defects Commence?  
Court Of Appeal Rules That Prime Contract Between General Contractor And Project  
Owner Cannot Conclusively Determine Date Of Substantial Completion (And Other  
Evidence Must Be Considered)

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As many are aware, construction defect claims in California have long been subject to a 10 year statute of repose. In 2002, as part of the Right to Repair Act, Civil Code section 941 was enacted to include the State's long existing 10 year statute of repose into the Right to Repair Act. That section provides:

"Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion...."

And, quite often, owners associations will file construction defect claims on the eve of the 10 year statute (and that may or may not in fact be timely). Where no recordation of completion has occurred, or there was a delay in recording, an important question will be the date of "substantial completion."

This very situation occurred in Hensel Phelps Construction v. Superior Court (2020) WL 370445 ("Hensel Phelps case"). In the Hensel Phelps case, the Smart Corner Owners association ("Smart Corner") brought a construction defect lawsuit against a general contractor and others in the San Diego County Superior Court. Smart Corner is a mixed use development in San Diego which includes a residential tower. Hensel Phelps Construction Co. ("Hensel Phelps") was the general contractor for the project. Hensel Phelps' contract with the project developer required Hensel Phelps to achieve "substantial completion" of the project within a time certain and its contract defined substantial completion based on a number of factors (which allowed for completion to be a date prior to the recording of a Notice of Completion). Pertinent to the Hensel Phelps case, the project Architect issued a Certificate of Substantial Completion on May 24, 2007, but the developer did not record a Notice of Completion until July 10, 2007. Also, the City of San Diego issued a Certificate of Occupancy for around two dozen individual condominiums and the common areas on July 6, 2007 and then issued a Certificate of Occupancy for the project generally on July 17, 2007.

On July 6, 2017, Smart Corner provided notice to Hensel Phelps of its construction defect claim. The notice identified numerous alleged defects in the project's windows, doors, railings, private decks, waterproofing, concrete, bathtubs and showers, plumbing, venting, roof, and parking structure. Hensel Phelps declined to participate in

pre-litigation dispute resolution, and Smart Corner filed suit. The operative complaint alleged a single cause of action for construction defects under the Right to Repair Act. After a year of litigation, Hensel Phelps filed a Motion for Summary Judgment arguing that substantial completion occurred prior to July 6, 2007 based on the contractual definition of substantial completion, and the suit was therefore barred by the 10 year statute of repose.

The trial court denied the Summary Judgment motion ruling that the contractual definition of substantial completion may not apply to Smart Corner, and, even if it did, there were factual questions as to what the date of completion was. Hensel Phelps petitioned the Court of Appeal, which petition was accepted. In its ruling, the Court of Appeal rejected the petition ruling that the date of substantial completion is an objective fact about the state of construction of the improvement to be determined by the trier of fact. The Court of Appeal went on to rule that substantial completion involves a statutory standard, not a contractual one and that the "[t]he parties to a construction contract may not arrogate to themselves the ability to conclusively determine when the statutory limitations period begins to run."

The Hensel Phelps case is an important decision in that it illustrates that substantial completion, at least prior to the recording of a valid notice of completion, will likely involve a question of fact.

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